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Chair in Financial Market Law and Regulation

INVESTORS PROTECTION UNDER THE PROSPECTUS DIRECTIVE

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To grandmother Camilla.

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Introduction

The European Union is politically under attack. The just finished 2016 left a wide diffusion of political parties against the system and against the Euro and the European Union.
The Brexit and the election of Donald Trump as president of the United States of America are examples of the diffusion of this populism, anti-globalisation and far-right movements. The fear that the European Union can be dismantled will face severe challenges in the year to come. The presidential election in France, where Marine Le Penn is running, the German presidential election and maybe the Italian one will get an insight of the future of the Union.
However, the EU, which has failed so far to address problems such as the migrant crisis and the economic depression is persevering its aim of integrating the European political systems.

Joseph Stiglitz in his most recent book titled "The Euro: How a common currency threatens the future of Europe" finds out three ways of getting out the Euro problem[1]. For him, the Euro system is a monetary union built on wrong economic assumptions that needs some changes in order to help the European citizens and government to provide growth and wellness. Stiglitz suggests three options, more Europe, or an end of the monetary union or a creation of two different Euros, one for the most developed European countries, such as Sweden, Germany, France, Netherlands and some others and one for south Europe (Italy, Greece, Spain, Portugal and so on). The first option suggests a creation of a real political union in Europe, based on solidarity, centralized powers and a creation of a European identity.
The process that Stiglitz proposes in order to overcome the great stagnation in Europe regarding politics is in an advanced phase concerning financial regulation. In 2015, after the achievement of a Monetary Union and a Banking Union the EU started its process of creating a single Capital Market Union[2]. The Prospectus Directive and its upcoming review, the Prospectus Regulation is a part of the Capital Market Union, which has as final objective job creation, growth and economic wellness.

This dissertation will describe the Prospectus Directive and analyses its upcoming review with the aim of demonstrating the hypothesis that a better regulation for admission to trading of

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[1] STIGLITZ J.E., The EURO: How a common currency threatens the future of Europe, New York, W.W. Norton & Company, 2016.

[2] See for further details: BLACKROCK, The European Capital Markets Union: An Investor Perspective, February 2015; POLNER G. and J. RYAN, *Capital Markets Union: A work in progress*, European Policy Brief, No. 37, September 2015; ANDERSON K., M. BROOKE, M. HUME and M. KÜRTÖSIOVÁ, *A European Capital Markets Union: Implication for growth and stability,* Bank of England, Financial Stability Paper No 33, February 2015; ANDERSON K., M. BROOKE, M. HUME and M. KÜRTÖSIOVÁ, *A European Capital Markets Union: Implication for growth and stability,* Bank of England, Financial Stability Paper No 33, February 2015.

securities on regulated market and public offer in EU can be made. The missed investment opportunities, the problems and inefficiency of the current EU regulatory framework concerning the prospectus can be overcome by a new regulation. The technique used in order to quantify, when possible, the benefit of the new regulatory framework is the Regulation Impact Analysis (RIA), an internationally used method useful to analyse policies. The analysis will demonstrate that new regulatory provisions can lead to an annual saving of around EUR 200,000,000 for some of the part involved in the process of raising capital through capital markets. Moreover, other benefits, unquantifiable, can be achieved.

Before studying the European Commission proposal for a new Prospectus Regulation (see part III), the dissertation will describe first of all the existing EU regulatory framework in part I. Secondly, discusses its implementation at national level in part II, specifically focusing on pointing out misalignments in the Member States law harmonization that creates competitive advantages, problems, more costs burdens and time loss for issuers and offerors.

The second part is also devoted to the description of the US analogous regulatory framework, presented in comparison with the EU one in order to present more ways of regulating this important argument.

Finally, part III, the core dissertation part, will demonstrate the dissertation hypothesis that the Prospectus Directive, Level II Prospectus Regulation and their amendments and supplements can be improved.

Even if, the admission to trading on a regulated market and public offers are one topic in the Capital Market Union, they are important for the European economy because the related laws regulate European capital markets, which are underdeveloped compared to the US. This problem prevents the majority of corporations in the Union, which are small and medium sized companies, from accessing those markets, limiting their funding opportunities.

In fact, Small and Medium Enterprises rely almost completely on the banking system which is dependent on the economic conditions, as exampled in the recent and not yet solved financial crisis. In addition, although a limited example of European integration[3], the Prospectus Regulation and its father the Capital Market Union can be taken as example of how is still possible to create an effective, integrated, stable, efficient, socially equilibrated Europe. The Europe that was first dreamed by visionaries such as Altiero Spinelli back in 1941.

[3] There are plenty of studies about European integration. For example, see: EGEBERG E., An organisational approach to European integration: outline of a complementary perspective, 43 European Journal of Political Research 199, 2004.

PART I

EUROPEAN UNION PROSPECTUS DIRECTIVE AND REGULATION

The European Regulatory Structure

The European Union, their institutions and countries competent authorities regulate, supervise and enforce, the financial markets, make provisions regarding all the matters that requires a public intervention in order to avoid market failures.

In this paragraph I will briefly focus on the actors involved in the European Union rule-making process and the structure of competences and objectives of each level of the process[4].

The prospectus laws are the dissertation objective and they fall into the EU security regulation framework.

The sources of security laws are *EU's founding Treaties*, reshaped in 2009 as a result of the *Lisbon Treaty*, *Court of Justice* interpretations of primary EU laws, *inter alias*, Romano and Meroni, and primary laws sources. In particular the latter are the prospectus directive[5] (PD) and level II prospectus regulation (PR).

Within the constitutional boundaries, *the Lamfalussy structure*[6] ruled the legislative process until February 2009 as a result of the publication of *De Laroisère report*. The former established a four level process in which the first was in charge of issuing laws, in form of regulations and directives, according to the political European approach. The second level issues detailed implementations and amendment to the primary law sources. At the level 3, institutions ensure the consistent application and implementation of the rules within member states (MS). Finally, level 4 is in charge of the enforcement of laws against non-compliant MSs.

De Laroisère report mainly reformed the supervisory mechanism, establishing a European Financial Stability Board (EFSB) for macro-stability issues and three European Supervisory Authorities (ESAs) ensuring micro-stability: European Securities and Market Authority (ESMA), European Banking Authority (EBA) and European Insurance and Occupational

[4] For further details on the EU decision making process see: BENEDETTO G., Rapporteurs as legislative entrepreneurs: the dynamics of the decision procedure in Europe's Parliament, 12 Journal of European Public Policy 67, 2005.

[5] Directive 2003/71/EC

[6] For further details on the Lamfalussy structure see: DE VISSCHER C., MAISCOCQ O. AND VARONE F., The lamfalussy reform in the EU securities markets: fiduciary relationships, policy effectiveness and balance of power, 28 Journal of Public Policy 19, 2008.

Pensions Authority (EIOPA), replacing CESR, CEBS and CEIOPS[7]. In addition, the structure is a three step process, the first one describes the legislation general framework, the second one details and the third one ensures the enforcement of the previous two.

1. Level 1: legislative procedure or general framework

In the legislative procedure, also known as level 1, the European Parliament (EP), the European Commission (EC) and the Council of the EU are the main actors[8].
The EC is made up of a president, the current one is Jean-Claude Junker, vice-presidents and commissioners, each one with powers in specific areas, for instance Pierre Moscovici is the Economic and Financial Affairs, and Taxation and Customs commissioner. It can propose legislative measures, following either an own initiative or third party ones, the latter can be made by either a third of MSs or the EP or the European Central Bank (ECB) or the European Investment Bank (EIB). The EP, chaired by Martin Schultz, is with the Council, chaired by Robert Fico until December 2016, the legislative body of the EU. The EP, divided in committees, first reads the proposal and accepts or amends it, then the Council, union of MSs ministers of the area subject to interest, do the same until they agree. If two readings are insufficient to agree upon a text, a conciliation is needed, a phase in which the Conciliation Committee, made by an equal part of Members of the European Parliament (MEPs) and Council representatives, is created in order to find a consensus regarding a text to be adopted.

The output is a regulation, which is directly binding in the MSs, or a directive that needs implementing national laws, those can be minimum or maximum harmonization depending on the level of discretion allowed to the national legislative authorities.
The legislative acts create a general framework ruling a specific area of interest for the EU, for instance admission to trading on a regulated market and an offer to public, following political directions set out in European Union bodies meetings, public statements, acts and citizens needs and expectations.

7 VOS E., The rise of committees, 3 European Law Journal 210, 1997.

[8] MOLONEY N., *EU securities and financial markets regulation,* Third Edition, Oxford, Oxford University Press, 2014 and ARNULL A., A. DASHWOOD, M. DOUGAN, M. ROSS, E. SPAVENTA and D. WYATT, *European Union Law*, London, Sweet & Maxwell, 2006.

2. Level 2: delegated acts or detailed implementation

Level two outputs are delegated acts, amendment or supplement, and implementing measures. The prerequisite is the previous formation of a legislative act, either in the form of regulation or directive[9].

Delegated acts are "non-legislative acts of general application" [10], which starting from the general principles underpinned by the legislative acts, add information (supplement) or explain better and deeper the EU political direction. In particular, the EP and Council empowers the EC to produce delegated acts within specified "objective, content, scope and duration"[11]. The delegated acts have also to meet criteria highlighted in the original law. The TFEU required a withdrawal and a veto power to be in charge of the EP and Council, *inter alias* possible conditions. For instance, the prospectus directive states that the EP and Council can withdraw the delegation of powers at least 3 months after the delegation notification date and that it will last for four years with automatic renewal if not blocked by the legislators.

Instead, implementing acts have the aim to ensure the uniformity of application of EU laws within MSs and should be adopted to ensure "uniform conditions for implementing legally binding Union acts"[12].

3. Level 3: guidelines, recommendations and standards or enforcement

Level 3 was in charge of ensuring the uniform application of laws, when *the Lamfalussy structure* was in force. In fact, level 3 committees, in particular for our purpose the Committee of European Securities Regulators (CESR), used to issue non-binding guidelines, recommendations and standards to the national authorities.

Instead, *De Laroisère report* established three ESAs, for our purpose ESMA, which are legal bodies with personality. ESAs can produce binding technical standards, directly supervise the national authorities, faster act in emergency situations, mediate and enforce EU laws. Instead of *the Lamfalussy structure*, *De Laroisère report* is a three level process, in which the third one enforces laws. The actors empowered to enforce EU regulations and directives are the EC, the Court of Justice and in some cases ESMA.

[9] For more details, see: LENAERTS K., Regulating the regulatory process: "delegation of powers" in the European community, 18 European Law Review 23, 1993.

[10] TFEU Art 290(1)

[11] ibid

[12] TFEU Art 290(2)

4. Level 4 stage: enforcement

In the final stage of *the Lamfalussy* process the *Court of Justice*, in some cases the EC and ESMA, enforce EU regulations and directives against non-compliant MSs. Note that this step does not exist under *De Laroisère report*, which basically unifies the previous second and third levels in a single one: level 2.

Prospectus laws: an economical and historical perspective

1. The Economic point of view

When a company offers securities, for instance common shares, investors buy them according to the information that they are able to gather about the underlying asset. That information is about the company business, the company management skills, growth opportunities, their securities risk return characteristics and the time in which there are willing to hold it. All the above are provided by a document called prospectus.

Two major economics and financial philosophies modelled this choice and underlying drivers: the neoclassical one and the behavioural one[13]. The first one thinks that markets are efficient and investor are rational, known as Econ. In fact, given all the information that they gather, Econs invest simultaneously minimizing risk and maximizing the expected return. In other terms, they buy securities after the disclosure of good news and sell them when bad news come out. The underlying economic theory is the efficient market hypothesis (EMH)[14] stated by Eugene Fama[15]. According to it, in the strong form, the price incorporates all the available information besides inside ones.

Instead, the behavioural approach[16] assumes that investors are human, therefore not completely rational, and invest following heuristics and emotions besides analytical analysis. Heuristics are systematic human biases which explains the recurrence of mistakes. In particular, a human mind intuitively and without recognize it, answers to a simpler question that the one presenting to them. For instance, a Chief Financial Officer of an important financial intermediary, admitted to have bought securities of a car company because he liked their products. In that case, the person answers to the question: do you like the company products? Instead of answering to: are

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[13] Even if untreated also political ideas have a central role in the law making process. For instance see: CAMPBELL J., Institutional analysis and the role of ideas in political economy, 27 Theory and Society 377, 1998; HIX S., *The Political System of the European Union,* Basingstoke, Palgrave Macmillan, 2005.

[14] For further details, see: GILSON R. AND KRAAKMAN R., *The mechanisms of market efficiency*, 70 Virginia Law Review 549, 1984 and GILSON R. AND KRAAKMAN R., The mechanisms of market efficiency twenty years later: the hindsight bias, 28 Journal of Corporation Law 715, 2003.

[15] FAMA E., Efficient capital markets: a review of theory and empirical work, 25 Journal of Finance 383, 1970.

[16] The behavioural approach studies exhaustively the economic rational of mandatory obligations, such as prospectuses in: BAINBRIDGE S. Mandatory disclosure: a behavioural analysis, 68 University of Cincinnati Law Review 1023, 2000; LANGEVOORT D., Taming the animal spirits of the stock markets: a behavioural approach to securities regulation, 97 Northwestern University Law Review 135, 2002.

you willing to invest in the company shares?[17] The main behavioural[18] economist is Robert Shiller, who won the Economics Nobel Prize, the 2008 housing bubble was caused by an "irrational exuberance" which made able households to overpaid houses.

According to the neoclassical theory, the prospectus should be a mandatory disclosure requirement when issuers seek admission to trading or make public offers, because helping transparency, cooperate in enhancing market efficiency and therefore security prices. After the financial crisis, the behavioural approach gained ground and, in our objectives, the security prices motivation for a mandatory prospectus loses appeal.

However, law and economics theorists since 1980s, motivates the mandatory prospectus obligation from a third-party externalities point of view. In fact, a voluntary disclosure could be an incentive for the good guys only to disclose their information, while bad ones will not, making hard to disentangle the difference between them from an investors perspective. In addition, a prospectus content standardization, both decrease the agency conflict between managers and shareholders, because the former would otherwise hide some information to make them work looks better and increase the comparability across different investment opportunities.

It grated investor protection[19], ensuring a comprehensible and complete assessment of the underlying risks and easy access to the company information, through publication and advertising channels.

To sum up, even if the bedrock of the mandatory disclosure has recently lost ground, the EMH, the consensus both within the industries and academia agree upon the usefulness of a mandatory obligation.

2. The Historic point of view

The prospectus directive regime first initiative took place in 1972 through a EC proposal, which would later become the Listing Particular Directive (LPD). The first EU mandatory disclosure

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[17] KAHNEMAN D., Thinking, fast and slow, Farrar, Straus and Giroux, 25 October 2011.

[18] Another nobel prize winner in the behavioural economics field is Kahneman, with the prospect theory. See for more details: KAHNEMAN D. and A. KRUEGER, *Developments in the measurement of subjective well-being,* 20 Journal of Economic Perspective 3, 2006; KAHNEMAN D. and A. TVERSKY, *Judgment under uncertainty: heuristics and biases*, 185 Science 1124, 1974 and KAHNEMAN D. and A. TVERSKY, Prospect theory: an analysis of decision under risk, 47 Econometrica 263, 1979.

[19] The academia studies about the effect of mandatory disclosure, such as prospectus, on investor protection have a long history. For instance, see: EASTERBROOK F. AND FISCHEL D., *Mandatory disclosure and the protection of investors*, 70 Virginia Law Review 669, 1984.

requirement was later imposed on issuers in 1979, by the now repealed Admission Directive, that used to regulate the admission to trading on official exchanges and the on-going transparency obligations, now ruled by the Transparency Obligation Directive (TOD). In 1980 the AD was replaced by the now repealed LPD, which harmonized, through a mutual recognition[20] principle, the document approval within the EU. In 1989, an eight-year process of discussions between MSs regulators and politicians, ended up in the issue of the now repealed Public Offer Directive (POD), aiming at ruling the offer to public, that I will deeply study in the following paragraphs. The POD eliminated the gap between admission to trading and other source of offers to a wide range of non-qualified investors, included into the same directive scope.

The POD and LPD produced a framework that remained in place until 2003, when came into force the Prospectus Directive that replaced them. The previous framework was based on a mandatory obligation to draw up a prospectus and seek approval from the MSs National Competent Authority (NCA) where the issuer or offeror or person asking for admission has located the registered office. Comply with those directives provided a regard: the mutual recognition principle. It tried to both decrease the cost burden towards issuers, increase the capital raising in the EU and provide European investors and companies a level playing field within Europe in order to unify the EU's capital markets. Moreover, the mutual recognition principle makes able issuers to avoid to seek approval in each MS where it offers tradable securities. In fact, the issuer, after being approved by the home member state authority, will be able to sell securities also in other MS markets without the host Member State prospectus approval.

Actually the mutual recognition principal didn't work because just a small number of offerors used it, on account of the huge derogations number. For instance, the power to request a full translation of the prospectus in a language adapt to the host state, makes the offer too expensive to be undertaken, compared to the potential benefit resulting in increasing their investor base in other countries. In addition, the LPD did not consider new form of trading venues, such as OTC, which gained popularity. In fact, public offers into OTC were excluded from the obligation to draw up a prospectus.

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[20] The mutual recognition principle is described, criticised in HÉRITIER A., *Mutual recognition: comparing policy areas*, 14 Journal of European Public Policy 800, 2007; NICOLAÏDIS K., Regulatory cooperation and managed mutual recognition: elements of a strategic model, in BERMANN G., HERDEGEN M. and LINDSETH P. (eds.), Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects, Oxford, Oxford University press 571, 2000; NICOLAÏDIS K. and SCHMIDT S., *Mutual recognition on "trial": the long road to services liberalization*, 14 Journal of European Public Policy 717, 2007 and NICOLAÏDIS K. and SHAFFER G., Transnational mutual recognition regimes: governance without global government, 68 Law and Contemporary Problems 263, 2005.

In 2003 the prospectus directive framework was duly changed with the entry into force of the PD and subsequent level II PR, that are just nowadays in the process of being reformed.
The following paragraphs describe the PD and level II PR, taking account all the supplements and amendments, while chapter 3 is devoted to the analysis of the 2016 EC proposal to review it, which almost surely will substitute soon the PD and level II PR.

The Prospectus Directive 71/2003/EC and Prospectus Regulation 809/2004/EC

The Directive number 71 of the 2003[21], called Prospectus Directive (PD) and its implementation **regulation number 809** of the subsequent year[22], so called level II Prospectus Regulation (PR), set out the prospectus EU discipline. Both of them were amended in 2007, with regulation number 211[23], in 2010, through the directive number 73[24] and a set a new amendments issued between 2012 and 2014[25] that will be discussed at the end of this chapter. The 2012-14 amendments introduced, *inter alias,* the proportional disclosure regime for right issues, small and medium enterprises (SMEs) and credit institutions.

The PD obliges to publish a prospectus if securities are admitted to trading on a regulated market and offers to public, filed it for approval to the home competent authority and comply with advertising rules. The reward for complying with those three obligations is the so called "passport system". The "passport system" allows issuer to raise capital in his/her home state and other member states without seeking prospectus approval in the host ones. Instead, the on-going and ad hoc disclosure obligations of information regarding issuers owning securities already admitted to trading are outside the directive scope. *The Transparency Obligation Directive* (TOD) rules on-going disclosure, while *Market Abuse Directive* and *Regulation* (MAD/MAR) discipline the ad hoc one.
Finally, the PD and related amendments are generally conforming with other regulations, such as *Market in Financial Instruments Directive* (MiFID), TOD, MAD and MAR. An exemption is, for example, the MiFID II Small and Medium Enterprises (SME) compared to the PD companies with reduced market capitalization definitions contradict each other, even if both of them are allowed to comply with the proportionate disclosure regime.

The analysis will be structured in two parts, firstly I will focus on the regulatory spectrum regarding admission to trading on a regulated market and public offers by EU issuers or offerors or person asking for admission. Meanwhile the second part is devoted to third country prospectuses. Those are issuers or offerors or person asking for admission to trading on a

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[21] DIRECTIVE (EU) No. 71/2003.

[22] COMMISSION REGULATION (EU) No. 809/2004.

[23] COMMISSION REGULATION (EU) No. 211/2007.

[24] DIRECTIVE (EU) No. 73/2010.

[25] COMMISSION DELEGATED REGULATION (EU) No. 486/2012; COMMISSION DELEGATED REGULATION (EU) No. 862/2012; COMMISSION DELEGATED REGULATION (EU) No. 759/2013 and COMMISSION DELEGATED REGULATION (EU) No. 382/2014.

regulated market or publicly offering securities in the EU with a registered office located in a country outside the EU. So it would be structured by issuer or offeror or person asking for admission (for now on, issuers, should be intended as comprehensive of also offerors or person asking for admission, for simplicity sake) divided between EU member and non-EU member.

Furthermore, the first part would describe first of all the economic regime underlying rationale, then it will move towards the followings directive obligations, accordingly to the structure used by the major reference of this chapter[26]:

1. Obligation to draw up a prospectus.
2. Obligation to seek approval from the home member state authority.
3. Obligation to publish a prospectus and comply with advertising laws.

If an issuer comply with those obligations is regarded with the so called "passport system", which make them easier to cross-list or offer in other member states, which will be afterwards analysed.

1. Drivers and objectives

The PD is a maximum directive issued in 2003 which has been implemented in the EU. The original implementation deadline was on 1 July 2005, though many countries implemented it later.

It first objective is to heighten the capital raised in the EU and *integrate EU capital markets*, ultimately *steering up both growth and job creation*.

Secondly PD and level II PR *protect investors*, especially retail ones, by ensuring prospectuses comprehensibility, completeness and consistency. Moreover, publication and advertising obligations make sure *investors information disposability*.

On the financial industry side, the directive relaxes obligations to non-equity securities, frequent issuers, the international debt issuers, employer share schemes and so on… to raise liquidity in the related markets. As I will show in the last chapter, devoted to the regulation analysis, the exemption to publish a prospectus for non-equity securities with a denomination per unit of at least EUR 100,000 caused a preference toward issuing greater than the threshold unit bonds, ultimately avoiding retail investments.

[26] SCHAMMO P., EU prospectus law: New perspective on regulatory competition in securities market, New York, Cambridge university press, 2011. However other bibliography has been used. See BRESLIN B. and D. RABINOWITZ, *The Prospectus Directive,* Journal of Financial Services Marketing, Vol. 9, No. 1, p. 91-103, 2004.

Moving from a bank oriented system to a capital based one is another bedrock of the *Capital Market Action Plan* and their related laws, including the upcoming prospectus regulation. In this context, also the PD helps in raising companies' opportunity to finance their self through capital markets, by reducing as much as possible the cost burden. *The passport system* and *the proportionate disclosure* regime focus on that aim too. The proportionate disclosure regime, introduced with an amending regulation in 2012, makes cheaper to raise capital in markets for Small and Medium Enterprises and companies with reduced market capitalisation (share outstanding*share price). Those financing needs rely almost entirely on the banking system and related credits.

2. The first core obligation

2.1. The obligation to draw up a prospectus

The material scope of the directive is, according to the PD's Art.1(1):

1. An admission of securities to trading on a regulated market.
2. Public offer.

First of all, an issuer should draw up a prospectus if he/she wants to have an admission of securities to trading on a regulated market.

A regulated market (RM) is a EU law concept defined in MiFID as a "multilateral system operated and/or managed by a market operator, which brings together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of (MiFID)".

In other words, are platforms, usually electronic, that automatically match buy orders (bid) with sell orders (ask) and managed by an authorized and qualified intermediary which would basically monitor, disclose information about it and run the market. An example is *Borsa Italiana*, managed by *London Stock Exchange* through *Borsa Italiana S.p.A.*, in which Italian listed company shares are exchanged by authorized investors.

There are also called formal because complying with a list of obligation sets out by MiFID, like pre and post deal prices, volume traded, buyers and sellers. The intermediary running regulated markets should be authorized by a national competent authority, in Italy CONSOB, and allows companies to list after checking compliance with some rules (gatekeeper job).

The securities cited in PD Article 1 are *"transferable securities"*. According to MiFID, those are "classes of securities which are negotiable on the capital market, with the exception of instruments of payments", the latter includes credit cards payments and similar. In addition, are not "transferable securities", money market instruments with a maturity of less than twelve months but allows member states to include them in the scope through national law. CESR suggests, also that national competent authorities should assess on a case by case analysis if contractual restriction to the transferability of securities are to extensive to be longer treated as "transferable securities". In fact, warranties included in securities contracts about the transferability limit of them can preclude the buyer to easily sell them.

The directive is a product based law, because it treats differently securities according to their equity or non-equity nature, both in the scope of the directive and within exemptions and derogations. Moreover, it is essential to clarify the difference between them.
Equity securities are:

1. Shares and other transferable securities equivalent to shares in companies.
2. Transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer[27].

The definition includes options with shares as underlying asset, covered warrants, convertible bonds and exchangeable bonds[28] if the latter underlying assets are company shares belonging to the same group of the issuer.
Options are derivatives contracts that gives to the buyer the right, but not the obligation, to buy or sell the underlying asset at a given price, within a given time; European options can be exercised only at maturity, while American ones at any time before maturity.
Convertible bonds instead, are a cheap way, especially for creditworthy institutions or companies, to raise capital, in fact are bonds that can become a fixed number of shares, therefore allowing bondholders to become shareholders of the company if they like and the market conditions make it economic reasonable to do that[29].

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[27] Art. 2(1)(b).

[28] An example of convertible bonds are mandatory convertible bonds, which gives to the buyer the obligation to convert the bond in a pre-specified fixed number of company's shares at maturity. For more details, see; AMMAN N. and R. SEIZ, *Pricing and hedging mandatory convertible bonds,* 13 Journal of Derivatives 30, 2006.

[29] For further details about why companies like to issue convertible bonds see: BANCEL F. and U. MITTOO, *Why do European firms issue convertible debt*, 10 European Financial Management 339, 2004.

Non-equity securities are the residual part of "transferable securities", for instance corporate bonds and notes.

Moving to the second scope of the directive, the PD defines public offers filling the gap missed in the previous POD. In fact, issuer of public offers has to draw up a prospectus.
A *public offer* is "a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable investors to decide to purchase or subscribe to these securities"[30]. By "sufficient information on the terms of the offer and the securities to be offered" the EU does not specify the meaning. Thus, in practice, the decision is taken at national level through national law implementation. For instance, UK and later on the EC, following the British initiatives, had exempted trading screen data from the scope of the directive and therefore insufficient to trig the obligation to draw up a prospectus. Likewise, the investors ability to decide whether to purchase or not the securities is tested on a case by case basis by NCAs.
In this context, offers of free shares are excluded from the obligation to draw up a prospectus, because they are free of charge.

2.2. Exceptions and special formats

The PD also provides exceptions from the scope of the directive in order to avoid the obligation to draw up a prospectus for certain types of issuers or securities size which would incur in shortages of issuance if forced to pay the fixed costs associated to the prospectus. Note in fact that the majority of prospectus costs are fixed, independent on the company market cap or revenues or assets. A fact that is more expensive to SMEs and companies without an internal law division than either Blue chips or high market cap holdings or ones which own lawyers.

Art. 1(2) and Art. 3(2)(e) list the exemptions to draw up a prospectus. In addition, later on in this paragraph, exceptions from the obligation to publish a prospectus will be discussed. Although literally different the two should be deem as equivalent, in fact, intuitively, it does not make any sense to oblige someone to draw up a document and simultaneously allow him to avoid the publication.

[30] Art.2(1)(d).

Moving towards the *exceptions* (to draw up a prospectus), they are divided in the three following groups: *size of issuance*, *issuer nature* and *special ones* for the protection of member states market niches.

Art. 1(2)(h) and Art. 3(2)(e) together provide that *securities offered to public* for which the *total consideration amount to less than EUR 100,000* do not have to draw up a prospectus and cannot be obliged differently under national laws. Meanwhile, *securities offered to public between a total consideration of EUR 5,000,000 and EUR 100,000*, can be obliged to write a prospectus by national laws or issuer discretional decision.
Finally, *securities offered to public with an amount of more than EUR 5,000,000* are not excepted. A "total consideration amount" should be computed on a EU-wide basis, over a time span of twelve months and by category of securities, included free shares. For instance, if company X issues EUR 1,000,000 of convertible bond in Germany, EUR 2,000,000 of shares in Italy, EUR 50,000 free shares in Germany and EUR 7,000,000 shares in Portugal is obliged to draw up a prospectus for the shares issuance, while it was given exemption from the free shares case and oblige, under German national laws, in the convertible bond case.
Note that the above size exemptions do not apply for securities admission to trading on a regulated market.

Each member state has taken a view about the threshold to be applied between EUR 100,000 and EUR 5,000,000 (see table 1).

***Table 1**: Obligation to draw up a prospectus: different Member State thresholds*

Threshold (EUR)	***100 000***	***250 000***	***1 000 000***	***1 500 000***	***2 500 000***	***5 000 000***
Member States	Belgium, Bulgaria, Germany, France[1], Hungary, Latvia, Slovak Republic and Slovenia	Austria	Czech Republic, Denmark and Romenia[2]	Finland[3] and Luxemburg	The Netherlands, Sweden and Poland	Croatia, Greece Ireland, Italy, Lithuania, Malta, Portugal, Spain and United Kingdom

Note: Data not available for Cyprus and Estonia. [1] Only for offers representing more than 50% of the share capital of the issuer. [2] EUR 200 000 for debt instruments. [3] Finland is in the process of raising the threshold to 2 500 000.
Source: ESMA.

The final one applies to non-equity securities, not subordinate, nor convertible nor exchangeable with underlying asset belonging to a company outside the issuer group, nor grant rights of subscription or acquisition to other types of securities, nor connected with derivatives, *issued by credit institutions "in a continuous or repeated manner" with a total consideration amounts to less than EUR 75,000,000*[31].

"In a continuous or repeated manner" means that two similar class or type of securities are offered over twelve months[32]. For the latter provision member states can oblige the exemptions to be included in the directive scope with a national law or the issuer itself can choose to opt-in if he is not obliged under a national law. In the latter case, credit institutions ex article 1(2)(j) are entitled to benefit from the proportionate disclosure regime.

Furthermore, *Art. 3(2)(d)* excludes from the obligation to draw up a prospectus *all the equity or debt securities offer to public with a denomination per unit of at least EUR 100,000*, but not for admission to trading. Actually, this provision has been used so far just by non-equity securities exchanged in unregulated market and unlisted non-equity securities placed to institutional investors and has been bought by professional institutions and individuals expert in the finance field. Because it does not exist an equity security with denomination per unit greater or equal to EUR 100,000, note that the highest value share in the world is the Berkshire Hathaway Inc., on 22 November 16 traded at roughly USD 159.

The exception for the nature of the offeror or issuers are the second type exceptions, those includes non-equity securities with the *following issuers*:

1. Member States or their regional/local authorities.
2. ECB and EU central banks[33].
3. Public international institutions, in which at least one MS is a member[34].
4. "Unconditionally and irrevocably guaranteed" by a MS or one of their regional/local authorities[35].
5. Associations and no-profit institutions recognized by a MS, which raise capital in order to finance their no-profit operations[36].
6. Units issued by collective investment undertaking not closed-end type[37].

[31] Art. 1(2)(j).
[32] Art. 2(1)(l).
[33] Art. 1(2)(b).
[34] ibid.
[35] Art. 1(2)(d).
[36] Art. 1(2)(e).
[37] Art. 1(2)(a).

7. Credit institution "in a continuous or repeated manner" if they meet four conditions ex Art. 1(2)(f).

Points 1,2,3 and 4 are allowed to opt-in.

Finally, the EC, EP and Council agreed upon providing some ad *hoc exceptions* in order to prevent the failure of particular markets, with legal provisions tailored made in order to incentivise specific habits. For instance, the PD does not apply for traditional Swedish mortgage bonds, known as "*bostadsobligationer*"[38], or in Finland in which the natural right to occupy a house required just to own a share of the house association[39]. Moreover, central banks holding companies capital raising does not comply with PD[40].

The PD establishes some special regimes too: those are the shelf-registration, also known tripartite prospectus, a *"wholesale regime"* for a special subset of non-equity securities admitted to trading on a regulated market, a *base prospectus* and lastly, the proportional disclosure regime that will be described in the review of last PD amendment at the end of this chapter.

Those regimes provide three different prospectus formats, the common one which strictly follows, without derogations, the level II PR content prescriptions, a tripartite prospectus and a base one.

The international debt market importance for financing governments, companies and credit institutions activities is recognized. In fact, the directive allows non-equity securities admitted to trading on a regulated market with a denomination per unit of EUR 100,000 to use the "wholesale regime" (remind that for the same denomination per unit public offers of both equity and non-equity securities the PD does not apply)[41]. It basically put forward the issuer needs of an easier and cheaper access to finance than the investor protection[42], because of the wide economic benefit underlying the international debt markets, note that the EU is bank-oriented system, of sources are provided by the debt market, through bonds and mostly bank credit.

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[38] Common Position (EC) No 25/2003 [2003] OJ C 125E/21,48.

[39] Ibid.

[40] Art. 1(2)(c).

[41] Art. 3(2)(d).

[42] See HERTIG G., KRAAKMAN R. and ROCK E., *Issuers and investor protection*, in KRAAKMAN R., DAVIES P., HANSMANN H., HERTIG G., HOPT K., KANDA H. and ROCK E. (eds.), *The Anatomy of Corporate Law – A Comparative and Functional Approach,* Oxford, Oxford University press 193, 2004 for an analysis of investor protection from an issuer point of view.

The wholesale regime is not affected by drawing up the prospectus summary if both, the issuer does not choose to write it anyway or a national law does not oblige him/her to do so. In addition, the PD leaves to the issuer the faculty to choose the prospectus language between an "international language customary in the sphere of international finance", such as English and the home Member State official one. Anyway, the Member States can ask to publish a prospectus summary in their own official languages, if a summary is needed under national laws.

The common formats are single and tripartite documents[43], while the special one is the base prospectus. The tripartite document or shelf-registration includes a registration document, containing information regarding the issuer, a security note, comprehensive of all the needed information regarding securities, *inter alias*, offer size, uses of proceeds, selling shareholder, "greenshoe[44]" existence and size, and a summary note.
It provides an efficient way to raise capital through the EU, because a registration document can be filled and consequently approved by the home competent authority independently of the public offer or admission to trading timing. For that purpose, the issuer should publish just the security and summary note afterwards. Furthermore, the annual report is coherent with the registration document as far as it complies with the general content principals written in Art. 5(1), making for a company, already obliged under TOD to publish an annual report, quick and cost efficient to raise capital. In fact, it is very important for the capital raise successfulness to tap the market under the best market conditions. Best market conditions could be a bull market and participants highly confident about future trends. Also the political stability of the current government system and no stability threats from outside play a role.

The content order of the single prospectus is, at first the summary, then a table of content, thirdly the risk factors descriptions and finally, all the information items found in the schedules/building blocks. Likewise, in the registration document and the security note, at first should be the table of content, then the risk factors section and finally all the information required by the schedules/building blocks. The PR requires that the order is mandatory, while schedules can be a bit changed.

[43] Art. 5(3).

[44] The "greenshoe" is an option to buy a specified number of new issuance securities at the issuance price. The option buyer is the underwriting investment company, and it exercise it if the first day of trading security closing price is greater that the issuance price, otherwise the investment firm buys the same amount directly in the market, at a lower price.

The base prospectus format goes a step further the shelf-registration document in allowing issuance flexibility in tapping the market in the best time. It is common for international debt issuance and it provides the use of a base prospectus for several issuances over a period of time. The regime can be used by non-equity securities (including all forms of warrants)[45] and non-equity securities issued by credit institutions “in a continuous and repeated manner” which are consistent with the following conditions:

1. the issuance proceeds are placed in assets that ensure coverage of the liability produced by the issuance until maturity
2. in the event of credit institution default, the proceeds are used for capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC[46].

The programme is not mandatory but an optional[47] arrangement and can take the form of a tripartite document too.

A specific feature is the fact that a base prospectus can avoid the inclusion of final terms information if they are unknown at that time, such as the price, maturity, identification number and others. That information should be filled in separately, with a supplement[48] or a final term[49], in the latter occasion the issuer should make information available to investors, find approval of the competent authority and communicate it to the host ones. The final term should be provided as soon as practicable, if possible before the issuance takes place.

It is clear that the PD provision, again, prefer to take the issuer part instead of the investor ones, in fact the provisions regarding the final terms publication granted greater flexibility for the issuer while confusing investors, which would, in many occasion, face the problem of making an investment decision quickly after the price is disclosed, making easier to decide under heuristic, therefore falling in committing biases. Some biases are preferring national products (home country bias) or buying ignoring news contrasting a previous idea (confirmation bias) or answering to a different question while investing (I like the company product, so I buy their bonds)[50].

In order to fill the gap, the PR states that information can be omitted from the base prospectus if “are not known when the base prospectus is approved” and can only be ascertained “at the

[45] Art. 5(4)(a).

[46] Art. 5(4)(b).

[47] PD Rec (23), Art. 5(4).

[48] Art. 5(4) final sub-paragraph.

[49] Ibid.

[50] KAHNEMAN D., *Thinking, fast and slow,* Farrar, Straus and Giroux, 25 October 2011.

time of the individual issue”[51]. Moreover, issuer should make clear the publication way in which they will provide the final terms[52], helping investors in gathering easily and as fast as possible that core information.

3. Prospectus content

3.1. Minimum Disclosure Requirements

The prospectus content is deeply standardized in order, on one hand, to better compare different investment opportunities and on the other hand to protect investors by ensuring the disclosure of information that makes them able to consciously decide.
The law takes the form of general principals under Art. 5(1) of PD, detailed schedules and building blocks (I will later define them) under level II PR[53] and liability risk. Art. 5(1) states in broader and general terms that the prospectus should contain all the information about the issuer, offeror or guarantor (if any) and securities in order to make investors able to provide “an informed assessment” of the whole operation. It also adds that the information should be provided in a way which is “easily analysable and comprehensible”. The principles are therefore the *completeness*, *consistency* of the information given and *comprehensibility*.

The Prospectus Regulation 2004/809/EC (known as PR or level II PR), which implements the PD, specifies the minimum information requirements to be contained in the prospectus, both a single document and a tripartite one, while the Amending Regulation 2012/486/EC “takes care” of the base prospectus and supplement information requirements. With minimum information requirements the EU legislator does not intend to make confusion with the maximum harmonization principle of the PD, but explain that the MSs authorities can ask for additions for certain issuer type. Thus, competent authorities may ask to shipping firms, start-ups, property, mineral and investment companies and scientific research firms and financial information of other companies belonging to same issuer group to disclose appropriate information.

[51] PR Art. 22(2).

[52] Art. 22(5)(2).

[53] COMMISSION REGULATION (EU) No. 809/2004.

Even if the regulation sets out different schedules, which are "minimum disclosure requirements adapted to the particular nature of the different types of issuers and/or the different security involved", and building blocks, that are "additional information requirements, not included in one of the schedules, as the case may be, depending on the type of instrument and/or transaction for which a prospectus or a base prospectus is drawn up", for different security types, issuer and transaction nature, there is a core common content.
In fact, a single prospectus should contain in this order:

1. Summary.
2. Table of content.
3. Risk factors section.
4. Information as required by specific schedules and building blocks.

Likewise, a registration document and a security note should be consistent with the following content order:

1. Table of content.
2. Risk factor section.
3. Information as required by specific schedules and building blocks.

The combination of one or more schedules and building blocks required for specific issuance subset are contained in detailed regulation annexes, between Annex I and XVII, while the corresponding issuance type is clearly presented in Annex XVIII of the same regulation.
Even if a detailed description of the prospectus content for each line of group is beyond the dissertation scope, to get a grasp of it I will now show the content needed for first issuance of equity securities (ex PD Art. 2(1)(b)), such as IPO[54]s.

Shares, which includes preference shares, redeemable shares, shares with preferential subscription rights etc.…, requests a registration document consistent with the following schedules and a pro forma financial information building blocks (see table 2) and specific schedules regarding the security note (see table 3).

[54] Quantitative data on European IPO are summarized in PWC, IPO Watch Europe, Q3 2016.

Table 2: *Minimum disclosure requirements for the share registration document (schedule)*

1	PERSONS RESPONSIBLE
2	STATUTORY AUDITORS
3	SELECTED FINANCIAL INFORMATION
4	RISK FACTORS
5	INFORMATION ABOUT THE ISSUER
5.1	History and Development about the Issuer
5.2	Investments
6	BUSINESS OVERVIEW
6.1	Principal Activities
6.2	Principal Markets
7	ORGANIZATIONAL STRUCTURE
8	PROPERTY, PLANS AND EQUIPMENT
9	OPERATING AND FINANCIAL REVIEW
9.1	Financial Condition
9.2	Operating Results
10	CAPITAL RESOURCES
11	RESEARCH AND DEVELOPMENT, PATENTS AND LICENCES
12	TREND INFORMATION
13	PROFIT FORECASTS OR ESTIMATES
14	ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES AND SENIOR MANAGEMENT
14.2	Administrative, management, and supervisory bodies and senior management conflicts of interest
15	REMUNARATION AND BENEFITS
16	BOARD PRACTICES
17	EMPLOYEES
18	MAJOR SHAREHOLDERS
19	RELATED PARTY TRANSACTIONS
20	FINANCIAL INFORMATION CONCERNING THE ISSUER'S ASSETS AND LIABILITIES, FINANCIAL POSITION AND PROFIT AND LOSSES
20.1	Historical financial information
20.2	Pro forma financial information
20.3	Financial statements
20.4	Auditing of historical financial information
20.5	Age of latest financial information

20.6	Interim and other financial information
20.7	Dividend policy
20.8	Legal and arbitration proceedings
20.9	Significant change in the issuer's financial or trading position
21	ADDITIONAL INFORMATION
21.1	Share Capital
21.2	Memorandum and Articles of Association
22	MATERIAL CONTRACTS
23	THIRD PARTY INFORMATION AND STATEMENT BY EXPERTS AND DECLARATIONS OF ANY INTEREST
24	DOCUMENTS ON DISPLAY
25	INFORMATION ON HOLDINGS
Plus pro forma financial information (building blocks)	
Source: Annexes I and II of Regulation 809/2004/EC	

Table 3: Minimum disclosure requirements for the share security note (schedules)

1	PERSONS RESPONSIBLE
2	RISK FACTORS
3	KEY INFORMATION
3.1	Working capital statement
3.2	Capitalization and indebtedness
3.3	Interest of natural and legal persons involved in the issue/offer
3.4	Reasons for the offer and use of proceeds
4	INFORMATION CONCERNING THE SECURITIES TO BE OFFERED/ADMITTED TO TRADING
5	TERMS AND CONDITION OF THE OFFER
5.1	Conditions, offer statistics, expected timetable and action required for apply for the offer
5.2	Plan of distribution and allotment
5.3	Pricing
5.4	Placing and underwriting
6	ADMISSION TO TRADING AND DEALING ARRANGEMENTS
7	SELLING SECURITIES HOLDERS
8	EXPENSE OF THE ISSUE/OFFER
9	DILUTION
10	ADDITIONAL INFORMATION
Source: Annex III of Regulation 809/2004/EC	

3.2. Liability risk

Liability risk is the risk of being sanctioned because non complying with laws and an important driver of the prospectus content. In fact, the person or company responsible for the aforementioned sanctions would prevent to trig it by disclose all the needed information. The liability risk is governed by member states and their competent authorities within the principle under the PD.

The civil liability is anticipated in this context because, although the PR did not plan it, is an important driver of prospectus content. The person responsible for writing the prospectus is heavily influenced by the risk of being later on sanctioned because he failed to comply with the relevant provisions. In fact, sometimes the real driver of prospectus content become the liability risk, although the prescript one is the investor protection. This is an important regulation failure which will be later on discussed.

3.3. The prospectus summary

The prospectus summary is the introductory part of the prospectus[55], which is meant to get a grasp of the investment opportunities and risks offered, aiming at appealing the investor appetite, making him carry on reading the all prospectus. It is the first part of a base prospectus, tripartite and single one, while is not for the "wholesale regime". The target reader is the retail investor; therefore, complexity of language should be balanced accordingly.

Using EU legislator words, the summary should provide "in a concise manner and in non-technical language… key information in the language in which the prospectus was originally drawn up"[56]. Additionally, the "format and content of the summary… shall provide, in conjunction with the prospectus, appropriate information about essentials elements of the securities concerned in order to aid investors when considering whether to in invest in such securities"[57]. It should not be longer that 2,500 words[58], cannot incorporate references and should be translated in case of abroad capital raise, furthermore, it must include a series of warnings.

[55] Art. 5(2)(a).

[56] Art. 5(2) as amended.

[57] ibid.

[58] Rec (21).

The keys information, for ensuring maximum standardization of summary content and format EU-wide, must contain:

1. A brief description of the essential issuer and guarantor characteristic, creditworthiness and risks.
2. Features, rights and risks associated to the securities involved in the offer.
3. Offer terms and estimated cost an investor would bear.
4. Admission to trading details.
5. Underlying objective and use of proceeds.

The EC, EP and Council wanted to create a summary framework that would produce a EU common format, that would make all the investors, retail too, able to assess which one to follow through and which not. They did not want that the introduction was the basement of the investment decision, which remain the all prospectus (for this objective a warning is contained in each summary), but important like a slogan in the all advertisement, effortless to read, involving emotions and intuitions rather than reflection and analytical thoughts and easy to understand by a retail, non-economical and/or financial expert.

In reality, the effect is not what expected, in fact, it is generic, technical, complex and almost useless, investors hardly read it carefully and an average investor cannot understand the all content meaning. To solve this problem, the law and economic academia came out with ideas like data mining[59] and sentiment analysis[60], but at the end (see next chapter) the prevailing idea is the KIID a standard format, already used for UCITS, which targets retail investors by using, actually and empirically proved, short and standardized non-technical language.

3.4. Prospectus supplement

The prospectus is a complete document, that include sufficient information about the company issuer and the securities object of the offer, in order to provide to investors the sufficient knowledge in order to make "an informed assessment" of the offer. However, sometimes it is

[59] For further details, see: ANANIADOU S. and J. MCNAUGHT, *Text Mining for Biology and Biomedicine*, Boston MA, Artech House, 2006 and FELDMAN R. AND SANGER J., The Text Mining Handbook – Advanced Approaches in Analysing Unstructured Data, Cambridge, Cambridge University press, 2006.

[60] On sentiment analysis see: PANG B. and LEE L., *Opinion mining and sentiment analysis*, 2 Foundations and Trends in Information Retrieval 1, 2008 and PIAO S., TSURUOKA Y. and ANANIADOU S., *Sentiment analysis with knowledge resource and Nlp tools*, 4 International Journal of Interdisciplinary Social Sciences 17, 2009.

incomplete because the person writing the prospectus missed some information for whatever reason. In other circumstances, the home competent authority asks to the issuer to add new part(s) toward the document. In such cases, a prospectus supplement is needed.
The new information included in the prospectus supplement need home competent authority[61] approval and will be sent to the host one if capital is raised abroad too[62]. Then is published, according to the relevant laws.
A prospectus supplement is the formal way of adding new information upon the previous approved document, irrespectively of the form of the original one. Thus, a base prospectus or a summary can be supplemented too.

In other words, a supplement is needed when a "significant new factor, material mistake or inaccuracy", which "is capable of affecting the assessment of the securities"[63], happens between "… the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later"[64]. Remind that the scope of the document is to make able investors to decide whatever to purchase or subscribe the securities offered and the minimum disclosure requirements ensures that the prospectus content is sufficient for that aim. When information is insufficient or inaccurate or wrong the prospectus supplement fills the gap.
Lastly, when a new information comes out after the closing of the public offer or the time when trading on a regulated market begins, it has to be published under the TOD.

The prospectus supplement publication date is important because it represents the legal start of the investors right of withdrawal. People who already subscribed securities can change their mind, taking account of the supplement news. The period lasts until the following two working day or more if the issuer permits so[65].

3.5. Incorporation by reference

The person responsible for writing the document can in all the parts, except the summary, incorporate files and other information by referring to them, typically using footnotes. The

[61] Art. 16(1).
[62] Arts. 16(1) and 17(1).
[63] Art. 16(1).
[64] Art. 16(1) as amended.
[65] Art. 16(2).

referenced files should be updated and already approved or filled to the relevant authorities and comply with national or EU laws, for example an annual report complying with TOD[66]. This provision reduces the document number of pages and is an instrument ensuring the consistency of information with the previous disclosed ones.

3.6. Information omissions

Inside the document can be omitted some information as a matter of exception, in fact, when some special situations occur the issuer can avoid to disclosure such information, without being ex post liable for the misbehaviour. The conditions that trig the special situation are both contained, again, in the PD and the PR.

All of them should be consider exceptions, in a normal course of action they should comply with all the minimum disclosure requirements under PR and the information required to make the investor able to make "an informed assessment" of the investment opportunities.

Now the paragraph will have structured by dividing conditions by law source.

Under PD the information omission is allowed when at least one of the following condition is met:

1. Unavailable information[67].
2. Information out of the public interest, or seriously detrimental to the issuer, or unimportant[68].
3. Inappropriate disclosure[69].

For all the above, the interpretation is in charge of the home competent authority, on a case by case basis.

Otherwise, under the PR can be omitted not pertinent information items[70] and unknown one for a base prospectus, for them interpretation guidelines are provided by CESR and ESMA, consequently helping home competent authority in detaching the occurrence of those situations.

[66] Art. 11(1).

[67] Art. 8(1).

[68] Art. 8(2)(a).

[69] Art. 8(3).

[70] PR Art. 23(4).

3.7. Language

The prospectus language prescriptions, aimed to facilitate cross-border listing[71], give more power on the home Member State hands than on host one.

Moreover, the home competent authority is free to decide the document language if the regulated market or the public offer is in its territory, otherwise it should accept a "language customary in the sphere of international finance", such as English[72].

On the other hand, the host member state(s) can only oblige(s) issuer to produce a summary in (its)their official language, while committed to accept the language chosen by the issuer for the other parts of the document. The choice has two options: an official language and a ""language customary in the sphere of international finance"[73].

Lastly the "wholesale regime" leaves more discretion upon the issuer's hands, in fact, also the home member state have the same power of the host one, in just requesting the language of the summary if there exist a national law obliging the issuer to draw up it[74]. Remind that the PD wholesale regime does not require to draw up a summary.

Finally, the person responsible for the prospectus is also in charge of ensuring the quality of the translation[75].

3.8. Validity

The period of prospectus validity is twelve months, starting from the date of approval[76]. The only special arrangement involves base prospectus ex. Art. 5(4)(b) (non-equity securities which are issued by credit institutions in a continuous and repeated manner), for which the validity period is extended until there are no more securities to be issued "in a continuous and repeated manner"[77]. The latter means that the base prospectus will be valid until will be reached the one-year anniversary of the penultimate issuance of similar type of securities.

[71] PD Rec (35).
[72] Arts. 19(1) and 19(3).
[73] Arts. 19(2) and 19(3).
[74] Art. 19(4).
[75] CESR Q&A July 2010, Question 33.
[76] Art. 9(1).
[77] Art. 9(3).

4. The second core obligation

4.1. The home Member State competent authority prospectus approval

The second prospectus directive core obligation is the obligation to seek approval with the competent authority of the home Member State.
When the prospectus is completed, the issuer, or offeror, or any other person allowed to act in name of them, should fil it to the home Member State competent authority to seek approval before being allowed to publish it.
However, how to determine the "home" one?

The general principle determining the home competent authority is picking up the best one in order to regulate, supervise and enforce EU law at company level.
However, the actual principle chooses the home Member State competent authority according to the security issued type.
Accordingly, the PD give the following three choices to the issuer of non-equity securities and "any issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised, provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer"[78] with a denomination per unit of at least EUR 1,000:

1. The MS in which the issuer's registered office is located.
2. The MS in which the regulated market, on which the securities are admitted to trading, is located, or
3. the MS on whose territory the securities are offered to the public.

In addition, non-equity securities and other hybrid categories (ex. Art. 2(1)(m)(ii)) offered publicly in a currency different from euro can opt between the above choices if their denomination per unit is nearly equivalent to EUR 1,000[79].

The residual categories of securities have not freedom and have to accept as home MS the one in which the issuer's registered office is located. The latter is known as territorial jurisdiction principle.

[78] Art. 2(1)(m)(ii).
[79] Art. 2(1)(m)(i).

5. The third core obligation

5.1. Obligation to publish a prospectus

The third core obligation under PD and level II PR is to publish a prospectus after the approval. The directive states, both the timing required for the publication, the ways and alternative formats combinations allowed, the notification procedures of the publication channels and exemptions.
First of all, it is important to highlight that the exemptions to publish a prospectus mean that the issuer or offeror can avoid to draw up a prospectus. Again, it is without any sense to oblige someone to draw an official document aimed to ensure transparency and investors protection without being required afterwards to publish it.

About the timing, the prospectus should be published "as soon as practicable" after being approved by the relevant home Member State competent authority and "at a reasonable time in advance of, and at latest at the beginning of, the offer to public or the admission to trading of securities". In addition, for IPOs the deadline should be at latest six working days before the offer ends, even when the offer lasts for less than the same amount of days. In other words, the EU legislator wants to ensure that the prospectus does not miss any relevant news about the issuer company and the securities offered by limiting, as much as possible, the time between the approval and the publication. The shortest is the period of time, the lowest is the possibility that news come out.

Regarding the publication arrangements, the directive sets out a number of different allowed ways to publish a prospectus, in all their forms. In particular, they are a printed medium, meaning insert in one or more newspapers which are widely distributed in all the MSs in which the offers take place, a printed copy and an electronic format.
The printed copy should be free of charge for any interested and targeted investors. It has to be distributed in one or both of the following two options: the issuer's registered office and the underwriter's office and/or at the regulated market one.
The electronic formats, instead, can be available at the issuer's web page or at the underwriter one, and if existent, at the home MSs authority's web site.

Finally, the directive allows some combination of publication formats, the printed medium together with the electronic one or the electronic format with the printed copy. However, the issuer has the freedom to widen the publications methods if at least one of the above two combinations is included in the choice.

When the document is published how can we be sure that the target investors, the one that can actually buy the securities offered, will be able to find it? An intuitive answer comes from the easiness of the problem. In fact, a person who is willing to spend his own money will put some effort in finding the prospectus, which is distributed in some easy to find locations, like the issuer's website.

Anyway, the directive gives to the home MS the power to ask to the issuer to publish a notice containing the prospectus allocations and way to get it. The notice should be send in a newspaper that has national or supranational coverage and be published at latest the working day which follows the date of publication of the prospectus.

In addition, both in the newspapers and web sites, a disclaimer is obliged to come up stating the targeting investors and the one which cannot take part on the offer. The latter is provided to ensure misunderstandings because both the web sites and newspapers can be reached by citizens living in states outside the MSs in which the securities can be bought.

5.2. Exemptions

Articles 3(2) and 4 of the PD, as amended in 2010, detail other ways of issuing securities which cannot require the disclosure of prospectus. In law terminology the following exemptions involve the publication of prospectuses and therefore they do not legally exclude the directive scope. Actually, using general terms, the followings should be deemed equivalent to the exemptions to draw up a prospectus.

For a person uncommon to law terminology this division can be misleading and my dissertation order of presenting can mislead the reader too, that's why I repeated the clarification so much. To be clear the chapter structure mimics the directive order and is coherent with the law terminology thanks to its institutional objective, though it is a master thesis, and provides an optimal chapter organization.

In particular, private placements and other specific operations are outside the obligation scope because the prospectus is either useless or a block. In fact, financial market experts, who are the targeting investors of private placement have the knowledge, skills and techniques to make

an informed assessment by their own. In addition, the specific operations cost burden attached to the publication of prospectuses is higher enough to overcome the potential proceeds.
For instance, free offers of shares from employers to employees and shares exchange as part of an acquisition or merger are exempt operations.

Article 3(2) increases the total number of exceptions by adding private placements and designs a precise framework for retail cascade. Furthermore, article 4 states precise operations than do not trig an obligation to draw up and consequently publish a prospectus.
Private placements, the opposite of public offer, is considered in this environment as two possible alternatives:

1. An offer limited to qualified investor[80].
2. An offer to less than 150 non-qualified investors in each Member State[81].

Thus, those operation, I repeat, do not require the issuer to write, ask for authority's approval and publish a prospectus.
The qualified investor[82] definition includes professionals and eligible counterparties[83], under MiFID[84].

There are two kinds of professional investors: first of all, all the companies which, on a daily basis, work in the financial markets and meet certain criteria.
Secondly are persons, legal or natural, who are not treated by default as such but explicitly declare their willingness to be part of it and also meet some prerequisites. Those are typically, autonomous workers in the financial industry or persons who use to trade for their own purposes.

The first category contains firms which are authorised or regulated to operate in the financial markets, like credit institutions, pension funds, investment firms, relatively big size companies which satisfy two of the following three criteria:

1. EUR 20,000,000 or greater balance sheet.
2. EUR 40,000,000 or greater net turnover.
3. EUR 2,000,000 or greater of own funds.

[80] Art. 3(2)(a).
[81] Art. 3(2)(b) as amended.
[82] Art. 2(1)(e) as amended.
[83] MiFID art. 24.
[84] Directive 2004/39/EC OJ L145/1.

Finally, governments entities as central banks, local, regional and national debt issuers and public entities, and other institutional investors that mainly invest in financial instruments.

Regarding the second category, those persons follow a three step process, at first they have to express their willingness to be treated as professionals, even if not forced to join the group. Secondly their ability to understand the risks bearded by the financial operation should be evaluated. Thirdly they have to satisfy two out of three following conditions:

1. They must have performed transactions “in significant size” on markets “at an average frequency of 10 per quarter over the previous four quarters[85]”.
2. Possess a financial portfolio which worth at least EUR 500,000.
3. A professional experience, last at least one year, in the financial sector regarding financial transactions.

Finally, eligible counterparties under MiFID are, *inter alias,* insurance companies and asset management companies.

Article 4 obliges to produce an alternative information document instead of the whole prospectus for a certain number of specific public offers. The public offers are all the below mentioned besides the first one.

Moreover, the alternative information document does not comply with the PD and level II PR provisions about the form, content and advertising material, and consequently are not involved in the passport system. In fact, the notification procedure misapplies to the following transitions.

The public offers investment operations are the following (remember that the first does not require to draw up an alternative information document):

1. Offers of shares which are issued “in substitution for shares of same class already issued” without ensuing increase in the issued capital[86].
2. Securities of all kinds[87] offered at the occasion of a takeover, acquisition, if those securities are offered by way of an exchange offer[88].
3. Securities that are offered or allocated at the occasion of a merger or a division (spin-off)[89].

[85] MiFID Annex II.

[86] Art. 4(1)(a).

[87] In this sense, 3rd Transposition Meeting 6.

[88] Art. 4(1)(b).

[89] Art. 4(1)(c) as amended.

4. Dividends which are paid out to present shareholders as shares, if these shares are of the same class as the ones for which the dividends are paid[90].
5. Securities which are offered or allocated to present or previous directors or employees by their employer (or an affiliated undertaking), if the company has its head office or its registered office in the EU[91].

Article 4 paragraph 2, instead, lists a certain number of specific operations requesting an admission to trading on regulated markets of securities are not affected by from the obligation to publish a prospectus. As the previous ones some of them require to publish an alternative information document and most of them are equal (from point 1 to 5).
The aforementioned are the following:

1. Securities of all kinds offered at the occasion of a takeover, acquisition, if those securities are offered by way of an exchange offer[92].
2. Securities that are offered or allocated at the occasion of a merger or a division (spin-off)[93].
3. Shares that are issued in substitution for shares of the same class and which have already been admitted to trading on the same regulated market, without there being an ensuing increase in issued capital[94].
4. Shares that are offered or allocated at no charge to present shareholders, including dividends paid out as shares which are of the same class as the ones for which dividends are paid[95].
5. Securities which are offered or allocated to present or previous directors or employees by their employer or by an affiliated undertaking, if the securities in question are of the same class as those already been admitted to trading on the same regulated market[96].
6. Shares that over one year, do not account to 10 per cent of the number of same class shares already been admitted to trading on the same regulated market[97].
7. Shares obtained as result of other securities being converted or exchanged (convertible or exchangeable bonds), or right exercised (options), as long as the shares in question

[90] Art. 4(1)(d) as amended.
[91] Art. 4(1)(e) as amended.
[92] Art. 4(2)(c).
[93] Art. 4(2)(d) as amended.
[94] Art. 4(2)(b).
[95] Art. 4(2)(e).
[96] Art. 4(2)(f).
[97] Art. 4(2)(a).

are of the same class as the shares that have been already admitted to trading on the same regulated market[98].

8. Securities which have already been admitted to trading on a different regulated market, subject to various conditions intended to ensure that investors benefit from a sufficient level of information[99].

5.3. Retail cascade

The retail cascade is a particular but common procedure in which securities are offered to public, which take the form of a two-step process. At the first the issuer sells his new securities to a poll of underwriters or a single credit institution and the latter then sell them to the public, pocketing the spread between the price paid and the one received from retail investors. The credit institution(s) bear(s) the risk of not being able to resell them and the possibility of bad news coming out regarding the underlying company which lead to decreasing the securities price while retaining them.

The retail cascade has a peculiarity: the first issuance usually takes the form of a private placement, which is not affected by the prospectus obligation, but it requires it in the second transaction. Moreover, the regulator problem is whether to treat the retail cascade as a unique securities offer or a discrete one, composed by two separate transactions with the attached disclosure requirements.

Thus, the CESR and article 3(2) as amended in 2010 overcome this problem by treating them as discrete offers, then if the issuer first step offer is prospectus exempted it does not mean anything about the second one, in which, if targets retail investor, comply with the PD disclosure requirements.

A second problem arises from the previous solution. Can the retail cascade intermediary, in the second step, use the already published prospectus produced by the issuer in the first one?

The CESR guidelines and level II PR distinguish by intermediaries acting “in association” with the issuer or acting by their own[100]. In the former case the credit institution can rely on the issuer prospectus and publish it in its offer, instead in the latter case it, if the issuer has not agreed “by means of a written agreement” to rely on his prospectus, the credit institution should draw up a new prospectus and/or the needed supplements[101].

[98] Art. 4(2)(g).

[99] Art. 4(2)(h).

[100] CESR Q&A July 2010, Question 56.

[101] CESR Q&A July 2010, Question 56.

6. The fourth core obligation

6.1. The obligation to advertise

The regulatory framework provides rules also about advertising in order to protect investors by making them easier to know when an offer starts and where to find the attached documentations. The PD aim in 2003 was to harmonise the different and somehow contradictory previous rules in the EU, thus, creating a standard way of advertising, using same channels and similar formats by making any new issuance easy to find. For instance, a person, not used to reading everyday business newspapers or specialized TV channels can be advised through a smartphone.
Actually the EU laws partly failed their objectives, because they preferred to established a set of broad principles regarding advertisement, instead of being precise. In particular, the issuer has great freedom in choosing the channels, content and timing of advertising. In this subject it is commonly accepted that the US regulatory framework is more complete and exhaustive that EU one, in fact, it details, *inter alias,* the advertising formats that follows out the scope of the law, thus not consider as public offers and how to treat road show materials. Just to take a grasp of the different level of detail, the US prospectus regulation about slides and documents distributed to the audience during roadshows requires that, if a document is left behind to participants, the information contained in it should be filled to the relevant US authority and disclosed to the public.

In particular, the level II PR defines advertisements accordingly to the material scope of the directive, as such advertisement is an "announcement" connected to a "specific offer to the public of securities or to an admission to trading on a regulated market" intended to "specifically promote the potential subscription or acquisition of securities". These definitions help in not considering some news or companies adverts as notification of a future offer. Think for instance of a newspaper article in which the writer states his opinion about a future offer that, thanks to his sources, will be come soon. In such case, if the writer details the security type, the offer size and other specific information can mislead the reader and let him thinks that it is a sure fact. The legislator trick is that, in the previous example, the newspaper writer did not intend to specifically promote the potential subscription or acquisition of securities but released a news. Thus, is not an advertisement for the regulation purpose.

The communication methods are not important for the EU legislators, in fact, the issuer can discretionally pick up the one it prefers between available, for instance a recent IPO conducted by Poste Italiane S.p.A. advertised it, *inter alias,* through TV channels and their post offices in order to maximise the retail investor subscriptions enhanced by their capillarity within the Italian territory.

In addition, PD states that advertisements should be identified as such, cannot be wrong or misleading, consistent with the related prospectus, have to inform investors about where to find documents and when issuance will take place and it should ensure equal treatment of investors about the information provided to them. For example, if the underwriter disclose some new information related to the offer, for instance that the company will use the selling proceeds to invest in a new technological equipment that will increase the productivity by decreasing the production costs, to an early meeting he should disclose the same information to all the other investors.

Surprisingly the last provision includes also private placements, which do not request the prospectus publication, in fact that specific advertisement provision includes also qualified investors, even if the prospectus is not mandatory for them.

7. The reward: "the passport system"

Throughout the above part I have described the obligations toward the issuer who would like to offer securities to the public or seek admission of securities to trading on a regulated market, which are:

1. The obligation to draw up a prospectus.
2. The obligation to seek approval by the home Member State authority.
3. The obligation to publish a prospectus and comply with advertising rules.

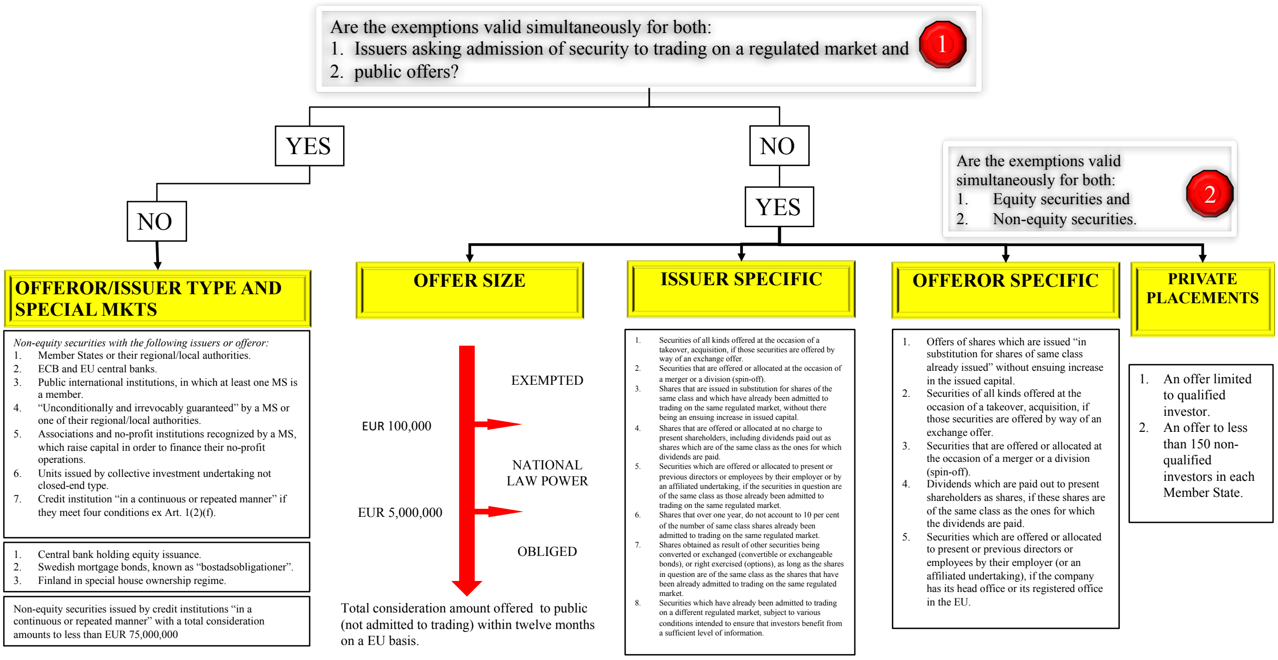
If and only if, the issuer has been diligent by complying with them he/she will be rewarded with the ability to sell his/her securities within the other EU Member States, host MSs, without a need of a new approval process. In fact, the home Member State authority should notify, at the same time, the host Member States, ESMA and the issuer himself, about the fact that it has just approved a prospectus. This notification allows the issuer to exchange his securities in the other Member States, which received the notification, because he/she comply with the EU disclosure requirements.

The latter principle, called home state principle, requires the home state authority to attach to the certification a copy of the approved prospectus too when sent to the host authorities. Finally, the time limit of certification is in theory sets at three working days after the issuer request of approval or one working day after the approval itself, while in reality authorities fail, without consequences, to comply with them. Actually, the time limit is a matter of bureaucratic speed and can be predicted in part.

The right to passport the prospectus goes a step toward the previous mutual recognition principle under LPD and POD, because both data about "passport prospectuses" over total approved yearly since 2005, see next section, and the legislative quicker notification procedures, show the increase of both total capital raising activity EU-wide and cross-listing.

8. Wrap up

Obligation to Draw Up a Prospectus Exemptions



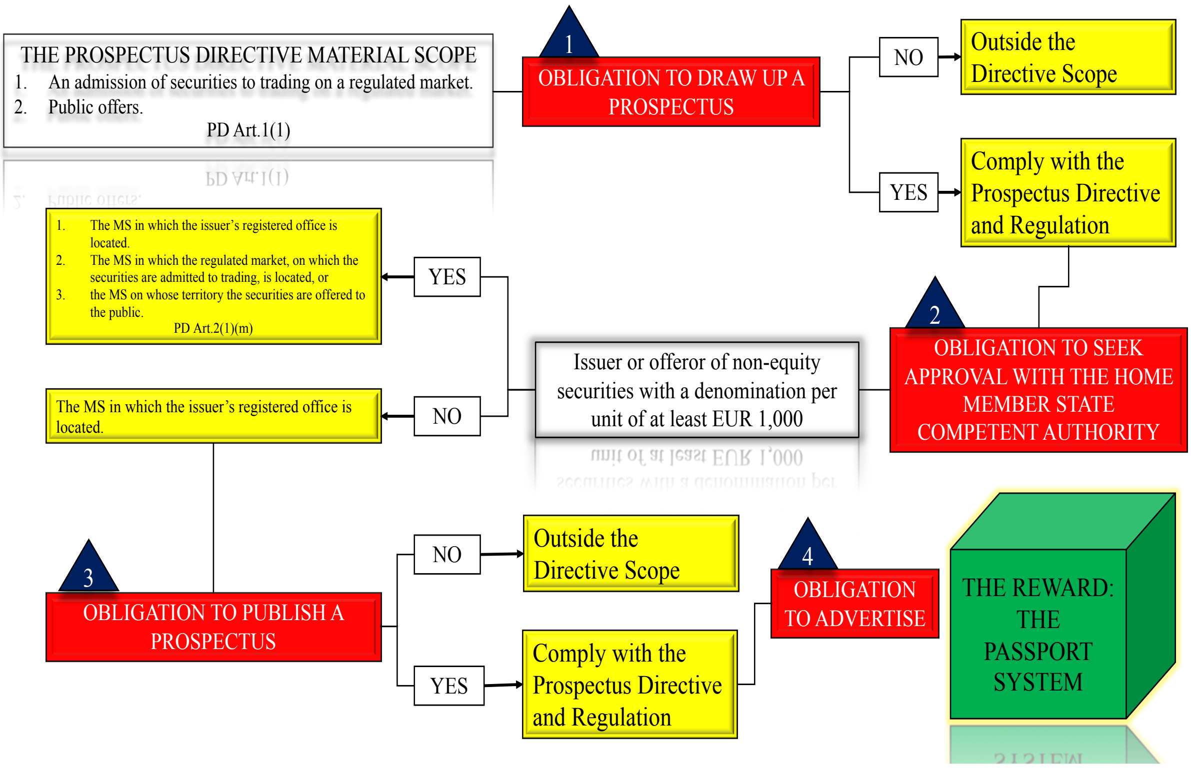
To wrap up the issuers admission of securities to trading on a regulated market and public offers exemptions to draw up a prospectus take a look at the above exemption road map. It details both the exemptions to draw up a prospectus and the one to publish a prospectus.

They can be categorized as follows:

1. By offer/issue size.
2. By offeror/issuer type and special markets.
3. Issuer specific.
4. Offeror specific.
5. Private placements.

Finally, the exemptions are divided according to two criteria, if they are valid for both an issuer asking for securities admission to trading on a regulated market and public offer, and if they are valid for both equity and non-equity securities (see points 1 and 2 of the road map).

The Prospectus Directive and Regulation Road Map:



Finally, to sum up the prospectus regulation and prospectus obligations take a look at the above road map. The directive material scope includes admission to trading on a regulated market and public offers, while the related offerors and issuers have to comply with the following four obligations:

1. Obligation to draw up a prospectus.
2. Obligation to seek approval with the home Member State competent authority.
3. Obligation to publish a prospectus.
4. Obligation to advertise.

If the issuer or the offeror has complied with the above obligations is rewarded with the passport system (see green cube)[102].

[102] For an early judgment of the PD see: MORRISON T. and J. MACHIN, *The pan-European capital market – is the Prospectus Directive a success or a failure?*, Oxford, Capital Markets Law Journal, Vol. 1, No. 2, 2006.

Foreign Prospectuses

The PD and level II PR, described in the above chapters, are concerned with companies that have their registered office in the EU or issuer/offeror of non-equity securities with a denomination per unit of at least EUR 1,000, that have one of the following criteria in the EU:

1. The MS in which the issuer's registered office is located.
2. The MS in which the regulated market, on which the securities are admitted to trading, is located, or
3. the MS on whose territory the securities are offered to the public.

For now, on I will move toward the description of the regulation regarding outside EU companies asking either admission to trading their securities in a regulated market, under MiFID definition which means, among other things, an EU formal market, or offer publicly securities in EU.

Among other European laws, the PD and connected implementing regulations are uncommon because they extend their material scope to outside EU issuers, an objective typically left to international agreements usually negotiated by legislative authorities.

This particular feature finds it rationale in the commonly accepted recognition of interconnection between global financial markets, which is after the 2008 financial crisis a concept agreed by both citizens without any economic or financial education and professionals. In fact, anyone nowadays knows that a shock in a United States market such as the real estate US market, can lead to dramatic consequences in countries such as Italy and Spain which are geographically far away from US.

In addition, banks throughout the world daily make contracts within each other, helping on one hand to provide liquidity toward banking system in need for it, in exchange of asset and on the other hand increasing the dependence between them[103].

Thinking about globalization, commonly the first impression that come out regards just the movement of people, perhaps in the form of images of crowd in boats trying to escape from wars to find a new life in democratic countries. In reality it consists also in movements of goods, services and capital, including financial ones.

[103] International banks generally use repo contracts for solve short term liquidity problems. Repo contracts are collateralized and standardized debt instruments, in which the buyer (long repo) agrees to pay a fixed sum at inception and the seller (short repo) promises to pay the notional back to the buyer and give him, as collateral, a financial instrument, such a government bond.

In a period like nowadays, in which the political debates are centred on open versus closed frontier[104], see the American election between Trump and H. Clinton and the diffusion of anti-EU, new nationalist and populist parties such as UKIP, National Front, Sweden Democrats, Bharatiya Janata Party, Hindu Nationalist[105], we do not have to forget the economic benefits of globalization. Bill Clinton once called globalisation "the economic equivalent of a force of nature, like wind or water".

The benefit or cost of openness is a delicate debate also in economy, in fact, a lot of both academic papers and books discuss it, without going through the different economic aspects of this problem, it is important to remind, besides personal opinions, that economy do not provide a general answer to the question, and globalization is not an exception.

Free trades are not generally a positive or a negative thing in terms of increasing GDP and decreasing inequality, they depend on the assumption of the model used to solve this puzzle and assumptions depend on the political, cultural and economic context in which they are applied. For instance, one cannot treat as equal an agreement between US and EU, such as TTIP[106] and between EU and other countries.

As last part of the chapter introduction I would like to analyse the social environment which emphasizes and influences the political and legislative contest regulation are studied and issued in.

In this matter is important to present the so called availability bias and availability cascade, introduced by behavioural economists and psychologists such as the Nobel prize in economics D. Kahneman. When people, including law makers, politicians and economists, judge sometimes they rely on their intuitions and emotions rather than rational thinking. Resulting in answering to a different question that the one subject to the judgment without being aware of it. For instance, they replace "what do I think about it?" with "how do I feel about it?" causing a substitution error, known as heuristic.

This phenomenon is important in publicly debated subjects such as globalization or terroristic attacks in fact, an availability cascade starts by news usually presented by medias about a particular episode, such as the ISIS terroristic attack in Paris of last spring, or even with less emotional impact like a company producing a toy that can probably provoke a disease. The news is repeated in news, then politicians start to talk about it, then think-tanks helps in spreading them, enhancing media debate on it and conversations throughout bars, pubs, streets

[104] *The new political divide,* The Economist, Volume 420 Number 9000, July 30th – August 5th 2016.

[105] *The new nationalism*, The Economist, Volume 421, Number 9016, November 19th- 25th 2016.

[106] Transatlantic Trade and Investment Partnership, for which the Trump election as President of the United States provide a step back which probably would lead to the end of negotiations.

creating a sort of cascade which undermine both the reliability of the original new and the statistical probability of being part in a similar rare event.
Finally, this cascade can influence political debates regarding laws, or internal security decision because people outweigh the probability of being part of a rare event in the case in which the information about the happening of such event is easily available to them. They overweight the probability thanks to their reliance on emotions like fear and panic.
I think that now we encounter this phenomenon at work both in the subject of a terroristic attack and globalization in their broad meaning, note in all European capitals, it is far more probable to die because of being part in a car accident rather than in a terroristic attack. Fact that is even true in Israel, a state in which the frequency of terroristic attacks is greater than in European states[107].

Coming back closer to the dissertation topic, the availability bias at the EU initial creation was toward greater integration, free movement of goods, people and services, the sources of EU capital market legal framework find their origination in the following three articles:

1. Treaty on the European Union (TEU) art. 3(3): "The Union shall establish an internal market"
2. Treaty on the Functioning of the EU (TFEU) art. 26(1): "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties".
3. TFEU art. 26(2): "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

To better understand my thought, think about the possibility to write the latter laws nowadays, probably the average of you judge as improbable, or at least less probable that it was when the articles were created, even if it is the basement of our supranational regulation.

The passport system results in more capital raising, both debt and equity, in all the EU member states, increasing the potential investors base for all EU issuers, who can then be able to find source of finance for their operations diversifying their risk. In fact, there is not perfect correlation between spending capacity through EU, think about Germany and Greece for example, and investors risk aversion and time horizon.
Consequently, a company can find more investors in a country in a particular time than in others, perhaps the Germans would like to invest in riskier securities than German Bund

[107] KAHNEMAN D., *Thinking, fast and slow,* Farrar, Straus and Giroux, 25 October 2011, page 187.

rewarding less than nothing at the moment[108], while Greece wealthy individuals would prefer safer assets issued by a foreign company than their risky government bond option.

The extend is not limited to the EU zone, in fact, PD and level II PR standardized the process of allowing outside EU companies to raise capital in the EU, using a bottom-up approach, instead of the normal opposite way of dealing with international processes, which usually involves at first an international agreement and then a national implementation.

The regulation provides a different treatment for outside issuers, depending on their accounting standards, which are standards ruling the way in which should be computed each line of the financial report, both the income statement and balance sheet. The EU accounting standards are IFRS and IAS, international accounting standards, studied and produced by international boards and implemented in the EU legislative space following the EC endorsement under EU IFRS[109]. Third countries are deemed and treated differently based on the assessment of equivalence between their accounting standards (known as Generally Accepted Accounting Principles (GAAP)) and the EU IFRS or not.).

When the EC has already assessed the equivalence between EU IFRS and the country specific Generally Accepted Accounting Principles (GAAP), within the prospectus the recognized country can rely on their already published financial report, which is an important part of the document required to be admitted to trading on a (EU) regulated market or public offer. The others, instead, should comply with EU IFRS and publish an according financial statement, resulting in increasing costs.

Finally, the legislator, to prevent the abandon of employer share scheme, avoid third country issuers to produce a fully-fledged prospectus upon a finding of equivalence, as long as they prepare a simple information document.

1. Third country GAAP

1.1. Prior equivalence assessment

This legislation part divides the financial report from the all prospectus for their importance by imposing an ex ante procedure of accounting standards, used in other countries than the European one, studies. Thus, before approving the all prospectus, the law points his attention

[108] Interest rate at 0.26% for 10 year German government bond on 26th November.

[109] Regulation 1606/2002/EC, known as “IAS Regulation” implemented the IAS and IFRS accounting standards in the EU regulatory framework.

on the way a country, outside the EU, computes the financial numbers in order to detect if there is a need of adjustments to be made.
The aim is ensuring the investor protection, avoiding misunderstandings and company competition, otherwise damaged by making feeling healthier a company just because it has a different method of asset calculation. In fact, different methods lead to different results, which can lower or increase the profits and losses, performance indices[110] and assets and liabilities.
Lastly, it ensures standardization and easier comparability of companies with do no need any work to be done, besides looking at differences between the same financial reports rows (or other more complex comparable analysis methods[111]).

The third country GAAP alleviated disclosure obligation starts after the assessment of equivalence between their own accounting standards used for historical and upcoming financial statements and the EU IFRS. This process, if ended up positively, allows the issuer to fill the already made reports in the prospectus, used for raising capital also in the EU. In some circumstances additional specifications or changes could be needed.

The assessment is a two-step process, the first one is the equivalence assessment, providing definition of equivalence and how to provide so, while the second one is the recognition step in which some accounting standards are deemed as equivalent and therefore automatically treated as such.

Starting from the latter, the European Commission has the legal power to decide whether third country GAAP is equivalent to European standards (EU IFRS) and ESMA support the decision by advising the commission. In particular, ESMA highlights differences between accounting standards.
So far the EC has decided about some third countries GAAPs, which are now part of the regulation thanks to amendment to the PR. For example, art. 35 of the level II PR, provides that third country are allowed to rely on EU IFRS, IFRS, US or Japanese GAAP in order to prepare historical financial information. Furthermore, also the followings country GAAP are equivalent to EU IFRS according to the EC:

[110] Operating margin (= operating profits/ Net Sales), Gross Profit Margin (= gross profit/net sales), Return On Capital(= Net Income + Interest Expenses / Average total capital), Return on Equity (= Net Income/ Equity) and Current Ratio (= Current Assets / Current Liabilities) are a subset of financial ratios which can be affected by different accounting standards. Those ratios are used to evaluate different clusters of companies, on a sector base.
[111] Comparable analysis of financial ratios is a method used in the asset management industry to assess the liquidity, profitability and risks opportunities between companies within the same sector or market, in order to choose the one in which invest in. Usually the individual firm specific financial ratios are compared to the market averages and if found greater is, normally, a posit sign while vice versa.

- China, Canada and Korea.
- Australia, Hong Kong and Israel.
- Singapore, New Zealand and South Africa.
- India for financial information before 1 January 2015.
- Argentina, Brazil and Mexico.
- Russia and Taiwan.

It is important to underline that the recognition is not subject to reciprocity, in fact, is not sufficient for another state to recognize EU IFRS as equivalent to their own principles for their own purposes for being recognized as equivalent by our regulation; each accounting principle should be evaluated by the EC without influences on any kind and on a case by case basis.
To sum up, the recognition mechanism is a smooth and automatic process that deemed as equivalent all the company's financial reports already been assessed as similar to the EU ones by the commission, consequently making those outside EU issuers able to rely on their standards while drawing up a prospectus for EU investors. In practice, they can insert their reports in the document without the need of adjustments and incurring in additional costs.

Instead, securities issuers for which an equivalence assessment does not exist, have to be scrutinised further. This process is called equivalence assessment and the major actor involved is again the European Commission. The PD, level II PR and CERS guidelines set out both the equivalence meaning and the actual approval procedure that issuers should follow sue.

At first I will describe the theoretical equivalence concept and secondly the detail procedure which finally make them able to fill their own report within the prospectus, with this regard, if requested, the issuer or anyone who is in charge of drawing the document has the obligation to modify the financial report in part or make some additional statements at the document end in order to fulfil gaps between the two accounting standards.

1.2. The Equivalence concept

The European Commission has adopted its own, binding, definition on equivalence in Regulation No 1569/2007; according to article 2 of the former, third country GAAP should be deemed to be equivalent to EU IFRS if: "… the financial statements drawn up in accordance with Generally Accepted Accounting Principles of the third country concerned enable investors to make a similar assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer as financial statements drawn up in accordance with IFRS, with the result that investors are likely to make the same decisions about the acquisition, retention or disposal of securities of an issuer".

The definition is outcome based, meaning that the equivalence assessment comes from the fact that investors will make the same investment decision, either subscribe the security or not, either in the case in which the report is drawn in accordance with EU IFRS or third country GAAP.

It is unfortunate in two ways, on one hand the decision to write "investors[112]" instead of "an investor" can mislead by thinking about the fact that anyone who would face a problem of whether to buy or not the outcome would likely do the same investment decision.

Contrarily, right interpretation of the definition is that *an investor* would likely make the same investment decision, not that all the investor will prefer one option than the other, for instance buy instead of not doing so. The difference is the subject between all the investors and a specific one, with this regards we have to take the second point of view.

The second form of anxiety comes from the word "same", which appears in the last sentence, but the combination of words "likely" and "same" fix it. In fact, it is hard to think that someone will interpret that an investor will make the same choice in both cases in any time and circumstances. For example, a person who lost half of his wealth the same day of the investment assessment would be surely more risk averse that the same guy who has been lucky the same morning and inherited EUR 1,000,000. In that example the same person would decide differently about the same offer opportunity, thanks to external and unpredictable factors. To sum up the article interpretation is the following: two accounting standards are equivalent, if and only if, a specific investor who would face the same investment opportunity with the two different accounting standards, would likely act equally.

In addition, a third country must respect two prerequisites: at company level must be ensured a correct and independent supervision of the whole financial report building process and at country level should exist "filters", both legal public bodies and others, ensuring the correct GAAP's implementation and enforcement.

A typical way of ensuring the report data fairness is letting the report being approved by an independent audit corporation, both in terms of ownership and auditors experience. In the

[112] Art. 2 of Regulation 1569/2007/EC

Anglo-Saxon capitalist system financial reports are evaluated by an internal audit committee, while in the other parts of the world, typically, an independent and qualified external audit company does it.

1.3. Post equivalence assessment

A third country outside the automatically equivalent countries needs their GAAP to be approved for being able to rely on them while drawing up their prospectus, ultimately useful to tap investors in the European Union. Ones they fulfil prerequisites ensuring that the accounting principles would be applied fairly and correctly by providing independent controls both at national and company level, and though sanction in case of non-compliance, the equivalence assessment process starts.
The process consists of four moments; the trigger, the first national equivalence assessment, level II committee supervision and advising powers and finally the European Commission last word.

I will describe the process, simulating an example in which a Mexican pharmaceutical corporation, called MexZ, seeks approval of their accounting standards, called Financial Reporting Standards, because it wants to diversify his shareholders base.
After almost five years of intensive and innovative research, MexZ Reserch and Development department, collaborating with the Finance and Marketing company units decides to launch a new pharmaceutical pill with extraordinary result in the cancer prevention. The pill has a high upside potential, while simultaneously bearing a high risk correlated to the collateral negative effects and huge costs. The MexZ manager realises that the existing shareholders risk averse attitude makes problematic the pill launch because they would not allow the company to move from a stable, low and reliable source of income in dividend form, to a volatile one. Although the expected returns on equity is supposed to increase in the following years.
To avoid that the manager realizes that he needs to change the firm shareholders base, making them overall more risk seeking. In addition, he thinks that the European investors, blocked by a stagnated economy with less companies able to provide a so risky and potentially profitable payoff, would join the program if allowed to do so. For that reason, MexZ creates a special purpose vehicle, formed by all the assets needed to launch the new pill and finance their forthcoming operations in two ways, first of all by bank loans and then by issuing equity securities in the EU.

The Mexican authority in charge of supervising the national financial system, the Comision National Bancaria y de Valores de Mexico (CNBV) consequently asks to the European Commission to start the equivalence assessment of the Mexican accounting standards.

The European Commission, after receiving it, asked the Mexican authority to produce a fair and honest assessment of the similarities and differences between the Mexican FRS and EU IFRS. The procedure involves a detailed comparison of each rule attached to each raw of the financial report, for instance the CNBV should compare the way in which the competence costs are accounted in both the standards and disclose any differences that would led to different outcomes. The ESMA decides the disclosure format in which the authority will publish his assessment.

Finally, the EC, helped by the CNBV assessment and the connected study of ESMA, is in charge of saying the last word regarding the equivalence of FRS to EU IFRS, by ultimately holistically[113] studying the two frameworks.

For our purpose the EC positively judged the FRS, providing that the gaps highlighted by the Mexican authority and ESMA, should be filled out the financial report, written according to the Mexican FRS, in form of comments at the end of the document, according to the ESMA opinions.

I will come back to the example after it will be clear, in general terms, how the prospectus approval process takes form.

2. Third countries prospectus approval mechanism

This chapter moves toward the prospectus approval process analysis, which is meant to protect EU investors when a third country issuer seeks admission of securities to trading on a regulated market within the EU or publicly offer securities in the same geographical area. The subparagraph number 2.3. of this paragraph instead, will analyse the special treatment of employer shares scheme issues within the EU, issued by a company having its registered office located outside the EU.

The main actor involved in the assessment of equivalence about accounting standard is the EC, which is empowered to permanently endorse the use of different types of GAAPs. In addition,

[113] A holistic analysis means a rule by rule comparison. Within this argument, means that the EC will compare all the rules regarding each specific accounting voice, for instance how the FRS and the EU IFRS account leasing operations.

says the last word regarding the equivalence of other accounting principles. Moreover, ESMA and third country financial market authorities have just some collateral powers.

In contrast, the prospectus approval mechanism gives more power to the European Member State authorities, that are excluded from the third country GAAP assessment and ESMA.

Specifically, under article 20(1) of the PD the EU gives the faculty to the home Member State competent authority to decide upon the approval of a prospectus, drawn up by an issuer whose registered office is located outside the EU according to the third country legislation. The approval automatically allows the issuer to carry on complying with its national legislation about disclosure and implicitly recognizes this legislation as equivalent to the PD and level II PR. The result is that the issuer or offeror is able to admit his securities to trading on a EU regulated market or publicly offer them using their national documentation.

This article needs some further specifications, the home competent authority is not the third country one, for instance the Banking Regulation and Supervisory Agency of Turkey (BRSA) for a Turkish company, but a Member State authority, for instance the Autorité des Marchés Financiers (AMF). If the Turkish company seeks admission to trading on Euronext Paris in France for whatever reason, note that there is not necessary condition for opting a home country instead of another. In fact, actually in advance to the choice of where the public offer would take place or in which regulated market the company, the Euronext Paris in the example, the issuer, the Turkish company in the example, deliberately choose the home competent authority. For instance, if the issuer decides to sell his equities on the London Stock Exchange (LSE) automatically the Financial Supervisory Authority (FSA) has the power to approve or not the prospectus, similarly if the securities are offered to the public in Italy the CONSOB is the home competent authority. Lastly, for issues of non-equity securities with a denomination per unit of at least EUR 1,000 and for certain assimilated instruments the third country can choose, likewise EU issuers, between the CONSOB and FSA, according to the example but it is to meant in general terms, if the issuer simultaneously sells securities in the LSE and to the public in Italy.

The Member State has the option, but not the obligation to approve third country prospectus. If it does not exercise that option, the issuer or offeror should comply with the PD and level II disclosure requirements that are also applicable to EU issuers. This does not mean that a third country has to forget its national legislation and apply the EU one exhaustively. With the results

of increasing costs connected to the hire of lawyers knowledgeable on the EU rules and other consultants.
But means that the issuer or offeror has to comply with the ESMA opinions about the content of prospectus, with summarizes and simplifies the prospectus regulation.

Specifically, if there is not a precise opinion about a given disclosure legislation (for instance opinion ESMA/2016/268 about Turkish law), the *ESMA opinion No 317 produced in 2013* states that where the third country prospectus regime does not require a prospectus to include information related to a Category A item in the form sets out in the PR, the issuer should include them in the wrap using the same format specified under the PD. In addition, where the third country prospectus regime does not require a prospectus to include information related to a Category B item in the same for specified under the PR, the issuer can either demonstrate to ESMA that the substantive information is disclosed in another form under national laws or add them up, in a form decided by the issuer itself, to the prospectus.
Categories A and B are specifically described in the ESMA opinion No 317 of 2013, which I will not present here for simplicity, by the way, just to give an idea the prospectus summary is included in the Category A, consequently the issuer has to comply precisely with the PD.

Coming back to the previous example, besides any additional disclosure requirements requested by the home competent authority if it chooses to exercise its approval power, the Turkish company can completely rely on their national legislation because deemed equivalent to the EU one, according to ESMA, if it complies with IFRS in drawing their financial information.
Differently, an Israel issuer should add some content to the one required under his national law, according to the *ESMA opinion No 1015 issued in 2015*.

Finally, if the MS choose to exercise the power to approve foreign prospectuses, article 20(1) required two conditions to be met:

1. The prospectus must satisfy international standards set by international securities commission organisations, including the IOSCO disclosure standards.
2. The third country disclosure requirements must be considered equivalent to those of the directive and the level II PR.

A foreign firm wishing to make a public offer or seek admission to trading on a EU regulated market, after being approved, can passport its prospectus to any other Member State under the same conditions applying to the EU issuer, which needs just to follow a notification procedure.

Coming back to our example about the Mexican Pharma company left after the equivalence assessment of its GAAP, it then needs to choose the regulated market for their SPV shares. Thanks to the risk seeking average attitude of United Kingdom investors, MexZ chooses the LSE and draws up the prospectus according to Mexican disclosure prescriptions, assuming that FSA exercise its power, the last phase requires the approval of prospectus by the English authority.

2.1. The European Commission bogus powers

A chapter describing the third country prospectus can rightly start either by highlighting the EC power to recognize the equivalence of third country disclosure legislation towards the PD and level II PR, therefore approving or not a third country prospectus or by pointing the attention on the approval optional power in charge of MS authorities, as I did.
This contradictory statement is neither wrong nor meant to mislead the reader, because just represents two different ways of emphasising the same regulation structure.
In the former, the one that I preferred, the actual law application has greater force than the formal one, while it works vice versa in the latter. In fact, actually the EC has the power both to lay down common criteria of assessing the equivalence of prospectus regulations[114] and to "stating that a third country ensures the equivalence of prospectuses drawn up in that country with this directive by reason of its national law or of practices or procedures based on international standards set by the international organizations, including the IOSCO disclosure standards".
But actually the EC has not yet exercised those powers, basically leaving the approval power upon the national competent authorities and the coordination power between MSs upon ESMA. Nonetheless the Member State authorities should determine whether foreign prospectus legislations are coherent with "international standards set by the international organizations, including the IOSCO disclosure standards".

2.2. Pros and Cons

The regulation framework intends to protect European investors by creating a same level playing field independently of the corporation nationality and increases the market efficiency

[114] Art. 20(3), para 1.

and integration worldwide. The two motivations conflict with each other because the greater standardization of information world-wide resulting from complying with the prospectus directive, increases the cost burden at the company level making. Furthermore, making for foreign offerors harder to access the European single market damages the world-wide market integration and efficiency. In fact, at the moment we know that few prospectuses joined the program, unfortunately we do not have data and empirical studies covering this phenomenon in order to make an analytical assessment of the causes underlying it. Anyway I will try to make some hypothesis about that. Those are based on intuitions, economic theory and comparable analysis, but not data, for that matter I divide the analysis in macro and micro, in the first one I will judge the aggregate shortcomings and positive aspects that probably results from the third country legislation relying on economic theories, while in the second I will present problems that can occur at the single unit level, either company or authority.

Disclosure of information increases market efficiency because it helps investors in gathering information about the company business, with this regards prospectuses are helpful especially for first issuance of securities because there surely exists some undisclosed information about the firm. This is ensured by the fact that the unlisted firm do not have to comply with the transparency obligation directive and market abuse one which rules the on-going disclosure. The third country prospectus regime improves market efficiencies if there are lacks in the abroad legislation compared to the EU one. For instance, in the case of inexistence of prospectus laws, the new information upcoming would benefit both national investors, who would never know some details about the company business which is now due, and European ones who would read it too. The new data helps people in becoming aware of securities fundamental value[115].

In addition, the standard form of the document decreases the chance of a too wide and disorganised spread of information.

From Modigliani Miller perspective the equity is a call option on the company's assets, in which the company is the seller and shareholders are the buyers, with asset value net of debt as strike price. According to the theory shareholders would quit the company if the company's belongings are valued less than their liabilities, but the asset are not valued fairly in the owners' minds, in fact each of them assign subjective probabilities at future activities outcome which

[115] According to the Discount Dividend Model (DDM) the fundamental value of a firm the present value of all the future shares proceeds, usually in form of future dividends.

are incorporated in the asset value, as goodwill[116] in accounting jargon. Therefore, the different culture, risk attitude, historical background, experience and so on play a crucial role in the business activity and it is fair to assume that the possibility of picking up different investors nationalities has a role too.

Another macro area is the integration of market, a sort of financial globalization. This phenomenon has a lot of implications, if the assumption of free mobility of capital and same human skills are satisfied, it leads to the decrease of inequalities between country's markets, which would converge toward a same level of efficiency and standards. In addition, increasing companies funding opportunities make them easier to invest and growth. Moreover, the spread of usage of same laws and standards, which is markedly easy to see about accounting standards, helps the comparability of investment opportunities.

To sum up, the disclosure of information and standardization of accounting standards and law regarding prospectuses, helps the world economic growth and job creation, through the enhanced financing opportunities, easier comparability, the financial knowledge creation and spread of data.

On the other hand, different culture, nationality, habits and values blocks the market integration and decrease the upside potential of the foreign prospectuses EU legislation.

Micro-related issues are the home country bias, the phenomenon of preferring their national securities to foreigners one, coordination of home competent authority's prospectus approval mechanism and lack of transparency of the approval assessment.

The home country bias needs few words to be understood, basically even if the regulation framework allows almost smoothly third country issuance of securities in EU, can be unproductive because the additional costs beard uncovers the potential benefits. In fact, the home country bias lets European investors to prefer generally European companies than foreign one, besides blue chip, worldwide known brand, like Apple and Google.

Secondly, the fact that prospectuses are approved on a case by case basis by Member State authorities creates problem both to the mutual trust between MSs and to abroad made prospectuses. In fact, host Member States are obliged, from the passport system, to allow the issuance on their territory while another state has approved the prospectus and the third

[116] The goodwill is a sort of brand value which sometimes is played by the firm buyer to the original owners, rewarding the founders entrepreneurship ability expressed in the firm.

countries can see their prospectus approved in a EU state while not in another one, even if it is the same.

However, at least the latter problem, that was a big issue in the first years after the regime entered into force, now has been almost entirely covered by the role played by ESMA. ESMA helped the convergence of approval criteria within MSs issuing binding opinions and the previous examples. Furthermore, the accumulation of prospectuses being approved by MS authorities is used as a criteria of assessment which make more predictable the approval output, for instance a documents approved one year ago by the CONSOB from a Chinese company would be used as benchmark in assessing another Chinese prospectus.

Finally, about the problem that competent authorities do not disclose the way in which they decide upon the approval, again ESMA opinions filled partly that gap. In fact, they clearly states some of the criteria that should be used in order to approve abroad prospectuses. Nonetheless there are just to county specific opinion already issued by ESMA and the home competent authorities can hide the non-compliance with them not disclosing their approval mechanism. To sum up, it seems that the authorities have not exhaustively solved this problem yet, and more work needs to be done.

2.3. Employer Share Scheme

The final subparagraph is devoted to the distinctive regime of employer share scheme.

Employer share scheme is the issue of free shares to the employees from their employer, as a form of remuneration for their work.

While issuing shares for their employee, companies who already has shares admitted to trading on a regulated market or on a foreign venue are excluded from the obligation to publish a prospectus[117].

They can avoid the prospectus publication, if they provide a short form prospectus in a language customary in international financial circles and they benefit from a decision on equivalence.

Although, the European Commission has the power to lay down equivalence criteria via delegated acts[118], the equivalence assessment is ruled by article 4(1)(e). The article ensures, that

[117] Art. 4(1)(e).

[118] Art. 4(1)(e), final sub-para., as amended.

the abroad venue in which the company shares are already admitted to trading, follows rules similar to the one stated in the TOD, MAD and MiFID[119].

In particular, the directive gives some clues regarding the requirements that a third country market must met in order to be assessed as equivalent to the EU regulated market, which are the following:

1. Authorization requirements.
2. "Effective" on-going supervision and issuer obligation to publish information that ensure a "high level of investor protection".
3. Enforcement arrangements.
4. "Clear and transparent" laws regarding securities admission to trading, consequently ensuring that the securities can be traded "in a fair, orderly and efficient manner, and are freely negotiable".
5. Market abuse provisions in order to ensure the market integrity and transparency.

If they do so, the EC would recognize the equivalence, therefore allowing them to avoid the production of the prospectus, by drawing up a short form one.

This special regime wants to help the usage of the employer share scheme. In fact, without extending the exemption scope to the foreign venue, almost no foreign share issuers who be able to join in the alleviated regime. Furthermore, the costs associated with the production of the whole prospectus are high enough to prevent employer to remunerate their employees with this form of salary.

To sum up, the PD and level II PR is on the employee side, and this provision ensures that the laws does not prevent employers do issue employer share schemes.

3. Wrap Up

To wrap up the chapter content look at the road map. A foreign issuer asking admission to trading of his securities on a EU regulated market or a foreign offeror willing to offer his securities in the EU has to follow a three step process. First of all, (see point 1 of the road map) the third country GAAP should be studied by, *inter alias,* the EC.

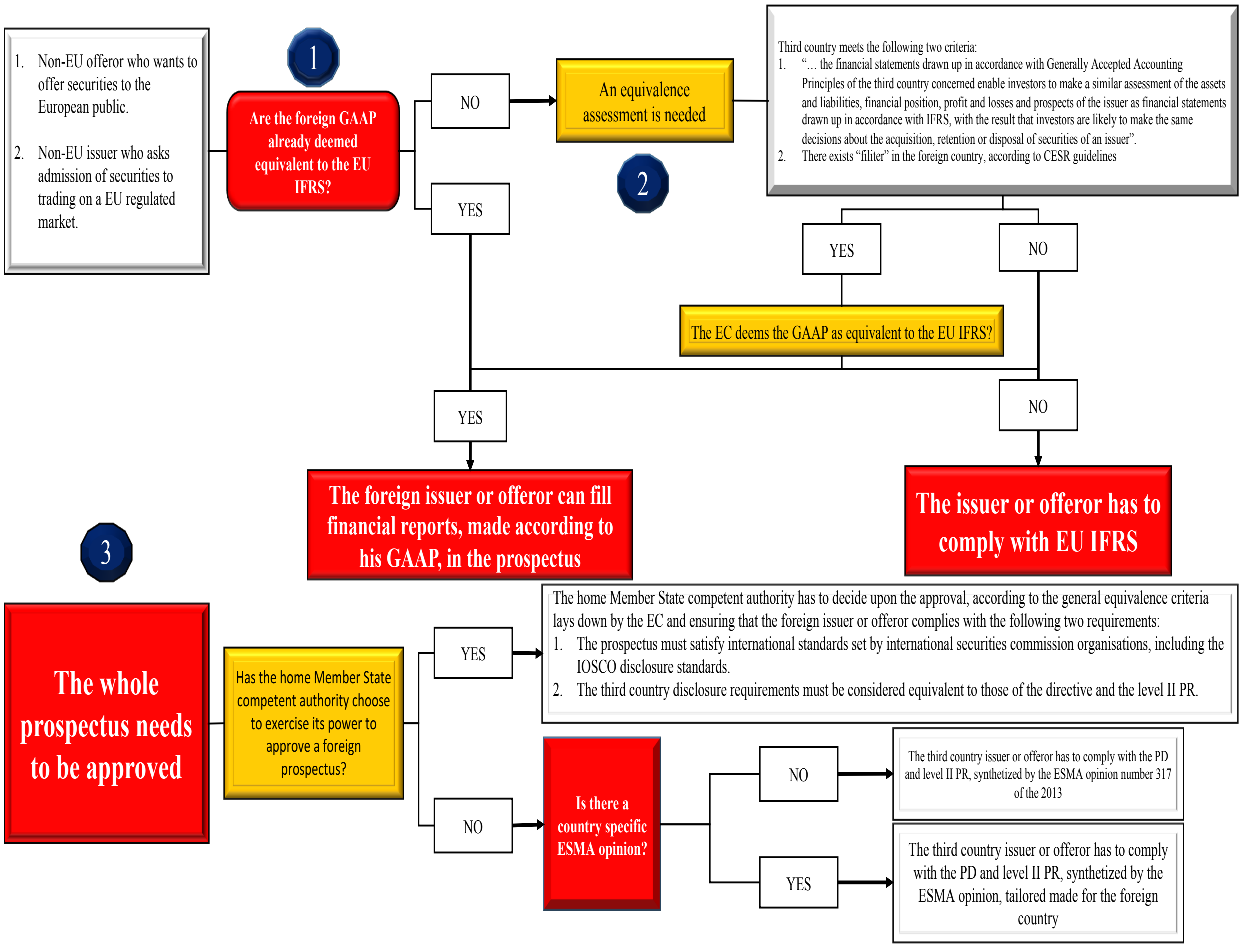
If there exist already a positive equivalent assessment between the abroad GAAP and the EU IFRS, the issuer or offeror can use his own accounting standard to draw up the financial reports

[119] Directive 2004/109/EC, Directive 2003/6/EC and Directive 2004/39/EC.

filled in prospectus. Otherwise, the issuer or offeror needs an equivalence assessment (look at point 2 of the road map).

Foreign Prospectus Road Map:

FOREIGN MANDATORY PROSPECTUS



The equivalence assessment between non automatically recognized foreign accounting principles and EU IFRS is a two-step process. Firstly, the EC should check if the third country has some "filters". Those are mechanism ensuring that the financial reports include true, correct and fair numbers, for instance an external audit company review.

Secondly, the EC has to assess the equivalence.

If the process ended up positively, the third country company can rely on their GAAP while drawing up financial reports to fill in the prospectus, otherwise it needs to comply with EU IFRS.

Finally, the third step (see point 3 of the road map) involves the whole prospectus approval mechanism. With this regard, the home competent Member State authority has the option to exercise the approval power. If it exercises it, the home competent MS authority is in charge of approving the whole-foreign prospectus. By the way, it has to check, before deciding upon

approval, the third country issuer or offeror compliance with two prerequisites and complying itself with the equivalence criteria laid down by the EC.
Contrarily, if the home competent authority chooses to opt out the power, the foreign issuer or offeror has to comply with ESMA opinions, in the form of country specific opinion if existent or general one120.

[120] ESMA opinion number 317 produce in 2013.

Proportionate Disclosure Regime and Prospectus Enforcement

1. Proportionate Disclosure Regime

The last part of the directive is devoted to the *proportionate disclosure regime*, abbreviated as PDR, in which the prospectus content is alleviated for some kind of specific operations.
In 2010, the EC and Council produced the directive number 73[121], amending the PD, adding to the amended directive *articles 7(2)(e) and 7(3)(g)*, introducing the PDR in the following three cases: (nevertheless, leaving the decision to opt in towards the related issuers)[122]

1. Small and medium enterprises or companies with reduced market capitalization.
2. Credit institutions ex article 1(2)(j) of the PD.
3. Right issues.

Briefly all the above, if they meet some conditions, can draw up a sort of *"mini-prospectus"* containing a subset of the prospectus content. In particular, the issuer or the responsible in lieu of the issuer should comply with a different *content* structure, according to the *regulation number 486 produced in 2012* amending the PR. For instance, under annex XXIX of regulation EC/486/2012, *credit institutions'*, ex article 1(2)(j) of the PD, *minimum disclosure requirements are:*

- Persons responsible.
- Statutory auditors.
- Risk factors.
- Information about the issuer.
- Business overview.
- Organisational structure.
- Trend information.
- Profit forecast or estimates.
- Administrative, management, and supervisory bodies.
- Major shareholders.

[121] DIRECTIVE (EU) No. 73/2010.

[122] The following describes other amendments changes, which are just stated in the dissertation, exhaustively: DOROTHEE, FISCHER – APPELT, *Prospectus Directive Amendments – discussion on key changes,* Law and Financial Markets Review, 4:5, 490-498, 2010.

- Financial information concerning the issuers assets and liabilities, financial position and profits and losses about the last year or a shorter period if it has been operating from less than a year.
- Material contracts.
- Third party information and statement by experts and declarations of any interest.
- Documents on display[123].

Instead, the proportionate schedules set out in annexes XXIII and XXIV shall apply to *right issues*[124] and annexes XXV and XXVIII to *SMEs and companies with reduced market capitalisation*[125].

1.1. Right issues

Right issues are secondary offers, consisting in issuing pre-emptive rights to buy company shares at a given price (subscription price) by existing shareholders. Corporation with shares already placed toward in a venue, can make a right issue in order to raise capital at risk[126]. The operation lasts few weeks and involves the right issues, free of charge, to the current shareholder pro rata. Pro rata means that each owner receives the right to buy the same percentage of share he or she already own; for instance, a person who owe 6% of company's shares will receive the right to buy 6% of the total shares issued if all rights are exercised. The pro rata mechanism does not change the ownership structure if all the shareholders exercise their rights. Furthermore, rights can be traded during a specified time and exercised in a bit longer period. From shareholders' point of view, the operation is market neutral because they are economically indifferent between buying new shares, resulting in a cash outflow matched by a share value increase, and selling their rights, then receiving cash for getting rid of a part of their pre right issue ownership. The third choice is not a real option because is wrong to do not cash in the right value[127].

[123] Art. 26(c) of PR, as amended.

[124] Art. 26(a) of PR, as amended.

[125] Art. 26(b) of PR, as amended.,

[126] Capital at risk means equity.

[127] Right value is equal to the difference between the current share price and the Theoretical Ex Rights Price (TERP), which is the weighted average of the previous shares and the new ones, whose weights are the relative sizes, while the subscription price is deeply at discount to respect to the TERP.

The issuer can rely on the proportionate disclosure regime if and only if a same class of securities are already admitted to trading on a regulated market or a multilateral trading facility[128]. In the latter case, the multilateral trading facility rules shall include the publication on the issuer website and compilation of a yearly financial and audit report not longer than 6 months after the end of each financial year and a half a year financial report within 4 months of the end of the half financial year. Furthermore, rules should oblige the issuer to disclose inside information and provisions preventing insider trading and market manipulation. If the multilateral trading facility in which the company shares are admitted to trading does not comply with the above requisites, the related right issue cannot join in the proportionate disclosure regime.

According to MiFID, *multilateral trading facilities* (MTF) are "multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract". MTF are different from regulated market (RM), because are considered investment services. In addition its ruler cannot authorize an issuer to entry in the market i.e. is not a gatekeeper and cannot discretionally set rules regarding orders matching or charging fees in the process (like RM). Contrarily to the regulated markets, multilateral trading facilities are managed through contracts between parties and matched automatically in electronic platforms. In addition, the investment firm or market operator do not need to be authorized by competent authority for providing this investment service and is exempt from the obligation to publish pre-trade prices. This venue type allows both qualified investors and retailer to buy exotic instruments not exchange in the regulated market, which typically trades bonds and shares.

Lastly, the PDR alleviation of disclosure for right issues is intended to *overcome unneeded costs burden at company level without damaging investors protection*, because investors can rely on both at issuance disclosure (sets by PD and level II PR) and on-going disclosure, under TOD and MAR, of same class of securities which almost completely fulfil the gap of the missing content in the "mini-prospectus" version. Simultaneously, the *issuer can tap the market faster* than in other issuance thanks to the lighter effort needed to draw the prospectus which fit in the right issues structure.

[128] Art. 26(a) of PR, as amended.

1.2. SME and companies with reduced market cap

Growth and job creations are one of the major concern of the EU, and even though can seems of few impact, the PDR tries to reach those targets by making cheaper for SMEs and companies with reduced market cap to finance their operation through financial markets. In fact, *small firm increasing ability to find financial sources*, almost completely dependent to the banking system in the EU also thanks to the hardly affordable fixed costs related to the capital raise through financial markets, can improve the business profitability and patrimonial quality. Note that *75% of the SMEs external funding source is in term of bank loans*, EU-wide[129].

Moreover, whit the additional returns companies can either invest in growing projects which would increase the competition in the market and therefore the efficient allocation of resources toward the society, or retaining earnings, therefore participate to the national income, a part of the Gross Domestic Product (recall that national income = GDP – assets depreciation + net income from abroad[130]) or hire new employees.

About the definition of the companies following in the regime the EU law is somewhat controversial because *SMEs are defined as firm with market* cap n*ot exceeding EUR 200,000,000*, under MiFID II, which will entry into force in 2017 and 2018 for some of their aspect (if the EU decides not to delay it further). While *companies with reduced market cap have a EUR 100,000,000 threshold*. Until now the latter interpretation is the applied one. Furthermore, the new prospectus regime, in regulation's form, will overcome that problem, by harmonizing the definitions.

Lastly, the small corporation, if it would like, can opt for the "normal" prospectus regime.

1.3. Credit institutions

Finally, the issuance of non-equity securities, not subordinate, nor convertible nor exchangeable with underlying asset belonging to a company outside the issuer group, nor grant rights of subscription or acquisition to other types of securities, nor connected with derivative, issued by credit institutions "in a continuous or repeated manner" with a total consideration amounts to less than EUR 75,000,000131 are third class that can opt in the PDR.

[129] Action Plan on Building a Capital Market Union, COM (2015) 468 Final.

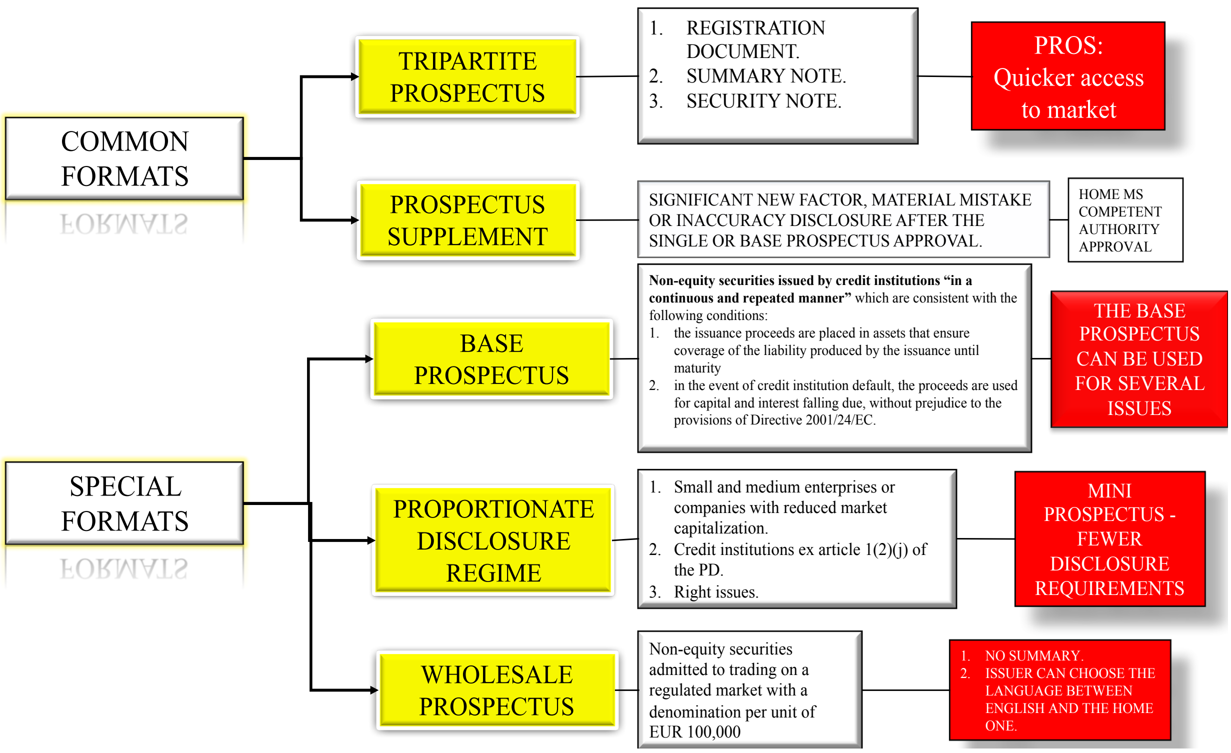
[130] net income from abroad= income produced by foreign capital – income produced by national capital send abroad. For more details, see: PIKETTY T., *Capital in the twenty-first century*, Cambridge, The Belknap Press of Harvard University Press, 2014.

[131] Art. 1(2)(j).

Specifically, they are not affected by the prospectus' publication, as soon as, there is not any national law prevented them to do so or the issuer does not decide, by his own, to comply with the directive anyway, though publishing a prospectus. In the latter two cases, those "qualified" credit institutions shall benefit from the proportionate disclosure regime.

2. Special Formats Wrap Up

Common and special formats Road Map:



This road map is devoted to summarize all the prospectus formats. They are common, which every issuer or offeror can choose and special, which are allowed to some subgroup of issuers or offerors. The common ones are the single prospectus, the prospectus supplement and the tripartite one (see first half part of the graph). Contrarily, the special formats are base prospectuses, proportionate disclosure regime and wholesale prospectuses (see second part of the graph.

3. Prospectus Directive enforcement and prospectus liability

3.1. An Administrative national authorities and national laws matter

The application of all the provisions stated by the prospectus directive and the implementing regulation is a matter of Member States, specifically Member State's competent authorities and their instrument of enforcement is the prior approval of prospectuses.
Secondly, the directive leaves the civil liability toward national laws hands, which identifies who is(are) the person(s) responsible for the prospectus, when he/she risks a sanction and what is(are) the sanction(s). Finally, the ligation takes place in the national competent court of justice. In addition, "the passport system" requires mutual trust between competent authorities, consequently the coordination needs to be ensured. Accordingly, ESMA solve disputes, within their mediation power. Furthermore, if the host member authority discovers breaches or irregularities to the PD or PR, it has, in the first place, the power to communicate its observations to the home state authority and ESMA. Moreover, host competent authorities breaks the home competence in assessing issuers compliance to articles 3(2), 4(1) and 4(2), which includes a set of exemptions to draw up a prospectus, *see supra*, though subject to the territorial jurisdiction principle.

The PD grants that competent authorities are able to fairly and effectively do their enforcement job by setting some conditions to be met. First of all, Member State should entrust the enforcement to a central administrative authority, however permitting to leave to other administrative bodies some specific operations such as, tasks regarding the approval of prospectuses or supplements, the filing of prospectus, its online publication and the control of advertising material. Nevertheless, the approval has to remain upon the central authority, which can delegate just two minor powers to non-administrative bodies, that are, the web updates of prospectuses and their filing.
The administrative authorities should be independent from any market actor and should possess at least a minimum set of powers. Those are the power to request information to be provided to the competent authority, or the power to request information to be published in a prospectus, to "name and shame" a non-compliance issuer, to ask for additional disclosure of information, and some sanctioning powers.
The latter are, the ability to suspend for ten days an admission to trading or a public offer, also for investigate for a possible crime and last but not least, prohibit trading or public offer.

Finally, even if the EU directive and regulation do not make detailed provision regarding civil liability, it requires the Member State to entitle its administrative authority to be able to enforce administrative measures or sanctions in an "effective, proportionate and dissuasive" way, and to make any measure or sanction public, if the publication does not "seriously jeopardise" financial markets or cause "disproportionate damage" to those involved.

3.2. License mechanism

A citizen, almost wherever it lives, needs a driving license in order to be admitted to drive and the license is provided to those who have passed two or more tests.
As the driving license, the prospectus approval makes an issuer of security able to seek admission of securities in a regulated market and/or make a public offer. In fact, the approval of prospectus is the condition *sine qua non* to have the "license"[132].

In other terms, the prior home competent authority prospectus approval is the enforcement technique used to ensure the compliance with the PD and level II PR. The central administrative authority (it and only it) of the Member State assigned as the home one by the PD provisions, has the power to approve or reject prospectuses or request additional information missing on it. Remember that non-equity securities and other hybrid instruments, listed in the article 2(1)(m)(ii), with a denomination per unit of EUR 1,000 or nearly equivalent to that amount if denominated in another currency, have the option to choose their home Member State between three choices. The can chose either to find approval in the state where his registered office is located or where the regulated market is or where the public offer takes place.
Besides the home Member State, the state where the company has its registered office has to check the compliance with article 3(2), 4(1) and 4(2).
The approval of prospectus and prospectus supplements is the necessary condition to allows the related issuer to publish the document and therefore admit his securities on a regulated market or makes a public offer. The PD does not leave any ground for different interpretation on it. In fact, Article 13(1) provides that "no prospectus shall be published until it has been approved by the competent authority of the home Member State", a requirement which applies equally to prospectus supplement. Furthermore, article 3(1) emphasizes that "Member States

[132] The dissertation paragraph describes just the approval mechanism while laws are plenty of others examples of licenses. For other details, examples and why it is so useful see: BEALES III J., *Licensing and certification systems*, in P. NEWMAN (ed.), The New Palgrave Dictionary of Economics and the Law, vol. 2.

shall not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus". Meanwhile paragraph 3 of the same article states that "Member States shall ensure that any admission of securities on a regulated market situated or operating within their territories is subject to the publication of a prospectus".

The process shall take ten working days for a prospectus, seven for a prospectus supplement and twenty working days if is the issuer first admission to trading or public offer. If the administrative authority has "reasonable grounds" that the information disclosed are incomplete or that additional information is required can ask to the issuer to solve the problem and stop the time limit until issuer submit the requested information.

The home competent authority should check, within the approval process, if the prospectus is complete, comprehensible and consistent. It has also to analyse the content by ensuring that each disclosure category is present in the prospectus and comprehensible for the average investors but cannot discretionally add requirements upon ones includes in the level II PR. Note that the prospectus content is generally defined, in terms of headlines, like risk factors, resulting in leaving some discretion toward authorities to detailed the paragraphs content, if they are consistent with the prescript headlines building blocks and schedules.

The PD does not specify how in practice shall the authority assess the prospectus, but excludes box-ticking and reviewing prospectuses selectively from the authority's set. Box-ticking means the process of checking that all the required chapters are within the prospectus, without any other analysis, even read it. The latter prohibited review is based on ignoring the assessment of some prospectuses.

To sum up, the prior approval of prospectus should be intended as a quality assessment of the overall content, ensuring the comprehensibility (the average investors), consistency regarding other company disclosed information and completeness of the disclosure regarding the minimum disclosure requirements sets out in level II PR.

In practice, the EU does not set out any diligence standards, as is typical for gatekeepers or professional under Italian laws, thus leaving it toward national laws.

As it is intuitive that driving licenses ensures that drivers have a common minimum level of ability required to be able to drive and complying with streets laws, it is less obvious what the prospectuses aim. In fact, someone would fairly argue that for professional investors there is not really need for a prospectus because they can rely on their skills, their companies own proprietary techniques and knowledge to proper assess the investment opportunities. The opinion against mandatory obligation of prospectus gaing grounds when thinking about retail investors, which lack the knowledge and techniques to assess by their own a security issue or offer.

In fact, primarily prospectus address retail investor protection needs by allowing them to rely on competent authority assessment of the quality of issuer disclosure. In other terms, retail investors can look at approved securities admitted to trading on a regulated market, or publicly offered as drivers with a driving license, while the one not approved as persons who lack the necessary skills to be admitted to drive. Furthermore, the standardization of content helps them in comparing different investment opportunity and ideally make them able to increase their knowledge through experiencing more prospectuses studies.

On the professional investor point of view, the authority faces a trade-off between the quality assessment and improving the standardization of disclosure. In fact, on one hand, as I already pointed out, professionals have generally more resources, skills, data and techniques to better that competent authority assess the information regarding an issuer, while in the other hand, they benefit from greater standardization of content because they can easier process their data. Accordingly, the financial industry generally agrees upon the usefulness of prospectus as a mean of ensuring a same level playing field for whose seeking admission to trading.

3.3. Prospectus Liability Risk

When a person drives without a driving licence, or fail to comply with the relevant laws, for example is drank while driving, he or she commits a crime and is entitled to sanctions. Similarly, non-complying with PD and level II PR is a crime and needs a sanction, as for national street laws, the EU leaves to the national legislature to cover prospectus liability.
Later on I will describe the French and UK civil liability framework, but for the moment I would just cover how the EU treats the argument. A fact that is very easy because the PD devotes just one article to the subject, *article 6(1).* The article *identifies the persons or bodies responsible for the information disclosed in the prospectus*, which as to be written in the document according to the PR. According to the provision, shall, at least, be responsible for the disclosure: “the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be”.

PART II

US PROSPECTUS FRAMEWORK AND EUROPEAN UNION NATIONAL IMPLEMENTATIONS

Two examples of Prospectus Directive national implementations: France and UK

The dissertation third part is devoted to two distinct topics: *The Prospectus Directive implementation* in the EU Member States and the *US prospectus regulation*.

While the second part threated the common EU feature of the legislation, the following will highlight the implementation at national level of the common provisions[133]. In particular, the part targets are, in the first chapter, the different ways adopted in the EU to deal with the PD implementation, while, in the second chapter, a different legislation approach, the US one. On one hand, the latter chapter will try to criticize the EU framework by comparing the two different approaches in order to find the drawbacks, pros and drivers of each one.

On the other hand, the first chapter tries to give substance to the more general and academic provisions regarding prospectus, which are the laws about enforcement. In fact, recall that the PD states a minimum sets of requirements that each national competent authority has to possess in order to properly absolve its enforcement power, leaving to national laws great freedom.

In addition, remember that the Prospectus Directive is a maximum harmonization directive, consequently leaving almost no freedom toward national implementation regarding the core obligations. For that reason, this chapter will just state few examples of different European implementations regarding the core prospectus directive obligations which are almost identical EU-wide.

The first chapter will describe the prospectus enforcement in United Kingdom and France[134], because they fall into two different legislation approaches: common law and civil law, and they

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[133] The academia provides study about the stakeholder's ability to change the development of rules through their lives, which are not studied in this dissertation but can be analysed. See for instance: ARMOUR J., S. DEAKIN, P. LELE and M. SIEMS, How do legal rules evolve? Evidence from a cross-country comparison of shareholders, creditor, and worker protection, 57 American Journal of Comparative Law 579, 2009.

[134] For further details on the French security laws see: DE VAUPLANE H. AND BORNET J., *Droit des Marchés Financiers,* Paris, Litec, 2001.

focus, primarily, on two different targets: market efficiency in UK and investor protection in France.

I think that the two states different regulatory approaches, although limited, give to the reader a comprehensive understanding of the whole spectrum of possible Prospectus Directive national applications[135].

Generally, national regulators, when dealing with the EU laws implementation, are driven by the national political, cultural, social and civil environments and the existing regulatory framework. Furthermore, regulators are influenced by the EU originating policy.

The literature that examines how the EU affects "domestic policy, politics and polity structures"[136] at Member State level is called *Europeanisation*[137]. Moreover, France and UK enforcement implementations of the PD and level II PR will be classified according to *Lenschow*, who is one of the major exponent of the *Europeanisation* literature. She identifies five different outcomes:

1. *Inertia*, when Member States resist adaptation.
2. *Retrenchment*, when MSs fortify the existent law rather than adopting the existing structure.
3. *Absorption*, when they incorporate under national laws the European requirements without the need to change the existent structure.
4. *Accommodation,* when they adapt the existing regulation without challenging their core features.
5. *Transformation*, when they fundamentally change the existent framework in order to fully harmonize the European primary source of law.[138]

This paragraph is divided in two, first of all I will describe the administrative enforcement in France and UK, secondly the private one.

Finally, will be presented the France "passport system" in detail.

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[135] For a country specific analysis of the different implementations of the PD see: GEHRINGER A. et al., The implementation of the EU Prospectus Directive – a country by country analysis, Capital Market Law Journal, Vol. 1, No 1, 2006.

[136] A. LENSCHOW, "Europeanisation of public policy", in J. Richardson edition, *European Union – Power and Policy-making*, Abington, Routledge, 2006.

[137] E.g. K. FEATHERSTONE and C. RADAELLI, *The Politics of Europeanization*, Oxford, Oxford University Press, 2003; P. GRAZIANO; M. VINK, *Europeanization – New Research Agendas*, Basingstoke, Palgrave Macmillan, 2008; CAPORASO J., *The three worlds of regional integration theory*, in GRAZIANO P. and VINK M., Europeanization – New Research Agendas, Basingstoke, Palgrave Macmillan 23, 2008.

[138] A. LENSCHOW, "Europeanisation of public policy", in J. Richardson edition, *European Union – Power and Policy-making*, Abington, Routledge, 2006, p.62; SAURUGGER S. and RADAELLI C., *The europeanization of public policies: introduction*, 10 Journal of Comparative Policy Analysis 213, 2008.

In France the main laws implementing the PD were the loi Breton amending the French code monétaire et financier (CMF) and the règlement général (RG) of the French Autorité des marches financiers (AMF)[139]. While in UK they were the Financial Services and Markets Act 2000 (FSMA) and The Prospectus Rules (FSA-PR)[140].

1. Administrative Enforcement in France and UK

The PD ensures that the national laws will be able to effectively enforce the Prospectus Directive provisions because, first of all, it empowers the national central and independent administrative authority to the *ex-ante power to approve a prospectus*. Which, I recall, is the most important enforcement technique employed by the EU in order to avoid non-compliance with the PD and level II PR and promote investor protection.

About the governance of the administrative authority there were no need in both countries to made changes because there were independent authorities already in place. The French administrative authority in charge of, *inter alias*, prospectuses approval, is the *AMF*, while in UK is the *UK Listing Authority* (UKLA), a part of the *Financial Supervisory Authority* (FSA). Accordingly, the following subparagraph will spot the power to approve in France and UK.

1.1. Power to approve prospectuses

Under article 13(1) of the PD "no prospectus shall be published until it has been approved by the competent authority of the home Member State", which includes in his scope both issuer seeking admission to trading of their security on a regulated market and offers to public.

The existing French laws have already included in their scope both of the issues types[141], resulting in avoiding the need of an ad hoc national implementing law.

Contrarily, UK public offers of unlisted securities only had to be filed with the Companies House, without the need of an ex-ante national authority approval. In order to fulfil the gap, the Prospectus Rule 3.1.10 R implements article 13(1) of the PD, extending the approval system also to public offers, essentially leading to a *transformation* of the previous regulation. In fact,

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[139] Loi nº 2005-842 du 26 juillet 2005 pour la confiance et la modernisation de l'économie (JO nº 173, 27 juillet 2005, p 12160); AMF *Reglement Général de l'Autorité des Marchés Financiers*, www.amf-france.org.

[140] The FSA-PR is a part of the Handbook of the Financial Services Authoriy.

[141] CMF Art L. 621-8; RG Art 212-1.

it provides that "prospectus must not be published until it has been approved by the FSA". To be more precise, nowadays, is the UK Listing Authority (UKLA), a part of the *Financial Conduct Authority* (FCA) which is in charge of the approval. The FSA was divided in two regulatory authorities; the FCA and the *Prudential Regulation Authority* (PRA), the first one in charge of the market enforcement and the second of the prudential supervision. Therefore, any provision citing the FSA, ultimately refers to the FCA for our purpose.

The scope of the *review of prospectus*, an essential part of the prospectus approval, is delimited by articles 5(1) and 2(1)(q) of the PD. The former provides the following general principle: the UKLA and AMF when reviewing a prospectus should check that the document contains all the information needed to make able investors to provide an "informed assessment" of the risk involved in the transaction. In addition, the latter defines approval as "the positive act at the outcome of the scrutiny of the *completeness* of the prospectus… including the *consistency* of the information given and its *comprehensibility*". Finally, the competent authority should check the information content according to the building blocks and schedules summarized in the PR.

The France implementation of the review scope falls into the *absorption* classification, contrarily, the UK resists the adaptation (*inertia*) of article 2(1)(q) undermining the construction of a level playing field in the EU and *absorbed* article 5(1).
For France the absorption was easy because, long before the implementation of the PD, the French Court requires the AMF to check for the *coherence* and *pertinence* of the information[142], which are almost equal to Article 2(1)(q). Nevertheless, the CMF implements the current practice into national laws, requiring that the AMF should review the *consistency*, *completeness* and *comprehensibilit*y of information, prior to approve a prospectus[143].

Contrarily, the FSMA Section 87A restated almost equally article 5(1) of the PD, while resisting on the implementation of article 2(1)(q). In fact, the United Kingdom legislator used a legislative trick in order to avoid the implementation and simultaneously the non-compliance with EU directive. The trick consists in describing the review process using manual guidelines instead of laws. The FSA manual stated that the FSA did "*not investigate or verify the accuracy*

[142] E.g. CA Paris, 7 juill 1995, D. aff. 1995 p.61; D.98, Som. 72, obs. ISABELLE BON-GARCIN; CA Paris 19 mai 1998 RJDA 11/98 nº 1235; P-H. CONAC, *La Régulation des Marchés Financiers par la Commission des Opérations de Bourse (COB) et la Securities and Exchange Commission (SEC)*, Paris, L.G.D.J. 2002, p.49.
[143] CMF L. 621-8-1. I.

or completeness of the information set out in such documents, nor does check the sources of, or verify, the information"[144].

The guideline is clearly in contrast with the PD and also highlight the regulator reliance on the market fairness and judgement.

The UK policy and politics, in fact, with the US relies on the Adam Smith "invisible hand" and the neo-liberalist approach to market regulation. Since 1980s with the *Reagan* government in US and the *Thachter* one in England the political, economical and regulatory view was print on leaving markets free as much as possible because they will allocate resources efficiently by their own.

In the prospectus enforcement this different perspective creates problems to the passport system because the other MSs are forced to allow issuance in their own markets when companies have found approval in UK. This phenomenon creates a *regulatory competitive arbitrage*[145] towards issuer which would prefer an UK approval that others ones, thanks to the lighter control. However, the 2008/9 financial crisis alleviated the liberalist approach to the UK review of prospectuses. In fact, since 2009 the UKLA intensified the control over issuer and offerors prospectuses and changed the review mechanism.

The French attitude towards investor protection, when dealing with securities issues, takes another example in the *accommodation* of the regulatory framework about *risk warnings*. Previously the *Commission des opérations de bourse (COB[146])*, the predecessor of AMF, allows the financial market authority to add risk warnings in the prospectus in order to alert the public to certain hazards of the investment. However, this practice forbidden by the PD, was first validated and then restated. Nowadays, The AMF no longer can add risk warnings to the prospectus but can decide to add them in the advertising material[147].

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[144] FSA, *UKLA Guidance Manual*, update June 2003, para. 1.3.14.

[145] The regulatory competitive arbitrage is deeply studied by Jurists. For a deeper study see: BARNARD C. and S. DEAKIN, *Market access and regulatory competition,* in BARNARD C. and J. SCOTT, The Law of the Single European Market – Unpacking the Premises 197, Oxford, 2002; HEINE K. AND KERBER W., European corporate laws, regulatory competition and *path dependence,*13 European Journal of Law and Economics 47, 2002; Federalism and the corporation: the desirable limits on state competition in corporate law, 105 Harvard Law Review 1435, 1992 and BEBCHUK L., A. COHEN and A. FERRELL, *Does the evidence favour state competition in corporate law?*, 90 California Law Review 1775, 2002; SCHAMMO P., Arbitrage and abuse of rights in the EC legal system,14 European Law Journal 351, 2008; SCHAMMO P., Comments on abuse of rights, in DE LA FERIA R. and VOGENAUER S. (eds.), Prohibition of Abuse of Law – A New General Principle of EU Law, Oxford, Hart publishing, 2010 and SCHAMMO P., EU prospectus law: New perspective on regulatory competition in securities market, New York, Cambridge university press, 2011.

[146] For a comparison between the SEC and the COB, which can be useful to better grasp the different powers see: CONAC P-H., La Régulation des Marchés Financiers par la Commission des Opérations de Bourse (COB) et la Securities and Exchange Commission (SEC), Paris, L.G.D.J. 2002.

[147] RG Art 212-28 6º.

Specifically, the AMF may ask to the issuer to add "certain exceptional characteristics of the issuer or the guarantors, if any, or the securities being offered to the public or admitted to trading on a regulated market" to the advertising materials.
The provision reconciles the previous procedure with the PD implementation for investor protection purposes *(accommodation)*.
In addition, it creates a problem with the PD competence distribution between home and host authorities, because the AMF power works both when France acts as home and host Member State. CESR solved the legal dispute. In fact, it declares that the advertising material is not included in the passport system, resulting in making the entitlement of some soft powers, such as adding risk warnings, possible for the host Member State.[148]

The *tripartite prospectus* format was pioneered in France and very popular long before the PD was issued. Contrarily, the UK *shelf registration* was in place in the country legislation while it was not so popular. Accordingly, the French implementation gave preference to the older national procedure, while UK translated[149] almost literally the PD provisions.
In particular, in France a registration document, if approved at least three times in a raw[150], can be made public the day after it has been filled with the AMF, without waiting the formal approval[151]. Basically, the French legislator allows for an *ex-post approval mechanism* for this specific type of issuers or offerors. This is an example of *inertia*, because the Principle 12 of Standard No. 1 highlights that for prospectuses "ex-ante approval is the normal procedure" and ex-post is possible but just as a complementary measure.

Finally, the role of *third parties in the approval process* is another example of the different attitude of the two states legislations. The liberalist UK relies on markets and their efficiency, while France prefers a more thought regulation in order to protect investors. In fact, the AMF *adapted* the previous reliance on statutory auditors *(contrôleurs légaux des comptes)* and investment services providers *(prestataires de services d'investissement)* quality prospectus assessment in the PD framework[152]. Contrarily, the FSA-LR *transformed* the previous sponsor regime for UK listing into a mixed structure.
Specifically, the AMF no more allows statutory auditors and investment services providers to substitute the market authority in the prospectus quality review but enable them to write a letter

[148] CESR, CESR's report on the PD, 33.
[149] FSA-PR 2.2.1 R.
[150] RG Art 212-13.
[151] RG Art 212-13 III.
[152] RG Arts 212-15 and 212-16.

(letter de fin de travaux), containing their suggestions, to the AMF prior to the formal approve. However, is the AMF who has the power to decide if its willing to follow the statutory clues and therefore, compatibly with the level II PR minimum disclosure requirements, asks for additional information to be added into the prospectus[153].

On the other hand, in Great Britain prior to the PD implementation, the sponsor, a financial intermediary, was in charge of checking the issuer compliance with the listing requirements in order to be admitted in UK official listing platforms and advice the issuer[154]. Moreover, after the PD implementation the issuer is not forced to appoint a sponsor and can rely on only the UKLA approval for standard listing purpose[155]. Anyway, issues outside the directive scope can still rely on the obligation of the sponsor regime[156].

Finally, an issuer can discretionally comply with a *sponsor super equivalent regime*, implying the compliance with more stringent information obligation, if he would like to be listed in a premium market segment[157]. This is mandatory, for example, for companies wishing to be part of the FTSE UK index series.

The segment distinction of venues is used all over Europe and permits companies, willing to do so, to be admitted to a premium segment in which the requirements are tougher and costs are higher than in the standard one. Companies are willing to pay the price because they are therefore included in a short list of premium brands which disclose more information to the public because they feel themselves wealthier than other companies. Investors look at them as top brands and generally are willing to pay a higher price for their financial products.

1.2. Minimum set of powers implementation

The PD, as already presented in the previous subparagraph, obliges the national regulators to at least empowered their national authorities with a minimum set of powers in order to efficiently and effectively do their job[158]. Those are, *inter alias*, the power to investigate, to request information and provide administrative sanctions[159]. The PD provisions are limited and contain just a minimum set of obligations which were easily and painless implemented in both the

[153] RG Art 212-15 II.

[154] FSA, *Review of the listing regime,* Annex H, CP 203, October 2003; FSA-PR 8.3.1 R.

[155] FSA, Review of the listing regime, CP 203, 70.

[156] Ibid.

[157] FSA-LR 8; FSA s 88.

[158] PD Art. 21(3) and (4).

[159] PD Art. 25.

French and British laws, taking the form of either *accommodation* or *absorption*. Moreover, the UKLA and AMF have more powers than what was at minimum required by the European regulation.

To the respect of the *power to request information* the EU regulation distinguishes it in two:

1. The power to request information or document to be provided to the national competent authority.
2. The power to publish in the prospectus the information or additional document requested by the national competent authority[160].

Both the UKLA and AMF have those powers. Precisely the UKLA can request information and documents to the person and his "court" (company manager, auditor, financial intermediary and so on) applying for approval of prospectus[161]. Likewise, the AMF may request explanation or justification, additional documents and needed information disclosure[162].
In addition, both the FCA and AMF can require the issuer to add supplementary information to the prospectus before the approval[163].

Regarding the *power to investigate*, both the competent authorities have huge powers.
For example, the AMF can ask to the company auditor to repeat its investigation or, if the statutory auditor is not considered a reliable counterparty may appoint an external auditor for that work[164].
On one hand, the AMF can carry out *inspections* in the issuer or offeror offices, in order to verify the hypothetical non-compliance with the directive prescriptions[165].

On the other hand, the FCA when acting in the form of the UK Listing Authority, can ask for *additional verification*[166] *of information or authentication*[167] and, under some delimitated circumstances, can start a *formal investigation procedure*[168].

The FCA and AMF are also entitled to a set of *sanctioning powers*.

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[160] PD Art. 21(3).

[161] FSMA s 87C(4), (6) and (7); FSMA s 87J(1)(b), (c) and (d).

[162] CMF Art L. 621-8-1 I and 621-18.

[163] CMF L. 621-8-1 and 612-18; FSMA s 87J(1)(a).

[164] RG Art 212-20.

[165] CMF Art L. 621-9 I.

[166] FSMA s 87C(8).

[167] Ibid.

[168] FSMA s 97(1), (2) and FSA's Enforcement Guide, FSA-EG 3.10.

Specifically, the FCA and AMF, according to the PD, can:

1. Suspend, on the basis of reasonable grounds, and offeror to public or an issuance of securities or securities trading, if already admitted, up to ten working days[169].
2. Suspend or block the dissemination of advertising materials[170].
3. Prohibit securities trading if the infringement is verified[171].
4. Ask to withdraw the offer if the relevant provisions are breached or likely to be[172].
5. Impose financial sanction[173].
6. Name and shame[174].

In addition, and differently from the FCA, the AMF "may *sanction any person* who, in France or abroad, has engaged, or has attempted to engage in, *inter alias*, the dissemination of false information in relation to the securities, or whose actions with respect to the securities harm investor protection or the proper functioning of markets"[175]. The latter provision is valid also for public offers[176].

Furthermore, the CMF provides a cap to the amount of financial sanctions that can be made by the AMF, the threshold is EUR 100,000,000 or ten times the amount of profit which may have been made[177].

Finally, in France the *public prosecutor (procureur de la République)* will decide on beginning criminal proceedings, while the *FCA* itself is entitled of this power in UK.

2. Private Enforcement in France and UK

The PD leaves to national laws and courts the faculty to discipline the civil liability attached to prospectuses. Recall that it devotes just two articles to the subject, one obliging the issuer or who is in charge of writing down the prospectus to explicitly declare the persons responsible for it[178]. While, the second article (Article 6(2)) limits the civil liability for prospectus summary.

[169] RG Art. 213-1, 2 and CMF L. 621-8-1 II; FSMA s 87L, (2), (3) and FSMA s 87K(2).
[170] CMF L. 621-8-2; FSMA s 87K(2) and L(2)(b), (3)(b).
[171] FSMA s 87L(4).
[172] FSMA ss 87K(3) and (4).
[173] FSMA s 91(1A).
[174] FSMA s 87M; CMF L. 621-18.
[175] CMF L. 621-15 II (c).
[176] CMF L. 621-15 II (e).
[177] CMF L. 621-15 III (c).
[178] Art. 6(1) of the PD.

Like the administrative enforcement, France and the UK find two different solutions to the implementation problem. France gives more powers to its national courts to discipline private enforcement, while the UK prefers detailed law provisions.

In France[179], the persons responsible for the prospectus shall be identified in the document itself, as requested by article 6(1) of the PD, and that persons must certify that "to the best of their knowledge" the disclose "is in accordance with the facts and makes no omission likely to affect its import"[180].
Furthermore, in order to bring a successful civil liability claim, the French court has clarified that the fault committed should be separated by the director's function[181]. Moreover, the *Cour de Cassation*, which is the highest court of the judicial order in France, has stated into a sentence that directors must have "intentionally committed a fault of a particular seriousness incompatible with the normal exercise of the director's functions *(fonctions sociales)*"[182]. The latter provision does not apply for claims requested by shareholders who have suffered personnel losses[183].
Finally, when the fault committed causes damage to another, the French Code Civil "…obliges the one by whose fault it occurred, to compensate it"[184]. The compensation is required when a person who has failed to comply with the prospectus disclosure obligations, has simultaneously made a mistake *(faute)* that caused directly a harm *(dommage)*. Between those two a causal relationship should be established[185].
The French legislator implemented in its national laws also the article 6(2) of the PD, which limits the possibility to claim a civil liability connected with the prospectus summary. In fact, the prospectus summary can be part of a civil litigation only when its "content or its translation is misleading, inaccurate or inconsistent when read together with information found in other parts"[186].

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[179] ROSENFELD E. and VEIL J., *Sanctions administratives, sanction pénales*, Pouvoirs 2009/1 n° 128, p. 61.

[180] RG Articles 212-214.

[181] COURET et al., *Droit financier, p.* 912 (translation according to Schemmo).

[182] Cass. Com. 20 mai 2003, nº 99-17092 (translation according to Schemmo).

[183] Cass. Com. 9 mars 2010 nº M08-21.547 and nº D08-21.793.

[184] For more details see; H-J. PUTTFARKEN and A. SCHRADER, "Frankreich" in K. HOPT and H-C. VOIGT (eds.), *Prospekt- und Kapitalmarktinformationshaftung*, Mohr Siebeck, Tübingen, 2005, p.595.

[185] For more details see; COURET et al., *Droit financier,* p.905-910.

[186] CMF Art. L. 412-1.

On the other hand, in the UK articles 6(1) and 6(2) have been implemented in Briton laws[187]. In particular, the UK distinguishes the persons responsible for non-complying according to the type of securities being issued.

In fact, for the following securities the personal scope is more extensive:

1. Equity shares.
2. Warrants or options which give a right to subscribe for equity shares and are issued by the issuer of the equity shares.
3. Transferable securities which are similar to the above two categories[188].

Precisely, for those three categories the persons responsible are:

1. The issuer or offeror or person seeking admission to trading[189].
2. Any company's directors who are in charge at the time when the prospectus is published[190].
3. Any persons who have "authorised himself" to be identified in the prospectus as a director and is identified therein as such or as a person who is bound to become a director of the issuer[191].
4. Any persons who have agreed to bear responsibility for the prospectus, provided that this information is set out in the prospectus[192].
5. Any other persons who have given authorisation for the prospectus content[193].

For the residual security types all the above persons, besides directors (point 2), are responsible.[194]

Finally, are excluded completely or in part from the personal scope, persons who have limited their responsibility to a part of the prospectus or in "specified respects"[195] and professional issuers advisers[196].

A compensation is required also in the UK[197]. It trigs when the failure to properly disclose information causes a loss towards investors who have acquired the securities or who have

[187] FSA-PR 5.5.
[188] FSA-PR 5.5.3 R (1).
[189] FSA-PR 5.5.3 R (2)(a), (d) and (e).
[190] FSA-PR 5.5.3 R (2)(b)(i).
[191] FSA-PR 5.5.3 R (2)(b)(ii).
[192] FSA-PR 5.5.3 R (2)(c).
[193] FSA-PR 5.5.3 R (2)(f).
[194] FSA-PR 5.5.4 R.
[195] FSA-PR 5.5.8 R. Rule 5.5.8 R applies to the persons mentioned in FSA-PR 5.5.3. R (2)(c); 5.5.4. R (2)(b); 5.5.3. R (2)(f) and 5.5.4. R (2)(f).
[196] FSA-PR 5.5.9. R.
[197] FSMA s 90(1).

committed themselves contractually to acquire securities or have declared any interest in them[198].

Like France, a causation relationship should be established and demonstrated between the fault and the loss suffered[199]. Contrarily, also investors who have committed themselves to acquire securities fall into the compensation scheme in the UK[200].

Peculiarly, the FSMA sets out *seven standardized scenarios* in which the persons who failed to comply with the PD and level II PR can demonstrate their "innocence".

The first scenario addresses the situation in which the prospectus information were untrue, misleading or some parts were omitted[201].

Persons can escape civil liability if and only if they "reasonably believed", at the time of the filling with the UKLA, that the statements were true and not misleading or the omission was "properly"[202]. To benefit from this defence, at least one of the following, additional, conditions must be met:

1. The person's belief lasted "until the time when the securities in question are acquired".
2. The securities were bought "before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them".
3. The person in question sought prior to the securities being bought, to take "all such steps as it was reasonably for him to have taken" to ensure that the persons concerned were made aware of the correction.
4. Where the person's belief lasted "until after the commencement of dealings in the securities following their admission and they were acquired after such lapse of time that he ought in the circumstances to be reasonably excused".[203]

The second and fourth scenarios deal with a fault made by an expert, who was advising the issuer, under his or her consensus[204].

In this case the persons responsible can avoid litigation if, at the time of UKLA submission, they "reasonably believed" that the expert was "competent to make or authorise the statement". However, one of the following additional conditions must be met:

198 FSMA s 90(7).

199 FERRAN, Corporate Finance Law, 456.

200 FSMA s 90(2) and (5) cross-refering to FSMA Sch 10.

201 FSMA Sch 10, para 1(1).

202 FSMA Sch 10, para 1(2).

203 FSMA Sch 10, para 1(3).

204 FSMA Sch 10, para 2(1).

1. The person who seeks to escape liability must have had such belief "until the time when the securities were acquired".
2. The securities were bought "before it was reasonably practicable to bring the fact that the expert was not competent, or had consented, to the attention of persons likely to acquire the securities in question".
3. The person had, before the securities were bought, taken "all such steps as it was reasonable for him to have taken" to make sure that persons were informed of this fact or,
4. The person's belief lasted "until after the commencement of dealings in the securities following their admission and they were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused".[205]

The fourth one avoids civil liability if the expert lack of competence or failure to agree to the prospectus publication was published "in a manner calculated to bring it to the attention of persons likely to acquire securities" or that the publication made the persons responsible "reasonably" sure "that it had taken place before the securities were acquired"[206].

The third scenario provides a defence against the correction of misleading, untrue or omitted statements.
In this case persons can avoid litigation if they have corrected the information and published it "in a manner calculated to bring it to the attention of persons likely to acquire securities", or when they have taken "all such steps as it was reasonable for him to take to secure such publication", provided that he "reasonably believed" that the publication "had taken place before the securities were acquired"[207].

The fifth scenario, concerning official statements included in the prospectus that have caused losses, makes able the persons responsible to escape litigation if such statement was made by an official person or was included in a "public official document" added to the prospectus. Furthermore, the statement is "accurately and fairly reproduced" in the prospectus[208].

[205] FSMA Sch 10, para 2(3).
[206] FSMA Sch 10, para 4(2)(a) and (b).
[207] FSMA Sch 10, para 3(2)(a) and (b).
[208] FSMA Sch 10, para 5.

The sixth scenario provides that the investors who suffered the losses, bought the securities knowing that the prospectus statement was "false or misleading" or of the "omitted matter" or "of the change or new matter"[209].

The final scenario deals with prospectus supplement and provides a way out if the persons responsible "reasonably believed" that a prospectus supplement was not needed in order to deal with a change or a new matter[210].

To sum up, the French legislator empowers the courts to provide the comitology in order to rule the private liability about the failure to disclose with the PD, level II PR and national implementing laws[211]. The sentences are just a few and fail to provide a comprehensive framework, resulting in leaving most of the power and discretion towards the court during the private litigation.

Contrarily, the UK, a common law jurisdiction, preferred to give more power to the national laws and, in the FSMA, has created a comprehensive framework for the private liability. In fact, it includes also the defences that the person responsible is required to provide during the litigation in order to avoid to pay out the compensation required for the loss caused. In addition, the personal scope was largely and widely implemented, including more persons to the one explicitly written in the prospectus to be responsible for the mislead, false or omitted statements.

3. Passport regime implementation

3.1. Passport regime in France

This paragraph deals with the procedure ruling the admission to trading on a French regulated market or a public offer, when the prospectus has AMF as host authority[212].

This would demonstrate the hypothesis that the integration of the European Economic Area (EEA) is far from efficient and smooth even if the passport system, introduced in the PD, has improved it. Data about the ratio of "passported prospectuses" over the total issued in the EU has increased after 2003 demonstrating the successfulness of that system compared to the

[209] FSMA Sch 10, para 6.

[210] FSMA Sch 10, para 7.

[211] For a complete analysis of the uniformity of European securities laws see: ENRIQUES L. and M. GATTI, *Is There a Uniform EU Securities Law After the Financial Services Action Plan?*, Stanford Journal of Law, Business & Finance, Vol. 14, No. 1, 2008.

[212] The main bibliography is LINKLATERS, Prospectus Directive Passporting Procedures in France, Paris, Linklaters, March 2006.

previous mutual recognition principle. Nevertheless, the notification procedure gets trickier at national level, therefore carries on limiting foreign, even if previously approved by an EEA authority, prospectuses allowance.
France is a good example of how tricky and costly still remains the passport system and the existent diffidence between European authorities. It is important to highlight that I choose to describe the "passport system" of the France legislator because of its strict appointment in the protection of French investors. In fact, its implementation is stricter than the EEA average and I recall, is intended to provide to the reader an extreme example of how the passport reward can be limited.

Accordingly, foreign issuers seeking admission to trading on a French regulated market or publicly offering securities in France should, additionally to the home competent authority approval mechanism, comply with *prior* and *on-going* obligations in order to be able to *passport their prospectuses in France*.

3.2. Pre trade or offer obligations

Any persons included in the PD scope, before applying with the notification procedure involving the home competent authority and AMF, should comply with four additional, France-specific, obligations.
Those are the followings:

1. Register a constitute documents.
2. Publication of a *communiqué* in AMF website.
3. Publication of a BALO notice.
4. Publication of a French notice in case of a public offer or a notification to Euronext Paris S.A. in case of an admission to trading.
5. Appointment of a French Agent.

The procedure estimated time is 15 days and it starts with the *constitute document*.
Any foreign issuers making a public offer or seeking an admission to trading of its securities on a regulated market in France must previously register its *constitutive documents*, written in French and fill it with the *Paris registry of commerce and companies*.
Documents should be accompanied with an attached paper containing key information about the issuer. The fees are minimal but the translation costs may vary on the document type, length, original language and market costs of a translation.

The second step, that can be in some circumstances the first one, concerns the publication of a *communiqué* in the AMF website informing the investors about the issuer or offeror securities proposal.
At least two weeks prior to the beginning of the public offer or admission to trading, the issuer or offeror should contact the AMF in order to inform the authority that he or she is willing to fill a *communiqué* in its database (*banque des communiqué*).
Then he or she must make an *online and free of charge application*, written in France, in order to be admitted in the database. The application ends up with the upload of the *communiqué* that should be written in French, but can be also translated in English and must contain the indication of where investors can find the documents related to the offer. Those documents are the prospectus, in form of a single document or tripartite, or base prospectus and supplements if required. If the offer requests a final term, which is often the case in *bookbuilding process*[213] offers, the offeror should public an additional *communiqué*, including the final terms information at least two days before the admission to trading.
The publication of the final term on the AMF website is not necessary for a public offer only when a notice have been already published in the press indicating where it is available.

The third phase obliges the issuer to publish a *notice* in the legal gazette called *Bulletin des Annonces légales obligatoires* (BALO) at least 5 days before the publication of the advertising materials takes place. The so called BALO notice should comply with specific information requirements and a failure to comply with them comports a monetary sanction at maximum of EUR 18,000. It is also required a BALO notice in case of a final terms issue.

The fourth step is different from public offers and admission to trading on a French regulated market. The former type should public a *notice in a financial newspaper* having general circulation in France, typically *La Tribune* or *Les Echos*.
The notice should inform investors whether to find the related documents and the French summary. In addition, it must specify who is the home competent authority and be formed by a French summary, which includes the transaction core information, such as the offer terms, and the whole notice should seek approval to the AMF before publication.

[213] A mechanism in which the price of the issuance is decided according to the demand. In fact, the syndicate of underwriters open the book, collect orders, close the book and decide the price according to the collected orders, the supply and the expected proceeds. The book building process starts after the publication of a base prospectus, which includes a *bona fide* estimates of the securities sale price, and required a publication of a final term after the end of the process. It is a common mechanism, very popular for IPOs.

The latter type of issuers, instead, should *notify the prospectus to the Euronext Paris S.A.*, which is the French regulated market gatekeeper, at least the Tuesday of the week before the trading will start. This because the Euronext Paris S.A. Board, which decides upon admission to trading, meets every Wednesday. The same procedure applies for final terms, even if the company has already been admitted to trading thanks to the verification of the base prospectus.

Finally, each issuer falling in the PD scope, must *appoint a French agent*, living in France (*mandataire*), which can be also the company French subsidiary, if existent.
Such *mandataire* can act in the name and on behalf of the issuer and his or her name and contact details must be specified in the BALO notice.
Non-complying issuers will be forced to pay to the French authorities an amount which can reach at maximum EUR 18,000.
In addition, the firm asking for admission to trading on a French regulated market should *appoint a correspondent* which will organize and control the exchange of information between the AMF and the agent.

3.3. Notification procedure

After complying with all the above pre France-specific obligation, the issuer who has received the approval of their prospectus by its home competent authority, will have no role in the notification phase.
In fact, in this phase the only actors are the home competent authority and the AMF. The first one sends a notification to the French authority, informing the latter about the approval of the issuer prospectus and the company intentions to issue securities in France too.
The AMF receives within the notification all the related documents which are, prospectus, a summary in France language and all the reference materials incorporated by reference in the documents. The authority will then send back a receipt, at no charges, confirming the positive ending of the phase if all the documents have been send. This procedure normally last one day.
The procedure in France is equal to the PD prescript one, besides the obligation of a summary written in France. Finally, the prospectus and related documents passported in France must be equivalent to the ones filled at home.

The notification procedure end automatically allows the issuer or offeror to extend its securities issues in France. This automatic mechanism can be blocked only according to a provision of the PD and some additional national laws requirements.

The first one provides the AMF the right to notify the home competent authority of any significant new factors, errors or inconsistencies occurring or appearing after the approval of the prospectus.

In addition, the AMF RG entitles the AMF to *suspend, prohibit or object the issuance* under the following certain circumstances:

1. The AMF may suspend a transaction for a period of 10 days where it considers that the proposed transaction is in *breach of statutory or regulatory rules* applicable to it.
2. The AMF may prohibit a transaction where it considers that the proposed issues or sale is in breach of statutory or regulatory rules applicable to it or where it considers that admission to trading on a regulated market is *in breach of statutory or regulatory rules* applicable to it.
3. The AMF may object an admission to trading on a regulated market in France when it considers that such transaction gives rise to risks incompatible with the *interests of investors* and *market integrity*.

Point 3 has a 5 days' deadline, starting when the issuer has notified the Euronext Paris S.A. about his or her intention to seek admission to trading on a French regulated market.

3.4. On-going obligations and marketing AMF control

The French legislator specifies, extending the TOD scope, that foreign issuers of debt securities on a regulated market in France should *publish an extract of their annual report also in France*. Specifically, at least after 6 months of the end of the financial year, the issuer should publish at minimum its balance sheet, profit and losses and notes to the financial statements selected by the issuer on the basis of the investors relevance.

The format is either in a *BALO notice* or a *press notice* and must be written in the mother issuer language, but requires a translation in French if the financial information contains news that may affect significantly the value of the financial instruments offered.

Finally, both the issuer and offeror must *appoint a Paris paying agent* as long as their securities offered publicly or traded on a regulated market are outstanding.

The AMF has the power to control the distribution of marketing materials in France too.

The power takes the form of approval, which is the *conditio sine qua non*, to the distribution of advertising material in France.
In this subject the French legislator has introduced just a special review regime for issues of warrants and other derivative financial instruments, differently from the PD provisions.
In fact, the general principles (*principes généraux*) underlying the review of the advertising materials hav been identically implemented in this country.
With this regard, AMF RG Article 212-28 requires to fill, before their distribution, any advertising material with the AMF.
In line with Article 15 of the PD, RG Article 212-28 additionally provides that the material must:

1. Specify that a prospectus will be published and where it will be available.
2. Be clearly recognizable as advertisements.
3. Not contain any misleading or inaccurate information.
4. Contain information consistent with the prospectus.
5. Draw the investor attention on the risk factors section of the prospectus.
6. Includes risk warnings if required by the AMF.

The process generally lasts one week.

The French legislator, as mentioned above, has established a special regime about the advertising material requested when an issuer or offeror issues warrants and other derivatives.
Thanks to the complex nature of derivative contracts, even if the prospectus has been approved by the home competent authority, the advertisement should specify the following information in order to protect investors:

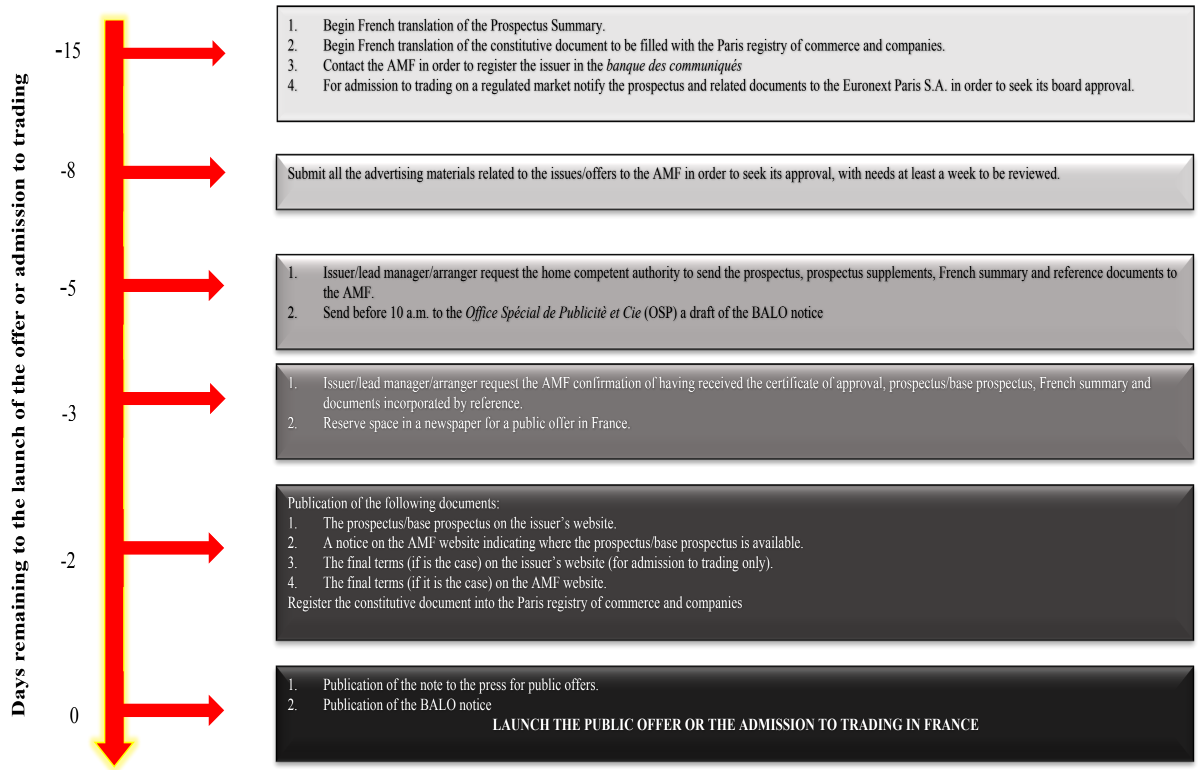
1. If, thanks to leverage, the investor can, at redemption, receive an amount less than the notional principal.
2. If derivatives are sold to individual investors too, the content should be adapted to their risk profile, portfolio and knowledge.
3. Add the information requested by AMF.
4. Highlight the risks involved in the transaction.
5. Underlie that the issuer is not a credit institution, if it is the case.
6. Underlie the fact that the issuer thinks that the market is not sufficiently liquid or large, if it is the case.
7. When no liquidity arrangements have been made with investors, the way in which they can resell the instruments.

8. The way in which the issuer will settle the instruments, if there exist some options that differ from cash.

Before concluding the chapter by presenting the estimated timetable of the passport French system, I would recall that this example provides an extreme way to implement the measure regarding the passport process. The French market authorities, in fact, are built on the aim of protecting investors and the French legislative approach is imprinted on ensuring the maximum disclosure possible in order to avoid problems at individual level. The French investors are not used to participate in financial markets as English or Luxemburg or Holland neighbours' ones. Therefore, the tougher requirements of this paragraph should not be interpreted only as punitive towards foreign issuers or caused by the AMF mistrust on EEA national regulating authorities. Accordingly, the knowledge gap between the French investors and others European ones plays a huge role.

3.5. Estimated Timetable

Passport system in France estimated timetable:



The procedure allowing a company to sell his securities in France, thanks to the passport regime, takes an additional 15 days. It starts with contacting the AMF for registration purposes and ends up with the publication of a BALO notice and a press release in case of a public offer. To sum up, I recall that the France example makes clear how actually the passport system can get trickier, costlier and time consuming than is supposed to be. However, there are a lot of others EEA countries implementations which permit a smother and quicker passport process than the French one. Nonetheless, each firm raising capital in more than one European Union Member State must be aware of the additional rules governing the passport system, which it seems from the PD an automatic process but actually is not.

1. US securities offer laws in a nutshell

The United States of America laws regarding the security industry construct a comprehensive and complete framework that rules out almost all aspects of the securities, securities issuer and owner lives.

The US has the most developed financial market, is the country of the self-made man and where the ability to create opportunities for the self-emancipation of every American is a constitution bedrock. Furthermore, although was not the first country to adopt the capitalist system (it was the UK), the US is the most convict fan of this form of economy and its rules governing markets participants and citizens have always been influenced by the liberal doctrine, in which Adam Smith "invisible hand" is the bedrock.

Nevertheless, the old security discipline is far away from being deregulated, as the liberalist approach would suggest, therefore involving a long list of wide acts[214]. Those are the following:

1. Securities Act of 1933[215].
2. Securities Exchange Act of 1934.
3. Trust Indenture Act of 1939[216].
4. Investment Company Act of 1940.
5. Investment Advisers Act of 1940.
6. Sarbanes-Oxley Act of 2002.
7. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.
8. Jumpstarts Our Business Startups Act of 2012[217].
9. Other rules and regulations.

In the following chapters I will touch partly just a little subset of the above list, but I want to highlight, in this context, the heavy intrusion of the Government in the securities industry in the US. The 2008 financial crisis wider this phenomena, especially with the Dodd-Frank Reform, but it was not born in 2010 as some argue.

[214] GOLDSTEIN J., *Ideas, institutions, and american trade policy*, 42 International Organization 179, 1988; GOSHEN Z. and PARCHOMOVSKY G., *The essential role of securities regulation*, 55 Duke Law Journal 711, 2006.

[215] SECURITIES ACT OF 1933, amended on 2012.

[216] TRUST INDENTURE ACT OF 1939, amended on 2010.

[217] ONE HUNDRED TWELFTH CONGRESS OF THE UNITED STATES OF AMERICA, *Jobs Act*, 2012.

The *Securities Act of 1933* (SA), also called "the truth in securities law" is the main law regulating the disclosure of information concerning securities being offered for public sale, which includes both the EU admission to trading and public offer definitions.
The SA main objectives are, according to the U.S. Securities and Exchange Commission (SEC):

1. Ensure that investors receive the necessary information concerning securities being offered for public sale.
2. Prohibit deceit, misrepresentations and other fraud in the sale of securities.

Those two aims are ensured primarily by the disclosure of important financial information through the registration and prospectus. The information provides but does not guarantee that investors are able to make an informed judgment of whether purchase or not the securities offered to them by companies.
The securities generally should be registered. Furthermore, the registration statements, which include the final prospectus, both minimize the cost burden of complying with laws at company level and provide investor protection.
However, there exist a list of offers exempted from the registration obligation. They will be described in the following subparagraphs. Moreover, the debt securities issuance provides an additional obligation under the Trust Indenture Act of 1939. In fact, debt securities can be offered to public if there is an agreement between bondholders and bond issuers, known as trust indenture, conform with the standard of the abovementioned act.

The registration statements and the prospectus should be filled with the SEC, which after having been verified the compliance with the disclosure requirements, allows the documents publication. In other words, the SEC provides prospectus effectiveness allowing the company to offer and sale the securities. If filled by U.S. domestic companies, the statements are available on the Electronic Data Gathering, Analysis and Retrieval system (EDGAR) database, which can easily be reached at www.sec.gov.
Finally, the U.S. Government, has introduced special regimes and safe harbours for the following types of offers:

1. Private transactions
2. Offers made by Emerging Growth Companies (EGCs) and Small Reporting Companies (SRCs).
3. Offers made by Well-Known Seasoned Issuers (WKSIs).
4. Offshore offerings and Foreign Private Issuers (FPI).
5. Offerings of limited size.

6. Exempted securities and exempted transactions.
7. Others safe harbours.

Thus far, the regulatory US framework is pretty similar to the one adopted in the EU with the PD and level II PR. Over the paragraphs I will underline the differences that will be incurred, but, I anticipate, the core features, objectives and provisions are similar. Contrarily, they differ in the style adopted, the level of detail and in specific circumstances.
Lastly, the final paragraph of this chapter will states some hypothesis regarding the different policy drivers of the two prospectus regulations.

2. A comprehensive obligation: the public offers obligation to fill registration statements with the SEC

The EU primary source of prospectus law is the PD, likewise the US relies on the SA of 1933. Similarly, the SA structure provides that an issuer[218] who wants to offer securities[219] for sale to the public within their territorial boundaries, which includes also an admission to trading, should disclose the required information in the *registration statements*[220], which includes the prospectus[221]. Those statements should be *filled with the SEC* and then allowed to be *published*. To sum up and restated intentionally equally to the PD ones, the U.S. securities offer framework has three core obligations (one less than the European counterparty in theory):

1. Obligation to draw up registration statements, including the final prospectus.
2. Obligation to fil the registration statements with the SEC and find its approval.
3. Obligation to publish the registration statements.

I underline that the obligation to comply with advertising rules is outside the act scope while it is left upon the hands of the issuer just in theory, because advertising materials are within the prospectus and offers definitions, according to Section 2(a)(1) and Section 2(a)(3) of the SA. Furthermore, fall into its scope all the "offers" as defined in Section 2(a)(3), which include both the European admission to trading on a regulated market (ex MiFID) and public offers, and other ones.

[218] Defined in Section 2(a)(4) of the SA.
[219] Defined in Section 2(a)(1) of the SA.
[220] Defined in Section 2(a)(8) of the SA.
[221] Defined in Section 2(10)(a) and Section 2(10)(b) of the SA.

In addition, *Section 5(c) prohibits pre-filing* offers by any mean, mail, telephone etc.
Differently it provides, as I will show, at first a broad and general definition of the term "offer" and them, step by step, details all offers not included in that definition. The "non-offers" are outside the prospectus regulation scope and may be treated in other rules, acts and regulations.
To sum up, the US prospectus regulation has one comprehensive obligation:

1. The obligation to registered any offers with the SEC.

This comprehensive rule, obliges any offers to be registered, if there is not a safe harbours or an exemption available. Furthermore, the registration documents include a final prospectus, which is a *Section (10) (a)* one, if not differently specified. The SEC approval makes companies able to sell the securities, but in between it delimits the marketing material that can be distributed. In fact, Section 5 of the SA divides the registration period in three steps (see the proper paragraph).
In this paragraph, as I did for the EU regulation, I will follow the act order[222].

Any offers need a registration statement or must meet an exemption, but what does offer mean according to the SA?
The *Section 2(a)(3)* of the SA defines the term "offer to sell", or "offer for sale", or "offer" expansively to include "every attempt or offer to dispose of, or solicitation of an offer to buy a security, or interest in a security, for value". In addition, the SEC, which is the financial market US authority, has stated that any publicities that may "contribute to conditioning the public mind or arousing public interest" in the offering can itself constitute an "offer".
The definition is broad and includes too many actions, contracts, declarations, security types etc. totally unrelated to an offer. The first cut, thought, comes just after the offer definition which excludes, *inter alias*, "preliminary negotiations". Some others are clearly not an offer, because are consensually deemed by all the parties involved outside the offer scope, even if a literal interpretation of it would results otherwise.
Those are the following:

1. Product Advertising and Factual Business Communications.
2. Disclosure of information falling into the Collision Principle.

The latter includes all *the on-going disclosure of information* under the *Securities Exchange Act of 1934*, which is the US counterparty of the TOD and MAD/MAR. In fact, those needed information should be disclosed and do not constitute an "offer".

[222] For a more practical analysis of the US prospectus regulations see: LATHAM & WATKINS, *The Good, the Bad and the Offer: Law, Lore and FAQs*, Delaware USA, Latham & Watkins, No. 1244, March 6, 2014.

3. Exemptions and Safe Harbours

Under the Securities Act of 1933 securities any offers to sell securities must be either registered with SEC or meet an exemption.
This paragraph is devoted to the description of the *exemptions*. As I have already mentioned in this paragraph I will compare the equivalent EU provisions with the US ones in order to detach the differences and similarities. Overall, the *US provides more exemptions than EU* does, thanks to the different style used.

3.1. Size

The first category involves all the offers excluded from the registration scope thanks to their limited size. With this regards, public offerings and issues of securities *cannot be exempted* by a SEC rule if the *total consideration exceeds USD 5,000,000* (EUR 5,400,000)[223]. Within this limit the SEC can exempt offers for public interest and/or investor protection. Finally, *rule 504 of Regulation D* provides an *exemption* from the registration requirements for a qualified subset of companies when they offer and sell up to *USD 1,000,000* (EUR 1,100,000) of their securities *within 12 months*.
Those companies are allowed to advertise and solicit their offering of non-restricted securities if are not a blank check company[224] and meet one of the following circumstances:

1. The securities are sold to only *Accredited Investors* (AIs)[225].
2. The company registers the offering exclusively in one or more states that require a publicly filed registration statement and delivery of a substantive disclosure document to investors.
3. A company registers and sell the offering in a state that requires registration and disclosure delivery and also sells in a state without those requirements, so long as the company delivers the disclosure documents required by the state where the company

[223] Section 3(b)(1) of SA.

[224] According to www.sec.gov, a blank check company is a development stage company that has no specific business plan or purpose or has indicated its business plan s engage in a merger or acquisition within an unidentified company or companies, other entity or persons. These companies typically involve speculative investments and often fall within the SEC's definition of "penny stock" or are considered "microcap stocks".

[225] "Accredited Investors shall mean any person who comes within any of the following categories (from Section (a)(1) to (a)(8) of Rule 501 of Regulation D), or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that persons: (from Section (a)(1) to (a)(8) of Rule 501 of Regulation D)" according to Section (a) of Rule 501 of Regulation D.

registered the offering to all purchaser (including those in the state that has no such requirements).

Those exempted companies, instead of the registration statements, must fill what is known as *"Form D"*[226] electronically with the SEC after they first sell their securities.

Recall that the PD excludes from the obligation to draw up a prospectus each offers or issues with a total consideration amount not exceeding EUR 100,000 (USD 93,000) within 12 months in a EU basis, a threshold that can be increased by national law as far as reaching EUR 5,000,000 (USD 4,650,000). In addition, the PD does not provide the disclosure of information in any other form for the abovementioned exemptions.
The *US securities laws*, regarding offering size, provides *no tout court exemptions* from filling files with the SEC, *differently from the EU* that provides so for offerings size less than EUR 100,00 and greater if provided by national laws. However, they *have in common the mandatory obligation to fall into the laws scope if the total consideration amount of the offering is equal to EUR or USD 5,000,000*. Note that, at current exchange rate, those monetary amounts are different but near to each other.

3.2. Exempted securities and exempted transactions

The second category of exemptions under the Securities Act are called *"exempted securities"* and *"exempted transactions"*. Those are detailed and exhaustively described in respectively, *Section 3(a)* for securities and *Section 4(a)* for transactions. Those includes interstate offerings and issuers related to the central and local governments, like municipal, federal and regional governments, likewise the PD. Leftovers are a huge list of offerings that will not be described in this paragraph but most of them are related to state owning companies, public institutions and third sector firms. Although, if compared on a one by one basis, the exemptions under Section 3(a) and 4(a) of SA are different from the one introduced by Articles 1(2), 4(1) and 4(2) of the PD, they answer the same question.
In fact, both of them, eliminates the cost burden of writing prospectus or registration statements, including a final prospectus, for all the issuer, offerors or securities types that do not need the

[226] Form D, according to www.sec.gov, is a brief notice that includes the names and addresses of the company's promoters, executive officers and directors, and some details about the offering.

disclosure of information for public interest, investor protection or specific markets or issuers matters.

3.3. Private Placements

Both the PD and the SA exclude private offerings from the obligation to draw up a prospectus, but differ slightly in respect to the object definition. Under the PD, private placements are offers limited to qualified investors or any offers to less than 150 non-qualified investors in each Member State.

The SA similarly to the style encountered defining the term “offer”, the act defines broadly private offers has “transactions by an issuer not involving any public offering”.[227] Then *Rule 144A, Rule 505 and 506 of Regulation D*, specify under which circumstances the private offers take actually place.

Rule 144A includes in private offerings some sale, and not offer and sale, of *qualified securities* only to *Qualified Institutional Buyers* (QIBs)[228] or investors that are reasonably believed by the seller to be QIBs. Those transactions do no need neither the registration nor any other form filing with the SEC and can use a general solicitation in order to advertise their products.

Rule 505 of Regulation D excludes from the registration requirements, simultaneously not allowing the issuer to advertise the offer or make any general solicitation some others offers. Those are offers that sell up to *USD 5,000,000* securities, in dollar terms, within 12 months only to AIs and up to *35 persons* non satisfying the standards associated to any qualified category, such as QIBs and AIs. However, those companies must inform investors if the securities are restricted and disclose all the information needed under the registration obligation to the 35 of less non-qualified persons. Furthermore, they have to fill a *“Form D”* with the SEC and meet some financial verifications by external independent auditors.

Rule 506 is divided in two parts, section “b” which extends a bit Rule 505 and section “c”.

On one hand, Rule 506(b) provides the same provision of the previous Rule, besides cancelling out the size threshold and adding up that the non-AIs investors should be sophisticated. *Sophisticated investors* are persons with sufficient knowledge and experience in financial and

[227] Section 4(a)(2) of the SA.

[228] Defined exhaustively by the SEC.

business matters to make them capable of evaluating the merits and risks of the prospective investments.

On the other hand, Rule 506(c) avoids the registration obligation, while permitting advertisement and general solicitations for offers taping only AIs, if and only if, the issuer has verified the qualification of its securities buyers. The verification process can take various forms and include different methods while maintaining some core aspects, like the study of individual incomes.

Although *qualified investors* and *eligible counterparties* under MiFID definitions and *qualified institutional buyers* and *accredited investors* under SEC rules ones *commonly* contains most of the wealthy individuals, investment companies, firm specialized in the finance field, such as insurance companies etc…, *there are some differences*. About those I will not spend rows because unimportant for the part objective of underlying the principal similarities and differences between the two regulatory frameworks.

In general, thought, the *US approach on private placements is more complete and penalizing than the European Union one*, because the latter provides fewer conditions to be met in order to avoid the prospectus publication. In fact, in North America private placements includes just 35 of non-qualified investors, while the other can be at maximum 150 in each Member State. In addition, further disclosure requirements are present with all the forms of private transactions, besides the Rule 144A types, which are, nonetheless, far specific operations.

3.4. Small businesses: SRCs, EGCs and no-large accelerated filers

The laws provide fewer disclosure obligations when small and medium enterprises fund their operations through capital raising in US too.

Small businesses rewarded with a scaled to their size information disclosure obligation when raising capital through securities offerings are of two types:

1. Smaller Reporting Companies (SRCs)[229].
2. Emerging Growth Companies (EGCs)[230].

[229] Item 10(f)(1) of Regulation S-K.

[230] Section 2(a)(19) of SA.

A Company is a SRC if its public equity float is less than USD 75,000,000 (EUR 80,600,00) or, if a public equity float is unavailable, has less than USD 50,000,000 (EUR 54,000,000) in annual revenue. The public equity float is computed by multiplying the number of common shares outstanding times its market price, or, if a company is next to become public, through an IPO, is equal to the common shares to be issued and an estimated post-IPO common share price.

The disclosure requirements scaled for SRCs permit, *inter alias,* to[231]:

1. Include less extensive narrative disclosure than required of other reporting companies, particularly in the description of executive compensation.
2. Provide audited financial statements for two fiscal years instead of three.
3. Do not have to provide an auditor attestation of internal control over financial reporting[232].

The second category of small enterprises are EGCs under *Section 2 (a) (19)* of SA definition. This states that "the term emerging growth companies means an issuer that had total annual gross revenues of less than USD 1,000,000,000 (EUR 930,000,000) (adjusted for inflation) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed as an emerging growth company until the earliest of:

1. The last day of the fiscal year of the issuer during which it had total annual gross revenue of USD 1,000,000,000 (EUR 930,000,000) adjusted for inflation.
2. The last day of the fiscal year of the issuer following the fifth anniversary of the first sale of common equity shares of the issuer (IPO) pursuant to an effective registration statement under this title.
3. The date on which such issuer has, during the previous 3-years period, issued more than USD 1,000,000,000 (EUR 930,000,000) in non-convertible debt.
4. The date on which such issuer is deemed to be a large accelerated filer[233]".

EGCs have the same scaled disclosure requirements, a sort of *mini-prospectus*, plus the faculty to do not change certain accounting standards during the period in which are deemed as such.

According to *Exchange Act Rule 12b-2* "the term large accelerated filer means an issuer after it first meets the following conditions as of the end of its fiscal year:

[231] www.sec.gov summary of the regime.

[232] Required for others under Sarbanes-Oxley Act Section 404(b).

[233] Exchange Act Rule 12b-2.

The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of USD 700,000,000 (EUR 753,000,000) or more, as of the last business day of the issuer's most recently completed second fiscal quarter.
The issuer has been subject to the requirements of section 13(a) or 15(a) of the Act (15 U.S.C. 78m or 78o(d)) for a period of at least twelve calendar months.
The issuer has filled at least one annual report pursuant to section 13(a) or 15(a) of the Act.
The issuer is not eligible to use the requirement for smaller reporting companies in part 229 of this chapter for its annual and quarterly reports".

In addition, the JOBS Act allows ECGs to "test the waters" before filing their "mini-prospectus". Testing the waters is the oral and written process of gauging interest in the potential new issues through meeting between QIBs, AIs[234] and company's managers and underwriter employees. ECGs can also privately inform potential investors concerning their future offering without being oblige to file their communication, even though the communication is considered an offer under Section 2(a)(3) of the SA[235].

Recalling that SMEs under MiFID are companies with a market capitalization of less than EUR 200,000,000 and that the PD allows SMEs to opt in the proportionate disclosure regime, which basically exchange the whole prospectus with a mini version of it. *The alleviation content of the two regulators are quite similar, while the companies entitled for the benefits are different*. Generally, the differences are encountered mostly five years after the first issuance of equity securities because most of the companies falling in the SMEs definition under MiFID would be treated as EGCs in the American counterparty. To be clear, this is a generalization because a deeper study of the balance sheets of those companies is needed to make a fairer and a more complete assessment than what I have done. In fact, we do not have data enough to compute the ratio of American companies with a market value between USD 75,000,000 and USD 215,000,000 (EUR 200,000,000) with total annual gross revenue less than USD 1,000,000,000 divided by the total.

[234] GOLDSTEIN FINANCIAL GROUP, LLC, *Accredited Investors & Qualified Purchaser*, IL USA, GoldesteinFinancial.com, No. 6015, 2016.

[235] Rule 163A of the SA.

3.5. Frequent issuers: WKSIs

The two regulatory frameworks provide an alleviated regime for a qualified subset of companies that have in common the frequent use of markets for their capital raise purposes. Those companies' public information, about their risks, operations, management, business plans, margins and so on, continuously, resulting in being well known by the financial market investors. A full disclosure of information would, then, overlaps some previously disclosed news and data, resulting in an unjustified cost burden at company level and overprotection at investor one.

The frequent US issuers are the so called *Well-Known Seasoned Issuer* (WKSI).
They are exempted from the pre-filing offer prohibition if certain conditions are met, nonetheless have to fill the related contents with the SEC when registering their offer[236].
Furthermore, WKSI can register their primary offerings using the *Form S-3* or *Form F-3*, if foreign, instead of the long format (Form S-1). Form S-3 is a short-form registration statement consisting primarily of disclosure of information about the securities, object of the offers, and can constitute the first part of a *shelf registration*.
The definition of WKSI[237] includes an issuer and its majority-owned subsidiaries under certain circumstances that meet both the registrant requirements of General Instruction I.A. of Form S-3 or Form F-3 and as of a date within 60 days of the determination date[238] has:

1. A worldwide market value of outstanding voting and non-voting common equity held by non-affiliates of at least USD 700,000,000 or,
2. Issued at least USD 1,000,000,000 in aggregate principal amount of non-convertible securities in transactions registered under the Securities Act, other than equity securities, in primary offerings for cash during the past three years and,
3. Is not an *ineligible issuer*[239] or asset-backed issuer.

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[236] Rule 163 of SA.

[237] Rule 405(1) of SA.

[238] Under Rule 405(2) of SA, the determination date is the later of:

1. The time of filling of the issuer most recent shelf registration statement.
2. The time of the most recent amendment to its shelf registration statement for purposes of satysfing Section 10(a)(3); or
3. The date of filing the issuer's most recent annual report on Form 10-K or Form 20-F (if it has not filed a shelf registration statement for 16 months).

[239] Under Rule 405 of SA, "Ineligible issuers" include those that:

1. Are not current in their Exchange Act reporting obligations (other than certain enumerated Form 8-K filings).
2. Are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than throught a firm commitment underwriting.

Contrarily, recall that the PD exempts from the scope major obligation *credit institutions* admission to trading of non-equity securities issued in "a continuous and repeated matter". However, if they choose to draw up a prospectus they can join both the *base prospectus* and *proportionate disclosure regime*. In addition, equity and non-equity securities with a *denomination per unit of at least EUR 100,000 offered to public* are exempted from the obligation of writing a prospectus, while admission to trading of non-equity securities with the same denomination per unit threshold can use the *wholesale prospectus*.

The comparison between the two regulations, in this case, is harder thanks to the detailed approach that they follow. However, while the *EU mostly alleviates the disclosure requirements for international debt issuers*, thanks to the related market importance in the EU, the *US lighter regime is general*. In fact, it does not discriminate the frequent issuer from the security category, between equity and non-equity, and does not provide safe harbours for specific markets. Nonetheless, *both of the two regulations aims are similar*, that are to reduce costs associated to raising capital through financial markets for frequent issuers. While the specific issuers admitted to the lighter regime are chosen thanks to the specific country market developments. In fact, in my opinion the US definition of frequent issuers (WKIs) is broaden because of the broaden developments of the US financial markets.
Finally, Form S-3 or Form F-3 and the proportionate disclosure regime are quite similar.

3.6. Specific US Safe Harbours

US prospectus laws specify further which communications must be deemed as offers and which not. This is a result of the broad definition of offers made by the SA and find no equivalent counterparty in the EU directive because it prefers a more specific and stringent definition of public offers and admission to trading on a regulated market.
In fact, as called by market participants and US authorities, US laws provide some safe harbours. Most of them state that some communications or notices are not public offers, while

3. Have filed for bankruptcy within the past three years, although ineligibility will terminate if an issuer has filed an annual report with audited financial statements subsequent to its emergence from bankruptcy.
4. Within the past three years, have been convicted of any fellony or misdemeanor under certain provisions of the Exchange Act.
5. Within the past three years, were made the subject of any judicial or administrative decree or under arising out of a government action that: prohibits certain conduct or activities regarding (includig future violations of) the US federal security laws, require them to cease and desist from violating the antifraud provisions of the US federal security laws or determines that they have violated those antifraud provisions.
6. Have had any registration statement subject to a refusal order or stop order within the past three years.

others are included in the offer definition but allowed to avoid filing with the SEC thanks to their particular nature.

Another reason is the different style used by the US prospectus regulation. In fact, while the PD and PR threat the obligation to advertise the offer or admission to trading as different from the obligation to draw up a prospectus, the US one mixes them all together.

Accordingly, the SA provides that any issuers that would make an offer, as defined by Section 2(a)(3), must fill its related documents with the SEC through a registration statement which includes the prospectus. Those documents, in some cases, are marketing materials that would deem as advertising one in the EU and consequently must comply with "advertising rules". The US includes them all in the offer definition and provide for all of them, at first glance, the obligation to be filled and verified by the SEC and at second glance, exempts some communications, public announcement, oral offers and notices from the abovementioned obligation. Resulting in helping the marketing process of the offeror.

First of all, *Rule 163A* provides to all issuers with a non-exhaustive safe harbour from the Section 5(c) of the SA prohibition on pre-filing offers for certain communications. Those must meet the following conditions:

3. Disclosed during the 30 days' period before the registration date.
4. The communication cannot refer to the securities being offered.
5. The communication must be made by or on behalf of the issuer, but cannot be made by the underwriter.
6. The issuer must take "reasonable steps within his control" to prevent the spill out of the communication before the registration date.

Secondly, *Rule 135* of the SA excludes certain public announcements of the planned offer from the filing obligation with the SEC. The notices that contain the following few information can be used at any time, before and after the registration date:

1. A legend.
2. The name of the issuer.
3. The title, amount and basic terms of the securities being offered.
4. A brief statement of the matter and purpose of the offering, without naming the prospective underwriters for the offering.

Thirdly, *Rule 168* of the SA, provides another safe harbour. Accordingly, any reporting issuers and some widely traded non-reporting Foreign Private Issuers (FPIs) can continue to disclose their "factual business information" and "forward-looking information", which not include facts concerning the offer, if are similar to the historical reporting of news. Specifically, disclose of Rule 168 information is permitted at any time only if they comply with the following:

1. The issuer has previously released or disseminated Rule 168 information in the ordinary course of business.
2. The timing, manner and form in which the information is released is materially consistent with similar past disclosures.

In addition, Rule 169 provides that non-reporting issuers can carry on disclosing their "factual business information" but not "forward-looking" ones if they are intended for customers, suppliers and other non-investors.

Finally, *Rules 137, 138 and 139* of the SA exclude from the offer definition the research reports about the issuer made by the underwriter during the sale process. The research reports are not considered as offers if they meet some specific requirements. In addition, Rule 139 permits to broker-dealers the publication of research reports about EGCs issuers in connection with common equity offerings.

4. Prospectus formats: final prospectus, red herring, pink herring and free writing prospectus

The US laws create a wide range of prospectuses types, that are tailored for specific issuers or offer kind features.

The range of *prospectuses formats* includes the following:

1. Final prospectus or Section 10(a) prospectus (Form S-1 or Form F-1).
2. Red herring or Section 10(b) prospectus or preliminary prospectus.
3. Short form prospectus (Form S-3 or Form F-3).
4. Pink herring.
5. Form S-20 prospectus.
6. Free Writing Prospectuses (FWPs) or prospectus supplements.

All written offers must fill with SEC using the required prospectus formats, if they do not fall into a safe harbour, for which, nonetheless, in some cases another document is needed. This obligation is mandatory if a corporation would sell its securities.

The "common format prospectus" is the *final prospectus*, also known as *Section 10(a) prospectus* because it is defined in the same SA article.

The final prospectus, if there are no other laws providing differently, is the only format that effectively allows the issuer to meet the *Section 5 prospectus delivery requirements* associated with actual delivery of securities after pricing. It can be either the unique format used in the registration statement or the second one, if filled after a *preliminary prospectus* or *red herring* or *Section 10(b) prospectus* has been filled with the SEC.
The final prospectus, also called *statutory prospectus* or *offering circular*, is complete in all details about the offering, which among other things includes:

1. Company history.
2. Management biography and compensation schemes.
3. Financial statements certified by an independent accountant.
4. Best-case and worst-case scenarios of company performances.
5. Company's properties and businesses.
6. Description of the securities being offered, including quantity and pricing.
7. Any other information required.

It is comparable, when drawn up as the unique one, to the single prospectus of the PD.
In addition, a final prospectus is needed for open-end mutual funds in order to provide investors of the sufficient information regarding the mutual fund performances, strategies, fee structure and so on. Recall that the PD includes closed-end mutual funds in their scope, while excludes open-ended ones.

Finally, *Section 6* of the SA details the SEC charges related to the offering, constructing a transparent and standardized way of computing the cost burden at company level. The fees are adjusted on an annual basis and do not find a comprehensive counterparty in the EU thanks to the different government system, which make for the EU impossible to provide a standardized fee structure. In fact, each Member States has its own fees.

For stocks and bonds a two stage process can be used. This involves at first the issuance of a preliminary prospectus, also known as red herrings thanks to the red ink used for the title or Section 10(b) prospectus thanks to its founding law. The red herring, which is usually used for IPOs, is used to shop the deal in order to see if there is interest in the offerings and includes all the final prospectus information besides the quantity and price of the securities.
In conjunction with an IPO, instead of the actual price of the securities being offered, a red herring must include a *bone fide estimate* of the price. The information must be in form of a price range with a maximum size of USD2 for ranges amounted at less than USD10 or 20

percent of the price otherwise. However, a final prospectus is mandatory for the actual delivery of securities.

The *preliminary prospectus* filed in Form S-3 or F-3 for foreign issuers is made available for *WKSIs* when using a *shelf registration format*. It is the equivalent of the sum of the *security note* and *registration statement* under PD or a *base prospectus* for non-equity securities issued by qualified credit institutions.

A *pink herring* is a short form notice with title print in pink ink, used when *EGCs test the waters*.
Form S-20 prospectus, instead, is a form used when the securities being offered are *stock options* and, as the pink herring, do not find a comparable counterparty format in the PD.

The US laws tailor the *prospectus supplement* format according to the type of additional information and the original prospectus to be amended. Moreover, there exist a *plethora* of different prospectus supplements formats, studied for the specific aim. For instance, frequent issuer can join the Short Form Prospectus Distribution System (SFPDS) when disclosing material information missing in the preliminary or final prospectus already registered and verified by the US market authority.
Generally, prospectus supplements, also generally known as *Free Writing Prospectuses (FWPs)* are needed when, *after the registration date*, the issuer or any guarantor acting on behalf of him, issues a *written offer* that falls into the offer definition of the SA or is a solicitation of the offer[240].
The information included in the FWP can be different by the one included in the registered prospectus but cannot be in conflict with the all previously disclosed information, either in the registered prospectus or any other formats required under the Exchange Act. Using PD words, the information must be consistent with the previously disclosed ones.
Finally, any post-filing oral offer does not trigger any addition disclosure requirements.

To sum up, again the US laws provides a more tailored-made framework than the European one concerning the prospectus formats. In my opinion this difference finds its motivations in three facts. First of all, the US financial markets are more developed than European ones. Secondly that the federal US government structure makes the regulators able to find a deeper level of detail, while the EU leaves some freedom at Member States level, reducing the

[240] Rule 405 of the SA.

harmonization at supranational level. Thirdly, the financial market crisis, even if damaged both the areas, started and was harder to solve in the US, than it was in the EU. However, the resulting recession was and is still deeper in EU.

5. Registration process

Section 5 of the SA distinguish the *registration process* in three different phases:

1. The pre-filing or "quiet" period.
2. "Waiting period".
3. Post-filing period.

The *pre-filing period* starts when the issuer or offeror or company decides to undertake a public offering. Usually the trigger is the conclusion of the contract between the company and the underwriter, typically an investment bank, which gives to the latter the mandate to manage the public offering. The "quiet" period ends when the company files the registration statements with the SEC.

During this period of time nothing that would be considered as an offer, under Section 2(a)(3) of the SA, is permitted. However, EGCs testing the waters activity[241], private placements[242] and exemptions from the definition of offer can take place in the so called "quiet" period. In addition, anyone involved in the public offering, cannot offer the securities during this period under Section 5(c) of the SA.

The *"waiting period"* starts when the company fills and makes public the registration statements with the SEC and ends up when the SEC declares the prospectus effective.

During this period, anyone involved in the public offering, can offer the securities but not sale them. However, according to Section 5(b)(1) and others provisions included in the same Section, only certain oral offers and, limited to specified investors, written offers can be made. For instance, a road show designed to comply with Rule 433 of the SA and ECGs testing the waters with QIBs and AIs are allowed during the "waiting period".

Finally, the *post-filing period* starts when the SEC declares the registration statements effective and ends up when the later of the following two conditions is meet:

[241] Section 5(d) of the SA.

[242] Section 4(a)(2) of the SA.

1. All the securities are distributed to the investors.
2. Expiration of the relevant prospectus-delivery period.

During the post-filing period the syndicate of underwriters can only sell the securities if they have already filled a final prospectus in the previous phase or they fill it in this phase, if the preliminary prospectus has already been effective for the SEC. The final prospectus must comply with the Section 10(a) requirements. In addition, advertisement of post-filings is limited during the post-filing periods. For instance, any additional material information must be disclosed in a properly designed prospectus supplement, while any oral offer is allowed.

6. Wrap up: different drivers

To sum up the differences between the US and EU prospectus regulatory frameworks are the level of detail adopted and the style.

However, those two differences are interconnected because the US laws style of defining offers in broad terms and include in the obligation all the offers kinds oblige the US regulators to increase the level of detail. In fact, a plethora of exemptions and derogations, specifically designed, are existent in the prospectus laws.

Finally, overall, it seems fair to argue that the disclosure requirements are higher in US than in EU, while the associated costs are generally lower and precisely published[243].

The differences, in my opinion, are driven by three facts:

1. Different state form[244].
2. Different development of financial markets.
3. Different impact of the 2008 financial crisis.

First of all, the US is a federal republic, while the EU is an international economic and politic organization with supranational elements[245]. This difference overall, makes for the EU harder to provide laws directly effective at national level and specifically designed than in US.

Secondly, as shown by the following three graphs[246], the development of financial markets is historically greater in America than in the EU.

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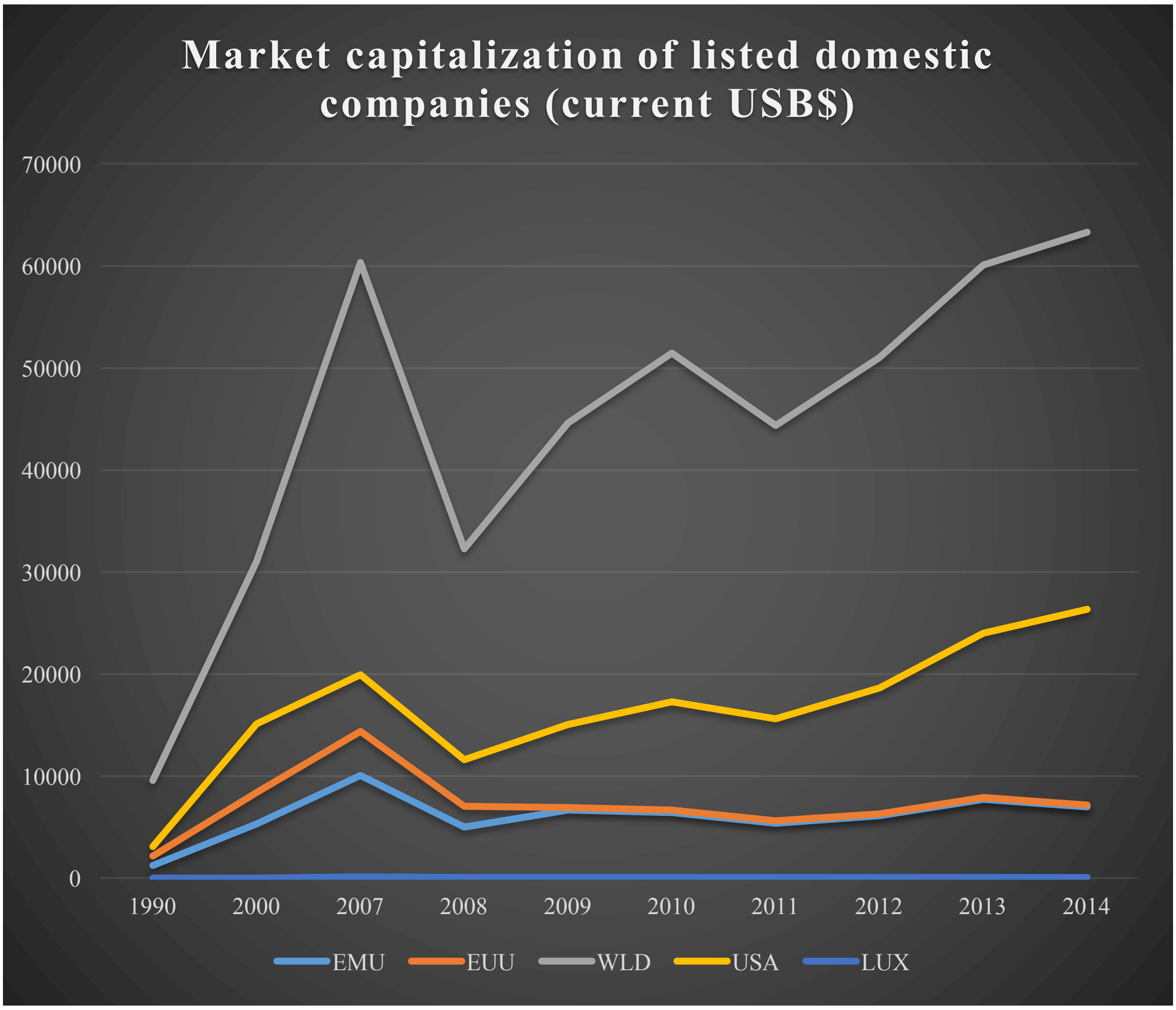
[244] I agree with the Romano opinion. For further details, see: ROMANO R., The Advantage of Competitive Federalism for Securities Regulation Washington D.C., Aei press, 2002 and ROMANO R., *The Genius of American Corporate Law,* Washington D.C., Aei press, 2002.

[245] For a complete description of the state forms see: KRASNER S., Approaches to the State: alternative conceptions and historical dynamics, 16 Comparative Politics 223, 1984.

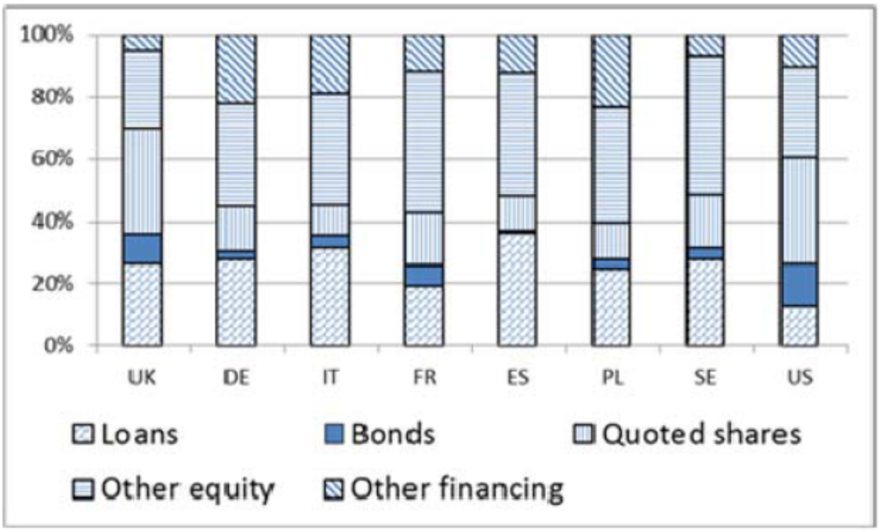
[246] Data source: World Development Indicators from the World Bank.

This, essentially makes the US more expert in dealing with the securities laws, note that the SA was issued in 1933. In addition, also the interconnection between the financial industry and the financial regulators is more durable, stable and profitable for both parts. Therefore, financial US regulators, in my opinion, have a greater knowledge of the different aspects of the financial industry, making them able to tailor-made their laws. Furthermore, the greater market cap of the US listing companies, make them easier to access capital markets, because they can afford to pay the related fees.



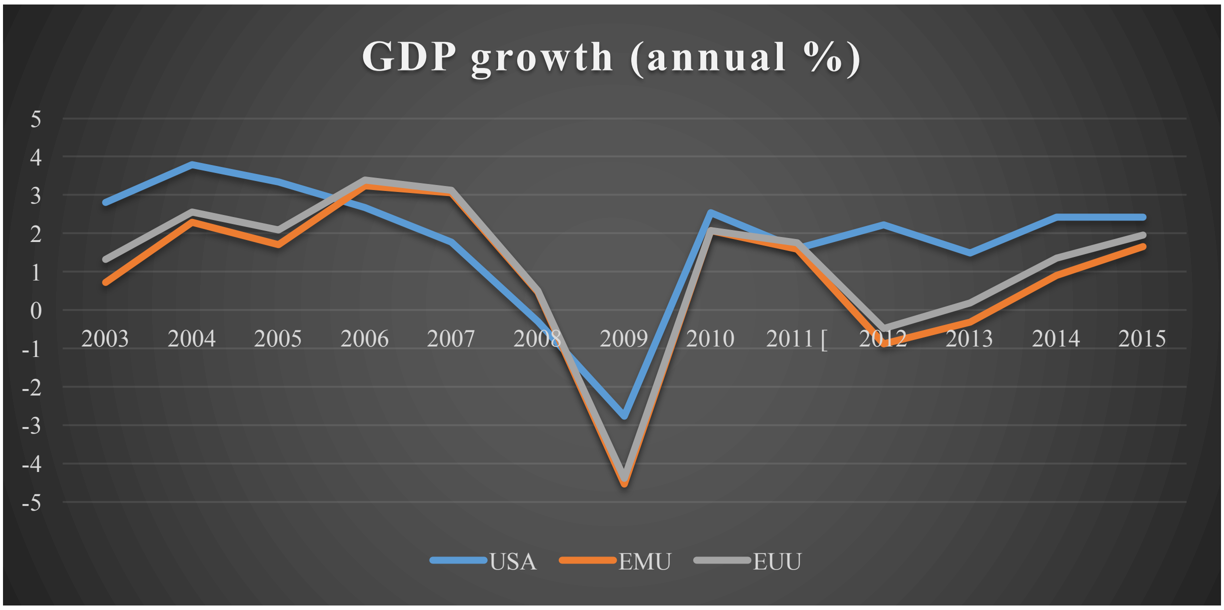
Finally, also the financing patterns of the companies in US are centred on the use of financial markets (market-based), while the EU companies still prefer debts as form of funding (debt-based) (see next graph).

Chart 3: Financing patterns corporates (in % of total liabilities)



Source: Eurostat, OECD. Note: Loans include bank loans and intercompany loans.

Thirdly, while, as shown by the following graph, the recession has been deeper in the EU than in US, the financial crisis started in US. Furthermore, most of the toxic financial instruments were made and bought by the US industry. Therefore, the regulatory and government work done and the diffidence in the financial market industry are still higher in America[247].



The subsequent regulations, which, *inter alias,* include the prospectus regulation is justifiably tougher.

[247] For a deeper study on the optimal EU regulatory framework see: DEAKIN S., Legal diversity and regulatory competition: which model for Europe?, 12 European Law Journal 440, 2006.

PART III

UPCOMING EUROPEAN UNION PROSPECTUS REGULATION

An empirical analysis of the new European Union approach: The Prospectus Regulation

1. Empirical based Methodology: Regulatory Impact Analysis

On 30th November 2015 the European Commission adopted a legislative proposal for the introduction of a "new" Prospectus Regulation. The Prospectus Regulation will replace the Prospectus Directive in order to overcome its drawbacks.

The methodology that I will use to describe this proposal is the Regulatory Impact Analysis[248] (RIA). An instrument which permits an ex-ante evaluation of the policies object of interest. Furthermore, RIA currently is a methodology used internationally in order to study the impacts of a given proposed law.

It was first introduced in US back in 1974[249] for the inflation-indexed impact assessment of a given policy in order to get an empirical grasp of the consequences of the policy introduction (Inflation Impact Assessment)[250].

In 1980s, under the Reagan government[251], the US extended the methodology scope, including in it the empirical study of both the positive and negative aspects of the policy (RIA). First of all, the Anglo-Saxon countries, such as Canada, Australia and Great Britain, followed the US and introduced the RIA in their policy making process. Then, in the 90s, RIA was adopted also in most of the European countries thanks to the suggestion made by the Organisation for Economic Co-operation and Development (OECD) in the "better regulation"[252] initiatives.

Nowadays roughly 35 OECD jurisdictions adopt RIA[253].

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[248] SALVI S., *Gli approcci alla valutazione nelle politiche di better regulation: la Regulatory Impact Analysis,* in " I paper dell'Osservatorio", Osservatorio sull'Analisi di Impatto della Regolamentazione, www.osservatorioair.it, Marzo 2013, P 1/2013. ISSN 2280-8698.

[249] Actually, a pioneer version of the RIA was introduced in Denmark in 1966 according to Jacobzone, 2007.

[250] *Inflation Impact Statements,* Executive Order 11821, 1974.

[251] *Federal Regulation,* Executive Order 12291, 1981.

[252] Among others see OCSE, *Report on Regulatory Reform,* 1997.

[253] Source: 2014 Regulatory Indicators Survey results, Measuring Regulatory Performance.

However, it is a recent method employed by the EU, which used to assess their policy just according to qualitative judgment made by jurists.

The RIA is a part of the policy making process and can lead both to stopping the law introduction or the further adoption. It is empirically based and, even if there are different ways to implement it, maintains a core structure. The OECD defines the RIA as an "information-based analytical approach to assess probable costs, consequences, and side effects of planned policy instruments (laws, regulations etc.)". It is employed in order to help the regulator to find the best policies according to the objectives, within the various options.

In addition, the actor in charge of making the analysis are the regulatory institutions. For example, the impact assessment of the proposed Prospectus Regulation, which is the main bibliography of this part, was made by an Inter-Service Steering Group, chaired by the Secretariat General comprised representatives from the following services of the European Commission:

1. The Legal Service.
2. The Directorates General for Competition.
3. Economic and Financial Affairs.
4. Financial Stability, Financial Services and Capital Markets Union.
5. Internal Market, Industry, Entrepreneurship & small and mid-sized enterprises.
6. Justice.
7. Trade.

The core structure of the RIA methodology is divided in four parts:

1. Problems and objectives definition.
2. Description, analysis and comparison of policy options.
3. Evaluation of policy options.
4. Third parties' consultation.

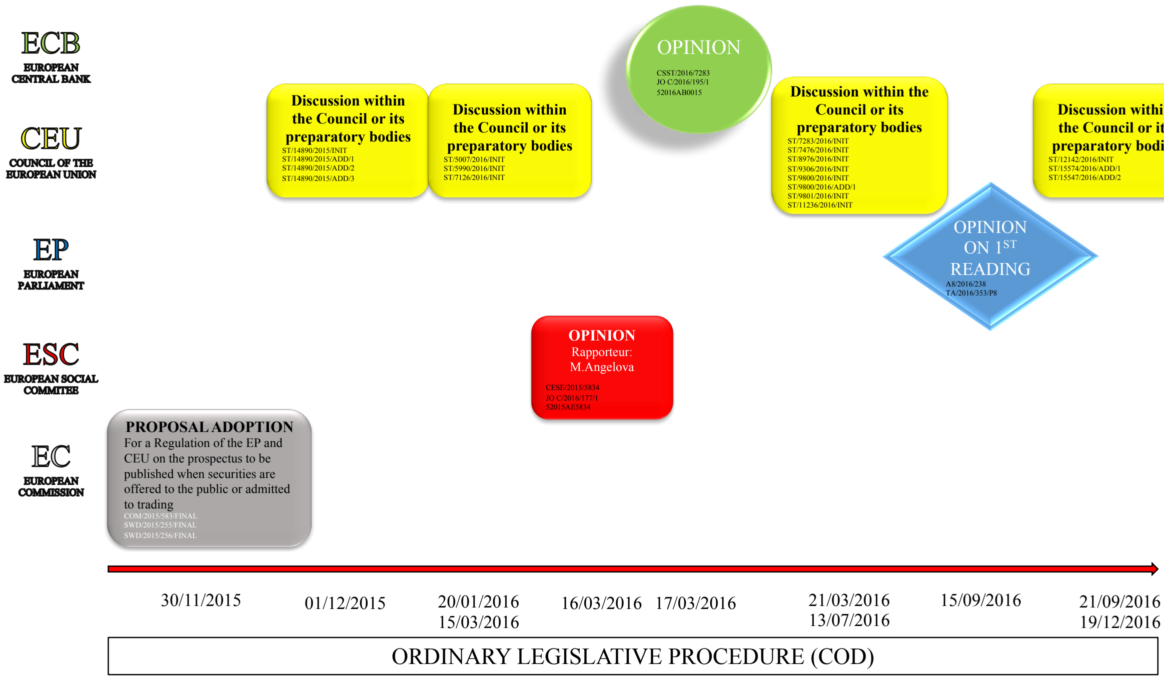
The first part identifies the problems of the existing regulatory framework according to the feedbacks received by external parties, for instance corporations, and the data collected during the period of validity. Then, problems are analysed in terms of causes and effects in order to find out which negative aspects should be mitigated by the upcoming law. In addition, the problems create a framework useful for the evaluation of the policy options. In fact, each policy must be evaluated according to its possibility to overcome the original regulatory problems.

The second part is devoted to the description of the policy specific options to modify the existing regulation. For the analysis, all the data and other materials available must be used. Finally, a "do nothing" option must be included in order to have a benchmark.

The third part must select a preferred option within the possible ones. The evaluation is between costs and benefits that directly or indirectly influence the persons falling within the regulatory scope. Costs and benefits are first of all computed in monetary terms, if possible, and finally in incremental ones from the existing regulation for each of the problems to overcome.

The final part, which usually is chronologically precedent to the others, is the consultation with all the persons, corporations and institutions having interest in the law. The most important consultation of interested parties employed by the European Commission in dealing with the Prospectus Regulation was an online one. The online consultation requested answers to a broad range of questions and gathered finally 182 participants.

2. Prospectus Regulation: State of Art



Source: www.eur-lex.europa.eu

The Prospectus Directive review is a part of the Capital Market Union[254] (CMU), a political, economic and juridical target of the European Union. The CMU, officially started with the issue of the relative action plan[255], wants to integrate capital markets throughout the European Union.

[254] For an overview of the CMU level of progress see: POLNER G. and J. RYAN, *Capital Markets Union: A work in progress*, European Policy Brief, No. 37, September 2015.

[255] EUROPEAN COMMISSION, *Action Plan on Building a Capital Market Union*, Brussels, 30/09/2015.

The economic theory background lies on the capital markets capability to provide a more efficient way of raising capital for the whole participants in the economic activity within the Union. In fact, during recessions the credit crunch, meaning the lack of credit available from the banking system, makes hard for the economy to recover if there is not available another funding source, as could be the case of capital markets. In addition, an integrated capital market provides advantages also in normal times. In fact, the different economic cycles and connected availability of resources of the different Member States can create, at individual level, problems in gathering any fund, or find cheap credit or find the appropriate level of risk return investments. An integrated EU capital market overcomes those problems, ultimately leading to a higher growth and job creation than would be otherwise.
After the monetary and banking union the new European objective is the Capital Market Union. Finally, the dependence of the European companies, especially the small and mid-sized ones on the banking system, and the on average small development of capital markets make the target more important and more profitable.

The Capital Market Union can be reached by adopting a series of reforms in the financial market regulation, such as the reform of securitizations and the review of the Prospectus Directive. At the moment, the process of the PD review is summarized by the previous table. Prior to the adoption by the European Commission of the proposal for a regulation of the European Parliament and council on the prospectus to be published when securities are admitted to trading or offered to the public (see chart), there was a consultation. The consultation targeted all the citizens interested, but preferred the answer of all the market participants who have already submitted a prospectus or with a high expertise in the field. Moreover, any data about the cost associated with the production of a prospectus or any other quantitative data were welcomed.
After the EC adoption, the ordinary legislative procedure (COD) started. At the moment the discussion is still in the first reading stage and in particular the EP has partially expressed its view on the review and the discussion is on-going in the council of the European Union (as you can see from the chart). In particular, the EP has already approved as amended a part of the proposal and made some new suggestions, specifically on the way in which the SMEs can be helped in raising capital. In fact, the EP proposed a EU Growth prospectus for SMEs.
To sum up, the process of reviewing the PD is still on-going and changes would probably be made from the original EC proposal. By the way, it is important, in the dissertation objective, to study the proposals and evaluate them presenting both the option preferred by the institution, and the one that seems better in my opinion. As you will see I will not disagree much with the EC, but I will use a critic approach in order to understand as much as possible all the possible outcomes.

The dissertation results show that the Prospectus Directive can be improved. The benefits from a review of the prospectus EU regulatory framework will bring monetary advantages for all the party involved.

3. The Prospectus Regulation: RIA

The RIA, I recall, is a newly used in EU, empirical method that assess quantitatively every benefit and disadvantages coming from new policies.

According to the internationally used RIA technique the following subparagraphs will be divided in three parts. The first one will introduce the drivers, problems and consequences of the in need of reform PD. Moreover, I will define the policy objectives according to the negative consequences caused by the PD drawbacks, which will constitute the measure for evaluating the specific policies. The second one will describe and compare the different specific reforms with the aim of overcoming the problems underlined in the previous part. The analysis will be based on the policy capability of overcoming the PD problems. The policy judgement follows an incremental scale, for instance a "+" means a positive effect of the policy on the object problem, while a "-" means a negative impact. Finally, the third part will evaluate all the policies previously analysed in order to make a judgment on the whole proposal, both in qualitative and quantitative terms, when possible. Nonetheless, the first subparagraph will describe quantitatively the prospectus activity in the EU from 2006 to 2014 because it will help the reader to give substance to the future quantitative context. In addition, all the data that will be presented, further will be taken for granted and used for the costs and benefits computation[256].

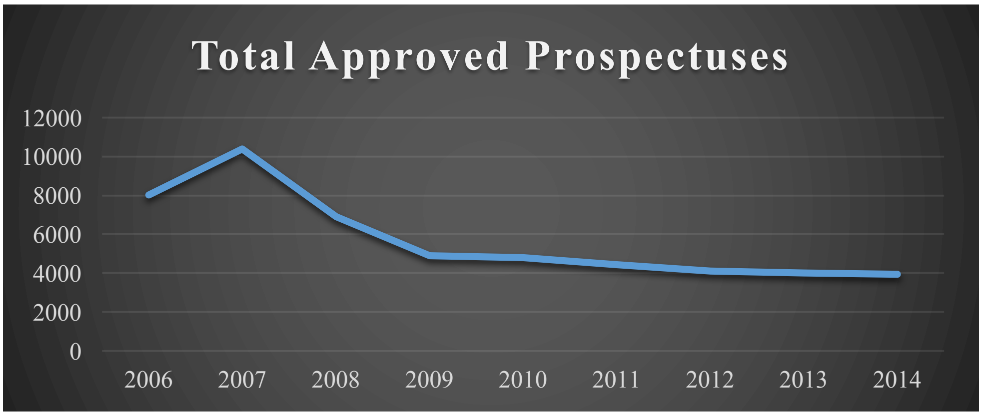
3.1. The Prospectus Activity in numbers

ESMA annually makes a report concerning the prospectus activity in the EEA countries. Accordingly[257], the total number of prospectuses approved annually in the EU, excluding prospectus supplements, has decreased since 2007, year when reached 10,392 approvals.

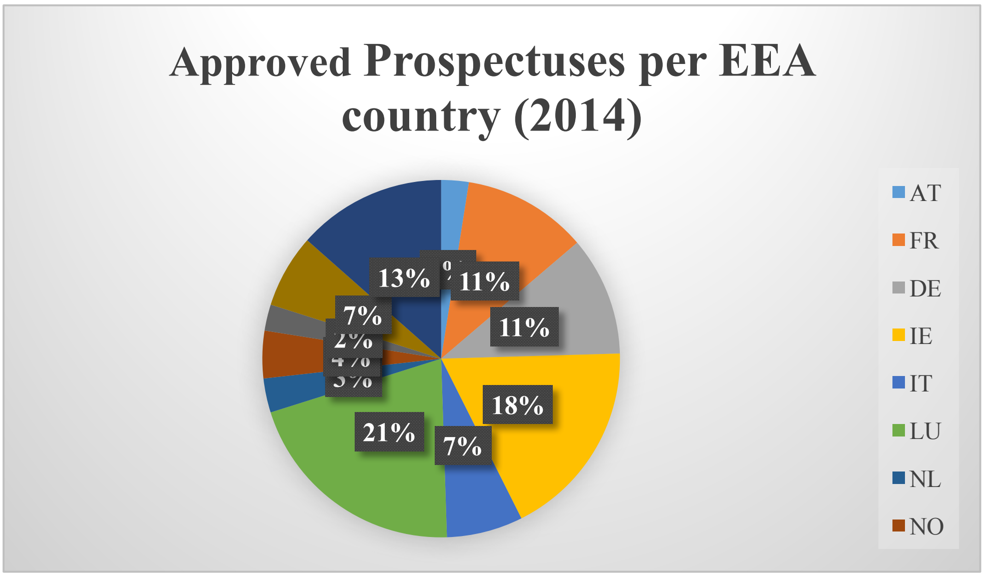
[256] If you prefer a quicker way of analysing the proposal see: MORRISON FOERSTER, *Proposed Overhaul of the EU Prospectus Directive*, Morrison & Foerster News Bulletin, Vol. 6, Issue 9, December 14, 2015.

[257] Data sources: ESMA, EEA prospectus activity in 2014, 2015; ESMA, ESMA Data on Prospectuses Approved and Passported January 2013 to December 2013, 2014; ESMA, ESMA Data on Prospectuses Approved and Passported January 2012 to December 2012, 2013; ESMA, ESMA Data on Prospectuses Approved and Passported January 2011 to December 2011, 2012.

Furthermore, since 2009 the curve is almost flat, reflecting the constant activity in terms of total number of prospectuses approved. In fact, **in 2009, 4,909 prospectuses were approved**, while **3,931 ones in 2014**. This phenomenon is surely caused by the financial crisis which depressed the number of companies able to tap the market and number of investors able to pay for their securities, but in part also reflects the limited capacity of the PD in ensuring the effectiveness of capital markets.



Secondly, the distribution of prospectuses per home Member States reveals that **most of the activity is concentrated in 9 out of 30 European Economic Area** (EEA) countries. In addition, just three countries, Luxembourg, Ireland and Netherlands competent authorities approved 42% of the total number of prospectuses approved in 2014.



Finally, recall that the whole EU Members plus Norway, Iceland and Liechtenstein compose the EEA.

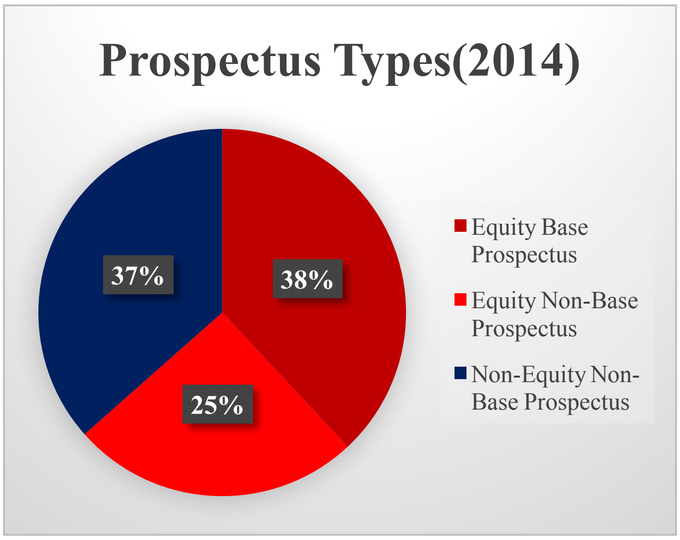
Thirdly, even if the data does not allow us to compare the period before the introduction of the PD with the later one, the passport regime, although imperfect, is widely adopted since inception, as shown by the following graph.

In particular, **the percentage of passported prospectuses is almost invariable**, reflecting that the proportion of passported prospectuses over the total does not depend much on the economic cycles and market conditions, making then fair to argue positively on the passport regime.

In fact, the percentage ranges from **20.4% in 2010 to 26% in 2011**.

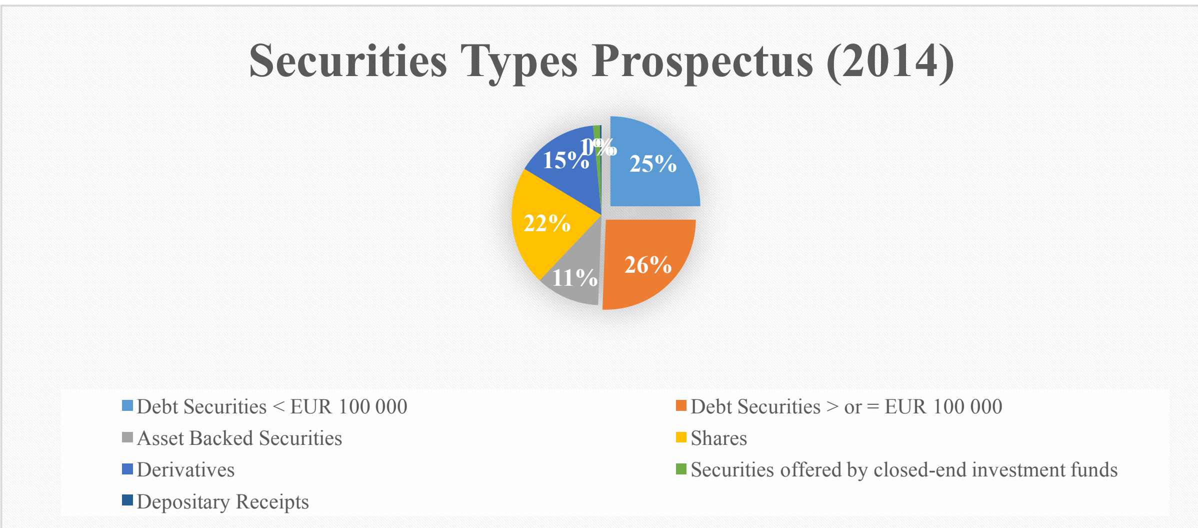
Fourthly, non-base prospectuses are the most used ones (62% of the total in 2014) and equity securities are the most common type of issuance with a 63%.

In addition, the most used type of prospectus is the non-base prospectus in conjunction with equity securities with a 38% of the total issued, according to ESMA data summarized in the following graph.



Finally, a deeper analysis of the securities issues type reveals that **debt securities are the most issued ones in 2014** and 22% of the total are shares. Derivatives count up to 15% of the total, while deposit receipts and instruments issued by closed-end investment funds are negligible.

Lastly, Asset Backed Securities (ABS) are 11.5% of the total, a low number which reflects also the stigma associated to it after the 2008 financial crisis. The EU with the introduction of Simple Transparent and Standardized (STS) securitizations is trying to revitalise this funding channel by incentivising a qualified subset of ABS, the STS.



4. The first part: Drivers, Problems, Consequences and Objectives definition

4.1. Drivers

The drivers of the PD problems, that make it in need of a reform, are the following:

1. Ineffective investor protection.
2. Regulatory framework inappropriate for SMEs and some securities.
3. Insufficient harmonization of the PD through Member States.
4. Inconsistency between the PD and the recent EU laws.
5. High cost of compliance with the PD.

The prospectus, including its summary is blamed to be drawn in order to avoid civil liabilities. The fact that legal fees are the most expensive costs connected with the prospectus somehow confirms the statement. Internal costs constitute 23% of the total, while audit costs and national competent authorities' fees on average account for a quarter of the total[258].

Cost type	Percentage cost
Legal fees	40%
Internal costs	23%
Audit costs and NCAs fees	25%
Others	12%

However, each Member State requires a different amount of payment in order to do their approval duties.

Furthermore, the prospectus and prospectus summary language style and length do not answer the investor needs, but are written in order to avoid any legal liabilities.

During the consultation all the investors agree upon blaming the prospectus summary to be too long, unwieldy and too comprehensive. Shareholders and other market participants also criticise the length and format of the summary which need to be translated when passported, resulting in increasing the total cost of compliance with the PD. The financial industry thinks that the prospectus summary is a sort of mini-prospectus which is not understood easily by the retail investors. Someone argues that retail investors actually do not read it at all.

[258] SWD(2015) 255 final.

The prospectus summary was intended to provide to investors concise and easy to understand, from a retail investors point of view, information about the product but in reality fails to do so. Adding up the inability of investors to understand the prospectus summary and its importance in assessing the investment makes it an essential part of the prospectus that need to be reformed in order to protect investors. In fact, if they do not understand it they will make investment without the proper knowledge requested by the PD.

Finally, although the prospectus summary is the PD major failure to protect investors, also the different Member State implementation of the directive makes them unable to build a financial knowledge and compare the investment opportunities.
To sum up the major causes of the investor protection ineffectiveness are the prospectus summary format, which was unhelpfully revised in 2010, and the different harmonization at country level.

The regulatory framework introduces a set of exemptions to draw up a prospectus or alleviation of the disclosure requirements for some specific type of securities or offers/issues.
However, in some cases the reward is inappropriate because creates troubles for some parts that outweighs the benefit for the entity entitled of the alleviation or exemption.
This is the case for SMEs and debt securities with a denomination per unit of at least EUR 100,000. In fact, the **proportionate disclosure regime is inappropriate for SMEs** because does not provide a sufficient reduction of the cost burden requested for incentivising the use of capital markets by small and mid-size enterprises. In addition, market investors view the use of the PDR as a bad sign of the company wealth.
In addition, **the exemption from the publication of a prospectus for debt securities with a denomination per unit of at least EUR 100,000** offered publicly and the alleviated regime for same type of securities trading on a regulated market for the OECD[259] **dries up the liquidity in the secondary markets and prevents small investors from buying it**.
In fact, the regime for the abovementioned denomination per unit debt securities issuance is inappropriate and need to be changed.

The PD implementation is heterogeneous through Member States. The phenomena were duly debated in the previous dissertation part, when the UK and France implementation were presented. In addition, the France passport regime too is an example of how costlier and trickier

[259]ÇELIK S., G. DEMIRTAS and M. ISAKSSON, *Corporate Bonds, Bondholders and Corporate Governance*, OECD Corporate Governance Working Paper, No 16, OECD Publishing, Paris, 2015.

things can get when implemented at national level. Another example is the different threshold applied in the different countries for the obligation to draw up a prospectus between a total consideration amount of EUR 100,000 and EUR 5 million.
Finally, there is not an IT-tool or database at European level that is comprehensive of all the prospectuses and advertising materials.

Another problem driver is the **misalignment between the PD and the new EU directives and regulations**. For instance, MiFID II defines SMEs as companies with a market capitalisation less than EUR 200 million, while the PD definition of companies with reduced market capitalisation sets the threshold at EUR 100 million. Therefore, when both of them apply to an entity, it is inconsistently regulated.

Finally, **the cost for complying with the PD is too high especially for small enterprises**. It is generally hard to estimate the cost of financing and is even harder to pin down the relative proportion associated to the compliance with the PD and the related prospectus build. However, the European Commission asked the Centre for Strategy & Evaluation Services (CSES) to estimate the cost of drawing up a prospectus, in all their formats. The results are summarized in the following table.

Type of prospectus	Average cost
Equity prospectuses	EUR 912,000
Non-Equity prospectuses	EUR 63,000
Base prospectus (continuous issue)	EUR 145,000
Supplement	EUR 19,000
Source: CSES estimates	

Prospectus published for selling equity securities purposes cost on average roughly EUR 1 million, non-equity prospectuses EUR 63,000. Base prospectuses used for several issues cost on average EUR 145,000 and supplements almost EUR 20,000.
In addition, some participants to the consultation gave other estimates, that according to their own words must not generalized, and ranges from EUR 10,000 to EUR 4 million for the maximum prices and from EUR 1,000 to EUR 3 million for the minimum one.

Type of prospectus	Maximum Average	Maximum Range	Minimum Average	Minimum Range
Equity prospectuses	EUR 1.3 million	EUR 10,000 - EUR 4 million	EUR 700,000	EUR 1,000 - EUR 3 million
Non-Equity prospectuses	EUR 500,000	EUR 10,000 - EUR 4 million	EUR 57,000	EUR 1,000 - EUR 3 million
Source: Consultation feedbacks				

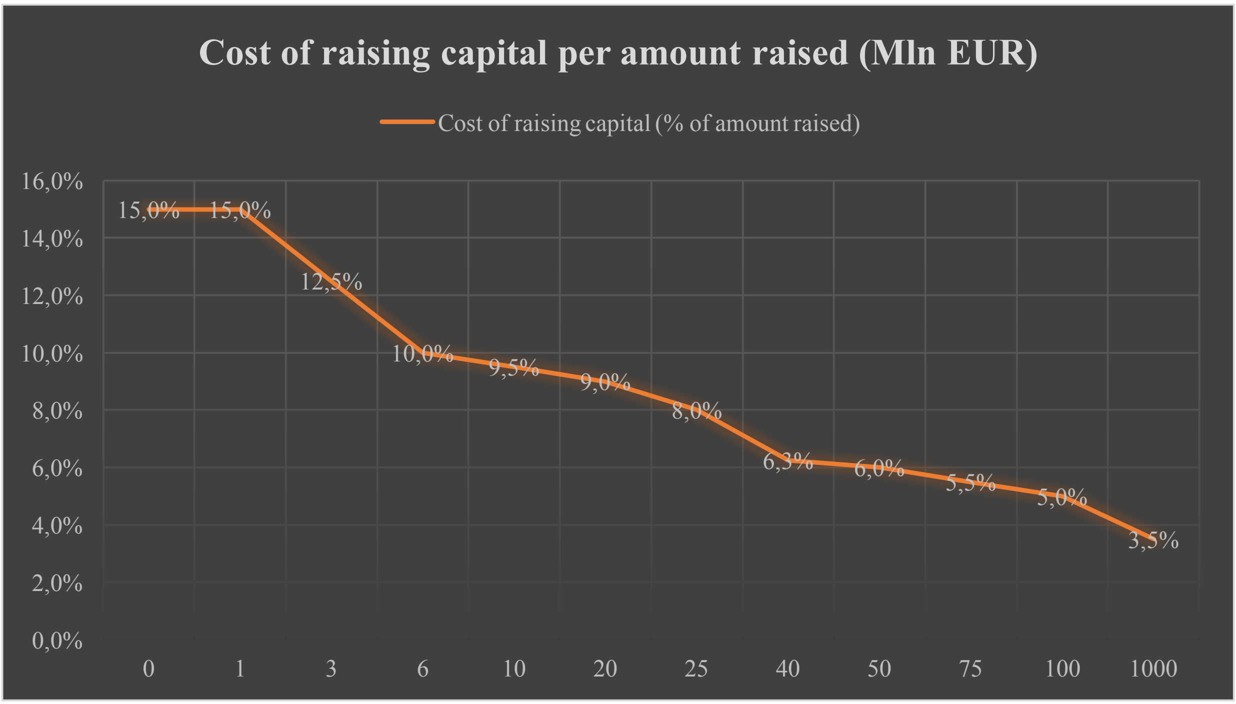
Nonetheless, consultation feedbacks are useful because validates the CSES ones. In fact, the averages are similar, EUR 1.3 million for equity prospectuses and EUR 500,000 for non-equity ones.

4.2. Problems

Those set of drivers contribute in making harder the integration, effectiveness and efficiency of capital markets in the EU. Moreover, the investor protection is not guaranteed in some circumstances. The drivers' negative outcome can be summarized in the following problems:

1. High cost of financing.
2. Differences in financing conditions between Member States and underdeveloped capital markets.
3. Limit access to capital for many SMEs.
4. Ineffective investor protection on capital markets, especially across borders.

In some Member States the cost of financing is too high, therefore creating a barrier to entry on capital markets for some types of companies. Thanks to the fixed costs of drawing up a prospectus the companies most blocked are the small ones. In fact, as previously shown, 40% of costs are legal fees which are fixed, meaning that do not change with the amount issued.
The statement is consistent with the total cost of raising capital estimates available. The following graph summarize all the available data on it.



The total cost of raising capital ranges from 3.5% of amount raised to 15% and has a negative slope. The negative slope reflects the negative relationship existent between the amount sold to the public or to investors and the total costs. This is caused by the fact that the **costs are for a majority part fixed**, therefore any issuer must pay them. Consequently, SMEs are disincentives to raise capital through capital markets because they usually raise low amounts.

The decreasing proportionality between amount raised and percentage costs is consistent also with the Federation of European Securities Exchanges (FESE) estimates of IPO costs.

Amount raised from an IPO	Cost of raising capital (% of amount raised)
< EUR 6 million	10% - 15%
EUR 6 million - EUR 50 million	6% - 10%
EUR 50 million - EUR 100 million	5% - 8%
> EUR 100 million	3% - 7.5%
Source: FESE	

Accordingly, SMEs pay from 10% to 15% of the amount raised when issue equity for the first time, while big corporations pay from 3% to 7.5%.

Finally, other estimates are presented in the next table.

All the available data confirm the decreasing relationship between the amount raised and the relative cost and provide cost ranges between 3% and 15%, so the reality must be nearby.

Data provider	Cost of raising capital (% of amount raised)	Cost of raising capital (EUR 5 mln amount raised)	Main Driver	Type of issuance
Deutsche Börse	7.6% - 9.7%	485,000 – 380,000	Stock Exchange Chosen	New issuance
FESE	3% - 15%	750,000 – 150,000	Size	IPO
Euronext	Average 7.5%	375,000	Unspecified	New issuance
Euronext	3.5% - 8.5%	175,000 – 425,000	Size	IPO
Ballpark	3.5% - 8.5%	175,000 – 425,000	Size	IPO

The EU capital market is underdeveloped compared to global average and there are **many differences between stock Member States markets**. The development of a given stock market compared to another is computed by the ratio between the outstanding financial assets, in market values, and the economic activity. This ratio in 2015, according to the IMF Global Financial Stability Report, published in April 2015, says that the EU stock capital markets are below the global average, which is a sign of underdevelopment. In addition, countries such as

Luxembourg, Ireland, the Netherlands and Denmark have capital markets more developed than the US. These two facts together conclude that there is the possibility of building up large stock markets in Europe, as they are already in place in some countries, and generally for debt. The integration of capital markets can help the achievement of a larger and more efficient EU market.

The SMEs do not use much equity capital markets for financing their operation. In particular, 20% of the total funding activity is in terms of equity, therefore SMEs rely heavily on the debt market credit availability, which is dependent on the economic activity. In addition, **only 3% of SMEs in EU are able to sell equity securities**, while in Hungary, Czech Republic and Portugal no small companies are able to do so. The fact that the majority of companies in the EU are small or medium sized, basically excludes the bigger part, in numbers term, of businesses from this funding source. Contrarily, the US companies primary source of money is equity. The reasons are various and the EU regulation, if in some circumstances creates problems for that companies, foremost incentivise them, but it is clearly not enough. The new prospectus regulation has the obligation to find another measure instead of the almost useless proportionate disclosure regime to help SMEs financing activity.

Finally, the investor protection is heterogeneously granted in the EU. When dealing with implementation, national country tradition and favourite perspective play a decisive role. In fact, there are different provisions regulating civil liability, right of withdrawal and others that provide a different degree of protection at the investor level. For instance, the France implementation protect heavily investors, carry on observing its tradition, while the UK prefers protecting the markets efficiency and integrity, as shown in the previous dissertation part. In addition, an effective Capital Market Union would help investors in meeting their target risk-return investment characteristics, time horizon, investment objective and risk diversification.

4.3. Consequences

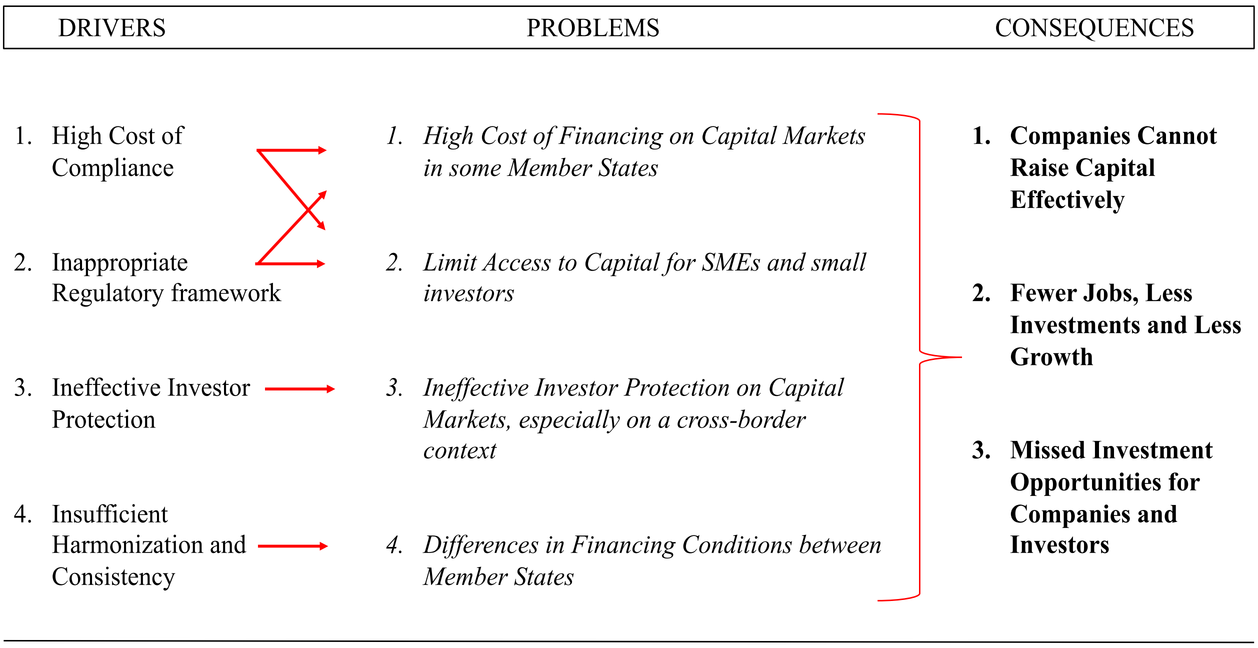
According to the European Commission “Impact Assessment” accompanying the prospectus regulation proposal, the abovementioned problems make capital markets unattractive for many companies, especially SMEs. The difficulties in finance their operation, especially through equity, translate in **less investments, fewer jobs and less growth in the EU**, inputs very important in the great stagnation.

The differences between Member States as well as the ineffective investor protection make investors reluctant to invest in securities in particular in those of other Member States.
Moreover, issuers are diffident in taping different from their own Member State. This home bias results in **missed investment and funding opportunities for investors and companies in the Union.**
Finally, although the PD is not the only one to blame for the fact that **companies cannot raise capital effectively**, it can be improved in order to overcome the problems that cause those consequences. To sum up the consequences are:

1. Companies cannot raise capital effectively.
2. Less investments, fewer jobs and less growth in the EU.
3. Missed investment and funding opportunities for investors and companies in the EU.

4.4. Objectives

The following scheme summarizes drivers, problems and consequences of the current EU



prospectus regulatory framework. According to the consequences the prospectus regulation proposal general objectives must ensure that companies can raise capital effectively, resulting in avoiding the loss of investment opportunities, therefore enhancing growth, jobs creation and investments.

Specific objectives would therefore be:

1. To reduce the cost of financing.
2. To achieve more convergence in the disclosure regimes for capital markets across Member States.
3. To improve access to capital markets for SMEs and companies with reduced market capitalization.
4. To improve investor protection on capital markets.

Finally, operational objectives are:

1. To reduce the administrative cost burden of compliance with the PD.
2. To make the regulatory framework for prospectuses more flexible and appropriate for the various types of securities and issuers covered, in particular SMEs.
3. To achieve more convergence in the application of the PD.
4. To better align the PD with the recent EU laws.
5. To make disclosure to investors under the prospectus regime more effective"[260].

5. Part two: Description, Analysis and Comparison of policy options

The part two will describe all the below mentioned arguments in order to overcome the problems, which have to below respective drivers.

Drivers: / Arguments:	High cost of compliance	Inappropriate regulatory framework	Ineffective Investor Protection	Insufficient Harmonization	Insufficient Consistency
1. Exemption thresholds	□□			□□	
2. Secondary Issuances	□□		□□		
3. High denomination per unit			□□		
4. Proportionate Disclosure Regime for SMEs	□□	□□	□□		
5. Prospectus summary	□□	□□			□□
6. Electronic Publication System				□□	

Source: SWD(2015) 255 Final

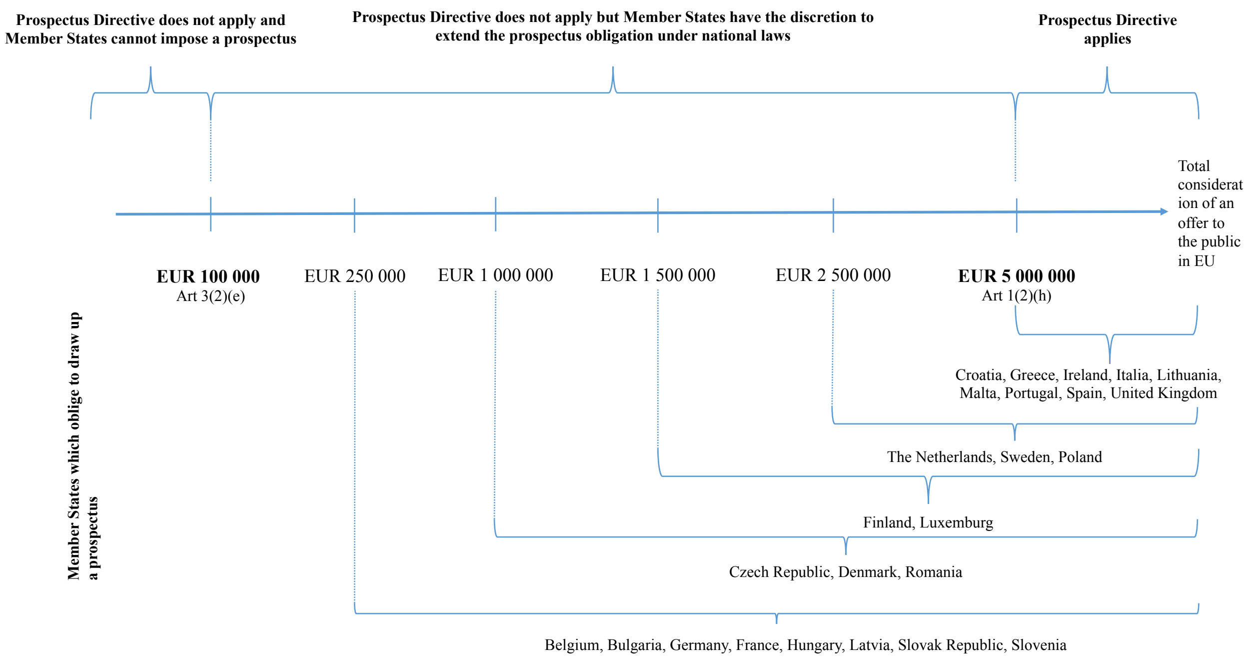
[260] SWD(2015) 255 Final.

Each argument corresponds to a part of the PD due to be amended in the proposed Prospectus Regulation. The content is foremost consistent with the impact assessment published by the European Commission Staff accompanying the proposal. Nonetheless with the available data and instruments I have tried to work out more specific estimates when possible.

The abovementioned arguments will be, first of all described, then analysed and finally compared in order to gauge the advantages and disadvantages in the following subparagraphs. Remember that the dissertation scope is to demonstrate that is possible to improve the current Prospectus Directive. Accordingly, the following paragraphs will quantify, when possible, the benefits of a new regulatory framework.

5.1. Exemption thresholds

The PD sets a number of exemptions from the obligation to draw up a prospectus. The



issuers/offerors entitled are delimited by articles 3(2)(b), 3(2)(e) and 1(2)(h). Accordingly, offers to public in EU with a total consideration below EUR 100,000 do not have to publish a prospectus and Member States cannot impose a prospectus. Contrarily, the PD applies for public offers with a total consideration amount above EUR 5,000,000. Between, those two thresholds the prospectus requirement does not apply but Member States have the faculty to oblige the publication under national law. As shown by the above graph, each Member State has taken a view about the size exemption threshold. The resulting framework is heterogeneous.

Finally, the prospectus requirement does not apply for offers and admission to trading limited to a maximum of 150 non-qualified investors for Member State.

5.2. Exemption thresholds: description of policy options

1. **Option 1** - "**Do nothing**": the exemption thresholds remain unchanged.
2. **Option 2** – "Raise the **upper threshold** under Article 1(2)(h)" from EUR 5,000,000 to EUR 100,000,000 leaving unchanged the ability of Member States to provide differently between the two thresholds and the 150 persons' limit.
3. **Option 3** – "Raise the **lower threshold** under Article 3(2)(e)" from EUR 100,000 to EUR 500,000 leaving unchanged the ability of Member States to provide differently between the two thresholds and the 150 persons' limit.
4. **Option 4** – "Raise the number of **non-qualified investors** under Article 3(2)(b)" from 150 to 300 persons for each Member State in which the offer takes place, leaving the others exemptions unchanged.

5.3. Exemption thresholds: analysis of policies impacts

Regarding **Option 1**, the consultation feedbacks and others lobby groups pointed out the followings. The threshold of 150 non-qualified investors must remain unchanged because it is already large enough to include all the private offers and issuers who a prospectus requirement would higher the cost burden to non-economically feasible levels, according to the Expert Group of the European Securities Committee (EGESC). In addition, 150 non-qualified investors and the EUR 5,000,000 upper threshold are a right balance between investor protection and cost burden for small issuances and offers according to stakeholders and the general view, which came up in the consultation.
An increase of the 150 persons' level to 300 would damage the investor protection for issuances which are properly designed to join the safe heaven by splitting the offer in many Member States. This is a possibility which has to be avoided.

Option 2: the second policy option wants to raise the upper threshold from EUR 5,000,000 to EUR 10,000,000, while maintaining for Member States the possibility to extend the prospectus requirements within the lower bound (EUR 100,000) and the new higher one.

Member States can, therefore, oblige offerors with a total consideration amount between EUR 5,000,000 and EUR 10,000,000 to draw up a prospectus or an alternative information document. At the moment 9 MSs have not decreased the upper threshold under national laws. For our purpose, seems then fair to assume that they will not do so even if the upper threshold will be EUR 10,000,000. In 2014, 9 MSs approved roughly 40% of the total number of prospectuses approved, while just 3% were offers with a consideration amount falling between EUR 10,000,000 and EUR 5,000,000. Assuming that the proportions will remain unchanged in the future, 1.145% of prospectuses annually would fall outside the scope of the regulation thanks to this option. Moreover, assuming that all the prospectuses included in the range are equity prospectuses this would translate in an **annual savings of EUR 15,500,000 for small offerors**.

The first assumption, which is that 9 MSs will not decrease the new upper threshold, is hard to discuss because no MSs has taken a public opinion with this regard. However, it is important to highlight that the possible introduction of an alleviated information document would decrease the potential cost benefit of the option or can also exceed the cost of an EU prospectus translating in a cost increase. In addition, the raise can get worse the harmonization within the EU because it leaves more powers at national level, possibly causing a more segmented regulatory framework.

The second assumption is downward biased because the new safe heaven would incentivise companies in raising funds through the capital markets, resulting in a higher than 3% proportion of prospectus approved in that range. Finally, it is hard to predict which kind of prospectuses will be published within that range. The most reasonable assumption is that they are all equity prospectuses, which increase the estimated cost saving but does not consider the probable increasing amount, resulting in an overall fair estimate.

In fact, large companies do not usually raise this small amount, while private companies, issuers traded on multilateral trading facilities, including SMEs might benefit from the lower cost of raising capital.

Conversely, the investor protection, especially for retail investors, is a bit damaged by the option because they will have less information about the new issues. However, retail investors do not commonly invest in high risky securities issued by small and unknown companies.

Finally, raising the upper threshold would provide more liquidity to the secondary EU markets, therefore increasing the efficiency of the market itself.

The option has support from trade associations and some market operators, which consist in a small section of the interested part.

Option 3: the amendment proposes to raise the lower threshold from EUR 100,000 to EUR 500,000. The option directly affects all the small offers which use as domestic Member State Belgium, Bulgaria, Germany, France, Hungary, Latvia, Slovak Republic and Slovenia and prevents others to oblige to draw up a prospectus for that small issuances.

The provision will make **zero the cost burden related to the compliance with the PD for most of the security based crowdfunding platforms**. In fact, 89% of funds raised through equity based crowdfunding platforms internationally between 2009 and 2011 were projects raising less than EUR 220,000. More recent researches show that the average is near EUR 250,000 and ranges from EUR 50,000 to EUR 1,500,000. On one hand, crowdfunding platforms would benefit from this law and will cheaply raise capital and probably will increase in popularity. On the other hand, investors will be less protected because will gather less information about the projects, which are nonetheless easier to understand than other financial products.

Option 4: the option consists in raising the number of non-qualified investors from 150 to 300. The aim is to provide a safe harbour for crowdfunding which typically tap more than 150 retail investors for each Member State in which the offer takes place. However, option 2 and option 3 together with a national implementation of the upper threshold generous to the offerors will include all the crowdfunding platforms without the need of changing the private placement regime.

Note that a threshold of 300 non-qualified investors per Member State would add up to 8,400 retail investors across the entire Union. If those investors will pay only EUR 2,500 on average, this would add up to more than EUR 20,000,000 of retail money collected without a legal requirement for appropriate disclosure.

This would exacerbate the original provision aim to protect private placements and would damage investors.

In addition, remember that the US has a lower threshold and has no intention in changing it.

5.4. Exemption thresholds: comparison of options

The below table summarizes option 2 and 3 impacts on issuer, estimated cost saving in annual terms and assumptions used in order to provide the final quantitative estimates.

I chose to cancel out option 4 because it is mostly damaging and useless if options 2 and 3 are introduced in the regulatory framework.

In fact, especially option 3 substitute the advantage coming from option 4, which is to help the development of the crowdfunding[261] market in the Union.

The crowdfunding is a new technological and innovative way of raising capital for specific projects. Investors know perfectly where their money will be used and can understand better than with financial products the underlying risks. Finally, sometimes the related projects have humanitarian or social aims and will gather money from investors sensible to those objectives. The resulting improvement of the crowdfunding market can then lead to positive externalities for the whole society.

Contrarily, the below table synthetizes the advantages and disadvantages of each policy option. Option 2, 3 and 4 help small issuers and offerors, making them able to raise capital cheaper than was possible with the PD. In particular, options 3 and 4 incentivise principally crowdfunding platforms, while option 2 heavily helps private companies and SMEs.

Impacts per stakeholders:

Options	Description	Issuer & Market affected	Assumptions	Estimated Impact
2	1. **Raise** the upper threshold **from EUR 5 000 000 to EUR 10 000 000**. 2. Maintain the ability of MSs to extend the prospectus obligation under the new threshold.	1. *Unlisted companies* and c*ompanies not listed on a regulated market*.	1. Same proportion of prospectuses approved in 2014 falling in the new threshold. 2. The MSs which have now an upper threshold equal to EUR 5 000 000 will have a threshold equal to EUR 10 000 000. 3. All the newly exempted prospectuses are equity prospectuses.	1. **1.145%** of newly approved prospectuses will fall outside the obligation to draw up a prospectus. 2. Cost savings equal to approximately **EUR 15 500 000**.
3	1. **Raise** the lower threshold **from EUR 100 000 to EUR 500 000**. 2. MSs cannot extend the prospectus requirements under the lower threshold.	1. *Unlisted companies* and c*ompanies not listed on a regulated market.* 2. Companies raising capital through *crowdfunding platforms*.	n/a	n/a

Source: SWD(2015) 255 Final plus personal adding

[261] But must crowdinvesting be helped by regulators? See HORNUF L. and A. SCHWIENBACHER, *Should Securities Regulation Promote Crowdinvesting?*, available at SSRN, June 11, 2015.

Companies with reduced market cap are usually growth companies for which a debt or a capital raise through equity can determine the existence of the company itself.

Thresholds: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: / *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2 (upper threshold)	*0*	+ +	*0*	-	*0*
3 (lower threshold)	*0*	+	*0*	*0*	*0*
4 (300 persons)	+	+	*0*	-	*0*

Source: SWD(2015) 255 Final

Therefore, the benefit to SMEs granted by options 2 and 3 will prevent job losses, help job creation and provide opportunities to the invention of disrupt products essential for productivity growth.

However, the benefit connected to option 2 depends on the behaviour of Member States which retain the ability to extend the PD scope towards offerors with a consideration amount ranging from EUR 5,000,000 to EUR 10,000,000.

The investor protection is damaged from all the options, but option 4 provides the greater problems. In fact, getting feasible to raising up to EUR 20,000,000 from the retail market without the need of disclosure of information damages too much investors. Contrarily, if Member States do not provide the disclosure of information through an EU prospectus or an another form one, investors have a slight deterioration of their protection under options 2 and 3. In fact, SMEs financial products are typically bought by qualified investors because they are risky, complicated and need a financial expertise which is uncommon to retail investors. In addition, crowdfunding platform, incentivised by option 3, provides independently information about the projects object of financing and the operation is usually easy to understand. Therefore, the investors protection added by the prospectus has less addition value than normal in such specific circumstances.

Finally, the efficiency and effectiveness of EU capital markets will profit from a greater amount of offers.

Taken account of all the above discussions the favourite options are 2 and 3, which raise the lower threshold from EUR 100,000 to EUR 500,000 and raise the upper threshold from EUR 5,000,000 to EUR 10,000,000.

The preferred options achievements related to the Prospectus Regulation objectives are summarized by the following table.

Thresholds: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2 (upper threshold)	+	+ +	0/−	+	+ +
3 (lower threshold)	+	+	-	+	+
4 (300 persons)	0	0	-	-	-

Source: SWD(2015) 255 Final

5.5. Alleviated regime for secondary issuances

Secondary issuances are offers of securities made by companies which have equity securities already admitted to trading through an IPO[262]. Those companies are known by the public thanks to the diffusion of information granted by the PD, at inception, MAD/MAR and TOD on-going. In fact, the TOD obliges public companies to disclose information regarding their activity at maximum on an annual basis. The information contains the annual financial report and others that overlap the disclosure requirements included in the prospectus.

As such, alleviating the regime and related cost burden for secondary issuances do not change the investor protection, but incentivise offers of securities.

The existing alleviations are two, the tripartite prospectus and the proportionate disclosure regime. The tripartite prospectus permits the use of positive market windows for offers who have already published a registration document. The companies, in fact, have to publish just summary and security notes which are easier and cheaper to construct than the whole prospectus. Right issues enjoy the benefit of the publication of a mini prospectus under the proportionate disclosure regime.

[262] The existing EU regulatory framework concerning IPOs is summarized in DANILOV A., *Initial Public Offering: the EU Prospectus Regime*, available at SSRN, University of Amsterdam, Amsterdam, 2016.

However, the existing regulation regarding secondary issuances missed the opportunity to develop the Capital Market Union and decrease the cost of complying with the directive without damaging investors. In fact, only 1.2% of the total prospectuses approved in 2014 were PDR for right issues.

The proposal tries to fill the gap.

5.6. Alleviated regime for secondary issuances: description of policy options

1. **Option 1** – "**Do nothing**": the alleviated regime for secondary issuances remains limited to right issues and shelf registration format.
2. **Option 2** – "**Abolish the admission prospectus when securities are already listed on a regulated market**": The Prospectus Regulation in this option will extend the current alleviated regime for all securities already admitted to trading on a regulated market. The related companies must comply with the TOD and MAD/MAR, therefore the prospectus contains information already made public. Accordingly, Article 4(2)(a) of the PD will be extended to all the type of securities, both equity and non-equity, and the dilution threshold eliminated. In fact, now the issuance of the same type of securities already listed on a regulated market can avoid the publication of a prospectus if they represent at maximum 10% of the existing float.
3. **Option 3** – "**Raise the dilution threshold** of Article 4(2)(a)": Under option 3 the dilution threshold is raised from 10% to 20% of shares of the same class already traded on the same regulated market, calculated over a period of 12 months. In addition, the securities object of the exemption is extended from only shares to all fungible securities.
4. **Option 4** – "**Alleviate the prospectus regime for all secondary issuances of securities**": The proportionate disclosure regime of Article 7(2)(g) of the PD, which alleviates the disclosure requirements for SMEs, right issues and qualified credit institutions, is extended to all secondary issuances. In addition, the mini prospectus needed to be published under the alleviated regime will be calibrated accordingly to the existing disclosure obligation under TOD and MAD/MAR. This would create a specific format for companies with reduced market capitalization and a specific one for all other secondary issuances, according to the already disclosed information.
5. **Option 5** – "**Universal registration document** and tripartite prospectus for frequent issuers": Option 5 will basically copy the tripartite prospectus format of France. In particular, all frequent issuers who have already securities admitted to trading on a

regulated market or a multilateral trading facilities can benefit from the new shelf registration format. This new regime, which includes all the companies with reduced market cap, reforms the registration document making it similar to the French *document de reference.* The registration document, which will be called universal registration document, is the most important part of the shelf registration. In fact, a registration document typical amounts up to 2/3 or 4/5 of the size of the full prospectus and generates the most discussion with competent authorities. Under a universal registration document, frequent issuers that have a registration document approved for three subsequent years will see a reduction of the time needed for the approval of the security and summary notes, from 10 working days to 5.

5.7. Alleviated regime for secondary issuances: analysis of policies impacts

Option 2: option 2 would alleviate significantly the cost burden for compliance with the prospectus directive for all the issuers who have securities already admitted to trading. The main disadvantage is the reduction of investor protection, because they will not receive for secondary issuances all the information contained in the full prospectus and not disclosed under TOD and MAR. Those are essential information, because, *inter alias,* they are about the issuer (shareholding structure, board practices, related party transactions, risk factors etc.), securities object of issuance (terms and conditions, risk factors, use of proceeds, etc.) and the admission itself (timetable, expenses, etc.). The importance of the abovementioned information makes this *tout court* provision useless for both issuers and investors. Investors would not gather the needed information in order to make an informed assessment of the offer, while issuers cannot publish properly their transaction.
According to the highlighted shortcomings the option will not pursuit further.

Option 3: the raise of the dilution threshold from 10% to 20% will incentivise secondary issuances, increase the secondary debt and equity markets liquidity, decrease the cost burden for secondary issuances and decrease investor protection. During the consultation, banks, stock exchange operators, association of issuers and some Member States argue in favour of this option. In addition, the 20% threshold would benefit SMEs that will be exempted for relatively big offers in value terms for them. However, for most of the companies in the EU an offering consisting in 20% of the total float, would severely change the capital and shareholders structure. Moreover, investors and stakeholders need information in case of an important company transformation, what will not happen in a lot of cases under this provision. In addition, the opacity of those secondary offers would undermine the purchase orders.

Option 4: this option is the best one because it fulfils the gap between the potential advantages coming from the misalignment between the PD and TOD/MAR. In fact, several advantages come from extending the scope of the proportionate disclosure regime to all secondary offerings and tailoring the mini prospectus format according to the existing on-going disclosure obligations. The option will decrease the cost burden for all secondary issuances, which will be forced to benefit from a mini format of prospectus, saving around 20% of the total costs. The 20% cost reduction is a *tout court* estimate, without any statistical background, but is far less than the 2009 estimates. According to the impact assessment issued in conjunction with the amendment introducing the PDR, 50% of the cost could be saved by the alleviated regime. In addition, investor protection is maintained constant thanks to the tailor made mini prospectus. In fact, any non-disclosed information, needed for investors to make an informed assessment of the transaction, will be disclosed in the mini prospectus.
The provision will increase the number of secondary issuances, resulting in an increased market liquidity and efficiency. Moreover, companies could raise capital more effectively and fund their operations easier than before.
According to Member States data, 1.2% of 2014 approved prospectuses were PDR for right issues and an average of 70% of all equity prospectuses were for secondary issuances (public offers made by companies already admitted to trading on a RM or a MTF). Equity prospectuses represent almost a quarter of the total in the EU over 2014 (935 prospectuses).
Assuming that the number of prospectuses that will be approved in the EU remain constant at 4,000 and that all the secondary issuances prospectuses will be equity ones. Note that the two assumptions are biased, one upward and one downward, because the new incentive will drive up the number of secondary issuances, while some non-equity ones will surely take place.
According to the assumptions, the expected PDR usage rate could be estimate at 17.5% instead of the current 1.2%, meaning 652 prospectuses on average a year.
For each of the 652 prospectuses EUR 182,400 will be saved by issuers, that account for a **total saving of EUR 120,000,000 per year on average**[263].

Option 5: the proposed provision to attach to the shelf registration format a reward if the registration statement is approved for three years in a row has been modelled from the French *document de reference*. If it happens the frequent issuer is rewarded by a fast track procedure

[263] Computed as follows: 4,000*(17.5%-1.2%)*EUR 182,400= EUR 120,000,000.

allowing him to have an answer regarding the summary and security note approval in less than 10 working days. The provision estimates an approval time at maximum of 5 working days. The provision can help frequent issuer in tap the market windows that they fell more positive for the offer outcome. In France, the universal registration document has been on operation for decades and around 350 issuers annually voluntarily files that document. According to ESMA estimates in 2014, only 20% of equity prospectuses (excluding IPO prospectuses) and 32% of non-equity prospectuses (excluding base prospectuses) were approved by competent authorities in less than 10 working days. In France those proportion are 50% and 55% respectively, also due to the widespread of tripartite prospectuses thanks to the reward attached.

Assuming that the prospectus approved in the EU will unchanged and that the universal registration document will mimic in the Union the effects produced in France, **370 equity prospectuses and 838 non-equity prospectuses will be approved in less than 10 working days**.

Without the introduction of this costless for investors and limited costly in terms of work for competent authorities the prospectuses approved in less than 10 working days were 150 and 493 respectively in 2014.

The provision would potentially lead to an increase by 146% for fast track approvals in the case of equity and by 70% in the case of non-equity.

5.8. Alleviated regime for secondary issuances: comparison of policy options

Impacts per stakeholders:

Options	Description	Issuer & Market affected	Assumptions	Estimated Impact
3	1. **Extend exemption** of admission prospectus of Article 4(2)(a) **to all fungible securities**. 2. **Raise the dilution threshold** from 10% **to 20%**.	*1. Issuers (including SMEs) listed on the same regulated markets issuing "more of the same".*	n/a	n/a
4	1. **Extend scope** of the **proportionate disclosure regime to all secondary issuances**.	*1. Issuers (including SMEs) listed on regulated markets or SMEs growth markets who occasionally offer securities to the public.*	1. Total number of approved prospectuses will remain stable at around 4,000. 2. All the prospectuses that will benefit from the option will be equity prospectuses. 3. The PDR decrease by 20% the total cost burden.	**Around EUR 120,000,000 per year**, saved collectively by issuers drawing up a PDR prospectus.

5	1. **Decrease by 5 days the approval time proceeds** for frequent issuers filing a universal registration document every year for three subsequent years.	*1. Issuers (including SMEs) listed on a regulated market or traded on MTFs (including SME growth markets) who frequently issue new securities/ offer them to the public.*	1. Total number of approved prospectuses will remain stable at around 4,000. 2. Benefits in EU equal to French ones.	**Increase by 146% and 70%** respectively in the number of equity and non-equity prospectuses approved by competent authorities in less than 10 working days, annually.

Source: SWD(2015) 255 Final plus personal adding

The above table shows the estimated impacts of options 3,4 and 5, the related assumptions and issuers and market affected. Instead, the following one present the impacts on stakeholders' relative to option 1.

Secondary Issuances: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2	+ +	+	+	--	*0*
3	+	+ +	-	-	*0*
4	+	+ +	+	+	*0*
5	+	+ +	+	+	*0/-*

Source: SWD(2015) 255 Final plus personal adding

As showed option 2 would significantly deteriorate retail investors while advantaging large and small issuers and wholesale investors, because of the *tout court* measure.

Option 3 evaluation is hard because issuers are preferred from investors. The impact of option 3 is different between mine and the European Commission one because they evaluate has insignificant the impact on investors, while I think that an offer that can potentially lead to a change in the shareholding structure would damage investors if not properly disclosed.

Also the other EU directives, such as TOD, tries to increase the transparency of company holdings by setting threshold for the disclosure, starting at low levels. The EU existing regulation is, therefore, in line with my opinion.

Finally, options 4 and 5 present only advantages, while being costly for authorities because option 5 obliges to work harder at competent authority offices.

Finally, the options achievement of objectives is summarized in the following table.

Secondary Issuances: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2	+ +	*0*	--	+	-
3	+	+	-	*0*	*0*
4	+	+	*0*	+	+
5	+	+	*0*	+	+

Source: SWD(2015) 255 Final plus personal adding

Accordingly, option 2 presents the higher reduction of administrative costs, while options 4 and 5 present a reduction of costs and helps SME in raise capital through financial markets. Furthermore, the latter two options increase the efficiency and effectiveness of financial markets, while option 3 has contrasting results. It reduces administrative costs and helps SMEs at the expenses of investor protection.

Differently from the European Commission, who choose also option 3, the favourite options are 4 and 5, meaning the extension of the PDR scope to all secondary issuances and the introduction of a fast track procedure called universal registration document.

5.9. Favourable treatment of issuers of debt securities with high denomination per unit

The PD provides a special treatment for non-equity securities with high denomination per unit. The provision partly caused a preference toward issuance of higher than EUR 100,000 denomination per unit in EU than in other part of the world, as the US[264]. The problem avoids the participation of the retail market to this products, that are, among other things, non-equity securities issued by investment grade companies and blue chip corporations. More specifically, Article 3(2)(d) exempts from the prospectus obligation equity and non-equity securities with a higher than EUR 100,000 denomination per unit offer to public. In practice this exemption, which excludes admission to trading on a regulated market, is used by issuers of non-equity securities traded on unregulated markets or by issuers of unlisted non-equity securities offered

[264] The upside unexpressed European bonds market potential and stakeholders' characteristics are described in CASEY J. and K. LANNOO, Europe's Hidden Capital Markets – Evolution, Architecture and Regulation of the European Bond Market, Brussels, cepS, 2005 and ÇELIK S., G. DEMIRTAS and M. ISAKSSON, *Corporate Bonds, Bondholders and Corporate Governance*, OECD Corporate Governance Working Paper, No 16, OECD Publishing, Paris, 2015.

to institutional investors through private placements which may then be traded over the counter. Furthermore, non-equity securities issuers when seeking admission on a regulated market enjoy the benefit of the wholesale prospectus[265]. The wholesale prospectus is cheaper than the full one because contains less information, does not need a summary and the related issuer has some flexibility regarding the choice of the language used to write it.

The EUR 100,000 threshold was intended by the EU regulators as a price protection for non-professional investors. In practice, it results in incentivising issuers and offerors in preferring high denomination per unit instruments than lower ones. This produced a detrimental effect on the retail market which is almost excluded from the debt market because retailers cannot afford to pay such amount. In addition, if they can afford to pay so they are not able to gather sufficient information in order to make an informed assessment of the operation.

Nowadays, this unintended regulatory effect is well known and a lot of investment grade bonds are issued in higher than EUR 100,000 denomination per unit, cutting out retailers from a safe and predictable source of income.

According to OECD data, about 70% of bonds listed in the Union have a higher than the threshold denomination per unit. The phenomena spread by the end of 2010, just a year after the introduction of the exemption and the wholesale prospectus; it cannot be random. In addition, in US the minimum denomination per unit is between USD 2,000 and USD 1,000, while in EU is next to the threshold. Retail markets are basically cut off from an important market for their protection than do not need any more, because good ratings and internationally known institutions issues financial products in that denomination.

The Prospectus Regulation has to solve a problem caused to the debt market by the PD.

5.10. Denomination per unit: description of policy options

1. **Option 1** – "**Do nothing**": both Article 3(2)(d) and Article 7(2)(b) remain in place. The unintended shortcoming produced by the EUR 100,000 threshold exemption for equity and non-equity securities public offers with a high denomination per unit and the wholesale prospectus for non-equity admitted to trading on a RM remains unsolved.
2. Option 2 – "Lower the threshold of Article 3(2)(d) from EUR 100,000 to an amount between EUR 50,000 and EUR 10,000".
3. Option 3 – "Remove the incentive to issue debt securities in high denomination per unit". Meaning abrogate both Article 3(2)(d) and Article 7(2)(b).

[265] Art. 7(2)(b) of the PD.

5.11. Denomination per unit: analysis of policies impacts

Option 1: If the existing favourable treatment for debt securities with a high denomination per unit remains in place, some problems will be unsolved. First of all, the debt market will remain distorted toward preferring higher than EUR 100,000 denomination per unit financial instruments. Secondly, retail investors will continue to cannot afford the purchase of debt securities, despite of the creditworthiness of the instrument and related issuers. The issuer in some case can be safer than the country government. Thirdly, the debt markets liquidity will remain damaged because volume traded is affected negatively by the instrument size. In fact, portfolio managers struggle to buy those securities for risk diversification purposes thanks to the high denomination[266].

Option 2: The diminishing threshold, from EUR 100,000 to an amount between EUR 50,000 and EUR 10,000 partly solves the debt market problems. Surely will lead to a decrease of the average denomination per unit issued in the debt market, helping restoring markets liquidity and volume traded. In fact, more issuers or offerors would be able to sell their securities to the financial markets, without paying more in administrative costs. The retail market would benefit from the provision just in part. They will afford the purchase of non-equity public offers if the denomination will be settle at EUR 10,000 but will not gather the needed information by the issuer. To sum up, it is hard to forecast an increase of retailers orders to buy debt securities if they can afford to buy just one or two financial instruments without knowing much about them. Moreover, non-equity securities admitted to trading on regulated markets will carry on benefitting from the wholesale prospectus. The debt regulated market illiquidity will remain and also the inaccessibility by retail markets.

Finally, portfolio managers would benefit from the lower threshold because they do not need prospectus to gather information and prefer lower amount to retain flexibility in constructing their portfolios.

Option 3: the proposal consists in eliminating both the exemption of Article 3(2)(d) and the alleviated regime of Article 7(2)(b). In particular, debt and equity securities offer to public with a higher than EUR 100,000 denomination per unit must comply with the obligation to draw up a prospectus. Moreover, non-equity securities issuers seeking admission to trading on a

[266] For further details on the risk diversification see: DEMYANYK Y., C. OSTERGAARD and B.E. SØRENSEN, *Risk sharing and portfolio allocation in EMU*, Brussels, European Commission, Economic and Financial Affairs, Economic Paper 334, July 2008.

regulated market must fill the full prospectus instead of the existing lighter disclosure requirements, known as wholesale regime.

The most likely results are multiples. Assuming that the higher costs of complying with the new Prospectus Regulation would not decrease the volume traded, the liquidity in debt regulated market and debt multilateral trading facilities will unchanged. Markets efficiency will then improve thanks to the higher investor base in secondary markets. In addition, the denomination per unit would become more "retail-friendly", maybe reaching an average of EUR 2,000 or EUR 1,000 as it is in US. The retail market will then be able to invest in the above market because they can gather the sufficient information through a full prospectus and because they can afford the payment. On the investors side, also portfolio managers can easier than now buy debt securities for their portfolio construction purposes, leading to more optimal portfolios than the one that they are able to build now.

On the issuers side the disadvantages comes from the higher disclosure requirements and the related higher costs burden. In fact, non-equity securities traded on a regulated market must draw a full prospectus instead of the wholesale one. Moreover, equity and non-equity securities offerors are no longer exempted from the obligation to draw up a prospectus. Nonetheless small issuers and to some extent large issuer can benefit from the higher investor base. In fact, they would easier than now sell their securities because the lower threshold would make able more investor to participate to the offer.

During the consultation, most of the Member States were in favour of maintain the favourable treatment for high denomination per unit because blaming other factors than the PD for the spread of high denomination per unit debt issuance. Contrarily, stock exchange operators and portfolio managers agree upon the new regime.

5.12. Denomination per unit: comparison of policy options

Denomination: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2	+ +	0	+	0	+
3	0/−	0/ +	+	+ +	0

Source: SWD(2015) 255 Final plus personal adding

Option 2 advantages both large issuers and offerors and wholesale investors. Because the lower denomination threshold makes issuers able to issue more securities and wholesale investors to buy them more and choose more flexible investment strategies.

However, the lower threshold, even if set at EUR 10,000, will not make retail investors better off because they lack the sufficient information to make an informed assessment. Small issuers would be indifferent because the lower threshold is insufficiently high.

On the contrary, option 3 probably will solve the problems created by the PD regarding the favourable treatment of high denomination per unit debt securities. This treatment distorts the market making available to investors only higher than EUR 100,000 denomination per unit instruments. The proposal would create benefits for all the party involved, besides large investors. As previously shown, investors, especially retail ones, would benefit because finally able to participate to the debt market in which there are investment opportunities feasible for all the risk-return characteristic investor types. Small issuers, instead, would be able to sell their securities because the high threshold, in some cases, created a barrier to entry the market. For instance, a company with EUR 5,000,000 as market capitalization under the PD in order to raise EUR 1,000,000 of corporate bonds must issue at minimum 100 bonds while, with the proposal, this number can be multiplied by a factor of 100, making them able to choose the right strategy to maximise the expected proceeds.

Impacts per stakeholders:

Preferred Option	Description	Issuer & Market affected	Assumptions	Estimated Impact
3	1. **Unify the disclosure regimes** for retail and wholesale non-equity securities admitted to trading on a regulated market. 2. **Remove the prospectus exemption** of Article 3(2)(d) for denomination per unit of EUR 100,000 or more.	*1. All issuers of non-equity securities, whether traded on RMs, MTFs or offered through private placements.*	n/a	Lower denomination per unit issuance of debt securities (in the order of EUR 2,000 or EUR 1,000 as happens in US), retailers are able to invest in debt markets, liquidity and efficiency increase.

Source: SWD(2015) 255 Final plus personal adding

The above table summarizes option 3, while the below table shows the option 3 achievement of objectives.

Denomination: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2	+	*0*	--	*0*	-
3	-	*0*	+ +	+	+

Source: SWD(2015) 255 Final plus personal adding

The preferred option is option 3, meaning remove completely the favourable treatment for high denomination per unit debt securities.

5.13. Reforming the proportionate disclosure regime for SMEs

The SMEs PDR established in 2010 by the Directive 2010/73/EU was only used in 143 prospectuses in 2014 in the Union, representing a mere 1.8% of the total number of prospectuses approved[267]. The consultation feedbacks pointed out that the lighter disclosure regime reduces insufficiently the information disclosure. Consequently, most of SMEs prefer to draw up the full prospectus. In addition, the ones that decided to use the mini prospectus find out that investors look at them with suspicion, because they fear than SMEs want to hide some crucial information. The stigma of using the PDR is, therefore, greater than the pros coming from the cost reduction associated with the alleviated regime. Taken into account the fact that in the EU most of the companies are small, the difficulties for them to find resources through capital markets must be a major concern for the EU authorities. In fact, the SMEs reliance on bank credit and the fixed nature of compliance cost with the PD, as previously showed, must be mitigated by some favourable regulatory treatments. If worthy, the regime can help SMEs in finance their operation through capital markets, resulting in greater growth opportunities, job creation and innovations.

[267] Other SMEs problems in gathering funds from capital markets are underlined in OICV-IOSCO, SME financing through capital markets final report, France, July 2015.

5.14. Reforming the proportionate disclosure regime for SMEs: description of policy options

1. **Option 1** – “**Do nothing**”: the proportionate disclosure regime for SMEs remains as it is, with the related problems.
2. **Option 2** – “**Design a new PDR for SMEs**”: the new proportionate disclosure regime would be designed reducing further the disclosure requirements and the related cost burden but just for unlisted SMEs and SMEs traded on MTFs (including the new category of SME growth markets). It will not be available for SMEs traded on regulated market in order to avoid the existing stigma.
3. **Option 3** – “**Modified Alternative Presentation (MAP) prospectus**”: introduce a new standardize prospectus format for unlisted SMEs and SMEs traded on MTFs (including the new category of SME growth markets). This format will be in the form of a prospectus template containing standardised language which SMEs could then complement with their individual issuer / issue-specific information. This format would create a distinct approach to prospectuses for SMEs as they would “fill in” a prospectus instead of draft it from scratch. The MAP prospectus would also contain guidance on how to fill in the specific information. In addition, ESMA and national competent authorities will develop a tool that assists the SMEs in computing it. Member States cannot ask the usage of intermediaries assisting the SMEs in the prospectus building process. The format will be surely easier to compare and understand for investors, in particular non-qualified ones. The MAP prospectus is optional and cannot be filled by SMEs traded on regulated market in order to avoid the replication of the stigma, already existing for the SME PDR.

5.15. Reforming the proportionate disclosure regime for SMEs: analysis of policies impacts

Option 2: which change the PDR for all SMEs, besides SMEs traded on regulated markets, decreases the cost burden for unquoted SMEs, while avoiding the stigma associated with the existing PDR. To provide an estimate of the cost savings for SMEs which will use the new PDR we need the following assumptions, because we do not have data enough to provide a better estimate:

1. Total number of approved prospectuses will remain stable at around 4,000.

2. All the public offers carried out by companies traded on MTFs/SMEs growth markets are made by SMEs or companies with reduced market capitalization.
3. The PDR costs EUR 700,000 and the new PDR reduces the costs by 20%.

Impacts per stakeholders:

Options	Description	Issuer & Market affected	Assumptions	Estimated Impact
2	1. **A new PDR for SMEs** with less information disclosure requirements for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets).	*1. Unquoted SMEs and SMEs traded on MTFs (including SMEs growth markets).*	1. Total number of approved prospectuses will remain stable at around 4,000. 2. All the public offers carried out by companies traded on MTFs/SMEs growth markets are made by SMEs or companies with reduced market capitalization. 3. The PDR costs EUR 700,000 and the new PDR reduces the costs by 20%.	Around **EUR 45,000,000** per year, saved collectively by SMEs drawing up a mini prospectus under the new PDR regime.
3	1. A **MAP prospectuses** (questionnaire type) optional for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets) .	*1. SMEs and companies with reduced market capitalization (< 200 million euro) traded on MTFs.*	1. All the option 2 assumptions. 2. Half of the companies benefitting from the SME PDR would choose the MAP format. 3. The MAD decrease by 30% the total cost burden, because no legal fees will be (accounting for 40% of the total costs) and internal costs will be higher by 10%.	Around **EUR 34,000,000** per year, saved collectively by SMEs drawing up a MAP prospectus.

Source: SWD(2015) 255 Final plus personal adding

The cost of the PDR SMEs prospectus comes from the minimum average costs presented during the consultation.
The resulting costs saved are around EUR 45,000,000 annually, thanks to the provision.

Option 3: which provides the introduction of the MAP prospectus for the same companies falling under the PDR SMEs scope, results in an **annual estimated cost saving around EUR 34,000,000 saved collectively by SMEs**.
The estimation needs the same option 2 assumptions plus the followings:
1. Half of the companies benefitting from the SME PDR would choose the MAP format.
2. The MAP decreases by 30% the total cost burden, because no legal fees will be payed (accounting for 40% of the total costs) and internal costs will be higher by 10%.

The positive impact comes from the standardized format of the MAP prospectus, which together with the help ensured by national competent authorities and ESMA will almost eliminate the legal fees associated with the prospectus.

Moreover, note than for SMEs legal fees are a high barrier to entry because usually they have to externalise this service because they do not have an internal law area. The saved costs translate partly in an increase of internal costs, because the process is internalized. However, the total effect is positive for SMEs because they will be able, under the MAP prospectus, to tap the market easier than before, resulting in less cost burden and more investor friendly disclosure format.

5.16. Reforming the proportionate disclosure regime for SMEs: comparison of policy options

Options 2 and 3 do not provide any disadvantages because solve the stigma problem with the first proposal and introduce an optional standardized regime in the second case.

PDR and MAP: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2	*0*	+ +	+	+	*0*
3	*0*	+ +	+	+	-

Source: SWD(2015) 255 Final plus personal adding

Just competent authorities and ESMA have some disadvantages on account of the fact that they must develop some tools to help the filling of specific information in the MAP prospectus. In addition, administrative authorities must get used to the new format but comprehensively the costs are minimal and the training easy.

On the small issuers side the advantages are multiple. They can cheaply and without the need of an external company comply with the directive in the MAP case, while disclose less information in the new PDR one. This would produce an increase of volume offered by companies with reduced market capitalization.

On the investors side there are also advantages. In fact, they can benefit from the increasing offer and the standardized way in which information will be published. The new PDR summarizes the needed content in a shorter and easier to understand format, while the MAP prospectus provides the more transparent way of going public ever made in the Union.

Through time it is supposed that investors will gain skills in comparing more easily the investment opportunities of SMEs thanks to the MAP, potentially leading to a better understanding of that market and a resulting increase in demand. Those options get a step toward the end of almost complete reliance of SMEs on bank credits, that depend on the economy conditions, as clearly showed in the 2007 financial crisis[268].
Finally, the CMU objectives are achieved by the proposal provisions, in particular concerning the SMEs access to capital markets and administrative burden reduction.

PDR and MAP: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2	+	+	*0*	+	+
3	+ +	+ +	+	+	+

Source: SWD(2015) 255 Final plus personal adding

Nonetheless, investor protection is getting better and the efficiency of the markets improved. Finally, the provisions plausibly will have a tangible effect on the economy. The cumulative estimated impact of the provisions is a **total annual saving of EUR 79,000,000 for SMEs**. The favourite options are thus, options 2 and 3 together, meaning the introduction of a new PDR for SMEs and the introduction of the MAP prospectus.

5.17. Prospectus summary and the Key Investor Information Document under the Package Retail and Insurance-Based Investment Product Regulation

The prospectus summary is commonly deemed as inadequate for its purpose. In fact, during the consultation the majority of responded ask for a summary reform and Member States during the Expert Group of the European Securities Committee (EGESC) too.
The summaries problems are, the huge length and the hard accessibility for the average investor thanks to its generic and technical language. Furthermore, the overlap between the prospectus summary and the Packaged Retail Investment and Insurance-based Investment Products (PRIIPS) regulation, which will become applicable on December 31st 2019. For issues of derivatives, convertible bonds, open-ended mutual funds and others a Key Information Document (KID+) is required under the PRIIPS.

[268] The financial crisis started thanks to the subprime mortgage market failure. For further details about, inter alias, the errors made by the law see: BAR-GILL O., The law, economics and psychology of subprime mortgage contracts, 94 Cornell Law Review 1073, 2009.

5.18. Prospectus summary: description of policy options

1. Option 1 – “Do nothing”
2. **Option 2** – “**Reduce length of summaries**”: Change Article 24(1) moving the ceiling from 7% of the whole prospectus length to 5% or 10 pages.
3. **Option 3** – “**Free form summary**”: Change the regime by allowing the issuer to decide their way of writing a prospectus summary according to some principles. The summary must be presented in a fair, balance and understandable for the average investor way. In addition, a length limit must be introduced.
4. **Option 4** – “**Redesign the summary as a KID+**”: The KID+ would focus on the most important information of the offer. The new summary must be presented in a fair, balance and understandable way for the average retail investor, instead of the average one. Its length must be limited to 6 A4 pages, which is longer than a KID+ under the PRIIPS but shorter than the current prospectus summary. Basically it will contain the KID+ information plus additional offer specific ones, such as the term offer, securities types and company overview. The format must be user-friendly. Accordingly, sections would answer some specific questions, such as “What are the key risks specific for the issuer?” and “What are the essential facts relevant to the offer/issue?”. Finally, any issuer who must comply with the PRIIPS can copy and paste the KID+ in order to draw up a prospectus summary.

5.19. Prospectus summary: analysis of policies impacts

Option 1: leaving the prospectus summary format constant will unchanged the current problems and do not overcome the future overlap problem with the PRIIPS Regulation, which will entry into force in 2019.

Investors will carry on ignoring the summary because too long and hard to understand. The compliance costs are too high compared to the usefulness of the document. The prospectus summary is in need of a reform.

Option 2: reducing the length of the summary to 10 pages can produce some quick wins and related benefits but would be an insufficient reform over the long run.

In fact, the length problem would be solved but the technical language will remain in place leaving it harder accessible to the average retail investors. The cost burden is reduced, especially for SMEs.
In addition, it does not address the overlap problem with the PRIIP.

Option 3: a free form summary will reduce further than option 2 the cost burden at company level, especially for SMEs. The issuer/offeror can tailor made the summary content in order to address the target investors, on average resulting in a more comprehensible summary language. However, the investor protection is not guaranteed by the law but by the issuer/offeror, that would decide for each case which degree of technical language to use. The comparability of prospectuses summaries will be damaged and the overlap problem not addressed.

Option 4: the KID+ style prospectus summary will overcome all the current prospectus summary problems. It will be shorter than now, a limit of 7% of the whole prospectus length versus 6 pages, more comprehensible, switching from the average investor target to the average retail investor and easier and cheaper to build. In fact, any issuer complying with the PRIIPS can copy and paste the KID+ into the prospectus summary, reducing the cost of writing down a prospectus summary. The format would be easier to understand by a retail investor thanks to the user-friendly headlines and the descriptive language.
Finally, the KID+ format will increase the comparability of investment opportunities thanks to its standardized style and the misalignment between the PD and PRIIPS will be solved.

5.20. Prospectus summary: comparison of policy options

Prospectus summary: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2	*0/ +*	*0/ +*	*+*	*0/ +*	*0*
3	*0/ +*	*+*	*+*	*0/?*	*0*
4	*+ +*	*+ +*	*0*	*+ +*	*+*

Source: SWD(2015) 255 Final plus personal adding

Option 4 produces advantages basically for all stakeholders. In fact, retail investors would benefit from an easier to understand and compare format, resulting in actually reading the prospectus summary. Issuers and offerors will pay less for writing the summary and competent authorities would lose less time in reviewing it. Wholesale investors are indifferent because they already understand the current format of prospectus summary.

Contrarily, option 3 will slightly improve the current framework, both reducing the cost for issuers and offerors and decreasing the time consuming for reading it at investor level.
Option 3 will likely advantage issuers and offerors and wholesale investors, while is not clear the effect on retail investors.
The free form summary, in fact, will make offerors able to address the target investor needs, who will be likely to be wholesale ones, who buy the majority of the new issuance securities, generally.

Finally, even if both option 2 and 4 achieve all the proposed regulation objectives, **Option 4 is the preferred option**, because it addresses also the overlap problem with the PRIIPS regulation and provides a new comprehensive and standardize framework for the prospectus summary. The **new KID+ summary** format will likely produce benefit for capital markets through time and provide a way of gaining competence and skill for retail investors[269].

Prospectus summary: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2	+	+	+	+ +	+
3	+	+	?	-	0
4	+ +	+	+ +	+	+ +

Source: SWD(2015) 255 Final plus personal adding

5.21. System for the electronic access to prospectuses

Currently, there is not a complete and efficient offer concerning the online access to the approved prospectuses. The problem remains on the national competent authorities' hands,

[269] The investment retail culture is important. In methods of how to improve it see: MOLONEY N., Building a retail investment culture through law: the 2004 Markets in Financial Instruments Directive, 6 European Business Organization Law Review 341, 2005.

which solve it according to their budgets, IT existing tools and willingness to provide that service. ESMA website only compile a list of hyperlinks to prospectuses and supplements on the basis of the notifications made by the EEA and EU Member State administrative authorities. However, the list has some shortcomings. In fact, some hyperlinks are inactive, the list is not up to date, does not contain all the approved prospectuses and supplements, and only provides a very limited search function.

5.22. System for the electronic access to prospectuses: description of policy options

1. **Option 1** – "**Do nothing**": Continuation of the current decentralised and fragmented system with very limited functionality and reliability in terms of comprehensiveness and timeliness.
2. **Option 2** – "**Single national electronic access points**": each national competent authority must construct an online platform containing all the prospectuses approved by its. The online platform must be free of charge, possibly with search functions helping the comparability of prospectuses for investors. The obligation does not avoid the Member State from the notification obligation towards ESMA and the liability risk of the issuer.
3. **Option 3** – "**European single electronic access point**": ESMA must construct and run an electronic platform containing all the up to date prospectuses and supplements, received from national competent authorities. The online platform must be in the ESMA website, must contain PDF formats documents and a modern research toolkit.

5.23. System for the electronic access to prospectuses: analysis of policies impacts

Option 1: leaves the marketing of prospectuses to the market. The current regime maintenance hope that a private institution will construct an electronic library of prospectuses because finds the business profitable. The profits will be the subscription to the library. However, no one has still access the market in 10 years and there is no news of an upcoming entry.

Option 2: option 2 is cheaper than option 3 because there is already in place an online platform for the publication of disclosed information under the TOD. Nonetheless, costs depend on the existing IT tool development of each national competent authority. In addition, investors would benefit from an easier way of comparing prospectuses online. Contrarily, the cross-border comparison of prospectuses is not provided, limiting the usefulness of the provision for building a Capital Market Union.

Option 3: even if option 3 is costlier than option 2, the costs are not so high and the benefits are greater than option 2. In fact, under the TOD and PD, ESMA already receives all the prospectuses and supplements approved in the Union and at Member State level there are example of how to build an electronic platform. The creation of a European comprehensive online prospectus library would need some additional costs, hard to estimate but a long list of potential benefit. Those are, increasing transparency, comparability both at national and cross-border level, overcome existing problems and help the exchange of information between issuers and institution. In fact, each issuer can check online if the approval has been successful and investors can get used to access the ESMA website, resulting potentially to an increase knowledge about the relating laws, contained in the same site.

5.24. System for the electronic access to prospectuses: comparison of policy options

Option 2 and 3 provide benefits for all the market participants involved in the Prospectus Directive, because they do not bear any cost and can access a new useful service.

System for the electronic access to prospectuses: Impacts on stakeholders relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
2	+	+ +	+	+ +	+
3	+	+ +	+	+ +	-

Source: SWD(2015) 255 Final plus personal adding

However, option 2 makes impossible the cross-border comparison and is slightly cheaper than option 3.

Option 3 is the favourite option because it maximises the transparency, improve the Capital Market Union and its objectives at a low expense.

System for the electronic access to prospectuses: Achievement of objectives relative to option 1 ("do nothing")

Impacted Parties: *Options:*	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
2	*0*	+	+	*0*	-
3	+	+	+	*0*	+ +

Source: SWD(2015) 255 Final plus personal adding

Empirical Analysis: preferred options overall impacts

Preferred option impacts summary

Preferred Option Area	Description	Issuer & Market affected	Estimated Impact (If available)
Exemption threshold	1. **Raise the upper threshold from EUR 5 000 000 to EUR 10 000 000**. 2. **Raise the lower threshold from EUR 100 000 to EUR 500 000**.	*1. Unlisted companies and companies not listed on a regulated market.* *2. Companies raising capital through crowdfunding platforms.*	1. **1.145%** of newly approved prospectuses will fall outside the obligation to draw up a prospectus. 2. Cost savings equal to approximately **EUR 15 500 000**.
Alleviated regime for secondary issuances	**1. Extend scope of the proportionate disclosure regime to all secondary issuances**. 2. **Decrease by 5 days the approval time** process for frequent issuers filing a **universal registration document every year for three subsequent years.**	*1. Issuers (including SMEs) listed on a regulated market or traded on MTFs (including SME growth markets) who frequently issue new securities/ offer them to the public.*	1. Around **EUR 120,000,000** per year, saved collectively by issuers drawing up a PDR prospectus. 2.**Increase by 146% and 70%** respectively in the number of equity and non-equity prospectuses approved by competent authorities in less than 10 working days, annually.
Favourable treatment of issuers of debt securities with high denomination per unit	1. **Unify the disclosure regimes** for retail and wholesale non-equity securities admitted to trading on a regulated market. 2. **Remove the prospectus exemption** of Article 3(2)(d) for denomination per unit of EUR 100,000 or more.	*1. All issuers of non-equity securities, whether traded on RMs, MTFs or offered through private placements.*	**Lower denomination per unit issuance of debt securities** (in the order of EUR 2,000 or EUR 1,000 as happens in US), retailers are able to invest in debt markets, liquidity and efficiency increase.
Reforming the proportionate disclosure regime for SMEs	1. **A new PDR for SMEs** with less information disclosure requirements for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets). 2. **A MAP prospectuses** (questionnaire type) optional for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets) **.**	*1. Unquoted SMEs and SMEs traded on MTFs (including SMEs growth markets).* *2. SMEs and companies with reduced market capitalization (< 200 million euro) traded on MTFs.*	1. **Around EUR 45,000,000 per year**, saved collectively by SMEs drawing up a mini prospectus under the new PDR regime. 2. **Around EUR 34,000,000 per year**, saved collectively by SMEs drawing up a MAP prospectus.
Prospectus summary and the Key Investor Information Document under the Package Retail and Insurance-Based Investment Product Regulation	**Redesign the summary as a KID+**	*1. All issuers/ offerors, especially SMEs and all investors, especially retailers.*	n/a
System for the electronic access to prospectuses	**European single electronic access point**	*1. All market participants, especially investors.*	n/a
			Total annual collective savings of EUR 214 500 000 annually plus unquantifiable benefits

Given all the preferred options chosen so far, it can be estimated the Regulation proposal overall impact, even if the Council and Parliament will have to decide upon it yet.
Overall, the proposed measures can improve significantly the current Prospectus Directive. **The annual costs savings will be at least EUR 200,000,000**. Crowdfunding platforms, unlisted companies and companies not listed on a regulated market will save around EUR 15,500,000 annually thanks to the revised exemption thresholds.
Secondary issuers (including SMEs) listed on a regulated market or traded on MTFs (including SMEs growth markets) will save collectively around EUR 120,000,000 annually thanks to the extended scope of the PDR.
Lastly, SMEs will save roughly EUR 45,000,000 per year thanks to the revision of the SMEs PDR and EUR 34,000,000 for those who opt for the MAD prospectus.
Even if unquantifiable, there are other improvements to the Prospectus Directive. Those are the investors benefits coming from the electronic European platform containing all the approved prospectuses and the new KID+ format summary.

In particular, raising the upper threshold from EUR 5,000,000 to EUR 10,000,000, while maintaining for Member States the possibility to extend the prospectus requirements within the lower bound (EUR 100,000) and the new higher one will translate in quantifiable cost savings. In 2014, the 9 MSs which did not extend the obligation to lower thresholds, approved roughly 40% of the total number of prospectuses approved, while just 3% were offers with a consideration amount falling between EUR 10,000,000 and EUR 5,000,000. Assuming that the proportions will remain unchanged in the future, 1.145% of prospectuses annually would fall outside the scope of the regulation thanks to this option. Moreover, assuming that all the prospectuses included in the range are equity prospectuses this would translate in an **annual savings of EUR 15,500,000 for small offerors**.

Extending the scope of the PDR to all secondary issuances will provides cost savings for SMEs too. In fact, assuming that the number of prospectuses that will be approved in the EU remain constant at 4,000 and that all the secondary issuances prospectuses will be equity ones.
Accordingly, the expected PDR usage rate could be estimate at 17.5% instead of the current 1.2%, meaning 652 prospectuses on average a year.
For each of the 652 prospectuses EUR 182,400 will be saved by issuers, that account for a **total saving of EUR 120,000,000 per year on average**[270].

[270] Computed as follows: 4,000*(17.5%-1.2%)*EUR 182,400= EUR 120,000,000.

In addition, the reform of the PDR for SMEs will be worthy. In fact, assuming the followings:

1. Total number of approved prospectuses will remain stable at around 4,000.
2. All the public offers carried out by companies traded on MTFs/SMEs growth markets are made by SMEs or companies with reduced market capitalization.
3. The PDR costs EUR 700,000 and the new PDR reduces the costs by 20%.

The cost of the PDR SMEs prospectus comes from the minimum average costs presented during the consultation.
The resulting **costs saved are around EUR 45,000,000 annually**, thanks to the provision.

Finally, the introduction of the MAP prospectus for the same companies falling under the PDR SMEs scope, results in an **annual estimated cost saving around EUR 34,000,000 saved collectively by SMEs**.
The estimation needs the same assumptions of the PDR reform plus the followings:

1. Half of the companies benefitting from the SME PDR would choose the MAP format.
2. The MAP decreases by 30% the total cost burden, because no legal fees will be payed (accounting for 40% of the total costs) and internal costs will be higher by 10%.

The positive impact comes from the standardized format of the MAP prospectus, which together with the help ensured by national competent authorities and ESMA will almost eliminate the legal fees associated with the prospectus.

Overall all the stakeholder's types will see an improvement thanks to the new Regulation (see next page table), without damaging the competent authorities work, who have no advantages nor disadvantages coming from the new provisions. Small issuers and offerors receive the most favourable treatment, thanks to the extended PDR regime, the new prospectus summary and the alleviated regime for their secondary issuances, while will encounter almost no benefit from the removal of the denomination per unit threshold.

Large issuers instead, will have slight improvements, mostly thanks to the reformed and cheaper summary, while a bit damaged by the need of drawing up a prospectus for high denomination per unit debt securities.

Preferred options: Impacts on stakeholders relative to option 1 ("do nothing")

Preferred Option Area	Description	*Larger issuers/ offerors*	*Small issuers/ offerors*	*Wholesale investors*	*Retail Investors*	*Competent Authorities*
Exemption threshold	1. **Raise the upper threshold from EUR 5 000 000 to EUR 10 000 000**. 2. **Raise the lower threshold from EUR 100 000 to EUR 500 000**.	*0*	+ +	*0*	*0/⁻*	*0*
Alleviated regime for secondary issuances	**1. Extend scope of the proportionate disclosure regime to all secondary issuances**. 2. **Decrease by 5 days the approval time** process for frequent issuers filing a **universal registration document every year for three subsequent years.**	+	+ +	*0*	*0*	*0*
Favourable treatment of issuers of debt securities with high denomination per unit	1. **Unify the disclosure regimes** for retail and wholesale non-equity securities admitted to trading on a regulated market. 2. **Remove the prospectus exemption** of Article 3(2)(d) for denomination per unit of EUR 100,000 or more.	*0/⁻*	*0/* +	+	+ +	*0*
Reforming the proportionate disclosure regime for SMEs	1. **A new PDR for SMEs** with less information disclosure requirements for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets). 2. **A MAP prospectuses** (questionnaire type) optional for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets) **.**	*0*	+ +	+	+	*0/⁻*
Prospectus summary and the Key Investor Information Document under the Package Retail and Insurance-Based Investment Product Regulation	**Redesign the summary as a KID+**	+ +	+ +	*0*	+ +	+
System for the electronic access to prospectuses	**European single electronic access point**	+	+ +	+	+ +	-
Overall impact on average		+	+ +	+	+ +	*0*

On the investors side, retail investors will find the major gains. On one hand, retail investors will be able to access debt securities markets because the new provision will remove the competitive advantage of issuing high denomination per unit bonds, which are over the availability of retailers.

On the other hand, retailers will be able to understand the prospectus summary, which for some expert is the most important part of the prospectus for the retailers' investment assessment.
Wholesale investors encounter some positive aspects, especially coming from the new availability of debt markets and the new European online platform.

To sum up the proposal is, most of all, tailor made for the small investors and issuers needs, without damaging the large ones. In fact, for the EU, small issuers/offerors have a comparative disadvantage to go public than the large ones thanks to the fixed nature of costs associated with the access to capital markets, which needs a regulation intervention. The proposed legislation tries to get a step toward the build of a Capital Market Union in addition with an increasing SMEs favourable treatment, which currently mostly depends on bank credits.
Furthermore, the EU protects investors especially the ones who needs more: retailers.
The new Regulation respects completely that ambition, in particular with the introduction of the MAP prospectus and the new KID+ type summary.

Finally, it achieves all the goals pointed out in the RIA introductory part (see next page table). Especially the effectiveness of Capital Markets will improve a lot thanks to the proposed measures. In addition, the administrative costs burden will be reduced for all the issuers, besides the previously exempted for the high denomination per unit.
SMEs will access the market easier than before and investors will be more protected especially thanks to the new summary and the new strict regime for debt securities.
The markets will increase their efficiency thanks to the likely increase of offers.

Ultimately, the above Prospectus Regulation RIA demonstrates the dissertation hypothesis that the Prospectus Directive was outdated and can be improved at low expenses and high advantages. With this regard, remember that the above provision can save annually EUR 200 million and improve all the stakeholders' ability to list securities on a regulated market or offer securities publicly.

Preferred options: Achievement of objectives relative to option 1 ("do nothing")

Preferred Option Area	**Description**	*Administrative burden reduction*	*SME access to capital markets*	*Investor Protection*	*Efficiency*	*Effectiveness*
Exemption threshold	1. **Raise the upper threshold from EUR 5 000 000 to EUR 10 000 000**. 2. **Raise the lower threshold from EUR 100 000 to EUR 500 000**.	+	+ +	-	+	+ +
Alleviated regime for secondary issuances	**1. Extend scope of the proportionate disclosure regime to all secondary issuances**. 2. **Decrease by 5 days the approval time** process for frequent issuers filing a **universal registration document every year for three subsequent years.**	+	+	0	+	+
Favourable treatment of issuers of debt securities with high denomination per unit	1. **Unify the disclosure regimes** for retail and wholesale non-equity securities admitted to trading on a regulated market. 2. **Remove the prospectus exemption** of Article 3(2)(d) for denomination per unit of EUR 100,000 or more.	-	0	+ +	+	+
Reforming the proportionate disclosure regime for SMEs	1. **A new PDR for SMEs** with less information disclosure requirements for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets). 2. **A MAP prospectuses** (questionnaire type) optional for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets) **.**	+ +	+ +	+	+	+
Prospectus summary and the Key Investor Information Document under the Package Retail and Insurance-Based Investment Product Regulation	**Redesign the summary as a KID+**	+ +	+	+ +	+	+ +
System for the electronic access to prospectuses	**European single electronic access point**	+	+	+	0	+ +
Overall impact on average		+	+	+	+	+ +

1. The choice of legal instrument: Regulation

The European Commission proposal about reforming the prospectus framework includes a change of the legal instrument use. The Prospectus Directive currently in place, is a maximum harmonization directive which has been implemented in the Member States and some EEA countries through national laws. Amendments and supplements were in some circumstances in regulation form. However, the proposal wants to include all the previously issued directives and regulations and the new provisions into an omnibus regulation. The regulation will limit the possible differences between Member States legislative frameworks in order to avoid costly researches at issuer level[271]. In fact, they can avoid the study of discrepancies between EU laws in order to comply effectively with all the working provisions in case of cross-border issues of securities. In addition, Member States and stakeholders agree upon the construction of a single rulebook for the entire Union regarding all the matters concerning capital markets. The choice of a regulation is within the Capital Market Union Action Plan scope.

[271] The following paper, for instance, compares the TOD and the PD. CLIFFORD CHANCE, The Prospectus Directive and the Transparency Directive, London, Clifford Chance, 2012.

Final Considerations

The Prospectus Directive and level II Prospectus Regulation have regulated the admission of securities to trading on a EU regulated market and public offers of securities since 2003.
In my opinion the regulatory framework has worked quite well, especially in granting an equal level playing field in the Union and protecting investors. The passport system has helped issuers and offerors in selling their securities in others than their home EEA country. The only major problem is the failure to incentivise small and medium corporations, which consist the majority of companies EU-wide. Their capital structure is biased toward debt, especially bank loans. The banking system has proven vulnerable to the economic situation, in particular during recessions the bank credit tightens and small and medium corporations risk bankruptcy. The fixed nature of costs associated with capital markets raising make for them hard to access markets. The new Prospectus Regulation tries to incentivise the admission to trading on regulated markets and public offer of securities made by SMEs. The Prospectus Directive amendments already tried to make capital markets accessible to small corporations, with the proportionate disclosure regime and the prospectus summary, but failed. The reform of the PDR and new alleviations will try to fix it. The dissertation hypothesis is that, even if overall positive, the EU prospectus framework can be improved. The third part demonstrates both the qualitative and quantitative benefits of a reform. The Prospectus Regulation proposal, which is currently at the first stage of the co-decision procedure, will save at least EUR 200,000,000 annually. This decrease of the cost burden for complying with the regulation can increase the capital markets development, helps in gather financing and provides a more efficient and integrated EU single capital market. The Prospectus Regulation is one of the pillar of the Capital Market Union. The CMU is an ambitious program started in 2015 with the aim of building a single integrated capital market in the EU and for some EEA countries. It is driven by the European willingness to integrate further the Union and to avoid another recession caused by a financial crisis. In fact, the systematic reliance of the economy on the banking system has proven vulnerable to shocks in the financial industry. The Single Supervisory Mechanism, the Single Resolution Mechanism, the bail in are insufficient if left alone without creating an alternative and cheap finding source, as could be the case of capital markets. A development of EU capital markets is possible because markets are underdeveloped compared to US ones if taken in aggregate terms, while there is some country specific example of development, as Luxembourg and Ireland.

The second part of the dissertation underlines all the differences between national implementations at Member States level and the US prospectus regulatory framework in order to understand all the possible existing ways of ruling this subject. National implementations have been heterogeneous, resulting in creating blocks towards the diffusion of a single integrated capital market. In fact, the prospectus passport system gets trickier and costlier than can seem reading just EU level laws when implemented. The new legal instrument choice (a regulation) and some new provisions can help the harmonization in the Union, helping the usage of the passport system.

The US regulatory framework provides an example of optimal prospectus regulation because provides detailed provisions ruling all the aspects concerning the process of issuing securities. The EU cannot currently copy that system because there are too many differences between capital Member States markets than there exist in the US. Nevertheless, I think that the new provisions, together with the others presented in the Capital Market Union Action Plan can create the optimal environment in which, in the coming years, the European Legislator will be able to issue more specific laws that will be optimal for the new, integrated and homogenous EU capital market.

The 2007 financial crisis and the resulting great stagnation in Europe demonstrates that the European Union, as it is today, cannot provide the wellness, prosperity and equality as it was supposed to do. The European Union needs structural political, regulatory and economical changes to achieve is goal. In my opinion the economic changes have started with the unconventional tools employed by the European Central Bank and also the regulatory ones with the CMU and others reform, such as the new Prospectus Regulation. The one that is missing is the political change, which, in my opinion, should focus more on centralized power, more solidarity and a cultural and social change. The European citizens must fell first of all Europeans and then Italians, Germans, Dutch and so on. To do this a political fight against the diffusion of populism and nationalism is needed. The fight, however, must be within the democratic boundaries, with reforms, regulations, political, social, cultural and economic actions and not with slogans or wars.

The years to come will prove essential for the survivor of the European Union, a dream build on the ashes of the post second world war Europe than nowadays is under attack.

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Useful web-sites

- www.amf-france. Org
- www.consob.it
- www.ecb.europa.eu
- www.ecfr.gov
- www.efama.org
- www.esma.europa.eu
- www.eur-lex.europa.eu/
- www.euractiv.com
- www.eurocrowd.org
- www.europa.eu/index_en.htm
- www.fsa.gov.uk
- https://blogs.cfainstitute.org/marketintegrity/2015/12/02/what-does-revision-of-the-prospectus-directive-mean-for-investors/
- http://www.nortonrosefulbright.com/knowledge/technical-resources/capital-markets-union/getting-funding/prospectus-directive-proposal/
- www.imf.org
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- www.iosco.org
- www.oecd.org
- www.pwc.com
- www.sec.gov
- www.us.practicallaw.com.

Summary

The European Union law making process, according to *De Laroisère report*, consists in three levels. The European Parliament and Council, after receiving a legislative proposal generally from the European Commission, produce regulations and directives, aimed of ruling homogenously the Union. Regulations are directly binding in the Member States, while directives need a national implementing law in order to be effective. The primary source of European laws has different degree of harmonization, from maximum to minimum, on the basis of the directionality leaved upon national hands.
The second level is in charge of issuing detail provisions regarding subjects ruled by primary source of law. Finally, level three takes care of the effective enforcement.

The *Directive number 73, issued in 2003* by the European Commission, known as Prospectus Directive and the *Regulation number 809, issued in 2004*, known as level II Prospectus Regulation, together with their later supplements and amendments regulate the admission to trading of securities in a EU regulated market and public offers.
Accordingly, all the issuers seeking admission to trading of securities on a regulated market and offerors selling securities to the public, if not exempted, must comply with four core obligations.
A public offer is "a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable investors to decide to purchase or subscribe to these securities".
In addition, the securities object of the obligations are transferable securities, which are "classes of securities which are negotiable on the capital market, with the exception of instruments of payments". Finally, Equity securities are:

1. Shares and other transferable securities equivalent to shares in companies.
2. Transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer.

Contrarily, non-equity securities are all the transferable securities not included in the equity definition.

Issuers and offerors must draw up a prospectus, seek home Member State competent authority approval of the prospectus, in all formats, and related supplements, publish a prospectus and comply with the advertising rules.
Every issuer, offeror or anyone writing the prospectus in name of the company issuer or offeror must draw up a prospectus within the formats allowed.
The formats are the single prospectus, the tripartite prospectus, the base prospectus and final term, wholesale prospectus, supplements and the mini-prospectus of the proportionate disclosure regime.
The formats are common and special, common formats can be used by all the people or companies included in the directive scope, while special ones are tailored-made for some issuers or offerors types.
Common formats are the single prospectus, the tripartite prospectus and supplements.
The single prospectus is a unique and comprehensive document which includes all the essential information regarding the issuer or offeror, the offer and risks associated to the securities object of the transaction.
The tripartite prospectus is made by three documents, a registration document that can be filled annually and not in conjunction with an issue or offer, that includes the company description and financial statements. Before the transaction takes place the issuer or offeror needs to fill with the competent authority a summary and a security note, that includes information concerning the offer, such as type of securities, risks, usage of selling proceeds and so on.
The last common format is the prospectus supplements which need to be drawn, approved, published and advertised when a significant new factor, material mistake or inaccuracy appear after the approval of a single or tripartite prospectus.
Special formats are base prospectuses, mini-prospectuses under the proportionate disclosure regime and wholesale prospectuses.
Non-equity securities issued by credit institutions in a continuous and repeated manner can use the base prospectus for several issues, instead of writing down a prospectus for each issuance.
Small and Medium Enterprises, credit institutions ex article 1(2)(j) of the Prospectus Directive and right issues have fewer disclosure obligation and, according to the proportionate disclosure regime must draw a mini-prospectus.
Finally, issuers of non-equity securities admitted to trading on a regulated market with a denomination per unit of at least EUR 100,000 can use the wholesale prospectus, which has no summary and leave some discretionally about the language choice in the issuer hands.

Not all the issuer and offerors fall into the directive scope. In fact, the Prospectus Directive exempts both public offers and admission to trading on regulated market of securities with specific issuers or offerors types. In particular, non-equity securities issued by credit institutions "in a continuous or repeated manner" with a total consideration amounts to less than EUR 75,000,000, Member States or their regional and local authorities, public international institutions, in which at least one Member State is a member, ECB and others EU central banks do not have to comply with the directive.

Furthermore, other offers and issues are exempted thanks to their specific national nature, such as Swedish mortgage bonds.

Offers to public with a total consideration amount greater than EUR 5 million cannot be excluded from the directive scope, while less than EUR 100,000 are outside. Offers with an amount between the two thresholds can be included through national law.

Furthermore, private placements, which are offers of securities limited to qualified investors and at maximum 150 non-qualified ones in each Member State, are exempted too.

Finally, some specific offers and issues fall outside the obligation to draw up a prospectus. Those are, among other things, securities of all kinds offered at the occasion of a takeover, acquisition, if those securities are offered by way of an exchange offer.

The single prospectus content must fulfil the principles of *completeness*, *comprehensibility* and *consistency* and must target an average investor. The specific information changes depending on the issue or offer type but has a common core structure that includes a table of content, a summary, a description of the company and the risks involved in the transaction.

Anyone who is willing to draw up a prospectus must choose its content according to schedules and building blocks prescript by the level II Prospectus Regulation.

The summary should provide "in a concise manner and in non-technical language… key information in the language in which the prospectus was originally drawn up" and must be no longer than 2,500 words or 7% of the whole prospectus.

After completed the prospectus and related documents requested under the first core obligation, the company issuer must seek home competent authority approval. Issuer or offeror of non-equity securities with a denomination per unit of at least EUR 1,000 can choose their home Member States between the following three options:

1. The MS in which the issuer's registered office is located.
2. The MS in which the regulated market, on which the securities are admitted to trading, is located, or
3. the MS on whose territory the securities are offered to the public.

Any other has the MS in which the issuer's registered office is located as home.

The validity period lasts 12 months.

After the prospectus approval, an issuer or offeror must "as soon as practicable" and "at a reasonable time in advance of, and at latest at the beginning of, the offer to public or the admission to trading of securities" publish the prospectus. The channels allowed are printed medium, electronic format and printed copy.

The fourth core obligation defines what must be deemed as advertising material useful to protect investors and promote the offer, while does not specify the mean. Accordingly, advertisement is an "announcement" connected to a "specific offer to the public of securities or to an admission to trading on a regulated market" intended to "specifically promote the potential subscription or acquisition of securities".

If an issuer or offeror has complied with all the above mentioned core obligations and some detailed provisions is rewarded with the passport system. The passport system, which replaced the old mutual recognition principle[272], makes smooth and quick the process of selling securities in other Member States than the home one. Anyone wishing to expand his or her issue or public offer to more than one Member State must communicate him or her intention to the home Member State authority, who will then notify simultaneously ESMA and all the other host Member States authority. The passport system increased considerately the amount of prospectuses diffused over more than one country. However, it persists a home country bias, meaning that issuers prefer to sell their securities only in his home country, and the national implementations provides more rule to comply with when a prospectus is passported.

The Prospectus Directive also rules out the process that allows non-European Union countries to offer their securities to the European public or ask admission to trading on a EU regulated market.

The foreign issuers or offerors access to EU capital markets is subject to two form of equivalence assessments. The first one concerns the evaluation of the foreign country accounting standard. They have to be deemed Generally Accepted Accounting Standard in order to be used in the prospectus. If there is not yet a European Commission opinion considering the foreign country accounting standards as GAAP, the issuer or offeror needs an equivalent assessment. If both the third country accounting standards are recognised by the European Commission as similar to the EU IFRS and there exists "filters" in the third country, such as external audit control the accounting standards are deemed as equivalent.

Contrarily, the third country must follow the EU IFRS while computing its financial statements. Finally, the *prospectus with the adjusted financial statements needs an approval of the home Member State competent authority.* In this case the administrative authority can choose to exercise its approval power or not. If the authority decides to do so must check if the prospectus satisfy international standards set by international securities commission organisations, including the IOSCO disclosure standards and it is consistent with the Prospectus Directive and level II Prospectus Regulation.

In the other option ESMA plays the bigger role because issues opinions about which information must be added to the foreign country prospectus in order to be deemed consistent with the EU laws. Contrarily, if ESMA has not produced an opinion regarding the specific third country, the issuer or offeror must fulfil the Prospectus Directive and level II Prospectus Regulation requirements by its own.

The *application of all the provisions* stated by the prospectus directive and the implementing regulation *is a matter of Member States*, specifically Member State's competent authorities and their *most important instrument of enforcement is the prior approval of prospectuses*.

Secondly, the directive leaves the civil liability toward national laws hands, which has to identify who is(are) the person(s) responsible for the prospectus, when he/she risks a sanction and what is(are) the sanction(s). Finally, the ligation takes place in the national competent court of justice.

The PD grants that competent authorities are able to fairly and effectively do their enforcement job by obliging the national countries to give to their administrative body a minimum set of enforcement powers. First of all, Member State should entrust the enforcement to a central administrative authority, however permitting to leave to other administrative bodies some specific operations such as, tasks regarding the approval of prospectuses or supplements, the filing of prospectus, its online publication and the control of advertising material. Nevertheless, the approval has to remain upon the central authority, which can delegate just two minor powers to non-administrative bodies, that are, the web updates of prospectuses and their filing.

The administrative authorities should be independent from any market actor and should possess at least a minimum set of powers. Those are the power to request information to be provided to the competent authority, or the power to request information to be published in a prospectus, to "name and shame" a non-compliance issuer, to ask for additional disclosure of information, and some sanctioning powers.

The latter are, the ability to suspend for ten days an admission to trading or a public offer, also for investigate for a possible crime and last but not least, prohibit trading or public offer.

Finally, even if the EU directive and regulation do not make detailed provision regarding civil liability, it requires the Member State to entitle its administrative authority to be able to enforce administrative measures or sanctions in an "effective, proportionate and dissuasive" way, and to make any measure or sanction public, if the publication does not "seriously jeopardise" financial markets or cause "disproportionate damage" to those involved.

The *dissertation second part* describes, first of all the implementation of the Prospectus Directive and level II Prospectus Regulation in France and UK, and secondly the US prospectus regulatory framework.
This part, ultimately, gives substance to the supranational rules, providing two practical examples of the prospectus EU regulatory framework enforcements.
France and UK financial legislations are opposite because the former prefers the investor protection, while the latter has faith in the market efficiency and ability to find second-best solutions by its own. Those two implementing examples, although limited, are at the boundaries of the range of possible different ways of enforcing and implementing the directive. The first chapter of the second part, though, gives to the reader a comprehensive knowledge of the regulatory discrepancies between Member States occurring in the implementation phase.
In France the main laws implementing the PD were the loi Breton amending the French code monétaire et financier (CMF) and the règlement général (RG) of the French Autorité des marches financiers (AMF). While in UK they were the Financial Services and Markets Act 2000 (FSMA) and The Prospectus Rules (FSA-PR).

The most important enforcement power is the power to approve prospectuses. In fact, a prospectus should be approved by the central administrative authority of each Member State before allowed to be published. The France implementation was smooth because it already entitled the AMF with this power while the UK transformed its previous law in order to fulfil the Prospectus Directive requirements. In UK the *UK Listing Authority* (UKLA), a part of the *Financial Supervisory Authority* (FSA), is in charge of prospectuses approval.
Concerning the prospectus review process, the UK implementation is in contrast with the EU. In fact, the FSA manual stated that the FSA did "*not investigate or verify the accuracy or completeness of the information* set *out in such documents, nor does check the sources of, or verify, the information*. Contrarily, the Prospectus Directive obliges the competent authority to review the consistency, completeness and comprehensibility of information included in prospectuses.
The UK reliance on market autonomy is also exampled by the super equivalence regime that allows companies to be listed in a premium market segment. In order to join the premium

segment they have to disclose more information and seek the verification of information from sponsors, in addition of the UKLA. The compliance with the super equivalent regime makes companies able to, among other things, be part of the FTSE UK index series.
On the other hand, the France most important difference with the EU framework regards the shelf registration format. In particular, in France a registration document, if approved at least three times in a raw, can be made public the day after it has been filled with the AMF, without waiting the formal approval. Basically, the French legislator allows for an *ex-post approval mechanism* for this specific type of issuers or offerors. This is in contrast with the Prospectus Directive, because the Principle 12 of Standard No. 1 highlights that for prospectuses "ex-ante approval is the normal procedure" and ex-post is possible but just as a complementary measure.
The Prospectus Directive, has already described, obliges the national regulators to at least empowered their national authorities with a minimum set of powers in order to efficiently and effectively do their job. Those are, *inter alias*, the power to investigate, to request information and provide administrative sanctions. The provisions are limited and contain just a minimum set of obligations which were easily and painless implemented in both the French and British laws. AMF and UKLA, actually, have more than the minimum requested powers.

The EU leaves to national laws and courts the faculty to discipline the civil liability attached to prospectuses. Like the administrative enforcement, France and the UK find two different solutions to the implementation problem. France gives more powers to its national courts to discipline private enforcement, while the UK prefers detailed law provisions.

The final paragraph of the first chapter of the second part deals with the passport regime in France.
The paragraph demonstrates the hypothesis that the integration of the European Economic Area (EEA) is far from efficient and smooth even if the passport system, introduced in the PD, has improved it. Data about the ratio of "passported prospectuses" over the total issued in the EU has increased after 2003 demonstrating the successfulness of that system compared to the previous mutual recognition principle. Nevertheless, the notification procedure gets trickier at national level, therefore carries on limiting foreign, even if previously approved by an EEA authority, prospectuses allowance.
Accordingly, foreign issuers seeking admission to trading on a French regulated market or publicly offering securities in France should, additionally to the home competent authority approval mechanism, comply with *prior* and *on-going* obligations in order to be able to *passport their prospectuses in France*.

Synthetically, the procedure allowing a company to sell his securities in France, thanks to the passport regime, takes an additional 15 days. It starts with contacting the AMF for registration purposes and ends up with the publication of a notice in the legal gazette called Bulletin des Annonces légales obligatoires (BALO) notice and a press release in case of a public offer.

The second chapter of the second dissertation part describes the US prospectus regulatory framework, underlining the different style adopted. Finally, I have tried to make hypothesises about the different drivers that made the EU regulatory framework different from the US one.
The United States of America laws regarding the security industry construct a comprehensive and complete framework that rules out almost all aspects of the securities, securities issuer and owner lives.
The US has the most developed financial market, is the country of the self-made man and where the ability to create opportunities for the self-emancipation of every American is a constitution bedrock. Furthermore, although was not the first country to adopt the capitalist system (it was the UK), the US is the most convict fan of this form of economy and its rules governing markets participants and citizens have always been influenced by the liberal doctrine, in which Adam Smith “invisible hand” is the bedrock.
Nevertheless, the old security discipline is far away from being deregulated, as the liberalist approach would suggest, therefore involving a long list of wide acts. Among others, they are the Securities Exchange Act of 1933 and the Trust Indenture Act of 1939. The *Securities Act of 1933* (SA), also called “the truth in securities law” is the main law regulating the disclosure of information concerning securities being offered for public sale, which includes both the EU admission to trading and public offer definitions.
The SA main objectives are, according to the U.S. Securities and Exchange Commission (SEC):

1. Ensure that investors receive the necessary information concerning securities being offered for public sale.
2. Prohibit deceit, misrepresentations and other fraud in the sale of securities.

Those two aims are ensured primarily by the disclosure of important financial information through the registration and prospectus. The information provides but does not guarantee that investors are able to make an informed judgment of whether purchase or not the securities offered to them by companies.
The securities generally should be registered. Furthermore, the registration statements, which include the final prospectus, both minimize the cost burden of complying with laws at company level and provide investor protection.
However, there exist a list of offers exempted from the registration obligation.

Differently from the EU Prospectus Directive it provides at first a broad and general definition of the term “offer” and them, step by step, details all offers not included in that definition. The “non-offers” are outside the prospectus regulation scope and may be treated in other rules, acts and regulations.

In fact, the US prospectus regulation has one comprehensive obligation:

1. The obligation to registered any offers with the SEC.

This comprehensive rule, obliges any offers to be registered, if there is not a safe harbours or an exemption available. Furthermore, the registration documents include a final prospectus, which is a *Section (10) (a)* one, if not differently specified. The SEC approval makes companies able to sell the securities, but in between it delimits the marketing material that can be distributed. In fact, *Section 5* of the SA distinguish the *registration process* in three different phases:

4. The pre-filing or “quiet” period.
5. “Waiting period”.
6. Post-filing period.

The *pre-filing period* starts when the issuer or offeror or company decides to undertake a public offering. The “quiet” period ends when the company files the registration statements with the SEC.

During this period of time nothing that would be considered as an offer, under Section 2(a)(3) of the SA, is permitted.

The *“waiting period”* starts when the company fills and makes public the registration statements with the SEC and ends up when the SEC declares the prospectus effective.

During this period, anyone involved in the public offering, can offer the securities but not sale them.

Finally, the *post-filing period* starts when the SEC declares the registration statements effective and ends up when the later of the following two conditions is meet:

3. All the securities are distributed to the investors.
4. Expiration of the relevant prospectus-delivery period.

During the post-filing period the syndicate of underwriters can only sell the securities if they have already filled a final prospectus in the previous phase or they fill it in this phase, if the preliminary prospectus has already been effective for the SEC. In addition, advertisement of post-filings is limited during the post-filing periods.

Any offers need a registration statement or must meet an exemption.

The *Section 2(a)(3)* of the SA defines the term "offer to sell", or "offer for sale", or "offer" expansively to include "every attempt or offer to dispose of, or solicitation of an offer to buy a security, or interest in a security, for value".

The exemptions concern the following types of offers:

1. Private transactions
2. Offers made by Emerging Growth Companies (EGCs) and Small Reporting Companies (SRCs).
3. Offers made by Well-Known Seasoned Issuers (WKSIs).
4. Offshore offerings and Foreign Private Issuers (FPI).
5. Offerings of limited size.
6. Exempted securities and exempted transactions.
7. Others safe harbours.

The US laws create a wide range of prospectuses types, that are tailored for specific issuers or offer kind features.

The range of *prospectuses formats* includes the following:

7. Final prospectus or Section 10(a) prospectus (Form S-1 or Form F-1).
8. Red herring or Section 10(b) prospectus or preliminary prospectus.
9. Short form prospectus (Form S-3 or Form F-3).
10. Pink herring.
11. Form S-20 prospectus.
12. Free Writing Prospectuses (FWPs) or prospectus supplements.

All written offers must fill with SEC using the required prospectus formats, if they do not fall into a safe harbour, for which, nonetheless, in some cases another document is needed. This obligation is mandatory if a corporation would sell its securities.

The "common format prospectus" is the *final prospectus*, also known as *Section 10(a) prospectus* because it is defined in the same SA article.

The final prospectus can be either the unique format used in the registration statement or the second one, if filled after a *preliminary prospectus* or *red herring* or *Section 10(b) prospectus* has been filled with the SEC.

It is complete in all details about the offering and equivalent to the single EU prospectus.

For stocks and bonds a two stage process can be used. This involves at first the issuance of a preliminary prospectus, also known as red herrings thanks to the red ink used for the title or Section 10(b) prospectus thanks to its founding law. The red herring, which is usually used for IPOs, is used to shop the deal in order to see if there is interest in the offerings and includes all the final prospectus information besides the quantity and price of the securities.

However, as second step, a final prospectus is mandatory for the actual delivery of securities.
The *preliminary prospectus* filed in Form S-3 or F-3 for foreign issuers is made available for *WKSIs* when using a *shelf registration format*. It is the equivalent of the sum of the *security note* and *registration statement* under PD or a *base prospectus* for non-equity securities issued by qualified credit institutions.
A *pink herring* is a short form notice with title print in pink ink, used when *EGCs test the waters*.
Form S-20 prospectus, instead, is a form used when the securities being offered are *stock options* and, as the pink herring, do not find a comparable counterparty format in the PD.
The US laws tailor the *prospectus supplement* format according to the type of additional information and the original prospectus to be amended. Moreover, there exist a *plethora* of different prospectus supplements formats, studied for the specific aim.
Generally, prospectus supplements, also generally known as *Free Writing Prospectuses (FWPs)* are needed when, *after the registration date*, the issuer or any guarantor acting on behalf of him, issues a *written offer* that falls into the offer definition of the SA or is a solicitation of the offer.

To sum up the differences between the US and EU prospectus regulatory frameworks are the level of detail adopted and the style.
However, those two differences are interconnected because the US laws style of defining offers in broad terms and include in the obligation all the offers kinds oblige the US regulators to increase the level of detail. In fact, a plethora of exemptions and derogations, specifically designed, are existent in the prospectus laws.
Finally, overall, it seems fair to argue that the disclosure requirements are higher in US than in EU, while the associated costs are generally lower and precisely published.
The differences, in my opinion, are driven by three facts:

1. Different state form.
2. Different development of financial markets.
3. Different impact of the 2008 financial crisis.

The third dissertation part is devoted to the description of the new Prospectus Regulation and demonstrates the dissertation hypothesis that the Prospectus Directive is in need of reform. The RIA on the European Commission proposed regulation will show that a set of new provisions, abrogation and modification of the current prospectus regulatory framework will provide benefits to all the stakeholders.

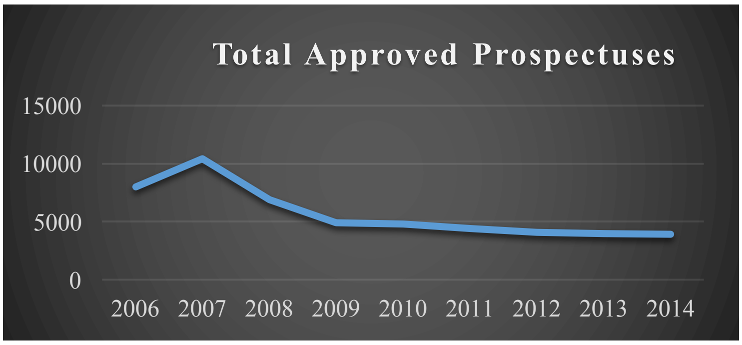
On 30th November 2015 the European Commission adopted a legislative proposal for the introduction of a "new" Prospectus Regulation. The Prospectus Regulation will replace the Prospectus Directive in order to overcome its drawbacks. At the moment the discussion is still in the first reading stage and in particular the EP has partially expressed its view on the review and the discussion is on-going in the council of the European Union. In particular, the EP has already approved as amended a part of the proposal and made some new suggestion, specifically on the way in which the SMEs can be helped in raising capital. In fact, the EP proposed a EU Growth prospectus for SMEs.

The methodology used to describe this proposal is the *Regulatory Impact Analysis* (RIA). The OECD defines the RIA as an "information-based analytical approach to assess probable costs, consequences, and side effects of planned policy instruments (laws, regulations etc.)". It is employed in order to help the regulator to find the best policies according to the objectives, within the various options. The core structure of the RIA methodology is divided in four parts:

1. Problems and objectives definition.
2. Description, analysis and comparison of policy options.
3. Evaluation of policy options.
4. Third parties' consultation.

The environment regulated in the Prospectus Directive has some data and characteristics that needs to be taken in account to fairly evaluate the proposed policies.

ESMA annually makes a report concerning the prospectus activity in the EEA countries. Accordingly, the total number of prospectuses approved annually in the EU, excluding prospectus supplements, has decreased since 2007, year when reached 10,392 approvals. Furthermore, since 2009 the curve is almost flat, reflecting the constant activity in terms of total number of prospectuses approved. In fact, *in 2009, 4,909 prospectuses were approved, while 3,931 ones in 2014.*



Secondly, the distribution of prospectuses per home Member States reveals that *most of the activity is concentrated in 9 out of 30 European Economic Area* (EEA) countries.

Thirdly, even if the data does not allow us to compare the period before the introduction of the PD with the later one, the passport regime, although imperfect, is widely adopted since inception.

In particular, *the percentage of passported prospectus is almost invariable*, reflecting that the proportion of passported prospectuses over the total does not depend much on the economic cycles and market conditions, making then fair to argue positively on the passport regime. In fact, *the percentage ranges from 20.4% in 2010 to 26% in 2011*. Fourthly, non-base prospectuses are the most used ones (62% of the total in 2014) and equity securities are the most common type of issuance with a 63%.
In addition, the most used type of prospectus is the non-base prospectus in conjunction with equity securities with a 38% of the total issued, according to ESMA. Finally, a deeper analysis of the securities issues type reveals that *debt securities are the most issued ones in 2014 and 22% of the total are shares*.

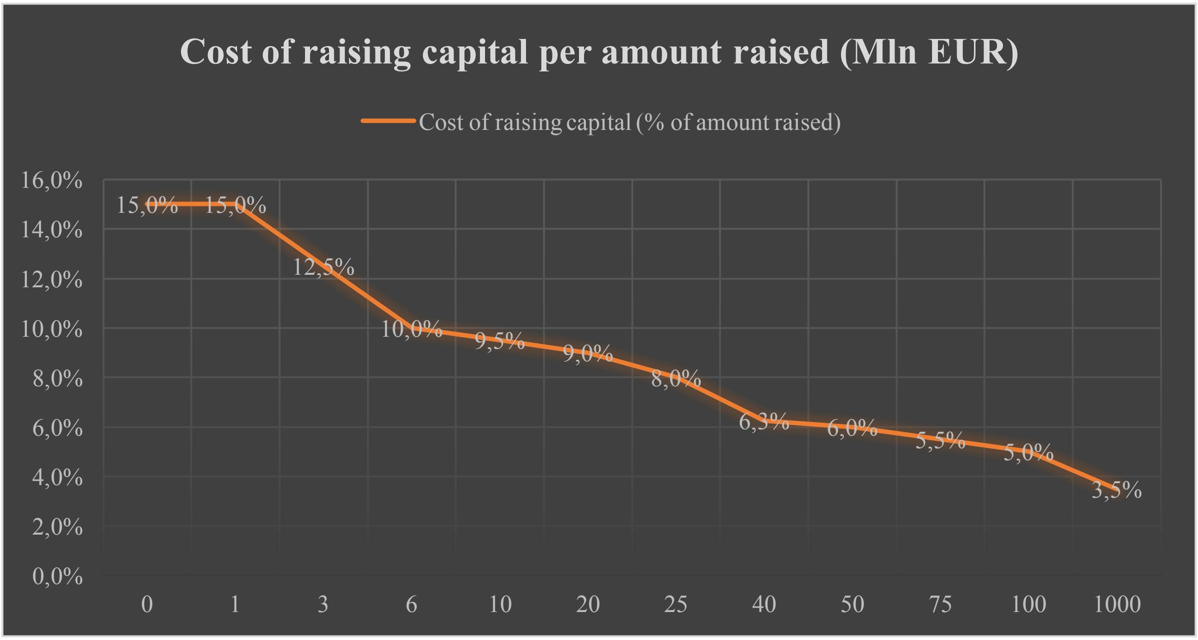
The drivers of the PD problems, that makes it in need of a reform, are the following:

1. Ineffective investor protection[273].
2. Regulatory framework inappropriate for SMEs and some securities.
3. Insufficient harmonization of the PD through Member States.
4. Inconsistency between the PD and the recent EU laws.
5. High cost of compliance with the PD.

Those set of drivers contribute in making harder the integration, effectiveness and efficiency of capital markets in the EU. Moreover, the investor protection is not guaranteed in some circumstances. The drivers' negative outcome can be summarized in the following problems:

1. High cost of financing.
2. Differences in financing conditions between Member States and underdeveloped capital markets.
3. Limit access to capital for many SMEs.
4. Ineffective investor protection on capital markets, especially across borders.

In some Member States the cost of financing is too high, therefore creating a barrier to entry on capital markets for some types of company. Thanks to the fixed costs of drawing up a prospectus the companies most blocked are the small ones. In fact, *40% of costs are legal fees which are fixed*, meaning that do not change with the amount issued.
The statement is consistent with the total cost of raising capital estimates available. The following graph summarize all the available data on it.



The total cost of raising capital ranges from 3.5% of amount raised to 15% and has a negative slope. The negative slope reflects the negative relationship existent between the amount sold to the public or to investors and the total costs. *This is caused by the fact that the costs are for a majority part fixed*, therefore any issuer must pay them.

All the above-mentioned problems contribute to the following consequences:

1. Companies cannot raise capital effectively.
2. Less investments, fewer jobs and less growth in the EU.
3. Missed investment and funding opportunities for investors and companies in the EU.

The following scheme summarizes drivers, problems and consequences of the current EU prospectus regulatory framework. According to the consequences the prospectus regulation proposal general objectives must be to ensure that companies can raise capital effectively, resulting in avoiding the loss of investment opportunities, therefore enhancing growth, jobs creation and investments.

DRIVERS	PROBLEMS	CONSEQUENCES
1. High Cost of Compliance	*1. High Cost of Financing on Capital Markets in some Member States*	**1. Companies Cannot Raise Capital Effectively**
2. Inappropriate Regulatory framework	*2. Limit Access to Capital for SMEs and small investors*	**2. Fewer Jobs, Less Investments and Less Growth**
3. Ineffective Investor Protection	*3. Ineffective Investor Protection on Capital Markets, especially on a cross-border context*	**3. Missed Investment Opportunities for Companies and Investors**
4. Insufficient Harmonization and Consistency	*4. Differences in Financing Conditions between Member States*	

All the below arguments (see table) reforms will try to overcome the problems and the related consequences.

Drivers: Arguments:	High cost of compliance	Inappropriate regulatory framework	Ineffective Investor Protection	Insufficient Harmonization	Insufficient Consistency
1. Exemption thresholds	□□			□□	
2. Secondary Issuances	□□		□□		
3. High denomination per unit			□□		
4. Proportionate Disclosure Regime for SMEs	□□	□□	□□		
5. Prospectus summary	□□	□□			□□
6. Electronic Publication System				□□	

Source: SWD(2015) 255 Final

Each argument corresponds to a part of the PD due to be amended in the proposed Prospectus Regulation.

The RIA, specifically built in the whole dissertation, choose at least one preferred policy option for each argument in need of reform. The below table summarizes all the new provisions, the connected issuers and markets affected and the estimated future impacts, which are quantitative when possible.

Preferred option impacts summary

Preferred Option Area	Description	Issuer & Market affected	Estimated Impact (If available)
Exemption threshold	1. **Raise the upper threshold from EUR 5 000 000 to EUR 10 000 000**. 2. **Raise the lower threshold from EUR 100 000 to EUR 500 000**.	*1. Unlisted companies and companies not listed on a regulated market.* *2. Companies raising capital through crowdfunding platforms.*	1. **1.145%** of newly approved prospectuses will fall outside the obligation to draw up a prospectus. 2. Cost savings equal to approximately **EUR 15 500 000**.
Alleviated regime for secondary issuances	**1. Extend scope of the proportionate disclosure regime to all secondary issuances**. 2. **Decrease by 5 days the approval time** process for frequent issuers filing a **universal registration document every year for three subsequent years.**	*1. Issuers (including SMEs) listed on a regulated market or traded on MTFs (including SME growth markets) who frequently issue new securities/ offer them to the public.*	1. Around **EUR 120,000,000** per year, saved collectively by issuers drawing up a PDR prospectus. 2.**Increase by 146% and 70%** respectively in the number of equity and non-equity prospectuses approved by competent authorities in less than 10 working days, annually.
Favourable treatment of issuers of debt securities with high denomination per unit	1. **Unify the disclosure regimes** for retail and wholesale non-equity securities admitted to trading on a regulated market. 2. **Remove the prospectus exemption** of Article 3(2)(d) for denomination per unit of EUR 100,000 or more.	*1. All issuers of non-equity securities, whether traded on RMs, MTFs or offered through private placements.*	**Lower denomination per unit issuance of debt securities** (in the order of EUR 2,000 or EUR 1,000 as happens in US), retailers are able to invest in debt markets, liquidity and efficiency increase.
Reforming the proportionate disclosure regime for SMEs	1. **A new PDR for SMEs** with less information disclosure requirements for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets). 2. **A MAP prospectuses** (questionnaire type) optional for unlisted SMEs and SMEs traded on MTFs (including SMEs growth markets) **.**	*1. Unquoted SMEs and SMEs traded on MTFs (including SMEs growth markets).* *2. SMEs and companies with reduced market capitalization (< 200 million euro) traded on MTFs.*	1. **Around EUR 45,000,000 per year**, saved collectively by SMEs drawing up a mini prospectus under the new PDR regime. 2. **Around EUR 34,000,000 per year**, saved collectively by SMEs drawing up a MAP prospectus.
Prospectus summary and the Key Investor Information Document under the Package Retail and Insurance-Based Investment Product Regulation	**Redesign the summary as a KID+**	*1. All issuers/ offerors, especially SMEs and all investors, especially retailers.*	n/a
System for the electronic access to prospectuses	**European single electronic access point**	*1. All market participants, especially investors.*	n/a
			Total annual collective savings of EUR 214 500 000 annually plus unquantifiable benefits

Overall, the proposed measures can improve significantly the current Prospectus Directive. **The annual costs savings will be at least EUR 200,000,000**. Crowdfunding platforms, unlisted companies and companies not listed on a regulated market will save around EUR 15,500,000 annually thanks to the revised exemption thresholds.

Secondary issuers (including SMEs) listed on a regulated market or traded on MTFs (including SMEs growth markets) will save collectively around EUR 120,000,000 annually thanks to the extended scope of the PDR.

Lastly, SMEs will save roughly EUR 45,000,000 per year thanks to the revision of the SMEs PDR and EUR 34,000,000 for those who opt for the MAD prospectus.

Even if unquantifiable, there are other improvements to the Prospectus Directive. Those are the investors benefits coming from the electronic European platform containing all the approved prospectuses and the new KID+ format summary.

Moreover, it achieves all the goals pointed out in the introductory part of the impact assessment. Especially the effectiveness of Capital Markets will improve a lot thanks to the proposed measures. In addition, the administrative costs burden will be reduced for all the issuers, besides the previously exempted for the high denomination per unit.

SMEs will access the market easier than before and investors will be more protected especially thanks to the new summary and the new strict regime for debt securities.

The markets will increase their efficiency thanks to the likely increase of offers.

Ultimately, the above Prospectus Regulation RIA demonstrates the dissertation hypothesis that the Prospectus Directive was outdated and can be improved at low expenses and high advantages.