



Department of Economics and Finance

Chair of Market Law and Regulation

***Impact of Prospectus Regulation on real data:
a comparative analysis on seven EU countries***

SUPERVISOR

Prof. Paola Lucantoni

Candidate

Veronica Adriani

Reg. No. 689951

CO-SUPERVISOR

Prof. Mirella Pellegrini

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I. Prospectus Directive 2003/71/EC vs Prospectus Regulation (EU)

No. 1129/2017

1.1 Legislative history

The EU has been issuing directives and regulations over time with the aim of harmonizing rules and conditions allowing companies to raise capital through admission to stock and securities markets. The very first step was taken in 1979, when the EEC released the Admission Directive 79/279/EEC. It was about coordinating the conditions for the admission of securities to official stock listing, this means it obliged companies to publish prospectuses whenever listed for the first time. The second one was in 1980, when the Listing Particulars Directive unified the disclosure terms for admission to listing. It then took nine years to produce the Public Offers Directive or POD (1989). It announced a prospectus regime to offer securities to the public. In ten years-time all those changes led to a highly-fragmented system finally resulting in a manifold and confusing legislative framework. Failure of achieving the original harmonization purpose motivated lawmakers to go farther.

In 1994, the Eurolist Directive allowed the Member States to exempt issuers whose securities had been listed in other countries for more than three years, from the listing particulars regime. This system did not support mutual recognition while at the same time promoting capital-raising. Evidence showed that no more than two or three issuers per year used such a complex regime¹. This system proved to be weak and insufficiently regulated to grant all companies Member States' equal access to capital markets, with conspicuous implications on public offers². Most of the NCAs made pressure on issuers to translate the entire approved prospectus, and made it mandatory to insert specific information on local taxation, paying agents, and notification procedures. This proved to be particularly burdensome especially for small issuers, who were inevitably forced to limit their offers to one Member State (MS) because of the high costs. For this reason, the cross-border wholesale market was defined as "relatively straightforward and seamless"³. Consequently, there was an ever increasing risk that NCAs formulated divergent definitions of public offers, with the result that the latter could be treated as private placements to avoid the requirements to be fulfilled when preparing prospectuses⁴.

The disclosure regime set out by the Listing Particulars Directive proved to be inadequate as compared to international best practice⁵. The disclosure documents and accounting standards

¹ Gros, D., & Lannoo, K. (2000). *The Euro Capital Market*. John Wiley & Sons Inc.

² Pietrancosta, A. (2006). The "public offering of securities" concept in the new prospectus directive. In G. Ferrarini, & E. Wymeersch, *Investor protection in Europe - Corportare law making, the MiFID and beyond* (p. 339). Oxford .

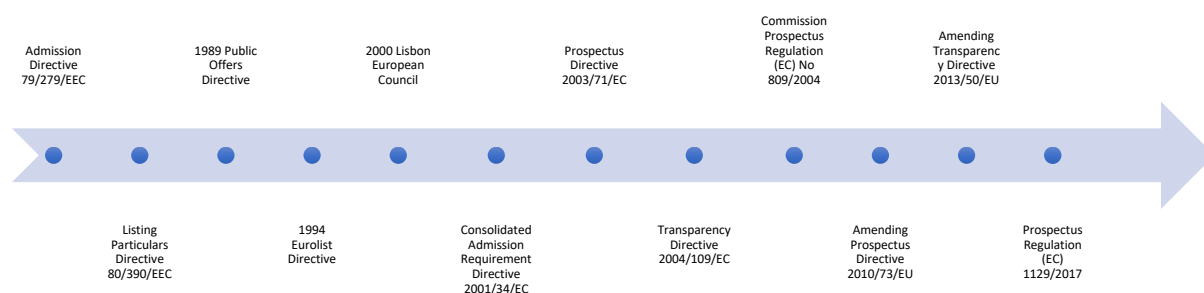
³ Burn, L., & Wells, B. (2007). The pan-European retail market - are we there yet? *Capital Markets Law Journal*, Vol. 2, Issue 3, 263 - 280.

⁴ FESCO. (2000). *A "European Passport" for Issuers, A Report for the EU Commission*. Paris.

⁵ Becht, M. (2003). European Disclosure for the New Millennium. In J. K. Hopt, & E. Wymeersch, *Capital Markets and Company Law* (p. 87). Oxford University Press.

were different from one country to another, and this hurdled comparability considerably. The use of the initial mutual recognition regime was limited because of the presence of technical weaknesses⁶. For this reason, from the very beginning of the new millennium, the 2000 Lisbon European Council stressed the necessity to prioritize disclosure reforms, as a first step to grant transparency to potential investors. With such an objective, the European Parliament and Council firstly released the Consolidated Admission Requirement Directive 2001/34/EC, which is about the admission of securities to official stock exchange listing and on information to be published on those securities. It prioritized disclosure reforms, as well as the possibility to access investment capital in the whole EU by means of a single passport.

Figure 1 – Timeline of the main steps in the EU regulatory process of convergence in disclosure requirements



Source 1 – Author's own graph

The Consolidated Admission Requirement Directive was lately amended by the well-known Prospectus Directive 2003/71/EC published on the Official Journal on the December the 31st 2003. The EEA Member States were called to implement the Prospectus Directive into national law prior that July the 1st 2005. Such a directive is part of the Financial Services Action Plan (FSAP). It is an ambitious plan launched by the European Commission in 1999. It is mainly focused on financial services, securities regulation, company law issues. It was then implemented in the subsequent years through a regular stream of EU legislative measures, including harmonization in securities regulation issues such as securities offerings, mandatory disclosure, insider trading and market manipulation. Its main purpose was to provide the legal framework for EU financial markets' integration through uniform rules providing a high level of investor

⁶ Ferran, E. (2007). *Cross-Border Offer of Securities in the EU: The Standard Life Flotation*.

protection while lowering the costs that otherwise stem from the joint application of different regimes to cross-border transactions⁷. The FSAP provides detailed measures to support the Single Market in financial services. The rationale behind it was that of granting the highest standards of investor protection, market efficiency, and integrity by harmonising the requirements to draw up approval and distribution of prospectuses to be published when securities are either offered to the public or admitted to trading on a regulated market situated or operating within the Member States. While the previous directives proved to be unsuccessful in facilitating the raising of capital across borders in Europe, Prospectus Directive is considered as a means to achieve “maximum harmonization”⁸. The Commission did not undertake any kind of public consultation prior to publication of this proposal. This situation, in addition to the fact that the new directive dealt with extensive prospectus publication requirements and a very limited set of exemptions, generated adverse comments and criticisms on the Commission’s ability to consult adequately⁹. The 2003 Directive had a positive impact on the initial public offerings it was applied to. They were two UK IPOs, and issuers seemed to handle the new regime easily¹⁰. However, difficulties subsequently emerged as documented by different studies developed in the following years¹¹.

The subsequent Transparency Directive (2004/109/EC) was about the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and it was initially reformed to reflect the European and Markets’ Authority’s (ESMA) provisions. This directive was later amended in 2007 by the Commission Requirement Transparency Directive 2007/14/EC. On April the 29th 2004, the European Commission issued the Prospectus Regulation (EC) No. 809/2004. Such a regulation was about the prospectuses’ information and format. The next crucial step was recorded in November the 24th 2010, with the release of the Amending Prospectus Directive 2010/73/EU. This was about transparency reporting requirements applicable to issuers of debt securities. The Member States were required to implement it into national law before July the 1st 2012. In 2013, the European Union issued the Amending Transparency Directive (2013/50/EU). In 2014, as part of the Regulation (EU) No. 596/2014 we can find the well-known Market Abuse Regulation (MAR). It is about imposing disclosure obligations on the issuers releasing material information. On January 2015, the European Union launched its project of building up a Capital Market Union (CMU). This is a huge programme developed and sustained by the European Commission and its main

⁷ Enriques, L., & Gatti, M. (2008). Is There a Uniform Securities Law After the Financial Services Action Plan. *Stanford Journal of Law, Business, and Finance*.

⁸ <http://www.elexica.com/en/legal-topics/capital-markets/13-overview-of-the-key-provisions-of-the-prospectus-directive>

⁹ Boland, V. (2001). Battle Looms over Brussels Plan for Capital Markets Regulation. *Financial Times*.

¹⁰ Rice, J. (2005). Equity Markets Take Prospectus Directive in their Stride. *International Financial Law Review*, 6 - 7.

¹¹ Revell, S., & Cole, E. (2006, July 1). Practicle issues arising from the implementation of the Prospectus Directive - what are the equity capital markets worrying about? *Capital Markets Law Journal*, Vol. 1, pp. 77 - 88.

objective is to facilitate the access of enterprises to capital markets. It consists in promoting circulation of capital around Europe while offering SMEs a wider range of sources of financing. Therefore, “if well designed and implemented, it can improve access to funding, the allocation of capital, prospects for savers, and financial stability in the European Union”¹².

The same year in February, the European Commission published a consultation paper on the review of the Prospectus Directive. On June the 30th 2017, the new Prospectus Regulation was published on the Official Journal. However, most of its provisions still have to come into force, to the extent that it will be entirely applied to all prospectuses approved starting from July the 21st 2019 onwards. Other important steps are represented by MiFID II and MiFIR¹³ both dealing deal with the admission to trading, while the Consolidated Admission Requirement Directive 2001/34/EC is more about the admission to official listing. MiFID (Markets in Financial Instruments Directive, i.e. 2004/39/EC) regulated the financial markets in Europe from January the 1st 2007 until January the 2nd 2018. Starting from January the 3rd 2018, the new directive came into force. The latter is known as MiFID II (i.e. 2014/65/EU), and together with the MiFIR (Markets in Financial Instruments Regulation, i.e. the EU regulation n. 600/2014) they replaced the previous directive. Its main objectives are “tackling conflicts of interest in asset management and investment advice, improving transparency in the price formation process of securities and derivatives, and requiring extensive data reporting to markets and supervisors”¹⁴. Therefore, MiFID II provides a harmonised regulation for investment services across the Member States of the European Economic Area (EEA).

Broadly speaking the prospectus, transparency, and market abuse regimes have been shaping around the behaviours of issuers who offer their financial instruments (derivatives, equity and debt securities) to the market, or try to get them admitted to be traded on regulated markets to raise capital thus widening their market focus. The prospectus regime has proved to be dynamic, and because of the relevance of this topic it has been reviewed, updated, and amended several times.

1.2 Prospectus Directive 2003/71/EC vs Prospectus Regulation (EU) No. 1129/2017

Legal entities offering securities to the market are subject to the duty of providing information on the financial instruments which will be offered. The general term of *securities* is used to make reference to shares and bonds. Henceforth, the former will be referred to as equity, the latter as debt. Where “the main features of equity securities are: (1) they are claims by shareholders on the

¹² Véron, N., & Wolff, G. B. (2016). Capital Markets Union: A Vision for the Long Term. *Journal of Financial Regulation*, 130 - 153.

¹³ Cfr. Lucantoni, P. (2017). Il mercato dei derivati: note preliminari ad uno studio sistematico. *Banca, Borsa, e Titoli di Credito - fasc. 2*, pp. 182-206.

¹⁴ Lannoo, K. (2018). *MiFID II will profoundly affect the portfolio management business*. European Capital Market Institute (ECMI).

net worth of the issuing corporation; (2) they are either listed on a stock exchange or unlisted; (3) they are issued on a specific issue date with a specific issue price; (4) they do not usually have a stated maturity; (5) they are usually issued in the domestic currency; and (6) they generate income in the form of dividends [...] while the main features of debt securities are: (1) an issue date; (2) an issue price; (3) a redemption price (or face value); (4) a maturity (or redemption date); (5) the coupon rate that the issuer pays to the holders; (6) the coupon dates; and (7) the currency of denomination and settlement”¹⁵. Whenever offered to the public those instruments must comply with certain rules to ensure the beneficiary gets all the necessary information to make aware decisions. Mandatory disclosure allows to make comparisons between high-quality and poor-quality issuers and securities in the marketplace¹⁶, and this objective is reached with the prospectus. It is a document the investor may rely on whenever making an investment decision, it contains information on both the issuer, and the financial instruments issued. With the main purpose of harmonizing prospectuses and granting the possibilities to issue securities in countries other than the home Member State, the European Commission issued the well-known Prospectus Directive 2003/71/EC, later amended by the directive 2010/73/EU. Prospectus Directive is strongly customer oriented, this means that the main purpose is to help investors making aware decisions, but at the same time it sets the borders within which the markets can operate legally. Following the 2010 wave of deregulatory reforms, it highlighted the value of the boundary-control of the directive. The term *prospectus* was not originally coined within the European Union, it rather dates back to the 1934, when it was firstly used in the US within the Securities and Exchange Act. Notwithstanding the years, the philosophy behind this term is still the same. Disclosure of information about the issuer and its financial instruments are mandatory because they improve the standards of the company’s corporate governance. However, the unfettered reliance on disclosure has been discredited by all those authors believing prospectuses fail to deliver valuable data¹⁷. This scepticism about prospectuses’ reliance is due to the fact that documents with too much information may fail to reach the objective of allowing investors to make aware decisions. However, the more the information, the closer the securities’ prices to their fair values¹⁸.

Prospectus Regulation (EU) No. 1129/2017 repeals Prospectus Directive 2003/71/EC and replaces Prospectus Regulation (EC) No. 809/2004. The former was published on the Official Journal of the European Union on June the 30th 2017, and it entered into force on July the 20th 2017. Despite the fact that some of its provisions have been applied starting from July the 20th

¹⁵ BIS. (2015). *Handbook on Securities Statistics*. Washington DC: International Monetary Fund (IMF).

¹⁶ Akerlof, G. (1970). The Market for "Lemons": Quality Uncertainty and the Market Mechanism. *The Quarterly Journal of Economics*, 488-500.

¹⁷ Benston, G. J. (1973). Required Disclosure and the Stock Market: An evolution of the Securities Exchange Act of 1934. *American Economic Review*, 132-155.

¹⁸ Coffee, J. J. (1984). Market Failure and the Economic Case for a Mandatory Disclosure System. *Virginia Law Review*, 70, 717.

2017 and July the 21st 2018, most of them are going to be effective on July the 21th 2019. The original idea was that two years were enough for the ESMA to work on secondary measures, for the NCAs to implement national laws, and for the issuers to prepare themselves to the new regime. This means that it will be ruled by a regulation instead of a directive, thus being directly applicable across the EU Member States without necessitating any further local implementation. With the objective of achieving the Capital Market Union (CMU), Prospectus Regulation (EU) No. 1129/2017 aims at facilitating access to capital markets while increasing their depth and liquidity. With the new regulation, the European Commission wanted to simplify the old prospectus regime reducing administrative burdens and improving efficiency. Despite the fact that most of the provisions contained in the Prospectus Directive 2003/71/EC are maintained in the Prospectus Regulation (EU) No. 1129/2017, some of them have been updated, amended, or modified. For this reason, the following paragraphs make an analysis of how some of the them were dealt with under the Prospectus Directive, and how they have changed with the latest 2017 Prospectus Regulation.

1.2.1 Purpose and scope of the directive

Art. 1(1) says that the purpose of the directive is to “*harmonize requirements for drawing up, approval, and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market*”. The proper meaning of the term *securities* is explained under Art. 2, while the concepts of *public offer* and *trading on regulated markets* are taken from the MiFID. This article is so important to the extent that it spurs international capital-raising. It promotes investor protection getting rid of the complex mutual recognition rules, which did not provide a *single passport* in the EU. The concept of *single passport* is dealt with under Art. 17 explained in the following paragraphs.

Art. 1(2) lists the securities not subject to the release of prospectuses whenever offered to the public. Since Prospectus Directive excludes certain specific securities, it is said to be *product driven* while MiFID is more *service oriented*. This paragraph classified the exemptions in three main groups:

- *Special classes of securities that are connected with peculiar regional regulation* such as Swedish mortgage bonds (known as *bostadsobligationer*) issued by credit institutions in Sweden, and Finnish non-fungible shares of capital;
- *The nature of the issuer* such as non-equity securities issued by a Member State or any other local authority, public international bodies, the ECB or central banks, shares in the capital of central banks, securities issued by associations with legal status or non-profit-making bodies, non-equity securities issued in a continuous and repeated manner provided that certain specific criteria are actually met (for example they are not subordinated, convertible or exchangeable). Moreover, units issued by collective investment

undertakings other than the closed-end type¹⁹ are excluded. Their main purpose is the collective investment of capital provided by the public, and their main advantage is that of sharing risk with other investors, and at the holder's request, units can be repurchased or redeemed .

- The *size of the securities offer* such as securities included in an offer whose total consideration is less than 5,000,000 € calculated over a period of twelve months, and non-equity securities issued in a continuous or repeated manner whose total consideration is less than 75,000,000€.

The 2003 Prospectus Directive set thresholds with the main objective of balancing investor protection while at the same time mitigating administrative burdens, legal and compliance costs related to tiny issues and issuers. The directive made the prospectus mandatory for issues above € 5 million, while they were not required to release any document for issues below € 100,000 (this provision was totally modified with the 2017 Regulation). The Member States were then free to follow their national implementations between those two extremes. Therefore, many juridical experts believe that the level of convergence was not particularly strong. This has inevitably raised the level of regulatory arbitrage among the EU countries. Countries like Germany, France, Bulgaria, Hungary, Latvia, Slovakia, Slovenia, and Belgium require their companies to publish prospectuses for issues greater or equal than 100,000 €. Other thresholds are: Austria 250,000 €, Czech Republic and Denmark 1 million €, Luxembourg 1.5 million €, Netherlands, Sweden and Poland 2.5 million €, Italy, the UK, Ireland, Spain, Portugal, Malta, Croatia, Greece, and Lithuania 5 million € (Table 1).

Table 1 – Thresholds above which EU countries require prospectuses to be drawn up

Country	Threshold
Germany, France, Bulgaria, Hungary, Latvia, Slovakia, Slovenia, Belgium	€ 100,000
Austria	€ 250,000
Czech Republic, Denmark	€ 1 million
Luxembourg	€ 1.5 million
Netherlands, Sweden, Poland	€ 2.5 million
Italy, UK , Ireland, Spain, Portugal, Malta, Croatia, Greece, Lithuania	€ 5 million

Source 2 – (Lucantoni, Market Transparency - Prospectus Directive 2003/71/EC, 2018)

¹⁹ Open-ended funds are regulated under UCITS (Undertakings in Collective Investment of Transferable Securities).

The 2017 Prospectus Regulation brings in several different changes which are generally divided into two main groups: general and special exemptions. The former refer to the application of the Regulation as a whole, while the latter to the exoneration from the application of certain prospectus obligations. However, many of the exemptions set forth by the Prospectus Directive remain invariant. Art. 1(3) of the 2017 Prospectus Regulation amends the exemption related to small scale offerings. The regulation “*shall not apply to an offer of securities to the public with a total consideration in the Union less than EUR 1 million, which shall be calculated over a period of twelve months. [...] Member States may require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden*”. The rationale behind this amendment is that the costs to prepare prospectuses are often disproportionate as compared to the size of the offering. This regulation enlarged both the lower and upper thresholds up to 1 and 8 million € respectively. This means that according to the new regulation, issuers are not required to release prospectuses for issues whose total consideration over a period of 12 months is lower than 1 million € (Art. 1(3) of the 2017 Regulation), while it is mandatory to publish them for issues whose total consideration over a period of 12 months is higher than 8 million € (Art. 3(2)(b) of the 2017 Regulation). In between those two thresholds the MSs are free to choose the limit above which investor protection is deemed to be appropriate. This provision was going to be valid starting from July the 21st 2018. We can now look at the consequences of this important provision. On the one hand, large issuers are not impacted from the higher thresholds as they usually do not make offerings on such a small scale; on the other, smaller issuers enjoy from a lower level of compliance and legal costs if they make issues between the old and new thresholds. Overall, the main risk set forth by this new provision is that it may eventually result in a reduction of investors’ protection as they would be eventually able to rely on less information.

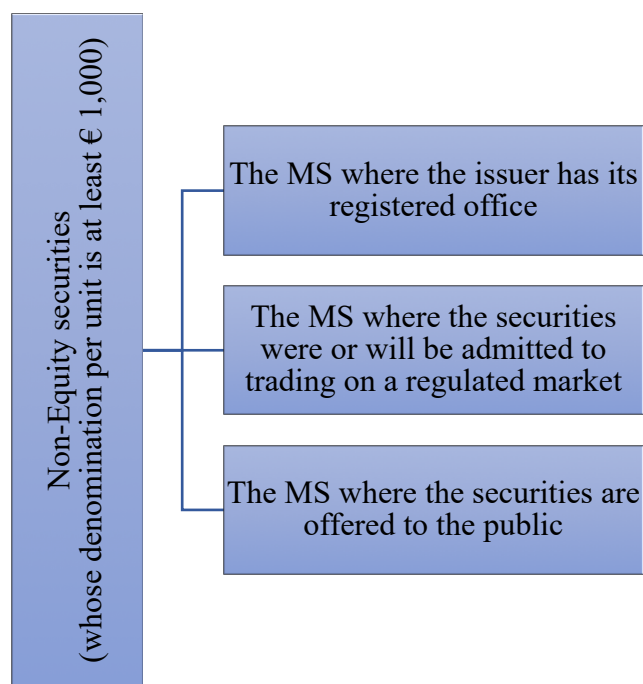
Art. 2 of the 2003 Directive exhibits definitions, and here below are some of major interest to understand the subsequent analysis developed throughout this thesis.

- The term ‘*securities*’ refers to *transferable securities* as defined under Article 1(4) of Directive 93/22/EEC. This term does not comprise *money market instruments* (as defined under Art. 1(5) of Directive 93/22/EEC), whose maturity is less than 12 months. For these instruments national legislation may be applicable. Prior to the financial crisis the EU securities and market regulation focused on the equity markets mainly, however starting from the 2003 adoption of this directive it broadened its area of interest a lot.
- ‘*equity securities*’ are shares or other transferable securities similar to company’s shares, and convertible bonds (whose main characteristics is that of providing the right to buy any

of the securities listed above as a consequence of being converted or the rights conferred on them being exercised). Convertible securities must be issued by the issuer of the underlying shares or by an entity belonging to the issuer's group.

- '*non-equity securities*' are all the securities that are not equity securities. This definition is broad and products like *convertible notes* fall within the labels of both equity and non-equity securities this is because convertible notes are akin to equity securities but formally become equity securities when covered. Despite the fact that NCAs are nowadays working in the same direction when treating with them, the risk of divergencies when dealing with complex and hybrid instruments like depository receipts and convertible notes is still extremely high.
- The term '*qualified investors*' was firstly introduced with the 2010 Amending Prospectus Directive. They are divided in two categories. The first category classifies qualified investors in four groups: (i) entities required to be authorized or regulated to operate in the financial market (like credit institutions, insurance companies, collective investment schemes, pension funds, other institutional investors); (ii) large undertakings meeting two of the following criteria like (a) having a balance-sheet total of € 20 million or more, (b) having a net turnover of € 40 million or more, (c) having their own funds of € 2 million or more; (iii) national or regional public bodies; (iv) other institutional investors. This definition is crucial to the extent that some securities addressed to qualified investors may be exempted from publishing prospectuses. The second category refers to *professional investors upon request* (of the investor to the financial intermediary) provided that they comply with two out of these three provisions: (i) the investor has carried out considerable transactions on relevant markets, with an average of ten transactions per quarter during the previous four quarters, (ii) investor's investment portfolio is higher than € 500,000; (iii) the investor has worked in the financial sector for at least one year in a professional position.
- The definition of '*Home Member State*' depends on the type of securities offered or for which admission to trading on a regulate market is sought. For '*non-equity securities whose denomination per unit amounts to at least € 1,000*' and some classes of hybrid or derivative securities that are regulated as non-equity, the issuer chooses the home member state among three main possibilities (look at Figure 2).

Figure 2 – Issuers' options to choose their Home Member State if they issue Non-Equity securities



Source 3 – Author's own graph

For what concerns *equity securities* and any other class of securities other than those described above, issuers are not allowed to choose their home Member State. The NCAs are rather responsible for approving their prospectuses where the issuer has its registered office.

- The '*Host Member State*' is the country where companies offer their securities to the public or ask for admission to trading, in case in which it is different from the home Member State.
- The concept of '*key information*' was amended by the 2010 Amending Prospectus Directive. It is defined as "*essential and appropriately structured information which is to be provided to investors [...] enabling them to understand the nature and risks of the issuer, guarantor, or securities that are to be offered to them or admitted to trading [...] to decide which offers of securities to consider further*". They shall include a short description of: the risks associated with the essential characteristics of the issuer, guarantor, their assets, liabilities, and financial position; the rights attaching to the securities; the estimated expenses charged to the investor; any details of the admission to trading, reasons of the offer, and use of proceeds.
- *Small and medium enterprise* means companies satisfying at least one of the following three criteria: (i) average number of employees lower than 250; (ii) total balance sheet

lower or equal than 43 million €; (iii) net annual turnover lower or equal than 50 million €. Art. 4(1)(13) of MiFID II (i.e. Directive 2014/65/EU) defines SMEs as companies whose market capitalization is lower than 200 million € over the previous three years. The 2017 Prospectus Regulation states that an enterprise is an SME if one of the two definitions listed here above holds true, thus broadening the interpretation reported in the 2003 Directive.

- '*offer of securities to the public*' is a communication of sufficient information about the terms of the offer and the securities offered to enable investors to make reliable evaluations, and decide whether to subscribe or not (Art. 2(d) of the 2003 Directive). This information may be spread out in any form and by any means, and this definition holds for the securities placed through financial intermediaries as well. The correct application of this concept is vital to reach the objective of Prospectus Directive, however its interpretation is a matter of national legislations and implementations of the directive. The same definition is reported under Art. 2(d) of the 2017 Regulation.

In this regard, it is interesting to notice that while the 2003 Directive made a clear distinction between *public offering* (subject to or exempted from the requirements) and *private placement* (i.e. *private offering*, and it is out of the scope of this prospectus requirement), the 2017 Regulation eliminated this division. More specifically, the new regulation looks at *private offering* as public offering enjoying the benefits of prospectus exemption, thus encompassing the notion of private placement in that of public offer.

Despite the fact that the notion of *private placement* could be barely noticed in the 2003 Directive, it could be directly identified in its fifth Recital, stating that "*in its initial report of 9 November 2000 the Committee stresses the lack of an agreed definition of public offer of securities, with the result that the same operation is regarded as a private placement in some Member States and not in others*". Moreover, it is true that Artt. 1 and 3 of Prospectus Directive did not explicitly use the term of *private offerings* or *private placements*, however this distinction also emerged from the *offers to the public* dealt with under Art. 4, despite the fact that in principle those two types of offers are antithetical²⁰. Therefore, the 2003 Directive made a distinction between non-application of Prospectus Directive (which corresponds to the obligation to publish a prospectus for certain "categories of offers"), and the exemption from the obligation to publish a prospectus for "certain offers to the public". The 2003 Directive creates some ambiguity, leading someone to think that the non-application of the obligation to publish certain categories of *offers* dealt with under Art.

²⁰ Pietrancosta, A. (2006). The "public offering of securities" concept in the new prospectus directive. In G. Ferrarini, & E. Wymeersch, *Investor protection in Europe - Corporate law making, the MiFID and beyond* (p. 339). Oxford .

3(2), is not justified by the fact that they are private in nature, but it rather stems from the lawmakers' intention to have such offers exempted as an expedient. Some MSs favour this interpretation. In the UK, the offers referred to in Art. 3(2) of the 2003 Directive are dealt with under Section 86 of the Financial Services and Markets Act 2000 (that implements Art. 3(2) of the 2003 Directive) and they come to be known as “exempt offers to the public”. Countries such as France, Germany, Italy, Spain, Belgium, and Portugal maintained a clear distinction between the definitions of *public offerings* and *private placements*. When tracing the line between those two definitions French law is much clearer and precise as compared to the others. It made a distinction between *public offerings* and *non-public offerings*. The AMF²¹ General Regulation embraced this differentiation, and the French Monetary and Financial Code made a distinction between *public* and *non-public offerings* by defining the former under Art. L. 411-1, and “*what does not constitute a public offering*” under Art. L. 411-2. The latter obviously encompasses all the cases not falling within the former definition.

In the 2017 Regulation the notion of *exempted public offerings* is enclosed into that of *private offerings* to the extent that: with Art. 1(3) the Regulation does not apply to a *public offering* of securities with a total amount in the European Union which is less than 1 million €; with Art. 1(4) the obligation to publish a prospectus does not apply to public offering of securities including the old cases provided for in the 2003 Directive but comprises also the cases of offers which are not intrinsically public such as those intended: (i) for qualified investors only; (ii) to less than 150 persons other than qualified investors; (iii) offers of securities of a nominal unit value at least equal to 100,000 €; (iv) to investors acquiring these securities for an overall amount of at least 100,000 €. This means that the offering of securities to a very small number of persons or a few qualified investors is not classified as *private offering* and hence excluded from the category of *public offering*. Therefore, the question naturally arises on whether it is correct to describe an offer addressed to a small group of people as *public*. This is acceptable for certain types of private placements based on their overall amount and disregarding the number of addressees. It is rather to be considered “as an unnatural species of public offerings”²². Similarly, the notion of public offering is itself threatened, to the extent that Art. 2(d) of the Regulation defines it as a *communication* to whatever person, therefore it is difficult to think of any offer of securities which cannot be categorized as a communication. At least, the plural word *persons* used in the Regulation excludes offers made to single entities.

It is now interesting to look at how some countries have been dealing with this topic so far. French Law, under Artt. L. 411-1 and L. 411-2 of the French Monetary and Financial Code specify

²¹ It is the French national competent authority, and it stands for Autorité de Marché Financier.

²² Marraud des Grottes, A., & Pietrancosta, A. (2018, January). Has the notion of “private offering” been abolished by the Prospectus Regulation of 14 June 2017? *Bulletin Joly Bourse*, p. 60.

that offers addressed to a single person cannot be qualified as public offerings. Section 576 of the UK Companies Act defines what is meant by an *offer to the public*, and lot of work has been done to clarify what *non-tender offers*²³ *to the public* (i.e. an offer to the public which is not public) are. Luxemburg Law uses only the words *public subscription* and *public issue*. For what concerns the US, its prospectus regime deals with *absence of an offer to the public*. This means that regulations and case law established the notion of *non-public offerings* and made a clear distinction with *exempt public offerings*.

The elimination of the distinction between private and public offers in the new regulation is not the result of an error, it rather stems from “the spirit of a system which assumes [...] that any offer of securities is made to the public and that the non-applicability of the obligation to publish a prospectus may [...] only result from a legal exception”²⁴. Indeed, the ambiguity resulting from this imprecise definition is mitigated by the exclusions from the obligation of producing prospectuses dealt with in the next paragraphs.

1.2.2 Information contained in a prospectus

The prospectuses is a document containing an analytical part on the issuer and the securities issued and a summary. It is retail-oriented as it must be easily analysable and comprehensible. The analysis developed in the next chapters shows that it sometimes fails in its objectives. This document is often found to be dense of information and technically difficult, thus “reflecting in part the litigation risk which characterizes prospectuses as liability shields”²⁵. Some retail investors use prospectuses as ex-post legal certificates rather than as ex-ante means to acquire instructions and data on the issue. They rather seem to privilege briefer marketing brochures reporting a few, clear information. With the objective of softening this problem, both the 2003 Directive and the 2017 Regulation require the prospectus to be published along with a summary. This condition does not apply to prospectuses related to admission to trading on a regulated market of non-equity securities with a denomination of at least € 100,000, but the Member States may still require the summary to be prepared. However, even the summary prospectus was found to be useless as issuers used to cut-and-paste their original prospectuses. This means that when preparing summaries, they made no effort in simplifying or adapting them to retail investors. The 2003 Prospectus Directive required them to be no longer than 2,500 words, however this comes with risks. The first one is that being really short some key information is not reported, the second one is that when releasing summaries that are too simple, retail investors do not capture the real risks

²³ A tender offer is an offer to purchase some or all of shareholders' shares in a corporation.

²⁴ Marraud des Grottes, A., & Pietrancosta, A. (2018, January). Has the notion of "private offering" been abolished by the Prospectus Regulation of 14 June 2017? *Bulletin Joly Bourse*, p. 60.

²⁵ TNS-Sofres. (2006). *Report for the AMF, Investigation of Investment Information and Management Processes and Analysis of Disclosure Documents for Retail Investors*.

entailed by such an investment. Therefore, a simplified version of the summary brings in the risk that crucial information is not reported. The 2010 reforms talk about short, simple, and easy to understand document. The summary must be written in a concise manner, contain key information in the language in which the prospectus is drawn up, and without using a technical vocabulary. Art. 2 of the 2003 directive defines *key information* as essential and appropriately structured notions, descriptions, and characteristics which is to be provided to investors to enable them to understand the risks of the issuer, guarantor, and securities. This information is necessary to make responsible investment decisions, they comprise: a brief description of the issuer or guarantor's peculiarities (financial position, assets and liabilities), the risks associated with the investment, the rights attached to the securities, the terms of the offer, and estimated expenses charged to the investor. The summary must be prepared following a standardized template to facilitate comparability across countries. A precise description of how summaries must be prepared according to the 2004 and 2017 Prospectus Regulations is reported in paragraph 1.2.5.

With the Prospectus Regulation (EU) No. 1129/2017 small but considerable changes have been made on the information to be included in a prospectus. Under the new regime, the length of a prospectus depends on the nature of the issuer, the circumstances, type of securities and prospective investors to whom securities are offered. As already specified, with the old regime information shall be easily analysable and comprehensible. Following the new reforms, it shall also be concise. Because of the friction between the concepts of brevity and completeness, it is difficult to assess whether these objectives can be wholly achieved.

Furthermore, with the 2003 Directive civil liability is attached to those who make decisions on its structure or translate the prospectus itself. However, liability applies either when the summary is misleading, inaccurate, or inconsistent when we read it along with the rest of the prospectus, or when it does not deliver information necessary to make reasonable investment decisions. This topic is dealt with under Art. 6(2). In case in which retail investors are not able to read the whole document in a foreign language, the host NCA may require the summary to be translated. However, issuers are still liable if material information is not reported on the prospectus.

Structured securities are also subject to Prospectus Directive because they provide a return which is usually linked to a basket of assets, moreover they are issued and developed by brokers as products for retail investors. Nowadays there are concrete rules on the release of information about complex products such as structured securities, however the prospectus regime does not contain specific disclosure guidelines on the risks they bring about, their risk-reward profiles,

redemption terms and costs²⁶. CESR²⁷'s assessment highlighted that disclosure was not always following Art. 5 requirements that disclosure must be easily analysable and comprehensible. Art. 3 of the 2004 Commission Prospectus Regulation allows the home NCAs to insert prospectus disclosures in the summary considering the specificity of any given prospectus.

The Annexes to the directive categorize the information contained in the different prospectus documents. The adoption of IOSCO's approach (through the annexes) provided reliable templates for the EU and facilitated the activities of investors seeking to raise capital out of their home country. IOSCO stands for International Organisation of Securities Commission, and it is an international association of the financial market authorities. It is not a controller, but a network of national regulators, market institutions, and international financial associations²⁸. It "identifies itself as the global standard setter for capital markets"²⁹. It particularly helped those wishing to invest in North American capital markets as the US regime is pretty close to IOSCO standards. The latter suggest to insert information about the risk factors, related party transactions and corporate governance³⁰.

1.2.3 Minimum information

This topic is dealt with under Art. 7 of the 2003 Directive, which is about the specific information that must be included in a prospectus. Duplication of information must be avoided, especially when the prospectus is composed of separate documents. Following Art. 7(2), drafting prospectuses companies shall take account of seven different factors: "*(i) various types of information needed by investors relating to equity and non-equity securities; (ii) various types and characteristics of the offers and admission to trading on a regulated market of non-equity security; (iii) the format used and the information required in prospectuses relating to non-equity securities, including warrants; (iv) the format used and the information required in prospectuses relating to non-equity securities, in so far as the securities are not subordinated, convertible, or exchangeable; (v) the various activities and size of the issuer; (vi) public nature of the issuer; (vii) a disclosure regime shall apply to companies whose share of the same class are admitted to trading on a regulated market or a multilateral trading facility as defined under Article 4(1)(15) of Directive 2004/39/EC*". The main objective of this article is to integrate substantive and procedural requirements. In the original 2003 Directive this article was not presented the way it looks today, as it was amended by the 2010 Prospectus Amending Regulation. Furthermore, NCAs

²⁶ CESR. (2009). *The Lehman Brothers Default: An assessment of the Market Impact (CESR/09-255)*. Paris.

²⁷ CESR stands for Committee of European Securities Regulators. The other level-3 committees in the Lamfalussy structure (2001) were: the Committee of European Banking Supervisors (CEBS), and Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

²⁸ Slaughter, A. M. (2009). *A New World Order*. Princeton, NJ: Princeton University Press.

²⁹ Jordan, C. (2018, September). The New Internationalism? IOSCO, International Standards, and Capital Markets Regulation. *Center for International Governance Innovation (CIGI) - Papers No. 189*.

³⁰ Karmel, R. S. (2005). Reform of the Public Company Disclosure in Europe. *University of Pennsylvania*.

in an issuer's home Member States (as defined under Art. 2) may ask for *adapted information* such as valuation or other experts' report on the issuer's assets, in addition to those reported on the schedules and building blocks. A schedule is "*a list of minimum information requirements adapted to the particular nature of the different types of issuers and/or the different securities involved*" (EC, Prospectus Regulation (EC) No. 809/2004, 2004). A building block is "*a list of additional information requirements, not included in one of the schedules, to be added to one or more schedules as the case may be, depending on the type of the instrument and/or under transaction for which a prospectus or base prospectus is drawn up*" (EC, Prospectus Regulation (EC) No. 809/2004, 2004). Prospectuses shall contain different information depending on the type of issue or securities involved. As explained under Art. 3 of the 2004 Prospectus Regulation, prospectuses must be drawn up as a mixture of schedules and building blocks. Notwithstanding the minimum information requirements dealt with under Art. 7 of the 2003 Directive, issuers have the right to omit certain information which is not deemed as relevant for the securities at issue.

In the 2017 Regulation the topic of *minimum information and format* is dealt with under Art. 13. Following the first paragraph of this article prospectuses shall take account of: (a) *the various types of information needed by investors relating to equity securities as compared with non-equity securities [...]*; (b) *the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities*; (c) *the format used and the information required in base prospectuses relating to non-equity securities, including warrants in any form*; (d) [...] *the public nature of the issuer*; (e) [...] *the specific nature of the activities of the issuer*". For what concerns point (b), the Commission shall set out specific information to be reported in prospectuses published for the admission to trading on regulated markets of non-equity securities. Firstly, they have to be traded on regulated markets or one of their segments whose access is reserved to qualified investors only. Secondly, non-equity securities shall have a denomination per unit of at least 100,000 €.

As a consequence of the fact that the 2017 Regulation introduced the concept of universal registration document (look at paragraph 1.2.7), Art. 13(2) says that the Commission shall define the minimum information to be included in the URD, and in particular it "*shall be aligned as much as possible with the information required to be disclosed in the annual and half-yearly financial reports referred to in Articles 4 and 5 of Directive 2004/109/EC³¹, including the management report and the corporate governance statement*". Moreover, in order to ensure the proper functioning of the wholesale market for non-equity securities and increase market liquidity an alleviated treatment of information should be defined. The latter refers to "*minimum information*

³¹ Artt. 4 and 5 of the Transparency Directive deal with *annual financial reports* and *half-yearly financial reports* respectively.

requirements that are less onerous than those applying to non-equity securities offered to retail investors". With the 2017 Prospectus Regulation, NCAs do not have the power to introduce additional information to that referred to as minimum. However, they must discuss with the issuer what information shall be included, and whether any modification or derogation from this provision is actually required. Art. 23 of the 2004 Prospectus Regulation calls for derogations in case in which the activities involved fall within some specific categories (e.g. real property, mineral and investment companies, scientific research companies, start-ups and shipping firms).

Instead of being forward looking, the minimum information that must be reported in prospectuses are mainly historical. The EU approach is more prudent as compared to that adopted in the US. This means that regulators are reluctant in inserting optimistic forward-looking information as it may be eventually misleading for potential investors. However, its inclusion is not forbidden. According to the new Regulation voluntary disclosure of profit forecasts is highly bounded but still allowed. Those forecasts must be presented in a consistent and comparable manner, they should come along with a statement carefully prepared by independent accountant or auditors, they *"should not be confused with the disclosure of known trends or other factual data with material impact on the issuers' prospects"*. It must necessarily include a clear presentation of all the assumptions the forecasts or estimates are actually based on. The term clear means that they must be specific, precise, and readily understandable. Furthermore, the report prepared by independent accountants or auditors must be consistent with the issuers' accounting policies. These requirements are onerous, and they may eventually frighten issuers from encompassing forward-looking information. Regulators introduced all those requirements to enhance investor protection. However, comparison of historical data is effortless but at the same time quite purposeless as the value of securities depends on their future fluctuations, and not on their past performances. As in the Art. 7 of the Directive, information which is not deemed as relevant for the securities at issue can be omitted from the prospectus, and this topic is dealt with under Art. 18 of the new Regulation.

1.2.4 Structure: Shelf-Registration and Base Prospectus

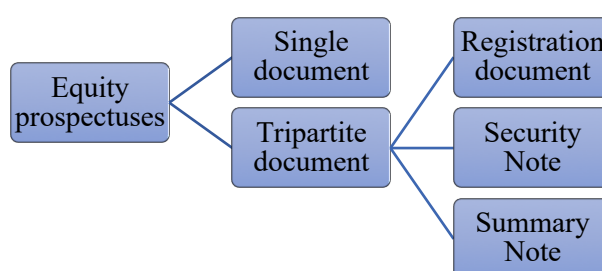
For the issuers frequently accessing the market (through offers of securities to the market or admission of their securities to trading), the arrangement and approval of long disclosure requirements may be burdensome³². For this reason, the shelf-registration main objectives are: the ease of this burden and the acceleration of this process through which issuers access the capital markets so that they can best exploit market conditions. With the shelf-registration schemes an initial disclosure and/or registration document is filed or approved and supplements are produced

³² IOSCO. (2001). *Adapting IOSCO International Disclosure Standards for Shelf Registration Systems*.

every time the securities are offered³³. The introduction of the shelf-registration scheme represents one of the most important advances made by the 2003 Prospectus Directive.

According to Art. 5(3) Prospectus Directive 2003/71/EC, those documents may take two different structures on the basis of whether they relate to equity or non-equity issues. Equity prospectuses may exhibit either a *Single* or a *Tripartite* document. The latter is further subdivided into initial *registration document*, which is about all the general issuer's information, *securities note* with all the information about the securities being offered or admitted to trading, and a *summary note* providing investors with an overview of all the information necessary to make responsive investment decisions (look at Figure 3).

Figure 3 – Equity prospectuses' structure



Source 4 – Author's own graph

The security note comprises the disclosure concerning the securities for the first and each subsequent offer or admission to trading. Following Art. 12(1) (*Prospectus Consisting of Separate Documents*), once the registration document is approved by the NCA, the issuer is required to prepare the *security note* and the *summary note* when the securities are offered to the public or admitted to trading on a regulated market. The *security note* contains information usually reported on the registration document, however if there is a considerable change or evolution influencing the investors' evaluations since the registration document or the last updated supplements, a security note must necessarily be released (Art. 12(2)). The competent authorities are required to approve security notes and summary notes separately.

At the choice of the issuer prospectuses related to non-equity issues might be presented with a special format, they are known as *Base Prospectuses*. The non-equity category comprises: asset-backed securities (ABS), debt securities < 100,000€, debt securities ≥ 100,000€, depository receipt, derivatives, and securities offered by closed-end funds. Before proceeding with the prospectus structure, it is first necessary to have a look at what these products are. Depository

³³ Moloney, N. (2014). *EU securities and financial markets regulation*. Third edition - Oxford University Press.

receipts³⁴ are “negotiable certificates that confer ownership of shares in the foreign market”³⁵. A derivative is “a financial contract whose value depends on the value of one or more underlying reference assets, rates or indices, on a measure of economic value or on factual event”³⁶. Closed-end funds (CEFs) are “traded equity shares against an asset pool that consists of traded securities”³⁷, they raise capital only once through IPOs.

A base prospectus contains information on the issuer, the securities offered or admitted to trading, and the final terms. It must be supplemented if relevant changes on the issuer or the securities arise, this means it cannot be structured as a tripartite document (i.e. it never presents securities notes). Consequently, if neither the base prospectus nor its related supplements comprise the *final terms*, then they must be delivered to the host NCA as soon as possible and before the public offer or admission to trading takes place. Art.5(4) says that the *final terms* document must contain information related to the securities note disclosure required in the tripartite document and which cannot be used to supplement the prospectus. As explained before, a base prospectus can be used for non-equity securities issued under an offering programme and for non-equity securities issued in a continuous or repeated manner, and they are not subject to the NCA approval. For this reason the review of the 2003 Directive highlighted difficulties with this regime, to the extent that issuers were using the final terms (not requiring an approval by the competent authority) instead of the supplement. The 2010 reforms aim at clarifying the information contained in the base prospectus and its related supplements, while minimizing the information contained in the final terms document. The 2010 Amending Prospectus Regulation and the subsequent 2012 Commission Delegated Regulation 486/2012 to the 2004 Commission Prospectus Regulation precise the way in which information must be categorized and subdivided between the two documents. They confirm that final terms must not amend or replace disclosures contained in the base prospectus which may affect the investors’ perception of the issuer and securities, they should be rather dealt with in the supplements. The new regulatory regime shows the EU’s ability to handle difficulties relatively quickly. The original 2003 Directive did not take account of the differences between the base prospectus and final terms, for this reason the 2004 Commission Prospectus Regulation was more flexible. Such an approach became “more restrictive”³⁸ with the

³⁴ Anytime a company decides to get listed in a foreign country with different currency, it makes an agreement with a depositary bank in the host country. According to this agreement the bank gathers foreign securities, and it lists them on the home market. Their peculiarity is that there is no one-to-one correspondence between the securities issued in the new currency and the old ones, i.e. one security in the currency may be equivalent to five securities issued by the original company. They were born as a consequence of the difficulties and additional research investors faced when deciding to acquire securities whose value was expressed in other currencies.

³⁵ Chiu, A. A. (2018, April 4). The Effect of Tax Policy on Foreign Ownership and Corporate Governance Mechanism. *International Research Journal of Applied Finance (IRJAF)*, IX, 209-210.

³⁶ ECB. (2009, December). Glossary of terms related to payment, clearing and settlement systems. *European Central Bank - Eurosystem*, 9.

³⁷ Jarrow, R. A., & Protter, P. (2017, March 14). A Rational Asset Pricing Model for Premiums and Discounts on Closed-End Funds: The Bubble Theory.

³⁸ ESMA. (2011). *Consultation Paper/2011/141*, 8.

2010 reforms. ESMA suggested that rules needed to be implemented using a category-based approach. It called for complicated payment formulae to be released in the base prospectus and for an assessment of its completeness and comprehensibility, for publication of redemption and settlement procedures for derivative securities. This makes NCAs go very close to an assessment of substantive merit of a product main characteristics, despite the fact that the directive does not allow them to undertake economic appraisals of the products offered. Therefore, under the new prospectus regime, the line division between disclosure review and product intervention is thin and nuanced.

In the 2017 Regulation the *base prospectus* is dealt with under Art. 8. The first paragraph of this article says that the issuer of non-equity securities (including warrants) can at the choice of the issuer, offeror, or person asking for admission to trading on a regulated market release a *base prospectus*. Non-equity securities, including those issued in a continuous or repeated manner, may now have a base prospectus. *“In order to enhance the flexibility and cost-effectiveness of the base prospectus, an issuer should be allowed to draw up a base prospectus as separate documents”*. This means that with the new Regulation, the base prospectus can consist of three separate documents, and its registration document can now take the form of a universal registration document (look at paragraph 1.2.7). Following Art. 8(2), it shall include information on: *“(a) a template, entitled ‘form of the final terms’, to be filled out for each individual issue and indicating the available options with regard to the information to be determined in the final terms of the offer; (b) the address of the website where the final terms will be published”*. Art. 8(5) states that notwithstanding whether the final terms are contained in the base prospectus or any subsequent supplement, *“the issuer shall make them available to the public [...] and file them with the competent authority of the home Member State”*. Moreover, the *final terms* shall contain a clear and prominent statement indicating: *(a) that the final terms have been prepared for the purpose of this Regulation and must be read in conjunction with the base prospectus and any supplement thereto [...] (c) that a summary of the individual issue is annexed to the final terms”*. As stated under Art. 8(6) base prospectuses can be drawn up as single or separate documents. In case in which the issuer, the offeror or the person asking for admission to trading on a regulated market has filed a registration document for non-equity securities, or an URD and chooses to draw up a base prospectus, the latter shall consist of: *“(a) the information contained in the registration document, or in the universal registration document; (b) the information which would otherwise be contained in the relevant securities note, with the exception of the final terms where the final terms are not included in the base prospectus”*. The summary shall comprise the key information in the base prospectus (including that on the issuer), and in the final terms (including that not contained in the base prospectus). One of the key features differentiating the 2003 Directive with

the 2017 Regulation is that the information contained in a base prospectus summary shall be *issue-specific* and not general (Art. 8(8)). If the final terms relate to several securities which differ in few details (e.g. issue price, maturity), it is possible to prepare a single summary for all those securities, provided that the information related to different securities is properly isolated. Information contained in the base prospectus may be supplemented if necessary (Art. 8(10)). Moreover, as explained under Art. 8(11), “*an offer of securities to the public may continue after the expiration of the base prospectus [...] provided that a succeeding base prospectus is approved and published no later than the last day of validity of the previous base prospectus*”. In case an offer of this typology takes place, the first page of the final terms shall properly report a warning on last day of validity of the previous base prospectus and where the subsequent base prospectus will be published. Finally, investors who have agreed to purchase or subscribe for the securities during the validity period of the previous base prospectus enjoy the right to withdraw, unless the securities have already been delivered to them.

1.2.5 Prospectus summary

Following Art. 5(2) of the 2003 Directive, prospectuses shall contain a *summary*, with the exception of those referred to non-equity securities with a denomination of at least 100,000 € related to admission to trading on a regulated market. This article deals with the rules on the style, content, format, and scope of the summary, as amended by the 2010 Amending Prospectus Directive. It must be written in a concise manner and in non-technical language, and contain the key information as defined under Art. 2(1). To facilitate comparability among summaries, they must be constructed on a modular basis and contain five tables containing (1) an introduction and warnings; information on (2) the issuer or any guarantor; (3) the securities; (4) the risks; (5) the offer, as described under Art. 24 and 25 of the 2004 Prospectus Regulation (amended in 2012). According to Art. 24(1) of the same regulation, the prospectus summary could not be longer than 7 percent of the whole document, or 15 pages. There is a difference in the *materiality test* carried out on the risks to be included in the summary and those included in the risk factor section of the prospectus document. The latter must contain all the material risks, while the summary (as explained under Section D of Annex XXII) contains information about key risks specific to the issuer, its industry, and the securities. The description of the risk factors in the summary should enable investors to understand the sources, nature, and consequences of those risks. If the summary is able to do it, then no additional information is required³⁹.

As described before, the 2017 Prospectus Regulation brought considerable changes in the prospectus regime. It says that the summary makes the prospectus more accessible and easily

³⁹ Question n. 94 ESMA. (2017). *Prospectus Q&A, latest version adopted, 20 October 2017, ESMA 31-62-780*.

readable. The 2003 Directive says that the summary shall be written “*in a concise manner and in non-technical language*”, the new regulation instead uses the following words: “the summary shall be accurate, fair and clear and shall not be misleading” and it shall be written in a language that is “clear, non-technical, concise and comprehensible for investors”. Prospectus summary shall also deal with civil liability in case in which, when read with the rest of the prospectus, it does not provide key information to aid investors deciding which securities they want to invest in. Art. 7 of the new regulation changed both content and format of the summary. It should be no longer than 7 pages of A4-sized paper and it shall be single sided. This limit can be extended in case of extraordinary circumstances only, specifically laid down in the regulation itself. The summary shall be presented as an “introduction to the prospectus” and it is made up of four different sections: (i) introduction, (ii) key information on the issuer, (iii) key information on the securities, and (iv) key information on the offer of securities to the public and/or admission to trading on a regulated market. The first paragraph must contain warnings such as for example communicating to potential investors to be cautious and reading the whole document and not the introduction only. The second section must include a brief description of the issuer, its major shareholders, and key managing directors, and information about the owner of the company. The third paragraph must report the seniority of the securities in the event of insolvency and the more likely consequences on the investment. Art. 7(11) of the new regulation states that the summary cannot incorporate information by reference or refer to other parts of the prospectus. The set of documents that can be incorporated by reference was enlarged to include management reports, corporate governance documents, asset valuation reports, memoranda and articles of association, and remuneration reports. Following the same article on *prospectus summary*, if the securities are not offered to retail investors, there is no obligation to produce a summary. This means that the summary as defined so far is required for investments addressed to retail investors only. As already reported in the previous paragraph, Art. 8(8) of the new regulation points out that summaries to base prospectuses shall be *issue-specific*. Furthermore, with the new regulation, the summary shall contain no more than 15 material risk factors, including those specific to the issuer, the most material risk factors associated to the guarantor, and the most material risks associated to the securities. The goal of this provision is to disclose the risks associated with such an investment before investors make any decision. Provisions laid down under the seventh article of the new regulation are going to be applied starting from July the 21st 2019.

Since the old regime was quite intricate in terms of requirements necessary to draw up summaries for base prospectuses, under the new regime the latter do not need to come out with summaries at all. Despite the fact that base prospectuses do not necessitate a summary, the final terms for each individual issue must have a summary of the issue annexed to it.

1.2.6 Risk factors

In order to assess the market risk associated with the securities offered or admitted to trading on a regulated market, the old and the new regimes both require a disclosure of risk factors specific to the issuer and its industry. The 2004 Prospectus Regulation considers risk factors as a list of risks material for taking investment decisions and specific to the issuer and/or the securities issued. Recital 54 of the new regulation clarifies that in addition to the specificity requirement, those risks should be *“corroborated by the content of the prospectus”*. Furthermore, the latter *“should not contain risk factors which are generic and only serve as disclaimers”*. Art. 16 (i.e. risk factors) of the 2017 Prospectus Regulation states that they must be limited to risks which are specific to the issuer and/or the securities and which are material for making an informed investment decision. Art. 16(1) reports that *“when drawing up the prospectus, the issuer, offeror, or person asking for admission to trading shall assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact”*. Moreover, *“the risk factors shall be presented in a limited number of categories depending on their nature. In each category the most material risk factors shall be mentioned first”* according to the issuer’s assessment. Hence the materiality assessment involves calculations of probabilities. However, on a voluntary basis the issuer may also refer to a qualitative scale of low, medium, high risk level. The use of the verb ‘may’ makes it unclear whether issuers are deemed to be liable if they use such a qualitative approach in their risk assessment. Broadly speaking, “the new requirements as to materiality and risk factors are not inconsistent with prevailing market practice”⁴⁰, however more accuracy on the specific meaning of the term material in relation to risk factors is needed. Moreover, issuers and advisers are concerned about the consequences of not fulfilling those new rules. An example is represented by the liability burden they are subject to if they do not place at the beginning of the document one of the risks that in a subsequent period turns to be the most important. With the qualitative scale the probability of making mistakes in assessing risk priority is much higher. Therefore, because of the liability consequences, it is unlikely that they will use the qualitative approach. Art. 16(2) specifies that risk factors shall also include: those resulting from the level of subordination of a security (in case of bankruptcy, or any other similar procedure), the insolvency of a credit institution, its resolution, or restructuring in accordance with Directive 2014/59/EU⁴¹. Art. 16(4) requires ESMA to develop guidelines concerning risk factors’ specificity materiality and presentation across categories depending on their nature. Finally, with Art. 16(4) the Commission is in charge of determining the criteria to

⁴⁰ Bullock, S., Delgado, A., Morris, T., & Chambers, C. (2017, July). New Prospectus Regulation - an evolving regime. *Practical Law - PLC Magazine*.

⁴¹ It establishes a framework for the recovery and resolution of credit institutions and investment firms.

verify the specificity and materiality of those risk factors. Provisions reported under Art. 16 of the new Regulation are going to be applied starting from July the 21st 2019.

1.2.7 Universal Registration Document (URD)

This topic is totally new and it was firstly introduced by the 2017 Regulation. Since there is no similar provision in the 2003 Prospectus Directive, it is not possible to make any comparison between these two. Art. 9(1) states that *“any issuer whose securities are admitted to trading on a regulated market or an MTF may draw up every financial year a registration document in the form of a universal registration document describing the company’s organisation, business, financial position, earnings and prospects, governance and shareholding structure”*. The URD is an optional registration mechanism reserved to the issuers of securities admitted to trading in regulated markets or in MTFs. It is a flexible tool whose information content does not depend on the subsequent use or purpose of the issuer (e.g. public offers, admission to trading to regulated markets, equity or non-equity securities). Hence, once an issuer has a URD it will be possible to use it as a constituent part of any future equity or debt prospectus. It aims at simplifying the process of issuing securities in the aftermath of the first issue, thus providing issuers who frequently raise financing on capital markets enough flexibility to operate swiftly. Following Art. 9(2) the URD must be submitted for the approval by the NCA, and, once approved by the NCA for two consecutive financial years, then subsequent UDRs are filed with the NCA without necessitating any additional approval. However, if *“the issuer thereafter fails to file a universal registration document for one financial year, the benefit of filing without prior approval shall be lost”*. This document may contain information incorporated by reference (Art. 9(6)). Furthermore, if the URD is used as a constituent part of a prospectus between the time the prospectus is approved and the closing date of the offer or the time when trading on a regulated market begins, the URD may only be amended through supplements. Once approved the URD is subject to the passporting activity. Following Art. 9(7), as long as the URD is not part of a prospectus *“the issuer may at any time update the information it contains by filing an amendment thereto with the competent authority”*. Art. 9(8) says that the NCA may at any time decide to *“scrutinising the completeness, the consistency and the comprehensibility of the information”* contained in UDRs filed without prior approval. Should it find that the document does not satisfy those requirements, it shall be notified to the issuer (Art. 9(9)). The latter has to take account of the request for amendment or supplementary information in the URD of the following financial year. In case in which the issuer wished to encompass the URD in the prospectus, he/she has to file an amendment to the document. If the URD contains material omission, mistake or inaccuracy which is likely to mislead investors from making *“an informed assessment of the issuer, the issuer shall file an amendment to the universal registration document without undue delay”*. Moreover, the NCA may ask the issuer to produce a consolidated version of the URD to ensure comprehensibility of the information contained in the document. Art. 9(10) states that *“paragraphs 7 and 9 shall only apply where the*

universal registration document is not in use as a constituent part of a prospectus". Art. 9(11) states that issuers using the URD gain the status of *frequent issuers* thus benefiting from quicker approval regime disciplined by Art. 20(6) of the 2017 Regulation. This fast-track approval of the prospectus (5 working days instead of the usual 10 working days) is then subject to the issuer: (i) confirming that it has, to the best of its knowledge, compiled over the 18 months or a shorter period commencing from the obligation to disclose regulated information) with its disclosure obligations under the Market Abuse Regulation (Regulation (EU) No. 596/2014) and Transparency Directive (Directive 2004/109/EC); (ii) amending its URD to reflect any comments from the competent authority. With the US short-form registration, issuers are allowed to refer in the prospectus to financial reports filed under the Securities Act 1934. This allows to avoid information overlapping in the prospectus⁴².

With the prospectus regime established in 2004, issuers had the possibility of filing and publishing registration documents as basis for prospectuses, however this option has been seldomly used. Now, it remains to assess whether the URD will result as being more appealing for issuers. When considering the possibility of drawing up this new document, issuers should take account of five main factors⁴³: (1) the expected frequency of the issues; (2) the new 20% exemption threshold which may raise concerns on whether issuers will be likely to undertake further frequent issues requiring the publication of a prospectus; (3) the obligation to file a URD each financial year to avoid losing the frequent-issuer status may prove to be unattractive; (4) in case in which issuers consider the possibility of offering securities in other countries like the US, they should take account of the fact that disclosure may be presented in a different standard or format; (5) issuers of non-equity securities may consider it unappealing the fact that the minimum information contained in the URD is the same as that required for a public offer or an admission to trading of equity securities.

To sum up, the URD is a registration document drawn up by issuers whose securities have already been admitted to trading on a regulated market or multilateral trading facility (MTF) in one of the MSs. The main objectives of this provision are essentially twofold: firstly, enabling the issuer to fast-track the approval procedure of its prospectuses; secondly, avoiding duplication of filings under the prospectus and transparency regimes. However, it is debateable whether in practice this innovative provision will have a considerable positive impact. Nevertheless, it is worth noting that with the new regime under certain circumstances it is going to be possible to

⁴² Vidal, E., & Joosten, J. J. (2011). *United States Securities Regulation: a Guidebook for International Companies* pp. 51 - 53. Globe Law and Business

⁴³ Bullock, S., Delgado, A., Morris, T., & Chambers, C. (2017, July). New Prospectus Regulation - an evolving regime. *Practical Law - PLC Magazine*.

passport registration documents including universal registration documents. Overall, the URD provisions are going to be applied starting from July the 21st 2019.

1.2.8 Supplements

In case in which a new factor, material mistake, or inaccuracy arises or is noticed in the period between the approval and the time the offer or admission to trading on a regulated market is completed, the prospectus must be updated with supplements (Art. 16 of the 2003 Directive). Issuers make the decision of publishing supplements or not. Their release is not a requirement, and whether they would be published or not depends on the general market conditions. There are some situations in which supplements are warmly recommended, such as: in case in which the interim financial statements present significant deviations from the information previously reported. Anyway, in case of doubt on whether to release supplements or not ESMA suggests to do it. It also says that forecasts made in relation to shares and not reported on the previous prospectus are assumed to be material (especially if related to IPOs). In this case, despite the fact that it is up to the issuer deciding whether to prepare supplements or not, ESMA suggests them to release such a document. Art. 14 (i.e. *publication of a prospectus*) of the directive states that once released the prospectus cannot be modified apart from the supplements. In case in which the prospectus contains mistakes which is not material or significant, the issuer is entitled to make an announcement to explain the mistake or inaccuracy⁴⁴, as in practice there are situations in which information is not significant under the disclosure regime but could be useful anyway. Supplements are used to update or correct prospectus summaries as well. Finally, ESMA deals with supplements in final terms⁴⁵. In case in which supplemental information to final terms is not considered a significant new factor or correcting a material mistake or inaccuracy, issuers shall release a notice reporting eventual adjustments. Issuers may also spontaneously replace final terms with new information. In case in which supplemental information to final terms is a significant new factor or corrects a material mistake or inaccuracy, issuers shall release a supplement reporting eventual adjustments. Text and format of supplements shall be identical to those used in the original version of the prospectus approved by the NCA. Moreover, supplements must be filed and approved within seven days at maximum.

NCA's approve and publish supplements, and the release of summaries triggers withdrawal rights. Art. 16(3) says that once the securities are offered to the public and before the supplement is published, investors who already subscribed may exercise their withdrawal right within two working days after the release of the supplement itself provided that the factor requiring the document publication arose before the final closing date or delivery of the products. Issuers may

⁴⁴ Question n. 23 ESMA. (2017). *Prospectus Q&A, latest version adopted, 20 October 2017, ESMA 31-62-780*.

⁴⁵ Question n. 24 ESMA. (2017). *Prospectus Q&A, latest version adopted, 20 October 2017, ESMA 31-62-780*.

extend this time limit, but the final term must be clearly reported in the supplement. This particularly boosts the risk of abuse of withdrawal in relation to speculative investments mainly. For this reason ESMA published the Regulatory Technical Standards (RTSs) aimed at identifying precise situations in which supplements must be released.

In the 2017 Regulation summaries are dealt with under Art. 23. As in the old Directive, the first paragraph of this article explains the scope of the supplement, which must be necessarily released should a “*new factor, material mistake or material inaccuracy relating to the information included in a prospectus*” materialize. Supplements shall be approved by the NCAs in five working days (Art. 2(t) defines them as “*working days of the relevant competent authority excluding Saturdays, Sundays and public holidays, as defined in the national law applicable to that competent authority*”) at maximum. Following Art. 23(2) states that in case in which the prospectus relates to an offer to the public, investors who have already agreed to purchase or subscribe for the securities prior to the release of the supplement have the right to withdraw their acceptance in two working days after the publication of the supplement itself, provided that the “*new factor, material mistake or material inaccuracy arose or was noted before the closing of the offer period or the delivery of the securities*”. At the choice of the issuer or offer this period may be eventually extended, and the final date of the withdrawal right shall be reasonably reported on the supplement. Therefore, the supplement shall report: (a) *that a right of withdrawal is only granted to those investors who had already agreed to purchase or subscribe for the securities before the supplement was published and where the securities had not yet been delivered to the investors at the time when the significant new factor, material mistake or material inaccuracy arose or was noted*; (b) *the period in which investors can exercise their right of withdrawal*; and (c) *whom investors may contact should they wish to exercise the right of withdrawal*”. Art. 23(3) deals with the situation in which securities are placed through financial intermediaries. In this case the intermediary has to advise investors that a supplement is going to be released and they also have to assist investors in the withdrawal process.

1.2.9 Mandatory publication of a prospectus and exemptions

The offer of transferable securities to the public does not always imply the obligation to release a prospectus. Publication of a prospectus is triggered by:

1. The promotion of transferable securities to the public
2. The admission of transferable securities to regulated market in the European Economic Area (EEA)

The concept of *offer of securities to the public* is defined under Art. 2 of the 2003 Directive (look at paragraph 1.2.1) it is different from that of *contractual offer* which may be binding on the offeror. The main reason is that of protecting investors further, EU legislators decided the directive

is intended to mere invitations and attractions concerned with transferable securities. Secondly, in case in which the issuer of transferable securities wishes to be admitted to regulated markets, he/she is then subject to the publication of a prospectus. This means that the release of a prospectus depends on the communication of an offer to the public, and the circumstances in which transferable securities get listed in a regulated market.

There are cases in which the offer to the public falls within the objective of Prospectus Directive, but are exempted from the obligation of publishing prospectuses. On the other hand, there are situations falling outside the scope of such a directive, and for this reason they are not required to publish prospectuses, i.e. the directive does not apply. Art. 1(2) deals with some cases in which the directive shall not apply at all. It lists all the securities not subject to the release of prospectuses whenever offered to the public. The exceptions are related to:

- some special classes of securities with peculiar national regulation (such as the Finnish non-fungible shares of capital entailing the right to occupy an apartment and other properties connected to the ownership of shares in a housing association, and the Swedish mortgage bonds);
- the nature of the issuer or the guarantor (such as “*non-equity securities issued by a Member State or by one of a Member State’s regional or local authorities*”, shares in the central bank’s capital, securities issued by associations with legal status or non-profit bodies, non-equity securities issued in a continuous or repeated manner by credit institutions as long as these securities are (i) not subordinated, convertible, or exchangeable, (ii) do not give the right to subscribe or acquire other types of securities and are not linked to derivatives, (iii) materialise reception of payable deposits, (iv) are covered by deposit guarantee schemes.
- the size of the securities offer (such as “*securities included in an offer where the total consideration for the offer in the Union is less than EUR 5,000,000, which shall be calculated over a period of 12 months; non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration for the offer in the Union is less than EUR 75,000,000, which shall be calculated over a period of 12 months*”).

When dealing with the concept of mandatory publication of a prospectus, we cannot forget to mention Art. 3 (i.e. *obligation to publish a prospectus*) of the 2003 Directive. Art. 3(1) says that the Member States can offer securities to the public after publishing prospectuses only. Art. 3(2) lists certain exemptions from the obligation to publish a prospectus, such as: (i) offers of securities addressed to qualified investors only; (ii) offers of securities addressed to less than 150 natural or legal persons (not deemed to be qualified) per MS; (iii) offers of securities addressed to investors individually interested in securities whose value is at least 100,000 € per single offer; (iv) offers

of securities whose denomination per unit is at least 100,000 €; (v) offers of securities with total value of at least 100,000 € whose threshold is calculated over a period of twelve months.

In relation to the first point it is important to specify that “*qualified investors* are mainly seasoned investors whose level of expertise, experience and knowledge is such that this does not require the same level of protection as ordinary investors”⁴⁶. At the beginning, Prospectus Directive gave its own definition of *qualified investors* saying that they are to be considered as large institutions and not as single individuals. The entities considered as such were governments, banks, investment firms, and corporations with at least 250 employees, a total balance sheet of at least 43,000,000 €, and an annual turnover greater than 50,000,000 €. They were hence assumed to have a high level of knowledge of financial products, and as a consequence not in need of receiving prospectuses to understand the kind of investment they were going to make. Nowadays, the concept of *qualified investors* within the prospectus regime is associated with the category of professional and retail clients. The second point of the list here above is referred to as *private placement*. It is an offer made to a small set of investors (such as individuals or small enterprises) whose number is so small that the requirement to publish a prospectus would be burdensome. The third point exempts issuers offering their securities to investors acquiring them for an overall amount of at least 100,000 €. However, investors able to make such a consistent subscription are necessarily to be considered as professional ones, hence they are assumed not to necessitate prospectuses to understand the products they are intended to acquire. Similar explanation follows from the fourth point. A minimum amount of 100,000 € is obviously “an off-limit area for retail investors, and conversely a hunting ground exclusively for major investors”⁴⁷. The reason behind the fifth and last exception is reversed, to the extent that the offer is considered as too small to cause any possible financial damage to any investor. This article basically fixes the boundary between *public* and *private markets*. In the former offers of securities to the public are subject to the Directive, in the latter capital is raised without fulfilling its requirements.

The topic of exemptions goes on with Art. 4 (i.e. *exemptions from the obligation to publish a prospectus*). It presents plentiful situations in which issuers are not obliged to release those documents. Art. 4(1) lists all the securities offered to the public which are not subject to the obligation to publish a prospectus, such as: “(a) *shares issued in substitution for shares of the same class already issued if the issuing of such new shares does not involve any increase in the issued share capital*; (b) *securities issued through takeovers by means of an exchange offer [...]*; (c) *securities offered [...] in connection with a merger or division [...]*; (d) *dividends paid out to*

⁴⁶ Schammo, P. (2011). *EU Prospectus Law*. Cambridge: Cambridge University Press.

⁴⁷ Haentjens, M., & De Gioia-Carabellese, P. (2015). *European Banking and Financial Law*. New York: Routledge Taylor & Francis Group.

*existing shareholders in the form of shares in the same class in which such dividends are paid [...]”. Art. 4(2) lists the securities not required to publish prospectuses whenever admitted to trading, such as: “(a) shares representing, over a period of 12 months, less than 10 % of the number of shares of the same class already admitted to trading on the same regulated market”. An example is represented by a listed company with a share capital 100,000,000 € deciding to raise capital by no more than 9,000,000 €. With an offer of these shares to the public such a company would be exempted from publishing a prospectus. The article goes then further saying that other securities exempted from publishing prospectuses are: “(b) *shares issued in substitution for shares of the same class already admitted to trading on the same regulated market*; (c) *shares issued in substitution for the shares of the same class already admitted to trading on the same regulated market, should the issuing of such shares not involve any increase in the issued capital*; [...]”.*

With Regulation (EU) No. 1129/2017 the new prospectus regime will continue to apply to: (i) offers of transferable securities to the public in the EU; (ii) admissions of transferable securities to regulated markets in the EU unless an exception applies. Most of the new exemptions reflect the old ones, however considerable differences are now enforced. The new regulation modified four different kinds of exemptions: firstly the exemption for the admission of securities to the same class of trading on a regulated market, secondly the exemption for the admission of shares resulting from conversion, exchanges or exercise of rights of securities if shares are of the same class as shares admitted to trading on a regulated market, thirdly exemptions in respect of (i) public offers, and (ii) the admission to trading of securities to a regulated market offered in connection with a takeover by means of an exchange offer and for securities offered, allotted or to be allotted in connection with a merger or a division, finally director and employee exemption in respect of public offers relating to securities offered, allotted or to be allotted to existing or former directors or employee by their employer.

The former was reported under Art. 4(1)(a) of the 2003 Directive, and later replaced by the provisions presented by Art. 1(5) of the 2017 Regulation, that was going to be valid starting from July the 20th 2017. It enlarges this exemption saying that “*the obligation to publish a prospectus [...] shall not apply to the admission to trading on a regulated market of any of the following: (a) securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20 % of the number of securities already admitted to trading on the same regulated market*”. It is important to notice that the new regulation replaces the word shares with that of securities, thus broadening the set of products (both equity and non-equity) the exemption applies to. With this new provision it is not necessary to release a prospectus for the admission to trading of securities fungible as securities already

admitted to trading on the same regulated market provided that those fungible securities represent less than 20% of the securities already issued. This provision was thought to enlarge the number of people who could potentially take advantage of this exemption (i.e. issuers of debt securities). However, this exemption will implausibly benefit them as a consequence of the fact that they can already “issue fungible debt relatively easily, particularly under debt insurance programmes”⁴⁸. As we will see in the next paragraph, the same exemption threshold is applied to the admission to trading on a regulated market of other products like “*shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities*”. Finally, this provision raises the exemption threshold for the admission of securities of the same class to trading on a regulated market from 10% to 20%.

We can now focus our attention on the second exemption in the list. Art. 4(2)(g) of the 2003 Directive says that “*the obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities: g) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market*”. Art. 1(5)(b) of the 2017 Regulation states that “*the obligation to publish a prospectus [...] shall not apply to the admission to trading on a regulated market of any of the following: (b) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20 % of the number of shares of the same class already admitted to trading on the same regulated market*”. This means that the new regulation does not require issuers to release prospectuses for the shares resulting from conversion, exchange, or exercise of rights of other securities in case in which those shares are of the same class of shares already admitted to trading, provided that they represent less than 20% of the latter over a period of twelve months. In the old regime lack of exemption threshold allowed issuers to sidestep prospectuses. An example is represented by issuers of convertible bonds who tried to avoid releasing prospectuses by admitting those products to be traded on MTFs. Because of a specific exemption on admission of shares resulting from the conversion of other securities, when bonds are converted into shares no prospectus is required even if new underlying shares are admitted to a regulated market. That is why, with the 2017 reforms, the exemption threshold was finally introduced and set at 20% of the class of shares already admitted to trading. This provision was going to be valid starting from July the 20th 2017,

⁴⁸ Tobin, M., & Phillips, E. (2017). *The new prospectus regime: impact on debt capital markets*. Slaughter and May.

however shares stemming from convertible bonds issued before this date were grandfathered and kept benefiting from the old exemptions.

Art. 1(6) of the 2017 Regulation says that the two provisions listed here above cannot be used jointly in case in which this combination leads to an “*immediate or deferred admission to trading on a regulated market over a period of 12 months of more than 20% of the number of shares of the same class already admitted to trading on the same regulated market, without a prospectus being published*”. This means that if the above two provisions lead to an overall admission to trading on a regulated market which is larger than 20% of the class of shares already admitted to trading on a regulated market, that they cannot be applied simultaneously. This provision is totally new as there was no similar restriction in the previous 2003 Directive.

With reference to the third exemption in the list, following Art. 4(1)(b) and (c) and Art. 4(2)(c) and (d) of the 2003 Directive issuers are not required to release prospectuses for the following types of securities “(b) *securities offered in connection with a takeover by means of an exchange offer [...], (c) securities offered, allotted or to be allotted in connection with a merger or division*” and “(d) *securities offered in connection with a takeover by means of an exchange offer [...], securities offered, allotted or to be allotted in connection with a merger or a division, [...] provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus*”. Therefore, in the 2003 Directive the exemptions apply if there is a document containing information the NCAs deemed to be equivalent to a prospectus. In the Art. 1(4)(f) and (g) and Art. 1(5) (e) and (f) of the 2017 Regulation we read that “*the obligation to publish a prospectus [...] shall not apply to any of the following types of offers of securities to the public: [...] (f) securities offered in connection with a takeover by means of an exchange offer [...], (g) securities offered, allotted or to be allotted in connection with a merger or division*” and “(e) *securities offered in connection with a takeover by means of an exchange offer [...], (f) securities offered, allotted or to be allotted in connection with a merger or a division [...] provided that a document is made available to the public in accordance with the arrangements set out in Article 21(2), containing information describing the transaction and its impact on the issuer*”. This amendment authorizes to assume that the corresponding document will be substantially simpler than the that required by the 2003 Directive. The striking difference here is that while the 2003 Directive made a list of the securities whose issues require no release of a prospectus provided that they publish a document deemed to be equivalent to the former, with the new regulation issuers are exempted from releasing prospectuses if they broadcast a document carefully describing the transaction and undertaking an assessment of the potential impact on the issuer. Therefore with the 2017 regulation in case of securities offered in connection with a takeover, or securities allocated or to be allocated in case of a merger or division it is enough to

release a document illustrating those operations and the relative impact on the issuer, no prospectus or similar document is needed anymore. This provision is going to be applied starting from July the 21st 2019.

For what concerns the fourth exemption in the list, Art. 4(1)(e) of the 2003 Directive states that issuers are not required to release prospectuses in relation to offers of securities to the public if those “*securities [are] offered, allotted, or to be allotted to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market [...] provided that there is a document with information on the number and nature of the securities and reasons for details of the offer*”. This exemption applied if the issuers had their headquarters or registered office in the EU, and had securities admitted to trading on a regulated market or admitted to trading on a third country market in respect of which the Commission has adopted an equivalent decision. If all those conditions are fulfilled than issuers had to make the abovementioned document available. Nowadays, Art 1(4)(i) of the 2017 Regulation states that “*the obligation to publish a prospectus [...] shall not apply to any of the following types of offers of securities to the public: (i) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment*”. Now, the exemption is not limited to issuers having their legal offices in one of the EU member states (as in the 2003 Directive). With the 2017 Regulation, under the circumstances listed above, the exemption from the publication of releasing prospectuses is recognized to all the issuers having their legal offices in third countries. This provision is going to be applied starting from July the 21st 2019.

1.2.10 Validity of a prospectus

Validity of prospectus is dealt with under Art. 9. According to Art. 9(1) a prospectus is valid for the 12 months following its approval, provided that it is completed and updated by any supplement required under Art.16 (i.e. *supplements to prospectuses*). Art. 9(2) clarifies that a base prospectus is valid for 12 months in case of an offering programme. Art. 9(3) says that a base prospectus on non-equity securities issued by credit institutions is valid until the moment in which there are no more securities to be issued in a continuous or repeated manner. Art. 9(4) says that once a registration document with its securities notes and summaries is filed and approved, then it is valid for a period up to 12 months if it has been correctly updated through supplements (in accordance with Art. 12 (i.e. *prospectus consisting of separate documents*) or Art. 16).

Analogously, Art. 12(1) of the 2017 Prospectus Regulation states that an approved registration document shall be valid for twelve months after its approval regardless of whether it is a single document or composed by several documents. In this case, validity begins “*upon*

approval of the securities note”. However, the deadline of its validity is not related to the validity of the prospectus it belongs to. Art. 12(2) and (3) report that a registration document (which have been previously approved) or a universal registration document (as a constituent part of the prospectus) shall be valid for twelve months after its approval, and the end of validity of one of them shall not affect the validity of a prospectus of which it is a constituent part.

1.2.11 EU passport

In absence of common rules dealing with the offer of securities to the public, in case the applicant decides to promote a cross-border offer of securities, each national competent authority would be responsible for approving prospectuses. However, to avoid any duplication of costs and legal burdens, Directive 2003/71/EC ensures the approval of a prospectus in any of the EU countries, suffices for further approval of the prospectus by other competent authorities within the EU country where the securities are offered. This is a consequence of the *EU passported activities* which are all those actions subject to mutual recognition among all the EU Member States. The list of all those activities falls within Regulation No. 575/2013. Under Art.17 an offer to the public or admission to trading on a regulated market is carried out in one or more Member States, or in a MS other than the home country, then the prospectus approved by the home NCA (and any supplement thereto) shall be valid for the public offer or the admission to trading in any other Member State, provided that ESMA and the NCA of each host Member State, are properly notified in accordance with Art. 18 (i.e. *notification*). The host NCAs do not initiate any approval or supervisory procedure relating to prospectuses, and this holds in presence of bugs too; the prospectus is always checked by the home NCA. Following Art. 17(2) (i.e. *community scope of approvals of prospectuses*), if significant factors, material mistakes, or inaccuracies arise after the original approval of the document, then a prospectus supplement must necessarily be approved by the home NCA. On the other hand, the host NCA and ESMA may ask for new additional information.

The concept of the *EU passport* was firstly coined with the Second Banking Directive 89/646/EEC. It builds around three main pillars. The first one is that financial institutions wishing to operate in another EU country must notify this decision to the national competent authority of the host country (as defined under Art. 2). This means the latter is not responsible for authorizing such a financial institution to operate there, it rather receives notification of the financial enterprises’ decision. The second one is about a greater level of harmonization among the Member States’ different legislations. Convergence has been a central topic since the beginning of the creation of the European Union. It is necessary to make comparisons (and this is the main topic that will be developed throughout this thesis), as well as encourage capital flows among different countries. Nowadays, it is possible to talk about minimum level of harmonization as the EU

directives need to be implemented within national legislations. Harmonization is oriented towards regulating specific products and institutions, rather than general private and commercial law. The third and final pillar is about the *home country control*. It is based on the idea that, irrespective of the country in which a given financial institution decides to perform its business activities, its stability is always supervised by the home relevant authority. Instead, the host country is responsible for supervising the activities such a financial institution carries out there. This was to explain the importance of the *EU passport*, and how necessary it is to make comparisons among different legislations. The first step is to identify the national competent authorities responsible for approving prospectuses. The issuer chooses one of the authorities within the EU, and it is necessary to highlight that such a decision may not coincide with the country where the corporate issuer is currently based. Nowadays, ESMA plays a central role in supporting the passport mechanism and managing numerous supervisory inefficiencies eventually arising between NCAs.

With the 2017 Regulation the concept of passporting activity stays unchanged. This means that in case of offers of securities to the public or admission of securities to trading on a regulated market, disclosure of information is fundamental to protect investors against information asymmetries with the issuers. Harmonising the disclosure regime strengthens the cross-border passport mechanism which in turn improves the functioning of the internal market. Different norms would result in fragmentation of the internal market since issuers and prospectuses approved in one Member State could be prevented from being used in another one. To ensure the approval, passporting, and compliance with the Regulation a competent authority needs to be identified in each Member States. To facilitate the access to capital markets of enterprises with small market capitalization, MSs are left free to set out in their national law a threshold between 1 million € and 8 million € (calculated as a total consideration over a period of 12 months), below which the exemption should apply depending on the level of domestic investor protection they deem to be appropriate. The last provision holds true if the issuers do not want to benefit from the passporting activity. As already explained, this means that, issues whose total consideration is: (i) lower than 1 million € are not legally required to release prospectuses; (ii) higher than 8 million € are legally required to release prospectuses; (iii) between those two thresholds the MSs are free to choose the proper limit to safeguard potential investors. However, offers below the 8 million € threshold cannot benefit from the passporting regime. “*Issuers, offerors or persons asking for the admission to trading on a regulated market of securities which are not subject to the obligation to publish a prospectus should benefit from the single passport where they choose to comply with this Regulation on a voluntary basis*”. When prospectuses are passported, information on the taxation of the country where the issuer’s registered office is placed, and of the countries where the offer is being made or admission to trading on a regulated market is being sought shall be

reported because it is costly and it might eventually hamper the cross-border effects. Moreover, in case in which an investment entails a specific tax regime, for instance securities granting investors a favourable tax treatment, the prospectus should necessarily report information on taxation. Under the 2017 Regulation the new EU Growth prospectus shall benefit from the passporting regime too. Moreover, with the aim of promoting proper functioning of financial markets and to avoid undermining public confidence, the advertisements procedures (including those related to the passporting activity) should be harmonized. Supervision of advertisement is an integral part of the role of competent authorities. Notwithstanding a few changes, the provisions on passporting activity are almost the same as those reported in the original Prospectus Directive.

1.2.12 Approval of the prospectus

Prior to releasing and making any offer to the public, the prospectus must be approved by the national competent authorities (NCA). The approval is a process starting with the prospectus submission to the authority, it is scrutinized and, if approved, issuers are authorized to release it to the public. The objective of such a scrutiny is not on the economic merit of the offer, it is rather an assessment of the compliance with the laws in force in the authority's country, i.e. the implemented Prospectus Directive. This is extremely important, as “the approval of a prospectus is not a signal to investors or the market of the quality of the underlying securities”⁴⁹. The approval is not carried out mechanically, it is rather a comprehensive assessment of the consistency and comprehensibility of all the information reported on the prospectus. The approval is defined as the *positive act* following supervisory scrutiny of the document completeness, as well as soundness and accuracy of the information reported. The specific approval process depends on the regulation of any EEA country, however there are some guidelines common to them all.

Following Art. 13(1) of the 2003 Directive, “*no prospectus must be published until it has been approved by the competent authority of the home member state*”. At this point it is useful to recall that issuers of non-equity securities whose denomination is at least 1,000 € may choose which state is their home Member State among three main possibilities: (i) the MS where the issuer has its registered office; (ii) the MS where the securities were or are to be admitted to trading on a regulated market; (iii) the MS where the securities are offered to the public (look at Figure 2). Issuers of equity securities may not choose the home Member State, and the latter is represented by the country where its registered office is currently based. ESMA clarifies that in relation to the Base Prospectus for non-equity securities whose denomination is less than 1,000 € the home Member State is the country where it has its registered office too⁵⁰. Art. 13(2) says that the issuer,

⁴⁹ Lucantoni, P. (2018). Market Transparency - Prospectus Directive 2003/71/EC. In M. Brenncke, S. Gerhards, Gerner-Beuerle, R. Grutze, J. A. Kammerer, C. Kumpan, . . . C. Schmies, *Financial Services Law* (pp. 942 - 1031). Bonn/London/Halle.

⁵⁰ Question n. 46 ESMA. (2017). *Prospectus Q&A, latest version adopted, 20 October 2017, ESMA 31-62-780*.

the offeror, or the person asking for admission to trading on a regulated market must notify the approval of the prospectus within 10 working days of the submission of the prospectus. However, *“if the competent authority fails to give a decision on the prospectus within the limits [...] this shall not be deemed to constitute approval of the application”*. This time limit may be extended to 20 working days if the issuer has no securities admitted to trading, and has never offered securities to the public before (Art. 13(3)). Despite being quite strict, this time provision is in practice eased by Art. 13(4) saying that, if the NCA *“finds [...] that the documents submitted to it are incomplete or that supplementary information is needed the time limits [...] shall apply from the date on which such information is provided by the issuer”*. However, regardless of whether the deadline is 10 or 20 working days, lack of the authority approval shall not be interpreted by the issuer as silent consent (Art. 13(2)). Should such a situation arise, the issuer - following national law - may eventually sue the NCA for damages. This means that the NCA’s liability is not regulated by the directive, it is rather a matter of national legislation (Art. 13(6)). An alternative solution is that the issuer, the offeror, or the person asking for admission to trading clarifies with the competent authority without undertaking any legal procedure. Furthermore, in order to facilitate communication between NCAs as well as between NCAs and ESMA, the latter provides implementing technical standards setting standard forms, templates, and procedures.

Under the 2017 Regulation *prospectus approval* is dealt with under Art. 20. Most of the provisions of the 2003 Directive are still valid under the new Regulation. This means that prospectuses cannot be published until the NCA approves them. The latter shall notify its decision on the document approval in ten days after its submission, and this time limit can be extended to twenty working days if the *“offer of securities to the public involves securities issued by an issuer that does not have any securities admitted to trading on a regulated market and that has not previously offered securities to the public”*. The ninth paragraph of this article states that the competent authority’s liability shall be governed solely by national law. Moreover, Art. 20(10) requires the fees charged by the NCAs of the MSs for the approval of prospectuses, documents incorporated by reference, supplements, amendments, or final terms, to be reasonable and proportionate. The latter *“shall be disclosed to the public at least on the website of the competent authority”*. The next paragraph requires the commission to specify the criteria to scrutinise prospectuses, *“in particular the completeness, comprehensibility and consistency of the information contained therein, and the procedures for the approval of the prospectus”*. Following Art. 20(12), ESMA is responsible for promoting supervisory convergence while assessing the completeness, comprehensibility and consistency of the information contained in the document. This means that ESMA is responsible for developing guidelines addressed to NCAs on supervision and enforcement to assess prospectus compliance with Regulation. Its main objective is to foster the NCAs convergence in the *“efficiency, methods and timing of the scrutiny [...] of the*

information given in a prospectus”. In the last paragraph of the twentieth article, ESMA is called to organize and conduct at least a peer review of the scrutiny and approval procedures of the competent authorities, and this report is going to be published by July the 21st 2022.

Moreover, the 2017 Regulation provides that prospectuses approved following national laws (in accordance with Prospectus Directive) before the date from which the 2017 Regulation applies, shall continue to be governed by that national law until the end of their validity, or until twelve months have passed by after the date from which the new Regulation applies, whichever occurs first. This is known as *grandfathering*.

1.2.13 Notification

In the 2003 Directive *notification* is dealt with under Art. 18. With the prospectus regime, mutual recognition and supervisory cooperation are based on notification across Member States and European Financial Markets. Those activities are carried out on an NCA-NCA basis, and the home competent authority must provide the host competent authority with a certificate of approval (whose template is given by CESR/ESMA). The host competent authority checks whether the prospectus has been drawn up in accordance with the directive and whether omissions are treated as explained under Art. 8 (i.e. *omission of information*). The host NCA has to receive a copy of the prospectus and the eventual translation of the summary. According to the 2010 Amending Directive, the issuer or guarantor and the host NCA must be notified of the certificate of approval simultaneously. Notification is subject to time limits with the aim of enhancing mutual recognition. The home NCA must notify the documents within three working days of the issuer’s request, or within one working day after the approval of the prospectus if the request was submitted with the draft prospectus. This procedure must be followed for any prospectus supplements (Art. 18(4)), and its operational peculiarities are implemented through International Technical Standards (ITS). The host NCA and ESMA must be notified of the certificate of approval; following Art. 18(3), they must subsequently release a catalogue with all the certificates of approval for prospectuses and supplements, and the direct links to those documents on the website of the home NCA.

In the 2017 Regulation the concept *notification* is dealt with in two distinct articles. Art. 25 that is about *notification of prospectuses and supplements and communication of final terms*, Art. 26 that is about *notification of registration documents or universal registration documents*.

Art. 25(1) states that at the request of the issuer, the offeror, the person asking for admission to trading on a regulated market, or the person responsible for drawing up the prospectus, the NCA of the home Member State shall notify the NCA of the host Member State with a *certificate of approval* corroborating that the prospectus has been drawn up in accordance with the 2017 Regulation. Where possible notification comes with a translation of the prospectus and summary. The same procedure holds for any prospectus supplement. Following Art. 25(3) by the NCA of

the home Member State shall notify the certificate of approval of the prospectus or any supplement to the NCA of the host Member State and ESMA simultaneously. In case in which a base prospectus whose final terms are contained neither in the prospectus itself nor in the supplement is notified by the NCA of the home MS to the NCA of the host MS, then the former shall communicate them to the latter and ESMA as soon as possible once they are filed Art. 25(4). The next paragraph specifies that NCAs of the home and host MSs shall not charge any additional fee for the notification or receipt of notification. ESMA shall institute a *notification portal* encompassing all the certificates of approval, and all transfers of documents between NCAs shall take place through this portal too. ESMA is also responsible for developing regulatory technical standards explaining how the notification portal shall function, they had to be submitted to the Commission by July the 21st 2018.

Art. 26 is about *notification of registration documents or universal registration documents*. This article applies to “*non-equity securities defined under Art. 2(m)(ii)*⁵¹ and to issuers established in a third country referred to in point (m)(iii)⁵²”. Art. 26(2) says that at the request of the issuer, the offeror, the person asking for admission to trading on a regulated market or the person responsible for drawing up such document, when an NCA approves a registration document or a URD, it shall notify the NCA of the home Member State the prospectus approval through a certificate of approval. “*That notification shall be made [...] within one working day following the approval of that document*”. Following Art. 26(3) registration documents and URDs are considered as constituent parts of the prospectus document submitted for the approval to the NCA of home MS. The latter is not responsible for scrutinizing or approving the notified registration document, URD, or amendments, it shall approve securities note and summaries after receipt of the notification only. Moreover Art. 26(4) reports that the registration document or URD shall contain an appendix reporting key information on the issuer, and it shall be enclosed in the approval of the registration document or Universal Registration Document. In case in which it is

⁵¹ Art. 2(m)(ii): *Home Member State* means “(ii) for any issues of non-equity securities whose denomination per unit amounts to at least EUR 1 000, and for 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, the Member State where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission to trading on a regulated market. The same shall apply to non-equity securities in a currency other than euro, provided that the value of such minimum denomination is nearly equivalent to EUR 1,000”.

⁵² Art. 2(m)(iii): *Home Member State* means “(iii) for all issuers of securities established in a third country which are not mentioned in point (ii), the Member State where the securities are intended to be offered to the public for the first time or where the first application for admission to trading on a regulated market is made, at the choice of the issuer, the offeror or the person asking for admission to trading on a regulated market, subject to a subsequent choice by issuers established in a third country in either of the following circumstances: where the home Member State was not determined by the choice of those issuers; in accordance with point (i)(iii) of Article 2(1) of Directive 2004/109/EC”.

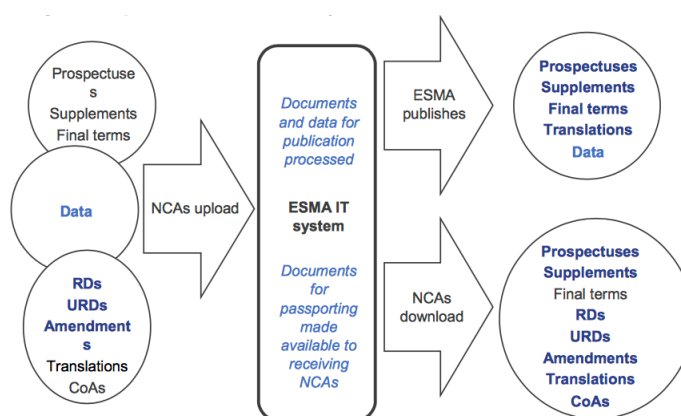
possible, notification comes with translation of the appendix. In case in which a material mistake or inaccuracy in the registration document or URD arises, then a supplement shall be released and “*notified to the NCA of the home MS for the prospectus approval within one working day following its approval*”. Once again, ESMA is responsible for developing draft implementing technical standards on forms, templates, and procedures for the notification of the certificate of approval.

Therefore, Artt. 25 and 26 of the 2017 Regulation empower ESMA: (i) to establish a portal to upload all the documents which have to be notified or communicated; (ii) to define the data to be provided when NCAs submit approved prospectuses and supplements to ESMA for their publication. The Final Report on RTS published on July the 17th 2018 deals with this topic, and talks about one large IT system used to notify the prospectuses and/or supplements passported to one or more other MSs and submitted to ESMA simultaneously. It is also used when the home NCA has to communicate final terms to base prospectuses which have to be notified to the host MSs and the ESMA at the same time. The IT System of the new notification portal works as a “single hub for passporting, publication and storage of prospectus information in the EU”⁵³. Figure 4 shows the functions of this IT system. Moreover, in the RTSs ESMA explains: (a) how a sending NCA should upload information to the portal; (b) how such information is to be managed once uploaded; and (c) what is the download process the receiving NCA has to follow in order to receive the passport. The Final Report also lists the documents the notification portal should be able to receive from the NCA of the home MSs and send to the NCA of the host MSs: (i) documents which are being notified such as prospectuses, registration documents, URDs, securities notes, amendments to URDs, and supplements; (ii) eventual translations of summaries, prospectuses, registration documents, URDs and eventual amendments, supplements, final terms or an appendix to a registration document or URD; (iii) certificates of approval; (iv) final terms. The very first step in the process is *information upload by sending NCA*, and it deals with the NCA which has approved a prospectus (or any of its constituent document or a supplement) and has to insert them into the Notification Portal in order to send them to one or several other NCAs. With the old prospectus regime, NCAs had to send approved prospectuses and supplements via email and only the final terms related to base prospectuses already approved and passported were communicated through a centralised system. In the RTSs, ESMA explains that the new notification portal should work as a core centre, and the NCAs are called to use emails only to notify issuers that the passport has been undertaken. NCAs should have the option to upload documents and data either through a *user-to-application* (i.e. the ESMA extranet) or through an *application-to-application* mode. NCAs cannot use the same option as for the small NCAs it would be costly to adapt to the *application-to-application* system, while for NCAs with larger approval numbers it would be

⁵³ ESMA. (2018). *Draft Regulatory Technical Standards under the Prospectus Regulation*.

inconvenient to upload manually via the *user-to-application* system. Article 21(5) of the 2017 Prospectus Regulation specifies that the NCA of the “*host Member State shall publish information on all notifications received in accordance with Article 25 on its website*”. This article does not require the host NCA to broadcast the notified or communicated documents, it is rather required to publish information on incoming notifications only. The second step in the process is *processing in the notification portal*. Once a set of documents is submitted by the sending NCA in the IT system, the latter assesses whether this information is consistent with the requirements on uploaded documents and accompanying data. Once a series of checks have been undertaken the IT system accepts or rejects the information submitted, and informs the sender about the outcome of this decision (i.e. whether to passport it or not). At this point if there are no mistakes in the documents and data uploaded on the notification portal, then a new record shall be made. Where the latter is a successful submission of documents and accompanying data. The third step is represented by *download of passports by the receiving NCA*. When the receiving authorities get the notification or communication to download information from the Register, they can use either a *user-to-application* or an *application-to-application* methodology, depending on their individual inclination. ESMA suggests the incoming notification / communications to be made available with a *push mechanism*⁵⁴ which should be able to reduce the risk that the NCAs get not informed about the eventual incoming documents. Now the IT system delivers to the receiving NCA all the passported documents and all the relative data coming with them (i.e. all the data notified by the sending NCA as well as those generated by the IT system).

Figure 4 – ESMA IT system



Source 5 - (ESMA, Draft Regulatory Technical Standards under the Prospectus Regulation, 2018)

⁵⁴ The *pull mechanism* has been used in the existing final terms component of the IT system where it has functioned fine.

1.2.14 Omission of information

Art. 8 of the directive recognizes three situations in which information can be (legally) omitted from the prospectus:

- When information regarding the final offer price or amount is unavailable at the time the prospectus is drawn up, and provided that three additional conditions are properly met (Art. 8(1)): (i) the prospectus clearly states the criteria and conditions through which the amount of securities offered will be determined; (ii) the prospectus specifies the maximum price; (iii) investors have the right to withdraw their acceptance to acquire or subscribe those the securities offered in a short period of time, but no less than two working days after the final offer price is published. Once the final offer price and amount of securities are published, the missing information must be filed with the home MS and released in accordance with the provisions reported under Art. 14 (*i.e. publication of a prospectus*). In relation to (ii), the recognition of maximum price may be replaced by the knowledge of the methodologies the prices will be determined. ESMA considers the latter as necessary disclosures concerning price information, and recognizes knowledge of maximum price and withdrawal right as adequate measures to protect investors when the final price is not reported in the prospectus. Moreover, ESMA believes that the above mentioned criteria must be precise enough to make the price predictable. This provision in conjunction with the withdrawal right are supposed to be sufficient to reach a level of protection analogous to the situation in which the final price is included in the document.
- When a disclosure is not in the public interest, is seriously detrimental to the issuer, or is of minor importance and would not influence the assessment of the financial position and prospectus of the issuer or guarantor (Art. 8(2)). In this case the MS may authorize the omission provided that the latter is not misleading to potential investors' evaluations necessary to make aware investment decisions.
- In case of inappropriate disclosure (Art. 8(3)). The term inappropriate refers to the issuer's sphere of activity, legal form, or the securities the prospectus is related to. If disclosure on those topics is inappropriate, issuers shall first look at whether there are equivalent information that can be eventually reported (and that is not supposed to be inappropriate). In absence of such an information, omission is allowed.

Under the 2017 Regulation, *omission of information* is dealt with under Art. 18, and the provisions contained in the 2003 Directive have been slightly modified. The first paragraph of this article clearly states that the NCA of the home MS may allow omission of information if: “(a) *disclosure of such information would be contrary to the public interest; (b) disclosure of such information would be seriously detrimental to the issuer or to the guarantor, if any, provided that the omission of such information would not be likely to mislead the public [...]; (c) such*

information is of minor importance [...] and would not influence the assessment of the financial position and prospects of the issuer or guarantor, if any". Art. 18(2) clarifies that in case in which there is information classified as inappropriate in relation to the activity or legal form of the issuer, the guarantor (if any), or the securities offered or admitted to trading on a regulated market, then the prospectus, or any constituent document, shall contain equivalent information unless it does not exist. When securities are guaranteed by one of the MSs, Art. 18(3) states that when preparing a prospectus an issuer, an offeror, or a person asking for admission to trading on a regulated market, "*shall be entitled to omit information pertaining to that Member State*". Finally, ESMA may on its own or when requested by the Commission develop draft regulatory technical standards to specify the cases in which information is omitted.

1.2.15 Incorporation by reference

Disclosure concerning an issuer may come from different public sources, therefore their integration is essential as it favours cost savings. In the US this topic is central for the SEC. It is totally committed at simplifying the complex and onerous disclosure regime. With the objective of reducing such a burden on issuers, the SEC allows the ongoing disclosure reports to be integrated in the disclosure required in a subsequent offer of securities. In order to explain the reason behind the integrated disclosure system it says that it "recognizes that, for companies in the top tier, there is a steady stream of high quality corporate information continually furnished to the market and broadly digested, synthesized and disseminated [...] the widespread market following of such companies and the due diligence procedures being developed serve to address the concerns about the adequacy of disclosure and due diligence and, thus, ensure protection of investors"⁵⁵.

Art. 11 of the 2003 Directive allows issuers to incorporate in the prospectus by reference to other previously or simultaneously published documents approved by the NCA or filed with it in accordance with the directive. Such an information must be the most recent available to the issuer, and the summary cannot incorporate information by reference. The information incorporated by reference must be identified by means of cross-referenced list to enable investors to easily identify specific information (Art. 11(2)). The documents incorporated by reference can be written in languages other than that used in the prospectus. Art. 28(1) lists the documents that can be incorporated by reference: (1) annual and interim financial information; (2) documents prepared on the occasion of a specific transaction such as a merger or de-merger; (3) audit reports and financial statements; (4) memorandum and articles of association; (5) previously approved and published prospectuses and/or base prospectuses; (6) regulated information; and (7) circulars to security holders.

⁵⁵ SEC. (1983). *SEC Release No 33-6499 para I*.

Art. 19 of the 2017 Regulation deals with *incorporation by reference*. It extends the range of information which can be incorporated by reference in a prospectus, and maintains the requirement that such information must have published prior to or simultaneously with the prospectus. Information can be published electronically and it is no longer necessary that it will be approved by or filed with any NCA. Art. 19(1) specifies that all regulated information may be incorporated by reference, including historic annual and interim financial information and audit reports published for whatever reason, management reports and corporate governance statements (Directive 2013/34/EU), reports on the determination of value of an asset or company, remuneration reports (Directive 2007/36/EC), annual reports (Directive 2011/61/EU), memorandum and articles of association. Moreover, “*where only certain parts of a document are incorporated by reference, a statement shall be included in the prospectus that the non-incorporated parts are either not relevant for the investor or covered elsewhere in the prospectus*”. Art. 19(2) specifies that in case in which issuers, offerors or person asking for admission to trading on a regulated market incorporate information by reference, they shall provide a cross-reference list and hyperlinks to all the documents containing information incorporated by reference to enable investors to identify specific information easily. Following Art. 19(3) issuers offerors, or persons asking for admission to trading on a regulated market “*shall submit in searchable electronic format any information which is incorporated by reference into the prospectus, unless such information has already been approved by or filed with the competent authority approving the prospectus*”. The fourth and last paragraph of this article states that upon request of the Commission, ESMA shall update the list of documents to be incorporated by reference

1.2.16 Liabilities

Under the English Law *negligent misstatement* is regulated under tortious liability. Despite the latest attempts of harmonization of the EU legislation, tort law and professional liability are still a matter of national discretion. However, Prospectus Directive does not want to achieve harmonization of civil liabilities in the EU. Under English law, the offer of securities via a prospectus gives rise to a contract between the issuer and the investor, hence an incorrect statement on such a document should be treated as a breach of contract. Since the statement is not a term in a specific agreement, the courts in Britain have been cautious in considering it as a matter of personal liability⁵⁶.

In the 2003 Directive, the concept of *liability* is dealt with under Art. 6(1) which is about the *responsibility attaching to the prospectus*. This article says that the liability for the information reported on a prospectus must be necessarily attached to “*the issuer, or its administrative management or supervisory bodies, the offeror, the person asking for the admission to trading or*

⁵⁶ Hudson, A. (2013). *Hudson: The Law of Finance*. London: Sweet & Maxwell.

the guarantor”. According to the same paragraph, those responsible must be clearly identifiable through their names and roles. In case in which the responsibility is attached to a legal person, its name and location where its office is officially registered must be clearly stated within the prospectus. The second paragraph of the same article (Art. 6(2)), establishes that none is responsible for the information reported on the summary only, unless it is misleading, inaccurate, or inconsistent. Moreover, in order to avoid problems with transparency the role played by each individual should be clear in the prospectus. This article states that all those liable for the information stated in a prospectus must be legally prosecuted following each Member State’s laws, regulations, provisions, and implementations of the EU directives apply with civil liability. Responsibility for false statement or misleading information in a prospectus may be prescribed in specific provisions of the securities or tort laws⁵⁷. This article ensures that all the countries in the EEA have got civil law able to punish them adequately, should this situation arise. This provision is intentionally left vague to bypass any conflict with national laws. “The mosaic of different liability regimes, still inevitable in this phase of the EU integration, may still represent an impediment to the development of a pan-European market”⁵⁸.

It is important to notice that the 2017 Prospectus Regulation did not bring substantial changes to the liability regime as compared to Prospectus Directive.

1.2.17 Publication and Dissemination

Art. 14 of the 2003 Directive deals with the process of prospectus publication. Once approved (in any of the EU countries thanks to *passporting activity* and *mutual recognition*) the prospectus must be filed with the home NCA and made available to ESMA. Art. 14(1) says that the issuer, offeror, or person asking for admission to trading on a regulated market must make the prospectus accessible to the public “*at a reasonable time in advance*” of the offer to the public or admission to trading. In presence of an IPO the prospectus must be available at least six days ahead of the offer. Art. 14(2) presents the means through which prospectuses can be made available to the public, such as for example: insertion in one or more periodicals circulated in one of the MSs in which the offer is made or admission to trading is sought, it can be printed and made available to the public either at the offices of the markets where the securities are admitted to trading or at the offices of the financial intermediaries placing them on the market. Following Art. 14(3) the MS may eventually require the issuer to release a notice on how the prospectus has been published and where it can be found. The original 2003 Directive did not make reference to the online publication, this was later updated through the 2010 Amending Prospectus Directive according to which now all prospectuses must be available on the Internet. The prospectus is considered

⁵⁷ ESMA. (2013). *Report on Comparison of liability regims in Memembr Satates in relation to Prospectus Directive*.

⁵⁸ Panasar, R., & Boeckman, P. J. (2010). *European Securities Law*. Oxford University Press.

accessible if it is published on: the issuer's or intermediary's website, the website of the regulated market in which the issuer wants to be admitted to trading, the website of the competent authority. Following these reforms, MSs require issuers to distribute the prospectus online. With Art. 14(4) the home NCA must publish on its website either all the prospectuses approved or a list of them along with the links to the issuer's or regulated markets' website where the prospectus is published, within 12 months. The website of ESMA must also present a list of the prospectuses approved in any given country along with the links to get them directly. Therefore, the Directive makes available each prospectus without offering a centralised database or library of approved prospectuses. The case in which the prospectus is made up of different documents and/or incorporates information by reference is regulated by Art. 14(5). This article allows each single document to circulate separately provided that they are accessible to the public (with no additional costs), and that each document contains information on where all the others may be obtained.

In the 2017 Regulation *publication of a prospectus* is dealt with under Art. 21, stating that once approved the prospectus shall be made available to the public prior to the offer or admission to trading on a regulated market. Therefore, the first paragraph of this article reports information equivalent to that presented under Art. 14 of the old Directive. With the objective of increasing transparency and making information easily accessible to retail investors too, Art. 21(2) lists the websites where the approved prospectus shall be made available, i.e. the website of the issuer, offeror, or person asking for admission to trading, website of the financial intermediaries placing or selling securities, and the website of the regulated market where admission to trading is sought. The next paragraph clarifies that the document shall be uploaded on a specific section of the website which is easily recognizable and accessible. Prospectuses shall be presented in an electronic format that cannot be modified, and any document incorporated by reference shall be made accessible under the same section of the website. Art. 21(4) explains that “*warnings specifying the jurisdiction(s) in which an offer or an admission to trading is being made shall not be considered to be disclaimers limiting legal liability*”. This is extremely important as prospectuses shall report warnings on the jurisdiction in which an offer is made or admission to trading is sought, however they play a cautionary role and do not restrict legal liability. Analogously to the 2003 Directive, Art. 21(5) of the new Regulation explains that the NCAs of the home MSs shall report the list of approved prospectuses along with the hyperlink to the dedicated website sections. When it notifies ESMA of the approval of a prospectus it shall provide the latter with a copy of the approved document too following provisions reported under Art. 47 of the 2017 Regulation which is about *ESMA report on prospectuses*. As already explained, ESMA shall disclose on its website all the approved prospectuses received from the NCAs, and following Art. 21(7) they shall be kept available to the public on its website for at least 10 years after their publication. Approved prospectuses shall report warnings stating that the obligation of releasing

supplements in case in which material mistakes or inaccuracies arise does not apply any longer when prospectus validity expires. Art. 21(11) states that, upon request of any potential investor, issuers, offerors, persons asking for admission to trading on a regulated market, or financial intermediaries placing or selling securities shall deliver them a copy of the approved prospectus free of charge. If the investor asks for a paper copy the abovementioned subjects shall handle a hard version of the approved document. However, the delivery is limited to the jurisdictions in which the offer of securities or admission to trading takes place.

These provisions were taken with the objective of spreading information to make it easily and freely available to potential investors, while fostering investor protection and transparency. Further analysis developed throughout this work will demonstrate whether this goal has been wholly achieved up to now.

1.2.18 Advertising

Art. 2(9) of the 2003 Directive reports the precise definition of *advertisement*. It is any announcement: (a) relating to a specific offer to the public of securities or to an admission to trading on a regulated market; and (b) aiming at promoting the potential subscription or acquisition of securities. In order to be considered as an advertisement, an announcement has to promote subscription or acquisition of securities. Therefore, the general release of a message about the securities cannot be considered as advertising. This article outlines the main principles ruling advertising activities to grant harmonization. The regime is limited and may leave room for host MSs to impose requirements on advertising thus interfering with the capability of passporting prospectuses. Such a limited regime applies to the advertising of public offers or admission to trading. The Directive does not grant a passport to advertising communications, and host MSs have the power to impose requirements on advertising. This brings the risk that the host NCAs could eventually stop the prospectus passport by imposing heavier requirements (such as those on approval) on auxiliary advertising communications. The advertisements must state precisely whether a prospectus has been or will be approved and must be clearly recognizable as such. The information contained in the advertisement must not be inaccurate or misleading, they must rather be consistent with the information in a prospectus if published, or with the information required to be in a prospectus if subsequently published. This limited regime is strengthened by the marketing communications rules in force under the EU investment product distribution regime. According to the 2014 Omnibus II regime ESMA has the power to recommend RTSs in relation to the diffusion of information.

Under Prospectus Regulation (EU) No. 1129/2017 Art. 2(k) defines advertisement as “*a communication with both of the following characteristics: (i) relating to a specific offer of securities to the public or to an admission to trading on a regulated market; (ii) aiming to*

specifically promote the potential subscription or acquisition of securities". It is important to notice that this regulation changed the word *announcement* with *communication*. It is still not clear whether it was done intentionally to broaden the previous definition thus encompassing private bilateral communications in addition to announcements made to a wide group of investors, such as for example road show presentations. However, it is necessary to highlight that if the advertisement regime is widened in this way, then the risk that the main objective of this activity are unattainable becomes much more consistent.

1.2.19 Supervision and Enforcement

According to Art. 21 of the 2003 Directive, each Member State must designate an independent and administrative authority known as National Competent Authority (NCA) or competent authority. Its main objectives are implementation, supervision, and enforcement of the Directive. The NCA has to be unique because if MSs had a variety of competent authorities they would bring useless additional costs and overlapping responsibilities, without delivering further benefits to market participants. The same article recognizes the NCA's powers in terms of prospectus approval and admission to trading on a regulated market. With the 2003 directive the NCA must be completely independent from other economic actors (such as stock exchanges and regulated markets) to avoid conflicts of interests. The Directive addresses the controversies on whether and to what extent stock exchanges should be in charge of reviewing issuers disclosure. This article marks a separation line with the previous regime in which prospectuses were approved by stock exchanges⁵⁹. Art 21(3) specifies the powers which must be conferred to the NCA with respect to the approval of a prospectus. Examples are: information gathering, requiring issuers or persons asking for admission to trading (but also managers of the issuer, audit firms or financial intermediaries) to release supplements and/or additional information and documents, suspending an offer or admission to trading within ten consecutive working days on a single occasion and provided that the competent authority has reasonable grounds for believing the Directive was infringed, prohibiting or halting advertisements for a maximum of ten consecutive working days, prohibiting a public offer. Such an authority is also responsible to make the public aware that an issuer has not complied with its duties. Art. 21(4) lists three powers in relation to admission to trading: first, issuers must disclose all the information likely to affect the valuations on securities admitted to trading; secondly, suspend securities from trading if the NCA believes it is detrimental to investors; thirdly, "*carry out on-site inspections in its territory in accordance with national law*". Therefore, once the securities have been admitted to trading on a regulated market, in order to enhance investor protection and grant smooth market operations, the NCA supervises on

⁵⁹ CESR. (2007). *CESR's Report on Supervisory Functioning of the Prospectus Directive and Regulation*.

whether the issuer releases all the information necessary to make a comprehensive assessment of all the securities admitted to trading.

Art. 22 is about *professional secrecy and cooperation between authorities*. Art. 22(1) deals with the topic of professional secrecy and it applies to all people who work or have worked for an NCA. Art. 22(3) does not limit them from exchanging confidential information or transmitting them to ESMA or ESRB (European Systemic Risk Board). Art. 22(2) deals with the obligation to cooperate and it applies to all the NCAs of the MSs. Under certain specific circumstances they have to share information and collaborate to grant the effectiveness of Prospectus Directive. Cooperation is required when an issuer has more than one home Member State because it has multiple classes of securities, or when the responsibility on prospectus approval is sent from one authority to another. Cooperation is also required to halt or prohibit trading of securities in other Member States. Therefore, to ensure an efficient control and regulation of international operations in terms of cross-border offers and securities admitted to trading in multiple MSs, cooperation among different authorities is essential. The two main objectives of this article are: (a) determining the regulatory framework for cooperation among NCAs and ESMA (as reported on the Omnibus I directive), (b) granting the duty of professional secrecy while cooperating with different bodies. The Omnibus directive I requires NCAs to cooperate with ESMA while at the same time providing it with all necessary information on time. Moreover, ESMA has to take part to on-site inspections when carried out by one or more NCAs (Art. 22(4)).

The Prospectus Directive enhanced harmonization by promoting supervisory convergence and cooperation. However, researchers suggest that supervisory arbitrage risk and related risks in supervision have not been reduced thus being still harmful to investor protection and market efficiency. Despite the fact that NCAs are empowered by such a directive equally⁶⁰, evidence shows that the intensity of supervision varies to the extent that some of them have been taking a proactive approach while others adopted a risk-based approach⁶¹. Through CESR supervisory cooperation among the NCAs has been strong since the beginning, and it was reinforced with the establishment of ESMA. Its powers in support of cooperation are: delegation, mediation, participation to home and host on-site inspections.

The review of the 2003 Directive highlighted poor convergence in operational supervisory practices. This means that several divergences in the methodologies used to supervise and interpret this regime finally emerged. This is one of the main drivers of this work, making a comparative analysis among seven EU countries to understand how different implementations have impacted public offers (both IPOs and secondary issues). Some of the main fields in which Member States' implementations differ the most are: translation, filing, and additional publication requirements.

⁶⁰ CESR. (2007). *CESR Supervisory Convergence Report n. 193*, 3.

⁶¹ CESR. (2007). *CESR Supervisory Convergence Report n. 193*, 5.

Sometimes the competent authorities breach the limits for prospectus approval. All those differences hurdled the passport mechanism, thus increasing costs and inefficiencies.

1.2.20 New simplified prospectuses

With the aim of guaranteeing differentiated information systems and proportional to any specific case considered, the 2017 Prospectus Regulation introduced two new simplified prospectus typologies: a) the EU Growth prospectus, and b) the prospectus for secondary issues.

a) Simplified disclosure regime for secondary issues

The Amending Directive 2010/73/EU and the Amending Regulation No. 486/2012 deal with a proportionate disclosure regime. With the old prospectus regime, proportionate disclosure had to apply to offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or a multilateral trading facility, which are subject to appropriate ongoing disclosure requirements and rules on market abuse. The decision of introducing a simplified prospectus for secondary issues stems from a basic principle laid down in the Regulation (EU) No. 596/2014 and the Directive 2014/65/EU (i.e. MiFID II) according to which investors receive continuous information from the issuers. Therefore, as long as investors are granted a continuous and regulated flux of information from issuers, there is no need to draw up an entire new prospectus ex-novo. This means that in presence of subsequent public offers or admission to trading on a regulated market executed by the same issuer (i.e. secondary issues) it is not necessary to provide investors with complete and complex prospectuses. Conversely, a simplified prospectus would reduce both costs and time of approval. This topic is dealt with under Art. 14 of the new regulation and it is going to be applied starting from July the 21st 2019.

Under the 2017 Regulation, Art. 14(1) says that in the case of an offer of securities to the public or of an admission to trading of securities on a regulated market, the following people may choose to draw up a simplified prospectus under the simplified disclosure regime for secondary issuances: “(a) *issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued*; (b) *issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities*; (c) *offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months*”. In presence of public offers or admission to trading on a regulated market, the first paragraph of the fourteenth article says that issuers whose securities have been continuously admitted to trading on a regulated market or SME growth market over at least the last 18 months, and issuing (a) securities fungible with securities already issued; (b) non-equity

securities; and (c) offerors of securities already admitted to trading on a regulated market or SME growth market over at least the last 18 months, are allowed to release simplified prospectuses. The latter shall consist of a summary, a specific registration document, and a specific security note.

Following Art. 14(2), the simplified prospectus shall contain information allowing investors to understand: “(a) *the prospects of the issuer and the significant changes in the business and the financial position of the issuer and the guarantor that have occurred since the end of the last financial year, if any; (b) the rights attaching to the securities; (c) the reasons for the issuance and its impact on the issuer, including on its overall capital structure, and the use of the proceeds*”. As in the 2003 Directive, information must be presented in an “*easily, analysable, concise and comprehensible form*”.

Following Art. 14(3), simplified prospectuses shall include information on “(a) *the annual and half-yearly financial information published over the 12 months prior to the approval of the prospectus; (b) [...] profit forecasts and estimates; (c) a concise summary of the relevant information as explained under Regulation (EU) No. 596/2014; (d) risk factors; (e) for equity securities the working capital statement, the statement of capitalisation and indebtedness, a disclosure of relevant conflicts of interest and related-party transactions, major shareholders and, where applicable, pro forma financial information*”.

b) *Reduced disclosure and EU Growth prospectus*

Directive 2003/71/EC and the subsequent Amending Directive 2010/73/EU and Amending Regulation No. 486/2012 deal with a proportionate disclosure regime. The European lawmaker took account of the different nature of the activities and size of issuers and, in particular, of companies with reduced market capitalization and SMEs. For such companies the information had to be adapted to their size and shorter track record. The path set forth by the abovementioned directives and regulation has been followed by the Prospectus Regulation (EU) 2017/1129. The latter introduced the EU Growth prospectus whose main purpose is to incentivise the SMEs to access the capital markets. This new simplified regime lowers costs and allows to make a specific informative which is proportionate to the size of the issuer. This topic is dealt with under Art. 15 of the new regulation and it is going to be applicable starting from July the 21st 2019.

With Art. 15(1) of the new regulation some entities may choose to draw up a standardized, lighter and easy to complete document when offering securities to the public, provided that their securities are not traded on a regulated market. The entities allowed to prepare the EU Growth prospectuses are: “(a) *SMEs; (b) issuers, other than SMEs, whose securities are traded or are to be traded on an SME growth market, provided that those issuers had an average market capitalisation of less than EUR 500,000,000 on the basis of end-year quotes for the previous three calendar years; (c) issuers, other than those referred to in points (a) and (b), where the offer of*

securities to the public is of a total consideration in the Union that does not exceed EUR 20,000,000 calculated over a period of 12 months, and provided that such issuers have no securities traded on an MTF and have an average number of employees during the previous financial year of up to 499; (d) offerors of securities issued by issuers referred to in points (a) and (b)”. This means that Art. 15(1)(b) is valid if the issuer’s market cap is lower than 500 million € over the three previous financial years. Art. 15(1)(c) is valid if: (i) the total consideration of the public offer is lower than 20 million € calculated over a period of 12 months, (ii) the issuer has no securities traded on an MTF, (iii) the number of employees over the previous financial year is not higher than 499.

Following Art. 15(2), the content of the prospectus shall be presented in a standardized format, and written in a simple language. It consists of a specific summary, a registration document, and a specific securities note. The former “*shall not impose any additional burdens or costs on issuers insofar as it shall only require the relevant information already included in the EU Growth prospectus*”. Moreover, issuers are required to focus on: (a) material and relevant information to make an investment decision; (b) ensure proportionality between size of the company and cost of producing a prospectus.

As explained in the 2003 Directive too, Art. 24 of the new regulation says that prospectuses approved in one of the EU Member States, are deemed to be valid in any of the others provided that the ESMA and the host NCA are properly notified. Moreover, the European Commission is responsible for adopting procedures and checking the content to apply the new regulation as explained under Art. 44.

1.3 Amending Prospectus Directive 2010/73/EU

The previous paragraphs report a detailed comparison between the Prospectus Directive 2003/71/EC and the Prospectus Regulation (EU) No. 2017/1129, while sometimes making reference to the Amending Prospectus Directive 2010/73/EU. Because the latter represents an intermediate essential step between the Directive and the Regulation, this paragraph presents some of the major changes achieved with the 2010 reforms.

Prospectus Directive 2003/71/EC was reviewed in 2009 and finally amended in November 2010 with the well-known Amending Prospectus Directive 2010/73/EU. It brought about several different modifications with the main objective of enhancing investor protection and market efficiency. This paragraph will go through five of them. Firstly, it reduced the disclosure requirements for small and medium enterprises (SMEs) and companies with small market capitalization, credit institutions, rights issues and government guarantee schemes. Secondly, the new directive modified the content and format of the summary. Thirdly, it clarified the exemptions from the obligation of publishing prospectuses when companies sell through intermediaries (i.e.

retail cascades). The retail cascade is a distribution mechanism according to which debt and equity securities whose denomination is low are offered to retail investors through intermediaries rather than by issuer or underwriters directly⁶². Fourthly, it repealed the disclosure requirements overlapping with the Transparency Directive (i.e. Directive 2004/109/EC). Finally, it clarified that the definition of *qualified investors* contained in the directive is equivalent to that of *professional clients* contained in the MiFID. Some of those provisions have been subsequently modified and improved with the 2017 Regulation. However, since the major changes never come from scratch, it was worth to mention the small initial steps undertaken with the Amending Prospectus Directive 2003/71/EC briefly to give an idea of how and why we finally reached the new provisions reported in the latest regulation.

1.4 Implications of Brexit

On March the 30th 2017 the UK government proposed the Great Repeal Bill whose main purposes are twofold: abolish the European Communities Act 1972, and convert the *acquis*⁶³ into UK Law at the moment of the repeal. Despite the fact that some of the provisions in the Prospectus Regulation (EU) No. 1129/2017 will not apply until July 2019, in the UK it became effective in July 2017. Up to now there is not an express agreement concerning the prospectus regime as part of the UK's withdrawal negotiations. When the UK will cease to be a Member State it will face two possibilities either maintain the old prospectus regime (which will be still in force when Brexit becomes executive) or adopt the new Prospectus Regulation regime (which will be effective immediately before exit but which will not be applicable for some weeks in the aftermath of the exit). Which of the alternatives will be embraced depends on what will be written on the Great Repeal Bill. The UK government has demonstrated interest in importing all the EU rules into British law, and to eliminate gradually those unwanted after Brexit⁶⁴. Therefore, since the white paper proposing the Bill reflects what suggested by the government and Brexit is going to be effective on March 2019, we expect the new prospectus regime to be adopted into British Law at the same time as it becomes applicable in all the other Member States.

Brexit will not determine any change in the new regime prescribed by the Prospectus Regulation (EU) No. 1129/2017. This means that it is a matter of UK national law whether it keeps recognizing prospectuses approved in other EEA countries as valid. However, the opposite is not directly applicable, as prospectuses approved by the UK competent authority will no longer receive a *passport* to raise capital in the EU. The UK alone has not the ability and power of

⁶² Dhonncha, M. N., & Wee, G. (2012). *Amendments to the Prospectus Directive*. Linklaters LLP.

⁶³ It is the accumulated legislation, legal acts, and court decisions which constitute the body of the European Union law.

⁶⁴ De Jones, B., & Arons, T. (2018). Modernizing the Prospectus Directive. In D. Busch, E. Avgouleas, & G. Ferrarini, *Capital Markets Union in Europe* (pp. 237-252). Oxford University Press.

recognizing as valid in the UK prospectuses approved in other EEA countries. It is something that needs to be discussed with all the other Member States once Brexit becomes executive. It needs to be ascertained whether there will be an agreement between the UK and the EU maintaining the principle of mutual recognition. In principle the UK has the ability to recognise as valid prospectuses approved abroad, however in practice it is a political and technical issue. Despite the fact that the new regime is going to work after withdrawal, it will continue to rely on topics dealt with under the new regulation or other EU legislations. Therefore, the question naturally arises on whether English Law will change as a consequence of the modifications that will necessarily characterize the EU legislation over time. Another interesting topic is on the effects that the decisions made by the European Court of Justice and ESMA may have on the UK legislation. Despite the fact that those policy choices may be left apart from the Bill, they will inevitably determine modifications in the policy choices by the government or other UK authorities.

Most of the thresholds dealt with under Directive 2003/71/EC are expressed in euros. Examples are represented by: the exemption from the obligation to publish a prospectus when offering to the public non-equity securities whose denomination is lower than 1,000 €, or the mandatory requirement to release prospectuses when offering securities whose total consideration is higher than 8 million €, as well as the decision to left the MSs free to choose whether they want to make it compulsory for the issuers to release prospectuses for offers whose denomination is lower than 1 million €. In the aftermath of the withdrawal, the UK should not continue to express those measures in euros anymore, however it seems plausible to think that they are simply going to convert those thresholds into equivalent sterling amounts. Under the old regime NCAs of the MSs shall communicate their approvals or notifications to ESMA. The FCA may keep doing it after the UK withdrawal, however what the potential consequences of this decision will be are not hundred percent clear.

The UK's withdrawal negotiation came without any specific provision in terms of prospectus regime. Therefore, as soon as Brexit applies, concerns may arise on the most probable impact this decision will have on the UK prospectus regime in terms of its ability to preserve its status quo in the nearby future especially considering the changes in the passporting activity.

II. Focus on Prospectus Summary

Structure and content of the Prospectus Summary has been already dealt with under paragraph 1.2.5. However, since it represents one of the main issues amended by Prospectus Regulation (EU) No. 1129/2017 and because of the fact that its role, function and efficacy are at the core of the discussions which are currently vigorously going on among EU lawmakers, this chapter specifically focuses on them. It first reports a comparison between Prospectus Summaries and KIDs for PRIIPs and it then presents a well-structured template for summaries as suggested by the CFA institute.

2.1 Regulation (EU) No. 1286/2014: KIDs for PRIIPS vs Prospectus Summary

First of all it is worth reminding that prior to the release of the Prospectus Regulation (EU) No. 1129/2017 the Prospectus Summary proved to be difficult to be read and understood by average investors. For this reason the 2017 regulation modified its content and structure deeply. However, the new rules of the “summary now closely mirror the rules for the essential information document as described in the PRIIPs Regulation”⁶⁵. This gave birth to intense discussions on how such an overlapping could be solved. This paragraph is entirely dedicated to this topic and at the end we will see how it has been currently figures out.

Regulation (EU) No. 1286/2014 is on *Key Information Document (KID) for Packaged Retail and Insurance Investment Products (PRIIPS)*. It was published on the Official Journal of the European Union in December the 9th 2014, and it has become applicable starting from January the 1st 2018. However, until December the 31st 2019 those selling *Units in Collective Investment Undertakings (UCITS)* are going to be exempted from the obligations under the PRIIPs Regulation. Retail investors are nowadays exposed to a huge variety of investment products, most of which fall in the PRIIPs category. Retail products can be mixed with insurance coverages, thus resulting in products extremely complex to be understood. This means that in the past few years, investors often undertook investments without fully understanding potential risks associated, thus experiencing unprecedented losses. In the aftermath of the financial crisis EU regulators wanted to improve transparency, and this is the main reason why this regulation was released. PRIIPs regulation belongs to a much wider set of provisions undertaken to provide investors as much information as possible, and, at the end of this thesis we will see whether their objectives have been entirely achieved or not.

Art. 4(1) defines a packaged retail investment product (PRIP) as an investment, including instruments issued by special purpose vehicles (SPVs) or securitisation special purpose entities

⁶⁵ De Jong, B., & Arons, T. (2017). Modernizing the Prospectus Directive. In Veil, & Rüdiger, *European Capital Markets Law* (pp. 282 - 309). Hart Publishing.

where “*the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor*”. Art. 4(2) defines insurance-based investment product as an insurance product offering a maturity or surrounding value which is “*wholly or partially exposed, directly or indirectly, to market fluctuations*”. Therefore a PRIIP is a financial product that mirrors either the first or the second definition.

Art. 2(1) specifies that the Regulation (EU) No. 1286/2014 shall apply to all those who advise or sell PRIIPs. While Art. 2(2) lists the products which are not subject to this regulation. Art. 2(2)(a) excludes “*non-life insurance products as listed in Annex I to Directive 2009/138/EC*”⁶⁶. This category refers to insurances against other risks, accidents, fires and natural forces. Art. 2(2)(b) excludes “*life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or infirmity*”. This means that this article exempts term life insurance contracts (such as insurances against the risk of death, incapacity due to injury, sickness, or infirmity) from being regulated by this regulation. Life insurance contracts qualify as PRIIPs. They invest on capital at the request of the retail investors and provide regular payments after maturity. Examples are represented by contracts with variable bonuses, index-linked life insurance products that contain investment elements (they are known as *with- profits* life insurance contracts)⁶⁷. Art. 2(2)(c) excludes “*deposits other than structured deposits as defined in point (43) of Article 4(1) of Directive 2014/65/EU*”. Structured deposit are usually associated with a higher risk-return profile than cash deposits. It is characterized by higher risks and eventually returns because investors put money in the account for a fixed term and at the end of this time they will receive their initial deposit and possibly a return. However, the latter depends on the performance of another financial variables such as “*(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor; (b) a financial instrument or combination of financial instruments; (c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or (d) a foreign exchange rate or combination of foreign exchange rates*”. Point (b) means that structured deposits fluctuating with variable rates directly linked to an interest rate such as Euribor or Libor or comparable interest rates are not PRIIPs. Art. 2(2)(d) excludes securities such as: (i) shares in the capital of central banks of the MSs of the EU and governmental guaranteed securities, (ii) securities issued by non-profit associations or bodies, (iii) non-equity securities

⁶⁶ Directive 2009/138/EC is about taking-up and pursuit of business Insurance and Reinsurance, also known as Solvency II Directive.

⁶⁷ Gerhards, S., & Rothenhöfer, K. (2018). Market Transparency - PRIIPs Regulation (EU) No. 1286/2014. In M. Brenncke, S. Gerhards, Gerner-Beuerle, R. Grutze, J. A. Kammerer, C. Kumpan, . . . C. Schmies, *Financial Services Law* (pp. 1032 - 1095). Bonn/London/Halle.

issued by credit institutions in a continuous or repeated manner, (iv) sovereign bonds⁶⁸. Art. 2(2) from (e) to (g) exclude pension products recognised as having the primary purpose of providing investors with an income at retirement and which entitle the investor to certain benefits, occupational pension schemes, and individual pension products for which a financial contribution from the employer is required.

Art. 3 of the PRIIPs Regulation clarifies that provisions established by Regulation (EU) No. 1286/2014 coexist with those reported under Regulation 2003/71/EC and Directive 2009/138/EC. This means that issuers or offerors may find themselves preparing KIDs and Prospectus Summaries. They are both short documents providing potential investors with information that is easy to read, accurate, and not misleading. Hence, they are both necessary to make comparisons between relevant features of different products. However, in the end potential investors may eventually receive redundant information. For this reason Art. 7(7) of the 2017 Regulation says that where a key information document is required to be prepared under Regulation (EU) No. 1286/2014, the issuer, the offeror or the person asking for admission to trading on a regulated market may substitute the content of the prospectus summary with information set out in Art. 8(3) from (c) to (i) of Regulation (EU) No. 1286/2014 in the prospectuses approved by its NCA.

Art. 8 of Regulation (EU) No. 1286/2014 standardises the KIDs' format and content to make it easier for retail investors to compare different PRIIPs. Following Art. 8(1) the title (i.e. *key information document*) shall be provided at the beginning of the very top of the document. Annex I of the PRIIP Delegated Regulation reports the specific template that shall be used when preparing the document. PRIIP manufacturers shall prepare a KID for every single PRIIP. However, there are exceptions such as exchange-traded derivatives. It is necessary to specify that the derivative products are split into two main categories: over-the-counter (OTC) and exchange-traded derivatives⁶⁹. The former are negotiated between two parties typically an end-user and an investment bank. Their primary advantage is that they can be easily customized to meet the end user's specific requirements, this means that contracts are not standardized. However, this comes with a series of disadvantages, such as for example the fact that lack of standardization implies that legal risks are inevitably higher, prices to the end-user may be unfair, etc. Exchange-traded derivatives are traded in regulated exchanges. This means that their contracts are standardized and cannot be specifically shaped on the end-user's necessities. They come with several advantages

⁶⁸ They are non-equity securities issued by a MS, a MS's regional or local authorities, a public international body of which one or more MSs are members, the ECB or the central banks of the MSs.

⁶⁹ Lahabitant, F. S. (2006). *Handbook of hedge funds*. The Atrium, Southern Gate, Chichester, West Sussex, England: John Wiley & Sons, Ltd.

such as for example the fact that in each transaction exchanges or their clearing houses act as counterparty, thus ensuring liquidity and reducing settlement risks. Manufacturers of those exchange-traded derivatives are exempted from producing KIDs because they are standardized. Therefore, it is enough to prepare a generic KID for each exchange traded derivative with a Unique Product Identifier (UPI). The latter is specific to each type of contract rather than to individual trades. Art. 8(2) reports the exact sentence that shall be inserted immediately after the title: *“This document provides you with key information about this investment product. It is not marketing material. The information is required by law to help you understand the nature, risks, costs, potential gains and losses of this product and to help you compare it with other products”*. Art. 8(3) lists the information that shall be necessarily encompassed in the KID, that can be roughly summarised as follows. Point (a) makes it mandatory to report: *“the name of the PRIIP, the identity and contact details of the PRIIP manufacturer, information about the competent authority of the PRIIP manufacturer and the date of the document”*. Point (b) mandates to insert a comprehension alert stating *“You are about to purchase a product that is not simple and may be difficult to understand”*. Points from (c) to (i) deal with specific sections that shall be included in the document, whose contents shall answer the following questions: (c) What is this product?; (d) What are the risks and what could I get in return?; (e) What happens if [the name of the PRIIP manufacturer] is unable to pay out?; (f) What are the costs?; (g) How long should I hold it and can I take money out early?; (h) How can I complain?; (i) Other relevant information. This means that in section (c) the KID shall report the type of PRIIP, its objectives and means of achieving them, the retail investor to whom the PRIIP is more suitable for, whether the it offers some insurance benefits, the term of the PRIIP. Paragraph (d) comprises a summary risk indicator which comes along with a narrative explanation, the eventual maximum loss of invested capital. Annex II of the PRIIP Delegated Regulation describes technically the methodology for presenting the risks, a market and credit risk assessment, and details on the situations in which PRIIPs bear the risk of being illiquid. Paragraph (e) explains whether losses are covered by an investor compensation or deposit guarantee scheme and if so the name of the guarantor and which risks are covered. This section shall necessarily differentiate between the situation in which “the default of an entity which would trigger a specific payment, and the default of an entity that guarantees or otherwise secures the payment obligations under the PRIIP”⁷⁰. Following paragraph (f), the sixth section of a KID shall present retail investors’ direct and indirect costs of investing in this PRIIP, as well as one-off and recurring costs. In order to enhance comparability, they shall all be presented through summary costs indicators and expressed in monetary and percentage terms. Annex VI of the PRIIP

⁷⁰ Gerhards, S., & Rothenhöfer, K. (2018). Market Transparency - PRIIPs Regulation (EU) No. 1286/2014. In M. Brenncke, S. Gerhards, Gerner-Beuerle, R. Grutze, J. A. Kammerer, C. Kumpan, . . . C. Schmies, *Financial Services Law* (pp. 1032 - 1095). Bonn/London/Halle.

Delegated Regulation contains specific guidelines on what costs shall be disclosed, how the costs shall be calculated, and the summary cost indicators determined. It also presents rules on the format of the tables disclosing costs in the KID. Section (g) shall explain whether there is a cooling-off period or cancellation period, the required minimum holding period, the conditions for disinvestment prior to maturity, and the potential consequences of cashing in before the end of the term. Paragraph (h) shall explain how and to whom retail investors shall eventually complain about the product or conduct of the acquired product. This section shall also present the links to the websites where these complaints can be undertaken, as well as postal and email addresses necessary to submit them. Finally, paragraph (i) shall briefly report the additional documents that retail investors must receive before and after the contract is signed (i.e. at the pre- and post-contractual stage), and taking into account that marketing material is not included in this list.

Art. 7 of the Regulation (EU) No. 1286/2014 requires the KID to be written in the official language of the country on which the PRIIP is placed. Alternatively it can be drawn up in another language accepted by the NCA of the MS where the product is distributed.

In presence of a public offer of securities to the public, the requirement to produce KIDs for PRIIPs and Prospectus Summary goes against the expressed intention of PRIIPs for three main reasons⁷¹:

- it is confusing for investors to receive two summary documents both pretending to give clear and concise information, but at the same time presenting data differently;
- it is in contradiction with the main goal of achieving regulatory harmonization to the extent that it creates unequal opportunities between PRIIPs that are subject to the Prospectus Directive and other PRIIPs;
- last but not least, preparing two distinct but duplicative short form disclosure requirements raises costs significantly, thus impacting the returns of the issuer, offeror, or persons asking for admission to trading on a regulated market (and indirectly to potential investors), without adding substantial benefits to retail investors who are the final addressees of those documents.

This means that information contained in the KID may eventually overlap with that contained in the prospectus summary. Therefore, with the aim of harmonizing the prospectus regime with the informative obligations in the Regulation (EU) No. 1286/2014, in case in which the KID is mandatory for the specific product typology, the 2017 Prospectus Regulation

⁷¹ AC. (2015). *JAC response to the Discussion Paper on Key Information Documents for Packaged Retail and Insurance-based Investment Product (PRIIPs)*.

introduced the possibility to replace the section on the key information on the securities with the KID itself.

2.2 An innovative template for the Prospectus Summary

The main objective of Prospectus Directive is to enhance market fairness, integrity, and investor protection. The latter are generally feasible when disclosure is complete, comprehensive and precise, however recent studies demonstrated that the simple communication of information to the market could result as being insufficient to achieve them all. A central role is played by the methodologies through which information is broadcasted and the way in which it is presented to market participants. Despite the fact that most of the activities in finance are nowadays carried out through technological devices, market participants as well as people programming those machines are human beings and as such they are inevitably subject to emotions and irrationality. Because of its increasing importance, Behavioral Finance is recognized as an academic discipline which is taught in most of the universities and business schools around the world.

As a consequence of the fact that professional financial intermediaries and investors suffer from irrationality and behavioral biases⁷², it is necessary to implement market regulations in a way that takes account of them too. Overload information hinders even professional investors' ability to fully understand prospectus content, while at the same time increasing the costs of drawing them up. Summaries were introduced to make a brief recap of all the main information contained in prospectuses. As already explained in paragraph 1.2.5, with the objective of improving the efficacy of the document, the 2004 Prospectus Regulation imposed the summary to be no longer than 7% of the whole document or 15 pages⁷³ at maximum. However, even the summaries proved to be extremely long documents, thus failing in their objective of giving a clear picture of the issuer and issue current situation. For this reason, that provision was later modified by the 2017 Regulation imposing a limit of 7 sides of A4 papers. This principle simplified the summary considerably, however there are behavioral biases that need to be accounted for in order to enhance investor protection. Despite the length limit, issuers still have enough freedom to implement national legislations in terms of selecting the information they perceive as material. Potential investors are inevitably discouraged from going through the document when it is extremely long and full of information (often irrelevant). Moreover, the fact that they are often written with small characters and the absence of paragraphs do not capture the attention of the readers. These aspects fall within the segment of behavioral finance and have nothing to do with law. However, if the objective of Prospectus Directive is that of enhancing investor protection, they should be necessarily included in market regulations. For this reason the CFA proposed a template for the summary prospectus

⁷² Spindler, G. (2011, September). Behavioural Finance and Investor Protection Regulations. p. 315.

⁷³ Art. 24(1) of the Regulation No. 809/2004.

structured taking account of the priority of standardization to improve comparability, increased use of images to make the document more appealing, highlight the importance of salience, and improve design that fosters comprehension on monitors and portable devices. This institute also suggested that there should be no hyperlinks or cross-references to other parts of the document. Moreover, it is important to specify that the issuers are not liable for the prospectus summary alone. As a matter of facts they are not required to prepare summaries for non-equity securities trading on exchanges if they are addressed to qualified investors only. This provision is quite important as it encourages non-equity trading to move from OTC markets to regulated markets. It stands for over-the-counter, the OTCs are “markets in which each dealer with private information can engage in bilateral transactions with other dealers because as determined by her links in a network”⁷⁴. Transactions take place without standardized contracts, and they are often executed by intermediaries. Prices result from investors’ or market-makers’ bargaining process⁷⁵.

Economists formally recognize the existence of four different market failures (each one of which is further subdivided): biases in individual decision-making, asymmetric information, imperfect competition, and externalities. Investors’ beliefs about the value of financial products are often biased, prejudiced, and swayed by crowds and herd mentality, this hurdles their ability to make rational individual decisions⁷⁶. The second in the list usually arises between buyers and sellers with the former being less informed than the latter about the financial product than the seller; for what concerns the second in the list it is necessary to highlight that competitive markets rely on the existence of a large number of small producers, free entry and exit of the firms into and out of the markets, a large number of well-informed consumers who can easily switch from one producer to another at no cost, absence of one of these conditions means that the market is imperfectly competitive⁷⁷. Finally, externalities are the costs (*negative externalities*) or benefits (*positive externalities*) consequences of an economic activity⁷⁸. Financial services are subject to ten biases specific to that sector: the present bias (preference for immediate gratification), loss aversion, regret, overconfidence, over extrapolation, projection bias, mental accounting (i.e. treating fungible assets differently depending on their purpose), framing, rules of thumb, and persuasion⁷⁹. Of all the biases listed above, potential investors reading prospectus summary are subject to framing mainly. It consists in changing opinion depending on the way in which things

⁷⁴ Babus, A., & Kondor, P. (2018). Trading and Information Diffusion in Over-the-Counter Markets. *Discussion paper No. 777 - Paul Woolly Centre working paper No. 57*.

⁷⁵ Duffie, D., Garleanu, N., & Pedersen, H. L. (2004, September). Over-the-Counter Markets. *NBER working paper series*.

⁷⁶ Kahnemann, D. (2011). *Thinking, Fast and Slow*. Cambridge University Press.

⁷⁷ Armour, J., Awery, D., Davies, P., Enriques, L., Gordon, J., Mayer, C., & Payne, A. J. (2016). *Financial Regulation*. Oxford.

⁷⁸ Helbling, T. (2010, December). What are externalities? - What happens when prices do not fully capture costs. *Finance & Development*, pp. 48 - 49.

⁷⁹ Etra, K., Hunt, S., Iscenko, Z., & Brambley, W. (2013). *Applying behavioural economics at the Financial Conduct Authority*. London: Financial Conduct Authority.

are presented. This means that “by making certain information more or less salient, the framer has the power to direct the reader’s attention towards or away from this information”⁸⁰. Framing in financial services takes two forms: complex and opaque pricing strategies whose main objective is to hide some of the service costs to make the investment more attractive, while formatting and presentation of the decisions can be taken as an attempt to exploit biases.

Researches show that when consumers are biased it is difficult that even information presented in the right way overcomes biases. This means that “there is no unequivocal evidence that behaviorally informed information disclosures are effective”⁸¹, however most of the researchers in this filed seem to share this idea. Disclosure requirements should take account of three main factors: design of the summary disclosure, engagement of consumers, and presentation of product information⁸². These three prerequisites are inevitably interconnected, to the extent that investor engagement is high the better the quality of the way in which information is presented. The latter is guaranteed by simplicity, salience, and standardization of the information reported. The CFA institute also highlighted the importance of the technological devices used to make disclosure available (e.g. computer monitors, screens on portable devices).

As already explained, prospectus summary shall present the following structure:

- Introduction (issuer; warnings)
- Key Information on the Issuer (details on the issuer and the auditor)
- Key Financial Information about the Issuer (selected historical financial information; key risk factors)
- Key Information on the Securities (main features; information on: dividend rights, voting rights, rights to attend shareholders’ meetings, preferential subscription rights, liquidation rights, buyback of shares, restrictions on the free transferability of the securities, dividend policy; trading venue; key risk factors)
- Key Information on the Offer (conditions and timetable; motivation of the offer)

The CFA institute proposed an innovative template to prepare prospectus summary. It is interesting because it takes account of potential investors’ behavioral biases. It follows certain sections contained in the prospectus for Takeaway.com N.V.⁸³ and the Half-Year Financial Report

⁸⁰ Rosov, S. (2017). *Desining a European Summary Prospectus using Behavioural Insights*. CFA Institute.

⁸¹ Lourenco, J. S., Ciriolo, E., Almeida, S. R., & Troussard, X. (2016). *Behavioural Insights Applied to Policy*. Brussels: European Commission.

⁸² Oxera. (2014, October 29). *Review of Literature on Product Disclosure*. Retrieved from Financial Conduct Authority (FCA): <https://www.fca.org.uk/publication/research/review-of-literature-on-product-disclosure.pdf>

⁸³ Takeaway.com. (2016). *Final Prospectus*. Retrieved from Euronext: <https://www.euronext.com/ipo-detail/676117/NL0012015705-XAMS/TAKEAWAY.COM%20N.V.>

of Safran Group⁸⁴. The CFA institute suggests to put *warnings* at the top of the summary as the introduction and the notions on the issuer do not represent salient information they can be briefly reported next. The *warnings* section should clarify that to make an informed investment decision the whole document must be read carefully (i.e. prospectus summary alone is not sufficient), and that investors may eventually lose some of their invested capital. The subsequent paragraph should be on *key financial information about the issuer*. It should deal with behavioral insights, that is keeping in mind ideas of simplicity, standardization, and salience. The risk factors paragraph should be divided in three subsections: firm-specific risk, macroeconomic risk, and risks related to the company's financial position. The risk factors subsections should be developed in this order, and they should be organized into highlighted areas. The institute suggests to pay attention to the colors used to display this kind of information, this means that color intensity should be used to identify the likelihood of each risk. However, the category of each risk factor should be written in plain English as well (i.e. using adjectives like high, medium, low). This section of the summary should contain at most ten risk factors. What is important to highlight is that issuers should report only the most relevant factors and they should not be necessarily ten. The next paragraph is on *key information on the securities*. According to the CFA institute, this section cannot be implemented consistently using behavioral insights. However, it proposes to display the content in tables as much as possible. The section on security-specific risk factors should contain a maximum of five risk factors. The last paragraph is on *key information on the offer*. It deals with how to take advantage of the offer mainly, therefore there is no much scope for behavioral insights. The main focus is on breaking up the text using as much tables as possible.

⁸⁴ Safran_Group. (2016). *2016 Half-Year Financial Report*. Retrieved from https://www.safran-group.com/sites/group/files/safran_rfs_va_2016.pdf

III. Implementations of the Directive 2003/71/EC in the seven EU countries

This chapter presents the different implementations of the Directive 2003/71/EC in the seven EU countries analysed. Each paragraph is structured in the following way: a) approval procedure and appeal; b) prospectus obligation and exemptions; c) content, format, language and supplements of the prospectus; d) publication and advertisement; e) use of the prospectus approved in other (non-EU and non-EEA) countries; f) prospectus liability and sanctions; g) others.

3.1 Luxembourg⁸⁵

The Grand Duchy of Luxembourg implemented the 2003 Prospectus Directive on the 10th of July 2005 with the Prospectus Act that applies together with the Prospectus Regulation (EC) No. 809/2004. The Prospectus Act is divided in four parts: the first is about the definitions used throughout the Act; the second is addressed to all the issues that fall within the scope of the 2003 Directive; the third presents the legal frameworks applying to issues falling outside the scope of the Directive; the fourth deals with the rules which apply in relation to the Euro MTF and the alternative market. The Luxembourg national competent authority (*Commission de Surveillance du Secteur Financier*, or CSSF) is responsible for the approval of prospectuses falling within the scope of the second and third parts of the Act, and for issuing administrative sanctions.

a) Approval procedure and appeal

Approved prospectuses may be submitted either in paper format or through email. The approval request shall include: (i) a list of all the documents provided in the application; (ii) the application purpose; (iii) a description of the entity responsible for the filing; (iv) information on the issuer, offeror or person asking for admission trading on a regulated market; (v) details on the issuer's agent; (vi) details on the agent responsible for receiving the invoice and the tax; (vii) information on the person in charge of determining whether the draft is the final version; (viii) the transaction timetable and the intended date of approval. Once all the documents have been submitted, the CSSF is responsible for approving the prospectus in ten days at maximum if: (i) admission to a regulated market is sought; (ii) some or all of the issuer's securities have been previously offered to the public or admitted to trading on a regulated market, by mail with confirmation by a separate mail. If the conditions in (ii) are not met, the approval period may be extended up to twenty working days (Art. 7 (3) of the Act). Depending on the nature of the prospectus, the document submission to the CSSF comes with a tax ranging from 1,500 € to 2,500€.

In case in which the CSSF finds that the documents submitted are incomplete, the approval period shall start on the date on which the issuer delivers the additional information. Art. 7(5) of

⁸⁵ Weydert, J., & Cera, F. O. (2008). Luxembourg. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe, Vol. I* (pp. 222-241). Cambridge University Press.

the Act provides that the message on missing information shall be notified within the above time periods. Art. 19 of the Act provides that in case of passporting the CSSF delivers a certificate of approval to the EU NCA along with a translation of the summary.

Art. 2(h)(i) of the Act states that issuers of equity or non-equity securities whose total denomination is lower than 1,000 € shall consider Luxembourg as their home Member State. EEA and non-EEA issuers of all the other types of securities such as non-equity securities with denomination of at least 1,000 € are free to choose their home Member State. Those issuers may choose the home state i.e. the state of the registered office (it does not apply to non-EEA issuers), and the state where the securities are offered to the public or admitted to trading on a regulated market (Art. 2(h)(ii)). Following Art. 2(h)(iii), at the choice of the issuer, the offeror, or the person asking for admission to trading on a regulated market, the home Member State for non-EEA issuers of equity or non-equity securities whose the nomination is lower than 1,000 €, having their registered office in a non-EEA country is either the Member State where the securities are offered for the first time, or where admission to trading is sought.

Claims against the CSSF decisions shall be presented within three months from the notification of the decision. The judgement of the administrative court may be appealed within forty days from the judgement notification. Following Art. 27(1) of the Act, those time periods cannot be extended. It is important to highlight that the recourse has no suspension effect on the CSSF decision unless the president of the Luxembourg administrative court decides to proceed in this way. Suspension becomes effective if: (i) it is likely that the execution of the CSSF decision entails serious and definitive damage; (ii) the legal controversies against the CSSF decision are serious (Art. 27(2) of the Act). The president of the Luxembourg administrative court has the power to grant temporary measures to protect the interest of the parties involved (Art. 27(2) of the Act).

Art. 7(7) of the Act specifies that the prospectus approval by CSSF does not mean that the prudential authority expresses any judgement on the economic opportunity of the transaction itself. The CSSF may transfer the prospectus approval to another NCA. This decision shall be notified to the issuer within three working days from the date of the CSSF decision. According to Art. 11 (1) of the Act, the CSSF approval is valid for 12 months as from publication of the prospectus.

The CSSF is a public body subject to the supervision of the Luxembourg minister in charge of the financial sector. Its supervision is not aimed at preserving companies or professionals interests, it rather protects the public interest (Art. 20 of the Law on CSSF). Therefore, the CSSF is liable only in case of gross negligence in the implementation of the public service.

The second part of the Prospectus Act excludes from its scope of application units issued by collective investments undertakings other than of closed-end type. However, the CSSF

specified that securities issued by a securitisation fund subject to the Luxembourg law of March the 22nd 2004 fall within the scope of the second part of the prospectus Act.

b) Obligation to publish a prospectus and exemptions

Art. 5 of the Act provides that in Luxembourg offering of securities to the public is subject to the prior publication of a prospectus. Before the prospectus Act there was no definition of offer of securities to the public. Offers made to sophisticated or institutional investors or to a limited number of existing clients of a credit institution or an investment firm, was not subject to advertising. It was not recognised as a public offer and it was considered by the CSSF as a private placement, therefore no prospectus was required. Following Art. 2(1)(1) of the Act, an offer of securities to the public is defined as “*a communication to persons in any forms and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. The definition includes the placing of securities through financial intermediates*”. This definition does not apply to securities out of the scope of the Prospectus Act, such as for example open-ended investments funds. Art. 2(1)(1) of the Act specifies that the word *persons* does not involve any distinction between institutional investors and non-professional clients. According to the CSSF Circular 05/225 (16 December 2005), public offers shall be analysed from a territorial view point. Therefore, it clarifies that the *location of the offer* is the place where the transaction is executed, and that the *place of residents of the public* shall be considered to determine whether the Prospectus Act shall apply or not. Consequently: (i) an offer of securities made from Luxembourg even to non-residents shall comply with the Prospectus Act, and (ii) an offer of securities made by a Luxembourg issuer in a foreign country is subject to that foreign country’s legislation. Nevertheless, the Act does not apply to: (i) offers made abroad to persons residing in Luxembourg; (ii) offers made in foreign media available in Luxembourg. Finally, Art. 5(2) specifies that sales of securities on secondary markets shall be considered as a separate offers.

The Act specifies that issuers are exempted from releasing prospectuses in case in which: (i) the offer of securities is addressed to qualified investors; (ii) the offer of securities is addressed to less than 100 persons (other than qualified investors) in Luxembourg; (iii) issues whose denomination is at least 50,000 €; (iv) the individual investors’ consideration amounts to at least 50,000 €; (v) the total consideration of the offer is lower than 100,000 € calculated over a period of twelve months (Art. 5(2) of the Act). Finally, employees options (which allow them to subscribe for securities) do not fall within the scope of publishing prospectuses provided that the options are not negotiable on the capital markets (as in the Directive).

Art. 6 of the Act states that any admission of securities to trading on a regulated market is subject to prior publication of a prospectus. The exemptions of publication of a prospectus are the same as those reported under Art. 4(2) of the 2003 Directive.

c) Content, format, language and supplements of the prospectus

As stated in the Directive, the prospectus shall contain information necessary to allow investors to make aware decisions, and they must be presented in an easily, analysable, and understandable form. In Luxembourg the most considerable category of issuers is represented by special purpose vehicles (SPVs) issuing asset-backed securities. If the SPV has not carried out any activity (i.e. the principal activity of the issuer) and has not drafted financial accounts, in order to be exempted from the obligation to prepare such accounting document, the issuer shall declare this situation in the registration document. The CSSF specified that if the SPV did not issue asset-backed securities, no exemption is allowed neither by the Regulation nor by the Act. Moreover, the CSSF does not made it mandatory to insert tables of risk factors immediately after the summary, and any information not expressly requested in the schedules or building blocks may be included everywhere in the document.

The CSSF requires the first page of the offering memorandum⁸⁶ to report the following statement: “*these offering memorandum comprises a prospectus for the purpose of Article 5.4 of the Prospectus Directive*”. The CSSF is even more prudent in using *pricing supplement* instead of *final terms* because a supplement is subject to the previous approval by the CSSF, while the final terms are not. The Prospectus Act allows the document to be structured in different ways: as a *single document*, as a *collection of three separate documents* or as a *Base Prospectus*. Therefore the Luxembourg law maintained the formats set forth in the Directive without introducing material differences. For what concerns the Base Prospectus, the final terms of each issue shall be separately filled with the CSSF. The withdrawal period for investors who have already agreed to purchase or subscribe the securities amounts to two working days. In case of issuance of structured products such as credit-notes, the CSSF accepts the submission of a standardized prospectus such as a *Unitary Prospectus* or *Draw-Down Prospectus*. This document describes the underlined securities, it generally incorporates the Base Prospectus by reference, and it is approved within a shorter time period as compared to the ordinary procedure.

Art. 8(2) of the Act requires the prospectus to contain a summary presenting the main characteristics and risks associated with the issuer, any guarantor and the securities. The summary shall be written in non-technical language and it shall include the information listed in Schedule I of the Act. Issuers of non-equity securities whose denomination is larger than 50,000 € shall not prepare summaries. The latter shall be presented as an introduction to the whole prospectus. In case in which the summary is unclear or misleading and those difficulties cannot be clarified by reading the whole document, its content may eventually trigger liability of those who prepared the document itself (Art. 8(2)(d) of the Act).

⁸⁶ The document to be submitted to the NCAs to request approval is called *prospectus*. However, in some jurisdictions (such as for example in the US) it is also referred to as *offering memorandum*.

According to Art. 20 of the Act the CSSF accepts prospectuses and summaries drafted in English, French, German or Luxemburgish. Documents incorporated by reference may be written in a language different from the one used in the prospectus provided that it is one of the four languages accepted.

Art. 13 of the Act presents the reasons why summaries shall be released, and they are exactly the same as those reported in the Directive. This means that, if a significant new fact, material mistake or inaccuracy on the information included in the prospectus arises, a supplement shall be submitted to the CSSF for its approval. According to the Act, issuers shall deliver to the CSSF a supplement containing information on the annual accounts or interim annual accounts each time a new significant fact emerges. However, the CSSF specifies that supplements shall be used to amend or update only general information contained in the prospectus, and not to describe or issue a specific tranche. This information is to be included in the final terms. Finally, a *red herring* prospectus may be approved without including the number of securities to be issued (or offered to the public or admitted to trading on a regulated market), or the exact price of the securities, provided that the document contains the method of calculation of the price.

d) Publication and Advertisements

The Act recognizes all the means of publication listed in the Directive. Advertisements are announcements: (a) relating to a specific offer; (b) aimed at promoting the potential subscription or acquisition of such securities (Art. 2(9) of the Regulation). Following Art. 17 of the Act: (i) investors must be able to identify the advertisement to the extent that the publicity must refer to the prospectus and indicate where it is made available (Art. 17 (2)); (ii) the advertisement must be clearly recognizable (Art. 17 (3)); (iii) information must be consistent with that contained in the prospectus, and it must not be inaccurate or misleading (Art. 17 (3)). Art. 17(6) specifies that there is no obligation to submit advertisements for prior approval, however the CSSF is responsible for assessing compliance with the Act.

e) Use of the prospectus approved in other non-EU countries

When Luxemburg is the home Member State with respect to issuers having their registered office in a third country, the CSSF may approve a prospectus provided that: (i) the document complies with international standards set by international securities commission organizations such as IOSCO; (2) the information requirements are equivalent to those listed under the Act; (3) the prospectus is prepared in a language accepted by CSSF.

f) Prospectus liability and sanctions

Following Art. 9 (1), issuers, offerors or persons asking for admission to trading on a regulated market are responsible for the information reported in the prospectus. Names and functions of those responsible shall be clearly stated in the document. Directors and managers are not responsible unless they ask for admission for securities to trading on a regulated market

(Art.9(1)). The CSSF has refined implementation of the directive because of its willingness to maintain its primacy in flexibility and innovation.

Now let's turn the attention on the sanctions. Lack of compliance with the provisions in the Prospectus Act is punished with pecuniary or material sanctions generally divided in three huge categories: civil liability, criminal liability, and administrative sanctions. (1) In Luxemburg, drafting of the prospectus is subject to civil liability. The latter is not applied to those preparing summaries (and their translations) unless their content is misleading, inaccurate or inconsistent when read together with the whole prospectus. (2) Issuers who do not receive a prospectus approval by the CSSF (i.e. approval failure) receive a fine ranging from 250 € to 125,000 € (it is a matter of criminal liability, Art. 26 of the Act). Finally, (3) any infringement of the Act and lack of cooperation with CSSF is punished with a fine ranging from 125 € to 125,000 € (it is a matter of administrative sanctions, Art. 25(1)). According to Art. 25(3) the CSSF is allowed to disclose every measure or sanction unless this would seriously compromise financial markets or cause disproportionate damage to the parties involved.

g) Others: omissions and incorporation by reference

In the Prospectus Act, the provisions on the omissions of information in the prospectus which mirrored those reported in the Directive. Following Art. 15(1) only the documents that have been previously approved may be incorporated by reference. The list of documents that can be incorporated by reference is reported under Art. 28(1) of the Regulation. Summaries cannot incorporate documents by reference.

3.2 United kingdom⁸⁷

In the UK the regulatory authority responsible for the financial industry is the *Financial Services Authority* (FSA). It is also responsible for approving prospectuses, for this reason it is also referred to as UK Listing Authority. Financial markets are regulated by the Financial Services and Markets Act 2000 (FSMA). The FSA exercises its functions in conjunction with HM Treasury. According to the Treasury and FSA, the Prospectus Directive calls for maximum harmonization, therefore the Member States have reduced freedom in implementing it.

a) Approval procedure and appeal

Section 87(1) of FSMA states that the FSA may not approve a prospectus unless: (i) the UK is the issuers' home Member State; (ii) the prospectus enables investors to understand the assets, liabilities, financial position, profits, losses and future prospects of the issuers, as well as the rights attached to the securities; (iii) all the other requirements imposed by Part VI of the FSMA or Prospectus Directive. Issuers seeking for prospectus approval shall submit to the FSA a draft

⁸⁷ Boardman, N. (2008). United Kingdom. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe* (pp. 314 - 332). Cambridge University Press.

prospectus, a registration document or a security note and a summary along with the documents listed in Prospectus Rule 3.1.1R. The FSA shall notify its decision within ten working days. This time frame may be extended up to twenty working days in case of a new issuer.

b) Obligation to publish a prospectus and exemptions

The Prospectus Directive introduced a pan-European definition of offering of securities to the public, thus creating a situation in which offerings of securities (whether listed or not) require a prospectus unless an exemption applies. The Treasury noticed that the definition reported in the Directive is broad and potentially ambiguous. It was concerned that this wide definition could affect trading on secondary markets, to the extent that ordinary secondary-market communication (such as posting of prices) could be categorized as offering of securities to the public. That is why the definition in the Prospectus Directive should be clarified. Part VI of FSMA specifies that a public offering does not encompass a communication related to trading on: a regulated market, an MTF, any market listed under Section 118 of FSMA. Following the broad definition in the Directive, secondary offerings could be recognized as public offerings for which a prospectus is required.

If an issuer issues a prospectus in connection with a secondary offering, a party offering its shares in relation to that offering is not liable for the prospectus if: (1) the issuer is responsible for the prospectus in accordance with the Prospectus Rules; (2) the prospectus was prepared by the issuer; (3) the offeror and the issuer are jointly making the offer.

The exemptions from the prospectus requirements are split into the following two categories, exemptions applying to: (i) offerings of transferable securities to the public; (ii) admission of transferable securities to trading on a regulated market. Section 86(1) of FSMA lists the exempt offerings. Parts 1 and 2 of Schedule 11 A of the SMA and prospectus rule 1.2.2R lists the exempt securities. Parts 1 of Schedule 11A of the FSMA and the prospectus Rule 1.2.3R lists the securities exempted from releasing prospectuses in case of admission to trading. Most of the exemptions are similar to those presented in the Directive, however some considerable differences arose. (i) In case the offering is made to fewer than 100 people per EEA MS, it is up to the FSA to determine whether a number of successive offerings constitute a single offering or a series of different offerings (and thus whether the exemption applies). Therefore, the FSA is responsible for identifying and stopping potential abuses. (ii) Section 86(i) of FSMA deals with exemptions related to offerings to qualify the investors. This is broader than the exemption applied to professionals only, to the extent that it refers to SMEs, and individuals who satisfy certain criteria reported in the Prospectus Directive and who are registered as qualified investors with the FSA. (iii) securities admitted to Professional Security Market (PSM) benefit from an exemption from the prospectus obligation because they are offered in high minimum denominations or sold to qualified investors. This unregulated debt market will be highly appreciated by non-EEA issuers

of non-equity securities whose denominations are lower than 50,000 € (as they would otherwise be subject to a stricter regulation including the requirement to deliver IFRS accounts).

c) Content, format, language and supplements of the prospectus

The general content requirements provided under Section 87 of FSMA, are almost the same to those reported in the Directive.

For what concerns the format, a prospectus may be drawn up either as a single document (including a summary) or as a three-part prospectus (registration document, securities note, summary note). Most of the content requirements are similar to those contained in the Directive, however seven main differences emerged. (i) Prospectuses must contain a summary unless they are related to admission to trading of non-equity transferable securities with a denomination of at least 50,000€ (Sections 87 A 5) and (6)). (ii) The prospectus directive requires prospectuses for equity issues to include a working-capital statement. The FSA cannot modify this requirement, however it has set out an alternative for regulated issuers who are not able to make clear statements about their working capital for the next twelve months. (iii) Documents that have been approved by the NCA of the home Member State can be incorporated by reference. (iv) Issuer's or its industry's risk factors must be clearly disclosed. (v) The Directive requires prospectuses to enclose audited accounts prepared in accordance with IAS or equivalent accounting standards for the last three years. The more liberal Prospectus Rules requires only the last two years accounts in accordance with IAS or equivalent standards. (vi) Prospectuses for equity securities must include an operating and financial review (OFR). It presents the causes of material changes in the financial information. The prospectus OFR resembles a US MD1A (management's discussion and analysis of the company's financial position and operating results). (vii) The FSA allows issuers to file an *Annual Information Update List* containing the information released over the previous twelve months.

For what concerns the language, the FSA requires all prospectuses to be drafted in English. If the issuer is making a public offer of securities the summary of non-FSA approved prospectuses shall be translated in English. The Directive allows the Member States to require issues of non-equity securities with high denominations to produce summaries in the language of that state. However, the UK has not adopted this option.

Supplements to prospectuses must be released if any significant new fact, material mistake, or inaccuracy in the prospectus arises between the time of approval and the close of the offering or the commencement of trading (it is determined on a case-by-case basis).

d) Publications and Advertisements

Prospectuses are available to the public if they are published: (i) in one or more newspapers circulated throughout the EEA member states; (ii) in a printed format; (iii) in electronic form on issuer's website; (iv) in electronic form on the website of the regulated market. The Treasury

proposed issuers to publish a notice specifying how the prospectus was made available to the public and where it could be obtained. However, the FSA has not enacted this option in order to reduce an excessive burden on debt issuers (i.e. they currently do not need to publish such a newspaper notice).

The FSA maintained all the provisions reported in the Directive and specified that a written advertisement should state clearly that it is not a prospectus.

e) Use of prospectuses approved in non-EU countries

The Prospectus Rules allow the FSA to approve prospectuses drawn up by non-EU issuers, provided that they comply with international standards and with national law if the UK is the home Member State. If prospectuses drawn up according to the laws of a third country are deemed to be equivalent, sufficient precedent would have been set to provide issuers with a degree of certainty on which third country prospectuses are broadly judged to be equivalent. The FSA will determine whether prospectuses meet these criteria analysing each case individually. According to Sections 87H and 87I of FSMA, prospectuses approved by NCAs other than the FSA cannot be deemed as approved until the FSA receives a certificate of approval, a copy of the approved prospectus, and a translation of the summary (if requested).

f) Prospectus liability and sanctions

The Prospectus Rules regulate liability for prospectuses. Issuers and directors share responsibility for equity prospectuses, while for all the other kinds of securities only issuers are responsible. Prospectus Rule 2.1.7R deals with civil liability attached to those responsible for the summary and its translation (if it is misleading, inaccurate or inconsistent when read together with the whole prospectus).

Now let's turn the attention on the sanctions. The FSA has the power to: (i) suspend or prohibit the offering to the public; (ii) suspend or prohibit admission to trading on a regulated market; (iii) publicly censor the issuer. In relation to the first one, the FSA can: (1) require the offeror to suspend the offering for a maximum of ten working days, (2) require not to advertise the offering for a maximum of ten working days. For what concerns the second, if securities have not been admitted to trading, the FSA can: (1) suspend the admission request for a maximum of ten working days; (2) require not to advertise the offering for a maximum of ten working days. Moreover, if the securities have already been admitted to trading the FSA can: (1) require the market operator to suspend trading in the securities for a maximum of ten working days; (2) require not to advertise the securities for a maximum of ten working days. If the FSA decides to proceed with one of the above sanctions (among those referred to (ii)) the parties involved must be notified with a written notice. In relation to (iii), if the FSA finds that an issuer, offeror or person asking for admission to trading does not fulfil its obligations, it may publish this information. Before

proceeding with this sanction, the FSA must first send the person involved a warning letter. This person is the entitled to report that matter to the Financial Services and Markets Tribunal.

g) Others: Eligibility

The Directive harmonizes rules on prospectuses, while the Listing Rules contain obligations which are *super-equivalent* to the requirements in the EU body of law. A company listed on the Official List must satisfy *super-equivalent* eligibility requirements, continuing obligations and rules in relations to sponsors. In the UK the admission to the official list is not granted by passporting prospectuses in because issuers must comply with the super-equivalent Listing Rules requirements.

3.3 France⁸⁸

In France the authority responsible for supervising financial markets is the *Autorité des Marchés Financiers* (AMF). The Directive is implemented through the French Monetary and Financial Code. It reports most of the definitions contained in the 2003 Directive. Art. L. 211-1 of the Monetary and Financial Code specifies that the securities subject to the purpose of the purpose of the Directive are: (i) shares and other securities which give rise to direct or indirect access to the share capital or voting rights; (ii) debt securities representing rights against the legal entity or the securitisation fund issuing them. The most important characteristics of these securities are transferability and negotiability. The directive harmonizes the requirements for preparing prospectuses in relation to offers to the public and admission to trading. Under French law, they are jointly defined with the definitions of public offer (*appel public à l'épargne*). Art. L. 411-1 defines this concept as either an admission to trading of securities on a regulated market or the issue (sale) of securities to the public through advertising, solicitation or financial intermediaries. Although the EU and the French definitions are similar they are not identical.

a) Approval procedure and appeal

The AMF approves prospectuses released by issuers of equity or non-equity securities with a nominal value per security lower than 1,000 €, and having their registered office in France. Issuers of debt securities whose nominal value is at least 1,000 € can choose the AMF to approve their prospectuses provided that their registered office is in France or the transactions are carried out in France (offer listing).

b) Obligation to publish a prospectus and exemptions

Offer of securities to the public and admission to trading on a regulated market follow the provisions reported in the Directive. Most of the French exemptions from the obligation to publish a prospectus result from an implementation of the Directive. Certain transactions may be

⁸⁸ Desachè, J. M. (2009). France. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe*, Vol. II (pp. 72 - 87). Cambridge University Press.

performed without triggering public offers procedures. It occurs if the offer is a private placement or because of the quality of the guarantor or issuer. There are transactions recognized as public offers, but enjoying the exemption from the obligation to publish a prospectus.

(i) Transactions that do not constitute a public offer: private placements

The offers that do not constitute public offers are those whose: (a) total consideration is lower than 100,000 € or its equivalent value in another currency; (b) total consideration is higher than 100,000 € and lower than 2.5 million € or its equivalent in another currency provided that the shares offered do not represent more than 50% of the issuer's share capital; (c) total consideration is at least 50,000 € or its equivalent in another currency per investor for each separate transactions; (d) nominal value of each of the securities is at least 50,000 € or its equivalent in another currency.

(ii) Public offers restricted to portfolio managers

Advertising and solicitation addressed to people performing portfolio management investment services to third parties are not to be considered as public offers.

(iii) Offers restricted to qualified investors

French Law provides a list of people recognized as qualified investors: investment firms, collective investment schemes, insurance and mutual insurance companies, certain public institutions, and venture capital companies. Provided that they act on their own account, the following people are recognized as qualified investors: (A) entities satisfying at least two out of the three following criteria: (i) they employ more than 250 people, (ii) they have a total balance sheet higher than 43 million €, (iii) their turnover exceeds 50 million €; (B) natural persons satisfying two of the three following criteria: (i) the value of their portfolio of securities exceeds 500,000 €, (ii) they carry out an average of ten transactions per quarter over the last four quarters of a value exceeding 600 € per transactions, (iii) they have covered a professional position in the financial sector for at least one year.

(i) Offers restricted to a limited circle of investors

A circle of investors is recognized as limited if it refers to less than 100 people (other than qualified investors).

Exemptions (1) and (4) apply to issues or sales of securities qualified as private placements (without any listing), they are not valid if the securities are admitted to trading.

There are transactions that do not constitute a public offer on the basis of the quality of the guarantor or the issuer. French Law does not apply rules on public offers of securities issued, sold, or admitted to trading: unconditionally and irrevocably guaranteed or issued by a MS of the EEA, issued by a public international organization France belongs to, issued by the ECB or by a central bank of one of the MSs, issued by collective investment schemes or real estate collective investment schemes.

Transactions that constitute a public offer but exempted from the obligation to publish a prospectus. Art. 4 of the Directive was implemented in the AMF General Regulation with Art. 211-3 et seq. Regardless of whether admission to trading benefits from a prospectus exemption, the issuer shall publish in an official legal gazette the main characteristics of the operation.

The Directive includes exceptions and exemptions from the obligation to publish a prospectus, while if the approved prospectus is not available, the AMF does not grant individual exemptions from the prohibition to offer or admit securities to trading on a regulated market. Following Art 212-21 of the AMF General Regulation, once received the approval request the AMF communicates its decision on the approval within a maximum of ten trading days. In case of a first public offer of securities this time frame is expanded up to twenty trading days.

c) Content, format, language and supplements of the prospectus

Following Art. 212-7 of the AMF of the General Regulation, the content of the prospectus is the same as that contained in the Directive. The AMF makes a distinction between *retail* and *wholesale* debt issue. This means that the AMF General Regulation has different requirements depending on whether debt securities denomination per unit is higher or lower than 50,000 €. The AMF ensures that prospectuses fully comply with Prospectus Regulation and CESR's Recommendations. In accordance with Art. 212-8 of the General Regulation, the prospectus shall always enclose a summary note, except when the request for admission to trading on a regulated market refers to that securities with a minimum denomination of 50,000€ or the equivalent amount in another currency. The summaries shall be structured as explained in the Regulation, and those preparing them are civilly liable if they are misleading, inaccurate or inconsistent when read with the whole prospectus (Art. 212-42 of the AMF General Regulation). As in the Directive, Art. 212-11 of the AMF General Regulation allows prospectuses to incorporate information (of documents published previously or simultaneously with the prospectus) by reference. As explained under Art. 11 of the Directive forthcoming information cannot be incorporated by reference. Summaries cannot incorporate information by reference.

Following Art. 212-9 of the AMF General Regulation, prospectuses can be drawn up as single documents or as three separate documents. The former should at least contain information reported under Art. 212-7 and a summary complying with Art. 212-8. For what concerns the latter, companies looking for an IPO should include a base document, companies already listed on a regulated market should include a registration document, information on the issuer, a securities note with information on the securities to be offered or admitted to trading and a summary note. As already explained in the directive the second format is suitable for all those issuers making multiple offerings of the same type of securities within one year. All the three documents have to be approved by the AMF. However issuers, who have received approval of their registration documents over the last three years, are allowed to file their registration document which is

henceforth subject to the AMF review (Art. 212-13,II of the AMF General Regulation). With Art. 212-24, prospectuses can refer to other prospectuses approved within the previous twelve months. If at the time of the offering the information on the issuer has changed, the securities note update the registration document (Art. 212-10 of the AMF general Regulation). Under Art. 212-32 issuers of debt securities issued within a debt issuance programme (e.g. Euro Medium Term Note, EMTN) are allowed to release base prospectuses.

In December 2000, a ruling of the French Conseil d'Etat made French the mandatory language for prospectuses published in France. Starting from the 20th November 2001 prospectuses were allowed to be drawn up in English in the following circumstances: (i) public offers of non-equity securities whose denomination per unit is at least 1000 €; (ii) admissions to trading in France without any offer to the public in France; (iii) public offerings or admissions to trading in one or more EU or EEA MSs other than France, where the latter is the home Member State. Whenever written in English, the AMF requires the prospectus summary to be translated in French, except in case of: (i) admission to trading of non-equity securities whose individual denomination is at least 50,000€ (i.e. wholesale securities under the Directive), since no summary is required for that kind of transaction (Art. 5.2 of the Directive; (ii) when neither a public offer nor an admission to trading is sought in France but it is the home Member State.

Supplements shall be prepared and approved in accordance with the provisions contained in the Directive. Any investor, who has already agreed to purchase or subscribe for financial instruments prior to publication of the supplement, may withdraw within two trading days.

d) Publication and Advertisements

Under French law publication requirements are essentially the same as those proposed by the Directive. In case prospectuses are spread using one of the methods listed under Art.14 of the Directive, the issuer must publish either the prospectus summary in a newspaper or a notice clarifying how the prospectus was made available.

The requirements for advertisements relating to an offer of securities to the public are very similar to those suggested by the Directive. The AMF calls for a notice alerting the public about the risk factors. Following Art. 212-29 any information about a public offer disclosed in oral or written form shall be consistent with that given in the prospectus.

e) Prospectus liability and sanctions

The AMF requires auditors a comfort letter to be included in the prospectus. Hence, the responsibility of the statutory auditors is unchanged. With the comfort letter the statutory auditors: (i) inform the issuer about the reports enclosed in the prospectus, updates or corrections; (ii) communicate that they revised financial information and financial statements, read the entire prospectus and assessed compliance with professional standards; (iii) make observations.

Now let's turn the attention on the sanctions. The AMF has the power to suspend or prohibit a transaction. Each time the AMF has reasonable grounds to suspect that the transactions breach laws and regulation, it can suspend them for a maximum of ten consecutive trading days. The AMF is allowed to prohibit transactions each time: (i) it suspects that an issue or sale breaches laws and regulations; (ii) it ascertains that an admission to trading on a regulated market breaches laws and regulation. The AMF has the right to control prospectuses approved by a foreign supervisory authority and release in connection with public offerings made in France. If the AMF finds irregularities in connection with that public offering made in France (whose prospectus was approved abroad) it shall inform the supervisory authority of the EEA. If the issuer keeps violating laws and regulations regardless of the measures taken, the AMF shall communicate them to the European Commission and take measure to protect investors.

Overall, the French legislation on public offerings and admission to trading on a regulated market is close to the European body of rules. There are differences in the definition of *offer of securities to the public* and *supplementary requirements* for statutory auditors and listing sponsors. France is currently reforming its definition of offer of securities to the public, to make it closer to the European definition. The AMF also introduced the concept of *professional investor market* enjoying reduced disclosure requirements including the exemption for statutory auditors and listing sponsors to handle a due diligence.

3.4 Germany⁸⁹

In Germany the prospectus Directive was implemented with the Prospectus Directive Implementation Act of 22 June 2005 which introduced the Security Prospectus Act. The competent authority responsible for the prospectus approval is the *Federal Financial Supervisory Authority* (BaFin). It is responsible for: (i) prospectus approval in relation to public offering of securities in Germany or another EEA MS if Germany is the home Member State; (ii) prospectus approval in relation to admission to trading on a regulated market in Germany or another EEA MS if Germany is the home Member State. The prospectus act does not contain an explicit provision on the possibility to transfer the competence for the approval of a prospectus to the NCA of another Member State (as reported under Art. 13(5) of the Prospectus Directive. It is not clear whether the German law wanted to explicitly ban this transfer (despite Art. 13(5) was a mandatory provision), or whether it was redundant to include this provision in the Prospectus Act.

⁸⁹ Wustholff, D. A., & Klasener. (2009). Germany. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe, Vol. II* (pp. 88 - 100). Cambridge University Press.

a) Approval procedure and appeal

If the prospectus structure is not identical to that proposed in the Appendix of the Prospectus Regulation, the draft filed with the BaFin has to come with a cross-reference list. It has to be released together with a formal written application for the approval of the prospectus. The BaFin is responsible for notifying any deficiencies to applicants within ten working days including Saturdays. If the offered securities have not been admitted yet to trading on a regulated market of another EEA Member State and the issuer has never offered them to the public, the BaFin has no more than twenty working days to make a decision on their prospectus approval. In any other case, the revising period is ten working days. It is important to notice that the BaFin takes advantage of this extension in extraordinary cases and usually attempts to deliver the approval within the intended time frame. If the products offered or admitted are shares the expected revising period is extended by ten working days due to deficiencies emerged. Lack of communication of the approval decision within the prescribed period is not to be interpreted neither as approval nor as rejection. In this case issuers bring a court action against the BaFin, however it seems to be unprecedented.

b) Exemptions

The Prospectus Act does not recognize authority to the BaFin in terms of exemptions in case of admission to trading dealt with under Art 4 (2) of the Directive. This decision is in the hands of the executive board of the respective stock exchange whose assessment takes place during the admission process.

c) Content, format, language and supplements of the prospectus

The provisions in the Prospectus Act on the content of the document mirror almost literally the respective provisions in the Directive.

A prospectus may be drawn up as a single document or as several separate documents made up of a registration document, a securities note and a summary note (Art. 12 of the Prospectus Act and Art. 12 of the Directive). Following Art. 5(2) of the Prospectus Act summaries shall be drawn up in a brief and understandable manner. The BaFin does not accept summaries with cross references. For certain types of non-equity securities base prospectuses may be presented as a single document (Art. 6 of Prospectus Act and Art. 5(4) of the Directive. Among the main strengths of a base prospectus, the issuers or offerors may not encompass the final terms of the offering in the prospectus. In this case they are not required to publish them until the first day of the offering or even later in certain cases. The determination of the final term is not to be released through supplements (unlike the case of the coupled offering), therefore their publication does not require the BaFin approval.

If the issuer's home Member state is Germany, prospectuses and supplements must be written in German. If the public offering or admission to trading takes place in another EEA Member State, Art. 19 of the Prospectus Act allows them to be written in English. If there is no

public offering or admission to trading outside Germany, at the discretion of the BaFin (in very restricted cases), prospectuses may be written in a language other than German. Therefore, issuers wishing to publish prospectuses in English for public offerings in Germany often resort to a public offering in another EEA Member State taking advantage of the passporting regime.

The Prospectus Act has implemented the provision on supplements set forth by the Prospectus Directive (Art. 16 Prospectus Act and Art. 16 of the Directive). The draft supplements have to be filed by the BaFin, which is responsible for releasing the approval within a maximum of seven working days. However, it usually approves supplements within a significantly shorter period of time. As stated in the Directive, the Prospectus Act recognizes a withdrawal period of two working days. Furthermore, the Prospectus Act specifies that acceptance can only be withdrawn if the purchase orders have not been fulfilled.

d) Publication and Advertisements

Approved prospectuses shall be made available to the public at least one working day before the beginning of the offering to the public or admission to trading. In case of an IPO (shares) the offering cannot be concluded before six working days from the publication of the prospectus. In the Prospectus Act the methods of publication are those reported in the Directive. Prospectuses, base prospectuses and registration documents prepared in relation to public offering or admission to trading are valid for twelve months from the publication provided that they are updated or supplemented as required.

The German law literally mirrors the provisions of the Prospectus Directive regarding advertisements into the Prospectus Act (Art. 15). The BaFin supervises compliance with those provisions, however its controlling activity is restricted to Germany. If the BaFin finds breach of the requirements in relation to advertisements, it can suspend this activity for a maximum of ten consecutive days (including Sundays and public holidays). The Prospectus Act does not require the BaFin approval before the circulation of advertisements. The BaFin has the power to prohibit advertisement that could be misleading.

e) Use of a prospectus approved in other (non-EU and non-EEA) countries

The Prospectus Act allows the BaFin to approve prospectuses drawn up in accordance with the laws of non-EEA countries, if: (i) it complies with international standards set by international security supervision bodies such as IOSCO; (ii) the information requirements are equivalent to those in the Prospectus Act (Art. 20). Moreover the German Federal Ministry of Finance issued a regulation to recognize whether or not such information requirements are in fact equivalent. The BaFin recognizes the validity of prospectuses already approved by other NCAs provided that they contain a German translation of the summary (Artt.17-19).

f) Prospectus liability and sanctions

The Prospectus Act does not regulate prospectus liability that is dealt in the Stock Exchange Act. The provisions on prospectus liability in the Stock Exchange Act apply directly to prospectuses for admission to trading on a regulated market, and indirectly to prospectuses for public offering of securities. The prospectus must contain names and functions of those assuming responsibility. In case of legal entities the document must report their names and corporate seats. The document must also report the declarations by the people assuming responsibility for the prospectus that, according to their knowledge, information is correct and no material information is omitted. Following the Prospectus Act, financial intermediaries and issuers applying for admission to trading are jointly responsible for the prospectus. Those assuming responsibility and the originators of the prospectus are jointly liable to investors who have acquired securities on the basis of a prospectus containing incorrect or incomplete information. These investors can ask for the repurchase of the securities they have acquired within six months from the admission to trading or offering. Unless those responsible for the prospectus are able to prove that investors did not acquire securities on the basis of the prospectus, they have to pay the acquisition price plus customary expenses. Prospectus liability cannot be claimed reading the summaries or translations only, unless it is misleading, inaccurate or inconsistent when read with the whole prospectus.

Now let's turn the attention on the sanctions. The powers set forth in Art. 21(3) and (4) of the Directive are not fully reported in Art. 21 of the Prospectus Act. Supervision and prohibition of trading are not assigned to the BaFin, while, according to the Directive, they belonged to NCAs (Art. 21 (3) (g) and (h) and 21 (4) of the Directive. This is due to the particular structure and supervision of the German stock exchanges, as the German Stock Exchange Act assigned them those two powers. According to the same act, the executive board of the stock exchange (not the BaFin) is empowered with suspension or prohibition of trading and of stipulation of post-admission information disclosure requirements. There is a vigorous debate on whether such a division of powers is in line with the Directive. In case of violation of any provision of the Prospectus Act the BaFin imposes administrative fines ranging from 50,000 € to 500,000€. However, it does not provide criminal sanctions.

Overall, the German Prospectus Act followed the wording and the structure of the Directive. However, it did not precisely follow the requirement to designate an NCA responsible for carrying out obligations contained in the Directive. The latter assigns certain powers to the NCA (in this case the BaFin), which in Germany are given to the executive board of the stock exchange.

3.5 *Ireland*⁹⁰

The authority competent for the purposes of the 2005 Act and the Prospectus Regulations is the *Irish Financial Services Regulatory Authority* (Financial Regulator or IFSRA). IFSRA is the Irish regulatory authority for the financial industry. It is a distinct component of the Central Bank and Financial Services Authority of Ireland with the power to make rules, policies and codes affecting the entire financial sector.

a) *Approval procedure and appeal*

The Financial Regulator is responsible for prospectus approval. It delegated a number of its tasks to the Irish Stock Exchange Limited (ISE). Therefore, ISE is in charge of revising and releasing comments on draft prospectuses submitted for approval. The application shall include: (i) the prospectus; (ii) a cross-reference list identifying the pages where each item can be found in the document (in case the order of the items does not follow schedules and building blocks in the Commission Regulations); (iii) a letter listing the items in the schedules and building blocks which have not been included in the prospectus; (iv) the information requested under Rule 4.9 of the Prospectus Rules, if the applicant is requesting authorization for omission of information; (v) the formal notice stating how the prospectus will be made available and where it can be obtained; (vi) a letter asking the Financial Regulator to provide another NCA with a certificate of approval; (vii) any information that the Financial Regulator and/or ISE may eventually require. ISE must notify the applicant its decision within a maximum of ten working days. In case of a new issuer, notification is sent in twenty working days after the application is received. However, if the ISE asks for specific documents or information, this period begins the day after the applicant satisfies the request. Lack of communication of the approval decision within the time limits, is not to be interpreted as approval. After the scrutiny the ISE communicates the Financial Regulator whether the prospectus complies with the Prospectus Regulation and the Commission Regulation. Once received this information, the Financial Regulator decides whether to proceed with the approval or not. If the prospectus is approved, the applicant must file the prospectus with the Financial Regulator immediately. If the company is Irish, it must file the prospectus with the Companies Registration Office within no more than fourteen days after the publication. If the Financial Regulator does not approve a prospectus, applicants have twenty-eight days to appeal such decision to the Irish High Court.

b) *Obligation to publish a prospectus and exemptions*

With the Directive all the offers of securities to the public must be accompanied by a prospectus, unless they fall within an exemption from publishing such a document. The Financial

⁹⁰ Green, A. M., & Mccourt, C. (2009). Ireland. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe, Vol. II* (pp. 101 - 112). Cambridge University Press

Regulator clarified the definition of public offers specifying that it does not apply to a communication in connection with trading on a regulated market.

No offer of securities to the public is allowed without prior publication of a prospectus, unless Ireland is the home Member State and the prospectus was approved by the Financial Regulator or where Ireland is a host Member State and the prospectus was approved by the NCA of the home Member State.

The exemptions from the requirement to publish a prospectus are: (i) an offer of securities addressed to qualified investors only; (ii) an offer of securities addressed to less than 100 persons (other than qualified investors); (iii) an offer of securities addressed to investors where the minimum consideration payable is at least 50,000 € per investor for each separate offer; (iv) an offer of securities whose denomination per unit is at least 50,000 €; (v) an offer of securities that limits the total consideration of the offer to less than 100,000 €; (vi) securities not offered because existing shareholders receive them by way of an existing right (e.g. shares issued in substitution for outstanding shares of the same class, an issuance of new shares not involving an increase in the company's share capital, shares offered free of charge to existing shareholders and dividends paid in the form of shares of the same class as those for which the dividends are paid); (vii) securities offered in connection with takeovers or mergers, provided that a document containing information deemed to be equivalent to that in the prospectus; (viii) securities offered to employees or former employees which are admitted to trading on a regulated market.

Securities exempted from the obligation to publish a prospectus are divided in two main categories: those which are exempt in a public offering (from (vi) to(viii)), and additional exemptions that may be used in connection with the exemption or offerings, such as: (i) an exemption or admission of shares representing less than 10% (now it is 20%) of shares of the same class already admitted to trading on the same regulated market over a period of twelve months; (ii) an exemption for shares resulting from conversion, exchange or substitution of other securities or the exercise of rights; (iii) an exemption that allows admission of securities where there is no prospectus to passport in, but the offeror nevertheless meets certain conditions.

c) Content, format, language and supplements of the prospectus

In Ireland the general content requirements are the same as those in the Directive.

A prospectus may be structured either as a single document (including a summary), or as a tripartite prospectus consisting of a registration document (information on the issuer) a securities note (details on the securities) and a summary note. Once approved the registration document is valid for twelve month provided that it is adequately supplemented. A base prospectus is allowed If the securities offered or admitted to trading are non-equity securities issued under an offering programme or in a continuous or repeated manner.

The Financial Regulator accepts prospectuses written in Irish or English. If an issuer is making a public offering or seeking for admission to trading, summaries of prospectuses approved by NCAs other than the Financial Regulator have to be translated in Irish or English.

In Ireland supplements are required for the same reasons listed in the Directive. They are subject to the same approval procedure of prospectuses. Once published the supplement, those who have agreed to purchase or subscribe to the securities offered or admitted to trading before the release of the supplement, can withdraw in two days from its publication.

d) Publication and Advertisements

Irish Law recognises as valid all the methods of publication and advertisements proposed by the Directive and the subsequent Regulations.

e) Prospectuses approved in other (non-EU and non-EEA) countries

The Financial Regulator accepts prospectuses approved by other NCAs if they comply with national law, they have been drawn up in accordance with appropriate international standards (such as IOSCO), and the information included are deemed to be equivalent to the requirements in the Directive, provided that Ireland is not the issuer's home Member State (i.e. the issuer comes from a non-EU and non-EEA country). Therefore, a prospectus approved by the NCA of a Member State (other than Ireland) shall be considered as valid if the Financial Regulation is properly notified with: (1) a certificate of approval; (2) a copy of the prospectus; (3) a translation of the summary (if requested by the Financial Regulator).

f) Prospectus liability and sanctions

The people responsible for prospectuses of equity securities are: (i) the issuer; (ii) all persons that are directors of the issuer when the prospectus is published and those that have authorized themselves to be named as directors or having agreed to become directors of the issuer; (iii) each person that accepts responsibility for the prospectus and is stated in the prospectus as accepting; (iv) the offeror of securities if there is an offer to the public and the offeror is not the issuer; (v) the person seeking admission of securities (if he is not the issuer); (vi) any other person that authorized the contents of the prospectus (other than the Financial Regulator). If the issuer does not authorize the application for admission to trading or the offer to the public, then he is not responsible. Directors who notified lack of their consent are not responsible for prospectus publication. Certain people such as experts are allowed to state in the prospectus that they accept responsibility in relation to some parts of the prospectus only. It must be confirmed in a written form.

For what concerns prospectus liability, under the 2005 Act: (i) misstatement in a prospectus is a matter of civil liability; (ii) breaches of the same Act are punished through criminal sanctions. The latter include fines up to 1,000,000 € and/or a maximum of jail sentence of five years. In case a person suffer a loss as a consequence of untrue statement or omission of information reported in

the prospectus, section 41 of the Act requires that compensation must be paid by: (i) the issuer of the prospectus; (ii) the offeror of the securities to which the prospectus relates; (iii) every person who has sought the admission of the securities to which the prospectus relates to a regulated market; (iv) the guarantor of the issue; (v) every director of the issuer; (vi) every promoter of the issuer; (vii) every person who has authorised the issue of the prospectus (not including the Financial Regulator). As in the Directive, people cannot be held liable for summaries only, unless they are inaccurate, misleading, or inconsistent when read together with the whole prospectus. Moreover, people are not liable if they can prove that: (i) they did not consent to the issue of the prospectus (or withdrew consent before publication or acquisition of any securities by an investor); (ii) if there are reasonable grounds to believe that the information in the prospectus was true or that the omission causing the loss was correctly omitted.

Now let's turn the attention on the sanctions. The Financial Regulator is in charge of assessing whether there is anyone breaching the provisions in the Prospectus Regulation, Rules, and Directive. The person empowered with this assessment activity is called *assessor*. He has the power to call witnesses and seek documentation. When someone is found to be against law, the Financial Regulator may impose the following sanctions: (i) a private caution or reprimand; (ii) a public caution or reprimand; (iii) payment of a fine up to a maximum of 2,500,000 € to the Financial Regulator itself; (iv) disqualification of the person from being involved in the management of any regulated financial service provider; (v) a direction to cease committing the contravention; (vi) payment of some or all of the Financial Regulator's costs. Any sanction may be appealed by a person to the Irish High Court.

g) Others: additional requirements, listing rules and private companies

Only information approved by the Financial Regulator (or filed in accordance with the issuers annual information requirements) may be incorporated by reference. Moreover, the issuers of securities admitted to trading, whose home Member State is Ireland, have to file an *annual update* with the ISE in a maximum of twenty working days from the release of the issuer's annual financial statements. They insert proper disclaimers to be sure the investors do not rely on out of date information.

The Directive contains provisions aimed at harmonising the prospectus regime. The listing rules of ISE contain a number of rules which are *super-equivalent* to the requirements of the Directive. This means that a company listed on the ISE's main market comply with eligibility requirements, continuing obligations and rules relating to sponsors. Therefore, prospectuses passported in are not directly admitted to the ISE's main market, as the issuer must fulfil super-equivalent listing rules requirements.

As explained under section 21 of the 1983 Companies Amendment Act and section 33 of the 1963 Companies Act, Irish private companies are forbidden to undertake public offers of

shares. Therefore, in order to make public offers, companies must be structured as public limited companies or be registered as such before the offering takes place. In case it is not possible, the private company has to figure out whether the offering is actually made to the public or not.

3.6 Sweden⁹¹

In Sweden all the rules on prospectuses are to be found in the *Swedish Securities Trading Act*, (SSTA, 1st January 2006). The competent authority responsible for supervising public offering of securities is the Swedish FSA.

a) Approval procedure and appeal

For what concerns the obligation to publish a prospectus, the SSTA makes it mandatory whenever transferable securities are offered to the public or traded on capital markets unless exemptions apply. Prospectuses are compulsory if those instruments are intended for *public circulation*. This means that the process is structured so that they can be easily traded on regulated markets. However, this implies that other negotiable instruments (e.g. shares in private companies) are not regulated by the Prospectus Regulation Act. Notwithstanding the situations that can be easily categorized as public offers, other worth-noting examples are: when people are invited to join a formation of a new company on a homepage, when an invitation is sent to several people (e.g. shareholders, members of association, inhabitants of a town) via email. However, Swedish legislators have not clearly defined the concept of *public offers*.

b) Exemptions

Under the Art. 2:4 of the SSTA no prospectus is required when a negotiable instrument is offered to the public in the following situations: (i) the offer is addressed to qualified investors; (ii) the offer is addressed to less than 100 natural or legal persons in one of the MSs of the EEA (other than qualified investors); (iii) the offer concerns the purchase of negotiable instruments for an amount equal to at least 50,000 € for each investor; (iv) each of the negotiable instruments has a nominal value of at least 50,000 €; (v) the amount which in total shall be paid by the investors or a period of twelve months is not higher than 1 million €.

Art. 2:5 of SSTA provides that negotiable instruments offered to the public do not necessitate a prospectus if the offer involves: (i) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase of issued capital; (ii) securities offered in connection with a takeover bid, if the FSA has approved a document equal to a prospectus; (iii) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is deemed to be equivalent to that contained in a prospectus; (iv) shares offered, allotted or to be allotted free of

⁹¹ Andersson, J. (2009). Sweden. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe*, Vol. II (pp. 195 - 204). Cambridge University Press.

charge to existed shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document with information on the number and nature of shares is made available; (v) securities offered, allotted or to be allotted to existing or former directors or employees by their employer, provided that the securities are of the same class as the securities already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the securities.

Art. 2.6 of the SSTA does not require prospectuses when negotiable instruments are intended for trading on a capital market if: (i) the share represent over a period of twelve months less than 10% (now it is 20%) of the number of shares of the same class already admitted to trading on the same capital market, (ii) the shares are issued in substitution for shares of the same class already admitted to trading on the same capital market, if the issuing of such shares does not involve any increase of the issued share capital; (iii) the securities are offered in conjunction with a public takeover bid provided that a document is available containing information which is regarded as being equivalent to that of a prospectus and the FSA has approved the document; (iv) the securities are offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is deemed to be equivalent to that contained in a prospectus; (v) shares offered, allotted or to be allotted free of charge to existed shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document with information on the number and nature of shares is made available; (vi) securities offered, allotted or to be allotted to existing or former directors or employees by their employer, provided that the securities are of the same class as the securities already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the securities; (vii) the shares result from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market.

For what concerns securities of the same class of those already admitted to trading for eighteen months Art. 2:7 of the SSTA requires no prospectus to be published. However, additional requirements have to be fulfilled.

c) Content, format, language and supplements of the prospectus

For what concerns the minimum requirements on the content of a prospectus, the SSTA mirrors the provisions in the Prospectus Regulation. They are dealt with under Art. 5(1) of the Directive and Art. 2:11et seq. of SSTA.

A prospectuses may be structured either as one document or as three separate documents (registration document, securities note and summary). However, prospectuses can also be drawn

up using a simplified version. This option is applicable to a limited number of securities such as non-share related negotiable instruments issued within an offering programme. Art. 2:13 of SSTA specifies that with this version of the prospectus the offer price and the number of securities do not need to be disclosed.

Prospectuses shall be written in Swedish unless the FSA allows another language. In case of prospectuses published in relation to non-share related negotiable securities with nominal value of at least 50,000 € and traded in a Swedish capital market, the prospectus may be drawn up in a language common in the international financial market. If there is a cross-border element in the offer (e.g. the offer is outside Sweden but it is the home Member State or another State within the EEA is the home Member State but the public offer takes place in Sweden), other languages are accepted.

Most of the provisions on supplements contained in the Directive have been adopted by the SSTA. One of the few differences is that investors who agreed or subscribed to the securities before the publication of supplements, are entitled to withdraw within five working days after its publication.

d) Publication and Advertisements

Prospectuses can only be published once approved by the FSA. The methods of publication accepted are exactly those reported in the Directive. If the prospectus is published in an electronic form, at the request of the investors it must be delivered to them in physical form free of charge.

Advertisements of negotiable instruments offered to the public or to be traded on a capital market must contain information that a prospectus will be eventually published and where investors can get it. Advertisements must clearly declare their role and cannot be inaccurate or misleading. The information in the advertisement must be consistent with that in the prospectus (Art. 2:32 of SSTA).

e) Prospectus approved in other (non-EU and non-EEA) countries

If Sweden is the home Member State and the issuer has its registered office in a non-EU and non-EEA country, the Swedish FSA is the NCA responsible for approving prospectuses if : (i) it has been prepared following the rules of the home Member State; (ii) the information requirements under the law of the relevant country are equivalent to those set forth in the SSTA and the Prospectus Regulation.

f) Prospectus liability and sanctions

The prospectus must be prepared by the issuing company if the public offer concerns purchase of shares, convertible bonds, share subscription rights or options from someone who is in possession of such a negotiable instrument. Following Art. 2:9 of SSTA, prospectuses relating to other public offers must be drawn up by the person responsible of the offer itself. Incomplete or mistaken prospectuses are disciplined by the Companies Act 2005, and they are a matter of civil

liability. The members of the board directors of the issuing company bear prospectus liability. The latter may be claimed by the company, shareholders or other third parties such as investors. Liability is invoked because of negligence. However, it is still not clear neither to what extent and under which circumstances financial companies bear civil liability in tort, nor if and to what extent companies are able to redirect liability towards the issuing company.

Now let's turn the attention on the sanctions. As specified under Art. 6:2-3e of SSTA, the FSA has the power to assign several sanctions, administrative fines and forbid trading. However, the Swedish Penal Code applies in serious cases only.

3.7 Italy⁹²

The Italian authority responsible for supervising financial markets and approving prospectuses is called *Commissione Nazionale per le Società e la Borsa* (CONSOB). The text regulating financial markets is called *Testo Unico della Finanza* (TUF). The 2003 Prospectus Directive and the 2004 Prospectus Regulation were implemented within the Italian legal system through the Implementation Decree (i.e. Legislative Decree No. 51, 28 March 2007) and the Issuer Regulation (i.e. Consob Prospectus Regulation No. 11971). It is necessary to specify that the provisions in the Prospectus Regulation, those regarding the EU passport, and the exemptions from the obligation to publish a prospectus have been implemented, while some of those in the Prospectus Directive were not implemented under the Issuer Regulation. The latter are: (i) some definitions (e.g. financial instruments, public offering, qualified investors); (ii) possibility to abolish the subscriptions in the event of publication of supplements or lack of the final price and amount of securities offered; (iii) civil liability for the information in the prospectus; (iv) sanctions; (v) advertisements.

a) Prospectus approval and appeal

Prior to the Implementation Decree, Art. 94 (i.e. *obligation of offerors*) of the TUF established that Consob had a maximum of fifteen days to approve prospectuses. However, after this deadline the *principle of silent consent* applied and the prospectuses could be published. Now, Art. 94bis (i.e. *approval of the prospectus*) of the TUF states that Consob shall verify the accuracy of the prospectus while assessing the consistency and comprehensibility of the information contained. This procedure shall comply with the EU regulations, and lack of communication of a final decision by the Consob shall not be interpreted as approval. This means that silence of Consob should be interpreted neither as approval nor as rejection.

b) Obligation to publish a prospectus and exemptions

⁹² Gianni, F., Marani, A., & Giusti, G. (2009). Italy. In D. Van Gerven, *Prospectus for the Public Offering of Securities in Europe, Vol. II* (pp. 113 - 133). Cambridge University Press.

With specific reference to the Italian legislation, the obligation of drawing up prospectuses does not apply to offers of securities only, but to financial products. This is a much wider concept “including not only securities *stricto sensu*, but also every other kind of investment having financial nature”⁹³. Following Art. 3 of the Implementation Decree, EC financial instruments are: (i) equity securities tradable in the capital markets; (ii) bonds, government securities and other debt securities tradable in the capital markets; (iii) all the other traded securities which allow the instruments described in (i) and (ii) to be acquired through the subscription or exchange determined on the basis of EC financial instruments. The latter are divided into equity securities and instruments other than equity securities.

Art. 2 of the Implementation Decree specifies that financial products necessitate prospectuses even if placed through financial intermediaries, unless the situation falls within one of the cases directly exempted from such publication. This is important because it prevents the elusion of the obligation to publish a prospectus in case of subsequent sale to retail markets of securities originally placed among institutional investors (as the publication obligation does not apply in this case). In accordance with Art.100bis of the TUF resale of financial products, which have been previously placed among professional investors only, to subjects other than professional investors, necessitate a prospectus over the twelve months following the former activity. This provision stems from the scandals that occurred in Italy in relation to certain offers such as offering of notes issued by the Argentinean State in 2001, Cirio-Del Monte in 2002 and Parmalat in 2003. Before this practice was uncovered, securities ended up in the portfolios of many non-professional investors despite the fact that the offering had originally been carried out without any prospectus, thus taking advantage of the exemption relating to offers addressed to professional investors only. In order to be qualified as a public offering, it is sufficient that the notices include core information about the offering and the financial products to allow investors to decide whether to acquire or underwrite them or not, however the purposes of the offering are no longer relevant.

Art. 3 of the Implementation Decree home Member State means: (1) for the issuers of financial instruments of the European Community not mentioned in (2), the Member State where the issuer has its registered office; (2) for the issuance of EC financial instruments whose nominal value per unit is at least 1,000 €, and for the issuance of EC financial instruments other than equity securities which give the right to acquire negotiable securities or to receive an amount in cash through the conversion or exercise of rights given by the same securities provided that the issuer of EC financial instruments other than equity securities is not the issuer of the underlying EC financial instruments, the Member State where the issuer has its registered office, or in which the EC financial instruments have been offered or admitted to trading on a regulated market. The same

⁹³ Pellegrini, M. (2006). Critical Analysis of the Prospectus Directive. In *European Business Law Review* (pp. 1679 - 1692). Kluwer Law International.

regime applies to EC financial instruments other than equity securities denominated in a currency other than Euro, provided that the value of such a minimum denomination is approximately equivalent to 1,000 €; (3) for all the issuers of EC financial instruments not mentioned in point (2) with registered office in third country, the Member State in which the EC financial instruments are intended to be offered to the public for the first time after the date of coming into force of the Directive.

The same article also gives the definition of host Member State. It is the Member State in which a public offering is made or admission to trading is sought, in case it is different from the home Member State.

For what concerns the exemptions, following to Art. 100 of the TUF, the obligation to publish a prospectus shall not apply to offerings: (a) aimed at qualified investors, including individuals and SMEs; (b) aimed at a number of subjects not exceeding that indicated by Consob; (c) of an overall amount not exceeding that indicated by Consob; (d) financial instruments other than equity securities issued by a Member State or by public international entities to which one or more Member State belong; (e) of financial instruments issued by the ECB or by the national central banks of other Member States; (f) of financial instruments continuously issued by banks provided that they (i) are not subordinate, convertible, exchangeable, (ii) do not give the right to purchase or subscribe other types of securities and are not generally linked to a derivative instrument, (iii) represent reimbursable debt, (iv) covered by a system of deposit guarantees (Artt. 96 to 96quarter of the Legislative Decree No. 385 of 1 September 1993); (g) regarding money market instruments issued by banks whose maturity is lower than twelve months.

c) Contents, format, language and supplements of the prospectus

Following Art. 94 of the TUF information in the prospectus must be easily analysable and comprehensible, to allow investors to make aware investment decision. The Italian TUF perfectly mirrored the provisions in the Directive. Moreover, prospectuses may incorporate information by reference provided that those documents have been previously approved (Art. 8 of the Issuer Regulation). If the prospectus is composed of several documents, its information may be published and made available: (i) by means of an announcement in one or more newspapers of national or widespread circulation; (ii) in printed form at the registered office of the issuer and at the offices of the intermediaries responsible for placement; (iii) in electronic form on the website of the issuer and intermediaries. Incorporating documents and information by reference lightens the drafting process thus making it less burdensome. Consob recognizes as valid incorporation by reference of documents written in English even if the prospectus is prepared in Italian.

Art. 94 of the TUF allows issuers and offerors to structure prospectuses in unitary form or as distinct documents (a registration document, an informative note on the financial instruments and product offered, a summary). Moreover, this article allows to avoid publication of certain

information upon request of the issuer, offeror and placement manager. Art. 5 of the Issuer Regulation states that if the price and the amount of the financial products are not available when the prospectus is published, they may be communicated later through supplements. However, the prospectus must specify the criteria that are going to be used to determine the price. The same article makes it mandatory to insert a summary in the prospectus. It shall be written in non-technical language and come with the terms set forth in Art. 24 of the Prospectus Regulation. It shall present the main risks and characteristics of the issuer, guarantors and financial instruments. Following Art. 5 of the Issuer Regulation the placement manager shall declare that the prospectus has been drawn up in accordance with the Prospectus Regulation. The issuer, the offeror and the other parties responsible for the prospectus shall sign a declaration of liability. Moreover, the same article specifies that if the offering relates to financial products for which schemes are not available, Consob shall establish the contents of the prospectus.

If the offering is carried out exclusively within Italy as home Member State, the prospectus shall be prepared in Italian. If the offering of the financial products is carried out outside Italy, and it is the home Member State, the prospectus may be drafted in language commonly used in the world of international finance. The NCA may at any time require the translation of the summary in the official language of that State. If the offering to the public made in Italy (i.e. it is the host Member State) but the prospectus was approved elsewhere, the prospectus may be drafted either in Italian or in another language commonly used in the world of international finance. However, the summary box shall be translated in Italian.

d) Advertisements

Prior to the publication of the prospectus any advertisement of EC financial instruments is totally forbidden by Art. 101 of the TUF. The methods used to make advertisements legally recognized as valid are exactly the same as those reported in the Directive. According to the same article Consob can: (a) suspend as a precautionary measure for a maximum of ten working consecutive days the further spread of an advertisement relating to a public offering concerning EC financial products, in the event of a well-founded suspicion of violation of the provisions in the preceding paragraphs or of the related regulations; (b) suspend as a precautionary measure, for a maximum ninety days, the further spread of an advertisement relating to a public offering of products relating different from those referred to paragraph (a), in the event of a grounded violation of the provisions or rules referred to previous paragraphs or related regulations; (c) prohibit the further spread of the advertisement of the public offering in the event of failure to comply with the measures referred to in paragraphs (a) or (b); (d) prohibit execution of the public offering, in the case of failure to comply with the provisions of paragraphs (a), (b) or (c). The last paragraph of this article establishes that the relevant information provided by the issuer or offeror must be disclosed to all qualified investors or all special categories of investor to whom the offering is

exclusively addressed. This provision guarantees that all the investors can access the same crucial information necessary to make aware investment decisions. However, this article does not expressly define the proper meaning of the adjective *relevant*, and Consob decided what information shall be considered.

e) EU passport

Art. 17 of the Directive (i.e. *community scope of approvals of prospectus*) is reflected in Art. 98 of the TUF. Consob is responsible for recognizing prospectuses approved in other NCAs of the MSs. If Italy is the home Member State prospectuses and supplements approved by Consob are valid for public offerings or admission to trading in another Member State. If issuers want to passport their prospectus, Consob must transmit the draft prospectus to the NCA of the Member State in which the offering has to be carried out within three days. The documents to be transmitted are: (i) a certificate attesting that the prospectus complies with the provisions in the Prospectus Regulation; (ii) a copy of the prospectus; (iii) a translation of the summary box (if requested). Issuers, offerors or other people drafting the prospectus shall assume responsibility for the truthfulness of the translation and its compliance with the version approved by Consob. Moreover, if Italy is the host Member state (i.e. the prospectus was approved by the NCA of another Member State) the prospectus can be published in Italy if it fulfils the criteria (i), (ii) and (iii).

Art. 95 of the TUF regulates the provisions for the implementations of the public offering of financial products, and establishes the conditions to transfer the approval of a prospectus to the competent authority of another Member State.

f) Prospectus liability and sanctions

Art. 94(8) of the TUF specifies that issuers, offerors, or any guarantor are responsible for the information contained in the prospectus because investors place reasonable faith in the truth and accuracy of what is reported. According to Art. 94(9), intermediaries are liable for false information or omissions that could influence the reasoned decisions of an investor. The securities note only are not enough to make anyone of the parts involved liable, unless they are misleading, inaccurate or inconsistent if read together with other parts of the prospectus (Art. 94(10) TUF). Finally, according to the Italian legislation, claims for compensation can be presented within five years from the publication of the prospectus, unless the investor proves of having discovered the false nature of the information or omissions in the two years prior to the financial year in which such action is taken.

Now let's turn the attention on the sanctions. Following Art. 173bis of the TUF, those intentionally including false information or conceals data or news in a way that is likely to mislead potential investors, with the aim of obtaining undue profit for themselves, shall be punished with a period ranging between one and five years of imprisonment. This is because in Italy false falsification of prospectuses is a matter of criminal law. Furthermore, Art. 191 of the TUF reports

the specific pecuniary sanctions in relation to infringements of certain specific articles. Breaches of the provisions laid down under Art. 94(1) of the TUF are punished with pecuniary sanctions ranging from 25,000 € to 5 million €. While violations of those under Art. 94 from paragraph (2) to (6), Artt. 96 (i.e. *issuer financial statement*), 97 (i.e. *information requirements*) and 101 (i.e. *advertisements*) are punished with fines ranging from 5,000 € to 75,000 €. Violation of Art. 98ter (i.e. *document containing key information for investors and prospectus*) is punished with a pecuniary sanction ranging from 25,000 € to 5 million €, but if the infringement is committed by a company or an entity, the sanction can be raised up to 10% of the sales volume (when this amount is in excess of 5 million €).

g) Others: revocation of subscriptions, annual update document and financial statement of the issuer

Art. 95bis of the TUF implemented Art. 16 and 8(1) of the Prospectus Regulation. It introduced two cases of revocability of the subscriptions: (i) failure to include in the prospectus the final offer price and the amount of financial products offered; (ii) publication of a supplement to the prospectus. The first option can be exercised within the terms in the prospectus and no later than two business days from the day in which this information is submitted. The second can be exercised within the deadline in the supplement and no later than two business days after the date of publication of the supplement. The revocation of subscription allows investors to think on whether the investment is still convenient in light of the new information that was not originally available in the prospectus.

Art. 54 of the Issuer Regulation implemented Art. 10 of the Directive, it obliged to file with Consob a document, at least on an annual basis, containing all the information published by them during the previous twelve months. If the annual update document reported information already published or made available to the public during the previous twelve months, it had to specify: (i) the nature of such information; (ii) the date of publication; (iii) the place where such information is available. This document had to be filed with Consob once the annual financial statements was published.

Art. 96 of the TUF provides the most recent annual financial statements of the issuers shall come along with audit reports. Moreover, offers to the public of financial products other than EC financial instruments cannot be carried out if the most recent annual financial statements and consolidated financial statements of the issuer have not been audited and the auditors express an adverse opinion.

3.8 Latest adaptation of Italian legislation to Prospectus Regulation (EU) No. 1129/2017

Some of the provisions of the regulation were planned to be applied in subsequent periods. All those related to the exemption from the obligation to prospectuses (provided that some specific

threshold requirements are fulfilled) came into force on July the 21st 2018. The provisions promoting a proportional information regime for the SMEs are going to be valid starting from July the 21st 2019. The new Prospectus Regulation introduced a simplified regime for all the issuers operating on the SME growth market, and for all the others gathering up to 20 million € over a period of twelve months and expecting that in case of public offer they can choose to release a growth prospectus. Moreover, the new regulation allows issuers whose securities have been already admitted to trading on regulated markets or on growth SME market, to draw up simplified prospectuses relatively to secondary issues.

3.8.1 Italian experience

With the aim of setting the right threshold below which issuers are not required to draw up prospectuses, the Italian competent authority analysed data on prospectuses drawn up by listed and non-listed companies, whose offers lie between 5 million € and 8 million €, and approved over the years 2015 – 2017. This data suggests that the Italian NCA approved 5 prospectuses for public offers of securities issued by non-listed companies whose overall value lies between 5 million € and 8 million €. Similarly, it approved 2 prospectuses for public offers of securities issued by listed companies whose overall value lies between the same range. This means that the number of listed and anon-listed companies that would be exempted from applying such a discipline on public offers, as a consequence of a higher threshold, would be very small as compared to the overall number of prospectuses approved. In 2015, 2016, and 2017 Consob approved 191, 117, and 77 prospectuses respectively (look at the last three columns of Table 6). However, it is believed that a mere snapshot of the past operations covering the same range would not be able to express the potential impact of an increase in the exemption threshold. It is necessary to highlight that the presence of a certain exemption threshold constitutes an implicit ceiling to the issuance amounts. Therefore, an eventual increase in this threshold could result in an increase in the overall value of the offer. For this reason the research has been enlarged to all the public offers whose main purposes are admission to trading and subsequent exchanges on the Italian regulated market MTA and MTF AIM Italia (Figure 12), still looking at the issues whose value ranges between 5 million € and 8 million € and those below 5 million €. Issuers may have considered this threshold as a ceiling not to be exceeded in order to avoid the costs linked to the issuance of prospectuses.

3.8.2 Equity, debt securities and post-listings public offers

On the regulated market Borsa Italiana MTA, in cases of IPOs, companies are required to issue prospectuses regardless of the value of the offer. Therefore, increases in this threshold would not affect issuers wishing to access this market. In June 2018, Borsa Italiana MTF MTA admitted to trading 98 companies. Historical data on IPOs highlights that: 38 issuers gathered more than 8

million €, 20 issuers gathered an amount ranging between 5 million € and 8 million €, and 40 issuers gathered an amount lower than 5 million €. From the analysis conducted, issuers placed their securities on the market through private placement reserved to institutional investors only. Therefore, any increase in the exemption threshold could encourage issuers to make offers by selling them to retail investors. However, it is difficult to estimate the outcome (on the IPO market) that may eventually materialize as a consequence of such an increase.

The Italian debt market of Borsa Italiana s.p.a. is called MOT (Figure 12). In this market the minimum outstanding value required to be listed is 15 million €. Since it is already higher than 8 million €, any increase in the exemption threshold would not affect the debt security market at all. Moreover, the new segment of the market ExtraMOT is for debt securities of SMEs reserved to institutional investors only, and those offers do not come with prospectuses.

For what concerns the post-listings public offers, the outcomes of this study are much more interesting when we look at public offers of equity securities issued by listed companies. Over the years 2015-2017, the Italian competent authority approved 5 prospectuses whose denomination was lower than 8 million €. Regardless of the fact that those issues were little in value, most of them were encompassed either in much wider operations of corporate reorganization, or in situations of economic and financial deterioration of the issuer. Consequently, their prospectuses reflected the uncertainties and riskiness coming from the decision of keeping the business activity even in case of positive outcome of the offer. The 2017 Prospectus Regulation, provided an increase in the exemption threshold for listed equities from 10% to 20%⁹⁴. From 2012 till June 2018, on the AIM Italia 18 companies registered 29 increases in capital after the IPO. All those increases (with the exemption of one) had a denomination lower than 5 million €. 34.5% of them had a denomination approximately equal to 5 million €. This means that in the post-IPO process, any increase in the exemption threshold could eventually encourage equity issuers on MTFs⁹⁵ who raised their capital up to 5 million €, to be much more open to retail investors. MTF stands for Multilateral Trading Facilities, this concept was firstly introduced by MiFID I.

3.8.3 Information regime for below-threshold operations

On April the 4th 2013 the Italian competent authority released a communication⁹⁶ dealing with the information that must be released in case of capital strengthening whose overall denomination is lower than the exemption threshold. This communication made it mandatory to publish information on: (i) proceeds of the offer in relation to the actual financial needs of the

⁹⁴ This provision has been valid starting from July 2017.

⁹⁵ It stands for Multilateral Trading Facilities, this concept was firstly introduced by MiFID I. MTFs are multilateral trading systems facilitating the exchange of financial instruments between different parties. They are usually controlled by investment firms or approved market operators.

⁹⁶ Comunicazione CONSOB n. DIE/13028158.

issuer; (ii) underwriting methods of execution; (iii) the risks linked to the eventual good outcome of the operation, in case in which there are uncertainties on the company future activities.

3.8.4 Description and analysis of a preliminary impact of the options resulting from an eventual increase in the exemption threshold

In June 2018 the Italian national competent authority considered three different options in relation to the possibility of raising the thresholds above which the prospectus release is mandatory.

Option 0 is about confirmation of the 5 million € threshold. This option allows issuers or offerors of securities with denomination lower than this threshold not to release prospectuses. While for the offers above 5 million € this document would be required. This option does not modify investor protection. This is particularly interesting in relation to offers whose main purpose is neither admission to trading, nor trading on MTFs, characterized by illiquidity risk. For this reason the main weakness of this option is that of not exploiting the benefits brought about by the Prospectus Regulation, such as facilitating the access to capital markets and lowering the administrative burdens to SMEs. This option is in line with the general trend followed by most of the other MSs, but differently from countries like France which is currently working toward an increase of the threshold.

Option 1 raises the threshold for the obligation to release prospectuses to offers with a denomination of 8 million € over a period of twelve months. As compared to the previous option, issuers whose denomination of the public offer is between 5 million € and 8 million € would not be obliged to draw up and publish prospectuses anymore. The main advantage of this option is that of exploiting at best the opportunities offered by the Regulation in terms of cost reduction in the capital gathering process. On the other hand, the main disadvantage of this option is that of reducing investor protection, to the extent that they would be deprived by the information contained in prospectuses for all the offers whose denomination lies between 5 million € and 8 million €.

Option 2 was created with the aim of integrating the high level of investor protection and reducing the administrative burdens for the SMEs wishing to raise capital on the market. Its main provision consists in raising the threshold to 8 million € in relation to some offers only, while at the same time requiring an information coverage in relation to all the operations exempted from the obligation of releasing prospectuses. This means that, thanks to this option, it would be possible to raise the exemption threshold to 8 million € for offerings on regulated markets or on the SME Growth Market, while at the same time leaving untouched the current threshold of 5 million € for all the other offers. This makes it possible to reward issues negotiated on regulated and supervised trading venues, while at the same time keeping the current regime for all the offers made by non-listed issuers bearing higher underwriter risks. Similar extensions may be eventually applied to

equity crowdfunding (typically associated with a high risk level). Offers whose denomination is lower than 5 million € are made on regulated markets, as the current Consob regulation contains several provisions on investor protection. From June 2017 till June 2018 there were 5 offers whose value was higher than 1 million €. Nevertheless, those offers registered an increasing trend because of the recent legislative changes and the extension to all the SMEs (even non-innovative ones). Therefore, the threshold within which it would be possible to make on-line offers could be eventually raised to 8 million € in Italy too.

For all the companies listed on regulated markets and SME Growth Markets, when making equity offers to retail investors whose denomination is lower than 8 million € (hence not requiring the release of any prospectus), issuers are called to make public information related to: (i) the right proceeds of the offer in relation to the financial needs of the issuer; (ii) methods of execution of subscription commitments; (iii) cases in which there are uncertainties related to the business continuity, risks coming from the eventual failure of the transaction itself. As an alternative it would be possible to encompass the same information in an autonomous information document, not requiring the Consob approval. This option favours the access of SMEs to capital markets, while reducing the administrative burdens and maintaining the SME Growth Markets as privileged trading venues. It is for those enterprises mainly that the costs of preparing and publishing prospectuses are proportionally higher. This option ensures a higher level of proportionality between the enterprise dimension and its financing needs on the one hand, and the costs of drawing up prospectuses on the other.

On May the 24th 2018, the European Commission released the mid-term revision of the Capital Market Union (CMU) project. This term is used to describe all the measures aimed at integrating the European Capital Markets while at the same time promoting economic stability and growth of all the EU countries. With the CMU, the Commission's three main objectives have been: boosting access to financing for all businesses across Europe (in particular SMEs); promoting other investment projects such as infrastructures; diversifying the financing of the economy; lowering the cost of raising capital; making markets more efficient, productive, and unified⁹⁷. A revision of the CMU proposed new provisions aimed at improving the entrance of SMEs in the capital market. These provisions introduced a more proportional approach in favour of SMEs with the aim of increasing the SME listings on the SME Growth Market, while at the same time protecting investors and safeguarding market integrity. The main proposal suggests that in case of transfer to regulated markets issuers with at least three years of listing on the SME Growth Market would be allowed to release a simplified prospectus. This option reduces the administrative burdens on SMEs while maintaining investor protection almost untouched. It grants information

⁹⁷ Anderson, N., Brooke, M., Hume, M., & Kurtosiova, M. (2015, February). A European Capital Markets Union: implications for growth and stability. *Bank of England - Financial Stability Paper No. 33*.

transparency to savers, by means of a consistent strengthening of the provisions contained in the current norms on regulated markets and SME Growth Markets.

Art. 33 (i.e. *SME growth market*) of the MiFID II (Directive 2014/65/EU) and Art. 78 (i.e. *registration as an SME growth market*) of the Regulation No. 2017/565 state that enterprises and institutions undertaking IPOs in the SME Growth Market have to release sufficient information by means of a detailed admission document or prospectus. Additional provisions are those communicated by *AIM Italia*. It is the “market dedicated to dynamic and competitive SMEs looking for capital in order to finance their growth”⁹⁸ (Borsa Italiana, 2018), and it is the unique Italian market recognized as SME growth market following the purposes and objectives listed in MiFID.

Therefore, the second option brings about two main advantages. As explained under Art. 32 (i.e. *powers of competent authorities*) of the Prospectus Regulation, it facilitates the supervisory powers of Consob (such as for example that of requiring the issuer to release relevant information and the possibility of halting or prohibiting the offer). Regardless of the fact that these powers are exercisable by the national competent authority also in the options 0 and 1, the release of specific information on the offer would make this activity much quicker. The second advantage is that this option requires the release of information with adequate timing before the offer, while at the same time giving the NCA enough time to integrate the information set available to the public.

Table 2 – Efficacy of the three options⁹⁹ proposed to implement the Directive Regulation No. 2017/1129

Option	Burden	Investor Protection	SMEs access to capital markets
0)	0	0	0
1)	++	--	++
2)	+	0	++

Source 6 – Consultation Document (CONSOB, 2018)

⁹⁸ Borsa Italiana. (2018). *AIM ITALIA - Helping companies to do great things*. Retrieved from Borsa Italiana: <https://www.borsaitaliana.it/azioni/mercati/aim-italia/home/aim-italia.en.htm>

⁹⁹Meaning of the symbols:

- ++ considerable improvements;
- + some improvements;
- 0 no impact;
- - some worsening;
- -- considerable worsening.

IV. IPO process

4.1 US

An IPO is the very first sale of companies' shares to the public and the subsequent listing on a stock exchange. It allows firms to raise capital, speed growth and achieve market leadership. Through IPOs firms improve their businesses so that they can later issue and sell new shares. Obviously not all businesses are well-suited to this process, for this reason an accurate analysis of their business models, financial statements and several other different parameters is required. This takes time and, despite lasting from three to four months, the IPO starts at least one year before the effective deal and goes on well beyond its realization. The entire process comes to be known as 'value creation journey', and Figure 5 lists the main steps in which it can be roughly divided.

Figure 5 – IPO process



Source 7 – (EY, EY's Guide to Going Public, 2016)

Preparation and planning are critical, to the extent that lack of study and analysis threaten the benefits it usually delivers. IPO is not for everyone, as it is necessary to check whether this is the right strategy for the business under analysis. Firms face different advantages and disadvantages when listing on a regulated market. They obviously need to balance them thus evaluating whether they would benefit from it or not.

Pros of going public:

1. Easier access to financing
2. Offers a more liquid share capital base
3. Enhances firms' prestige, brand image, and credibility
4. Facilitates future acquisitions of other businesses, which may be paid in a public company's shares (at least partially)

5. Allows firms to obtain higher valuations as the greater level of disclosure lowers uncertainty around performance and increases value
6. There is a potential exit liquidity and strategy for investors, owners, and shareholders
7. Allows to retain employees through stock option plans
8. Improves benchmarking operations against other companies in the same industry
9. Reduces debt or refinancing
10. Creates opportunities to expand the firms' business in other markets

Cons of going public:

1. It is time consuming (from 6 to 12 months and beyond) as it involves periodic reporting and investor relations
2. Brings high initial and on-going costs (advisors for regulatory compliance, and maintaining listing)
3. It lowers management's control and privacy because of the requirement to release sensitive data and information
4. Shareholders expectations create pressure on management
5. There is a limited range of opportunities to access the IPO market, hence a compromise on price is needed

Moreover, firms need to develop a long-term business plan, look at their equity growth story, make comparisons with competitors. Secondly, firms need to be open to different options. They should evaluate all the possible alternatives to choose the one that best fits their specific business. The third phase consists in timing the market, it involves examining the specific markets they operate in look at how similar companies are currently performing, as well as studying all the factor influencing the market such as political developments, interest rates fluctuations, inflation, make forecasts. Underwriters help companies in this phase and “track all these changes to anticipate when investors are likely to be receptive to new offerings”¹⁰⁰. Timing IPOs strongly impacts stock performance. The fourth phase is extremely important as well as people are what make or break great companies. The management team must be working in the company before the IPO, top managers must be able to work together, be skilled and experienced. A crucial role is played by the external advisory team. Professional advisors are able to prime the business under analysis, introduce it to the right investors, and highlight its value to reflect its current position and its growth potential. In the fifth phase, firms looking to go public must exhibit a solid system of people, policies, and procedures to release periodical reports in compliance with regulations. Such an infrastructure promotes regulatory compliance, protects against risk exposure, and provides

¹⁰⁰ EY. (2016). *EY's Guide to Going Public*.

guidelines to meet or beat forecasts. In the sixth phase, firms must check whether they have corporate governance policies that inspire shareholder confidence. The board of directors has to be balanced in terms of executives and non-executive directors (NEDs). Board members should present a mix of skills, technical knowledges, business development, strategic planning, and financial expertise. They must be selected and hired well in advance of the effective IPO, and the best companies have it in place at least six months before the deal. The seventh phase consists in keeping clear and constant communications with stakeholders. The firm must exhibit strong investor relations, as they help communicate with shareholders and the public, attract and retain investors, and manage risk. Broadcast the equity story and answer potential investors' main answers is key. The eighth phase consists in delivering a message that must be as persuasive as possible. The road show is a critical event in which companies wishing to go public show the firm's growth potential and management credibility to convince potential investors to invest in that firm. It must be sure the business plan is not only clear and consistent but also feasible and supportable. At the beginning most of the newly public companies benefit from high share prices fuelled by investors' and press interest in IPOs. However, if the market interest in the IPO is not maintained in the aftermath of the deal, the initial euphoria fades away. Therefore, companies must have a solid aftermarket strategy. Once the IPO is over, the firm enters the process of restating and calibrating its equity story. Moreover, companies need to constantly keep in touch with their analysts. Since public markets are an unforgiving place, accuracy in forecasts is necessary as even a single negative news considerably impacts stock price, therefore reliability of research analysts is essential. Nowadays, underwriters provide both market-making and aftermarket trading support. The last step consist in delivering the promises. Once the company goes public the company must be able to use its proceeds to fund growth, as well as update previously made long-term plans for growth and shareholder value.

Through the IPO journey the executives face challenges continuously, and they need to go back at the beginning of the cycle frequently to reformulate strategies and the subsequent steps in the process. At the end of this long journey, firms must concentrate on being public companies, not on going public only. Although it delivers high proceeds at the beginning, the best companies' objectives is to maintain their market leadership in time by employing capital raised for strategic initiatives, constantly evaluating the management team, creating and broadcasting strong communication plans, ensuring transparency, and managing risk properly.

4.1.1 NYSE listing requirements

A foreign private issuer (FPI) may satisfy either the general listing standards or the Alternative Listing Standards. Issuers (both domestic and FDI) must meet minimum distribution and market value criteria (number of holders of 100 shares or more, number of publicly held shares, aggregate

market value of publicly held shares, price at the time of initial listing), and one of the financial standards (earning test, valuation/revenue test, assets and equity test).

Figure 6 – NYSE listing requirements

	NYSE quantitative listing standards applicable to Domestic Issuers and Foreign Private Issuers*	NYSE Alternate Listing Standards for Foreign Private Issuers*
Minimum distribution and market value criteria:		
Number of holders of 100 shares or more or of a unit of trading if less than 100 shares	400	5,000 worldwide
Number of publicly held shares	1.1 million	2.5 million worldwide
Aggregate market value of publicly held shares	US\$ 40 million	US\$ 100 million worldwide
Price at the time of initial listing	US\$ 4	US\$ 4
Financial standards (must satisfy one of the following requirements):		
Earnings Test: Income before tax from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees (subject to certain adjustments) must total at least	US \$10 million in the aggregate for the last three fiscal years, together with a minimum of US \$2 million in each of the two most recent fiscal years, and positive amounts in all three years OR US\$ 12 million in the aggregate for the last three fiscal years, together with a minimum of US\$ 5 million in the most recent fiscal year and US\$ 2 million in the next most recent fiscal year	US \$100 million in the aggregate for the last three fiscal years, together with a minimum of US \$25 million in each of the two most recent fiscal years
OR		
Valuation/Revenue Test: <i>Valuation/Revenue with Cash Flow Test</i> Issuer must have at least	1) US\$ 500 million in global market capitalization, 2) US\$ 100 million in revenues during the most recent 12 month period, and 3) US\$ 25 million in aggregate cash flows for the last three fiscal years with positive amounts in all three years (subject to certain adjustments)	1) US\$ 500 million in global market capitalization, 2) US\$ 100 million in revenues during the most recent 12 month period, and 3) US\$ 100 million in aggregate cash flows for the last three fiscal years, where each of the two most recent years is reported at a minimum of US\$ 25 million (subject to certain adjustments)
<i>Pure Valuation/Revenue Test</i> Issuer must have at least	1) US\$ 750 million in global market capitalization, and 2) US\$ 75 million in revenues during the most recent fiscal year	
OR		
Assets and Equity Test Issuer must have at least	1) US\$ 150 million in global market capitalization, 2) US\$ 75 million in total assets together with at least US\$ 50 million in stockholders' equity (in each case subject to certain adjustments)	-
Corporate governance	Yes	Yes

* For companies that list at the time of their IPO

Source 8 – (PWC, 2012)

4.1.2 US IPO process

The US securities markets represent one of the main sources of capital in the whole world. Getting listed in the US brings several benefits as it enhances shareholder value and a company's reputation and profile, and lowers a company's overall cost of capital. However, there are also several different costs that need to be measured to understand whether it is convenient for company to start this journey or not.

The very first obstacle is compliance with the provisions of the Sarbanes-Oxley Act (SOX) as it might be costly and time-consuming for the newly public companies. SOX is the most significant change in securities regulation since the Securities Act in 1933. It was released in 2002 by the US Congress as a consequence of a series of heavy corporate scandals. Its main objective

was that of increasing reliability of financial statements with the aim of preventing accounting frauds¹⁰¹. However, according to some researchers the provisions reported on the SOX brought about a considerable reduction in investment and risk taking¹⁰². The second hurdle is represented by the stringent and rigorous SEC accounting, disclosure, and reporting requirements. It is mandatory to file annual financial statements with the SEC, and quarterly ones with domestic issuers¹⁰³.

For the SEC once all the meetings with the underwriters are completed the IPO process begins. The process is divided in four main steps. The first one is the registration statement, which is the company's responsibility. It takes around 45 days to be completed. After that financial information and disclosures are reviewed and updated, and it takes at least five weeks. With the second step the firm reviews the registration statement to check whether it contains adequate disclosures, and whether it complies with SEC regulations properly. In 30 days the SEC releases a comment letter comprising eventual weaknesses and requests for additional information. Auditors usually help the company fulfilling deficiencies and preparing answers to the SEC. Once the SEC considers all comments as clarified, the company prepares the preliminary prospectus (also known as *red herring*) and begins the selling phase of the IPO. With the Road Show (third phase) senior management and investment banks meet investors, perspective members, underwriters, selling syndicate, and analysts. The main objective of this meeting is to attract the former's interest in the firm in general and the IPO in particular. Investment banks use the Road Show "to gauge the level of interest in a company's stock and help build an order book among significant investors"¹⁰⁴. The last step involves two activities: pricing and closing. At this time, the company going public prices the offer and files the final prospectus with the SEC. When the offering ends the company delivers the registered securities to the investment bank and receives payment for the issue, this is known as closing date.

Rule 144A allows companies to offer securities for sale or resale to institutional investors without requiring registration of the offer or sale with the SEC. This means that non-US companies wishing to raise capital there, do not need to be registered with the SEC. Consequently, foreign firms may go public on the US without meeting the on-going requirements associated with a SEC registration.

¹⁰¹ Albuquerque, A., & Lei Zhu, J. (2018, March). Has Section 404 of the Sarbanes-Oxley Act Discouraged Corporate Investment? New Evidence from a Natural Experiment. *Management Science*.

¹⁰² Barger, L. L., Lehn, K. M., & Zutter, C. J. (2010, February). Sarbanes-Oxley and corporate risk-taking. *Journal of Accounting and Economics - Volume No. 49*, pp. 34-52.

¹⁰³ Latham & Watkins LLP. (2018). *US IPO Guide*. New York.

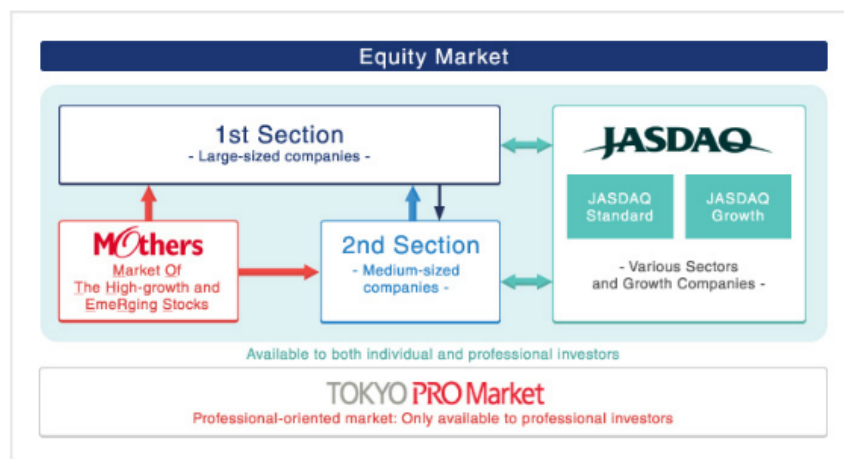
¹⁰⁴ PWC. (2012). *Listing in the US - A guide to listing of equity securities on NASDAQ and NYSE*.

4.2 Japan

4.2.1 Listing on Tokyo Stock Exchange¹⁰⁵

The TSE works on five different markets: First Section, Second Section, Mothers, JASDAQ, and Tokyo PRO Market (Figure 7).

Figure 7 – Japanese equity markets



Source 9 – JPX website

The First and Second sections are the main boards of the TSE where leading large and second-tier Japanese and foreign companies get listed. The former is considered as one of the top ranked markets in terms of size and liquidity. The First and Second sections are usually referred to as *Main Markets*.

Mothers is a market for companies with good growth potential, and that are going to be traded in the First Section in the short-run. Requirements in the TSE are strict, and it requires companies to have good growth potential. Leading underwriters check the companies' growth potential on the basis of their business model and environment. Leading underwriters play an essential role as they represent "the head of a syndicate of financial firms that are sponsoring an initial public offering of securities or a secondary offering of securities. Could also apply to bond issues"¹⁰⁶. This market offers financing opportunities to companies with high probability to grow, and there is no limit on the size of applicants. If a company's stocks get successfully listed on Mothers, this means it has fulfilled all the requirements necessary to be reassigned to the First Section and get listed there.

¹⁰⁵ See the definitions at: <https://www.jpx.co.jp/english/equities/listing-on-tse/new/basic/index.html>

¹⁰⁶ Campbell, R. H. (2011). *Lead Underwriter*. Retrieved from NASDAQ: <https://www.nasdaq.com/investing/glossary/l/lead-underwriter>

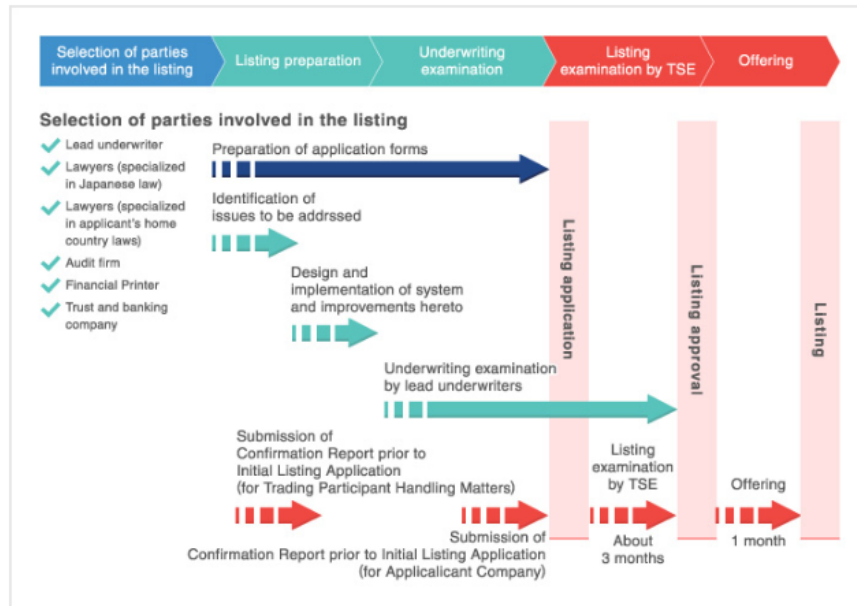
JASDAQ is a market with three main characteristics: reliability, innovativeness, region and internationalization. It is split into two parts: ‘*Standard*’ and ‘*Growth*’ markets. The first one is for growth companies with considerable size and business performance. The second is for companies with solid future growth potential and exclusive technologies or business models.

Tokyo PRO Market derives from AIM. The latter was a joint venture between Tokyo Stock Exchange Group, Inc. and the London Stock Exchange. Its main objectives were: firstly, providing appealing financing opportunities and advantages to companies with good growth potential, as an alternative to other Japanese and Asian markets that were not able to offer similar benefits; secondly, granting professional investors access to new investments opportunities both at home and abroad; thirdly, stimulating and internationalizing the entire financial market in Japan. TOKYO AIM realized an limber and flexible market management. In July 1012, TOKYO AIM changed its name to Tokyo PRO Market. After that, the Tokyo Stock Exchange Inc. has continued to operate TOKYO AIM based on the original market concept.

4.2.2 Japanese IPO process

In the Japanese system it usually takes no less than two years to get listed, and the company wishing to go public needs to be audited for at least two business years. The whole process is divided in five steps: selection of parties involved, listing preparation, underwriting examination, listing examination by TSE, and offering. The first step consists in selecting all the parties involved such as underwriters, lawyers, and audit firms. The second step consists in: preparing the application form, identify the issues, prepare a system of improvements, underwriting examination by the leading underwriters, submission of confirmation report. Once the listing application is submitted, it is then examined by the TSE (it takes around three months) and eventually approved. Around one month later the company is listed.

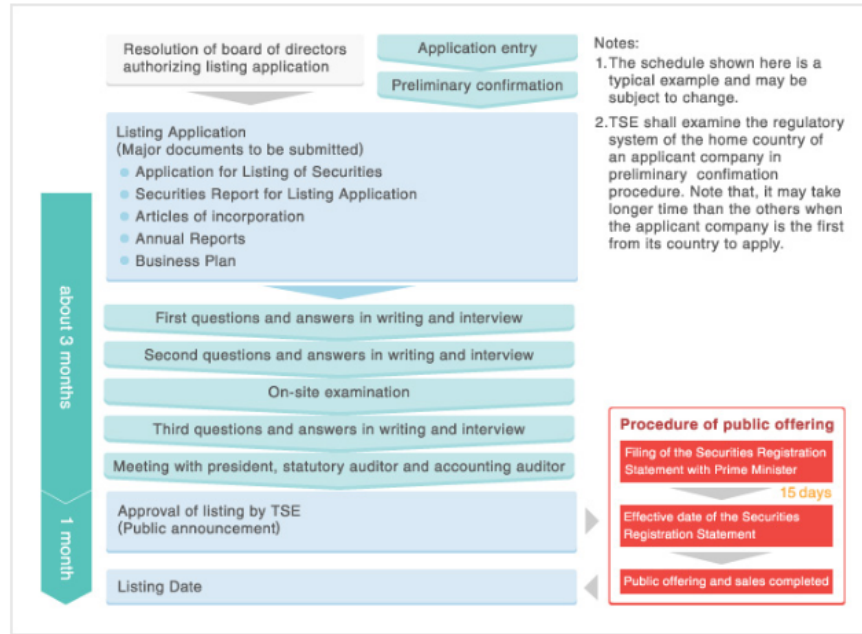
Figure 8 - Japanese IPO process



Source 10 – JPX website

The listing examination takes around three months to get completed. Once the TSE approves the listing, it takes one month for public offering procedures (i.e. the proper IPO). Hence, applicants need four months from the submission of the application to the first day of listing (Figure 9). Listing examination starts with the application entry, and it is then followed by preliminary confirmation. The third step is represented by listing application. It requires five documents to be submitted: the application for listing of securities, the securities report for the listing requirements, the articles of incorporation, the annual reports, and the business plan. The following five steps are: the first and second questions and answers in writing and interviews, then there are on-site examinations, the third questions and answers in writing interview, and finally the meeting with president, statutory auditor, and accounting auditor.

Figure 9 – Japanese listing examination schedule



Source 11 – JPX website

4.2.3 Japanese listing requirements

In the Japanese securities market, the listing requirements are divided in two main groups: Formal Requirements and Eligibility Requirements. The TSE examines the company to check whether it fulfils them both. They are not the same in all the five markets, they rather vary on the basis of the market in which the firm wishes to get listed.

When the TSE checks the firm's Formal Requirements (Figure 10), it takes account of nine different factors: number of shareholders, number of tradable shares, market capitalization of tradable shares, ratio of tradable shares to listed companies, public offering, market capitalization of listed shares, number of years of business operation, shareholders' equity, and market capitalization.

Figure 10 – Japanese ‘formal’ listing requirements

	Main Market		Mothers	JASDAQ		TOKYO PRO Market
	1st Section	2nd Section		Standard	Growth	
Number of shareholders	2,200 or more	800 or more	200 or more	200 or more		—
Tradable shares	20,000 units or more	4,000 units or more	2,000 units or more	—		—
Market capitalization of tradable shares	JPY 1 billion (USD 10m) or more	JPY 1 billion (USD 10m) or more	JPY 500 million (USD 5m) or more	JPY 500 million (USD 5m) or more		—
Ratio of tradable shares to listed shares	35% or more	30% or more	25% or more	—		—
Public offering	—	—	500 trading units or more	10 percent or more or 1,000 trading units		—
Market capitalization of listed shares	JPY 25 billion (USD 250m) or more	JPY 2 billion (USD 20m) or more	JPY 1 billion (USD 10m) or more	—		—
Number of years of business operation	3 years or more		1 year or more	—		—
Shareholders' equity	JPY 1 billion (USD 10m) or more		—	JPY 200 million (USD 2m) or more	Not negative	—
Amount of profits or Market capitalization	[Ordinary profit] Total amount of JPY 500 million (USD 5m) or more in the last 2 fiscal years [Market cap] Market cap: JPY 50 billion (USD 500m) or more Sales: JPY 10 billion (USD 100m) or more		—	[Ordinary profit] JPY100 million (USD 1m) or more [Market cap] JPY5 billion (USD 50m) or more	—	—

Note: 1US\$ = 100JPY

Source 12 – JPX website

When the TSE checks the firm's Eligibility Requirements (Figure 11) it takes account of five different factors. They vary depending on the market in which the securities get listed. The First and Second Main Markets listing requirements are: corporate continuity and profitability, soundness of corporate management, effectiveness of corporate governance and internal management system of an enterprise, appropriateness of disclosure of corporate and other information, other matters deemed necessary by the TSE from the viewpoint of the public interest or the protection of investors. The listing requirements of Mothers are similar to those listed for the Main Market, with the exception of the first one which is appropriateness of the disclosure of corporate and risk information, and the fourth which is reasonableness of the business plan. The listing requirements on JASDAQ (standard). look at: business continuity, establishment of sound corporate governance and internal management system, reliability of corporate actors, appropriateness of disclosure of corporate details and other information. The fifth requirement is identical in Mothers and JASDAQ (standard). The listing requirements in JASDAQ (growth) are exactly the same as those reported for JASDAQ (standard) with the exception of the first one which is corporate growth potential.

Figure 11 - Japanese 'eligibility' listing requirements

Main Markets (1 st and 2 nd Section)	Mothers	JASDAQ Standard	JASDAQ Growth
1. Corporate continuity and profitability	1. Appropriateness of the disclosure of corporate information, risk information, etc.	1. Business continuity	1. Corporate growth potential
A business is operated continuously and a stable revenue base is present	The company is able to make disclosure of the corporate information, risk information, etc. may be carried out in an appropriate manner	There are no obstacles to continuity of business activities	The company has growth potential
2. Soundness of corporate management	2. Soundness of corporate management	2. Establishment of sound corporate governance and internal management system	2. Establishment of sound corporate governance and internal management systems in accordance with the stage of growth
A business is carried out fairly and faithfully	The company is carrying out business in a fair and faithful manner	Corporate governance and internal management system have been established in accordance with corporate scale and function effectively	Corporate governance and internal management system have been established in accordance with the company's stage of growth and function effectively
3. Effectiveness of corporate governance and internal management system of an enterprise	3. Effectiveness of corporate governance and internal management system of an enterprise	3. Reliability of Corporate Actions	3. Reliability of Corporate Actions
Corporate governance and internal management system are properly prepared and functioning	Corporate governance and internal management system are developed in accordance with the size, corporate maturity, etc. of the enterprise, and functioning properly	Corporate actions which cause market disorder are not expected	Corporate actions which cause market disorder are not expected
4. Appropriateness of disclosure of corporate information, etc.	4. Reasonableness of the business plan	4. Appropriateness of disclosure of corporate details, etc.	4. Appropriateness of disclosure of corporate details, etc.
The applicant is in a status where disclosure of the corporate information, etc. may be carried out in an appropriate manner	The listing applicant has developed reasonable and suitable business plans, and has developed the operating base necessary for executing such business plans, or there is reasonable expectation that it will develop such operating base	The company is capable of appropriately disclosing corporate details, etc.	The company is capable of appropriately disclosing corporate details, etc.
5. Other matters deemed necessary by TSE from the viewpoint of the public interest or the protection of investors.	5. Other matters deemed necessary by TSE from the viewpoint of the public interest or the protection of investors.	5. Other matters deemed necessary by TSE from the viewpoint of the public interest or investors protection.	5. Other matters deemed necessary by TSE from the viewpoint of the public interest or investor protection.

Source 13 - JPX website

4.3 Italy

4.3.1 Listing on Borsa Italiana s.p.a.

Borsa Italiana s.p.a. is the unique Italian stock exchange. In 1997 it was privatised, and finally acquired by the London Stock Exchange Group plc in 2007. It is currently divided in five main markets (Figure 12): MTA that is the telematic equity market, ETFplus that is the telematic market for ETF, ETC/ETN¹⁰⁷, MOT that is the telematic debt market, MIV that is the telematic market of investment vehicles, and finally the IDEM that is the market of derivative instruments.

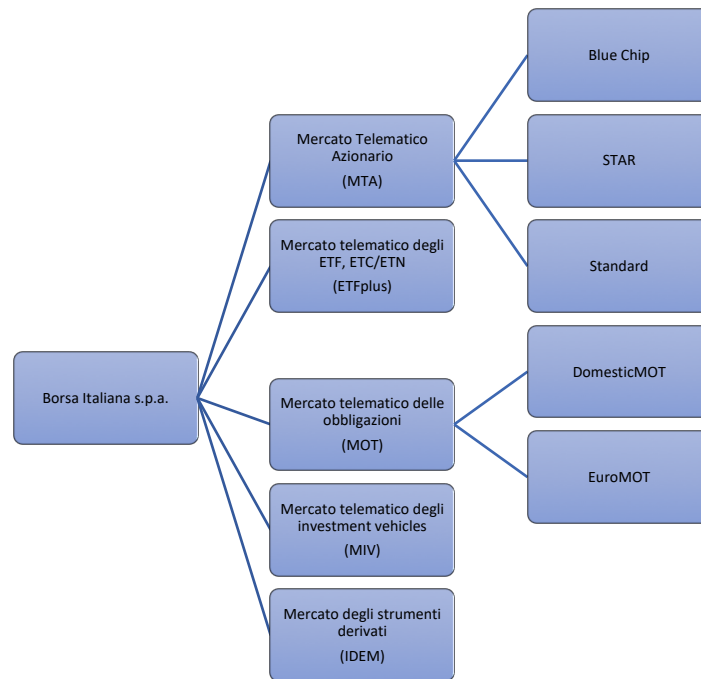
¹⁰⁷ ETC stands for Exchange Traded Commodities, while ETN means Exchange Traded Notes. ETNs are financial instruments issued as a consequence of the issuer's investment in an underlying (that in this case it is not a commodity) or derivative contract on it. ETN price is inevitably linked to the movements of the underlying itself. They are traded as shares, and they replicate the performance of an underlying (typically an index). This means that ETNs are financial instruments issued by investment vehicles that are themselves tracking indices. ETCs and ETNs are exactly the same in terms of issuers and ways in which they operate, what distinguishes them is the nature of the underlying only.

ETF stands for Exchange Traded Fund, it is an investment fund with two main characteristics: ETFs are traded as shares, and their main objective is that of replicating an index (also referred to as benchmark) throughout passive strategies. They are “index tracking instruments but in the hands of a skilful professional investor. [...] They can be used to gain exposure to an index or in combination with other products as part of more complex strategies”¹⁰⁸. ETFs summarise the positive features of shares and funds to enjoy the advantages offered by them both. Each one of the above mentioned segments is further subdivided, however Figure 12 reports the branches of MTA and MOT only as this work analyses equity and debt products only.

The Blue Chip is the segment of the MTA market of Borsa Italiana s.p.a. in which companies with high market cap get listed. On the Italian market this threshold is set at 1,000 million €. STAR is the second segment of MTA. This is an acronym which stands for *Segmento Titoli ad Alti Requisiti*, that in English means *segment of securities with high requirements*. It is typical of companies with medium market cap, this means that their market cap lies between 40 million € and 1 billion €. Those companies also commit themselves at fulfilling excellence requirements in terms of: high levels of transparency and communication: high liquidity (35% of the company post-listing market cap should be represented by the outstanding shares or free float), and corporate governance. Standard is the third segment of MTA in which securities of companies whose market cap is lower than 1,000 million € get traded. Now we can look at the MOT market segment, it is “the only Italian-regulated market dedicated to the trading of Italian and foreign government securities, domestic and international bank and corporate bonds, supranational securities and asset-backed securities” (LSEG, MOT, s.d.). It is divided in two subsegments: DomesticMOT and EuroMOT. The former is the market segment for instruments liquidated in domestic settlement systems. The latter is the market segment for instruments liquidated in foreign settlement systems.

¹⁰⁸ LSEG. (2013, November). *Exchange Traded Funds - Simple Products. Sophisticated Strategies*. Retrieved from London Stock Exchange Group (LSEG): <https://www.lseg.com/sites/default/files/content/documents/LSE/ETF/LSEG ETF brochure.pdf>

Figure 12 – Regulated markets in Borsa Italiana s.p.a.



Source 14 – Author's own graph

V. Data analysis

5.1 Equity IPOs

This paragraph presents an analysis on the IPO market and related proceeds in the US, Japan, and Europe. It focuses on the equity and debt IPO markets. Then it goes on making comparisons among prospectuses issued by seven European countries (Germany, France, Ireland, Italy, Luxembourg, Sweden, UK) thus highlighting the divergences on their approved prospectuses despite the convergence on the law-of-the-books.

5.1.1 USA

The following paragraph deals with the US equity IPO trend over the years 2012 – 2017 plus the first two quarters of 2018. Table 3 makes a distinction on the overall number of IPOs over those six years, along with proceeds generated.

Table 3 – US: number and proceeds of equity IPOs from 2012 to 2017

	2012	2013	2014	2015	2016	2017	YTD ¹⁰⁹ 2018
Number of IPOs	133	222	288	173	112	174	101
% variation¹¹⁰	-	+ 67	+ 30	- 40	- 35	+ 55	+ 20
Proceeds US\$b¹¹¹	46.7	59.6	95.2	33.3	21.3	39.5	29.9
% variation¹¹²	-	+ 28	+ 60	- 65	- 36	+ 85	+ 30

Source 15 – EY global IPO trend (2013-2018)

This data is then presented in Figure 13. In the years 2012 and 2013 the trend increased by almost one-hundred deals. The proceeds went up by more than 10 billion \$. Looking at the consistent increase in the number of deals, we would have expected much higher proceeds in 2013. However, this is not the case, this means that the average proceed per single deal was lower in 2013. The general trend kept increasing in 2014, thus reaching the highest number of IPOs in 2014, where this huge amount of deals brought about 95.2 billion \$ of proceeds. In the years 2015 and 2016 the US trend went down considerably. In 2015, the decrease was more dramatic as compared to the one recorded in the subsequent year. Nevertheless, the US reached its lowest number of

¹⁰⁹ First two quarters of the year. Values under this column refer to priced IPOs from January the 1st 2018, till June the 15th plus expected IPOs by the end of this month.

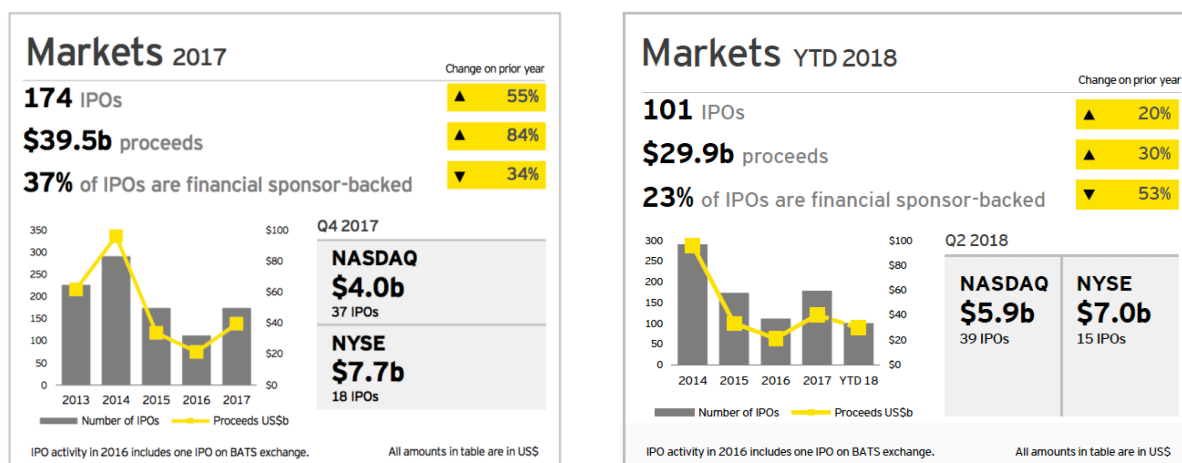
¹¹⁰ The percentage variations in the second row of Table 3 are not taken from EY reports, they result from the author's calculations.

¹¹¹ All the proceeds are calculated in US billion dollars.

¹¹² The percentage variations in the fourth row of Table 3 are not taken from EY reports, they result from the author's calculations.

IPOs in 2016, with proceeds around 20 billion \$. In 2017, the trend went up again reaching proceeds for 39.5 billion \$. Looking at the first two quarters in 2018, the US capital market exhibited 101 deals in six months only, thus generating proceeds for 29.9 billion \$. This is obviously a huge result as compared to figures reported for the previous years.

Figure 13 - US: number and proceeds from IPOs



Source 16 – EY global IPO trend (2017)

In 2013, the US economy offered many opportunities in terms of IPOs, this is reflected in the substantial increase in the number of IPOs, as reported in Table 3. The 67% increase in the number of IPOs (and the subsequent 28% increase in proceeds) is due to the peaceful economic climate, and the consequent low volatility. The IPO activity in 2013 proved to be the most active since 2004. The NYSE and NASDAQ ranked first and third by capital raised among the whole exchanges all over the world. During this year, the US proved to be more and more appealing to all those international companies seeking to follow such a momentum. In 2014, was an unprecedented year. The number of listings reached its highest value since the beginning of the new millennium. The soaring increase in the overall number of IPOs was certainly boosted by the listing of Alibaba¹¹³ in September 2014. “Alibaba Group Holding Ltd.’s initial public offering became the biggest ever at \$ 25 billion, after the company’s bankers exercised an option to boost the deal size by 15 percent” (Picker & Chen, 2014). Overall, the three trending sectors were: health care with 111 deals, technology with 47 deals, and financial with 29 deals. The IPO activity was generally strong over the entire year. Following a surprisingly outstanding 2014, the next year (2015) was necessarily subject to an overall decrease. And that was the case, the number of IPOs went down by 40% as compared to the previous year, along with a reduction of 65% in proceeds. Such a reduction did not signal weaker fundamentals as compared to the previous year. Indeed,

¹¹³ It is a Chinese global leader in the online and mobile commerce.

the US economy proved to be solid enough with good indicators with respect to housing, employment, and consumer demand, but with investors becoming wary of high valuations. The three trending sectors were: health care with 78 deals, technology with 25 deals, and financials with 13 deals. In 2016, IPOs recorded a slowdown. The number of IPOs and proceeds decreased by 35% and 36% respectively, as compared to 2015. The general anxiety generated by the US president elections impacted the IPO activity globally. The increase in volatility and macroeconomic uncertainty were reflected in the local economies. Political and monetary uncertainty brought about a further downtrend. Despite this deceleration, the three trending sectors were: health care, technology, energy with 23, and 11 deals. In 2017, the IPO market recorded a trend reversal, thus raising the number of IPOs and the proceeds by 55% and 85% respectively. The three trending sectors were: technology, health care, and financials with 19, 15, and 6 deals respectively. During the first two quarters of 2018, the US capital market recorded a 20% increase in the number of IPOs as compared to the second quarter of the previous year. Similarly, proceeds went up by 30%. This semester saw the technology, consumer products, and health care as the trending sectors. Figure 1 presents a slightly downward sloping yellow line as well as a shorter grey column in correspondence of YTD¹¹⁴ 2018. This may eventually make the reader think the IPO market performed badly as compared to what happened in the previous periods. But looking at the last column of Table 3 the former immediately realises that data registered during the first semester of this year are large, and not so much lower than the previous years'. This means that the yellow line and the grey column represent data from January till June of 2018, that is why they are slightly downward sloping. Final evaluations on how the US IPO market is going to perform by the end of December necessitate of additional data we are still waiting for.

What is now interesting to look at is the possible outlook for the second semester of 2018. Following the strong momentum of the last year and a half, we expect the third and fourth quarters of 2018 to keep pace. With the Congressional elections expected for the last quarter of the year, the companies interested in the US equity listings will either anticipate them thus avoiding the impact the elections may produce, or wait for the results to come out before choosing the US equity IPO market.

5.1.2 Japan

The next paragraph focuses on the Japanese equity IPO trend over the years 2013 – 2017 plus the first two quarters of 2018. Table 4 makes a distinction on the overall number of IPOs over those six years, along with proceeds brought about.

¹¹⁴ This is a shortage for Year To Date.

Table 4 – JAPAN: number and proceeds of equity IPOs from 2013 to 2017

	2012	2013	2014	2015	2016	2017	YTD 2018
Number of IPOs	51	60	83	98	88	95	39
% variation¹¹⁵	-	+ 18	+ 38	+ 18	- 10	+ 8	-5
Proceeds US\$b¹¹⁶	-	-	11.6	15.6	9.2	5.4	2.7
% variation¹¹⁷	-	-	-	+ 35	- 41	- 41	+ 8

Source 17 – EY global IPO trend (2013-2018)

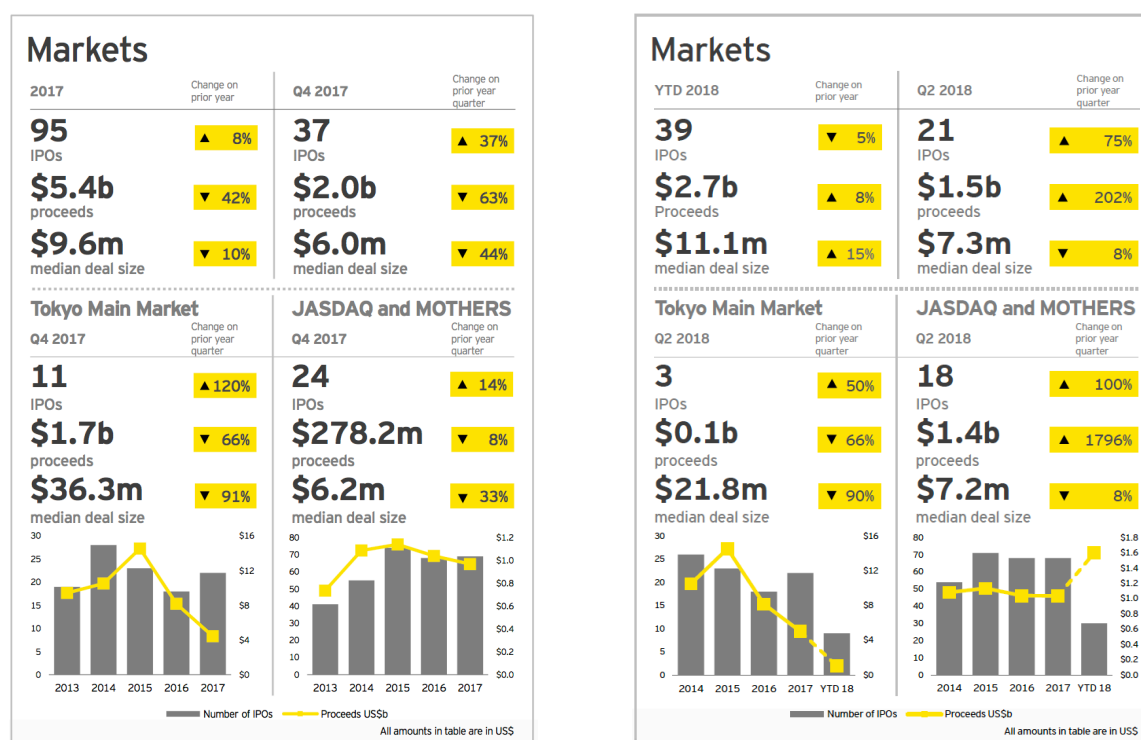
Data reported in Table 4 are displayed in Figure 14. In 2013, the number of equity IPOs in Japan increased by nine units as compared to 2012. Unfortunately, no data is available with respect to the proceeds generated. In 2014, the Japanese capital market made 83 deals, accounting for 11.6 billion \$. Because some data about proceeds is missing, no interesting conclusion can be drawn for the years 2013 and 2014. In 2015, there was an increase in the number of IPOs (from 83 to 98). This positive trend is reflected in the proceeds generated, amounting to 15.6 billion \$. In 2016, the Japanese exchanges altogether experienced a reduction of ten deals. Annual proceeds reached 9.2 billion \$ down from 15.6 billion \$ last year. In 2017, the number of IPOs went up to 95 deals, however the overall proceeds reduced to 5.4 billion \$. This is interesting, to the extent that the upward trend in the number of IPOs is not mirrored in the proceeds. This means that the average proceeds per deal in 2017 was lower than the same value during the previous year. By the end of June 2018, Japan recorded almost forty deals along with proceeds for 2.7 billion \$. As already explained for the US, those two last figures seem to be small as compared to the previous ones. However, it is necessary to keep in mind they are referred to the first six months of the year only. So, prior to making any consistent conclusion on how the Japanese IPO market has been performing in 2018, we should wait for additional data. Overall 2015 proved to be the one with the highest proceeds, at least over the period analysed.

¹¹⁵ The percentage variations in the second row of Table 4 are not taken from EY reports, they result from the author's calculations.

¹¹⁶ All the proceeds are calculated in US billion dollars.

¹¹⁷ The percentage variations in the fourth row of Table 4 are not taken from EY reports, they result from the author's calculations.

Figure 14 - JAPAN: number and proceeds from equity IPOs



Source 18 – EY global IPO trend (2017)

In 2013, the equity IPO activity went up by 18%, as compared to 2012. Software, related IT-service industry, and retail sectors were the dominant ones, followed by biotech and construction. In 2014, the Japanese capital market experienced a slowdown. Among the main causes there was mid-year uncertainty stemming from sales tax increase in April, and a somewhat unsteady economic environment. Tokyo Stock Exchange recorded the largest number of IPOs throughout the year. Proceeds were encouraged by the listing of Recruiting Holdings Co., Ltd.¹¹⁸, whose bullish pricing rose investors' confidence in the Japanese market. The three trending sectors were the IT, media, and technology ones. In 2013, the Japanese prime minister Shinzo Abe promoted a series of economic reforms known as *Abenomics*. It developed around three major fields: monetary easing, fiscal stimulus, structural reforms with the objective of jolting the Japanese economy to go out of the slowdown it had been experiencing for ten years. Those macroeconomic provisions coupled with the strong stimulus measures taken by the Bank of Japan had an immediate positive impact on capital markets, as we can see from data gathered by the end of 2014. However, it took two years to shake the whole economy, and this is why the biggest results are those reached throughout 2015. Japan experienced a consistent level of deal activity during all quarters. The number of new IPOs incremented by 18%, and proceeds by 35%, as Table 4 shows. During this year, the greatest shake came from the listings of Japan Post Holdings Co.,

¹¹⁸ Japan's biggest staffing agency, i.e. it offers human resources services.

Ltd., Japan Post Bank Co., Ltd., Japan Post Insurance Co., Ltd., raising 5.7, 5, and 1.2 billion \$ respectively. To get how huge this decision was, it is sufficient to know that the Japan Post Holdings Co., Ltd. and Japan Post Bank Co., Ltd. listings were the largest IPOs globally in the whole 2015. This was Japan's biggest sale of state-owned companies in almost three decades. The three trending sectors were: technology, consumer products, and retail. Following those listings, investors' confidence was massive and none of the companies that filed for an IPO withdrew or postponed that decision. In 2016, the number of IPOs and their proceeds experienced a deceleration. However, it was not possible to keep pace with numbers of the previous years. In 2017, the number of IPOs increased by 8%, while proceeds went down by 41%, which is quite a lot. The most active sectors were: consumer products, technology, and industrials. In 2017, Shinzo Abe was elected as prime minister for the second time in a row, and for the third time in his life. The *Abeconomics 2.0* and fears over North Korea were not expected to negatively impact the IPO market unless events degenerated further. During the first two quarters of 2018, the number of IPOs decreased by 5%, differently from the overall proceeds that increased by 8%, as compared to the same period the previous year. Differently from what we saw for the US, Figure 2 shows the IPO market trend at the Japanese major markets, namely Tokyo Main Market, JASDAQ and MOTHERS. During the first six months of the year, Abe's reforms kept being fruitful in the Nipponese IPO market. Technology confirms as the driving sector, and consumer products demonstrates as being extremely active as well. The Japanese government has been promoting the artificial intelligence and the FinTech sectors substantially, as means to sustain long-term economic growth. During the second quarter of 2018, the listing of Mercari, Inc.¹¹⁹, raised approximately 1.1 billion \$. It was listed on the MOTHERS board and it represents the biggest IPO that has been reached so far. In April 2018, the Japanese government setup a self-regulating organization (SRO) to control virtual currency exchanges and initial coin offerings (ICOs). The SRO creates, enforces, and develops rules, and fines for ICOs. Looking at Figure 2, we can easily see that the yellow line at the Tokyo Main Market recorded an increase between 2013 and 2015, and a subsequent slowdown starting from this year onwards. The proceeds line at the JASDAQ and MOTHERS was almost stable and constant between 2014 and 2017.

The consistent support the Japanese government is currently giving to the high-tech sector makes us predict a good performance over the next two quarters of the year.

¹¹⁹ This is an e-commerce whose service is like that offered by e-bay.

5.1.3 Europe

The following paragraph focuses on the European equity IPO trend over the years 2012 – 2017 plus the first two quarters of 2018. Table 5 makes a distinction on the overall number of IPOs over those six years, along with proceeds coming from those IPOs.

Table 5 – EU: number and proceeds of equity IPOs from 2012 to 2017

	2012	2013	2014	2015	2016	2017	YTD 2018
Number of IPOs	164	158	259	-	174	250	119
% variation¹²⁰	-	-4	+ 64	-	- 33	+ 44	-12
Proceeds US\$b¹²¹	13.2	30.3	62.3	-	31.7	46.1	23.8
% variation¹²²	-	+130	+ 106	-	- 49	+ 45	+ 5

Source 19 – EY global IPO trend (2013-2018)

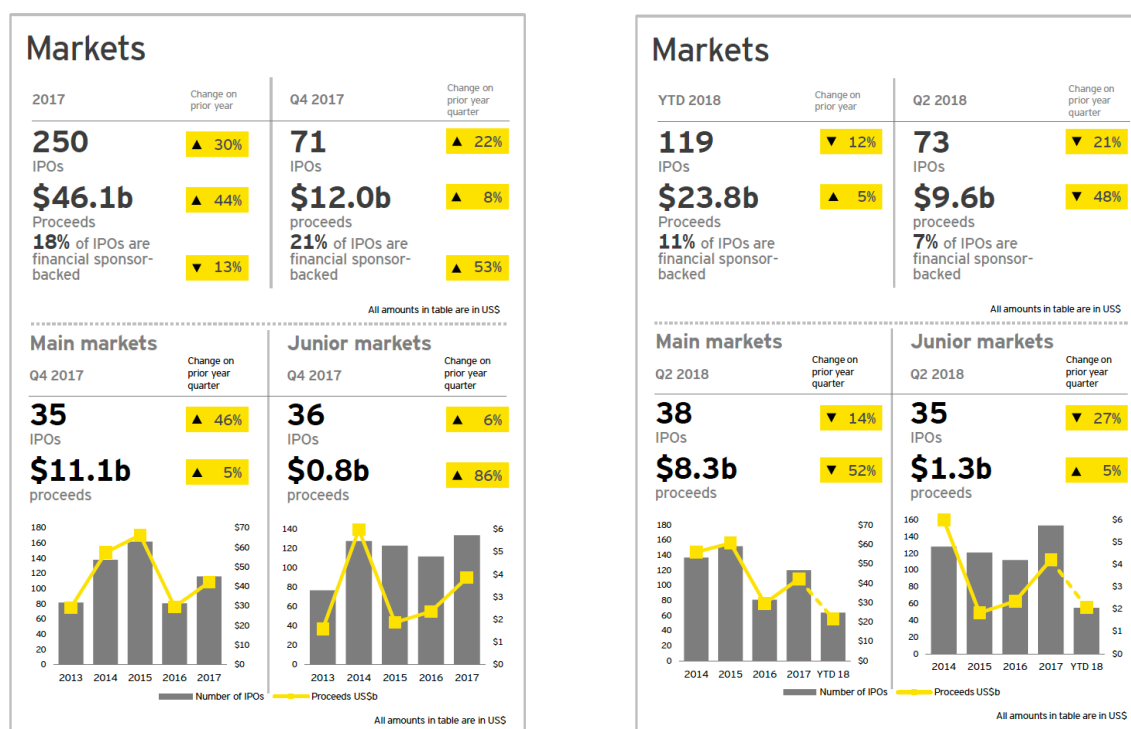
The above data is then displayed in Figure 15. In 2012, the overall equity IPO market in Europe accounted for 164 deals in total, generating proceeds for 13.2 billion \$. 2013 was a record year in terms of number of IPOs (158). Proceeds were extraordinary high and reached 30.3 billion \$. In 2014, the European number of deals and rewards were even higher, they reached more than two-hundred and fifty units and 62.3 billion \$ respectively. This means the latter doubled in one year only, which is obviously a great result. Unfortunately, no specific data is available for the year 2015. In 2016, the European IPO market performed slightly worse than in the previous years. There were more than one-hundred and fifty deals raising 31.7 billion \$ altogether. This means that proceeds almost halved in two years only. In 2017, Europe was back at its great levels, thus recovering from the poor performance of the previous year. There were 250 deals generating proceeds for 46.1 billion \$. During the first two quarters of 2018, the European capital market exhibited almost one-hundred and twenty deals generating proceeds for 23.8 billion \$. That is why over the whole period we are looking at (and considering that no data is available for the year 2015), 2014 qualifies as the best performing.

¹²⁰ The percentage variations in the second row of Table 5 are not taken from EY reports, they result from the author's calculations.

¹²¹ All the proceeds are calculated in US billion dollars.

¹²² The percentage variations in the fourth row of Table 5 are not taken from EY reports, they result from the author's calculations.

Figure 15 – EU: number and proceeds from equity IPOs



Source 20 – EY global IPO trend (2017)

In 2013, although some countries were still suffering from the deleterious impact of the financial crisis, Germany and the UK had a great year in terms of IPO activity. During this period, the European Central Bank and the Bank of England kept stimulating the market and improving the overall economy. The three trending sectors were: financials, consumer products, and real estate. This year was particularly favourable for the real estate sector. Focusing on the latter, UK's most important listings were: Foxtons Group¹²³, Crest Nicholson¹²⁴, and Countrywide¹²⁵; Germany's were: LEG Immobilien AG¹²⁶, and Deutsche Annington Immobilien GmbH¹²⁷. The two largest equity listings in Europe both occurred in the UK, the first one was UK's Royal Mail¹²⁸ which raised 3.2 billion \$ alone (it was the third largest deal globally), the second was the listing of Merlin Entertainement¹²⁹ in London. As already explained before, 2014 was the best performing year over those considered, and whose data is available. This is due to several provisions taken by local governments. Broadly speaking they strengthened the equity markets and sustained policies in favour of low interest rates. Those provisions together contributed to creating a situation in which investors' confidence increased a lot, thus making the year 2014 an outstanding one. The

¹²³ It is the leading London estate agency.

¹²⁴ It is a British housebuilding company.

¹²⁵ It is the UK largest agency group.

¹²⁶ It is a German housing provider.

¹²⁷ It is a German real estate company.

¹²⁸ It is the main postal service and bearer in the UK.

¹²⁹ It is a British company specialized in entertainment, hotels, and villages all over the world.

number of equity IPOs and proceeds went up by 64% and 106% respectively. In 2015, the Eurozone was characterised by slow but constant recovery from the crisis. However, the absence of data does not allow to make any deeper analysis. Political changes occurred in 2016 have been changing the world substantially. In June 2016, the British voted in favour of the referendum to bring the UK out of the European Union (provision came to be known as *Brexit*), and in November the 8th the Americans elected Donald Trump as prime minister. The uncertainty brought about by those two elections' results were mirrored in the equity IPO market, whose overall number of deals went down by 33%, similarly their proceeds lowered by almost 50% (please notice the percentage variations are computed with respect to 2014). In 2017, the number of IPOs and proceeds both increased. Despite the *Brexit* the UK IPO market was highly active, with 72 IPOs accounting for almost fifteen billion dollars alone. In 2017, the number of IPOs increased by 44%, and proceeds generated went up by 45%. During this year, the London Stock Exchange (LSE) was considered as the ninth among the top exchanges by proceeds behind New York, Shanghai, and Hong Kong. In the last two quarters of 2018, the number of equity IPOs seemed to go down, however this is not the case. Table 3 says that the last column makes comparisons with the results obtained in the first two quarters of the previous year. This means that in the first six months of 2018 the number of equity IPOs decreased by 12% as compared to the first semester of 2017. The variation in proceeds went in the opposite direction. Since the number of deals arose, but proceeds lowered, then the average return per deal was higher than in the previous year.

5.2 Focus on Europe

The next paragraphs make a detailed analysis and focus on seven EU countries, namely Germany (DE), France (FR), Ireland (IE), Italy (IT), Luxembourg (LU), Sweden (SE), and the United Kingdom (UK). It develops around five core areas of interest. It first looks at the total number of prospectuses approved in those seven countries within the European Union. After that, in light of the Directive 2014/51/EU we will look at the overall amount of equity and non-equity prospectuses approved starting from 2014 till 2017. This allows us to better understand how different implementations within national law have been influencing the overall amount of approvals in any given country. This also gives us a clearer picture of how all those countries have been recovering from the recent financial crisis. The third area gives an overview on the number of prospectuses passported both in and out of any member state. The fourth core area studies the length and dimension of prospectuses, whose PDF files seem to be quite different despite the rules set out in the Prospectus Regulation and Directive. The last core area is about counting the supplements over a sample of prospectuses approved in the countries analysed to figure out how much it costs to companies to get listed in any given country. It is important to highlight that this work considers the UK as part of the European Union as the Brexit is still not executive, and it

will be on March the 29th 2019. Since this study looks at historical data, we can still consider it as part of the EU.

Prior to proceeding with an analysis of the trend approvals, it is necessary to understand how the European directives define prospectuses and how they are generally structured. This topic is dealt with in paragraph 1.2.4.

5.3 General trend of approved prospectuses

Table 6 shows the total number of prospectuses approved starting from 2006 till 2017 in the seven EU countries analysed. This data is taken from the “EEA prospectus activity” published any given year by the ESMA, which is responsible for collecting data sent by the NCAs, and filing it in its Prospectus Register.

Table 6 – Total number of prospectuses approved per year

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
DE	785	700	585	442	493	409	364	396	377	399	345	299
FR	320	268	153	222	320	324	484	357	394	374	345	358
IE	1982	2789	1279	677	509	543	518	604	631	625	614	653
IT	793	1161	798	705	584	541	362	264	241	191	117	77
LU	1542	1823	1393	668	640	630	606	736	722	684	649	634
SE	261	227	185	178	184	195	200	180	232	212	279	310
UK	735	1515	1200	852	947	764	658	477	471	516	383	459
Total	6418	8483	5593	3744	3677	3406	3192	3014	3068	3001	2732	2790

Source 21 – EEA Prospectus Activity 2017 (ESMA)

Table 7 presents the percentage variations in the overall number of prospectuses approved in some of the European countries. These figures are computed using data reported in the above table, and they are all expressed in % terms.

Table 7 - % variation in prospectuses approved

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
DE	-	- 11	- 16	- 24	+ 12	- 17	- 11	+ 9	- 5	+ 6	- 14	- 13
FR	-	- 16	- 43	+ 45	+ 44	+ 1	+ 49	- 26	+ 10	- 5	- 8	+ 4
IE	-	+ 41	- 54	- 47	- 25	+ 7	- 5	+ 17	+ 4	- 1	- 2	+ 6
IT	-	+ 46	- 31	- 12	- 17	- 7	- 33	- 27	- 9	- 21	- 39	- 34
LU	-	+ 18	- 24	- 52	- 4	- 2	- 4	+ 21	- 2	- 5	- 5	- 2
SE	-	- 13	- 19	- 4	+ 3	+ 6	+ 3	- 10	+29	- 9	+ 32	+ 11
UK	-	+106	- 21	- 29	+ 11	- 19	- 14	- 28	- 1	+ 10	- 26	+ 20

Source 22 – Author’s own calculations using data from EEA Prospectus Activity 2017 (ESMA)

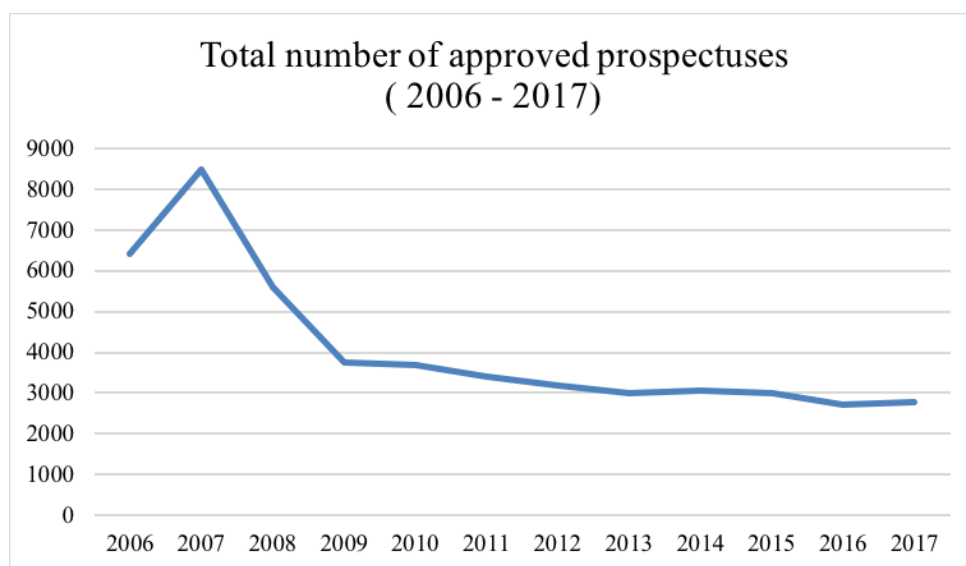
What emerges from Tables 6 and 7 is that Ireland and Luxembourg are the countries approving the biggest number of prospectuses. Starting from 2006, which is a record year in terms of approvals, they released slightly less than two-thousand and around one-thousand five hundred prospectuses respectively. The next year (2007), both countries experienced an increase in the overall number of approvals, thus reaching their peaks over the twelve years considered. Despite showing lower figures, Italy still recorded a huge number of approvals in 2006. The following year, with a + 46-percentage variation, it reached its highest value (1161 approvals). In 2007, the UK exhibited outstanding results in terms of percentage variation. It released 1515 prospectuses, thus recording a 106 % increase from the previous year. Overall in 2007, Ireland, Italy, Luxembourg, and the UK all reached their highest number of approvals. As a consequence of the financial crisis, Table 6 clearly shows 2008 was a bad year for all countries, as they all recorded reductions in the number of approvals. This means that percentage variations from 2007 to 2008 are negative for all of them. However, because in 2007 the number of approvals were maximal for most of them, in 2008 figures are still considerable. The declining trend kept going on in 2009, year in which France only presented a + 45-percentage variation. In 2010, Germany, France, Sweden, and the UK presented a small recovery, thus exhibiting a few percentage points increase in the number of approvals. Despite the above-mentioned countries, France presented a 44 % increase. 2011 qualifies as the year with the smallest variations (both positive and negative ones). Italy's declining trend goes on and it presents a 7 % reduction in the number of approvals in 2011. The following year (2012), it exhibited a dramatic cutback of 33 %. In six years only Italy almost halved its approvals. French positive trend kept going on, and in 2012 it reached its peak with four-hundred eighty-four prospectuses approved. In 2016, the seven countries together approved the lowest number of prospectuses (2732). Germany and the UK present their smallest values (345 and 383 respectively) throughout the twelve years considered.

Germany and Sweden confirm as being solid economies. The up and down percentage variations are tiny throughout the entire period considered. This means that those countries reacted well to the crises, and were still able to promote healthy and florid financial markets. Same reasoning holds true for Luxembourg, whose biggest negative variation was recorded in 2009, as a straight consequence of the financial crises. However, this country has been performing well since then. What is interesting to notice is that in Italy, notwithstanding the + 46-percentage variation from 2006 to 2007, it has been showing a declining trend in the number of approvals over the subsequent ten years. 2017, really was a dramatic year for this country as it approved 77 prospectuses only. This means that in ten years it cut the number of documents approved by more than fifteen times. This is really a critical value and one of the reasons standing behind the decision to develop such a research. The need to figure out what was wrong in the Italian way to implement

the European Directives is one of the drivers of this work. The mazy bureaucracy, and the considerable costs associated with approvals are some of the answers.

Data reported in Table 6 is then displayed in Figure 16 . It clearly shows the general trend of the total number of prospectuses approved in some of the EU countries over those twelve years considered.

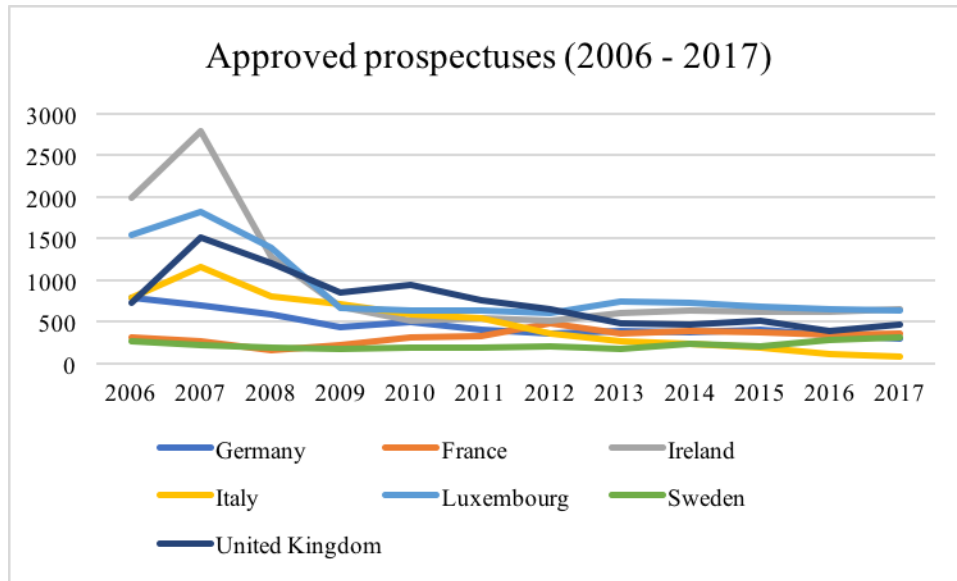
Figure 16 – European total number of approved prospectuses from 2006 to 2017



Source 23 – Author's own graph using data from EEA Prospectus Activity 2017 (ESMA)

Figure 16 presents the overall trend approvals. Prior to the 2007 financial crises there was an increase in the number of prospectuses approved. During this year, the seven countries approved way more than eight-thousand prospectuses all together, thus reaching the trend's peak over the entire period considered. The whole trend recorded a dramatic decrease over the years 2007 – 2009, in which they approved less than four-thousand prospectuses. This means that in two years only the financial crises cut more than a half of the approvals recorded prior to this striking event. From 2009 onwards, there has been an almost constant decline in the approvals. With the release of the Amending Prospectus Directive 2010/73/EU the total number of approved prospectuses declined even further, by almost one-thousand units, so that this trend steadied around three-thousand. Therefore, it seems reasonable that the Amending Prospectus Directive was not able to halt the continuing decline in prospectus activity.

Figure 17 – Total number of approved prospectuses from 2006 to 2017



Source 24 - Author's graph using data from EEA Prospectus Activity 2017 (ESMA)

Figure 17 shows each single country's trend. In 2007, all countries performed well in terms of approvals. Ireland qualifies as the country with highest number of approved prospectuses (almost three-thousand units). In the same year, Luxembourg and the UK exhibit large figures as well, and Italy's number of approvals was not low at all. The financial crisis obviously hit all the countries badly, thus determining a huge drop in the approvals. From 2009 onwards, all countries have been approving less than one-thousand prospectuses. As already said, Germany, France, and Sweden approvals have been quite steady over the twelve years. Their resilience to the crisis highlights the strength and solidity of those economies. Italy, instead, presented a constant decline over the years, until it reached the dramatic low value of 77 approvals in 2017 (look at Table 6).

The following paragraph focuses on more specific data necessary to gain a detailed insight on the approval distribution. Table 8 shows the total number of equity and non-equity prospectuses approved over the years 2014 – 2017. Here we restricted the time horizon to the last four years because the NCAs were called to send this data to the ESMA starting from 2014 (Directive 2014/51/EU). This means that prior to this year no data is available to make a reliable comparison on the total number of equity and non-equity prospectuses approved by those countries. Moreover, the reader may find some differences in the figures related to the total number of approvals when comparing Table 6 and 8. This is due to the fact that data reported in Table 6 is taken from the last "EEA prospectus activity in 2017", while this reported in Table 8 comes from each year's specific report. What happens is that with the release of the new report the ESMA reviews and updates data published in the previous years, hence there might be slightly differences among the aggregated numbers reported in the abovementioned tables. Nevertheless, having a quick look at

them it is easy to see that, when different, numbers vary by few units. Since the discrepancies are so small, we can disregard them and focus on the overall trend, that is what really matters to analyse how the EU countries reacted to the release of new directives and general macroeconomic conditions.

Table 8 – Prospectuses approved as Standalone versus Base Prospectuses

	2014			Total sum	2015			Total sum	2016			Total sum	2017			Total sum
	Equity		Non-equity		Equity		Non-equity		Equity		Non-equity		Equity		Non-equity	
	Standalone	Base	Standalone		Standalone	Base	Standalone		Standalone	Base	Standalone		Standalone	Base	Standalone	
DE	70	261	50	381	89	270	40	399	72	244	30	346	51	226	22	299
FR	195	72	131	398	190	76	109	375	190	90	66	346	198	88	72	358
IE	15	221	395	631	13	213	398	624	15	224	375	614	10	263	380	653
IT	55	171	15	241	48	131	12	191	29	84	4	117	27	49	4	80
LU	12	318	392	722	5	313	366	684	12	306	331	649	9	307	315	631
SE	114	64	58	236	112	57	43	212	144	61	74	279	166	75	69	310
UK	208	193	70	471	228	204	84	516	170	191	22	383	191	211	57	459

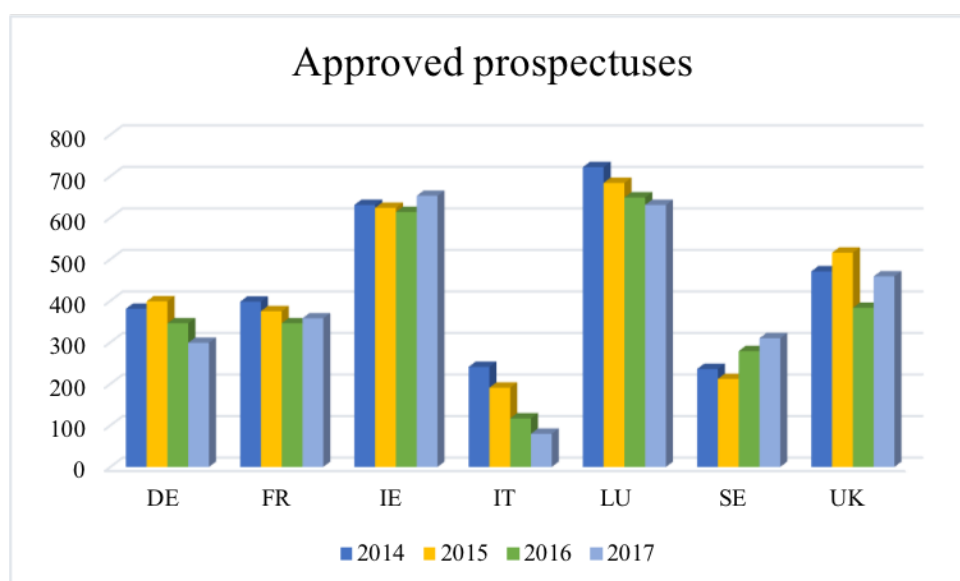
Source 25 - EEA prospectus activity 2014-2017 (ESMA)

Figure 18 exhibits the total sum of prospectuses approved in each country over the time period 2014 – 2017. Data used to realize this graph is taken from the above table. As already stated these numbers might be slightly different from those reported in Table 6, this is due to the fact figures get always adjusted with the release of new reports. The information displayed in Table 6 comes from the latest report, this exhibited in Table 8 comes from the single reports release any given year from 2014 till 2017. However, since difference are so small we can ignore them while focusing on the overall approvals fluctuations.

Ireland and Luxembourg generally exhibit the highest figures. Discrepancies with all the other countries considered are huge, this means they are typically more appealing to all those firms wishing to get their prospectuses approved. Apart from the mere number of prospectuses approved, there are other interesting factors that need to be analysed to make comprehensive comparisons among the countries. First of all the dimension of each country in terms of population. Luxembourg is the smallest and less populated country among all those analysed (as a consequence it has got less firms), but it is still that with the highest number of prospectuses approved. Similarly, Ireland is tiny as compared to countries like Germany or France, however most of the prospectuses in the EU are approved there. This means that many companies wish to get their prospectuses approved not in the counties in which their legal offices are placed. This happens for a number of different reasons: first of all because the time needed to screen and approve prospectuses is shorter there, secondly because the fees required by the NCA are lower. The main implications are that in those

countries the bureaucracy is more efficient and the competent authorities less exigent and stringent. All those factors together encourage the companies to ask for approval in Ireland and Luxembourg. Thanks to the passporting activity firms submit their prospectus approval request in Ireland or Luxembourg maybe because it costs less and then ask for certificates of approvals to countries in which they want to place their products. Because of the mutual recognition principle it is exactly the same as the permission obtained in all the other countries. Italian results are interesting but at the same time dramatic. First of all we notice that the trend is declining over the four years, but even worst, numbers are the lowest as compared to the other six counties.

Figure 18 – Approved prospectuses over the years 2014 - 2017

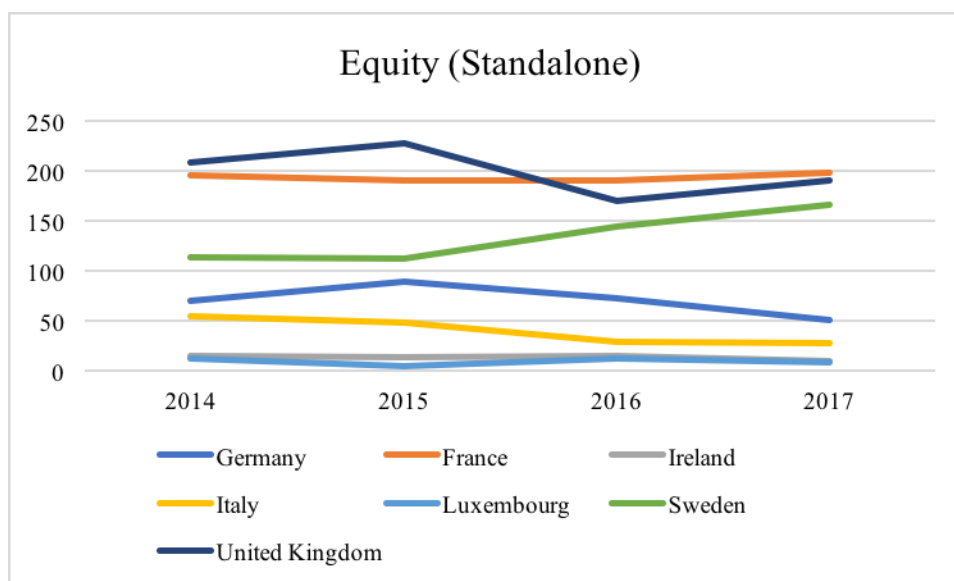


Source 26 - Author's own graph using data from EEA Prospectus Activity 2014-2017 (ESMA)

5.3.1 Approved equity prospectuses

Figure 19 displays the trend approvals in equity standalone prospectuses. France and the UK are outliers, as their figures are the highest throughout the four years considered. France confirms its steady trend; the UK presents a reduction from 2015 to 2016. Starting from 2015, Sweden presents an uptrend until almost reaching the UK's level in 2017. German figures range between fifty and one-hundred units, it reached its peak in 2015 and its lowest value in 2017. Considering the equity standalone prospectuses Italy confirms its downward tendency. Finally, Ireland and Luxembourg exhibit the lowest number of approvals in terms of equity standalone prospectuses. Those two countries never reach more than fifteen units approved.

Figure 19 – Approved Equity (Standalone) Prospectuses

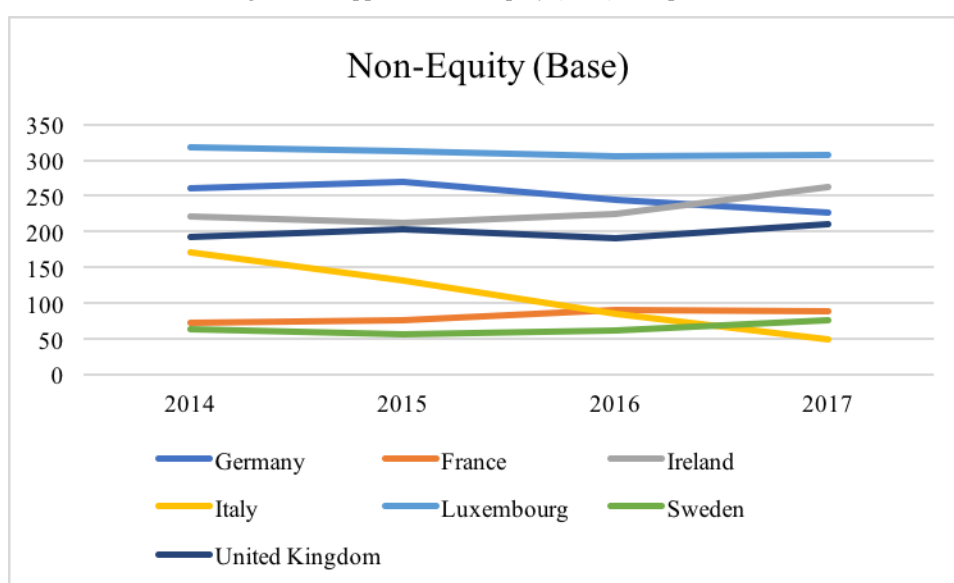


Source 27 - Author's own graph using data from EEA Prospectus Activity 2014-2017 (ESMA)

5.3.2 Approved non-equity prospectuses

Figure 20 shows the approved non-equity base prospectuses by the seven European countries considered. In this case Luxembourg is the outlier, as its figures never go below three-hundred units. Italian trend plummeted dramatically over the four years. In 2014, it approved around one-hundred and seventy units, and this value swooped below fifty in 2017. The UK did not exhibit huge fluctuations, as their values move around two-hundred units. Similarly, France and Sweden confirm their regular trends, and they both exhibit a slight increase throughout the years.

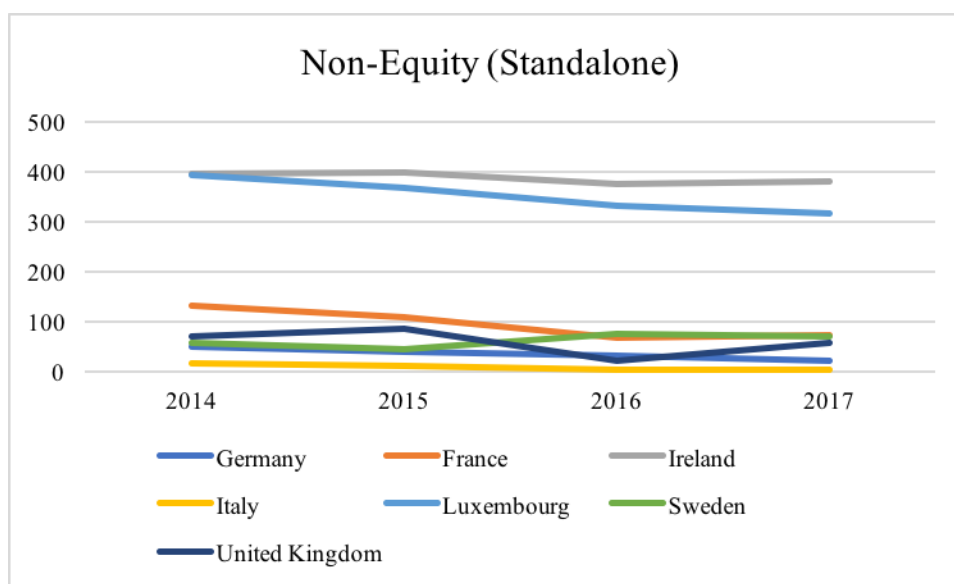
Figure 20 - Approved Non-Equity (Base) Prospectuses



Source 28 - Author's own graph using data from EEA Prospectus Activity 2014-2017 (ESMA)

Figure 21 displays the trend in non-equity standalone approved prospectuses. Luxembourg and Sweden are the outliers as their figures range between four- and three-hundred, while all the other countries present numbers below or slightly above one-hundred. France presents a declining trend. Italy has been approving very low number of non-equity standalone prospectuses, whose values never go above fifteen units.

Figure 21 - Approved Non-Equity (Standalone) Prospectuses



Source 29 - Author's own graph using data from EEA Prospectus Activity 2014-2017 (ESMA)

Overall, France and the UK qualify as the countries approving the highest numbers of equity standalone prospectuses, as opposed to Ireland and Luxembourg presenting the tiniest figures. When looking at the non-equity base prospectuses, Luxembourg reaches the highest values in terms of approvals. Sweden instead exhibits the smallest figures between 2014 and 2016. However, in 2017 Italy recorded the least value. Finally, Ireland and Luxembourg both approved the highest number of non-equity standalone prospectuses, while Italy is the country with the lowest figures.

5.4 Passporting activity

This paragraph presents data on passporting activity of approved prospectuses. Companies are required to publish a single EU prospectus, approved by their home state NCAs. "They can request their home Member State to issue the host Member State with a certificate of approval

known as *prospectus passport*¹³⁰. Figures reported here below do not include supplements, and prospectuses passported to more than one country are counted once, as their main focus is on the activity of the home country. Please note that in each country the number of prospectuses passported out does not correspond to the number of prospectuses passported in, as the same country can passport the same prospectus to several host countries.

5.4.1 Prospectuses passported out

Table 9 is about the prospectuses passported out, i.e. “information about the number of prospectuses in relation to which EEA countries provided one or more other EEA countries with a certificate of approval”¹³¹ over the years 2014 – 2017. The very first trend emerging from this table is that Germany and Luxembourg are those with the highest number of prospectuses passported out over the entire period considered. Italy, instead, presents the lowest figures throughout the four years investigated.

Table 9 – Prospectuses passported out

	2014	2015	2016	2017
DE	257	287	251	223
FR	44	92	64	87
IE	117	99	76	77
IT	2	1	1	2
LU	360	291	283	318
SE	21	18	28	23
UK	49	51	37	36

Source 30 - EEA prospectus activity 2014 - 2017 (ESMA)

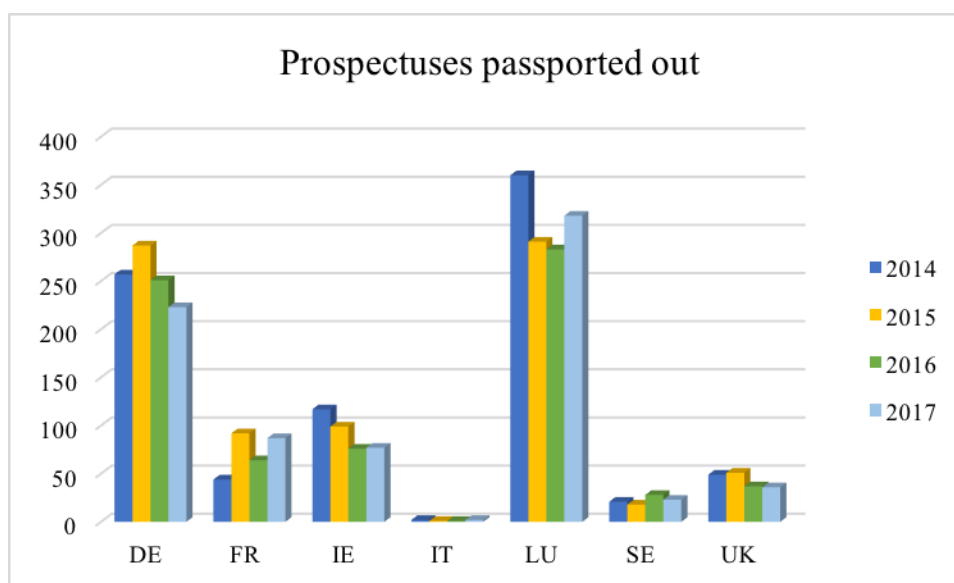
Figure 22 shows how each country performed in terms of prospectuses passported out over the years 2014 – 2017. Germany and Luxembourg are surely the counties passporting out the most. German figures range around two-hundred and fifty units. Luxembourg reached a peak of more than three-hundred and fifty prospectuses passported out in 2014. Its figures for the subsequent years fluctuate around three-hundred units. All the other countries present lower numbers, France and Ireland show figures below one-hundred units, except for the year 2015, in which France exceeded this value. Sweden and the UK always passported out less than fifty prospectuses throughout the four years considered. Italy, instead, presents extremely low numbers because it is not convenient neither for the Italian, nor for the other foreign companies to get their prospectuses

¹³⁰ FCA. (2018). *EEA Prospectus Passport*. Retrieved from <https://www.fca.org.uk/markets/ukla/regulatory-disclosures/eea-prospectus-passports>.

¹³¹ ESMA. (2018). *EEA Prospectus Activity 2017*.

approved there. Times of approval are long (this increases the costs of lawyers, accountants and advisors), bureaucracy is not efficient, costs to get prospectuses approved are high, all those factors together discourage companies to get their prospectuses approved in Italy, that is why Italian figures are so small.

Figure 22 – Prospectuses passported out over the years 2014 - 2017



Source 31 – Author's own graph using data from EEA Prospectus Activity 2014 - 2017 (ESMA)

This histogram presents large figures for countries like Germany and Luxembourg. These figures are reasonable because in these countries the time periods to approve prospectuses are short, the fees to be paid to the NCAs are low and the indirect costs are inevitably lower. For example, the BaFin asks 6,500 € to approve prospectuses for public offers and admission to trading¹³². Hence, many issuers go there to approve prospectuses and then ask for a certificate of approval to place the products abroad. French and Irish numbers fluctuate around one-hundred units, those related to Swedish and UK firms are lower than fifty units, while Italy presents the lowest figures. Italian numbers of prospectuses passported out are extremely low as it is generally not convenient for companies to make their prospectuses approved there. The Italian implementation of the European regulation is strict, the requirements from the NCA (i.e. Consob) are high, approval periods are long, and all those factors together do not attract companies. They rather prefer moving towards countries like Ireland and Luxembourg whose implementations of the Directive are much less rigid and subsequent costs in terms of professionals employed are low.

¹³² BaFin. (2011). *The securities prospectus - German and European capital markets*. Bonn and Frankfurt am Main.

5.4.2 Prospectuses passported in

Table 10 is about prospectuses passported in, i.e. “the number of certificates of approval each EEA country received”¹³³ over the years 2014 – 2017. Once again Germany and Luxembourg passported in way more than two-hundred prospectuses per year over the time frame considered. Ireland, instead, is the country with the lowest numbers of inwards prospectuses activity.

Table 10 – Prospectuses passported in

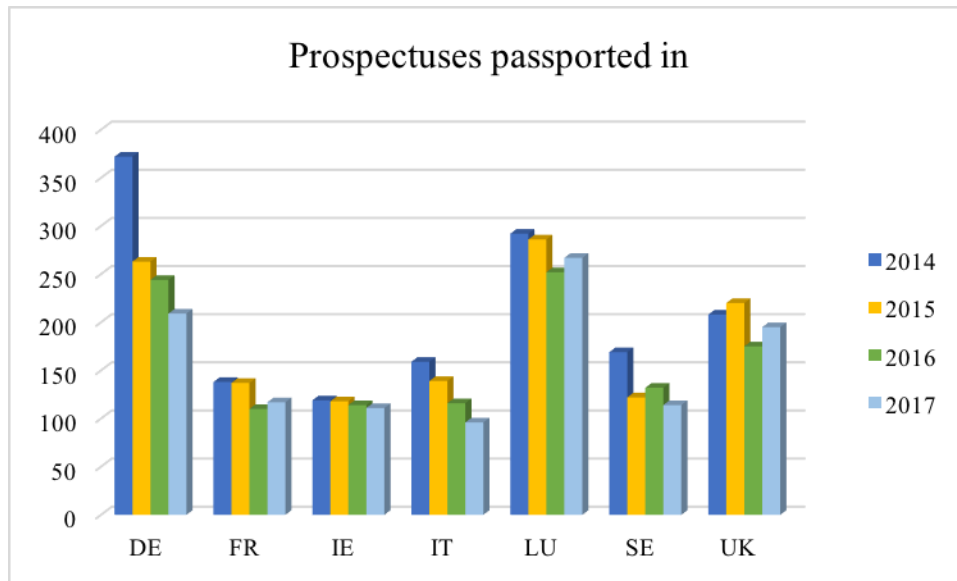
	2014	2015	2016	2017
DE	372	263	244	209
FR	138	137	110	117
IE	119	118	114	111
IT	159	139	116	96
LU	292	286	252	267
SE	169	122	132	114
UK	208	220	175	195

Source 32 - EEA prospectus activity 2014 - 2017 (ESMA)

Figure 23 shows how each country performed in terms of prospectuses passported in over the years 2014 – 2017. Germany and Luxembourg exhibit the highest figures. The latter presents an outlier result in 2014, year in which it passported in more than three-hundred and seventy prospectuses. In Luxembourg figures range between two-hundred and fifty and three-hundred units. The third position is taken by the UK, whose number of prospectuses passported in fluctuates around two-hundred units. France and Ireland exhibit quite stable figures over the four years considered. Swedish values flutter around one-hundred and twenty-five units, with an outstanding result in 2015. Italy, instead presents a declining trend throughout the years. In 2014, it passported in almost one-hundred and sixty prospectuses, while in 2017 this value reaches slightly more than ninety-five units.

¹³³ ESMA. (2018). *EEA Prospectus Activity 2017*.

Figure 23 – Prospectuses passported in over the years 2014 - 2017



Source 33 - Author's own graph using data from EEA Prospectus Activity 2014 - 2017 (ESMA)

This graph presents outstanding results in countries like Germany and Luxembourg. For all the other countries numbers fluctuate above and below one-hundred and fifty units. Italian figures are high for two main reasons: firstly, because most of the Italian companies ask their prospectuses to be approved in other European countries, and then go back to place them on the Italian market; secondly, because Italy is a country in which most of the products (especially debt-related instruments) are still highly appreciated by retail investors. Italians are great savers, consequently it is still common to invest in low-risk products like bonds. Even though German figures are large, we should take account of the fact that this country is huge, population is big, and the number of companies is high therefore the relative number of prospectuses passported in should be necessarily large. What is more interesting to look at are the numbers in Luxembourg. This country is small, and population is low, consequently huge figures cannot be justified following the same reasoning as we did in Germany. Numbers are higher because this country is more appealing. Luxembourg is considered as a good 'window' for all companies wishing to raise capital. Most of the European and international mutual funds shop in Luxembourg and Ireland mainly, therefore getting prospectuses approval there means that it is more likely that foreign investors will notice them and decide to subscribe. Moreover, legal risks in those countries are much lower than in other European countries like Italy. This attracts foreign companies because in case in which the issue and/or the issuer face problems that may eventually damage the investor, judges are way less severe in attributing responsibilities to the issuer. Because of the lower risk they bear, companies want their prospectuses to be passported in countries like Ireland and Luxembourg.

5.5 Prospectuses pages and file dimension

To bring the comparison further, this study considers the length of prospectuses in terms of the number of pages they are made up of, along with the dimension of any given file. Data is filtered using Single Documents for both equity and debt issues. Tallies are made using a sample of twenty prospectuses per issue typology (i.e. equity and debt). All data has been gathered through the ESMA website, where the latter provides direct links to the documents' PDFs. When considering the equity prospectuses of Luxembourg and Ireland the following tables will make reference to eight and three prospectuses respectively due to absence of available data. For what concerns Italy, data is taken from the Consob webpage. Unfortunately, the ESMA database does not allow to filter data on the basis of the issuance's purpose, that is Initial Public Offering or Admission to Trading. However, to make further considerations and a more precise analysis it was necessary to work on a considerable number of documents, and proceeding with such a distinction would make the sample too small to be statistically significant. For all these reasons, prospectuses refer to the both of them. Now we turn our attention on the methodology used to realize the following tables. First of all prospectuses have been downloaded (251 in total), then the Consob IT team developed a programme specifically for such a research, they inserted all those PDF documents, and it finally delivered an excel file reporting the number of pages and dimensions. As already said at the beginning, this paragraph considers the number of pages and the dimension of any given prospectus. Those values are expressed in MB, however when numbers are small they are measured in KB. Therefore, integer numbers mean that the value is expressed in KB. Figures reported in the tables result from the author's calculations, and they are obtained by opening independently all the links associated to the prospectuses reported on the ESMA website. When analysing the documents individually we bumped in a series of peculiarities it is worth to mention to grant an effective and smooth reading of the following tables. Prospectuses often enclose:

- The translation of some of the paragraphs in English
- Series of general attachments or appendices
- Employee stock ownership plans
- The entire auditors' valuation
- Financial statements

Moreover, some of them contain a lot of pictures thus increasing the overall dimension of the single PDF file. For this reason, we will mainly focus on the number of pages, but still having a look at the dimension of the files. Leaving aside all those considerations it would not be possible to make any valuable comparison among the documents, as some of the figures might be eventually misleading. The following paragraphs analyse each single country in detail. The columns on the number of pages present several footnotes explaining whether there are pages

containing attachments. Under the columns on the file dimension, the symbol * means that the relative prospectus has lot of images, graphs, and copies inside.

This paragraph deals with Germany. When looking at the second column of the next table it is easy to see that debt prospectuses present lot of discrepancies in the number of pages they get approved with. For example, prospectuses number four, seven, nine, and seventeen exhibit many more pages as compared to others. The presence of those prospectuses in the sample obviously raises the average number of pages with which debt prospectuses get approved. However (as explained in the footnotes), those figures are so high as the German NCA¹³⁴ allows issuers to enclose auditors' valuation, translation of the paragraphs from German to English, as well as the previous year's financial statements. On the one side, all those attachments make the reading of the prospectus easier as a consequence of the fact that anytime the documents refer to numbers reported in those attachments the reader can go directly to the end of the paper and find them straight. Nevertheless, when potential investors read the document it may seem a bit redundant and may eventually discourage them from reading it all. The same discrepancy (despite being present) is way less evident in equity prospectuses. Germany is quite exceptional in drafting prospectuses as it often encloses attachments, this makes the files heavy. Some of the examples are represented by prospectus number one, and two. Notwithstanding the modest number of pages, they weight a lot. This is because of the considerable number of images reported inside the files. Looking at the third column only, we would have said those two files were too long, however looking at the pages it is clearly not the case. Similarly, prospectus number twenty-three weights a little as compared to its length in terms of pages. Once again, looking at the dimension column only would be misleading. Hence, to make any conclusion it is necessary to look at both columns.

¹³⁴ The German NCA is called: Bundesanstalt für Finanzdienstleistungsaufsicht.

Table 11 - GERMANY

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
1	71	9.141*	21	425	3.207
2	94	7.198*	22	151	826 KB
3	58	1.038	23	806 ¹³⁵	5.071
4	514 ¹³⁶	5.290	24	183	1.887
5	275	7.131	25	364	1.988
6	104	627 KB	26	413	1.146
7	211 ¹³⁷	8.731*	27	363	5.054
8	81	2.085	28	191	3.236
9	425 ¹³⁸	31.642*	29	77	951 KB
10	502	3.888	30	293	3.005
11	80	861 KB	31	271	3.234
12	302	2.163	32	428	3.526
13	465	2.898	33	298	2.720
14	203	2.708	34	120	4.002
15	196	2.180	35	395	2.826
16	98	1.208	36	252	5.944
17	867 ¹³⁹	5.192	37	112	5.434
18	767	5.009	38	96	2.158
19	202	2.225	39	338	2.638
20	155	1.244	40	386	1.090
Mean	283.5	5.123	Mean	298.1	2.997

Source 34 – Author's own findings

This paragraph is about France. The following table presents more homogeneous figures for what concerns debt prospectuses' length. They are in general concise, not redundant and this makes such a country be the second one with the shortest debt prospectuses among all those analysed. With an average of 93.15 pages it comes after Sweden and before Luxembourg. Similar reasoning holds for the equity prospectuses, with which France covers the third position among the countries with the briefest equity prospectuses. With an average of 131.85 pages, it follows Sweden and Ireland.

¹³⁵ Starting from pag. 429 onwards this prospectus contains the auditors' valuation, this means it is slightly shorter than 400 pages. We can consider the prospectus's effective length to be around 430 pages.

¹³⁶ This prospectus is written both in German and English that is why it is this long. We can consider its effective length to be around half this number, i.e. 257 pages.

¹³⁷ Starting from page 121 there are several different attachments. This means the prospectus effective length is around 121 pages.

¹³⁸ Starting from page 128 onwards this prospectus contains all the company's financial statements. We can consider its effective length to be 128 pages.

¹³⁹ The summary of this prospectus is 96 pages long. Nevertheless, despite its entire length this prospectus does not contain any additional appendix or attachments, the figure reported in the table represents its' effective dimension.

Table 12 - FRANCE

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
41	94	1.764	61	160 ¹⁴⁰	3.937
42	39	667 KB	62	78	631 KB
43	50	856 KB	63	174	6.467
44	62	1.309	64	187 ¹⁴¹	7.318
45	54	468 KB	65	80	645 KB
46	67	1.578	66	302 ¹⁴²	9.956
47	127	2.146	67	83	713 KB
48	33	667 KB	68	89	644 KB
49	82	1.154	69	104	972 KB
50	62	793 KB	70	128	986 KB
51	309	6.215	71	86	764 KB
52	88	1.275	72	51	1.227
53	139	5.614	73	92	617 KB
54	113	684 KB	74	152	1.238
55	111	1.301	75	145	2.965
56	92	439 KB	76	133	918 KB
57	56	1.053	77	66	865 KB
58	85	1.124	78	89	1.171
59	167	4.113	79	339	4.018
60	33	667 KB	80	99	1.330
Mean	93.15	1.694	Mean	131.85	2.369

Source 35 - Author's own findings

Particularly interesting is the Irish case. Here again there are huge discrepancies among the figures reported in the second column of the next table. Some of the debt prospectuses exhibit lots of pages as opposed to others with very few papers. The fifth column presents a poor sample (there are three elements only) because of absence of available data on the ESMA database. Nevertheless, Ireland covers the second place in the ranking for the shortest equity prospectuses. When analysing the Irish documents of both issue typologies we found out impressive results about the huge number of countries all over the world issuing securities in Ireland: North Carolina, Kingdom of Jordan, Italy, Netherlands, Republic of South Africa, Japan, Germany, Turkey, Bulgaria, Sweden, and Luxembourg are some of the examples extrapolated from the sample. Since so many companies and institutions from all over the world decide to issue securities there, this clearly

¹⁴⁰ From pag. 82 this prospectus contains the employee stock ownership plan. We can consider the prospectus effective length to be a half of the figure reported in the table, i.e. 80 pages.

¹⁴¹ Starting from pag. 104 this prospectus contains the auditors' valuation, hence the prospectus is around 100 pages long.

¹⁴² At the end of this prospectus there are a few pages about the auditors' valuation, its figure is so small we can still consider the prospectus' effective length to be around 300 pages.

means it is more attractive than the others. There are plenty of reasons why this happens, examples are: the short periods of approval, taxation issues, and smoother bureaucracy. This is a crucial topic as all the other countries should necessarily question themselves on why the Irish system works well and why it is so attractive. Consequently, they should implement national legislations with some of the Irish positive features.

Table 13 - IRELAND

Debt	Pages	Dim (KB)	Equity	Pages	Dim (KB)
81	396 ¹⁴³	5.404	101	70	752 KB
82	25	444 KB	102	218 ¹⁴⁴	7.022
83	293 ¹⁴⁵	3.241	103	90	592 KB
84	91	1.121			
85	347 ¹⁴⁶	4.382			
86	109	1.228			
87	221 ¹⁴⁷	12.853			
88	63	393 KB			
89	349 ¹⁴⁸	2.798			
90	194 ¹⁴⁹	3.457			
91	764	24.288			
92	182	1.617			
93	96 ¹⁵⁰	1.799			
94	116	1.215			
95	102	883 KB			
96	116	1.627			
97	124	1.271			
98	96	796 KB			
99	80	1.042			
100	153	4.274			
Mean	195.85	3.707	Mean	126	2.789

Source 36 - Author's own findings

¹⁴³ Starting from pag. 233 this prospectus contains all the annual financial statements.

¹⁴⁴ Starting from page 46 there is the auditors' valuation. The prospectus effective length is around 46 pages.

¹⁴⁵ From pag. 191 there are the terms and conditions in German and English, they are around 100 pages long.

¹⁴⁶ From page 187 there is the auditors' valuation.

¹⁴⁷ Starting from page 72 inwards there are all the annual financial statements. We can consider the prospectus effective length to be around 70 pages.

¹⁴⁸ Starting from page 140 there is the auditors' valuation. The prospectus effective length is 140 pages long.

¹⁴⁹ Starting from page 543 there is the auditors' valuation. The prospectus effective length is 543 pages long.

¹⁵⁰ Starting from page 74 till page 93 there is the auditors' valuation, this means it is around 20 pages long. Hence, the prospectus is around 75 pages long.

The next paragraph focuses on the Italian situation. The equity prospectuses come from the ESMA website, while the debt ones from the Consob webpage. This is because debt prospectuses were filtered, thus taking only those related to issues higher or equal than 100,000 €. However, in this way the ESMA database did not contain data. For this reason, we looked for debt prospectuses on the Consob webpage. This database allows to distinguish between prospectuses related for Initial Public Offerings and those related to Admission to Trading. However, since it was not possible to make such a distinction for the prospectuses downloaded from the ESMA webpage (i.e. for all the other documents apart from Italian debt prospectuses with issues \geq 100,000 €) we took debt prospectuses related to both IPOs and admission to trading. Ordering the averages from the smallest to the highest, Italy reaches the fourth position in terms of debt prospectuses, just before Ireland and after Luxembourg. Moreover, in the pyramids below (Figure 26) Italy takes the last position in terms of equity prospectuses' length. This is not good at all as it means Italy issues the longest equity prospectuses among the countries analysed. Prospectuses' main purpose is that of informing potential investors about the investment they are intended to make. The reader may think that the longer the prospectus, the more informative the document. However, this may eventually discourage the investor from reading it, thus leading to unaware decisions despite the considerable amount of information reported. On the other side, short prospectuses may enclose just a few of the data needed to make a conscious investment selection. So, the best is in the middle neither extremely long documents, nor empty ones.

Table 14 - ITALY

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
104	80	2.5	124	238	4.823
105	64	1.8	125	716 ¹⁵¹	15.591
106	50	617 KB	126	565 ¹⁵²	29.283
107	63	885 KB	127	391	4.420
108	458	5.2	128	352	4.848
109	52	2.1	129	359	3.999
110	210	5.5	130	369	4.049
111	85	435 KB	131	317	4.203
112	310	6.6	132	682	8.711
113	40	698 KB	133	429	5.900
114	28	281 KB	134	545 ¹⁵³	15.863
115	34	765 KB	135	405	4.458
116	444	13.3	136	278	3.119
117	53	2.4	137	271	3.546

¹⁵¹ Starting from page 575 there are the assembly minutes, this means the effective length is around 575 pages.

¹⁵² Starting from page 565 there are several attachments, the prospectus effective length is 565 pages.

¹⁵³ Starting from page 179 there are several attachments, the prospectus effective length is around 179 pages.

118	370	8.9	138	295	5.786
119	36	289 KB	139	215	2.517
120	311	2.7	140	534	7.827
121	300	2.3	141	658 ¹⁵⁴	7.178
122	321	8.7	142	311	6.990
123	286	13.2	143	190	3.235
Mean	179.75	3.959	Mean	406	7.317

Source 37 - Author's own findings

This paragraph deals with Luxembourg. The equity prospectuses' sample is again small (eight documents only) because of absence of data. This country covers the third position in terms of debt prospectuses length with an average of 126.15 pages. Its equity prospectuses (with an average of 242.75 pages) are a bit longer, thus making it go below in the ranking. As for Ireland, Luxembourg seems to be an attractive country as we found out companies and institutions from all over the world deciding to issue securities there. Some of the examples are: Germany, Netherlands, France, UK, Italy, Portugal, Turkey, and Switzerland. This means Luxembourg is obviously more attractive than others.

Table 15 - LUXEMBOURG

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
144	87	870 KB	164	462	2.118
145	225	3.882	165	645 ¹⁵⁵	7.102
146	132	1.070	166	238 ¹⁵⁶	10.983
147	106	1.491	167	94	877 KB
148	122	1.182	168	211	2.374
149	195	1.871	169	108	1.112
150	36	992 KB	170	142	1.539
151	68	387 KB	171	42	519 KB
152	49	337 KB			
153	34	256 KB			
154	84	1.844			
155	228	1.954			
156	346 ¹⁵⁷	7.317			
157	171	2.340			
158	121	1.192			

¹⁵⁴ From page 603 onwards there are several attachments, this means the prospectus effective length is around 603 pages.

¹⁵⁵ Starting from page 242 this prospectus contains attachments on various financial information. This means the prospectus is around 242 pages long.

¹⁵⁶ Starting from page 166 this prospectus contains attachments on various financial information. This means the prospectus is around 166 pages long.

¹⁵⁷ Starting from page 262 there is the auditors' valuation, hence the prospectus effective length is around 262 pages long.

159	80	4.500			
160	159	1.714			
161	103	604 KB			
162	117	1.656			
163	60	434 KB			
Mean	126.15	1.795	Mean	242.75	3.328

Source 38 - Author's own findings

This paragraph is about Sweden. It covers the top positions for both debt and equity prospectuses, with an average of 66.8 and 105.3 pages respectively. There are no considerable discrepancies among the figures reported in the second column of the next table, thus highlighting that in Sweden it is common practice to approve very short prospectuses. Looking at the fifth column of the same table it is easy to see that equity prospectuses usually present higher number of pages (as compared to debt ones), however their average is still around one hundred pages.

Table 16 - SWEDEN

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
172	61	435 KB	192	108	6.416
173	36	599 KB	193	149	3.461
174	67	833 KB	194	53	298 KB
175	66	517 KB	195	132	5.927
176	91	998 KB	196	236	3.138
177	79	1.271	197	164	6.733
178	68	12.731*	198	64	5.207
179	83	908 KB	199	216	9.082
180	79	677 KB	200	82	7.688
181	69	428 KB	201	39	651 KB
182	38	414 KB	202	136	2.215
183	53	864 KB	203	144	5.015
184	64	901 KB	204	124	6.911
185	35	600 KB	205	67	436 KB
186	53	770 KB	206	98	4.781
187	64	474 KB	207	78	1.410
188	107	12.985	208	54	3.366
189	66	740 KB	209	60	4.207
190	85	1.144	210	42	1.150
191	73	883 KB	211	60	6.539
Mean	66.85	1.959	Mean	105.3	4.232

Source 39 - Author's own findings

This paragraph deals with the UK. The second column of the next table presents some discrepancies among the number of pages. This means the UK does not generally favour neither short nor long documents, it accepts the both of them. This country ranks at the sixth position in terms of debt prospectuses, with an average number of 256.6 pages it stays right before Germany and after Ireland. For what concerns equity prospectuses, it is right in the middle of the pyramid, with an average of 241.75 pages.

Table 17 - UK

Debt	Pages	Dim (KB)	Equity	Pages	Dim (KB)
212	133	1.236	232	267	1.312
213	600	8.532	233	411 ¹⁵⁸	2.612
214	177 ¹⁵⁹	3.796	234	184	1.779
215	677 ¹⁶⁰	5.042	235	132	1.059
216	37	244 KB	236	32	144
217	537 ¹⁶¹	8.614	237	114	890 KB
218	58	903 KB	238	226	1.730
219	432 ¹⁶²	31.865	239	148	389 KB
220	203	3.032	240	269	4.033
221	67	580 KB	241	226	5.008
222	27	434 KB	242	277	876 KB
223	138	956 KB	243	242	2.655
224	82	639 KB	244	525 ¹⁶³	9.099
225	737 ¹⁶⁴	35.535	245	358	2.102
226	135	1.393	246	150	1.682
227	401	10.052	247	240 ¹⁶⁵	1.822
228	539 ¹⁶⁶	11.002	248	136	985 KB
229	108	1.087	249	158	1.400
230	22	445 KB	250	460	6.882
231	22	196 KB	251	280	862 KB
Mean	256.6	6.279	Mean	241.75	2.366

Source 40 - Author's own findings

¹⁵⁸ Starting from page 260 there are several different attachments; the prospectus effective length is around 260 pages.

¹⁵⁹ Starting from page 72 there are several different attachments; the prospectus effective length is around 72 pages.

¹⁶⁰ Starting from page 209 there are the documents about the auditors' valuation; the prospectus effective length is around 209 pages.

¹⁶¹ Starting from page 71 there are several different attachments; the prospectus effective length is around 71 pages.

¹⁶² Starting from page 123 there are several different attachments; the prospectus effective length is around 123 pages.

¹⁶³ Starting from page 106 there are several different attachments, the prospectus effective length is around 106 pages.

¹⁶⁴ Starting from page 150 there are several different attachments; the prospectus effective length is around 150 pages.

¹⁶⁵ Starting from page 115 there are several different attachments; the prospectus effective length is around 115 pages.

¹⁶⁶ Starting from page 336 there are several different attachments; the prospectus effective length is around 336 pages.

Tables from 11 to 17 feature considerable differences among the countries. Swedish debt prospectuses exhibit an average number of pages of 66.8, thus reaching the smallest value among all the countries analysed. Germany, on the contrary, approves debt prospectuses with an average length of 283.5 pages, thus reaching the highest figure. Reorganizing the averages from the smallest to the highest Italy covers the fourth position, with an average number of 179.75 pages. It is clearly closer to the highest average, thus making Italy as one of the countries approving the longest debt prospectuses in the EU. What is even more interesting is that Italy exhibits the longest equity prospectuses among the countries analysed. It generally approves documents with an average of 406 pages. Once again Swedish equity prospectuses are the shortest, as they get approved with an average of 105.3 pages. This is particularly impressive as Sweden is the country approving the shortest debt and equity prospectuses.

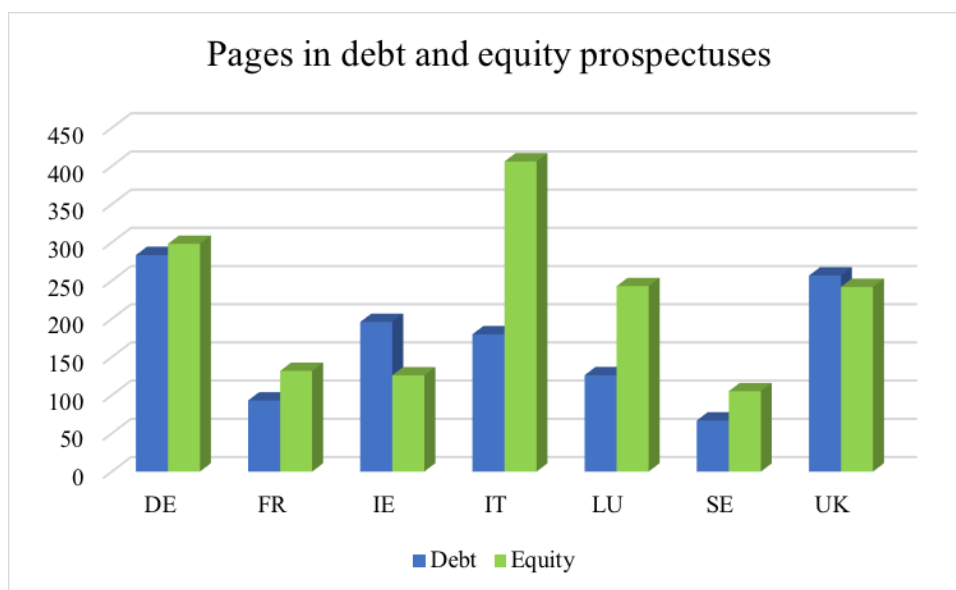
Table 18 - Average number of pages and dimension per prospectus

	Debt		Equity	
	Pages	Dim (MB)	Pages	Dim (MB)
DE	283.5	5.123	298.1	2.997
FR	93.15	1.694	131.85	2.369
IE	195.85	3.707	126	2.789
IT	179.75	3.959	406	7.317
LU	126.15	1.795	242.75	3.328
SE	66.85	1.959	105.3	4.232
UK	256.6	6.279	241.75	2.366

Source 41 – Author's own findings

The numbers here above are then displayed in Figure 24. This is a histogram with double columns per country. On the y-axis there are the number of pages, on the x-axis the countries. Any given column represents the average number of pages of debt and equity prospectuses. This graph is useful to get the disparities in the average number of pages between the two issue typology. In Germany, France, Sweden, and the UK figures are approximately the same in both documents. Ireland, Italy, and Luxembourg exhibit huge discrepancies in the two averages considered. Italy presents the biggest divergence, with the equity prospectuses being on average more that 225 pages longer than debt ones. Overall five (i.e. Germany, France, Italy, Luxembourg, Sweden) out of the seven countries considered exhibit higher averages for the equity prospectuses, for the others (i.e. Ireland, UK) the reverse trend holds.

Figure 24 – Average number of pages in debt and equity prospectuses



Source 42 – Author's own graph

Despite the general comparisons we can make from one country to another, each one of them presents interesting trends. Ordering the averages from the smallest to the highest the following two pyramids give a clear picture of how each country among all those analysed positions in terms of debt and equity prospectuses' length respectively.

Figure 25 – Ranking of debt prospectuses

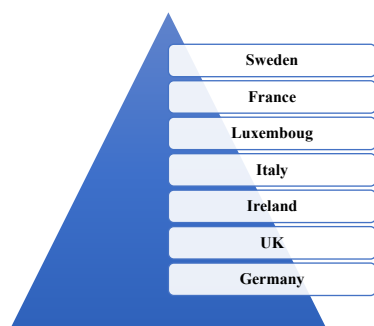
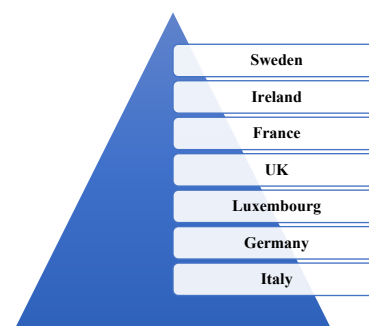


Figure 26 – Ranking of equity prospectuses



Prospectuses are often drafted with the objective of addressing potential legal liability rather than to inform investors, for this reason they are extremely long documents. When analyzing the prospectuses in the sample we bumped in a recurrent characteristics common to all the documents and countries. In order to shield themselves from potential liability problems, issuers insert several pages dealing with the potential risks entailed by the securities offered. At first sight it might seem as a positive feature as it means that the company, by communicating all those risks, is as clear and transparent as possible. However, prospectuses length threatens the objective of achieving investor protection. Nevertheless, encompassing too many information of the risks

entailed by the investment makes the overall document too difficult to be understood by retail investors, who finally end up reading only the marketing material on the offer available. Information must be rather suitable and appropriate to safeguard them from being attracted into investments they would have not made if they had fully understood the offer. Therefore, long and complex prospectuses result in inefficient investor protection.

5.6 Supplements

Another interesting parameter necessary to assess investor protection among the seven countries analysed is represented by the number of supplements the NCAs require the issuers to release. Table 19 reports the overall number of supplements for equity and debt prospectuses issued between 03/10/2017 and 03/10/2018. The study covers this period because some of the EU countries (such as Ireland and Luxembourg) update their online databases daily, leaving on their websites the approvals made within their borders one year ahead only. The next paragraphs refer to debt and equity issues, disregarding all the other typologies of non-equity issues such as warrants, asset-backed securities (ABS), derivatives, and depository receipts. When dealing with debt, the following table considers debt issues $\geq 100,000\text{€}$. It is divided in two main columns for debt and equity prospectuses respectively. Below each of them, it exhibits the total number of debt ($\geq 100,000\text{€}$) and equity prospectuses approved between 03/10/2017 and 03/10/2018, and the number of supplements released during the same period. Numbers result from the author's calculations, and they are obtained by opening individually all the links associated to the prospectuses reported on the ESMA website.

Table 19 – Supplements to equity and debt prospectuses issued between 03/10/2017 and 03/10/2018

	Debt		Equity	
	Total number of prospectuses approved	Supplements	Total number of prospectuses approved	Supplements
DE	47	67	67	9
FR	104	53	169	4
IE	114	90	7	1
IT	23	7	22	2
LU	344	271	8	3
SE	98	18	150	23
UK	153	64	85	58

Source 43 – Author's own findings

The numbers of supplements in debt prospectuses are clearly higher than those related to equity prospectuses. Equity investments are obviously more volatile and subject to daily

fluctuations as compared to debt ones, this means they are less subject to updates reported on supplements. Therefore, supplements released in relation to equity prospectuses are very low. Debt investments are more stable and less volatile as compared to equity. Since maturities are much larger in this type of investment, and clauses are closed way ahead of their deadlines, this type of prospectuses needs to be updated much more frequently. In a long time horizon, the issuer and the issue may be subject to material changes affecting the investors' interests, therefore situations that may be eventually harmful to the investors must be notified thorough supplements. Think of a situation in which a company gives away all of its belongings, then it must necessarily notify such an unexpected change to its investors through supplements and allow them to withdraw from the previously signed agreement. The overall number of supplements in debt and equity prospectuses is so divergent because the triggers in each typology of contract are different.

Table 20 exhibits the percentages of supplements as compared to the overall number of prospectuses approved in any given country. This is useful to understand how EU countries have been impacted by the duty to release supplements, to the extent that numbers in this table clearly show that some of them statistically incurred much more frequently in such a provision as compared to the others. This means that in Germany on average each debt prospectus comes with more than one supplement. This result is unique as in Table 20 this is the only value higher than 100%. Looking at the first column we can easily see that France, Germany, Ireland and Luxembourg are the countries requiring the release of supplements the most. The Italian legislation requires companies to release supplements in debt prospectuses way less than the above mentioned counties, as its percentage fluctuates around 30%. Data reported for the UK suggests that debt prospectuses come with less that a supplement each (on average). Hence not all the prospectuses examined between the period 03/10/17 and 03/10/18 were supplemented. Overall Sweden is the country with the lowest percentage (18% only) of supplements in relation to the total number of prospectuses approved. Such a value means that in this country very few debt prospectuses were supplemented over the time period considered. In conclusion, for what concerns debt prospectuses German legislation requires its companies to issue supplements frequently, while all the other countries seem to be more flexible. The second column of Table 20 suggests that all the seven EU countries require their companies to supplement their equity prospectuses much less frequently. This is reasonable as the equity investments are much less stable than debt ones. Equity typically fluctuates much more than debt, for this reason NCAs cannot require them to issue supplements for any given change arising in the market and eventually impacting them. They rather ask equity prospectuses to be supplemented in presence of extremely relevant new factors, material mistakes or inaccuracies related to the information reported in the prospectus. The UK is the country requiring equity prospectuses to be supplemented the most. 68% means that on average each equity

prospectus comes with less than a supplement. The same conclusion holds to all the other countries, however the UK has got the highest percentage. Luxembourg (with 38%) comes second in the list. France and Italy are the countries with the lowest values. This means that in the sample analysed almost none of the equity prospectuses was supplemented. Germany, Ireland, and Sweden place in between the two extremes. Their percentages are very low (13%, 14% and 15% respectively) thus highlighting that on average only a few of their equity prospectuses gets supplemented. Divergences in the percentages are explained by three distinct factors: different implementations of the EU directives into national law, different pervasiveness of the NCAs, and finally because of the occurrence of events specific for the issuer or issue naturally bringing the necessity of producing supplements.

Table 20 – Percentages of supplements in relation to the total number of prospectuses approved between 03/10/2017 and 03/10/2018

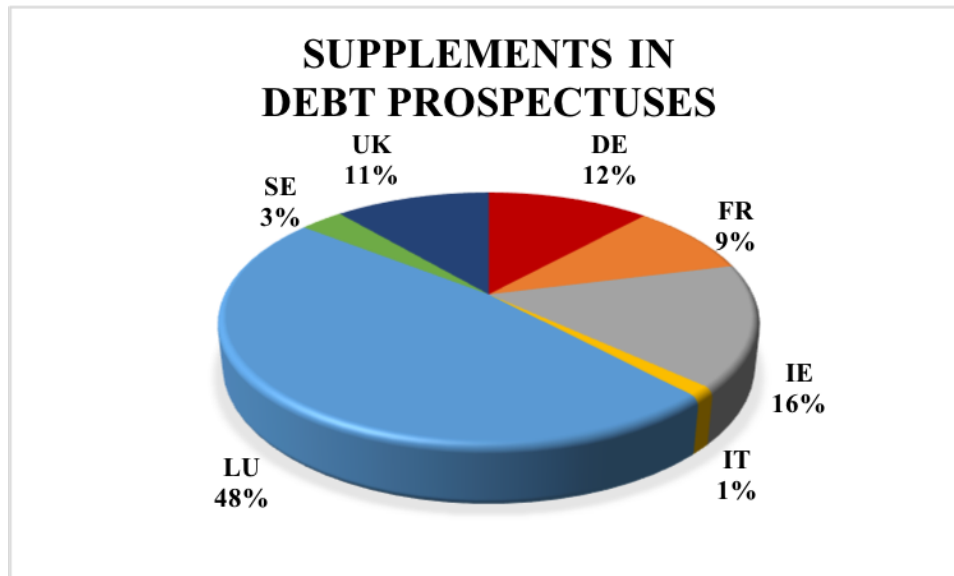
	Debt	Equity
DE	143%	13%
FR	51%	2%
IE	79%	14%
IT	30%	9%
LU	79%	38%
SE	18%	15%
UK	42%	68%

Source 44 - Author's own calculations

Here below are two pie-charts reporting the percentage of supplements published by each country in relation to the overall amount released by the seven countries together.

Figure 27 clearly shows Luxembourg is the country with the highest number of supplements released for debt prospectuses. This means this country alone covers almost 50% of the entire chart. It is then followed by Ireland with a 16% value, UK and Germany exhibit close percentages 11% and 12% of the chart respectively. Italy presents the smallest size, it released only 1% of the supplements among all the countries considered.

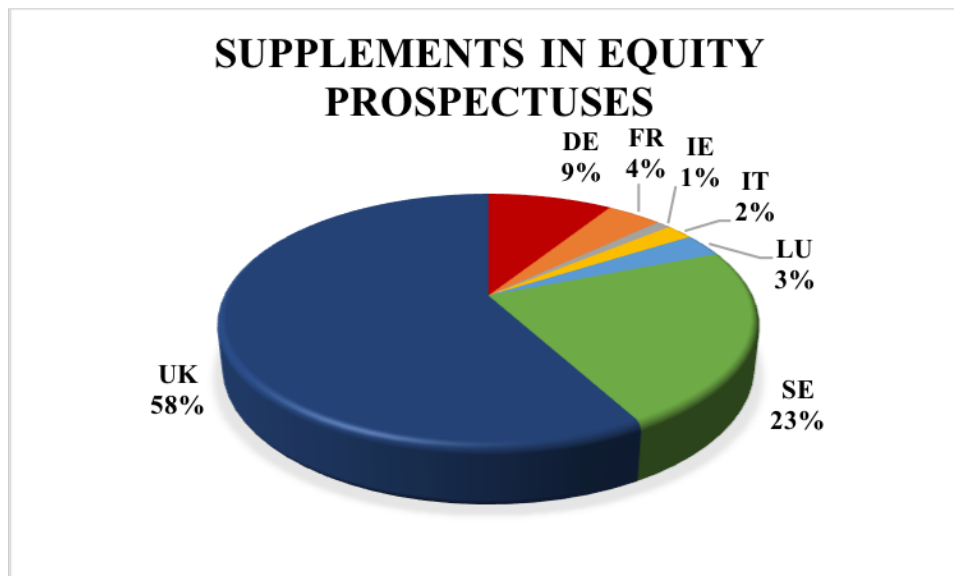
Figure 27 – Supplements in debt prospectuses issued between 03/10/2017 and 03/10/2018



Source 45 - Author's own graph and calculations

Figure 28 presents the UK as the country releasing the highest number of supplements in equity prospectuses (58%). It is then followed by Sweden releasing 23% of the overall amount. This time Ireland presents the thinnest slice (1%), it comes immediately after Italy representing the 2% of the entire pie-chart.

Figure 28 – Supplements in equity prospectuses issued between 03/10/2017 and 03/10/2018

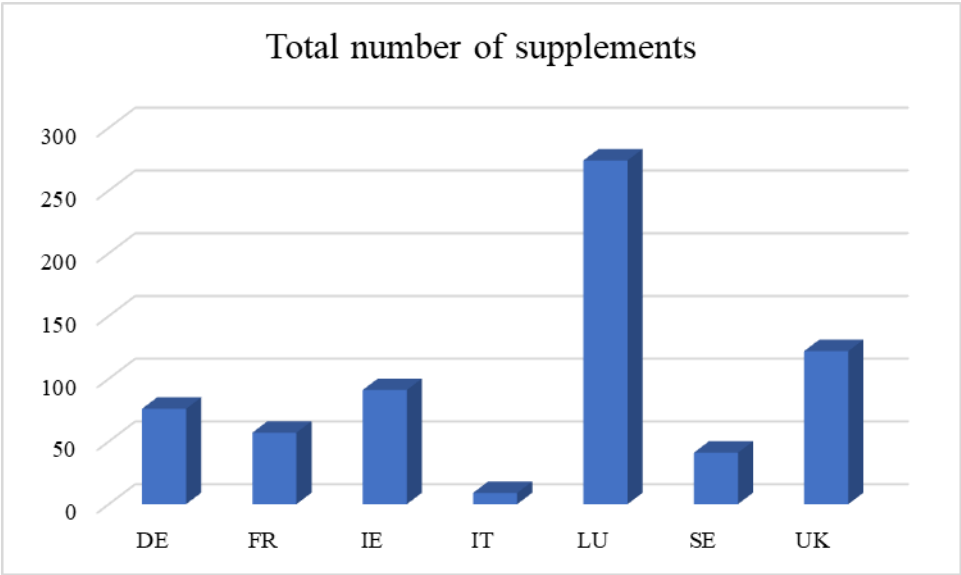


Source 46 - Author's own graph and calculations

Figure 29 reports the total number of supplements (both debt and equity) issued between 03/10/2017 and 03/10/2018. Overall Luxembourg exhibits outstanding results, it clearly is the EU

country (amongst those analysed) with the highest number of supplements issued (around 270 units). It comes immediately before the UK with slightly more than 120 units in a single year. This means that between Luxembourg and the UK there is a difference of approximately one-hundred and fifty units. Ireland presents more than fifty units, while Germany has almost twice this value. Sweden released a number of supplements which is less than fifty units each. Finally, Italy reveals as being the country with the lowest figure, whose value is slightly lower than ten units. This picture presents interesting discrepancies among the countries, whose highest and lowest values are reached by Luxembourg and Italy respectively.

Figure 29 – Total number of supplements released between 03/10/2017 and 03/10/2018



Source 47 – Author’s own graph and findings

The following two paragraphs present an analysis of debt (with issues $\geq 100,000$ €) and equity supplements aimed at analysing the reasons behind the decision of drawing them up. To develop this study we picked all the supplements and not just a sample of them because we wanted to focus on those with the biggest dimensions. The documents are downloaded from the ESMA website. The time period covered is from 1/12/2017 until 31/10/2018 because some countries like Ireland and Luxembourg delate information reported on their websites every day, thus leaving prospectuses and all the related documents approved in the previous year only. The following tables present three columns each, the first one lists the number of supplements downloaded over the period analysed, the second the number of pages of each document, the third one the dimension of any given file. The latter is measured in KB, however when the PDF files are heavy figures are expressed in MB (i.e. decimal numbers mean that the dimension is expressed in MB). Figures reported from Table 21 to Table 27 result from the author’s work and calculations, this means that the ESMA website does not present matrices reporting the overall number of supplements issued,

their pages and dimensions directly. We now turn our attention on the methodology used to realize those tables. First of all the supplements to debt and equity prospectuses over the time period considered have been download (478 and 50 supplements respectively); as explained in paragraph 5.6 the Consob IT team developed a programme specifically for such a research, they inserted all those PDF documents, and it finally delivered an excel file reporting the number of pages and dimensions of all the files submitted. In these paragraphs we selected the two supplements with the highest dimensions for any given country and we looked for the reasons behind the decision of releasing them. Similarly to prospectuses, supplements contain different information and there is no extremely specific provision determining what should be included or not. This means that issuers still have some ‘degrees of freedom’ in inserting what they believe is relevant and necessary to be included in the documents. We chose the two supplements with the highest dimension to analyze their contents just to have an idea of the drivers generally bringing to the decision of supplementing prospectuses. As explained before, it is generally not possible to make generalizations, issuers may be subject to the release of supplements because of several different reasons. We are now ready to go further by analysing supplements to debt and equity prospectuses and relative figures for each country more in detail.

5.6.1 Analysis of debt supplements

The first country analysed is Germany. Over the period 1/12/2017 - 31/10/2018, the German NCA approved 43 supplements to debt prospectuses. As a result of the calculations made, German supplements to debt prospectuses are slightly shorter than 35 pages long, and weight a bit less than 730 KB. At this point we chose the documents with the highest dimensions. The thirty-third is the heaviest however it is written in German, therefore it was not possible to read it and make any kind of analysis. Therefore, we analysed the twenty-third. This supplement was published for three main reasons: firstly because the company released the second quarter interim report, secondly because Moody’s upgraded the company’s rating, thirdly because it realized its base prospectus had some material mistakes. The twenty-second supplement was released because of accounting purposes as well, namely the company published an interim report for the second quarter of the year.

Table 21 – GERMANY (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
1	37	706	23	308	3.301 MB
2	12	77	24	24	322
3	13	83	25	9	324
4	8	262	26	15	499
5	14	106	27	16	1.513 MB
6	23	491	28	13	185
7	11	292	29	15	497
8	15	326	30	19	118
9	30	2.223 MB	31	18	137
10	16	1.513 MB	32	6	43
11	5	317	33	63	6.629 MB
12	7	360	34	94	712
13	11	81	35	80	569
14	7	48	36	17	982
15	14	328	37	11	371
16	126	1.669 MB	38	5	140
17	13	185	39	72	334
18	4	39	40	15	497
19	7	427	41	13	185
20	10	177	42	6	426
21	6	426	43	10	177
22	279	3.246 MB			

Average number of pages 34.8

Average of dimensions 728.923

Source 48 – Author's own findings

The second country analysed is France. Over the period 1/12/2017 - 31/10/2018 the French NCA approved 51 supplements to debt prospectuses. French supplements to those documents are on average a bit shorter than 20 pages and they weight around 565 KB each. At this point we chose the documents with the highest dimensions. The seventy-second supplement was released because the company made an interim accounting upgrade. The eighty- third supplement was released for two main reasons: firstly because the company realized it made some material mistakes in the previously approved prospectus; secondly because it issued a press release encompassing new information that have to be made available to the market participants.

Table 22 – FRANCE (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
44	5	49	70	5	66
45	5	58	71	11	483
46	40	323	72	18	2.179
47	11	370	73	17	623
48	28	227	74	11	697
49	7	86	75	7	87
50	18	969	76	7	493
51	5	276	77	55	769
52	13	597	78	13	779
53	11	518	79	8	489
54	10	457	80	6	195
55	29	337	81	66	1.955
56	9	91	82	70	1.980
57	28	619	83	137	2.508
58	21	545	84	5	548
59	17	531	85	7	110
60	19	344	86	7	361
61	17	422	87	8	485
62	16	714	88	17	582
63	5	409	89	6	271
64	24	675	90	18	576
65	24	198	91	16	181
66	7	336	92	7	94
67	8	328	93	26	157
68	23	1.562	94	4	160
69	60	911			
Average number of pages 19.8					
Average of dimensions 564.314					

Source 49 – Author's own findings

The third country analysed is Ireland. Over the period 1/12/2017 - 31/10/2018 the Irish NCA approved 78 supplements to debt prospectuses French supplements to those documents are on average a bit shorter than 15 pages and they weight slightly more than 300 KB each. Supplement number 125 was released because the company had just signed the acquisition of another company; secondly because another firm was nominated as manager of the legal affairs and at the same time as effective member of the board of directors (BoD.) Supplement number 159 was released because the company published the unaudited financial statements for the third quarter of the year; secondly because of the presence of material errors in the previously approved prospectus; finally because the company entered in a forward sale agreement with a private equity fund and another company.

Table 23 – IRELAND (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
95	8	460	134	3	169
96	5	111	135	2	100
97	75	975	136	70	533
98	68	903	137	4	256
99	62	1.154	138	37	646
100	3	32	139	3	38
101	2	88	140	3	89
102	3	29	141	3	31
103	2	77	142	3	99
104	38	501	143	3	166
105	2	28	144	5	142
106	53	1.28	145	5	63
107	2	42	146	2	28
108	2	153	147	5	619
109	3	295	148	2	118
110	3	114	149	4	122
111	3	143	150	22	470
112	3	61	151	8	169
113	63	1.084	152	2	92
114	14	198	153	3	271
115	3	39	154	2	153
116	65	558	155	46	633
117	3	109	156	4	66
118	3	59	157	3	44
119	7	430	158	37	272
120	22	443	159	21	1.57
121	2	44	160	4	57
122	2	215	161	19	332
123	42	676	162	4	253
124	3	482	163	3	134
125	77	1.105	164	2	70
126	3	159	165	3	106
127	62	975	166	5	348
128	4	121	167	2	157
129	4	67	168	61	1.106
130	4	182	169	3	39
131	3	40	170	6	241
132	2	85	171	3	99
133	4	43	172	2	19

Average number of pages 14.7
Average of dimensions 301.026

Source 50 - Author's own findings

The fourth country analysed is Italy. Over the period 1/12/2017 - 31/10/2018 the Italian NCA approved 7 supplements to debt prospectuses. Italian supplements to those documents are on average a bit shorter than 20 pages and they weight slightly less than 1 MB (i.e. 1000 KB). At this point we chose the documents with the highest dimensions. Supplement number 182 was released because of an increase in the company's credit spread as compared to other listed firms' with similar selling value. Supplement number 183 was released because this company deposited to the Italian NCA a registration document replacing the registration document which was previously approved.

Table 24 – ITALY (debt supplements)

Debt	Pages	Dim (KB)
173	18	586
174	89	925
175	21	580
176	22	1.016
177	48	2.539
178	14	333
Average	35.3	996.5

Source 51 – Author's own findings

The fifth country analysed is Luxembourg. Over the period 1/12/2017 - 31/10/2018 the NCA in Luxembourg approved 248 supplements to debt. In Luxembourg, supplements to debt prospectuses are on average a bit longer than 20 pages and they weight around 305 KB each. At this point we chose the documents with the highest dimensions. Supplement number 305 was released for two main reasons: firstly because the company published the interim financial position; secondly because it gave an overview of the discussions on the investments made in Chile which was going on within the board of directors. This means that administrators either had Chilean pesos in their balance sheet or undertook some investments in Chile. Supplement number 400 was released because the company's rating changed, and secondly because of variations in terms and conditions of the securities issued.

Table 25 – LUXEMBOURG (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
179	18	148	262	18	139	345	6	278
180	19	402	263	20	152	346	10	128
181	15	136	264	3	46	347	6	60
182	2	92	265	2	95	348	21	197
183	27	1.036	266	23	285	349	6	124
184	2	89	267	8	158	350	18	139
185	15	144	268	7	225	351	22	209
186	4	269	269	3	99	352	2	16
187	340	2.771	270	152	2.004	353	17	749
188	14	151	271	8	113	354	6	73
189	18	119	272	18	141	355	6	549
190	21	263	273	14	489	356	8	270
191	2	89	274	178	2.894	357	19	929
192	15	285	275	7	317	358	9	72
193	6	125	276	4	421	359	11	92
194	17	749	277	21	105	360	5	114
195	5	78	278	3	146	361	6	128
196	21	197	279	8	140	362	9	267
197	18	157	280	221	1.116	363	3	40
198	14	116	281	11	87	364	6	38
199	14	130	282	2	86	365	4	281
200	328	2.156	283	9	62	366	28	425
201	115	690	284	6	53	367	5	541
202	6	185	285	24	407	368	4	217
203	32	239	286	3	351	369	5	46
204	3	50	287	3	470	370	19	120
205	13	157	288	5	251	371	27	126
206	13	270	289	2	97	372	3	19
207	7	251	290	17	152	373	4	512
208	19	355	291	6	272	374	9	535
209	5	122	292	14	168	375	4	466
210	9	96	293	8	173	376	4	229
211	4	295	294	8	326	377	26	160
212	22	275	295	10	57	378	15	288
213	6	252	296	11	176	379	5	100
214	162	1.616	297	9	51	380	6	167
215	17	214	298	4	118	381	12	110
216	3	111	299	2	146	382	19	179
217	3	107	300	2	144	383	6	124
218	9	92	301	14	120	384	3	97
219	9	58	302	4	252	385	4	23
220	5	462	303	2	64	386	8	346

221	32	1.008	304	2	26	387	13	475
222	9	69	305	263	4.582	388	13	82
223	6	116	306	81	642	389	8	308
224	9	78	307	6	100	390	3	114
225	29	751	308	25	344	391	6	133
226	79	751	309	6	51	392	13	142
227	2	19	310	3	39	393	46	187
228	26	251	311	16	534	394	8	128
229	14	159	312	6	267	395	7	44
230	13	335	313	14	108	396	2	93
231	14	168	314	2	141	397	2	89
232	2	144	315	28	401	398	34	185
233	4	35	316	3	189	399	18	144
234	2	145	317	5	141	400	645	2.785
235	2	105	318	9	90	401	5	251
236	8	170	319	17	645	402	2	311
237	11	367	320	3	21	403	3	505
238	5	198	321	4	56	404	19	179
239	28	613	322	20	159	405	10	283
240	4	250	323	11	528	406	17	380
241	2	25	324	2	139	407	3	108
242	54	446	325	14	116	408	9	459
243	2	145	326	2	183	409	1	210
244	2	27	327	8	49	410	22	187
245	7	161	328	5	57	411	18	160
246	14	173	329	8	156	412	6	231
247	17	644	330	6	376	413	16	161
248	4	327	331	5	173	414	15	89
249	6	124	332	10	701	415	5	81
250	5	210	333	7	111	416	7	39
251	5	33	334	6	257	417	39	901
252	40	489	335	6	257	418	37	726
253	12	78	336	19	134	419	15	463
254	5	111	337	10	89	420	15	464
255	24	391	338	12	155	421	10	47
256	34	682	339	11	343	422	4	149
257	14	223	340	19	676	423	14	545
258	9	373	341	7	176	424	4	248
259	2	187	342	18	157	425	11	212
260	2	147	343	2	142	426	17	123
261	25	450	344	14	169			

Average number of pages 20.8
Average of dimensions 304.950

Source 52 – Author’s own findings

The sixth country analysed is Sweden. The overall number of supplements to debt prospectuses released over the period 1/12/2017 - 31/10/2018 is 11. Swedish supplements to debt prospectuses are on average 10-pages long and they weight slightly less than 280 KB each. At this point we chose the documents with the highest dimensions. Supplement number 427 was released as a consequence of the issuance of new subordinated securities, and secondly because of changes in terms and conditions. Supplement number 429 was released because the company published its consolidated annual financial statement.

Table 26 – SWEDEN (debt supplements)

Debt	Pages	Dim (KB)
427	69	562
428	3	33
429	18	940
430	6	111
431	1	416
432	1	413
433	3	23
434	3	24
435	3	84
436	2	370
437	1	71
Average	10.0	277.000

Source 53 – Author's own findings

The last country analysed is the UK. The overall number of supplements to debt prospectuses released over the period 1/12/2017 - 31/10/2018 is 41. In the UK, supplements to debt prospectuses are on average a 3-pages long and they weight around 150 KB each. At this point we chose the documents with the highest dimensions. Supplement 451 was released because of a settlement agreement related to a huge credit on mortgages; secondly because the company made some changes to its original prospectus; thirdly because it replaced its board of directors.

Table 27 – UK (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
438	6	232	459	2	154
439	9	199	460	2	139
440	2	219	461	2	107
441	2	131	462	4	615
442	6	129	463	4	362
443	2	33	464	3	166
444	3	158	465	4	72
445	2	28	466	2	116
446	2	27	467	4	157
447	3	166	468	3	216
448	4	224	469	4	51
449	4	47	470	2	47
450	4	58	471	2	28
451	6	384	472	2	88
452	4	117	473	5	361
453	2	189	474	6	258
454	2	27	475	3	160
455	2	37	476	2	121
456	3	74	477	3	137
457	3	91	478	2	77
458	2	178			

Average number of pages 3.3
Average of dimensions 150.732

Source 54 – Author's own findings

5.6.2 Analysis of equity supplements

The first country analysed is Germany. Over the period 1/12/2017 - 31/10/2018, the German NCA approved 13 supplements to equity prospectuses. As a result of the calculations made, German supplements to debt prospectuses are on average 14-pages long, and weight a bit less than 450 KB. At this point we chose the documents with the highest dimensions. The fourth and the twelfth documents are the heaviest, however they are both written in German, therefore it was not possible to read them and make any kind of analysis. Then, we analysed the sixth. This supplement was published because the company amended several parts of the prospectus previously approved. It reported changes to the following paragraphs: summary, German translation of the summary, risk factors, general information, the offering, proceeds and cost of the offering, reasons of the offering and use of proceeds, capitalization and indebtedness, statement on working capital, dilution, shareholder information, description of share capital and related information, management, relationships and related party transactions, underwriting. This supplement is thirty-one pages long because the company reported so many modifications and

updates. The eleventh supplement was released because the company amended the following paragraphs: summary, German translation of the summary, risk factors, and recent developments and outlook. Since changes are way less than those brought about in the previous document, it is reasonably shorter (eleven pages).

Table 28 – GERMANY (equity supplements)

Equity	Pages	Dim (KB)
1	3	80
2	9	61
3	4	99
4	64	1.4 MB
5	9	276
6	31	580
7	2	90
8	4	400
9	10	316
10	3	68
11	11	543
12	22	1.1 MB
13	11	813
Average	14.1	448.154

Source 55 - Author's own findings

The second country analysed is France. Over the period 1/12/2017 - 31/10/2018, the French NCA approved six supplements to equity prospectuses. Those documents are on average a bit shorter than 30 pages and they weight more than 1000 KB each (i.e. around 1 MB). At this point we chose the documents with the highest dimensions. The fourteenth supplement was released because the company amended paragraph titled ‘recent developments’ contained in the prospectus. Despite the fact that this documents is one of the shortest, it weights a lot as it contains several pictures. The seventeenth supplement was released because the company amended the following paragraphs: nature of the operations and activities, restrictions on the free transferability of securities, expiration date, terms and conditions of the offer and subscription, risk factors, and reasons of the offer. All the documents are written in French with the exception of the fifteenth, for this reason we analysed this document as well. It was released as a consequence of recent developments, and because it issued a press release comprising new information that have to be made available to the market.

Table 29 – FRANCE (equity supplements)

Equity	Pages	Dim (KB)
14	8	1.1 MB
15	23	588
16	5	310
17	85	3.6 MB
18	39	914
19	4	293
Average	27.3	1134.167

Source 56 - Author's own findings

The third country analysed is Sweden. Over the period 1/12/2017 - 31/10/2018 the Swedish NCA approved 22 supplements to equity prospectuses. They are on average 8-pages long and they weight approximately 600 KB each. At this point we chose the documents with the highest dimensions, the thirty-fifth and the thirty-eighth. Despite being very short, they both weight a lot because of the presence of several images. They are both written in Swedish, therefore it is not possible to analyse them. All the other prospectuses are written in Swedish too, with the exception of documents number thirty-six and forty. The former was needed because of the release of interim reports and as a consequence of the latest financial news released by the company prior to the commencement of the second enrolment period. Therefore, the financial information of the first quarter included in the prospectus has been replaced by that released in the interim period. Supplement number forty was published because of significant changes in the aftermath of the document approval. The company announced earnings and interim financial statements, it provided a non-GAAP outlook of the last quarter of the year, and it finally implemented a restructuring initiative of its operations.

Table 30 – SWEDEN (equity supplements)

Equity	Pages	Dim (KB)	Equity	Pages	Dim (KB)
20	33	981	31	2	66
21	7	646	32	5	653
22	5	190	33	7	740
23	11	785	34	4	470
24	9	112	35	4	1.2 MB
25	4	207	36	7	379
26	5	684	37	4	479
27	6	190	38	10	2.2 MB
28	19	696	39	3	123
29	5	725	40	18	328
30	4	655	41	4	782

Average number of pages 8
Average of dimensions 604.136

Source 57 – Author's own findings

The last country analysed is the UK. Over the period 1/12/2017 - 31/10/2018, the UK NCA (FCA) approved 9 supplements do equity prospectuses. These documents are on average slightly lower than 7-pages long and they weight around 270 KB each. At this point we chose the documents with the highest dimensions. Supplement number forty-nine and fifty were both released as a consequence of the publication of interim financial statements (i.e. for accounting purposes).

Table 31 – UK (equity supplements)

Equity	Pages	Dim (KB)
42	6	178
43	5	37
44	16	240
45	2	202
46	7	216
47	5	106
48	5	103
49	6	968
50	8	356
Average	6.7	267.333

Source 58 – Author's own findings

Table 32 presents several differences among the seven countries analysed. An evident finding is that Ireland, Italy, and Luxembourg did not approve any equity supplement over the period 1/12/2017 - 31/10/2018. Italy exhibits the longest and heaviest debt supplements, with an around of 35 pages each, weighting slightly less than 1 MB. On the contrary, the UK NCA seems to approve the shortest and lightest debt supplements. The latter are 3-pages long and weight approximately 150 KB each. Ordering the countries from those whose NCAs approve short debt supplements to those releasing the longest ones we get: UK, Sweden, Ireland, France, Luxembourg, Germany, Italy. For what concern equity supplements data is available for four countries only. The following table shows that the UK once again approves the shortest and lightest documents, which are slightly more than 6.5-pages long, and weight a bit less than 270 KB. On the contrary, France is the country approving the heaviest and longest documents (at least as compared to the countries whose data is available). The French NCA approves on average equity supplements with 27 pages, weighting more than 1 MB. Ranking the countries following the methodology just explained, we get: UK, Germany, Sweden, and France.

Table 32 – Average number of pages and dimension of debt and equity supplements

	Debt		Equity	
	Pages	Dim (KB)	Pages	Dim (KB)
DE	34.8	728.923	14.1	448.154
FR	19.8	564.314	27.3	1134.167
IE	14.7	301.026	-	-
IT	35.3	996.500	-	-
LU	20.8	304.95	-	-
SE	10	277	8	604.136
UK	3.3	150.732	6.7	267.333

Source 59 – Author's own findings

5.7 Costs of compliance with the Directive

Empirical evidence shows that costs to comply with the directive are high. Equity and non-equity prospectuses cost around 1 million € and 250,000 € respectively. As seen in the previous paragraphs prospectuses and their summaries are long documents, as a consequence legal fees increase the overall expenses by 40% of the compliance costs or more. The drafting and approval process is costly, complicated, and time-consuming. This turns to be particularly true for SMEs, to the extent that some of these expenses are fixed costs not proportionate to the sums raised. Consequently, the costs of drawing up new prospectuses have proportionately a stronger impact

on companies undertaking small issues¹⁶⁷. The *proportionate disclosure regime* introduced by the 2010 directive allows SMEs to draw up prospectuses whose content is curtailed, as well as time and costs required to draw them up. The Centre for Strategy & Evaluation Services made a research on the impact of the prospectus regime on EU financial markets. The center gathered data through surveys submitted to market participants and estimated the costs of drawing up prospectuses. As a result of its analysis, it highlighted that the additional costs of preparing those documents vary from case to case, that is on the basis of the issue typology and amount raised. Therefore, it is difficult to make good valuations. As a result of this survey limited data was available as only twenty respondents provided good estimates of the costs. The respondents themselves suggested that their estimates cannot be generalized. Overall the minimum costs estimated for equity prospectuses range between 1,000 € and 3 million €, with an average of 700,000 €. The maximum costs for equity prospectuses range between 10,000 € and 4 million €, with an average of 1.3 million €. Costs estimated for non-equity prospectuses are substantially lower. The minimum and maximum averages are 57,000 € and 500,000 € respectively. As already said at the beginning, legal fees constitute 40% of the total costs, around 23% of them is represented by internal costs (such as time spent in preparing the document and dealing with administrative issues, regulatory and translation fees, etc.), then followed by audit costs and fees charged by competent authorities representing around 25% of the overall expenses. However, data gathered for those partial expenses is rough too and they still vary from issue to issue¹⁶⁸. In general fees charged by the NCAs are lower than 10,000 € per prospectus (at that time the German and Luxembourg competent authorities asked 6,500 € and 8,000 € for the approval of a base prospectus respectively). Table 33 shows that Equity prospectuses are the most expensive ones as compared to the others, while preparing documents for non-equity issues seems to be considerably less costly (i.e. it covers approximately 7% of the costs for equity prospectuses). Costs to draw up and approve supplements are also high especially if we think that companies often need to release them several times during their lifetime. As a result of this study CSES said that it could not isolate the effect of the prospectus regime from other influences using available data. For this reason figures reported in the table below are comprehensive and not specific. They are rough measures showing the general dimensions of costs but they cannot be considered as extremely precise.

¹⁶⁷ EC_SWD. (2015). *Staff Working Document (2015) 255 - Impact assessment accompanying the document: Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading.*

¹⁶⁸ CSES. (2008). *Study on the impact of the Prospectus Regime on EU Financial Markets - Final report.*

Table 33 – Costs of drawing up prospectuses

Type of prospectus	Average cost
Equity prospectus	912,000 €
Non-equity prospectus	63,000 €
Base prospectus (continuous issue)	145,000 €
Supplement	19,000 €

Source 60 - (CSES, 2008)

More interesting results are those related to total costs of raising capital. The Federation of the European Securities Exchanges gathered data on the cost of IPOs depending on the amount raised. It generally found that the cost of raising capital ranges between 3% and 15% of the amount raised. The estimates are reported in Table 34. According to the FESE companies raising less than 6 million € pay from 10% to 15% of their proceeds, those getting between 6 million € and 50 million € pay an amount ranging between 6% to 10%, those raising amounts between 50 million € and 100 million € pay from 5% to 8% of the proceeds, and issuers getting more than 100 million € pay from 3% to 7.5% of the amount raised. Those figures clearly show that the percentages paid by issuers to comply with the directive decrease the higher the amount raised, thus confirming what predicted theoretically. The cost of capital in European IPOs impacts SMEs (or in general companies undertaking small issues) the most, as the latter are proportionately subject to higher costs than those raising greater amounts.

Table 34 – Cost of capital in European IPOs

Amount raised from the IPO	Cost of raising capital (as a % of the amount raised)
less than EUR 6 million	10 to 15%
between EUR 6 million and EUR 50 million	6 to 10%
between EUR 50 million and EUR 100 million	5 to 8%
more than EUR 100 million	3 to 7.5%

Source 61 - (FESE, 2013)

Similarly, Euronext estimated the average costs of undertaking an IPO to be 7.5% of the total amount raised. It figured out that the total cost of an IPO raising 20 million € or less is around 8.5% of this value (e.g. the cost of an IPO raising 10 million € is 850,000 €). When the deal is worth 1 billion € or more, the cost of raising capital is approximately 3.5% of the amount raised (e.g. the cost of an IPO raising 1 billion € is 35 million €).

Most of the survey respondents highlighted that it is not possible to make evaluations of the precise costs of drawing up prospectuses as there is no typical issuer or circumstances. For this reason the figures reported here above are to be considered as general indications to give an idea of the amounts needed and not as precise calculations.

In 2015, the European Commission made a consultation on the review of the Prospectus Directive during which they found higher estimates. The EBF answer to the consultation presents the results reported in Table 35.

Table 35 - Costs of drawing up prospectuses

Type of prospectus	Average cost
Equity prospectus	2 million € - 4 million €
Non-equity (standalone)	160,000 € - 1.6 million €
Base prospectus	120,000 € - 600,000 €
IPO	1.8 million € - 2.5 million €
Listing prospectus of an already listed issuer	800,000 - 1 million €

Source 62 - (EBF, 2015)

It is now reasonable to look at whether “the extra costs of complying with the Prospectus Directive [are] proportionate to the benefits achieved”¹⁶⁹. When the amount raised is high offering securities to many EU countries is definitely convenient as the high costs of drawing up prospectuses are likely to be offset by the extra liquidity coming from offering securities to a much larger market. On the contrary, issuers of non-equity securities try to undertake issues below the exemption threshold so that they are not required to release prospectuses. They were found to address their offers to qualified investors only. Empirical evidence demonstrated that SMEs seldomly use the passport because of the costs of preparing prospectuses. For those companies the costs of drawing up prospectuses can be so high relative to the capital raised so that this capital market access methodology not feasible.

¹⁶⁹ EC SWD. (2015). *Staff Working Document (2015) 255 - Impact assessment accompanying the document: Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading.*

Conclusions

Such a comprehensive review revealed that the Prospectus Directive 2003/71/EC and the Prospectus Regulations generally meet their objectives in terms of market efficiency, however effectiveness of investor protection is still limited. The presence of unjustified requirements delivers new higher costs and inefficiencies. EU legislators still believe that investor protection is granted by disclosure of detailed information. However, evidence shows that retail investors are not able to fully understand long and complicated documents¹⁷⁰. The strongest criticism on the proposal for Prospectus Regulation was presented by Enriques, a Professor of Corporate Law at the University of Oxford. He basically questioned whether the proposals to reduce administrative burdens and make the prospectus more user-friendly are the real challenges to be handled. He rather proposed a cost-effective way to reshape Prospectus Regulation. For what concerns IPOs and non-exempt secondary offerings, he suggests¹⁷¹: firstly, a requirement that the price of the offer to the public will be no higher than the price set for the offering reserved to institutional investors should be introduced (it is currently just a best practice within the EU); secondly, that the required disclosures should cover the kind of information that securities analysts find relevant rather than working out the information needs of a mythological non-professional prospectus reader; thirdly, unlike in the current framework and in the Commission's proposal, there should be no need for: a) mandating the inclusion in the prospectus of a summary, let alone for detailing its scope, length and contents; b) prescribing which risk factors should be highlighted and which should be omitted; c) laying out detailed rules on how to publish the prospectus; d) imposing any language requirement for prospectuses. Because of the less requirements, issuers would reduce administrative costs and liability risk. Obviously, his view point is not totally shared by all the practitioners and academicians. However, his innovative and outstanding proposals are necessarily going to play a central role in the forthcoming discussions on this topic.

The detailed provisions of the Prospectus Directive left little room for the implementation. The comparative analysis developed in the third chapter reveals that for what concerns content, format, minimum information, omissions, incorporation by reference, publication and advertisements there seem to be no differences among the national legislations. However, the sanctioning instruments under supervisory law and civil laws are yet not well harmonised. Despite the fact that issuers are subject to prospectus liability in almost all the countries analysed, some of them are softer in the application practices. For example the Swedish Penal Code applies seldomly, the UK does not specify the pecuniary sanctions, and the latter in Luxembourg and Germany seem to range between values extremely smaller as compared to the Italian ones. These are factors

¹⁷⁰ Moloney, N. (2010). *How to Protect Investors*. Cambridge University Press.

¹⁷¹ Enriques, L. (2016, May 10). *EU Prospectus Regulation: Some Out-of-the-box Thinking*. Retrieved from Faculty of Law - University of Oxford: <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/eu-prospectus-regulation-some-out-box-thinking>

attracting issuers to get their prospectuses approved in those countries. They are more appealing because, in addition to the lower liability burden, the approval periods are shorter and the bureaucracy is much less intricate than in Italy.

The analysis of data presented in the last chapter of this work aims at assessing whether the Directive and the Regulations have been so far able to enhance market efficiency and investor protection. Data on the overall number of prospectuses approved over the years 2006 – 2017 and the passporting activity over the years 2014 – 2017 suggest that market efficiency has been largely achieved in some countries (e.g. Luxembourg, Ireland) and less in others (e.g. Italy). Luxembourg and Ireland achieved really outstanding results in terms of prospectuses approved, while the Italian trend has experienced a constant decline throughout the years 2007 – 2017. After the initial reduction in the 2009 approvals, some countries like Luxembourg and Ireland have then started recovering. On the contrary, Italian figures have been constantly declining up to the dramatic number of only 77 approvals in 2017. Therefore, the analysis suggests that the Directive was not able to deal with the legal uncertainty brought about by the recent financial crisis, thus resulting in an overall loss of confidence in capital markets. For what concerns the passporting activity, interesting considerations arose. Luxembourg exhibits extremely high numbers in terms of both prospectuses passported in and out. Many issuers want their prospectuses to be approved in Luxembourg because approval fees are low, approval periods are short, bureaucracy is quick, most of the European and international mutual funds shop there and pecuniary sanctions are small. Germany has similarly achieved outstanding results in terms of prospectuses passported in and out. Even though German figures are large, we should take account of the fact that this country is huge, population is big, and the number of companies is high therefore the relative number of prospectuses passported in should be necessarily large. On the other hand, Luxemburg is small and population is low, consequently huge figures cannot be justified following the same reasoning as we did in Germany. Numbers are higher because this country is more appealing. Italy, instead, exhibits insanely small figures in terms of prospectuses passported out because it is not convenient neither for the Italian, nor for foreign companies to get their prospectuses approved there because times of approval are long (this increases the costs of lawyers, accountants and advisors), bureaucracy is not efficient, costs to get prospectuses approved are high and the administrative sanctions may reach unbelievable high amounts. On the contrary, Italian number of prospectuses passported in are high for two main reasons: firstly, because most of the Italian companies ask their prospectuses to be approved in other European countries, and then go back to place them on the Italian market; secondly, because Italy is a country in which most of the products (especially debt-related instruments) are still highly appreciated by retail investors. Italians are great savers, consequently it is still common to invest in low-risk products like bonds. Investor protection has been assessed by looking at the average number of pages of prospectuses and supplements. The

main results follow: Sweden prepares the shortest prospectuses for both equity and debt prospectuses, Germany and Italy approve the longest debt and equity prospectuses respectively. For what concerns supplements, the numbers of those approved in relation to debt prospectuses are clearly higher than those related to equity prospectuses. Equity investments are obviously more volatile and subject to daily fluctuations as compared to debt ones, this means they are less subject to updates reported on supplements. Therefore, the number of supplements released in relation to equity prospectuses are very low. Debt investments are more stable and less volatile as compared to equity. Since maturities are much larger in this type of investment, and clauses are closed way ahead of their deadlines, this type of prospectuses needs to be updated much more frequently. In a long time horizon, the issuer and the issue may be subject to material changes affecting the investors' interests, therefore situations that may be eventually harmful to the investors must be notified thorough supplements. Overall, Italy and the UK exhibit the longest and shortest supplements to debt prospectuses respectively. Lack of data in relation to supplements to equity prospectuses makes the comparison among the countries useless.

Overall, market efficiency has been achieved especially by certain countries, while there is still a lot to do on investor protection. For what concerns prospectus liability and sanctions there are evident disparities to be fixed. Because of all these reasons, the three main goals of Prospectus Regulation (EU) No. 1129/2017 are: reducing administrative burdens for different types of issuers, increasing the relevance of the prospectus and foster harmonization of the EU disclosure rules.

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Executive Summary

Introduction

Prospectus Directive 2003/71/EC main purpose was that of harmonizing the process of drawing up prospectuses among the EU countries, while at the same time promoting market efficiency and investor protection. Thanks to the concept of passporting activity, prospectuses approved in one of the European Economic Area (EEA) countries are recognized as valid in all the others. In principle this clearly allowed to reduce costs considerably, to the extent that companies wishing to raise capital abroad do not necessitate any further approval from the national competent authorities (NCA) of the host Member State. On the contrary, prospectus approval from the home Member State is sufficient to cross-border offers and listings. Over the years difficulties and pitfalls in the previous directives and regulations have been progressively recognized and implemented with other provisions. For this reason, the prospectus regime set forth by the Prospectus Directive 2003/71/EC was later modified by the Prospectus Regulation (EC) No. 809/2004 which was subsequently amended by the Amending Prospectus Directive 2010/73/EU and more recently by the Prospectus Regulation No. 1129/2017. Up to now many improvements have been taken to achieve the directive original objectives, however the process is still not complete. For this reason, the research developed throughout this thesis aims at assessing to what extent market efficiency and investor protection have been actually achieved, which countries proved to be more successful and why, and what are the next steps to be taken to reach them.

I. Prospectus Directive 2003/71/EC vs Prospectus Regulation (EU) No. 1129/2017

Prospectus Regulation No. 1129/2017 maintained most of the provisions reported in the previous directives and regulations, however some major changes have been introduced. Firstly, it raised the exemption thresholds above which prospectuses must be released (8 million €), and below which prospectuses are not mandatory (1 million €). Secondly, it modified the maximum extension of the prospectus summary; with the 2003 Directive it could not be longer than 7% of the length of the document or 15-pages long, now it cannot be longer than 7 pages of A4-sized paper, and it shall be single sided. Thirdly, it introduced the existence of the Universal Registration Document (URD) as an alternative registration mechanism reserved to issuers of securities admitted to trading in regulated markets or in MTFs. Fourthly, it introduced new simplified prospectuses: the simplified disclosure regime for secondary issues and the reduced disclosure for EU Growth prospectus. The former stems from the fact that investors receive a continuous and regulated stream of information. Therefore, in case of secondary issues there is no need to prepare new complete and complex documents, a simplified disclosure regime is rather desirable. The second new simplified prospectus is addressed to Small and Medium Enterprises (SMEs) to facilitate their access to the capital markets. The fifth huge modification brought about by the latest regulation is on the exemptions from the obligation of releasing prospectuses. First of all issuers

of securities (equity and non-equity) fungible with securities already admitted to trading on a regulated market (over a period of twelve months) are exempted from releasing prospectuses if they represent less than 20% of the securities already admitted to trading. Issuers of shares resulting from conversion or exchange of other securities, where the resulting shares are of the same class of the shares already admitted to trading, and they represent less than 20% of the number of shares already admitted to trading are exempted from releasing prospectuses. Issuers of securities offered in connection with a merger or a division are exempted from releasing prospectuses provided that there is a document which is detailed enough and deemed to be equivalent to a prospectus. Therefore, the enlargement of the number of exemptions from the obligation to publish a prospectus, the simplified disclosure regime for SMEs and secondary issuances, and frequent issuers aim at reducing administrative burdens while at the same time increasing the importance of the prospectus as a document.

II. Focus on Prospectus Summary

Prior to the release of the Prospectus Regulation (EU) No. 1129/2017 the Prospectus Summary proved to be difficult to be read and understood by average investors. For this reason the 2017 Regulation modified its content and structure deeply. However, the new rules of the summary are close to the rules to be followed to prepare the KIDs for PRIIPs. This gave birth to intense discussions on how such an overlapping could be solved. Regulation (EU) No. 1286/2014 is on *Key Information Document (KID) for Packaged Retail and Insurance Investment Products (PRIIPs)*. Retail investors are nowadays exposed to a huge variety of investment products, most of which fall in the PRIIPs category. Retail products can be mixed with insurance coverages, thus resulting in products extremely complex to be understood. This means that in the past few years, investors often undertook investments without fully understanding potential risks associated, thus experiencing unprecedented losses. In the aftermath of the financial crisis EU regulators wanted to improve transparency, and this represents the main reason why this regulation was released. In presence of a public offer of securities, the requirement to produce KIDs for PRIIPs and Prospectus Summary goes against the expressed intention of PRIIPs for three main reasons: firstly, it is confusing for investors to receive two summary documents both pretending to give clear and concise information, but at the same time presenting data differently; secondly, it is in contradiction with the main goal of achieving regulatory harmonization to the extent that it creates unequal opportunities between PRIIPs that are subject to the Prospectus Directive and other PRIIPs; finally, preparing two distinct but duplicative short form disclosure requirements raises costs significantly, thus impacting the returns of the issuer, offeror, or persons asking for admission to trading on a regulated market (and indirectly to potential investors), without adding substantial benefits to retail investors who are the final addressees of those documents. This means that information contained in the KID may eventually overlap with that contained in the prospectus

summary. Therefore, with the aim of harmonizing the prospectus regime with the informative obligations in the Regulation (EU) No. 1286/2014, in case in which the KID is mandatory for the specific product typology, the 2017 Prospectus Regulation introduced the possibility to replace the section on the key information on the securities with the KID itself. The main objective of Prospectus Directive is to enhance market fairness, integrity, and investor protection. The latter are generally feasible when disclosure is complete, comprehensive and precise, however recent studies demonstrated that the simple communication of information to the market could result as being insufficient to achieve them all. A central role is played by the methodologies through which information is broadcasted and the way in which it is presented to market participants. Overload information hurdles even professional investors' ability to fully understand prospectus content, while at the same time increasing the costs of drawing them up. Summaries were introduced to make a brief recap of all the main information contained in prospectuses. Despite the length limit, issuers still have enough freedom to implement national legislations in terms of selecting the information they perceive as material. Potential investors are inevitably discouraged from going through the document when it is extremely long and full of information (often irrelevant). Moreover, the fact that they are often written with small characters and the absence of paragraphs do not capture the attention of the readers. These aspects fall within the segment of behavioral finance and have nothing to do with law. However, if the objective of Prospectus Directive is that of enhancing investor protection, they should be necessarily included in market regulations. The CFA institute proposed an innovative template to prepare prospectus summary. It is interesting because it takes account of potential investors' behavioral biases. The CFA institute suggests to put *warnings* at the top of the summary as the introduction and the notions on the issuer do not represent salient information they can be briefly reported next. The subsequent paragraph should be on *key financial information about the issuer*. The risk factors paragraph should be divided in three subsections: firm-specific risk, macroeconomic risk, and risks related to the company's financial position. The risk factors subsections should be developed in this order, and they should be organized into highlighted areas. The institute suggests to pay attention to the colors used to display this kind of information, this means that color intensity should be used to identify the likelihood of each risk. However, the category of each risk factor should be written in plain English as well (i.e. using adjectives like high, medium, low). This section of the summary should contain at most ten risk factors. What is important to highlight is that issuers should report only the most relevant factors and they should not be necessarily ten. The next paragraph is on *key information on the securities*. According to the CFA institute, this section cannot be implemented consistently using behavioral insights. However, it proposes to display the content in tables as much as possible. The section on security-specific risk factors should contain a maximum of five risk factors. The last paragraph is on *key information on the offer*. It deals with how to take advantage of the offer

mainly, therefore there is no much scope for behavioral insights. The main focus is on breaking up the text using as much tables as possible.

III. Implementation of the Directive 2003/71/EC in seven EU countries

With the Directive 2003/71/EC the prospectus regime achieved an extensive harmonization in terms of the requirements for the drawing up and content of the prospectuses for public offers and admission to trading. This means the seven countries analysed generally mirrored the provisions on content, minimum information, format, language, omissions, incorporation by reference (among others) contained in the EU body of legislation. However, the sanctioning level does not seem to be similarly harmonised. The Member States present a number of different sanctioning instruments under supervisory law and also varying sanctions under civil law. Even the prerequisites in terms of prospectus liability seem to be quite disparate. In Luxembourg prospectus liability applies to: issuers, offerors or persons asking for admission to trading on a regulated market, therefore they are responsible for the information reported in the prospectus. Drafting of the prospectus is subject to civil liability, and any infringement of the Act and lack of cooperation with CSSF (Luxembourg) is punished with a fine ranging from 125 € to 125,000 € (it is a matter of administrative sanctions). For what concerns prospectus liability in the UK, issuers and directors share responsibility for equity prospectuses, while for all the other kinds of securities only issuers are responsible. The FSA (UK) does not specify pecuniary sanctions. French and Irish pecuniary sanctions may reach up to 2.5 million €. In Sweden members of the BoD of the issuing company bear prospectus liability, however the Swedish Penal Code applies in serious cases only. In Italy, issuers, offerors, or any guarantor are responsible for the information contained in the prospectus. Intermediaries are liable for false information or omissions that could influence the reasoned decisions of an investor. Fines may reach up to 5 million €. The majority of the Member States have introduced either provisions regulating the maximum fines or their NCA have set a maximum limit. What emerges is that the minimum fine in Italy (25,000 €) can overcome the maximum amount in other Member States. For what concerns private enforcement, civil liability in relation to wrong or incomplete prospectuses does not differ considerably among the Member States. Germany, UK, and Italy have introduced special provisions that can apply along with other general civil law provisions. Countries like France and Sweden rely on their general civil law liability concepts. In terms of deficiencies in a prospectus, German and Italian liability rules on the prospectus apply in presence of material mistakes for valuation purposes. German Law specifies that a reasonable investor must be able to read and understand balance sheet even without above-average expert knowledge. In general it is difficult to determine whether a prospectus is incorrect on the basis of statements made on future events. In Germany incorrect statements are also subject to prospectus liability rules, and statements on future events are incorrect if they are not reasonable or not based on real facts. Similarly, France requires statements on future developments to have a

verifiable foundation. If the prediction is based on intentions (ex. future acquisition of a company) or estimations (ex. future profits), this must be clearly declared in the prospectus. Any given statement must always be accompanied by information on how it was established. In the UK, liability applies if the person to be held liable for an incorrect prospectus was convinced that the statement on future developments was correct, and whether it was assumed that his predictions would prove to be true. Furthermore, in Germany and France investors are considered as claimants if they have already disposed or have not yet disposed of the securities. Under German law this right applies for all the prospectuses and for six months after their publication, irrespective of whether the securities were acquired on primary or secondary markets. In the UK investors who have acquired securities on the secondary market within a certain time frame from the publication of the prospectus are entitled to claim for compensation. In Germany, France and Italy issuers are to be held liable. Sweden does not provide a possibility for claims against the issuer. In Germany those responsible for drawing up and publishing prospectuses may be held liable too. This means that the issuer, the banks issuing the securities and any person upon whose initiative the publication is based may be held liable. The latter encompasses any person with an economic interest in the issuance such as for example major shareholders and banks participating in the issuance. However, German law does not recognize liability of experts (such as lawyers and accountants) involved in the issuance, unless they have a personal economic interest in the process. In the UK issuers, directors, all prospective directors, and any person responsible for drawing up and approving the prospectus are subject to prospectus liability. Hence, risk of liability applies to bodies of the issuer and experts responsible for the prospectus. However, professional advice on the content of the prospectus does not entail liability. All jurisdictions require prospectus liability, in the UK, France, Italy and Sweden negligence is sufficient. Germany has the most strict rules on responsibility. However, in the UK and in Germany if the person subject to prospectus liability is able to prove that he/she truly believed that the information reported in the prospectus were correct and sufficient, that person is exempted from liability. A person does not incur in any liability for loss caused by a statement if he/she satisfies that he/she reasonably believed that the statement was true and not misleading.

IV. IPO process

An IPO is the very first sale of companies' shares to the public and the subsequent listing on a stock exchange. It allows firms to raise capital, speed growth and achieve market leadership. In the US the entire process is divided in ten main steps and it comes to be known as 'value creation journey'. To be listed on the NYSE, a foreign private issuer (FPI) may satisfy either the general listing standards or the Alternative Listing Standards. Issuers (both domestic and FDI) must meet minimum distribution and market value criteria (number of holders of 100 shares or more, number of publicly held shares, aggregate market value of publicly held shares, price at the time of initial

listing), and one of the financial standards (earning test, valuation/revenue test, assets and equity test). The TSE works on five different markets: First Section, Second Section, Mothers, JASDAQ, and Tokyo PRO Market. In the Japanese securities market, the listing requirements are divided in two main groups: Formal Requirements and Eligibility Requirements. The TSE examines the company to check whether it fulfils them both.

V. Data analysis

The analysis is developed around two core areas: market efficiency and investor protection. The former is measured looking at prospectus activity and it has been assessed by looking at: the overall number of approved prospectuses over the years 2006 - 2017, the numbers of equity standalone, non-equity base and non-equity standalone approved prospectuses over the years 2014 – 2017, and passporting activity over the years 2014 – 2017. Investor protection is achieved thorough synthetic but at the same time effective prospectuses, so that they report all the relevant information without including irrelevant one that makes them uselessly longer. It has been assessed by looking at: prospectuses pages and dimensions of the files, supplements pages and dimensions of the files. Data is gathered from different sources and it relates to debt and equity issues only. Let's start looking at the main results achieved in terms of market efficiency. The overall number of prospectuses approved in the seven EU countries experienced a considerable increase in 2006 (Figure 16). During this year, they approved way more than eight-thousand prospectuses all together, thus reaching the trend's peak over the entire period considered. The whole trend drastically plummeted over the years 2007 – 2009, in which they approved less than four-thousand prospectuses. This means that in two years only the financial crises cut more than a half of the approvals recorded prior to this striking event. With the release of the Amending Prospectus Directive 2010/73/EU the total number of approved prospectuses declined even further, by almost one-thousand units, so that this trend steadied around three-thousand. Therefore, it seems reasonable to say that the Amending Prospectus Directive was not able to halt the devastating effects of the financial crisis on prospectus activity. Looking at data disaggregated by country (Figure 16), in 2007 Ireland qualified as the country with the highest number of approved prospectuses (almost three-thousands). In the same year, Luxembourg and the UK exhibited large figures as well, and Italy's number of approvals was not low at all. The financial crisis obviously hit all the countries badly, thus determining a huge drop in the approvals. From 2009 onwards, all countries have been approving less than one-thousand prospectuses (Figure 16). As already said, Germany, France, and Sweden approvals have been quite steady over the twelve years. Their resilience to the crisis highlights the strength and solidity of those economies. Italy, instead, presented a constant decline over the years, until it reached the dramatic low value of 77 approvals in 2017. We can now have a close up to the number of approved prospectuses over the years 2014 – 2017 (Figure 18). Notice that the reader may find some differences in the figures related to the

total number of approvals when comparing Figure 16 and 18. This is due to the fact that data reported in Figure 16 is taken from the last “EEA prospectus activity in 2017”, while that reported in Figure 18 comes from each year’s specific report. What happens is that with the release of the new report ESMA always reviews and updates data published in the previous years, hence there might be slight differences among the aggregated numbers reported in the abovementioned figures. Nevertheless, having a quick look at them it is easy to see that, when different, numbers vary by few units. Since the discrepancies are so small, we can disregard them and focus on the overall trend, that is what really matters to analyse how the EU countries reacted to the release of new directives and general macroeconomic conditions. Going back to the analysis of the total number of approved prospectuses over the years 2014 – 2017, we restricted the time horizon to the last four years because the NCAs were called to send this data to ESMA starting from 2014 (Directive 2014/51/EU). This means that prior to this year no data is available to make a reliable comparison. Ireland and Luxembourg generally exhibit the highest figures. Discrepancies with all the other countries considered are huge, this means they are typically more appealing to all those firms wishing to get their prospectuses approved. One of the main reasons is that legal risks in those countries are much lower than in other European countries like Italy. Apart from the mere number of prospectuses approved, there are other interesting factors that need to be analysed to make comprehensive comparisons among the countries. First of all the dimension of each country in terms of population. Luxembourg is the smallest and less populated country among all those analysed (as a consequence it has got less firms), but it is still that with the highest number of approved prospectuses. Similarly, Ireland is tiny as compared to countries like Germany or France, however most of the prospectuses in the EU are approved there. This means that many companies wish to get their prospectuses approved not in the counties in which their legal offices are placed. This happens for a number of different reasons: first of all because the time needed to screen and approve prospectuses is shorter there, secondly because the fees required by the NCA are lower. The main implications are that in those countries the bureaucracy is more efficient and the competent authorities are less exigent and stringent. All those factors together encourage the companies to ask for approval in Ireland and Luxembourg. In order to gain a more detailed insight on the approval distribution we can look at the total number of equity and non-equity approved prospectuses over the years 2014 – 2017. Figure 19 shows that France and the UK approved the highest numbers of equity standalone prospectuses throughout the four years considered. Figure 20 shows that Luxembourg is an outlier to the extent that its number of non-equity base approved prospectuses never go below three-hundred units. The Italian trend plummeted dramatically over the four years. Figure 21 shows that Luxembourg and Swedish number of non-equity standalone approved prospectuses range between four- and three-hundred, while all the other countries’ figures lower or slightly higher than one-hundred. Italy has been approving a very low number of

non-equity standalone prospectuses, these values never go above fifteen units. Now we can look at data on passporting activity of approved prospectuses. Companies are required to publish a single EU prospectus, approved by their home state NCAs. Figures in Table 9 – 10 do not include supplements, and prospectuses passported to more than one country are counted once, as their main focus is on the activity of the home country. Table 9 is about the prospectuses passported out over the years 2014 – 2017. The very first trend emerging from this table is that Germany and Luxembourg are those with the highest number of prospectuses passported out over the entire period considered. These figures are reasonable because in these countries the time periods to approve prospectuses are short and the costs are inevitably lower. Hence, many issuers go there to approve prospectuses and then ask for a certificate of approval to place the products abroad. Italy, instead, presents the lowest figures throughout the four years investigated. Its numbers are extremely low because it is not convenient neither for the Italian, nor for the other foreign companies to get their prospectuses approved there. Times of approval are long (this increases the costs of lawyers, accountants and advisors), bureaucracy is not efficient, costs to get prospectuses approved are high, all those factors together discourage companies to get their prospectuses approved in Italy, that is why the Italian figures are so small. Table 10 is about prospectuses passported in over the years 2014 – 2017. Once again Germany and Luxembourg passported in way more than two-hundred prospectuses per year over the time frame considered. These figures are justified because they are active economies, hence placing the products there is much easier. Therefore, many issuers wish to access the German and Luxembourg markets. In this case the Italian figures are high for two main reasons: firstly, because most of the Italian companies ask their prospectuses to be approved in other European countries, and then go back to place them on the Italian market; secondly, because Italy is a country in which most of the products (especially debt-related instruments) are still highly appreciated by retail investors. Italians are great savers, consequently it is still common to invest in low-risk products like bonds. Even though German figures are large, we should take account of the fact that this country is huge, population is big, and the number of companies is high therefore the relative number of prospectuses passported in should be necessarily large. What is more interesting to look at are the numbers in Luxembourg. This country is small, and population is low, consequently huge figures cannot be justified following the same reasoning as we did in Germany. Numbers are higher because this country is more appealing. Luxembourg is considered as a good ‘window’ for all companies wishing to raise capital. Most of the European and international mutual funds shop in Luxembourg and Ireland mainly, therefore getting prospectuses approval there means that it is more likely that foreign investors will notice them and decide to subscribe. Moreover, legal risks in those countries are much lower than in other European countries like Italy. This attracts foreign companies because in case in which the issue and/or the issuer face problems that may eventually damage the investor,

judges are way less severe in attributing responsibilities to the issuer. Because of the lower risk they bear, companies want their prospectuses to be passported in countries like Ireland and Luxembourg. Let's start looking at the main results achieved in terms of investor protection. To bring the comparison further, this study considers the length of prospectuses in terms of the number of pages they are made up of, along with the dimension of any given file. Data is filtered using Single Documents for both equity and debt issues. Tallies are made using a sample of twenty prospectuses per issue typology (i.e. equity and debt). All data has been gathered through the ESMA website, where the latter provides direct links to the documents' PDFs. When considering the equity prospectuses of Luxembourg and Ireland the analysis makes reference to eight and three prospectuses respectively due to absence of available data. For what concerns Italy, data is taken from the Consob webpage. Unfortunately, the ESMA database does not allow to filter data on the basis of the issuance's purpose, that is Initial Public Offering or Admission to Trading. However, to make further considerations and a more precise analysis it was necessary to work on a considerable number of documents, and proceeding with such a distinction would make the sample too small to be statistically significant. For all these reasons, prospectuses refer to the both of them. Now we turn our attention on the methodology used to realize the Tables 11 - 17. First of all prospectuses have been downloaded (251 in total), then the Consob IT team developed a programme specifically for such a research, they inserted all those PDF documents, and it finally delivered an excel file reporting the number of pages and dimensions. When analysing the documents individually we bumped in a series of peculiarities it is worth to mention to grant an effective and smooth reading of the following tables. Prospectuses often enclose: the translation of some of the paragraphs in English, series of general attachments or appendices, employee stock ownership plans, the entire auditors' valuation, and financial statements. Moreover, some of them contain a lot of pictures thus increasing the overall dimension of the single PDF file. For this reason, we will mainly focus on the number of pages, but still having a look at the dimension of the files. Leaving aside all those considerations it would not be possible to make any valuable comparison among the documents, as some of the figures might be eventually misleading. Table 18 feature considerable differences among the countries. Ordering the averages of the number of pages of debt prospectuses from the smallest to the highest we get: Sweden, France, Luxembourg, Italy, Ireland, UK, Germany. Ordering the averages of the number of pages of equity prospectuses from the smallest to the highest we get: Sweden, Ireland, France, UK, Luxembourg, Germany, Italy. This is particularly impressive as Sweden is the country approving the shortest debt and equity documents. Prospectuses are often drafted with the objective of addressing potential legal liability rather than to inform investors, for this reason they are extremely long documents. When analyzing the prospectuses in the sample we bumped in a recurrent characteristics common to all the documents and countries. In order to shield themselves from potential liability problems,

issuers insert several pages dealing with the potential risks entailed by the securities offered. At first sight it might seem as a positive feature as it means that the company, by communicating all those risks, is as clear as possible and transparent with potential investors. However, prospectuses length threatens the objective of achieving investor protection. Nevertheless, encompassing too many information of the risks entailed by the investment makes the overall document too difficult to be understood by retail investors, who finally end up reading only the marketing material available on the offer. Information must be rather suitable and appropriate to safeguard them from being attracted into investments they would have not made if they had fully understood the offer. Therefore, long and complex prospectuses result in inefficient investor protection. Another interesting parameter necessary to assess investor protection among the seven countries analysed is represented by the number of supplements the NCAs require the issuers to release. The research has been conducted using the overall number of supplements for equity and debt prospectuses issued between 03/10/2017 and 03/10/2018. The study covers this period because some of the EU countries (such as Ireland and Luxembourg) update their online databases daily, leaving on their websites the approvals made within their borders one year ahead only. Table 19 shows that the numbers of supplements in debt prospectuses are clearly higher than those related to equity prospectuses. Equity investments are obviously more volatile and subject to daily fluctuations as compared to debt ones, this means they are less subject to updates reported on supplements. Therefore, supplements released in relation to equity prospectuses are very low. Debt investments are more stable and less volatile as compared to equity. Since maturities are much larger in this type of investment, and clauses are closed way ahead of their deadlines, this type of prospectuses needs to be updated much more frequently. In a long time horizon, the issuer and the issue may be subject to material changes affecting the investors' interests, therefore situations that may be eventually harmful to the investors must be notified thorough supplements. The overall number of supplements in debt and equity prospectuses is so divergent because the triggers in each typology of contract are different. Table 20 exhibits the percentages of supplements as compared to the overall number of prospectuses approved in any given country. This is useful to understand how EU countries have been impacted by the duty to release supplements, to the extent that numbers in this table clearly show that some of them statistically incurred much more frequently in such a provision as compared to the others. German debt prospectuses come with on average of more than one supplement each while Sweden is the country with the lowest percentage of supplements in relation to the total number of approved prospectuses. The second column of Table 20 suggests that all the seven EU countries require their companies to supplement their equity prospectuses much less frequently. The UK is the country requiring equity prospectuses to be supplemented the most. France and Italy are the countries with the lowest values. Divergences in the percentages are explained by three distinct factors: different implementations of the EU directives into national

law, different pervasiveness of the NCAs, and finally because of the occurrence of events specific for the issuer or issue naturally bringing the necessity of producing supplements. Empirical evidence shows that costs to comply with the 2003 Directive are high. As seen before, prospectuses and their summaries are long documents, and legal fees increase the overall expenses by 40% of the compliance costs or more. The drafting and approval process is costly, complicated, and time-consuming. This turns to be particularly true for SMEs, to the extent that some of these expenses are fixed costs not proportionate to the sums raised. Consequently, the costs of drawing up new prospectuses have proportionately a stronger impact on companies undertaking small issues. The *proportionate disclosure regime* introduced by the 2010 Directive allows SMEs to draw up prospectuses whose content is curtailed, as well as time and costs required to draw them up. In 2008, the Centre for Strategy & Evaluation Services made a research on the impact of the prospectus regime on EU financial markets. The center gathered data through surveys submitted to market participants and estimated the costs of drawing up prospectuses. As a result of its analysis, it highlighted that the additional costs of preparing those documents vary from case to case, that is on the basis of the issue typology and amount raised. Therefore, it is difficult to make good valuations. However, as a result of this study they found that the average cost of: equity prospectuses is 912,000€, of non-equity prospectuses is 63,000€, of base prospectuses is 145,000€, of supplements is 19,000€. In 2015, the EBF answer to the consultation document on the review of Prospectus Directive estimated the cost of equity, non-equity and base prospectuses to range between 2 million € - 4 million €, 160,000 € - 1.6 million € and 120,000 € - 600,000 € respectively. In 2013, the Federation of the European Securities Exchanges gathered data on the cost of IPOs depending on the amount raised. It generally found that the cost of raising capital ranges between 3% and 15% of the amount raised. According to the FESE companies raising less than 6 million € pay from 10% to 15% of their proceeds, those getting between 6 million € and 50 million € pay an amount ranging between 6% to 10%, those raising amounts between 50 million € and 100 million € pay from 5% to 8% of the proceeds, and issuers getting more than 100 million € pay from 3% to 7.5% of the amount raised. Those figures clearly show that the percentages paid by issuers to comply with the Directive decrease the higher the amount raised, thus confirming what predicted theoretically. The cost of capital in European IPOs impacts SMEs (or in general companies undertaking small issues) the most, as the latter are proportionately subject to higher costs than those raising greater amounts. Most of the survey respondents highlighted that it is not possible to make evaluations of the precise costs of drawing up prospectuses as there is no typical issuer or circumstances. For this reason the figures reported here above are to be considered as general indications to give an idea of the amounts needed and not as precise calculations.

Conclusions

Such a comprehensive review revealed that the Prospectus Directive 2003/71/EC and the Prospectus Regulations generally meet their objectives in terms of market efficiency, however effectiveness of investor protection is still limited. The presence of unjustified requirements delivers new higher costs and inefficiencies. EU legislators still believe that investor protection is granted by disclosure of detailed information. However, evidence shows that retail investors are not able to fully understand long and complicated documents. The detailed provisions of the Prospectus Directive left little room for the implementation. The comparative analysis developed in the third chapter reveals that for what concerns content, format, minimum information, omissions, incorporation by reference, publication and advertisements there seem to be no differences among the national legislations. However, the sanctioning instruments under supervisory law and civil laws are yet not well harmonised. Despite the fact that issuers are subject to prospectus liability in almost all the countries analysed, some of them are softer in the application practices. For example: the Swedish Penal Code applies seldomly, the UK does not specify the pecuniary sanctions, and the latter in Luxembourg and Germany seem to range between values extremely smaller as compared to the Italian ones. The analysis of data presented in the last chapter of this work aims at assessing whether the Directive and the Regulations have been so far able to enhance market efficiency and investor protection. Data on the overall number of prospectuses approved over the years 2006 – 2017 reveals that after the initial reduction in the 2009 approvals, some countries like Luxembourg and Ireland have then started recovering. On the contrary, Italian figures have been constantly declining up to the dramatic number of only 77 approvals in 2017. For what concerns the passporting activity over the years 2014 – 2017, Luxembourg and Germany exhibit extremely high numbers in terms of both prospectuses passported in and out. Italy, instead, exhibits insanely small numbers of prospectuses passported out and in respectively. Investor protection has been assessed by looking at the average number of pages of prospectuses and supplements. The main results follow: Sweden prepares the shortest prospectuses for both equity and debt prospectuses, Germany and Italy approve the longest debt and equity prospectuses respectively. The numbers of approved supplements to debt prospectuses are clearly higher than those related to equity prospectuses. Overall, Italy and the UK exhibit respectively the longest and shortest supplements to debt prospectuses. Lack of data in relation to supplements to equity prospectuses makes the comparison among the countries useless. Overall, market efficiency has been achieved especially by certain countries, while there is still a lot to do on investor protection. For what concerns prospectus liability and sanctions there are evident disparities to be fixed.