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To everyone who ever hurt me
because, doing so, they gave me the chance
to learn how to rise from the ashes.
To everyone who ever showed me love
because it is only thanks to this love
that I have always been able to fight.

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Introduzione

Il "*prospetto informativo*" è un documento il cui scopo è fornire informazioni a chiunque desideri investire denaro in titoli per l'emissione dei quali è richiesta la redazione di questo documento. Descrive quantità, qualità, prezzo dei titoli, fornisce informazioni sull'emittente, che passano dall'essere molto importanti a fondamentali nei casi di IPO,[1] come il core business di un'azienda e qualsiasi altra informazione rilevante. La divulgazione di tutte queste informazioni consente ai potenziali acquirenti di valutare la convenienza dell'investimento e i rischi conseguenti.

Generalmente si prevede che i prospetti vengano redatti e pubblicati su base obbligatoria, come ad esempio in base al Diritto Europeo le cui norme richiedono l'elaborazione e la pubblicazione di un prospetto in tutti i casi che rientrano nell'ambito del Diritto Europeo, ad eccezione di alcune situazioni specificamente esentate, rappresentando così un esempio di divulgazione obbligatoria.

L'importanza di una divulgazione preliminare o almeno contestuale, al fine di garantire agli investitori la possibilità di fare una scelta migliore, è dimostrata dall'attenzione dimostrata dalla Commissione come anche dagli organi legislativi di alcuni paesi extra-UE rispetto a queste tematiche. I requisiti che il prospetto informativo deve rispettare, nel caso di offerte al pubblico e di ammissione alla negoziazione in un mercato regolamentato di strumenti finanziari, sono abbastanza dettagliati e sono stati anche sottoposti a varie riforme, sia negli Stati Uniti che negli Stati Membri dell'UE. Ciò è dimostrato dal fatto che, nell'ultimo caso, la disciplina è stata armonizzata si può dire per la prima volta negli anni '80, è stata regolata dal diritto dell'UE con solo alcune prerogative lasciate agli Stati dopo il 2003 e, infine, è diventato un campo quasi totalmente regolato a livello sovranazionale con la riforma del 2017. In effetti, il diritto dell'UE, nella forma della direttiva 2003/71/CE[2] prima e del regolamento 2017/1129[3] e successivamente dei loro atti di esecuzione, ha trattato nel dettaglio quasi tutti gli aspetti della legge sul prospetto.

Essendo, come indicato nel considerando 16 della direttiva 2003/71/CE, uno degli obiettivi della direttiva la protezione degli investitori, ma considerando che "*diverse esigenze di tutela delle varie categorie di investitori e del loro livello di competenza tecnica*" devono essere tenuti in conto, è possibile dedurre che il legislatore, ritenendo l'inadeguatezza di un approccio unico in tutti i casi, ha analizzato situazioni in cui le

[1] IPO sta per "offerta pubblica iniziale", in inglese "initial public offer", nota anche come "quotazione in borsa". È un tipo di offerta pubblica che consiste in un processo, attraverso la quale una società privata viene trasformata in una società pubblica, in cui le azioni di una società vengono vendute agli investitori

[2] DIRETTIVA 2003/71/CE DEL PARLAMENTO EUROPEO E DEL CONSIGLIO del 4 novembre 2003 relativa al prospetto da pubblicare per l'offerta pubblica o l'ammissione alla negoziazione di stru- menti finanziari e che modifica la direttiva 2001/34/CE

[3] Regolamento (UE) 2017/1129 del Parlamento europeo e del Consiglio, del 14 giugno 2017, relativo al prospetto da pubblicare per l'offerta pubblica o l'ammissione alla negoziazione di titoli in un mercato regolamentato, e che abroga la direttiva 2003/71/CE

caratteristiche specifiche dei titoli emessi, dell'emittente o altre circostanze specifiche giustificano un trattamento diverso. Questo ragionamento spiega la presenza di eccezioni, casi che esulano dal campo di applicazione della direttiva, e ancor più di esenzioni, tutte le situazioni che sarebbero state assoggettate al regolamento europeo sul prospetto ma che non rientrano in tali obblighi a causa di una scelta espressa dal legislatore. Queste esenzioni sono varie e hanno subito alcuni cambiamenti nel corso degli anni senza perdere la loro *ratio*. Sono considerati appartenenti alla stessa ragion d'essere i regimi alternativi: regimi che prevedono norme specifiche per far fronte agli obblighi legati al prospetto e che in alcuni casi prevedono persino l'elaborazione, in alternativa, di documenti che differiscono rispetto ad alcuni requisiti e alcune caratteristiche strutturali dal prospetto standard. Le caratteristiche peculiari di questi regimi alternativi sono state adattate alle esigenze di alcuni soggetti: PMI (piccole e medie imprese[4]), titoli emessi da società già ammesse alla negoziazione in un mercato regolamentato o in un mercato di crescita per le PMI, emittenti frequenti ed emittenti di titoli diversi dai titoli di capitale. L'intenzione del legislatore nel senso di sostenere le piccole e medie imprese, che hanno sofferto i costi eccessivi, in termini di denaro e tempo, derivanti dagli obblighi collegati al prospetto, sta prendendo forma negli ultimi anni anche grazie a iniziative legislative europee specificamente dedicate alle PMI.

Nonostante la prima regolamentazione della disciplina del prospetto a livello UE sia arrivata negli anni '80, il primo regime su cui si concentra la trattazione è quello in vigore dal 2003 al 2017. Questo perché l'entrata in vigore della direttiva 2003/71/CE ha determinato grandi cambiamenti e l'unificazione della materia. La direttiva ha organizzato in modo organico tutti gli aspetti relativi all'elaborazione, all'approvazione e alla pubblicazione del prospetto, dando vita a un sistema apparentemente completo, ma con alcune imperfezioni. Nonostante il tentativo di colmare le lacune normative tramite la riforma del 2010, alcuni problemi non trovarono soluzione. Questo è stata una delle principali ragioni dietro alla decisione di dare vita al regolamento 2017/1129. Il presente regolamento ha mantenuto la maggior parte delle principali norme tra quelle ereditate dal regime precedente anche se ha rielaborato un considerevole numero di disposizioni. Le principali modifiche introdotte, per colmare le lacune lasciate nella disciplina della direttiva 2003/71/CE dall'opera riformatrice della direttiva 2010/73/UE,[5] dal regolamento (UE) 2017/1129 sono prese in considerazione al fine di rilevare le differenze tra il regime precedente e quello nuovo. Anche i due atti emanati come integrazione del regolamento sul prospetto nel 2019 e i vari pareri dell'Autorità europea degli strumenti finanziari e dei mercati (ESMA) sono presi in considerazione per far luce.

Lo scopo di questa tesi è fornire una panoramica della regolamentazione del prospetto ai sensi del diritto europeo e delle maggiori modalità di divulgazione alternative previste dalla normativa sul prospetto e non

[4] Una definizione più precisa di PMI è fornita nel secondo capitolo

[5] DIRETTIVA 2010/73/UE DEL PARLAMENTO EUROPEO E DEL CONSIGLIO del 24 novembre 2010 recante modifica delle direttive 2003/71/CE relativa al prospetto da pubblicare per l'offerta pubblica o l'ammissione alla negoziazione di strumenti finanziari e 2004/109/CE sull'armonizzazione degli obblighi di trasparenza riguardanti le informazioni sugli emittenti i cui valori mobiliari sono ammessi alla negoziazione in un mercato regolamentato

solo. L’attenzione viene a concentrarsi sul rapporto tra le nuove tecnologie della raccolta di capitale e le modalità di tutela degli investitori che vengono a svilupparsi nella legislazione europea venendo così ad analizzare le sovrapposizioni con la disciplina del prospetto e le aree grigie in cui vengono trovate varie soluzioni in alternativa. Al fine di comprendere queste dinamiche e poter capire il livello di avanzamento del Diritto dell’Unione su questi temi sono prese in considerazione le norme che trattano tutte le fasi e i requisiti della redazione, dell'approvazione e della pubblicazione di un prospetto, le eccezioni dal campo di applicazione della direttiva, le esenzioni che riguardano specifiche situazioni e le regole che compongono i regimi alternativi, la emergente normativa sul Crowdfunding a livello europeo così come la regolamentazione di questo ultimo fenomeno in vari paesi.

In funzione della trattazione questi argomenti la discussione è stata divisa in tre capitoli.

Il primo capitolo, fornendo un'idea dello sviluppo attraverso gli anni della legislazione europea sul prospetto in generale, offre una panoramica del contesto normativo in cui sono inquadrate le esenzioni e i regimi alternativi, analizzati nel secondo capitolo. Al fine di descrivere lo sviluppo della normativa sono prese in esame le differenze tra la normativa ai sensi della direttiva del 2003 e quella introdotta dal regolamento del 2017.

Dopo una breve esposizione dell'evoluzione storica della legge sul prospetto, viene esaminato il regime ai sensi della direttiva 2003/71/CE prendendo in considerazione, inoltre, l’ambito di applicazione della direttiva e le sue eccezioni, il periodo di validità del prospetto, il formati che il prospetto può assumere, il suo contenuto e le possibili omissioni di informazioni, le procedure di approvazione e pubblicazione.

L'ultima parte del capitolo si concentra sulle principali modifiche introdotte dal regolamento (UE) 2017/1129, analizzando in modo più approfondito alcuni aspetti, che più hanno risentito dell’ondata innovatrice della riforma, come la nuova nota di sintesi del prospetto, il prospetto di base, i fattori di rischio, la pubblicazione del prospetto e il regime degli emittenti stabiliti in paese extra UE.

Il capitolo 2 tratta delle esenzioni dall'obbligo di pubblicazione di un prospetto, il loro sviluppo nel corso degli anni, principalmente i regimi del 2003 e del 2017, concentrandosi sulle principali modifiche introdotte dal regolamento (UE) 2017/1129. Questa analisi è considerata utile al fine di comprendere lo scopo di tali esenzioni. Per quanto riguarda le esenzioni previste della direttiva del 2003, vengono presi in considerazione l'articolo 3, paragrafo 2 e l'articolo 4 della direttiva. Tra quelle previsti dall'articolo 3, paragrafo 2, della direttiva 2003/71/CE si sottolineano le offerte agli investitori che non richiedono protezione giuridica, le offerte di valore limitato e le offerte rivolte ad un numero limitato di investitori. L'articolo 4 è considerato tenendo conto delle differenze tra le eccezioni previste dal primo e quelle previste dal secondo paragrafo di questo articolo.

Per quanto riguarda le esenzioni previste dal regime di regolamentazione del 2017, si descrivono le modifiche cui sono state sottoposte le eccezioni già presenti nella direttiva e le nuove norme introdotte dal regolamento.

Nel secondo capitolo si presta particolare attenzione anche ai regimi alternativi previsti dal regolamento sul prospetto informativo, menzionando anche alcune deviazioni dalla disciplina della direttiva 2003/71/CE. Due regimi di informativa specifici per le PMI e per le emissioni secondarie sono introdotti dal regolamento. I regimi di informativa per le PMI, nel quale si inquadra il nuovo "*Prospetto UE della crescita*", e per le emissioni secondarie[6] sono esaminati per primi. Il terzo regime alternativo preso in considerazione è quello progettato per gli emittenti frequenti, ai quali viene data la possibilità di redigere e pubblicare, sia per le emissioni di titoli di capitale e di strumenti finanziari diversi dai titoli di capitale, ogni anno un nuovo documento, introdotto dal Regolamento sul prospetto, denominato "*documento di registrazione universale*".

Nei primi due capitoli vengono presi in considerazione alcuni aspetti dal punto di vista dell'Autorità europea degli strumenti finanziari e dei mercati al fine di meglio inquadrare i vari argomenti nel contesto europeo.

Mentre i capitoli precedenti offrono una panoramica della normativa sul prospetto e delle sue esenzioni, l'obiettivo del terzo capitolo è invece quello di fornire una valutazione sulla normativa a livello europeo in tema di Crowdfunding. La rassegna delle regole sul prospetto, fornita dai capitoli precedenti, è fondamentale anche per poter comprendere l'importanza della legislazione riguardante il prospetto e dell'informativa in generale rispetto a questo metodo di raccolta del capitale, come analizzato nel terzo capitolo.

Per raggiungere questo obiettivo, il capitolo si apre con un quadro generale sulla realizzazione dell'Unione dei mercati dei capitali. L'analisi di questo obiettivo è rilevante in quanto cornice in cui si sono sviluppati vari interventi normativi, tra cui la riforma del 2017 della normativa sul prospetto informativo e la proposta di regolamento sul Crowdfunding del 2018. Viene inoltre presa in considerazione la realizzazione dell'Unione dei Mercati Digitali e la sua interazione con gli strumenti FinTech, tra i quali Crowdfunding e ICO[7] vengono ricompresi. Il nucleo dell'analisi consiste in un'esposizione dell'attuale normativa in tema di Crowdfunding, con particolare attenzione al tema della protezione degli investitori tramite la pubblicità obbligatoria.

L'analisi si sofferma sull'interazione tra l'attuale normativa sul Crowdfunding e la normativa sul prospetto. Prendendo in considerazione le differenze tra la situazione ante-riforma e post-riforma del 2017. Quindi continua con gli altri testi legislativi dell'Unione applicabili al Crowdfunding con una particolare attenzione rivolta alla Proposta di Regolamento del 2018. Successivamente l'analisi si concentra sulle differenze che

[6] offerte o ammissioni relative a titoli emessi da società già ammesse alla negoziazione in un mercato regolamentato o in un mercato di crescita per le PMI da almeno 18 mesi

[7] ICO sta per "Initial coin offering", letteralmente "Offerta di moneta iniziale". Per una definizione più approfondita vedere il secondo capitolo.

intercorrono tra la regolamentazione del fenomeno in alcuni stati UE e extra-UE. Nello specifico vengono presi in esame Italia, Regno Unito e Stati Uniti d'America e le differenze a livello di ratio e disciplina in generale così come in rapporto alle varie modalità di pubblicità obbligatoria previste. Quindi viene posto l'accento sull'importanza della divulgazione ai fini della riuscita di una campagna di Crowdfunding volendone sottolineare gli effetti positivi riscontrati nella pratica. Le incertezze relative al regime regolamentare delle ICO[8] vengono inoltre affrontate.

Da ultimo si cerca di tirare le somme riguardo all'effettiva attualità del Diritto Europeo rispetto alle nuove tecnologie emergenti nei mercati dei capitali e al livello di incidenza delle ultime riforme al riguardo.

[8] ICO sta per "Initial coin offering", letteralmente "Offerta di moneta iniziale". Per una definizione più approfondita vedere il secondo capitolo.

Overview

The "*prospectus*" is a document aimed at giving information to whoever wants to invest money in the securities for the issuance of whom this document is required. It describes quantity, qualities, price of the securities themselves, gives information about the issuer, which turns from very important to fundamental in IPO[9] cases, such as a company's core business and any other relevant information. All this disclosed information allows potential buyers to evaluate the convenience of the investment and the consequent risks.

Prospectuses are usually drawn and published on a mandatory basis, such as happening under European Law with norms requiring a prospectus to be drawn and published in every case falling under the scope of European Law except some specifically exempted situations, representing so an example of mandatory disclosure.

The importance of a preliminary or at least contextual disclosure of information in order to grant investors the possibility to better make their choice is shown by the fact that all the main legislations have some sort of disclosure regulation. Prospectus requirements for offers to the public of securities and admission of securities to the market are quite detailed and were also subjected to various reforms both in US an EU Member States, being in the last case the regulation somehow harmonised for the first time in the 80s, being regulated by EU Law with some prerogatives left to the states after 2003 and, finally, becoming a field almost totally regulated at a supranational level with the 2017 reformation. EU Law indeed, in the form of Directive 2003/71/EC[10] before and Regulation 2017/1129[11] then and their implementing acts, has been setting out in details almost every aspect of prospectus law.

Being, as stated in Recital 16 of Directive 2003/71/EC, one of the objectives of the Directive is investors' protection, but considering that "*the different requirements for protection of the various categories of investors and their level of expertise*" have to be taken into account, it is possible to deduce that the legislator, not believing that one size always fits all, analysed situations in which specific characteristics of the issued securities, of the issuer or other specific circumstances do justify a different treatment. This reasoning explains the presence of exceptions, cases falling outside the scope of the directive, and even more

[9] IPO stands for "initial public offering", colloquially known as "*going public*". It a type of public offering consisting in a process, through which a privately held company is transformed into a public company, in which shares of a company are sold to investors.

[10] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

[11] REGULATION (EU) 2017/1129 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

of exemptions, all the situations that would have been subject to the European regulation about prospectus but do not fall under these obligations due to an express choice of the legislator. These exemptions are various and have undergone some changes through the years without losing their *ratio*. Considered to belong to the same rationale are the alternative regimes: regimes providing specific rules to face prospectus obligations and even requiring, in certain cases, documents, differing with respect to some requirement and structural characteristic from the standard prospectus, to be drawn as an alternative. The peculiar characteristics of these alternative regimes have been tailored to the needs of some subjects: SMEs (small enterprises[12]), securities issued by companies already admitted to trading on a regulated market or an SME growth market, frequent issuers and issuers of non-equity securities. The intention of the legislator in the sense of supporting small and medium enterprises, that have been suffering the excessive costs, in terms of money and time, deriving from prospectus obligations, is taking shape in the last years also thanks to European legislative initiatives specifically dedicated to SMEs.

The chronological starting point of the dissertation, besides the first regulation of the prospectus regime on an EU level arrived in the '80, is the regime that have been in force from 2003 until 2017. This is because major change and unification of the subject came with the enter into force Directive 2003/71/EC. This Directive organized in an organic way all the aspects about the drawing, approval and publication of prospectuses, giving birth to an apparently comprehensive system with some imperfections. Despite the attempt to filling in the legal loopholes with the 2010 reform some problems stood still. This was one of the main reasons behind the decision to bring Regulation 2017/1129 to life. This Regulation maintains most of the core rules inherited by the precedent regime even though revising a considerable amount of provisions. The main changes introduced to fill the gaps left in prospectus law by Directive 2010/73/EU[13] reformation of Directive 2003/71/EC by Regulation (EU) 2017/1129 are taken into consideration in order to detect the differences between the previous regime and the new one. The two 2019 supplementing acts to the Prospectus Regulation and the opinions of the European Securities and Market Authority (ESMA) are considered too in order to shed some light.

The purpose of this dissertation is to provide an overview of prospectus regulation under European Law and of the main alternative disclosure regimes provided by prospectus law as well as other EU legislative acts. In order to analyse overlaps with prospectus regulation and grey areas filled with various alternative solution, the attention is focused on the interactions between the use of new technologies to raise capital and the investors' protection solutions enacted in European Law. The norms dealing with all steps and requirements

[12] A more accurate definition of SMEs is given in Chapter 2

[13] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

of the redaction, the approval and the publication of a prospectus, exceptions from the scope of the directive, exemptions for some situations and alternatives regimes special rules, emerging Crowdfunding regulation on an European level as well as some national regulations are taken into consideration to fully understand these interactions and the progress made by the European legislation towards these aims.

To deal with these arguments, the discussion has been divided into three chapters.

Chapter 1 gives an overview of the prospectus law in general. The differences between the prospectus regime under the 2003 Directive and the one under the 2017 Regulation is dealt with in this Chapter. Chapter illustrates, providing an idea of the development through the years of prospectus law, the normative context in which the exemptions and the alternative regimes, analysed in Chapter 2, are framed in.

The first part of the chapter describes briefly the historical evolution of prospectus law.

The second one concerns the regime under Directive 2003/71/EC. This part of the chapter analyses, among the others, the scope and the exceptions of the directive, the period of validity of the prospectus, the format the prospectus can assume, its content and the possible omissions of information, the approval and publication procedures.

The latter part of Chapter 1 focuses on the main changes introduced by Regulation (EU) 2017/1129, analysing more deeply the new prospectus summary, the base prospectus, risk factors, the publication of the prospectus and Non-EU issuers regime.

Chapter 2 deals with the exemptions from the duty to publish a prospectus, their development through the years, mainly the 2003 and the 2017 regimes, focusing on the main changes introduced by Regulation (EU) 2017/1129. This analysis is considered to be useful in order to understand the purpose of these exemptions. With regard to the exemptions under the 2003 Directive regime Article 3(2) and Article 4 of the Directive are taken into consideration. Among the ones provided by Article 3(2) of Directive 2003/71/EC stress is laid on offers to investors who do not require legal protection, offers with a limited value and offers to a limited number of investors. Article 4 is considered bearing in mind the differences between the exceptions provided by first and the ones provided by the second paragraph of this article. Indeed, Article 4(1) dealt with offers that, in absence of an exemption, would have been caught under the directive's rules governing public offers, Article 4(2) on the other side concerned securities meant to be admitted to trading on a regulated market. Notwithstanding this difference, many of the operations exempted under Article 4(2) correspond to the ones found in the Article 4(1).

With regard to the exemptions under the 2017 Regulation regime, the modifications the exceptions already present in the Prospectus Directive[14] have undergone are described as well as the new norms introduced by Prospectus Regulation.[15]

In Chapter 2 particular attention is given also to the alternative regimes under Prospectus Regulation, mentioning also some deviations from Directive 2003/71/EC. Two specific disclosure regimes for SMEs and for secondary issuers introduced by the regulation. In the Proposal for the Prospectus Regulation it the disclosure regimes for secondary issuances (offers or admissions concerning securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months) and SMEs are examined at first. Dealing with SMEs alternative regime, the new "*EU Growth prospectus*" is analysed. The third alternative regime considered is the one designed for Frequent issuers to whom is given the possibility to draw up and publish, for equity and non-equity issuances, every year a new document, introduced by the Prospectus Regulation, named "*universal registration document*".

In the first two chapters some aspects from the point of view of the European Securities and Banking Authority are taken into consideration to better frame the various topics in the European context.

While the previous chapters offer an overview of the prospectus law and its exemptions, the aim of Chapter 3 is, instead, to provide an assessment on European Crowdfunding regulatory framework. The overview on prospectus rules, provided by the previous chapters, is also fundamental in order to understand the importance of prospectus, and disclosure in general in relation to this capital funding tool, as analysed in this third chapter.

The starting point of this chapter is a general overview on the realization of the Capital Markets Union. An analysis of this goal is important being the contest in which various reformation, and among them the 2017 one on prospectus law and the 2018 proposed regulation on Crowdfunding, should be framed in. The Digital Markets Union and its interplay with FinTech, especially Crowdfunding and ICOs,[16] is taken into consideration as well. The main focus of the analysis is regulation on Crowdfunding, with particular attention to investors' protection through mandatory disclosure.

The interplay between Crowdfunding regulation and prospectus law is examined taking into account differences between pre and post-reformation prospectus law. The other European legislative acts applicable to Crowdfunding, with a particular focus on the 2018 Proposal, are considered. Subsequently, the analysis focuses on the differences among some EU and non-EU regulations on this FinTech tool. Italy, the United Kingdom and the United States of America are examined highlighting the differences in terms of rationale

[14] Directive 2003/71/E

[15] REGULATION (EU) 2017/1129

[16] ICO stands for "Initial coin offering". For a more accurate definition see Chapter 2.

and discipline in general as well as in relation to various methods of mandatory disclosure provided by these regulations. Then, emphasis is placed on the importance of disclosure in a successful Crowdfunding campaign, providing an overview of the consequential positive effects. The uncertainty linked to ICOs regulation is dealt with in this chapter too.

Ultimately, we try to draw conclusions about how European law is keeping up with new technologies in capital markets and about the relevance of the latest reforms.

Chapter 1

Prospectus Law

Introduction

This Chapter aims at giving an overview of the prospectus law in general. The differences between the regime under Directive 2003/71/EC[17] and the one under Regulation (EU) 2017/1129[18] will be dealt with in this Chapter. The purpose of Chapter 1 is to illustrate, providing an idea of the development through the years of prospectus law, the context in which the exemptions and the alternative regimes, analysed in Chapter 2, are set. A review of these rules is also fundamental in order to understand the importance of prospectus law, and information in general, in relation to Crowdfunding as it will be dealt with in Chapter 3.

1. Historical evolution of Prospectus Law

The first regulation of the prospectus regime at an EU level was enacted in the '80 with the Listing Particulars Directive (LPD)[19] and the Public Offer Directive (POD).[20]

Major change and unification of the subject came with the enter into force of the Prospectus Directive (Directive 2003/71/EC). This Directive organized in an organic way all the aspects about the drawing (included content, format, language and other requirements), approval and publication of prospectuses. This

[17] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

[18] REGULATION (EU) 2017/1129 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

[19] Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing

[20] Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public

comprehensive project took place also thanks to the subsequent introduction of the 2004 implementing Regulation.[21] The Transparency Directive[22] also took a place in the picture requiring disclosure to issuers.

The main reform of the Prospectus Directive, which changed some core provisions and tried to correct some inefficiencies of the system, arrived in 2010 with the amending Directive 2010/73/EU.[23]

Despite the attempt to filling in the legal loopholes with the 2010 reform some problems stood still. This was the main reason to bring Regulation 2017/1129 to life, so called Prospectus Regulation, which revised the great majority of the provisions previously in force, although maintaining most of the core rules inherited by the precedent regime. With its two 2019 supplementing acts the Prospectus Regulation finally appears to become more clearly defined but, still opinions of the European Securities and Market Authority (ESMA) may be coming down to the pike and some further discussion will surely take place some months after the entrance into force of the last and most dispositions.[24]

[21] COMMISSION REGULATION (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

[22] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

[23] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

[24] Last date referred to the entrance into force of the majority of the Prospectus Regulation's dispositions is the 21 of July 2019

2. Prospectus Directive regime

The purpose of Prospectus Directive, as declared in Article 1(1) of the same directive, was *"to harmonise requirements for the 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 situated or operating within a Member State"*. This affirmation is an expression of one of the two principles Directive 2003/71/EC is based on: the maximum harmonisation principle. This principle means that the Prospectus Directive aimed at regulating in an exhaustive way the prospectus disclosure field. The other principle taken into consideration is the home country principle which complemented the harmonization choice. This principle was meant to solve problems relating to the horizontal division of competence among Member States. Even though the directive did not give to the states broad or general powers, it left matters to be decided by national law. A prove of the type of autonomy left in same cases to Member States is Recital 15 of Prospectus Directive providing the possibility for the states (chance also given to a competent authority or an exchange) *"to impose other particular requirements in the context of admission to trading of securities on a regulated market (notably regarding corporate governance)"*, but specifying that the additional requirements eventually *disposed "may not directly or indirectly restrict the drawing up, the content and the dissemination of a prospectus approved by a competent authority"*.

Prospectus Directive, in order to prevent multiplication of regulatory or enforcement efforts among the states of the Union, locates the competence with the home Member State of an issuer.

Recital 10 of the Prospectus Directive affirmed that *"investor protection and market efficiency"* were the aim both of the Directive and of its implementing measures. The objective of investors' protection was dealt with again in Recital 16, but here proportionality also came into play. Recital 16 indeed provided that was *"appropriate to take account of the different requirements for protection of the various categories of investors and their level of expertise"* adding that the *"Disclosure provided by the prospectus is not required for offers limited to qualified investors"*.

The main obligations stemming from Prospectus Directive are three: the obligation to draw up a prospectus, the obligation to seek approval of a prospectus, the obligation to publish a prospectus and compling with rules governing advertising.[25]

[25] Schammo, 2011, pp. 70-75

2.1 Scope of the Directive and exceptions

2.1.1 Scope

The scope of the Directive is defined by few core concepts: admission of securities to trading on a regulated market, offer to the public, transferable securities and finally equity and non-equity securities.

Article 1(1) of Prospectus Directive provided that a prospectus was needed when securities had to be "admitted to trading on a regulated market situated or operating within a Member State". "Regulated market" is a concept created by EU law. A definition can be found in Article 4(1)(14) of MIFID[26] stating that *"Regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non- discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III"*. Briefly it can be affirmed that regulated markets are European markets exposed to the EU securities regulation at all. This concept replaced the *"admission to official listing"* which was present in the Listing Particular Directive.[27]

The second concept, mentioned in Article 1(1) and defined in Article 2(1)(d) of Prospectus Directive, needed to define the scope of the Directive is the concept of an offer to the public. The Public Offer Directive,[28] governing the disclosure requirements to be met drawing a prospectus for public offers, did not manage to define this concept. By contrast, Article 2(1)(d) stated the meaning of "*offer of securities to the public*" to be *"a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries."* This definition is wide on purpose. What was important in the light of this definition was not the medium used but, the fact that the communication contained "*sufficient information on the terms of the offer and the securities to be offered*" and that it made an investor able *"to decide to purchase or subscribe to these securities"*. The only clue, given by the Directive, to interpret the same definition is the specification in the same Article 2(1)(d) requesting to provide "*information on the terms of the offer and the securities to be offered"*. In order to fill the interpretative gap, the Commission gave the Member States

[26] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

[27] Council Directive 80/390/EEC

[28] Council Directive 89/298/EEC

some autonomy in defining the concept of *"sufficient information*", as affirmed in the 3rd Transposition meeting of the Prospectus Directive, and it can be said that Member States used in practice the freedom given to them. With a public offer which "*enable an investor to decide to purchase or subscribe to these securities*" was meant that the communication must be filled with the information necessary to make possible for investors to choose between buying, subscribing the securities or neither of the two options. The meaning of the entire definition had to be considered from an ex post point of view. Both the concepts of "*sufficient information*" and which information "*enable an investor to decide to purchase or subscribe to these securities"* had to be evaluated in the light of the outcome by the competent authorities. The Commission also pointed out that an individual must have some choice whether to accept or not in order to have a public offer in the sense of Prospectus Directive.

In order to define the scope of the Directive the concept of "*securities*" is fundamental too. Article 2(1)(a) defines *"securities"* as "*transferable securities as defined by Article 1(4) of Directive 93/22/EEC*[29] *with the exception of money market instruments as defined by Article 1(5) of* Directive *93/22/EEC*[30]*, having a maturity of less than 12 months. For these instruments national legislation may be applicable*". The definition given by Directive 93/22/EEC was then replaced by the one provided by Article 4(1)(18) of MIFID stating that the meaning of *"Transferable securities"* should be "*those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:*

> *(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*
>
> *(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*
>
> *(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures*".

It has to be noted that Article 2(1)(a) of Prospectus Directive provided also an exception: money-market instruments with a maturity of less than 12 months were excluded from the Directive scope.

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[29] Article 1(4) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field:
"*transferable securities shall mean:*
— shares in companies and other securities equivalent to shares in companies,
— bonds and other forms of securitized debt
which are negotiable on the capital market and — any other securities normally dealt in giving the right to acquire any such transferable securities by subscription or exchange or giving rise to a cash settlement excluding instruments of payment;"

[30] Article 1(5) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field:
"*money-market instruments shall mean those classes of instruments which are normally dealt in on the money market*"

After defining the concept, Directive 2003/71/EC subdivides into equity and non-equity securities. Article 2(1)(d) defined *"equity securities"* as "*shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the afore mentioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer*". *"Non-equity securities"* were defined by reference to the definition of equity securities as *"all securities that are not equity securities*".[31] These definitions had to cope with several instruments with their own characteristics, derivative and hybrid instruments included. For example, convertible securities were treated as equity or non-equity securities, under Prospectus Directive, depending on the fact that the instrument gave or not to its holder the possibility to access to the issuer's capital or to the one of a third-party company. On one hand what was important was only the identity of the issuer of the underlying shares, on the other hand the fact that the decision was completely in the investor's hands or not was irrelevant.[32]

2.1.2 Exceptions[33]

Article 1(2) of Prospectus Directive contained the list of exceptions falling under which securities were outside the scope of the Directive. As a consequence, Member States were free to decide the treatment of these securities under national law. To deal with the cases in which subjects might consider as an advantage being subject to Prospectus Directive regime some opt-in mechanisms were included in the Directive. It is so provided by Article 1(3).

The exceptions contained in Article 1(2) were introduced for different reasons. Some of them, letters (g)(i) and (c), were included to cope with some legal arrangements present in different Member States.

The raison d'être of some others was to be found in the nature of the issuer or the guarantor. Have to be included in this category the securities issued "*by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States*"[34] as well as "*securities unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities*".[35] Also exceptions of securities *"issued by associations with legal status or non-*

[31] Article 2(1)(c) of Directive 2003/71/EC

[32] Schammo, 2011, pp. 78-86

[33] Here "*exceptions*" is used to highlight the distinction between "Securities which fall under one of the exceptions" that "are simply outside the scope of the directive" and securities that would have fallen under the scope of the directive but are not because of specific "*exemptions*". In line with Schammo, 2011, p. 86 and 124

[34] Article 1(2)(b) of Directive 2003/71/EC

[35] Article 1(2)(d) of Directive 2003/71/EC

profitmaking bodies recognised by a Member State, with a view to their obtaining the means necessary to achieve their non-profit- making objectives"[36] and *"units issued by collective investment undertakings other than the closed-end type"*[37] were introduced because of the special nature of their issuer. The last exception linked to the issuer nature is the one provided by Article 1(2)(f) covering "*non-equity securities issued in a continuous or repeated manner by credit institutions*" provided that some conditions are met.[38]

The exceptions belonging to the last category were included because of the size of the offers taken into consideration. Offers of securities falling outside the scope of the Prospectus Directive because of the amount of their consideration were the ones provided by letter (j) and letter (h) of Article 1(2). The first one applied to "*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"*. The amount was raised from €50 000 000 to €75 000 000 by Directive 2010/73/EU. The non-equity securities, with a consideration lower than the specified amount calculated over a 12 months period, had to meet also some additional conditions in order to fall outside the scope of the directive. They both shall not be "*subordinated, convertible or exchangeable*" and "*do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument*".

The second exception of an issuance considered to have a small value was applicable when *"the total consideration for the offer in the Union"* had a value, calculated over a 12 months period, lower than €5 000 000.[39] This provision has been amended as well by Directive 2010/73/EU which raised the amount from €2 500 000 to €5 000 000. This exception has to be considered also in relation to the exemption provided by Article 3(2)(e) of Prospectus Directive. This provision exempted from the obligation to publish a prospectus offers of securities with a total value, calculated over a 12 months period, of less than €100 000. Article 1(2)(h) exception excluded the offers with an amount lower than €5 000 000 not only from the obligation to publish a prospectus but from the scope of the Directive at all. The Member States, as already mentioned, were able to choose the regime for issuances falling under the exceptions so requiring to publish a prospectus as well under national law, but they were not able to do so for offers of securities with a total

[36] Article 1(2)(e) of Directive 2003/71/EC

[37] Article 1(2)(a) of Directive 2003/71/EC

[38] Article 1(2)(f) of Directive 2003/71/EC:

"*non-equity securities issued in a continuous or repeated manner by credit institutions provided that these securities:*

(i) are not subordinated, convertible or exchangeable;

(ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument;

(iii) materialise reception of repayable deposits;

(iv) are covered by a deposit guarantee scheme under Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes;"

[39] Article 1(2)(h) of Directive 2003/71/EC

consideration lower than €100 000 because in this case was expressly prohibited by the Directive. In coordinating the two provisions the result was the possibility for the Member States to require the publication of a prospectus for offers with a value between €100 000 and €5 000 000.[40]

2.2 Validity of the prospectus

Article 9(1) of Prospectus Directive, as amended by Directive 2010/73/EU, provided that a prospectus should have a period of validity of 12 months *"after its approval"* provided when necessary that it is updated by a prospectus summary. It has to be mentioned that the original text of Article 9(1) indicated as starting moment of the prospectus validity the publication of the prospectus.[41]

2.3 Format

2.3.1 Common format

Article 5(3) of the Prospectus Directive[42] provided two possibility to draw up a prospectus: as a single document or as a tripartite one. When the prospectus was drawn as a tripartite document the required information should be divided "*into a registration document, a securities note and a summary note"*. About the content of these documents the same Article stated that "*The registration document shall contain the information relating to the issuer. The securities note shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market*". The summary should contain the essential characteristics of the issuer and associated risks and any eventual guarantor and the securities.[43]

2.3.2 Base prospectus

Prospectus Directive provided also a special alternative format, known as base prospectus, mainly used in the debt market for offering programmes. This format allowed the issuer to set most of the disclosure in the base prospectus and so to save time. The Directive gave the possibility, to the issuer, the offeror or the person asking for the admission, to draw, instead of a standard prospectus, a base prospectus *"containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market"* when issuing

"(a) non-equity securities, including warrants in any form, issued under an offering programme;

[40] Schammo, 2011, pp. 86-89

[41] "A prospectus shall be valid for 12 months after its publication"

[42] Article 5(3) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[43] Breslin and Rabinowitz, 2004, pp.93-94

(b) non-equity securities issued in a continuous or repeated manner by credit institutions,

(i) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient coverage for the liability deriving from securities until their maturity date;

(ii) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions ."[44]

The first paragraph of Article 2a of the Regulation implementing the Prospectus Directive[45] specified the categories of information to be contained in the base prospectus and also provided that the degree of flexibility by which information might be given, in the base prospectus or in the final terms, was explained in Annex XX of the same Regulation. The categories, as amended in 2012, were:

"(a) 'Category A' means the relevant information which shall be included in the base prospectus. This information cannot be left in blank for later insertion in the final terms;

(b) 'Category B' means that the base prospectus shall include all the general principles related to the information required, and only the details which are unknown at the time of the approval of the base prospectus can be left in blank for later insertion in the final terms;

(c) 'Category C' means that the base prospectus may contain a reserved space for later insertion for the information which was not known at the time of the approval of the base prospectus. Such information shall be inserted in the final terms."

Issuers had the possibility to include additional information too on a voluntary basis. That additional information was limited to a list included in Annex XXI, as specified by Article 22(4) of the implementing Regulation, containing *"Example(s) of complex derivatives securities as referred to in recital 18 of the Prospectus Regulation"; "Additional provisions, not required by the relevant securities note, relating to the underlying"; "Country(ies) where the offer(s) to the public takes place"; "Country(ies) where admission to trading on the regulated market(s) is being sought"; "Country(ies) into which the relevant base prospectus has been notified"; "Series Number"* and *"Tranche Number".*

The second paragraph of Article 5(4) added that the information provided in the base prospectus The information given in the base prospectus had to be supplemented, if needed, in accordance with Article 16 of

[44] Paragraph 1 of Article 5(4) of Directive 2003/71/EC

[45] Article 2a(1) of Commission regulation (EC) No 809/2004

the Prospectus Directive, requiring a supplement to the prospectus where a *"significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later",* with further information on the securities and on the issuer. Article 2a(2) of the implementing regulation confirmed that, when the condition provided by Article 16(1) of Prospectus Directive were met, a supplement was required.

A specific characteristic of the base prospectus was the possibility not to include in it the finale terms considering that they might be unknown. The final terms had to be included, if not contained in the base prospectus, in a supplement or with a separate document *"they shall be made available to investors, filed with the competent authority of the home Member State, and communicated by that competent authority to the competent authority of the host Member State(s) as soon as practicable upon the making of a public offer and, where possible, before the beginning of the public offer or admission to trading."* The amended version of the Article also gave to the competent authority of the home Member State the task to communicate to ESMA those final terms. However, *"The final terms shall contain only information that relates to the securities note and shall not be used to supplement the base prospectus"*.[46]

Considering omitting information as a not uncommon fact for base prospectuses, special rules on the omission of Information were applicable to these documents. The relevant provision contained in the implementing Regulation was Article 22(2) which provided that *"The issuer, the offeror or the person asking for admission to trading on a regulated market"* had the possibility to *"omit information items which are* (were) *not known when the base prospectus is* (was) *approved and which can* (might) *only be determined at the time of the individual issue".* But Article 5(4) of the Prospectus Directive, as amended in 2010 and with a slightly modified text after the further amendment brought by Directive 2014/51/EU, clarified that, as far as the final terms of an offer were concerned, these terms, if missing, should be communicated, once become available, to the authorities of the host state.

2.4 Prospectus summary

The aim of the prospectus summary was to provide investors with an overview of essential information. It represented an integral part of a prospectus, both of a single or a tripartite prospectus, or a base prospectus.[47] In this second case only one summary was needed even if different types of securities were

[46] Last paragraph of Article 5(4) of Directive 2003/71/EC as amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014

[47] Article 26(1) of the COMMISSION REGULATION (EC) No 809/2004:

issued.[48] Intended mainly to inform retail investors, giving them short explanation about the issued securities, who usually do not have the same finance skills as wholesale investors to analyse every aspect of the prospectus. Considering this as the purpose of the document it is easy to understand why there was no need to prepare a summary under the EUR 100,000 (Wholesale) regime for non-equity securities, unless the issuer chose to do so or it was required a summary to be translated into the official language of a Member State whose law provided so. If the decided to produce an overview section in the prospectus, that section might not be entitled *"summary"* unless the issuer complied with all disclosure requirements of the amended Prospectus Regulation. With the 2010 reform the rules governing summaries have been revised with the intention to make summaries more useful for retail investors. Anyway, the rules themselves became more complex than before but the new rules suggested too that the legislative intent was for the summary to provide in an easily accessible and understandable way key information to investors. The amended directive set out the first set of rules, the additional measures were adopted at Level 2 amending the implementing REGULATION (EC) No 809/2004.[49] The Amending Directive contained in Article 2(1)(s) a defined term of **"***key information*" that has to be included in the summary. Key information is *"essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the securities that are being offered to them"* adding than a list of elements that the key information shall include.[50] The list was non-exhaustive given the wording of the Article.

"*Where an issuer, an offeror or a person asking for the admission to trading on a regulated market chooses, according to Article 5 (4) of Directive 2003/71/EC to draw up a base prospectus, the base prospectus shall be composed of the following parts in the following order:*

1. *a clear and detailed table of contents;*
2. *the summary provided for in Article 5 (2) of Directive 2003/71/EC;*
3. *the risk factors linked to the issuer and the type of security or securities covered by the issue(s);*
4. *the other information items included in the schedules and building blocks according to which the prospectus is drawn up*."

[48] Article 26(6) of the COMMISSION REGULATION (EC) No 809/2004:

"*Where a base prospectus relates to different securities, the issuer, the offeror or the person asking for admission to trading on a regulated market shall include a single summary in the base prospectus for all securities. The information on the different securities contained in the summary, however, shall be clearly segregated*."

[49] Schammo, 2011, pp. 99-101

[50] "*In light of the offer and securities concerned, the key information shall include the following elements:*

(i) a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position;

(ii) a short description of the risk associated with and essential characteristics of the investment in the relevant security, including any rights attaching to the securities;

(iii) general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror;

(iv) details of the admission to trading;

(v) reasons for the offer and use of proceeds;"

The Amending Directive introduced a new requirement providing that a summary *"shall be drawn up in a common format in order to facilitate comparability of the summaries of similar securities and its content should convey the key information of the securities concerned in order to aid investors when considering whether to invest in such securities"*.[51] The amended Directive insisted on standardization in order to make it easier for investors to compare summaries. Details of the proposed format are set out in the First Delegated Regulation, which includes a revised Article 24 of the Prospectus Regulation regarding the content of the summary, the base prospectus and the individual issue. It stated that *"A summary shall contain the key information items set out in Annex XXII. Where an item is not applicable to a prospectus, such item shall appear in the summary with the mention 'not applicable'".* Article 24 also changes the requirements for the length of a summary (previously 2,500 words) by specifying that, despite the fact that *"the length of the summary shall take into account the complexity of the issuer and of the securities offered"* the summary must not *"exceed 7 % of the length of a prospectus or 15 pages, whichever is the longer"*.

Furthermore *"It shall not contain cross-references to other parts of the prospectus"*, it provided that the order of the sections is mandatory and that the summary *"shall be drafted in clear language, presenting the key information in an easily accessible and understandable way"*.

It has to be clarified that the aim of the summary was not to allow investors to decide whether to invest or not. This decision had to be made in light of the full prospectus under the Prospectus Directive regime. The directive, as amended, confirmed these basic principles stating that the summary is meant to *"aid investors when considering whether to invest in such securities"*.[52]

When defining the meaning of key information, the directive also stressed on the fact that this information is merely intended to enable investors *"to decide which offers of securities to consider further"*.[5354]

A number of the directive's original provisions on summaries survived even though the changes regarding summaries were significant. The directive was still forbidding, as mentioned, a person to incorporate information by reference into summaries.[55] The rules about summary language requirements survived.[56] The provisions dealing with the translation of summaries, in cases where capital is raised abroad, were kept too.[57] The Prospectus Directive still contained provisions requiring the summary to include a number of warnings. In order to address the risk that investors might focus only on the summary without reading the full prospectus, the summary had to state that was meant to be read "*as an introduction to the*

[51] Article 5(2) of Directive 2003/71/EC

[52] Ibidem

[53] Article 2(1)(s) of Directive 2003/71/EC

[54] Fischer-Appelt, 2014, pp. 99-101

[55] Article 11(1) of Directive 2003/71/EC

[56] Article 5(2) of Directive 2003/71/EC

[57] Article 19 of Directive 2003/71/EC

prospectus"[58] and that investment decisions should be based on the prospectus "*as a whole*".[59] It had also to be stated that "*where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under the national legislation of the Member States, have to bear the costs of translating the prospectus before the legal proceedings are initiated*".[60] The summary had to make clear the limits of liability for information disclosed in the same document.[61] It has to be considered too that the annexes of the Prospectus Directive remained substantially the same for what concerned summaries, but being not meant to be binding and being non-exhaustive[62] their influence on the summary drafting depended on the issuer's willingness to comply with the rules themselves.

2.5 Incorporation by reference

Before the adoption of the Prospectus Directive, incorporating information in a prospectus by simply making a reference to a document containing the relevant information was possible in some Member States. Incorporation by reference started to be allowed under Article 11 of the Prospectus Directive. "*The aim of incorporation by reference, as provided for in Article 11 of Directive 2003/71/EC, is to simplify and reduce the costs of drafting a prospectus; however this aim should not be achieved to the detriment of other interests the prospectus is meant to protect*".[63] The interests mentioned are the ones of issuers and investors which the Prospectus Directive, as did elsewhere, attempted to balance while drawing the incorporation by reference regime. In its amended form, the Directive stated that published documents, which have been approved or filed with the home state competent authority pursuant to the Prospectus Directive or the Transparency Directive[64] might be incorporated by reference.[65] Information contained in a prospectus or base prospectus, fulfilling all the above mentioned requirements, might also be incorporated by reference into a new prospectus or in a new base prospectus.[66] In addition, the Regulation implementing the provisions of the Prospectus Directive included an open-ended list of documents whose content might be fully or partially incorporated by reference.[67] It was also possible to incorporate information found in a registration

[58] Article 5(2)(a) of Directive 2003/71/EC

[59] Article 5(2)(b) of Directive 2003/71/EC

[60] Article 5(2)(c) of Directive 2003/71/EC

[61] Article 5(2)(d) of Directive 2003/71/EC

[62] Schammo, 2011, pp. 99-101

[63] Recital (30) of COMMISSION REGULATION (EC) No 809/2004

[64] Directive 2004/109/EC

[65] Article 11(1) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[66] Article 28(1)(5) of COMMISSION REGULATION (EC) No 809/2004

[67] Article 28(1) of COMMISSION REGULATION (EC) No 809/2004:

"*Information may be incorporated by reference in a prospectus or base prospectus, notably if it is contained in one the following documents:*

1. *annual and interim financial information;*

document by reference into a base prospectus.[68] "*The issuer, the offeror or the person asking for admission to trading on a regulated market may incorporate information in a prospectus or base prospectus by making reference only to certain parts of a document, provided that it states that the non- incorporated parts are either not relevant for the investor or covered elsewhere in the prospectus*".[69]

Incorporation by reference have been subjected to a number of conditions and restrictions. Information to be incorporated by reference needed to have been included in a published document either approved or filed with the home competent authority pursuant to Directive 2003/71/EC or Directive 2004/109/EC.[70] Article 11(1) of the Directive also provided that the information to be incorporated by reference had to be *"the most recent available to the issuer"* and it had also to be information that has been published "*previously or simultaneously".* This means that the Directive did not allow future documents to be incorporated by reference.

In order to ensure that incorporation by reference would not prejudice the quality and clarity of the disclosure, the implementing regulation also required *"offerors or persons asking for admission to trading on a regulated market"*, when incorporating by reference information, to *"endeavour not to endanger investor protection in terms of comprehensibility and accessibility of the information"*.[71] The Prospectus Directive and its implementing regulation also sought to promote disclosure clarity through other means too, for example by mandating that *"When information is incorporated by reference, a cross-reference list must be provided in order to enable investors to identify easily specific items of information"*,[72] or excluding the possibility to incorporate information by reference in summaries.[73] Moreover, the rules governing the language requirements of the prospectus have been applied to incorporation by reference too.[74] Last but not least, it has to be recalled that incorporation by reference of information was not an exception of the

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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. *earlier approved and published prospectuses and/or base prospectuses;*
6. *regulated information;*
7. *circulars to security holders*"

[68] Article 26(4) of COMMISSION REGULATION (EC) No 809/2004

[69] Article 28(4) of COMMISSION REGULATION (EC) No 809/2004

[70] Article 11(1) of Directive 2003/71/EC

[71] Article 28(5) of COMMISSION REGULATION (EC) No 809/2004

[72] Article 11(2) of Directive 2003/71/EC

[73] Article 11(1) of Directive 2003/71/EC

[74] Article 28(2) of COMMISSION REGULATION (EC) No 809/2004

uppermost disclosure principle of the Directive which requires, among other things, that information to be laid out in the prospectus had to be *"presented in an easily analysable and comprehensible form"*.[75]

2.6 Omission of information

For a piece of legislation, whose aim was to promote "*the protection of investors*" and to give information which "*provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets"*,[76] allowing issuers to omit information from the prospectus was clearly a sensitive matter. Broad and unconditional provisions allowing issuers and competent authorities to exclude information items would not have been fitting nor with the principles laid down in the Prospectus Directive and in its implementing Regulation nor with their objectives. But, considering that full disclosure may not always be possible or desirable some good reasons for allowing issuers to omit information have been taken into consideration. The outcome of the balancing, stricken in the Directive between these different concerns and interests, is that information can only be omitted as a matter of exception. It has to be noted that the rules governing omissions often used undefined concepts or terms as the expression *"seriously detrimental"* referred to a certain disclosure, raising questions of interpretation, and it can be derived from the fact that the rules governing omissions were exceptions to two overriding principles - the principle of full disclosure and the one of maximum harmonization - of the Directive that these terms or concepts had to be interpreted strictly.

The grounds for omitting information, under the Prospectus Directive, were: the unavailability of information, the disclosure was not in the public interest, or was seriously detrimental to the issuer or not important, the information was deemed to be inappropriate.

The first ground provided in Article 8(1) of the Directive was *"unavailable information"*, the Article dealt with the situation in which *"the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus"* allowing this omission but requiring the Member States to ensure *"(a) the criteria, and/or the conditions in accordance with which the above elements will be determined or, in the case of price, the maximum price, are disclosed in the prospectus; or (b) the acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the final offer price and amount of securities which will be offered to the public have been filed"*. The Prospectus

[75] Article 5(1) of Directive 2003/71/EC and Recital (30) of COMMISSION REGULATION (EC) No 809/2004

[76] Recital (18) of Directive 2003/71/EC:

"*The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus*."

Directive did not express a preference for one of these two arrangements but provided them as alternatives. Article 8(1) also required the information on the offer price and amount of securities, once become available, to be *"filed with the competent authority of the home Member State and published in accordance with the arrangements provided for in Article 14(2)".* It has to be noted that during the 2010 revisions of the directive, the legislature missed the opportunity to make an adjustment, similar to the one made in relation to base prospectuses,[77] to the provisions governing the omission of information.

The second category of grounds to omit disclosure of information under Prospectus Directive were related to disclosures "*contrary to the public interest"*,[78] "*seriously detrimental to the issuer*"[79] or "*of minor importance*".[80] The task to "*authorise the omission from the prospectus of certain information provided for in this Directive or in the delegated acts referred to in Article 7(1)*"[81] was attributed to the competent authority of the Member State. This authority had the possibility to define, being no definition of "*public interest*" in the Prospectus Directive, whether the omission was a matter of public interest or not. Dealing with disclosure "*seriously detrimental to the issuer*", the same authority was entitled to authorise a person to omit the information in question "*provided that the omission would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer, offeror or guarantor, if any, and of the rights attached to the securities to which the prospectus relates"*.[82] Finally, the possibility for a home state authority to authorize the omission of "*information of minor importance*" (unimportant information) might be, under Article 8(2)(c) of the Directive, "*only for a specific offer or admission to trading on a regulated market" and under the requirement not to be "such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any"*.

The third ground for omitting information under the Prospectus Directive was the case in which exceptionally certain information, required to be included in the prospectus under the Directive regime, was "*inappropriate to the issuer's sphere of activity or to the legal form of the issuer or to the securities to which the prospectus relates*".[83] In this case, at the condition not to prejudice the proper information of investors, the prospectus had to contain information equivalent to the one required. Article 8(3) also added that "*If there is no such information, this requirement shall not apply*".

For sake of completeness it has to be said that the 2010 reform added to Article 8 paragraph 3a which dealt with the case of securities guaranteed by a Member State and gave the possibility "*to omit information about*

[77] See Article 5(4) of Directive 2003/71/EC and subparagraph 2.3.2 of this Chapter

[78] Article 8(2)(a) of Directive 2003/71/EC

[79] Article 8(2)(b) of Directive 2003/71/EC

[80] Article 8(2)(c) of Directive 2003/71/EC

[81] Article 8(2) of Directive 2003/71/EC

[82] Article 8(2)(b) of Directive 2003/71/EC

[83] Article 8(3) of Directive 2003/71/EC

such guarantor", while drawing the prospectus, to the issuer, the offeror or the person asking for admission to trading of these guaranteed securities.

Some rules allowing information items to be omitted from a prospectus were contained also in the implementing Regulation. An information item or information deemed to be equivalent if not "*pertinent to the issuer, to the offer or to the securities to which the prospectus relates*" might be omitted under Article 23(4) of the Regulation. When exactly information had to be considered not pertinent remained an open question even if the topic has been discussed and some guidance has been given by CESR. Anyway, the control applied by the home state authority gave some safeguards.[84]

It has been discussed previously in this Chapter the possibility to omit unknown information in base prospectuses.[85]

2.7 Prospectus supplements and withdrawal rights

Article 16(1) of the Prospectus Directive provided that an issuer had to publish a prospectus supplement containing every "*significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later*". It also added that the supplement should be approved by the home member state regulator *"in a maximum of seven working days"* and subsequently "*published in accordance with at least the same arrangements as were applied when the original prospectus was published*".

Article 16(2) granted investors who have already agreed to purchase or subscribe for the securities before the supplement was published the right "*to withdraw their acceptances*" if certain requirements were met. The right was granted only when the "*prospectus relates to an offer of securities to the public*" and not in the case of prospectuses prepared only in connection with an admission to listing, "*provided that the new factor, mistake or inaccuracy referred to in paragraph 1 arose before the final closing of the offer to the public and the delivery of the securities*" even though the provision provided for the possibility for the issuer or the offeror to extend that period, the right is "*exercisable within two working days after the publication of the supplement"*, "*The final date of the right of withdrawal*" had to "*be stated in the supplement*".

Article 16(3) stated that "ESMA shall develop draft regulatory technical standards to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the

[84] In this sense Schammo, 2011, p. 111

[85] See subparagraph 2.3.2 of this Chapter Article 22(2) of COMMISSION REGULATION (EC) No 809/2004

prospectus requires a supplement to the prospectus to be published". The authority submitted its Final Report in 2013[86] after a consultation on draft regulatory technical standards concerning situations which generally might trigger the requirement to publish a supplement to the prospectus. Among the various affirmations ESMA clarified that "*the content of the supplement should be that which is necessary to supplement all information that is affected in the prospectus by the situation which triggered the supplement and which is reasonably identifiable at the time of drafting of the supplement*". ESMA set out and submitted to consultation a list of ten situations in which issuers, offerors or persons asking for admission to trading should have been always required to draw up and publish a supplement.[87] Thanks to the result of the consultation on this topic the authority drew in Article 2 of its Draft Regulatory Technical Standard, contained in Annex V of ESMA Final Report, a final list of nine situations, considered to be always significant in the context of securities issuance, where a supplement to the prospectus was always required. The authority considered a case-by-case assessment to be required when dealing with other situations.[88]

2.8 Content

When dealing with the information content of a prospectus there were three broad factors to be considered: the disclosure requirements of the Regulation No 809/2004; the general disclosure principle provided in Article 5(1) and liability risks.[89]

Starting with the first factor, it has to be said that the main instrument determining the disclosure content of a prospectus was the implementing Regulation. It laid down detailed disclosure requirements. The Prospectus Directive defined only broad disclosure principles mainly in Article 7. In particular the second paragraph of Article 7 provided a list of factors to be taken into consideration when elaborating the various models of prospectuses. These principles were implemented by the European Commission when adopting the Level 2 implementing regulation.[90] The disclosure requirements were given the form of specific information items, set out in various schedules, requiring an issuer to disclose information on various items such as, for example, risk factors, property and equipment, research activities, *et cetera*. The Recital 2 of the implementing regulation stated that "*Depending on the type of issuer and securities involved a typology of minimum information requirements should be established corresponding to those schedules that are in practice most frequently applied*". The schedules should be based on the information requirements provided

[86]ESMA, 2013. Final Report "Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus", 2013/1970

[87] Fischer-Appelt, 2014, p. 106

[88] https://www.esma.europa.eu/document/draft-regulatory-technical-standards-specific-situations-require-publication-supplement-0

[89] Schammo, 2011, p. 90

[90] ESMA is now also empowered to prepare draft implementing technical standards 'in order to ensure uniform conditions of application of the delegated acts adopted by the Commission'. See Article 7(4) as amended in 2010

by the International Organization of Securities Commissions ('IOSCO') in its "Disclosure Standards for cross-border offering and initial listings"[91] (part I on Disclosure Standards) and on the existing schedules of the Consolidated Admissions and Reporting Directive (CARD).[92]

After the adoption of the International Financial Reporting Standards (IFRS) as the common EU financial standards the Regulation required historical financial information to be prepared in accordance with these principles.[93] Article 7 of Prospectus Directive, Recital (2) and Arts 1(2), 2(1), 3, 22 and 23 of the implementing Regulation referred to these information items as minimum information requirements.[94] That was not meant to be a reference to the level of harmonisation. In fact, as far as the disclosure requirements were concerned, the maximum harmonisation nature of the Prospectus Directive was very obvious. That is because of the Regulation was stating that the authority of the home state generally had not the possibility to ask for information items, which were not found in the regulation, to be added to a prospectus.[95] Even though this rule was subject to a certain number of adjustments and derogations. For wholly new kinds of securities for which the Regulation No 809/2004 did not provide appropriate disclosure requirements, competent authorities were given discretion.[96] For these new types of securities, authorities, after receiving the notification from the issuer, the offeror or the person looking for admission to trading, had discretion, under Article 23(3), only to the extent that the type in question had *"features completely different from the various types of securities mentioned in Annex XVIII"* and only *"if the characteristics of this new security"* were *"such that a combination of the different information items referred to in the schedules and building blocks provided for in Articles 4 to 20"* might not provide an appropriate solution.[97] Meanwhile, for securities which, albeit not identical, are similar to several types of securities, the Regulation allowed the issuer, the offeror or the person looking for admission to trading to make adjustments saying that the subject should *"add the relevant information items from another securities note schedule provided for in Articles 4 to 20 to the main securities note schedule chosen"* and that this addition should be done *"in accordance with the main characteristics of the securities being offered to the public or admitted to trading on a regulated market".* [98] An information item may also, occasionally, be omitted where such an item (or any equivalent information) is deemed not to be *"relevant to a particular security and thus may be inapplicable in some specific cases"*[99] or *"pertinent to the issuer, to the offer or to the securities to which the prospectus relates,*

[91] International Organization of Securities Commissions, *"International disclosure standards for cross-border offerings and initial listing by foreign issuers",* September 1998

[92] Directive 2001/34/EC of the European Parliament and of the Council of 28 May on the admission of securities to official stock exchange listing and on information to be published on those securities

[93] In this sense Schammo, 2011, p. 91

[94] Article 7 of Directive 2003/71/EC, Recital (2) and Arts 1(2), 2(1), 3, 22 and 23 of the implementing Regulation

[95] Article 3 second subparagraph and Article 22(1) second subparagraph of COMMISSION REGULATION (EC) No 809/2004

[96] Article 23(3), Recital (23) of COMMISSION REGULATION (EC) No 809/2004

[97] Article 23(3) of COMMISSION REGULATION (EC) No 809/2004

[98] Article 23(2) of COMMISSION REGULATION (EC) No 809/2004

[99] Recital (24) of COMMISSION REGULATION (EC) No 809/20

that information may be omitted".[100] Finally, following an amendment in 2007,[101] a new exception was added to the Regulation, introducing Article 4a, in order to deal with issuers having a *"complex financial history"*[102] or *"having made a financial commitment"*[103] that is deemed to be significant.[104] In relation to these issuers, a competent authority is empowered to ask for items of financial information, which relate to another company that would not otherwise be disclosed by the issuer, to be added to the issuer's registration document. The Regulation was stating these items to *"be deemed to relate to the issuer"*.[105] Certain base requirements on the disclosure that competent authorities can require were provided in Article 4a(2). Competent authorities were required to inform the Commission if they chose to exercise their discretion and depart from the schedules drafted in the Regulation.[106] Competent authorities might ask for *"adapted information"* also in relation to certain types of issuers which, because of the nature of their activities, benefitted from an exceptional treatment under the regime.[107] The Commission had to be informed, also in this case, if a competent authority decided to ask for adapted information.[108] These adjustments and derogations to the prospectus disclosure requirements of the Regulation No 809/2004, not being open-ended and providing procedural or substantive requirements when used, did not undermine the general principle of maximum harmonisation. Information items might be omitted *"By way of derogation of Articles 3 to 22"*, as stated in Article 23(4), only if the information item *"required in one of the schedules or building blocks referred to in 4 to 20"* or any equivalent information was deemed not to be *"pertinent to the issuer, to the offer or to the securities to which the prospectus relates"*.[109]

The Annexes to the Regulation set out the necessary minimum disclosure in respect of different classes of registration document such as shares, both retail and wholesale debt and derivative securities, asset backed securities, securities issued by member states, third countries and their regional and local authorities.[110]

The second factor affecting the information content of the prospectus, under Directive 2003/71/EC, was the disclosure obligation of Article 5(1) of the same Directive. This Article stated, in broad and general terms,

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[100] Article 23(4) of COMMISSION REGULATION (EC) No 809/2004

[101] Commission Regulation (EC) No 211/2007 of 27 February 2007 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment [2007] OJ L 61/24.

[102] For a definition of an issuer "*having a complex financial history*" see Article 4a(4) of the implementing regulation

[103] For a definition of an issuer "*having made a financial commitment*" see Article 4a(5) of the implementing regulation

[104] Article 4a(1) of COMMISSION REGULATION (EC) No 809/2004

[105] Ibidem

[106] Article 23(3) of COMMISSION REGULATION (EC) No 809/2004

[107] Examples are property, mineral and investment companies, scientific research companies, start-ups and shipping firms, see Article 23(1), Recital (22) and Annex XIX of the implementing regulation

[108] Article 23(1) of COMMISSION REGULATION (EC) No 809/2004

[109] Schammo, 2011, pp. 90-92

[110] Breslin and Rabinowitz, 2004, p. 96

that the prospectus must include all information which, *"according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market"* was necessary for investors *"to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities"*. Moreover, the last statement of this paragraph provided that the information should be presented *"in an easily analysable and comprehensible form"*. Notwithstanding the apparent contrast between this open-ended provision and the ones contained in the implementing regulation, not allowing competent authorities to require information items to be added to a prospectus if these items were not dealt with in the Regulation, there was no real contradiction at all. Article 5(1) had three functions: it was useful in order to interpret the provisions of the Regulation or the provisions of the Directive itself dealing with the same matter; Article 5(1) was also supposed to guide issuers and their advisers when making decisions about the information to be disclosed under each disclosure item, in relation to this function it has to be noted that issuers were allowed to add *"additional information going beyond the information items"* if additional disclosure was deemed to be *"appropriate to the type of securities or the nature of the issuer involved"*;[111] last function of Article 5(1) was to inform investor about the level and extent of the disclosure to be expected.

The third and last factor to be analysed was the liability risk. This risk, having a consistent influence on the determination of the extent and amount of disclosure issuers were prepared to provide, has generally been seen as the main factor to be taken into consideration for issuers and their advisers. Notwithstanding its importance, liability risk might lead to excessive levels of disclosure with a potential loss of clarity in the prospectus formulation. It has to be considered, given the incidence of this factor, that the Directive posed a certain onus on competent authorities, when scrutinizing and approving prospectuses, to ensure comprehensibility of the disclosure.[112] Given that excessive levels of disclosure can have a detrimental effect on the comprehensibility of the prospectus. It followed the necessity for competent authorities to be able to address the problem of a potentially detrimental excessive amount of disclosure even though the same authority might have been sometimes reluctant to address this problem being them concerned about their own liability risk.[113]

2.9 Approval by home competent authority

Article 13(1) of the Prospectus Directive stated: "*No prospectus shall be published until it has been approved by the competent authority of the home Member State*". The subsequent paragraphs provided the procedure for the approval and the linked communications.[114] Letter (q) of Article 2(1) of the Prospectus

[111] Recital (5) of COMMISSION REGULATION (EC) No 809/2004

[112] Article 2(1)(q) of the Directive 2003/71/EC

[113] Schammo, 2011, p. 93

[114] Article 13(2)(3)(4)(5) of the Directive 2003/71/EC

Directive gave the meaning of "*approval*" to be "*the positive act at the outcome of the scrutiny of the completeness of the prospectus by the home Member State's competent authority including the consistency of the information given and its comprehensibility*". Letter (m) of the same Article disposed that the meaning of "*home Member State*" has to be intended as:

"*(i) for all Community issuers of securities which are not mentioned in (ii), the Member State where the issuer has its registered office;*

(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, as the case may be. The same regime shall be applicable 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;

(iii) for all issuers of securities incorporated 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 after the date of entry into force of Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC 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 and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC 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, as the case may be, subject to a subsequent election by issuers incorporated in a third country in the following circumstances:

— *where the home Member State was not determined by their choice, or*

— *in accordance with Point (1)(i)(iii) of Article 2 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market*".

Point (iii) of this definition was so modified by Directive 2013/50/EU to bring the Prospectus Directive in line with the amendments of the Transparency Directive.

Providing this definition Article 2(1)(m) subsequently gave the possibility to identify the competent authority of that Member State. It is possible to better understand what was actually meant by "competent authority" looking at the Recital 37 of the Directive. In this Recital it was stated that "*In each Member State one single competent authority should be designated to approve prospectuses and to assume responsibility for supervising compliance with this Directive*" it was also given a possibility to designate more than one authority provided that only one would have assumed "*the duties for international cooperation*". The Recital added that "*Such an authority or authorities should be established as an administrative authority and in such a form that their independence from economic actors is guaranteed and conflicts of interest are avoided*".

The Directive identified the home Member State of the issuer as the one in the best position to regulate the issuer. This home country principle, introduced by the Prospectus Directive, replaced a different situation previously regulated under the Listing Particulars Directive[115] and the Public Offer Directive.[116] In the Listing Particulars Directive competence was settled according to territorial jurisdiction[117] instead of on the home state principle. Moreover, the Prospectus Directive no longer included separated provisions dealing with jurisdictional competence in case of use of the passport system. Under the Listing Directive regime when an issuer was willing to use the mutual recognition system of the same Directive the provisions dealing with the recognition affected the distribution of competence. When an issuer was looking for listing at least in two Member States, including the one where the issuer's registered office was, the Directive attributed the competence in favour of the latter.[118] The Public Offer Directive included a similar provision, but the rules were slightly more complicated.[119]

In Prospectus Directive it might be found only one set of rules - provided by Article 2(l)(m) and (n) - determining the home Member State of an issuer and the host Member States. These rules were differentiating between the type of securities offered to the public or admitted to trading and their denomination in order to determine competence. For non-equity securities with a denomination per unit of at least € 1,000 the Directive provided the possibility to choose a home Member State, and so the authority, among state of the issuer's registration office; the one where the regulated market, on which the securities were going to be admitted, was located; or the Member State on where the securities were offered to the public.[120]

[115] Council Directive 80/390/EEC

[116] Council Directive 89/298/EEC

[117] Under this regime issuers submitted their listing particulars to the competent authority of the Member State where was situated or operating the stock exchange on which they intended to list.

[118] Article 24 of Directive 80/390/EEC

[119] Article 20(1) Directive 89/298/EEC

[120] Article 2(1)(m)(ii) of Directive 2003/71/EC

For any other type of securities not falling under the abovementioned provision, comprised equity securities, being the home Member State identified as "*the Member State where the issuer has its registered office*"[121] regardless of the place where the securities were offered or admitted to trading, a person had no possibility to choose. The same rules governing competence were applied to base prospectuses.[122]

2.10 Single passport

Under the Prospectus Directive the approval of a prospectus by the home Member State authority granted to the issuer a single passport to be used in all other Member States for a period of 12 months. The same prospectus might be used for the public offer or admission to trading in any number of states of the Union, at the condition that ESMA and the competent authority of each host state have been notified by the authority of the home state and that an approval certificate and a copy of the prospectus were delivered to the host state authority,[123] together with a translation of the summary of the prospectus in the official language of the host Member State when applicable this additional requirement. The host competent authority might not impose approval or administrative procedures regarding prospectuses, but it could anyway inform the home Member State about the need for new information required to be specified in a supplementary prospectus and had also the possibility to impose additional requirements regarding admission to trading but, even doing so, it might not restrict in any way the drawing up, content or dissemination of an already approved prospectus. The mutual recognition process was improved in a considerable way compared to the previous directives. Before the entrance into force of the Prospectus Directive the previous regime allowed host member states to impose the translation of the prospectus and also to require the inclusion of additional market specific information.[124]

After the 2010 reform the Directive presented a new obligation for the competent authority of the home Member State. The amended version of the Prospectus Directive required the authority of the home Member State to notify the issuer, at the same time as it notifies the competent authority of the host Member States, that a certificate of approval of a prospectus has been issued. The aim of this provision is clearly making it clear to issuers the moment when a notification actually has been made.[125]

[121] Article 2(1)(m)(i) of Directive 2003/71/EC

[122] Schammo, 2011, pp. 117-118

[123] Article 17(1) of Directive 2003/71/EC

[124] Breslin and Rabinowitz, 2004, pp. 91-92

[125] Fischer-Appelt, 2014, pp. 111-112

2.11 Publication

The nature of the publication as a fundamental requirement under Prospectus Directive regime was stated in Article 3(1) of the Directive providing that Member States should not allow anyone to make offers of securities to the public within their territories "*without prior publication of a prospectus*". Article 14 dealt with the publication of the prospectus. The first paragraph of this Article provided that after the approval of the prospectus "*the issuer, the offeror or the person asking for admission to trading on a regulated market*" had to accomplish various obligations "*as soon as practicable and, in any event, at a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or the admission to trading of the securities involved*". Under the Directive regime these obligations concerned the document had to be "*filed with the competent authority of the home Member State*", made "*accessible to ESMA through the competent authority*" and also "*made available to the public*". Article 14(1) also added a specification referred to the case of "*an initial public offer of a class of shares not already admitted to trading that is to be admitted to trading for the first time*" stating that in this case the prospectus had to be made available "*at least six working days before the end of the offer*".

The Directive listed in Article 14(2) a number of alternative means for publishing a prospectus. A prospectus might be considered available to the public "*when published either:*

(a) by insertion in one or more newspapers circulated throughout, or widely circulated in, the Member States in which the offer to the public is made or the admission to trading is sought; or

(b) in a printed form to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents; or

(c) in electronic form on the issuer's website or, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents; or

(d) in an electronic form on the website of the regulated market where the admission to trading is sought; or

(e) in electronic form on the website of the competent authority of the home Member State if the said authority has decided to offer this service."

These methods did not represent perfect alternatives. It has to be considered that any home Member State should require the prospectus to be published also electronically, in accordance with point (c), by the issuer who already published it in a material form, according to letter (a) or (b).[126] Before the 2010 reform Member States had the possibility to choose to require or not ("may require") the publication in an electronic form while after it they had no choice ("shall require"). It has to be considered the opposite situation that is when,

[126] Article 14(2) second subparagraph of Directive 2003/71/EC

in case of a prospectus made available in electronic form, investors had the possibility to ask for a paper copy and receive it free of charge.[127] Another amendment introduced by the 2010 reform was the substitution of the word "*and*" with the word "*or*" in Article 14(2)(c). Even though substituting a single word could look like a small change, in this case it introduced a choice between electronic publication on the issuer's or on financial intermediary's website, whereas before the amendment it had to be published on both sites in case this was the chosen method.[128]

The abovementioned rules were applicable to all formats but there were some additional provisions for specific situations. The first is the case of "*a prospectus comprising several documents and/or incorporating information by reference*" Article 14(5) provided the possibility "*for the documents and information making up the prospectus" to be published and circulate separately at the condition that the said documents have been made "available, free of charge, to the public, in accordance with the arrangements established in paragraph 2*". Furthermore, each document had to "*indicate where the other constituent documents of the full prospectus may be obtained*". The other additional rules were about base prospectuses. Considering the fact that the final terms of an offer might not be contained in these prospectuses and being consequently published separately there was the possibility for the final terms and the base prospectus to be published with different methods[129] and this is the ratio of the provisions, contained in the implementing regulation, requiring the publication method of the final terms to be disclosed in the final terms.[130]

The purpose of some provisions of the Prospectus Directive and its implementing Regulation had the purpose of ensuring access to the prospectus and integrity if the information disclosed. Examples are: the possibility for home Member States to "*require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public*" provided by Article 14(3); the duty of the competent authority of the Member State "*to publish on its website over a period of 12 months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved in accordance with Article 13*" provided by Article 14(4) of Prospectus Directive; ESMA too had to "*publish on its website the list of prospectuses approved in accordance with Article 13*"as required by Article 14(4a);[131] Article 14(6) required "*The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public*" to be "*at all times be identical to the original version approved by the competent authority of the home Member State*" in order to protect the integrity of the disclosure.

[127] Article 14(7) of Directive 2003/71/EC

[128] Fischer-Appelt, 2014, p. 111

[129] Article 33 of COMMISSION REGULATION (EC) No 809/2004

[130] Article 22(5) of COMMISSION REGULATION (EC) No 809/2004

[131] In the two last mentioned cases, "if applicable, a hyperlink to the prospectus published on the website of the issuer, or on the website of the regulated market" must be included in the lists. See Article 14 (4)(4a) of Directive 2003/71/EC

2.12 Advertisement

Article 2(9) of the implementing Regulation provided the definition of "advertisement" stating that it meant *"announcements:*

(a) relating to a specific offer to the public of securities or to an admission to trading on a regulated market; and

(b) aiming to specifically promote the potential subscription or acquisition of securities".

As a consequence of this definition a communication made outside the scope of a public offer or an admission to trading might not be considered to be a form of advertisement.

The implementing Regulation also listed, in Article 34, various means suitable for the distribution of advertisement. In this non-exhaustive list of means were included telephone, television, radio, seminars, printed matter, electronic mail, fax *et cetera*.[132]

The Prospectus Directive provided some broad principles about advertisement contained in Article 15. Paragraph (2) of this Article clarified the aim of advertisement stating that it should "*state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it*". The third paragraph of the Article affirmed that advertisement had to be "*clearly recognisable as such*" and, in order to assure clarity, it required the information so disclosed not to be inaccurate or misleading. Moreover, in order to avoid contrasts and confusion between the information included in the prospectus and the information distributed through advertisement, Article 15(3) also required the latter to be consistent with the former in case of a prospectus already published or, in case of a prospectus published subsequently, consistence was demanded with the information required to be in the prospectus. The Directive stressed on consistent information extending the scope, in the fourth paragraph of the Article, of the consistence requirement with prospectus information to "*all information concerning the offer to the public or the admission to trading on a regulated market disclosed in an oral or written form, even if not for advertising purposes*". Article 15(5), the only paragraph applicable to cases not covered by the obligation to draw up a prospectus,[133] tried to avoid a non-equal treatment among investors requiring any material information disclosed selectively among qualified investors or special categories of investor to be communicated to all other qualified investors or special categories to whom the offer is exclusively addressed as well. In order to comply with this last provision, the abovementioned information should be "*included in the prospectus or in a supplement to the prospectus*". Analysing this provision, it has to be noted that cases exempted from the obligation to publish a prospectus did not fall indeed outside the scope of the Directive and so triggered anyway the obligation to disclose relevant information in order to protect investors.

[132] See Article 34 of COMMISSION REGULATION (EC) No 809/2004 for the complete list

[133] See Article 15(1) of Directive 2003/71/EC

2.13 Language

Article 19 of the Prospectus Directive provided the different language and translation requirements applicable the various offers depending on where the offer to the public or the admission to trading was sought. For offers to the public made or admission to trading on a regulated market sought only in the home Member State, the prospectus had to be drawn up in a language accepted by the competent authority of that state.[134] For offers made or admission to trading sought in one or more Member States excluding the home Member State, then the prospectus had to be either in a language accepted by the host Member States' authorities or "*in a language customary in the sphere of international finance*". Competent authorities of the host Member States had only the possibility to require a translation of the Summary into their official languages. For scrutiny by the home competent authority, the prospectus was required to be "*either in a language accepted by this authority or in a language customary in the sphere of international finance, at the choice of the issuer, offeror or person asking for admission to trading, as the case may be*".[135] In contrast, for offers made or admission to trading sought in one or more Member States including the home Member State the prospectus had to be drawn up in a language accepted by the home state authority and either in a language accepted by the host Member States authorities or in a language customary in the sphere of international finance. In this case too each host authority might ask for a translation of the Summary into its official language.[136] Finally it has to be mentioned Article 19(4) which provided simplified language rules for high denomination non-equity securities ("*whose denomination per unit amounts to at least EUR 100 000*") falling under the wholesale regime. Where admission to trading on a regulated market was sought in respect of these debt securities, the prospectus might be drawn either in a language accepted by the home and host states authorities or in a language customary in the sphere of international finance. In order to have the possibility to require a translation of the summary in this case Member States had to specify it in their national legislation.

2.14 Non-EU issuers

One of the distinctive traits of the Prospectus Directive was the fact that its provisions were applicable to companies incorporated in a EU Member State and to "*third country issuers*" (i.e. issuers outside the EU) that wished to raise capital in the European Union by way of a public offer or seeking admission for their securities to trading on a Member State's regulated market. As extensively discussed above, the Directive required, when applicable, a prospectus to be prepared, approved and published according to its provisions and to the ones contained in its implementing Regulation. But when dealing with third country issuers the

[134] Article 19(1) of the Directive 2003/71/EC

[135] Article 19(2) of the Directive 2003/71/EC

[136] Article 19(3) of the Directive 2003/71/EC

Prospectus Directive regime provided a special set of arrangements. For example, they might not have to comply with the common EU disclosure items or they might instead rely in certain cases on third country prospectus documentation for a public offer or an admission to trading on a EU regulated market, provided that the third country requirements were considered to be equivalent to European ones. Equivalence provisions are increasingly common in EU law. Their emergence reflects a growing awareness among policy makers that financial markets no longer operate in isolation. All these provisions might be considered as falling under a broader concept of "*equivalence-based regulation*".[137]

Talking about the equivalence-based regulation, in the prospectus field. The first notable provision was about financial reporting. In this field, EU requirements were based on international standards, the so-called at first "*International Accounting Standards*" (IAS) and subsequently "*International financial Reporting Standards"* (IFRS), which became applicable within the European regulatory, space after their endorsement at EU level, acquiring the denomination of EU IFRS. Historical financial information had to be prepared in compliance with EU IFRS as a consequence of these developments. Notwithstanding this trend, a choice, in order to limit the impact of the adoption of these standards as EU common standards on third country issuers, was made in drawing the amendments of the implementing Regulation. Article 35(5) and (5a) of the Regulation provided that third country issuers had the possibility to continue drawing up historical financial information in accordance with accounting standard of certain selected third countries, standards called "*third country GAAP*", on a temporary or indeed permanent basis.[138] These two paragraphs were added to Article 35 after the first assessment of the Commission about the equivalence of third countries GAAP to EU IFRS.

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[137] Schammo, 2011, p. 143

[138] 35(5) of COMMISSION REGULATION (EC) No 809/2004:

"*From 1 January 2009, third country issuers shall present their historical financial information in accordance either with one of the following accounting standards:*

(a) International Financial Reporting Standards adopted pursuant to Regulation (EC) No 1606/2002;

(b) International Financial Reporting Standards provided that the notes to the audited financial statements that form part of the historical financial information contain an explicit and unreserved statement that these financial statements comply with International Financial Reporting Standards in accordance with IAS 1 Presentation of Financial Statements;

(c) Generally Accepted Accounting Principles of Japan;

(d) Generally Accepted Accounting Principles of the United States of America.

In addition to standards referred to in the first subparagraph, from 1 January 2012, third country issuers may present their historical financial information in accordance with the following standards:

(a) Generally Accepted Accounting Principles of the People's Republic of China;

(b) Generally Accepted Accounting Principles of Canada;

(c) Generally Accepted Accounting Principles of the Republic of Korea."

The second arrangement concerned employee share schemes. The second subparagraph of Article 4(1), after the 2010 reform, extended the exemption from producing a prospectus, provided in Article 4(l)(e) of the Prospectus Directive for companies "*with their office or registered office in the Union*", to "*a company established outside the Union*" with its securities not admitted to trading on an EU regulated market but "*admitted to trading either on a regulated market or on a third-country market*", in case the third country market benefitted from a finding of equivalence. A more in-depth analysis of this provision can be found in Chapter 2.

Finally, the third provision was Article 20 of the Prospectus Directive. Following a finding of equivalence under Article 20, a third country issuer had the possibility to use a third country prospectus when seeking to raise capital in the European Union. Actually Article 20(1) provided that the competent home authority of the Member State of issuers having their registered office in a third country might approve a prospectus, made for an offer to the public or for admission to trading, even if drawn up in accordance with the legislation of a third country, *"provided that:*

(a) the prospectus has been drawn up in accordance with international standards set by international securities commission organisations, including the IOSCO disclosure standards;

(b) the information requirements, including information of a financial nature, are equivalent to the requirements under this Directive".

The second paragraph of the same Article was dealing with offers to the public or admissions to trading on a regulated market "of securities, issued by an issuer incorporated in a third country, in a Member State other than the home Member State" stating that the requirements provided by Articles 17, 18 and 19 of the Directive should apply to this situation. Moreover Article 20(3) declared the necessity of equivalence criteria and implementing measures, stating that a third country was able to ensure the equivalence of prospectuses drawn up in that country's territory with the Prospectus Directive, to be established by the Commission. As abovementioned the Commission provided its first equivalence assessment, which led to the amendment of Article 35 of the implementing Regulation, in 2008.

3. Main changes introduced by Prospectus Regulation

The Prospectus Regulation,[139] which reformed the prospectus regime, entered into force on July 20, 2017 and became applicable in three tranches:

1. the first group of provisions, become applicable from July 20th, 2017, regards "*points (a), (b) and (c) of the first subparagraph of Article 1(5) and the second subparagraph of Article 1(5)*"[140] i.e. the first three exceptions, provided by the first subparagraph of Article 1(5),[141] from the obligation to publish a prospectus in relation to the admission to trading on a regulated market when it is sought for offers lower than certain thresholds and the cases in which "*The requirement 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 as referred to in point (b) of the first subparagraph shall not apply;*"[142]

2. the second group of provisions, which became applicable from July 21st, 2018, is composed by Article 1(3) and Article 3(2) i.e. provisions regarding the exemption from the obligation to publish a prospectus for offers to the public lower than certain thresholds;[143]

3. all the other provisions became applicable from the July 21st, 2019.[144]

In addition, Article 49(3) states that "*Member States shall take the necessary measures to comply with Article 11, Article 20(9), Article 31, Article 32 and Articles 38 to 43 by 21 July 2019*".

[139] REGULATION (EU) 2017/1129, see note n 2

[140] Article 49(2) of REGULATION (EU) 2017/1129

[141] "*(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;*
(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, subject to the second subparagraph of this paragraph;
(c) securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/ EU;"

[142] Second subparagraph of Article 1(5) of REGULATION (EU) 2017/1129

[143] Article 49(2) of REGULATION (EU) 2017/1129

[144] Ibidem

There are other relevant documents in order to complete picture of the prospectus regime under Prospectus Regulation. At first it has to be considered the ESMA Final Report "*Technical advice under the Prospectus Regulation.*"[145] covers three main areas, previously subject of three ESMA consultations:

- "*the format and content of the prospectus*"[146] including information about the content and the format of the base prospectus and the final terms, the minimum information required for the universal registration document and the reduced information requirements for secondary issuances;
- "*the content, format and sequence of the EU Growth prospectus*",[147] dealing also with its specific summary;
- "*the scrutiny and approval of the prospectus*"[148] and its constituent parts with additional information on the filing and the review of the universal registration document.[149]

The two implementing regulations approved in 2019 have to be taken into consideration too.

The first one must be viewed within the broader context of the regulatory technical standards necessary in order to "*understand the prospectus such as key financial information in the summary, publication of the prospectus, data for classification of prospectuses, supplements to the prospectus, advertisements, and notification portal*".[150] The Prospectus Regulation requires ESMA to develop regulatory technical standards (RTSs) in order to have some of the technical details of the new rules. The authority answered with its Final Report "*Draft regulatory technical standards under the Prospectus Regulation*" of 17 July 2018. Moreover, the Commission was also empowered to adopt such draft RTSs by Articles 10 to 14 of Regulation 1095/2010.[151] The commission provided its technical standard in the first act implementing Prospectus Regulation.[152]

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[145] ESMA, 2018. Final Report "*Technical advice under the Prospectus Regulation*", ESMA31-62-800

[146] ESMA, 2018. Final Report "*Technical advice under the Prospectus Regulation*", ESMA31-62-800, p. 8

[147] Ibidem

[148] Ibidem

[149] Richter, 2018

[150] Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301. Brussels, 14.3.2019 C(2019) 2022 final.

[151] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84-119).

[152] Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and

The objectives of the second implementing act are to illustrate the information that issuers must include in the prospectus, and more specifically in all types of prospectuses, both if it is drawn up as a single document or as separate documents, and to make certain that national competent authorities of the EU Member States and individuals making public offers or seeking for admission on regulated markets can consistently interpret and apply the technicalities linked to the new prospectus rules.[153]

After this brief overview it is possible to analyse the main changes introduced by the 2017 Prospectus Regulation into prospectus law.

3.1 Scope of the prospectus obligation and exceptions

Article 1 of the Prospectus Regulation consolidates all articles in the Prospectus Directive dealing with the scope of the prospectus requirement. In particular, Article 1(4) and (5) set out a number of exemptions ("*circumstances in which an offer of securities to the public or an admission of securities to trading on a regulated market is outside the scope of the requirement to publish a prospectus*")[154]. Most of the provisions on scope remain unchanged but, new thresholds are set down in Article 1(3) and Article 3(2), of "*€ 1 000 000*" and the optional one of "*€ 8 000 000*", giving Member States the possibility to exempt offers between € 1 000 000 and € 8 000 000, respectively. The functioning of the exemptions and the thresholds are widely addressed in Chapter 2.

3.2 Prospectus content

When transposing Article 5(1) of the Prospectus Directive into Article 6(1) of the Prospectus Regulation among the information to be contained in a prospectus it is added the information necessary to an investor in order to make an informed assessment of "*the reasons for the issuance and its impact on the issuer*".[155]

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the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/30

[153] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004

[154] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final, p 13

[155] Article 6(1)(c) of REGULATION (EU) 2017/1129

3.3 Voluntary prospectus

Article 4 of Prospectus Regulation allows issuers to opt in for the EU prospectus regime and draw a prospectus in accordance with the Regulation. The approval of a "*voluntary prospectus*" by the competent authority entails the same rights and obligations as a prospectus required under the Prospectus Regulation.[156]

3.4 The new prospectus summary

Under Prospectus Directive regime, according to the second subparagraph of Article 24(1) of the implementing Regulation, the length of the summary had to take into *account* "*the complexity of the issuer and of the securities offered*" but, might not "*exceed 7% of the length of a prospectus or 15 pages, whichever was the longer*". On the other side, Article 7 takes into consideration the general views expressed in the public consultation that the summary format introduced by the amending Directive 2010/73/EU has not met its objectives. The new summary has now to be "*drawn up as a short document written in a concise manner*" and is subject to "*a maximum length of seven sides of A4-sized paper when printed*" (*"characters of readable size*" must be used). This threshold may be exceeded only in the cases set out under the New Prospectus Regulation.[157] Actually a possibility to exceed the maximum number of pages of the summary is provided when the summary covers several securities differing only in some limited details.

Next to the usual section *("an introduction, containing warnings*"), there are three main sections in the summary, covering key information "*on the issuer*", "*on the securities*" and "*on the offer of securities to the public and/or the admission to trading*" respectively.[158] For each of them Article 7 introduces general headings and indications on their content, but issuers have some leeway to develop short narratives and select the material information. For securities falling under the scope of the PRIIPS Regulation,[159] the issuer can substitute the section of the summary covering "*key information on the securities*" with the content of the key information document.[160] The prohibition, set out in Article 11(1) of Prospectus Directive, to incorporate information by reference into the summary, has been kept and can now be found in Article 7(11) of the Prospectus Regulation.[161] The aim of this operation was avoiding the risk that the summary could become a mere collection of hyperlinks and cross-references.[162]

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[156] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final, p 14

[157] Article 7(7) third and fourth subparagraphs of REGULATION (EU) 2017/1129

[158] Article 7(4) of REGULATION (EU) 2017/1129

[159] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (Text with EEA relevance)

[160] Article 7(7) second subparagraph of REGULATION (EU) 2017/1129

[161] "*The summary shall not contain cross-references to other parts of the prospectus or incorporate information by reference*"

3.5 The base prospectus

The base prospectus was dealt with in Article 5(4) of the Prospectus Directive. These legal rules can now be found in Article 8 of Prospectus Regulation altogether with the ones, on base prospectuses, previously contained in the 2004 implementing Regulation. The aim of Article 8 is clarifying the functioning of the base prospectus, which remains almost unchanged compared to Directive 2003/71/EC, except for some points. Now a base prospectus may be drawn up, not only for those "*issued under an offering programme*"[163] or "*in a continuous and repeated manner by credit institutions*",[164] but instead for any kind of non-equity securities.[165] Moreover is now possible to draw a base prospectus consisting of several documents.[166] It has to be noted that the registration document of a base prospectus may take the form of a universal registration document. The obligation to prepare a summary of the base prospectus, in case the final terms are not contained such prospectus, is removed, so that now only "*a summary of the individual issue*"[167] is required to be produced and annexed to the final terms, if those terms are filed. Finally, Article 8(11), stating that "*An offer of securities to the public may continue after the expiration of the base prospectus under which it was commenced provided that a succeeding base prospectus is approved and published no later than the last day of validity of the previous base prospectus*", clarifies how cases where an offer starts under one base prospectus and continues unchanged under a new, succeeding base prospectus should be dealt with under a base prospectus.[168]

3.6 The universal registration document

The Prospectus Regulation introduces the universal registration document, that can be drawn for equity and non-equity issuances by frequent issuers, hoping that it can result in faster prospectus approvals. Article 9

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[162] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final, p 14

[163] Article 5(4)(a) of Directive 2003/71/EC

[164] Article 5(4)(b) of Directive 2003/71/EC

[165] Article 8(1) of REGULATION (EU) 2017/1129:

"*For non-equity securities, including warrants in any form, the prospectus may, at the choice of the issuer, offeror or person asking for the admission to trading on a regulated market, consist of a base prospectus containing the necessary information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market*"

[166] Article 8(6) of REGULATION (EU) 2017/1129

[167] Article 8(5)(c) of REGULATION (EU) 2017/1129

[168] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final, p. 15

provides the functioning and the details about this new document. This topic is addressed in Chapter 2, more specifically in the paragraph dedicated to frequent issuers.[169]

3.7 Specific regimes for SMEs and secondary issuances

The Prospectus Regulation introduces in Article 15 the EU Growth prospectus regime. Doing so establishes a new proportionate disclosure regime for the drawing up of this document, bearing in mind the aim of facilitating SMEs growth removing some burdens considered too costly in terms of time and money for these small enterprises. Article 14 provides the other specific regime: the simplified disclosure regime for secondary issuances. Both the regimes are addressed in Chapter 2 in the two paragraphs dedicated respectively to SMEs and to secondary issuances.[170]

3.8 Non-equity securities

As already mentioned, Prospectus Directive provided a wholesale regime, relaxing some requirements of Prospectus Directive, for non-equity securities with a denomination per unit at least equal to €100.000. Despite the statement in the Proposal for Prospectus Regulation about the intention to have a uniform prospectus regime for non-equity securities and abolish the wholesale / retail dual regime in force under Prospectus Directive, this distinction has been maintained under Prospectus Regulation as can be intuited from provision applicable to SMEs, secondary issuances and frequent issuers. More information about this topic are provided in the paragraph about non-equity securities issuances in Chapter 2.[171]

3.9 Risk factors

Article 16(1) provides that "*The risk factors featured in a prospectus shall be limited to risks which are specific to the issuer and/or to the securities and which are material for taking an informed investment decision*". The aim is to restrain the tendency of overcharge the prospectus with generic risk factors obscuring the more specific ones that investors should be aware of and being useful only in order to protect the issuer or its advisors from liability. For this reason, the issuer is required to "*assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact*", describe adequately each risk factor "*explaining how it affects the issuer or the securities being offered or to be admitted to trading*", allocate risk factors in a limited number of categories based on their

[169] Paragraph 3.2 of Chapter 2

[170] Paragraphs 3.1.1 and 3.1.2 of Chapter 2

[171] Paragraph 3.3 of Chapter 2

nature.[172] ESMA is empowered to develop guidelines "*to assist competent authorities in their review of the specificity and materiality of risk factors and of the presentation of risk factors across categories depending on their nature*" by Article 16(4). An answer of the authority came in March 2018 with ESMA's Final Report "*Technical advice under the Prospectus Regulation*" which points out that "*Article 16 of the Prospectus Regulation sets out the framework for the disclosure requirements under this item. Risk factor guidelines are also being prepared at Level 3, which is a requirement further outlined in Article 16 of the aforementioned regulation*"[173] and subsequently deals with risk factors in relation to various documents and different kind of issuances in the Annexes of its Final Report.[174]

3.10 Incorporation by reference

The scope of documents whose information may be incorporated by reference in a prospectus is enlarged, being no more the reference to the power of Member States to allow the incorporation,[175] subject to the condition *that* "*it has been previously or simultaneously published electronically, drawn up in a language fulfilling the requirements of Article 27*" and it is contained in one of the documents listed by the Article. A list of documents has indeed been introduced by Article 19(1).[176] Moreover, Article 19(4) provides that ESMA "*may, or where the Commission so requests shall, develop draft regulatory technical standards to*

[172] Article 16(1) of REGULATION (EU) 2017/1129

[173] ESMA, 2018. Final Report "*Technical advice under the Prospectus Regulation*", ESMA31-62-800, p 88

[174] Annex 1, Annex 2, Annex 3, Annex 4, Annex 5, Annex 6, Annex 7, Annex 9, Annex 14, Annex 18, Annex 19, Annex 22, Annex 23, Annex 24, Annex 25, Annex 26 and ANNEX 27, containing the "*Table of combinations"* setting out the schedules and building blocks to be used for prospectuses, of ESMA, 2018. Final Report "Technical advice under the Prospectus Regulation", ESMA31-62-800

[175] Article 11(1) of Directive 2003/71/EC

[176] List of documents contained in Article 19(1) of REGULATION (EU) 2017/1129:

"*(a) documents which have been approved by a competent authority, or filed with it, in accordance with this Regulation or Directive 2003/71/EC;*

(b) documents referred to in points (f) to (i) of Article 1(4) and points (e) to (h) and point (j)(v) of the first subparagraph of Article 1(5);

(c) regulated information;

(d) annual and interim financial information;

(e) audit reports and financial statements;

(f) management reports as referred to in Chapter 5 of Directive 2013/34/EU of the European Parliament and of the Council;

(g) corporate governance statements as referred to in Article 20 of Directive 2013/34/EU;

(h) reports on the determination of the value of an asset or a company;

(i) remuneration reports as referred to in Article 9b of Directive 2007/36/EC of the European Parliament and of the Council;

(j) annual reports or any disclosure of information required under Articles 22 and 23 of Directive 2011/61/EU of the European Parliament and of the Council;

(k) memorandum and articles of association."

update the list of documents set out in paragraph 1 of this Article by including additional types of documents required under Union law to be filed with or approved by a public authority".

3.11 Publication of the prospectus

Two of the options provided by Article 14(2) of Prospectus Directive for publishing an approved prospectus ("*insertion in one or more newspapers*"[177] and "*printed form to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries*"[178]) have been removed because considered largely outdated. Consequently in the list in Article 21 of the Prospectus Regulation can be found only the publication in electronic form "*on the issuer's website or , if applicable, on the website of the financial intermediaries*",[179] "*on the website of the regulated market*"[180] or *"on the website of the competent authority of the home Member State*".[181] Notwithstanding the removal of the abovementioned options, the obligation to provide a free paper copy to anyone who requests it is maintained and can be found now in Article 21(11) of the Prospectus Regulation. The responsibility of publishing the prospectus falls on "*the issuer, the offeror or the person asking for admission to trading on a regulated market*" exactly as it was the case under Prospectus Directive regime. It has also to be noted that Article 21(6) states that ESMA has to "*publish all prospectuses received from the competent authorities on its website*"[182] and to do so needed to develop an online storage mechanism with the possibility for EU investors to search information for free. Article 47 adds that "*Based on the documents made public through the mechanism referred to in Article 21(6), ESMA shall publish every year a report containing statistics on the prospectuses approved and notified in the Union and an analysis of trends*". ESMA in its Final *Report* "*Draft regulatory technical standards under the Prospectus Regulation*" provides some standards about the functioning of the online mechanism.[183]

3.12 Non-EU issuers regime

Article 29 of Prospectus Regulation is a transposition of Article 20 of the Prospectus Directive with few modifications. The main difference is that letter (a) of Article 20(1), requiring the prospectus to be "*drawn up in accordance with international standards set by international securities commission organisations,*

[177] Article 14(2)(a) of Directive 2003/71/EC

[178] Article 14(2)(b) of Directive 2003/71/EC

[179] Article 21(2)(a) of REGULATION (EU) 2017/1129

[180] Article 21(2)(b) of REGULATION (EU) 2017/1129

[181] Article 21(2)(c) of REGULATION (EU) 2017/1129

[182] Article 21(6) of REGULATION (EU) 2017/1129

[183] ESMA, 2018. Final Report "*Draft regulatory technical standards under the Prospectus Regulation*", ESMA31-62-1002

including the IOSCO disclosure standards", is removed. In addition to letter (a) of Article 29(1) requiring "*the information requirements imposed by those third country laws*" to be equivalent to the ones under EU prospectus law, transposes letter (b) of Article 20(1) of the Prospectus Directive except only the removal of the parenthesis "*including information of a financial nature*", Article 29(1) of the Prospectus Regulation in letter (b) grants the approval of the prospectus of a third country issuer provided that "*the competent authority of the home Member State has concluded cooperation arrangements with the relevant supervisory authorities of the third country issuer in accordance with Article 30*". In Regulation 2017/1129 two other provisions in relation to issuers established in third countries have been added: Article 28 and Article 30. Article 28 deals with offers of securities to the public or admission to trading on a regulated market made under a prospectus drawn up in accordance the Regulation. In this case when the issuer is looking for offering securities of looking for admission to trading in the UE "*shall obtain approval of its prospectus, in accordance with Article 20, from the competent authority of its home Member State*"[184]. Doing so, after the approval, the issuer will be subject to all the rights and obligations provided for a prospectus under Prospectus Regulation and both the issuer and the prospectus will be subject to all of the Prospectus Regulation's provisions "*under the supervision of the competent authority of the home Member State*".[185] Article 30 instead provides the mechanism for cooperation with third countries. Article 30(1) provides that "*For the purpose of Article 29 and, where deemed necessary, for the purpose of Article 28, the competent authorities of Member States shall conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information with supervisory authorities in third countries and the enforcement of obligations arising under this Regulation in third countries*" with the exception of third countries are "*on the list of jurisdictions which have strategic deficiencies in their national anti-money laundering and countering the financing of terrorism regimes that pose significant threats to the financial system of the Union*". The minimum level required to be reached by these cooperation arrangements is that they can ensure "*an efficient exchange of information that allows the competent authorities to carry out their duties*"[186] under Prospectus Regulation. Moreover the Article requires ESMA to "*facilitate and coordinate the development of cooperation arrangements between the competent authorities and the relevant supervisory authorities of third countries*",[187] "*where necessary, facilitate and coordinate the exchange between competent authorities of information obtained from supervisory authorities of third countries that may be relevant to the taking of measures under Articles 38 and 39*"[188] and adds that that the authority can or have to, in case the Commission requests so, "*develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 1 and the template document to*

[184] First subparagraph of Article 28 of REGULATION (EU) 2017/1129

[185] Second subparagraph of Article 28 of REGULATION (EU) 2017/1129

[186] Article 30(1) of REGULATION (EU) 2017/1129

[187] First subparagraph of Article 30(2) of REGULATION (EU) 2017/1129

[188] Second subparagraph of Article 30(2) of REGULATION (EU) 2017/1129

be used therefor".[189] Article 30(3) impose on the competent authorities the obligation to "*conclude cooperation arrangements on exchange of information with the supervisory authorities of third countries*" but "*only where the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 35*".

[189] Article 30(4) of REGULATION (EU) 2017/1129

Chapter 2

Prospectus Exemptions and Alternative Regimes

Introduction

The previous chapter offered an overview of the prospectus law in general. Instead Chapter 2 aims at dealing with the exemptions from the duty to publish a prospectus, their development through the years and their purpose under EU Law. We will also take into consideration some aspects from the point of view of the European Securities and Banking Authority to better frame the topic in the European context.

1. Exemptions under Prospectus Directive regime

1.1 Article 3(2) of the Directive – Private Placement

Article 3(2) of the Prospectus Directive,[190] as amended by Directive 2010/73/EU[191] provided that "*The obligation to publish a prospectus should not apply to the following types of offer:*

(a) an offer of securities addressed solely to qualified investors; and/or

(b) an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors; and/or

(c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer; and/or

[190] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

[191] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

(d) an offer of securities whose denomination per unit amounts to at least EUR 100 000; and/or

(e) an offer of securities with a total consideration in the Union of less than EUR 100 000, which shall be calculated over a period of 12 months.;"

These were exemptions to the general principle expressed in article 3(1)[192] which required for a prospectus to be issued at any time securities are offered to the public. The exemptions did not address situations in which there are issuances of securities which are meant to be traded on a regulated market. Consequently, it was still necessary to draft a prospectus and publish it, after the approval of the competent authority, if the securities were intended to be admitted to regulated markets.

The main question raised by the introduction of the article was whether in these cases the issuer was exempted only from the obligation to publish the prospectus or also from the obligation to write the prospectus itself and to seek its approval. This doubt was based mainly on the consideration that those cases, which benefitted of the exemption, did not fall outside the scope of the Directive and so the obligation to write the prospectus should be considered implicit. Considering the fact that the term "*publish*" was not defined explicitly in the Directive, it was generally understood as "*made available to the public*" in compliance with the given rules applicable to the publication of the prospectus. Such a literal interpretation can be considered too formalistic in certain situations. The legislation about prospectus and disclosure in general should take into consideration the different needs and characteristics of the issuer and of the investors.[193] Assuming this consideration to be the rationale behind the exemptions from the obligation to publish the prospectus drawn in art 3(2) it follows their interpretation in the sense of exemptions also from the obligation to draw up the prospectus itself. Otherwise there would have been an inconsistency in the system of Prospectus law as a whole. [194]

1.1.1. Offers to investors who do not require legal protection

Investors' protection is the rationale behind mandatory disclosure and therefore also prospectus law.[195] This means that if there is no need for their protection, the *raison d'être* falls.

A case in which we can think protection is not necessary is when investors are assumed to have the means to acquire for themselves all the information they need in order to assess risks and profits of the investment.[196] These persons were defined as "qualified investors" in the Prospectus Directive. Article 3(2)(a) exemption

[192] Article 3(1) Directive 2003/71/EC

[193] In this sense Recital 16 Directive 2003/71/EC

[194] In this sense Schammo, 2011, p. 126

[195] Recital 16 Directive 2003/71/EC

[196] Armour, 2016, p. 168

referred to these subjects, but a propter definition might be found elsewhere. Originally, the text of the Directive, namely in article 2(2),[197] also provided the specific criteria defining a "qualified investor". This provision however was repealed by Directive 2010/73/EU.[198] Nevertheless, there was no legislative gap thanks to the same Directive which replaced the original formulation of article 2(1)(e)[199] of the Prospectus Directive with a new one.[200] The new version of the article not only gave a definition of "qualified investor" but also referred to the more specific criteria provided in the Markets in financial instruments directive (MiFID)[201] and clearly delineated in Annex II of this last directive. The reform brought the

[197] Article 2(2) of Directive 2003/71/EC:

"*For the purposes of paragraph 1(e)(iv) the criteria are as follows:*

(a) the investor has carried out transactions of a significant size on securities markets at an average frequency of, at least, 10 per quarter over the previous four quarters;

(b) the size of the investor's securities portfolio exceeds EUR 0,5 million;

(c) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment."

[198] Article 1(2) of Directive 2010/73/EU:

"*Article 2 is amended as follows […] (b) paragraphs 2 and 3 are deleted;*"

[199] Original text of art. 2(1)(e) of Directive 2003/71/EC

"'*qualified investors' means:*

(i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;

(ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;

(iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);

(iv) certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set out in paragraph 2;

(v) certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors;"

[200] Art. 2(1)(e) of Directive 2003/71/EC as modified by Directive 2010/73/EU:

"(e) "qualified investors" means persons or entities that are described in points (1) to (4) of Section I of Annex II to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (*), and persons or entities who are, on request, treated as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC unless they have requested that they be treated as non-professional clients. Investment firms and credit institutions shall communicate their classification on request to the issuer without prejudice to the relevant legislation on data protection. Investment firms authorised to continue considering existing professional clients as such in accordance with Article 71(6) of Directive 2004/39/EC shall be authorised to treat those clients as qualified investors under this Directive;"

[201] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

Prospectus Directive into line with MIFID requirements. Seasoned investors were the ones considered to fit the "qualified investors" definition in all the various formulation even if there were some differences in the criteria. With regard to the previous formulation, it is possible to see that the original text of Directive 2003/71/EC deployed the seasoned investors on two levels: the first category was composed of certain investors to whom is automatically attributed the status of qualified investors, because of the kind of activity they undertake or due to their status. Instead the second one included those who did not automatically benefit automatically of this qualification but could opt-in if certain conditions were met. The new formulation provided by the 2010 intervention was based on a similar distinction but referred to the MIFID rules.

MIFID mainly dealt with the professional clients' classification in Annex II. Here it is possible to find two categories of persons.

The first one comprised persons treated as professionals as a default rule but who were able to expressly opt-out asking not to be treated as professionals. In the first category there *were* "*Entities which are required to be authorised or regulated to operate in the financial markets.*", in the Annex there was a list *which* "*should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned*" and including credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and management companies of such schemes, pension funds and management companies of such funds, commodity and commodity derivatives dealers, locals and other institutional investors; big firms which *were* "*meeting two of the following size requirements on a company basis: balance sheet total: EUR 20 000 000, net turnover: EUR 40 000 000, own funds: EUR 2 000 000.*"; "*national and regional governments, public bodies that manage public debt, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.*"*; and* "*other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.*".[202]

The second one comprised persons not treated as professional, by default, but who may ask to be treated as such and provided, after a propter evaluation, that they were able to make their decision to invest and so they were also able to appreciate the involved risks. A waiver of the protection normally afforded by the standard regime "*shall be considered valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved.*"[203] and at least two criteria out of the following three should have been satisfied:

[202] Section I of Annex II Directive 2004/39/EC

[203] Section II of Annex II Directive 2004/39/EC

"*— the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters,*

— the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500 000,

— the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged."[204]

It is important not to forget that, in addition to the categories provided in Annex II of MIFID, Art. 2(1)(e) of the Directive 2003/71/EC, as modified by the Directive 2010/73/EU, defined as qualified investors also persons[205] "*recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC unless they have requested that they be treated as non-professional clients.*" and provided for investment firms, already authorised by MIFID's transitional arrangements[206] to continue considering existing professional clients as such, the possibility to treat those clients as qualified investors for the purposes of Prospectus Directive's qualified investors' regime.

1.1.2 Offers with a limited value

Another important exemption in the Prospects Directive is the one deriving from the value of the offer. As already noticed in Chapter 1, offerings of equity securities below €5 million were excluded from the scope of the directive.[207] Talking about exemptions from the obligation to write a prospectus, we find out in Article 3(2)(e) of the Prospectus Directive that "*an offer of securities with a total consideration of less than €100.000, which limit shall be calculated over a period of 12 months*" was not covered by the prospectus requirements in the directive and so did not generate an obligation to publish the document.

The threshold, exempting offers below €5 million from the scope of the directive, was already present in the public offering directive,[208] even though indicating a lower amount. In this mentioned piece of legislation offers not exceeding 40,000 ECU[209] were exempted from the scope of the directive.[210] With the introduction

[204] Ibidem

[205] Intended as comprising individuals and legal entities

[206] Art 71(6) of Directive 2004/39/EC

[207] Art 1(2)(h) of Directive 2003/71/EC as amended by Directive 2010/73/EU:

"*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;*"

[208] Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public

[209] ECU (acronym of *European Currency Unit*) was a basket of European Union currencies introduced in 1978 and used as an accounting unit before the introduction of the Euro.

[210] Art 2(1)(c) of Council Directive 89/298/EEC:

"*This Directive shall not apply:*

of the Prospectus Directive in 2003, the threshold was increased to €2.5 million.[211] In 2010, with the modifications to the Prospectus Directive introduced by Directive 2010/73/EU, the threshold was raised from €2.5 million to €5 million. In addition, the Commission was given the authority to adjust the thresholds, in light of technical developments and inflation.[212][213] The new formulation of the Prospectus Directive thus excluded all the offers with a total consideration is lower than €5 million during a twelve-month period.[214]

The initial purpose of the Commission, during the negotiations on the directive in the early 2000s, was to create a harmonized regime. Following that all Member States would have had to exclude small offerings from any prospectus requirements but, several member states objected to the €2.5 million threshold, asking for a lower amount. After a political compromise was reached by the Council, the text was amended and offers below €2.5 million were excluded from the scope of the directive.[215] It is at that time that the directive was rewritten to include in article 3 an exemption from the obligation to publish a prospectus for offers of less than €100,000.[216][217]

The changes in the initial proposal brought to a dilution of the EU-wide applicability of the thresholds in the directive.[218] Member states preferring a threshold lower than €5 million were able to introduce it in their national legislation. The reason being that offers below €5 million were not covered by the directive, so there was space for national legislative choices. Considering that they might not require a prospectus for offerings not considered to be public offers according to article 3. Member states might only introduce national legislation covering all the offers whose total consideration is €100,000 or more, but less than €5 million. European Commission noted, in the analysis given in its Proposal for the Prospectus Regulation then

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1. *to the following types of offer:*

   […]

   (c) where the selling price of all the transferable securities offered does not exceed ECU 40 000, and/or"

[211] Original formulation of Art 1(2)(h) of Directive 2003/71/EC:

"*securities included in an offer where the total consideration of the offer is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months;*"

[212] Art 1 of Directive 2010/73/EU.

[213] In this sense Härkönen, 2017, pp. 121–148.

[214] Art 1(2)(h) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[215] European Commission, 2002. Press Release "Financial Services: Commission welcomes Council's political agreement on prospectuses proposal", IP/02/1607, Brussels: s.n.

[216] Art 3(2)(e) of Directive 2003/71/EC

[217] In this sense Härkönen E., 2017, pp. 121–148

[218] Ibidem

approved in 2017, that in 2015 18 member states out of 28 did require issuers to publish a prospectus for offerings below the €5 million limit.[219]

1.1.3 Offers to a limited number of investors

Another important exemption in the Prospectus Directive is the one concerning the issuance of securities offered to a limited number of investors.

The exemption has its origin in the public offering directive. It provided that offers to *a* "*restricted circle of persons*" were excluded from the scope of the directive.[220] However there was a problem about the meaning of the expression "*a restricted circle of persons*" as it was not specified how it should be intended and this uncertainty leaded to different interpretations in different member states. The ambiguity created by the public offering directive was identified in 2001 by the Committee of the Wise Men[221] as one of the major deficiencies of European financial law. In the final Report of the Committee of Wise Men on the Regulation of European Securities Markets the lack of a common definition for what had to be considered a public offer in the member states was acknowledged as a weakness of EU law.[222]The Commission attempted to find a remedy for this major gap explaining what constitutes an offer to a "restricted circle of persons" and introducing the definition of a public offer in the text of the Prospectus Directive. In the early version of the directive offers to less than 100 persons were excluded from the obligation to publish a prospectus.[223] This was later revised rising the amount to 150 investors per member state.[224]

According to article 3(2)(b) of Prospectus Directive as amended by Directive 2010/73/EU, offers to less than 150 non-qualified persons in each member state were not considered public offers. According to this provision issuers might issue shares to 149 investors in a first member state, as well as to 149 investors in a

[219] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final.

[220] Council Directive 89/298, art. 2 (1) (b)

[221] The Committee of Wise Men on the Regulation of European Securities Markets was set up by the European Council on July 17, 2000 to develop proposals for making the regulatory process for European Union securities legislation more flexible, effective and transparent.

[222] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, at 12, 15 (Feb. 15, 2001).

[223] Original text of Art 3(2)(b) of Directive 2003/71/EC:

"*an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors; and/or*"

[224] Art 3(2)(b) of Directive 2003/71/EC as amended by Directive 2010/73/EU:

"*an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors; and/or*"

second one and eventually the same number of investors in a third one and so on falling this issuance under the exemption for offerings to a limited number of persons.

Thanks to an easy calculation we discover that, theoretically, this rule allowed an issuer to offer its securities to 4,172 non-qualified investors (149 investors in each of the 28 Member States) without triggering prospectus requirements. We have to consider that the issuance of shares to a limited number of non-qualified investors might be also combined with other exemptions provided by the directive; an example can be the exemption concerning issues to qualified investors, thus broadening the scope of the exemption even further.[225] We can notice that there have been a progressive enlargement of the aim and effect of the exemption we are talking about.

1.2. Additional exemptions in article 4

Additional exemptions from the obligation to publish a prospectus were provided under article 4 of the Prospectus Directive. Article 4 mostly covered very specific operations such as, securities that are offered at the occasion of a merger or takeover, or which are offered to employees by their employer, or offered free of charge to current shareholders. As well as offers which benefit from Article 3(2) exemption, offers under Article 4 did not fall outside the scope of the directive. They were exempted by the obligation to publish a prospectus and so from the obligation to prepare it.[226] Article 4 not only applied, unlike Article 3(2), to transactions that would otherwise had to comply with the Prospectus Directive requirements for public offers; it also covered operations in which securities had to be admitted to trading on a regulated market. Another feature of Article 4 is that many of its exemptions were available only under the condition that in place of the prospectus, an alternative information document was to be made available.[227] The third paragraph of this article, in its formulation after the 2010 amendments, also assigned, "*In order to ensure consistent harmonisation of this Directive*", to the European Supervisory Authority (European Securities and Markets Authority)[228] the power to "*develop draft regulatory technical standards to specify the exemptions concerning the points (a) to (e) of paragraph 1 and points (a) to (h) of paragraph 2.*"[229] in addition to the power of "*the Commission to adopt the regulatory technical standards referred to in the first subparagraph*" already provided by the original formulation of Article 4(3).[230]

[225] Härkönen, 2017, pp. 121–148

[226] In line with considerations above.

[227] Schammo, 2011, pp. 130-131

[228] European Securities and Markets Authority ('ESMA') established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council

[229] Article 4(3) of Directive 2003/71/EC as amended by Directive 2010/73/EU.

[230] Original text of Article 4(3) of Directive 2003/71/EC:

1.2.1. Article 4(1)

Starting with the first paragraph of the article we can see that the initial text of article 4(1) covered five types of operations:

"*(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 capital;*

(b) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

(c) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

(d) shares offered, allotted or to be allotted free of charge to existing 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 is made available containing information on the number and nature of the shares and the reasons for and details of the offer;

(e) securities 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 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."[231]

With the entrance into force of Directive 2010/73/EU the text of letters from (c) to (e) was changed and new subparagraphs were added.

In the text of letter (c) is added "or division", thus extending so the provision about securities allotted or to be allotted in connection with a merger to the ones allotted or to be allotted in connection with a division recognising the same ratio in the two situations.

In the text of letter (d) the words "shares offered, allotted or to be allotted free of charge to existing shareholders, and" were eliminated.

Letter (e) was modified as follows: "securities 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*] or by an affiliated undertaking *provided that the company has its head office or registered office in the Union* and provided that a document is made available containing information on the number and nature

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"*In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraphs 1(b), 1(c), 2(c) and 2(d), notably in relation to the meaning of equivalence*."

[231] Original formulation of Article 4(1) of Directive 2003/71/EC

of the securities and the reasons for and details of the offer."[232] eliminating the first proposition – here highlighted *in italics* - and adding the second one.

Directive 2010/73/EU than extended the applicability of letter (e) to companies "*established outside the Union whose securities are admitted to trading either on a regulated market or on a third-country market.*"[233] specifying that "*In the latter case, the exemption shall apply provided that adequate information, including the document referred to in point (e), is available at least in a language customary in the sphere of international finance and provided that the Commission has adopted an equivalence decision regarding the third-country market concerned.*" The new formulation of the article gave to the Commission the task to adopt equivalence decisions on the request of the competent authority of a Member State. Equivalence decisions must be taken in accordance with the procedure referred to in Article 24(2) of the Prospectus Directive. This procedure was meant to verify whether the legal and supervisory framework of a third country was ensuring the compliance of a regulated market authorised in that third country with legally binding requirements, equivalent to the ones resulting from Market Abuse Directive[234] from Title III of MIFID and from the Transparency Directive,[235] and subject to effective supervision and enforcement in that third country. It also gave that competent authority the task to indicate why it considers that the legal and supervisory framework of the third country concerned is to be considered equivalent and to provide relevant information to this end.

In the subsequent paragraph were listed the conditions to be followed by a third-country legal and supervisory framework to be considered equivalent.[236]

The third added paragraph gave the Commission the power to adopt, by means of delegated acts, measures to specify the criteria or to add further ones to be applied in the assessment of the equivalence.

Save for the exemption provided in letter (a) dealing with offers of securities "which are issued in substitution for shares of the same class already issued", Article 4(1) required an information document to be prepared in replacement of the prospectus. But the EU legislature stopped short of demanding the

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[232] Article 4(1)(e) of Directive 2003/71/EC as modified by Directive 2010/73/EU

[233] First subparagraph added to Article 4(1) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[234] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)

[235] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

[236] Second subparagraph added to Article 4(1) of Directive 2003/71/EC by Directive 2010/73/EU:

"*(i) the markets are subject to authorisation and to effective supervision and enforcement on an ongoing basis;*

(ii) the markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

(iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and

(iv) market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation."

publication of this document in accordance with the Prospectus Directive requirements[237] even though it was already declared an intention to give some specification in Common Position about the adoption of the 2003 Directive.[238] The main problem is that the legislature did not specify in a clear way the information content of the alternative document.

For securities offered in the context of a takeover, merger or division, the Prospectus Directive merely stated that the competent authority had to be convinced that the information contained in the document was equivalent to that of a prospectus. For payments of dividends in the form of shares and securities offered to employees or directors by a company having in the European Union its head office or registered office, as specified after the 2010 amendment, the Prospectus Directive only required information to be provided with respect to the number and nature of the securities to be offered, including the reason of the offer and the details about it. The amendments brought by Directive 2010/73/EU to the Prospectus Directive made directive's rules governing exemptions for offers of securities to directors or employees more complicated; but this is true only for issuances concerning third-country firms. The amended version of Directive 2003/71/EC set out separate arrangements, seeking to rely on Article 4 for this purpose, for third-country companies that wanted to offer securities to directors and/or employees in the European Union. In order to make it possible for third-country firms to offer employee share schemes in Europe, under better conditions than before, the Prospectus Directive, as amended, enacted an equivalence clause. The EU legislature sought to facilitate employee share schemes for European companies too. It realized this purpose by no longer requiring employers to already have securities admitted to trading on a regulated market in order to give employees shares or the opportunity to buy shares in the company. This requirement was originally meant to ensure transparency considering that an admission to trading ensures that issuers are subject to ongoing disclosure requirements.[239] However, the EU legislature then considered "*The current exemptions for securities offered, allotted or to be allotted to existing or former employees or directors*" to be "*too restrictive to be useful to a significant number of employers operating share schemes for employees in the Union.*".[240] The legislature also added, albeit only in a non-binding recital, that EU firms taking advantage of the revised arrangements of Article 4(1)(e) "*should update the document referred to in Article 4(1)(e) of Directive 2003/71/EC where necessary for an adequate assessment of the securities.*".[241] But given that the legislature did not make provision about the obligation to prepare the alternative information document in the legally binding text of the directive, it remained uncertain the effectiveness of this requirement.[242]

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[237] Schammo, 2011, p. 131

[238] Common position (EC) No 25/2003 adopted by the Council on 24 March 2003 with a view to adopting Directive 2003/. . ./EC of the Parliament and of the Council of . . . on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC C 125 E/51

[239] Schammo, 2011, pp. 131-132

[240] Recital 14 of Directive 2010/73/EU

[241] Ibidem

[242] In this sense Schammo, 2011, p. 132

1.2.2. Article 4(2)

Article 4(1) dealt with offers that, in absence of an exemption, would have been caught under the directive's rules governing public offers, Article 4(2) on the other side concerned securities meant to be admitted to trading on a regulated market. This second paragraph exempted certain securities operations from the requirement to publish a prospectus as well as Article 4(1) did. Reading Article 4(2) it is easy to notice that many of the operations exempted under this article correspond to the ones found in the Article 4(1).[243] More precisely, Article 4(2) applied to:

"*(a) shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;*

(b) shares issued in substitution for shares of the same class already admitted to trading on the same regulated market, if the issuing of such shares does not involve any increase in the issued capital;

(c) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

(d) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

(e) shares offered, allotted or to be allotted free of charge to existing 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 the said shares are of the same class as the shares 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 shares and the reasons for and details of the offer;

(f) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking, provided that the said 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 and the reasons for and detail of the offer;

[243] In this sense Schammo, 2011, p. 133

(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;

(h) securities already admitted to trading on another regulated market," following some conditions specified in the same paragraph.

The amendments of Directive 2010/73/EU had no strong effects on this paragraph. Actually, the only changes in the original text of Article 4(2) were the addition of the words "*or a division*" after the word "*merger*" in letter (d) and the substitution of "*Community legislation*" with "*Union legislation*" in the formulation of the same letter.

As already mentioned (§ 1.2) there are some exemptions in Article 4 requiring an information document to be made available in lieu of the prospectus. Among the ones located in Article 4(2) can be mentioned the case of securities issued at the occasion of a takeover, a merger or a division. As already said,[244] even thought there was the intention as declared in the Common Position of the Council No 25/2003,[245] the Directive provided no detail on the information this document should contain. The only explicit requirement provided by Article 4(2) is that competent authorities should deem the information in the document to be equivalent[246] to the ones of a prospectus. For shares offered free of charge to shareholders, or securities offered to employees or directors, it was needed a disclosure document "*containing information on the number and nature of the securities and the reasons for and detail of the offer*".[247]

[244] See above in this Chapter paragraph 1.2.1

[245] Common position (EC) No 25/2003 adopted by the Council on 24 March 2003 with a view to adopting Directive 2003/. . ./EC of the Parliament and of the Council of . . . on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC C 125 E/51

[246] Article 4(2)(c) and (d) both in the original and amended version of Directive 2003/71/EC

[247] Article 4(2)(f) of Directive 2003/71/EC; see also in this sense Article 4(2)(e) of Directive 2003/71/EC

2. Legislation under Prospectus Regulation

As already mentioned in Chapter 1, Regulation 2017/1129[248] has been introduced to fill the gaps left in prospectus law by the 2010 reformation of the Prospectus Directive.[249]

In the Proposal for the Regulation the European Commission declared that this reformation should focus on proportionality in order to have a new regulation addressing the needs of subjects suffering the disadvantages linked to the high costs, in time and monetary terms, arising from the redaction of a prospectus in compliance with law requirements. The Commission explained that "*the chosen options are designed to reduce the compliance burden for the following target groups: SMEs, secondary issuers, frequent issuers, issuers of non-equity securities.*" and that "*All of these groups are expected to benefit from the proposed reforms to varying degrees.*".[250] Based on this position some modifications of the previous regime followed the approval of the Regulation and probably more will follow in the future. Among these changes announced in the Proposal about the applicability of the full prospectus regime the one regarding the non-equity securities issuance was quite strong. The reform aimed at abolishing the favourable treatment granted by the Prospectus Directive to non-equity securities offers to the public with a denomination per unit of EUR 100 000 or above.[251] In the formulation laid down in the Proposal there was no reference to this favourable treatment but in the final approved version it is possible to find again the translation of Article 5(2) third subparagraph[252] of the Prospectus Directive in Article 7(1) of Regulation 2017/1129. Has to be mentioned that, in the transposed version of this disposition, another possible exemption to the obligation to include a summary in the prospectus has been added: in order to have this benefit "*such securities are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have*

[248] REGULATION (EU) 2017/1129 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

[249] 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, Brussels, 30.11.2015 COM(2015) 583 final, 2015/0268 (COD), p. 11

[250] Ibidem, p. 6

[251] Ibidem, p. 3

[252] Article 5(2) third subparagraph of Directive 2003/71/EC as modified by Directive 2010/73/EU:

"*Where the prospectus relates to the admission to trading on a regulated market of non-equity securities having a denomination of at least EUR 100 000, there shall be no requirement to provide a summary, save where a Member State so requires in accordance with Article 19(4).*"

access for the purposes of trading in such securities".[253] The maintenance of a specific regime is also shown by the addition of a paragraph to the proposed version of Article 13(1) of the Regulation in which it is disposed that "*when setting out the various prospectus schedules, the Commission shall set out specific information requirements for prospectuses that relate to the admission to trading on a regulated market of non-equity securities which:*" fall in the two above mentioned categories (accessible only to qualified investors or denomination of at least €100000 per unit).

Talking about exemptions in general, most of the previous regime has been maintained excepted the suppression of Article 3(2)(e), some variations and integrations in the text of certain exemptions, the elimination of second and third subparagraphs of Article 4(1) dealing with equivalence decisions of the Commission about third country markets compliance with requirements needed to apply Article 4(1)(e) of Prospectus Directive.

The exemptions are deployed in two different paragraphs. Article 1(4) of the Prospectus Regulation deals with exemption of certain types of securities offers to the public. Article 1(5) on the other side deals with cases in which the obligation to publish a prospectus shall not apply to the admission to trading on a regulated market.

2.1 Article 3(2) of the Directive exemptions in Prospectus Regulation

It is possible to find in Article 1(4) all the Article 3(2) exceptions, in their formulation after 2010 reformation, but Article 3(2)(e). Actually Art 3(2)(a) of the Prospectus Directive is now transposed into Article 1(4)(a) of Regulation 2017/1129; Article 3(2)(b) of the Directive into Article 1(4)(b) of the Regulation; Article 3(2)(c) into Article 1(4)(d) and Article 3(2)(d) into Article 1(4)(c).

Second and third subparagraphs of Article 3(2) dispositions about subsequent resale of securities flowed into Article 5(1) of the Regulation. This provision deals with the "*retail cascade*" distribution of securities. This phenomenon occurs in some markets "*when securities are sold to investors (other than qualified investors) by intermediaries and not directly by the issuer*".[254] Article 5 clarifies how the provisions about the production and update the prospectus and the ones on responsibility and liability should apply in case of placement of securities, by the issuer with financial intermediaries, and subsequent sale of the same

[253] Article 7(1)(a) of REGULATION (EU) 2017/1129 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

[254] 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, Brussels, 30.11.2015 COM(2015) 583 final, 2015/0268 (COD), p. 14

securities to retail investors, potentially through one or more additional levels of intermediaries. Following the general principle laid down in Article 3(1) of the Prospectus Regulation, a valid prospectus, drawn up by the issuer or the offeror and made available to the public in the final placement of securities through financial intermediaries or in any subsequent resale, should provide sufficient information in order to give investors the possibility to make informed investment decisions. However Article 5(1) provides that financial intermediaries, placing or subsequently reselling the securities, might rely on the initial prospectus published by the issuer or the offeror if the document is valid and supplemented properly and the issuer or the offeror responsible for drawing up such prospectus gives his written consent to use of the prospectus. In the abovementioned case no other prospectus should be required. However, considering the need of the consent in order to have the exemption, it follows that lacking the issuer's or the offeror's consent to the use of the initial prospectus, the financial intermediary should publish a new prospectus.[255]

2.1.1. Offers to investors who do not require the law's protection

The first part of Recital 25 of Prospectus Regulation affirms that "*Disclosure provided by a prospectus should not be required for offers of securities to the public which are limited to qualified investors*". This statement is the result of the reasoning, before in this Chapter and already clarified in Recital 16 of Directive 2003/71/EC, starting from the principle that mandatory disclosure rationale is investors' protection and so if there is no need for their protection there is no reason for mandatory disclosure. It follow that, being a case in which protection seems not to be necessary when investors are assumed to have the means to acquire for themselves all the information they need[256] and being these the kind of persons usually identified as "*qualified investors*", there is no need of a prospectus when securities are sold only to these subjects.

Prospectus Regulation keeps in its formulation the abovementioned reasoning already provided in Prospectus Directive and the consequent exemption too. Art 3(2)(a) of the Prospectus Directive text is indeed transposed in Article 1(4)(a) of Regulation 2017/1129.

To be thorough it is necessary to clarify some details about the "qualified investors" definition in the new regime. It is possible to find the definition in Article 2 letter (e) of the Prospectus Regulation.[257] The text is quite similar to the one found in Directive 2003/71/EC as amended by Directive 2010/73/EU.

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[255] Ibidem

[256] Armour, 2016, p. 168

[257] Article 2(e) of REGULATION (EU) 2017/1129

"*qualified investors' means persons or entities that are listed in points (1) to (4) of Section I of Annex II to Directive 2014/65/EU, and persons or entities who are, on request, treated as professional clients in accordance with Section II of that Annex, or recognised as eligible counterparties in accordance with Article 30 of Directive 2014/65/ EU unless they have entered into an agreement to be treated as non-professional clients in accordance with the fourth paragraph of Section I of that Annex. For the*

The article not only gives a definition of "*qualified investor*" referring to the specific criteria provided in Directive 2014/65/EU (MiFID II)[258] and clearly delineated in Annex II of this directive but also considers "qualified investors" persons "*recognised as eligible counterparties in accordance with Article 30 of Directive 2014/65/ EU unless they have entered into an agreement to be treated as non-professional clients in accordance with the fourth paragraph of Section I of that Annex*"[259] proposing again the structure found in Prospectus Directive.

The requirements to be met to be considered as a "qualified investor" are laid down in Annex II of MIFID II and, despite the majority of the text of the Annex is the same of Annex II of MIFID, there are few additions to notice. All of them aim at clarifying that local authorities can be considered to be professionals. Actually, the words "*at national or regional level*" have been added to paragraph (3) of section I, the words "*local public authorities, municipalities*" to the first paragraph and "*Member States may adopt specific criteria for the assessment of the expertise and knowledge of municipalities and local public authorities requesting to be treated as professional clients. Those criteria can be alternative or additional to those listed in the fifth paragraph.*" at the end of II.2 subsection in section II dealing with clients who may be treated as professional on request.

All the remarks made in paragraph 1.1.1. of this Chapter about the various criteria may be applied to the new formulation.

2.1.2. Offers with a limited value

As mentioned above, Article 3(2)(e) of Prospectus Directive, providing that the obligation to publish a prospectus should not apply *to* "*an offer of securities with a total consideration in the Union of less than EUR 100 000, which shall be calculated over a period of 12 months*", has not been transposed in Regulation 2017/1129.

Talking about the quantitative thresholds giving birth to the obligation to make a prospectus, it is necessary to analyse Article 1(3) of the Prospectus Regulation[260] which establishes that the Regulation "*shall not apply*

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purposes of applying the first sentence of this point, investment firms and credit institutions shall, upon request from the issuer, communicate the classification of their clients to the issuer subject to compliance with the relevant laws on data protection;"

[258] DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

[259] Article 2(e) of REGULATION (EU) 2017/1129

[260] Art. 1(3) of REGULATION (EU) 2017/1129:

"*Without prejudice to the second subparagraph of this paragraph and to Article 4, this Regulation shall not apply to an offer of securities to the public with a total consideration in the Union of less than EUR 1 000 000, which shall be calculated over a period of 12 months.*

to an offer of securities to the public with a total consideration in the Union of less than EUR 1 000 000, which shall be calculated over a period of 12 months".

This implies that the obligation to publish a prospectus does not apply to offers below this threshold. According to Article 3(2) of the Prospectus Regulation,[261] Member States may decide to exempt offers of securities to the public from the obligation to publish a prospectus provided that "*(a) such offers are not subject to notification in accordance with Article 25;*" and "*(b) the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8 000 000*" Articles 1(3) and 3(2) were object to an earlier application date than the majority of the provisions contained in the Prospectus Regulation and became applicable on 21 July 2018.[262]

Comparing these provision to the rules laid down in the Prospectus Directive[263] it is possible to notice that the quantitative thresholds giving birth to the obligation to make a prospectus have been raised in the new Regulation to €1 million and €8 million.[264] Despite this change the same mechanisms to draft the prospectus requirements are kept in the proposed regulation. These mechanisms allow member states to introduce prospectus requirements for domestic offers between €1 million and €8 million in their national law. According to Recital 12 of the Regulation, member states should refrain from imposing disclosure requirements at national level for offers below €1 million, since "*the cost of producing a prospectus in accordance with this Regulation is likely to be disproportionate to the envisaged proceeds of the offer*".[265] However, "*in view of the varying sizes of financial markets across the Union*", member states are given the option to exempt offers that do not exceed €8 million.[266] It is up to the Member States to decide the level of domestic investor protection they consider to be appropriate for offers between €1 million and €8 million. In Member States where there is no obligation to publish a prospectus for these offers, issuers can offer their

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Member States shall not extend the obligation to draw up a prospectus in accordance with this Regulation to offers of securities to the public referred to in the first subparagraph of this paragraph. However, in those cases, Member States may require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden."

[261] Art. 3(2) of REGULATION (EU) 2017/1129:

"*Without prejudice to Article 4, a Member State may decide to exempt offers of securities to the public from the obligation to publish a prospectus set out in paragraph 1 provided that:*

(a) such offers are not subject to notification in accordance with Article 25; and

(b) the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8 000 000."

[262] ESMA "*National thresholds below which the obligation to publish a prospectus does not apply*" ESMA31-62-1193, 8 February 2019

[263] Art 1(2)(h) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[264] Art. 1 (3) and Art. 3(2) of REGULATION (EU) 2017/1129

[265] Recital 12 of REGULATION (EU) 2017/1129

[266] Recital 13 of REGULATION (EU) 2017/1129

securities with no need of a prospectus only to domestic investors, since the mutual recognition rules become applicable only with the redaction of a prospectus to passport to another Member State.

It is debatable if the change from €5 million to €8 million achieves a remarkable change in the accessibility to the European capital markets.[267] The Commission itself noted that only 3% of prospectuses approved by national authorities during 2013 and 2014 were presented for offers between €5 million and €10 million and only about 6% of the prospectuses approved were for offers between €5 million and €20 million. Considering these data, it is possible to observe that a slightly higher threshold would have limited consequences for the capital markets in Europe too.[268]

As a consequence of the voluntary nature of the upper clause Member States are required to notify the European Commission and ESMA if they decide to apply Article 3(2) exemption and how, including in the communication the amount below which the exemption applies in that Member State. They are required to notify to the same authorities any subsequent change to the communicated monetary amount.

Looking at the table, based on the abovementioned notifications, published by ESMA, it is possible to affirm that Member States have implemented the voluntary threshold in a non-harmonized way. Thirteen Member States have opted for a threshold of €5 million. Some states, Belgium and Germany with €5 million and €8 million thresholds and Romania with €1 million and €5 million, have instead chosen to have two different thresholds applicable depending on the situation. Five Member States have opted for a threshold of €8 million and the remaining states have chosen clauses with a lower value (€1 million, €2,5 million or €3 million).[269] It should be considered that the voluntary nature of the upper threshold creates concern about potential cross-border forum shopping issues. Issuers from Member States where a lower threshold is applied might decide to issue securities in a different Member State where the national law provides no prospectus requirements for the amount of their issuance. If no prospectus to passport is redacted in these cases, the initial problem with fragmented financial markets will remain.[270] Despite the change in the voluntary threshold range, it is unlikely that member states will opt for a more harmonized approach as a consequence of this change. This consideration leads to the conclusion that the concerns, about forum shopping and cross-border impediments to access financing, risen under Prospectus Directive regime will continue to exist. Moreover, additional powers, to introduce further requirements at national level are given to Member States in the new Prospectus Regulation. Even though in their legislation the states will not have

[267] Härkönen, 2017, p. 129

[268] European Commission, 2015. Commission staff working document 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, SWD(2015) 255 final, p. 19

[269] ESMA "*National thresholds below which the obligation to publish a prospectus does not apply*" ESMA31-62-1193, 8 February 2019

[270] Härkönen, 2017, pp. 129-130

the possibility to require the redaction of a prospectus for offers under the amount of €1 million, they are allowed anyway to introduce other disclosure requirements "*to the extent that such requirements do not constitute a disproportionate or unnecessary burden*".[271]

2.1.3. Offers to a limited number of investors

Article 1(4)(b) of Regulation 2017/1129 provides that an offer of securities to the *public* "*addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors*" does not trigger the obligation to publish a prospectus. In this article the formulation of this exemption is maintained as found in the amended version of Prospectus Directive. However, the number of natural persons the offer could be addressed to was raised in 2010.

Recital 15 of Prospectus Regulation explains the ratio of this exemption saying that "Where an offer of securities is addressed exclusively to a restricted circle of investors who are not qualified investors, drawing up a prospectus represents a disproportionate burden in view of the small number of persons targeted by the offer, thus no prospectus should be required."

Due to the maintenance of the same formulation of the exemption here examined, all the remarks made in paragraph 1.1.2. of this Chapter, about the consequences of the choice to rise the number of persons addressed to 150, may be applied to the new article. Being offers to less than 150 non-qualified persons in each member state not considered public offers, as already said, an offer may be addressed to 149 in each of the 26 Member States with a potential total result of investments reaching more than 4,000 investors. This increase of the number of potential investors has led to a development that was not intended at the time of the introduction of the exemption in the Prospectus Directive. It has to be considered that under these conditions also a relatively minor investment can reach more than 4,000 investors and thus lead to considerable amounts of capital with no need to provide relevant information to investors. This situation is found to be problematic from an investor protection point of view.[272]

Despite the Commission noted that the original aim of the exemption was to permit issuers to include a limited number of non-qualified investors to an offering directed to qualified investors, introducing a more restrictive interpretation of this exemption in the Prospectus Regulation has not been taken into consideration as an option. The Commission instead first considered the stakeholders' suggestion to increase the threshold to 300 or even 500 based on their argumentation "*that such a rise could benefit the development of crowdfunding*". However, the Commission considered this argument not strong enough being an increase in the number of persons covered by the exemption examined in this paragraph likely to

[271] Art. 1 (3) of REGULATION (EU) 2017/1129

[272] Härkönen, 2017, pp. 131-132

have for crowdfunding activities and SMEs less relevance than those relating to the total consideration of the offer. It concluded that such an expansion was not needed, since an increase in the number of persons covered by the exemption would likely have only marginal relevance for crowdfunding activities and SMEs in general, because most offers by such issuers are already covered by the monetary threshold exemptions. This conclusion was based on the fact that the majority of the offers on crowdfunding platforms, at the moment of the Impact Assessment redaction, even if addressed to more than 150 non-qualified investors, were anyway prospectus-exempt remaining below the monetary threshold[273] or, if provided and applicable, the lower thresholds, above which the prospectus requirement applies, set by Member States at national level.

Furthermore, the Commission considered that "*a threshold of 300 non-qualified investors per Member State would add up to 8 400 non-qualified investors across the entire Union. Were those investors to invest only EUR 2 500 on average, this would add up to more than 20 million euro of retail money collected without a legal requirement for appropriate disclosure.*" And facing the impressing potential effect in terms of investors' protection loss concluded that "*This would go far beyond the original objective of the exemption which was to serve as a kind of 'de minimis' clause allowing issuers in a private placement to include a restricted circle of non-qualified investors in their offer*". [274]

2.2 Article 4 of the Directive exemptions in Prospectus Regulation

2.2.1. Exemptions

All the Article 4 of Prospectus Directive exemptions are maintained under the Prospectus Regulation regime. However, it has to be considered that some of them have been amended and the third countries equivalence decision mechanism, provided by Article 4(1) of Prospectus Directive, has been removed.

It is possible to find the exemptions provided by Article 4(1) of Prospectus Directive in letters from (e) to (i) of Article 1(4) of Regulation 2017/1129. Article 1(4)(f) and (g), equivalent to respectively Article 4(1)(b) and (c) of Prospectus Directive, require, in order to benefit from the exemption, to make a document "*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;*". In the Prospectus Directive the legislator opted for granting the exemption of the offers mentioned in Article 4(1)(b) and (c) "*if a document is available containing information which is regarded by the competent authority as being equivalent to that of the*

[273] At the time €5.000.000 now substituted by €100.000 and the optional threshold to set between €1.000.000 and €8.000.000

[274] European Commission, 2015. Commission staff working document 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, SWD(2015) 255 final, pp. 20-21

prospectus, taking into account the requirements of Union legislation;" The dispositions still require an information document to be prepared in replacement of the prospectus but the evaluation about the equivalence of this document to be done by the competent authority it is replaced with a concise description of the document content: "*information describing the transaction and its impact on the issuer*". However, it is specified how the equivalent document has to be made available referring to the arrangements described in Article 21(2) of the Regulation.

Article 4(1)(e) exemption is maintained. It is possible to find it in Article 1(4)(i) with two differences: the words "*or allotment*" have been added at the end of the text and the words "*provided that the company has its head office or registered office in the Union and*" have been repealed. Under the previous regime second to fifth subparagraph of Article 4(1) of Prospectus Directive extended the applicability of the exemption to companies "*established outside the Union whose securities are admitted to trading either on a regulated market or on a third-country market.*".[275] It was also specified that in the case of a third country the exemption should apply if adequate information was available "*at least in a language customary in the sphere of international finance*" and "*the Commission has adopted an equivalence decision regarding the third-country market concerned.*" on the request of the competent authority of a Member State, in accordance with the procedure referred to in Article 24(2) of the Prospectus Directive, stating whether the legal and supervisory framework of a third country ensures that a regulated market authorised in that third country was in compliance with legally binding requirements subject to effective supervision and enforcement in that third country.

The conditions for a third-country legal and supervisory framework to be met were clearly provided by the fourth paragraph of Article 4(1)[276] which required those markets to be authorized, supervised, and their rules enforced, to have clear and transparent rules on admission of securities and also called for periodic and ongoing information to be published, and market abuse prohibited. The fifth paragraph of Article 4(1) of the Prospectus Directive gave, moreover, to the Commission the power to adopt a delegated act in order *to* "*specify the above criteria or to add further ones to be applied in the assessment of the equivalence*".

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[275] First subparagraph added to Article 4(1) of Directive 2003/71/EC as amended by Directive 2010/73/EU

[276] Fourth paragraph of Article 4(1) of Directive 2003/71/EC as amended by Directive 2010/73/EU:

"*Such a third-country legal and supervisory framework may be considered equivalent where that framework fulfils at least the following conditions:*

(i) the markets are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(ii) the markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

(iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and

(iv) market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation."

Under Prospectus Regulation Article 1(4)(i) does not ask anymore the company to have its office in the Union and does not provide a specific regime for third countries. The new regime expands so the exemption, provided for third-country issuers offering securities in the context of employee stock option plans, to the situations in which the company is located in a third country with no need of an equivalence decision. The reason of this modification is explained to be, in Recital 17 of the Prospectus Regulation, the positive impact that incentivising directors and employees to hold securities can have on companies' governance and the help that can give in creating "*long-term value by fostering employees' dedication and sense of ownership, aligning the respective interests of shareholders and employees, and providing the latter with investment opportunities*".[277]

It has to be noted that references to the definition of an equivalent third-country framework, as laid down in Article 4(1) of Prospectus Directive, can be found in other provision, as in MiFID II in order to define its execution-only regime[278] and in MiFIR[279] for defining third-country markets as equivalent, and consequently it seems that it is to be considered as an organic provision.

This definition shows so to have a structural function, to be considered applicable in other regulations as well.[280]

Article 4(2) provisions have undergone less modifications as a consequence of their translation in the Prospectus Regulation regime. Article 4(2)(b)(c)(d)(e)(f) and (h) of Directive 2003/71/EC provisions can be found respectively in Article 1(5), first subparagraph, point (d)(e)(f)(g)(h) and (j) of Prospectus Regulation with the only difference that the text of letters (e) and (f) requires an equivalent document under the conditions abovementioned talking about Article 1(4)(f) and (g). Article 4(2)(a) and Article 4(2)(g) exemptions have been restated in Regulation 2017/1129 but some modification occurred in the text provided by the Prospectus Directive. Article 1(5), first subparagraph, point (a) repeats Article 4(2)(a) provision but now an issuance of "*securities fungible with securities already admitted to trading on the same regulated market*" shall represent less than 20% of the number of securities already admitted to the same market over a period of 12 months and not less than 10% of them as was previously provided. This change enlarges the effect of the exemption itself. Article 1(5), first subparagraph, points (b) and (c) provide an extended version of Article 4(2)(g) of Directive 2003/71/EC. The admission to trading on a regulated market *of* "*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*

[277] Recital 17 of REGULATION (EU) 2017/1129

[278] Article 25 (4) (a) of DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

[279] Article 23 of REGULATION (EU) No 600/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012; referring to article 25(4) (a) DIRECTIVE 2014/65/EU

[280] Wymeersch, 2018, pp. 209–275

on the same regulated market" is exempted from the obligation to publish a prospectus, under Article 1(5), first subparagraph, letter (b), "*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, subject to the second subparagraph of this paragraph*". The second subparagraph of Article 1(5) lays down the cases to which this requirement does not apply.

While the second part of letter (b) narrows the original extent of the exemption, letter (c) extends it to "*securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/ EU;*". A "*resolution authority*" is defined by Article 2(1)(18) of Directive 2014/59/ EU as "*an authority designated by a Member State in accordance with Article 3*".[281] Recital 15 of Directive 2014/59/ EU declaring "*In order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform the functions and tasks in relation to resolution pursuant to this Directive.*" clarifies which kind of subjects can be appointed. The aim of the Directive is to prevent insolvency and eventually limit its effects,[282] to avoid failure,[283] to harmonize procedures to resolve institution,[284] to make credit institutions resolvable and this is why it is needed "*to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system*".[285] Among the tools provided to the resolution authorities there are the powers attributed to them by Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/ EU. The peculiar situation and reasons behind the exchange or conversion of securities seems to be the reason why the obligation to publish a prospectus shall not apply to the admission to trading of the resulting securities on a regulated market.

2.2.2. The Exempted document

It has to be mentioned also Article 1(7) of Prospectus Regulation giving to the Commission the power to adopt delegated acts in order to define the minimum information content of the equivalent document to be

[281] Article 3 of the same Directive provides the rules the Member States shall follow to designate their resolution authorities

[282] Recital 1 of DIRECTIVE 2014/59/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

[283] Recital 2 of DIRECTIVE 2014/59/EU

[284] Recital 10 of DIRECTIVE 2014/59/EU

[285] Recital 5 of DIRECTIVE 2014/59/EU

redacted in order to benefit of exemptions provided by Article 1(4)(f) and (g) and Article 1(5) first paragraph letters (e) and (f). In all these cases it is required 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 provision is equivalent to Article 4(3) disposition under Prospectus Directive regime notwithstanding the fact that the subparagraph giving the power to ESMA to develop technical standards has not been translated. Notwithstanding the missing translation the Banking Authority has been asked on 28th February 2017 by the Commission, through a mandate covering various topics, to provide "*technical advice on the minimum information content of documents describing a merger, division or takeover which is necessary to apply an exemption from the obligation to publish an approved prospectus (Article 1 (7) of the PR)*".[286] In Consultation Paper ESMA31-62-962, containing draft technical advice in order to seek the views of stakeholders on the proposed advice, the Authority solely addressed the part of the mandate concerning the technical advice requested in connection with Article 1 (7) of the PR. More specifically in the mandate ESMA is asked "*to provide technical advice on the minimum information content of the documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 of the PR, taking into account recital 16 of the PR and in particular to define how the impact of the transaction on the issuer should be presented in such documents*"[287] as a consequence of the fact that these articles of the Prospectus Regulation require to make available to the public a document containing information describing the transaction and its impact on the issuer in order to benefit from the application of an exemption from the requirement to publish a prospectus obligations to securities that are offered to the public or admitted to trading on a regulated market (or both), in connection with a takeover, by means of an exchange offer, or in connection with a merger or a division.

The Commission described, in the mandate, the above mentioned exemptions as representing as an alleviation compared to the corresponding exemptions in Prospectus Directive, where it was required a document to be available containing information "*which is regarded by the competent authority as being equivalent to that of a prospectus*", and in line with this consideration ESMA considered the fact that the equivalent document is not subjected to scrutiny and approval by the National authority, according to Article 20 of the Prospectus Regulation, to be already an alleviation comparing this situation to the regular prospectus regime.

ESMA noted that, notwithstanding the new formulation do not ask for the national authority to approve the Exempted documents and in these cases there is no obligation to publish a prospectus and so no prospectus

[286] European Commission, 2018. Request to ESMA for technical advice on possible acts concerning the 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 on a regulated market, Ref. Ares(2018)328260

[287] ESMA, 2018. Consultation Paper "*Draft technical advice on minimum information content for prospectus exemption*", ESMA31-62-962, p. 10

to analyse, an authority may still be able to use its powers deriving from Article 32 of the Prospectus Regulation that are not related to the publication of a prospectus.

Under Directive 2003/71/EC regime equivalence criteria and so information provided to the public in the context of takeovers, mergers or divisions was regulated at national level and. In the case of takeovers, national legislative implementing acts of the Takeover Directive.[288] National regulations or guidance from national competent authorities too prescribed in some situations the criteria for the equivalence assessment to a prospectus. Under the Prospectus Regulation the Commission is instead empowered to harmonise the minimum information content sufficient for the exemption to be applied. Notwithstanding this aim of the new regulation, ESMA took into consideration the fact that the national laws transposing the Takeover Directive and the Merger and Division Directive differ amongst Member States and that there are few overlaps between these pieces of legislation. As a consequence of this situation the authority decided to keep and identify the disclosure items in the relevant Appendixes instead of removing the overlapping dispositions from the same appendixes. This decision has been taken considering that the burden for issuers to include this information in the document is not supposed be significant based on the assumption that the issuers, drawing up an Exempted Document, can take advantage of the information required by the national laws implementing the two abovementioned directives.

The importance of the opinion of ESMA on this topic is shown by the authority itself consideration "*that non-compliance with the minimum disclosure information requirements set out for the Exempted Document would result in an issuer not being exempted from the obligation to publish a prospectus. In such case, issuers are required to publish a prospectus*".[289]

In its Consultation Paper ESMA developed different suggestions in the appendixes, with the option to be subjected to consultation, depending on whether the issuer is known, and information is already available to the market. ESMA developed two sets of requirements for the Minimum Information Content Issuer Section depending on whether there is already available public information on the issuer disclosed in relation to the Takeover Directive or the Prospectus Regulation provisions. The reason of this choice is that, even though no distinction is made in Prospectus Regulation between issuers already admitted to trading on a regulated market and unlisted issuers in relation to the application of the exemptions, ESMA considered that "*the information requirements should be lighter for issuers admitted to trading on a regulated market as they are already known to investors and publish regulated information*".[290] In line with this position ESMA affirmed that the criteria laid down in 14(1) of Regulation 2017/1129, dealing with simplified regime for secondary

[288] Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids

[289] ESMA, 2018. Consultation Paper "*Draft technical advice on minimum information content for prospectus exemption*", ESMA31-62-962, p. 11

[290] Ibidem, p. 19

issuances, should be present in the technical advice on the Exempted Document too in order to give the possibility to issuers that fall within these criteria to use a more simplified regime.

After the consultation ESMA published a Final Report on the 29th of March 2019 in which noted that respondents to the consultation paper[291], issuers and banking associations' representatives above all, would have preferred a proposal providing for higher alleviation compared to the current regime of the prospectus. Respondents pointed out there would be substantial costs in terms of money and time spent for the preparation of the Exempted Document. It has been argued too that there is a sufficient level of disclosure on these transactions thanks to national legislation provisions implementing either the Takeover Directive or the Merger and Division Directive. Being offers of securities to the public or admissions to trading on regulated market connected to takeovers, mergers or divisions, on ESMA's opinion, transactions which are usually very complex and likely to have a significant impact on issuers' financial conditions and corporate governance, the authority maintained its view, already shown in the Consultation Paper, that there is limited room for alleviations compared to the general prospectus regime without adversely impacting investor protection. ESMA's conclusion on this point was that, at least in the context of transactions between an unlisted and listed company, the compliance costs associated with higher disclosure are lower than the investor protection benefits descending from a strengthened protection of investors. For transactions exclusively involving listed companies ESMA has identified lower investor protection risks and consequent costs permitting so to opt for a lightened disclosure regime.[292]

ESMA explained in the Consultation Paper[293] the methodology that it considered to be used for the identification of the minimum information content of the Exempted Documents. More specifically ESMA considered, as abovementioned, appropriate to use, as a starting point for the development of the minimum information content of the equivalent document, the full information included in a prospectus. Starting from the prospectus law ESMA and looking at Articles 6, 14, 19, 27 of the Regulation, which are only applicable in the case of the publication of prospectus, ESMA declared that similar provisions should be addressed in provisions dealing with the equivalent document "*in order to ensure that the use of the Exempted Document*

[291] It has to be noted that "*ESMA received responses from only 5 entities. None of the entities responding to the consultation represented the interests and views of investors. Taking into account the limited feedback received and in particular the absence of responses from investors and investors' associations as well as the lack of specific evidence to ease ESMA's concerns of investor protection, ESMA considers that it does not have a sufficient basis to significantly change the approach in its technical advice*."

[292] ESMA, 2019. Final Report "*Technical advice on Minimum Information Content for Prospectus Exemption*", ESMA 31-62-1207, p. 51

[293] ESMA, 2018. Consultation Paper "*Draft technical advice on minimum information content for prospectus exemption*", ESMA31-62-962, Section 5.1

is operational, its content remain relevant for investors and is not overly burdensome for issuers to draw up such documents for the reasons set out in the following paragraphs."[294]

In its Final Report ESMA identified the policy objective[295] and the possible options to the technical advice. The authority proposed two options: the first one was to "*Establish the content of the Exempted Document broadly based on the information to be made available under Directive 2004/25/EC and Directive (EU) 2017/1132*", the secondo one was to "*Establish the content of the Exempted Document leveraging on the prospectus content and regulatory framework provided for by Regulation (EU) 2017/1129 and relevant delegated acts*". After a propter evaluation "*Option 2 was chosen because of the investor protection benefits connected to disclosing the transaction and its impact on the issuer in a more thorough way*".[296]

In Annex IV of the Final Report it can be find ESMA definitive Technical advice on the minimum information content for a prospectus exemption. Among the various articles it is worth mentioning Article B dealing with the Exempted Document in general and providing the information, that the document shall contain, "*which is material to an investor for making an informed assessment of:*

(a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer;

(b) the rights attaching to the securities; and

(c) the takeover/merger/division and its impact on the issuer.

That information may vary depending on any of the following:

(a) the nature of the issuer;

(b) the type of securities;

(c) the takeover/merger/division which the issuer has entered into;"[297]

The Article provides rules about the structure of the document listing the various sections that should be contained and some form rules.[298] It adds also a derogation from paragraph 1.[299]

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[294] Ibidem, Section 4, p. 17

[295] "*To draw up a list of minimum information items that should be included in the Exempted Document*."

[296] ESMA, 2019. Final Report "*Technical advice on Minimum Information Content for Prospectus Exemption*", ESMA 31-62-1207, p. 52

[297] Article B paragraph 1 of Annex IV of ESMA, 2019. Final Report "*Technical advice on Minimum Information Content for Prospectus Exemption*", ESMA 31-62-1207, pp. 54-107

[298] "*The information in an Exempted Document shall be written and presented in an easily analysable, concise and comprehensible form, taking into account the factors set out in the second subparagraph of paragraph 1.*"

[299] "*By the way of derogation from paragraph 1, where a disclosure item included in the appendices is not material or pertinent, it may be omitted provided that an explanation is included in the Exempted Document*"

3. Alternative regimes under Prospectus Regulation

In the Proposal for the Prospectus Regulation it is affirmed that the goal of the reform was to provide all types of issuers with disclosure rules tailored to their particular needs and, at the same time, make the prospectus a more relevant tool to inform potential investors.

In the proposal special emphasis was put on four groups of issuers: "*(1) issuers already listed on a regulated market or an SME growth market, which want to raise additional capital by means of a secondary issuance, (2) SMEs, (3) frequent issuers of all types of securities and (4) issuers of non-equity securities*".[300] As a consequence of the reform purpose, the options chosen for the new regulation were designed to reduce the compliance burden for the abovementioned target groups and all the groups were expected to benefit, in different degree, from the proposed reforms.

In line with this regulatory choice the Commission elaborated, following ESMA technical advice, the two regulations, dealing with prospectus content, implementing Regulation 2017/1129. In the implementing regulations it is possible to find more detailed information about these alternative regimes.

The next paragraphs will deal with these categories of issuer in a more specific way.

3.1 Specific disclosure regimes

Starting from the initial estimations on cost savings in the Impact Assessment it was considered the possible positive impact linked to the introduction of the two proposed disclosure regimes for SMEs and for secondary issuers. In the Proposal for the Prospectus Regulation it is stated that the disclosure regimes for secondary issuances and SMEs were aimed at resulting in lower compliance costs for issuers and so reducing the work load of competent authorities considering the lower amount of information disclosed and scrutinised. In fact, according to this regime, SMEs, not admitted to trading in a regulated market, wanting to raise capital by means of a public offer will benefit from new disclosure rules meant to lower the cost of preparation of a prospectus. Talking about secondary issuances, it has to be mentioned that data provided by Member States indicated that around 70% of all prospectuses approved in a reference year pertained to a secondary issuance of securities by already admitted companies. This means that a huge quantity of prospectuses per year might benefit from the alleviated disclosure regime for secondary issuances.

[300] 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, Brussels, 30.11.2015 COM(2015) 583 final, 2015/0268 (COD), p. 6

The two sets, one for secondary issuances and the other for SMEs, of specific disclosure rules, contained in the proposal and approved subsequently with some amendments, replaced the "*proportionate disclosure regimes*"[301] for rights issues and SMEs introduced by the amending Directive 2010/73/EU.

3.1.1. Disclosure in a SMEs' growth perspective

A proportionate disclosure regime has been introduced for SMEs in 2010. Even though small offerings exemptions were already present in Prospectus Directive before the 2010 reform, the disclosure rules operated mainly on a one size fits all basis. Things started to change for SMEs with the introduction of the € 1.000.000 threshold under which no prospectus is needed. Drawing a prospectus was in fact a deterrent for these small companies being too expensive compared to the relatively small amount of capital usually raised.[302]

SMEs' treatment under Prospectus Regulation is provided by Article 15 of the Regulation. Article 2(f) of Regulation 1129/2017 defines SMEs providing two alternative groups of requirements. Article 2(f)(i) requires the enterprise to meet at least two of the three criteria provided that are: "*average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000*". Meanwhile Article(f)(ii) referring to point (13) of Article 4(1) of MIFID II which defines SMEs as "*companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years*". ESMA in its Consultation Paper on EU Growth prospectus regime,[303] delivered in response to the 28 February 2017 mandate of the Commission,[304] underlined the main aspects dealt with in Article 15 of Prospectus Regulation and laid down some proposal for the implementing regulation. The Authority affirmed that supporting access to finance for SMEs was one of the key priorities under the Commission's Capital

[301] Article 7(2)(e) and (g) of Directive 2003/71/EC by Directive 2010/73/EU:
"*(e) the various activities and size of the issuer, in particular credit institutions issuing non-equity securities referred to in Article 1(2)(j), companies with reduced market capitalisation and SMEs. For such companies the information shall be adapted to their size and, where appropriate, to their shorter track record;*
(g) a proportionate disclosure regime shall 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 as defined in Article 4(1)(15) of Directive 2004/39/EC, which are subject to appropriate ongoing disclosure requirements and rules on market abuse, provided that the issuer has not disapplied the statutory pre-emption rights."

[302] Howell E., "*An Analysis of the Prospectus Regime: The EU Reforms and the 'Brexit' Factor*", in European Company and Financial Law Review, De Gruyter, Volume 15, Issue 1, p. 86

[303] ESMA, 2017. Consultation Paper "*Draft technical advice on content and format of the EU Growth prospectus*", ESMA31-62-649

[304] "*e) The measures specifying the reduced content and standardised format and sequence for the EU Growth prospectus, as well as the reduced content and standardised format of its specific summary (Article 15(2) of the Regulation);*"

Markets Union Action Plan.[305] SMEs are considered to be a priority being important drivers of growth, employment and innovation in the Union. Moreover, direct investment in these enterprises supports sustainable economic development and facilitating the growth of these companies, providing to them easier and more cost-efficient access to risk capital, may strengthen these companies and foster job creation.

Prospectus Directive provided that the European lawmaker should take into account the different nature of the activities and size of issuers while elaborating the different types of prospectuses. Particular attention, as already said was focused on SMEs. The need of information adapted to their size has already been individuated. However, Article 15 of the Prospectus Regulation establishes a new proportionate disclosure regime for the drawing up of an EU Growth prospectus. The EU Growth prospectus is available to three types of entities in the case of offers of securities to the public if they respect the condition of having no securities admitted to trading on a regulated market. "*These entities are:*

(a) SMEs, i.e. enterprises which meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding €43 million and an annual net turnover not exceeding €50 million; or small and medium-sized enterprises as defined in Article 4(1)(13) of the Market in Financial Instruments Directive ('MiFID')[2]*;*

(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 €500 million on the basis of end-year quotes for the previous three calendar years;

(c) Issuers, other than those referred to under points (a) and (b), where the offer of securities to the public is of a total consideration in the Union that does not exceed €20 million 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.

The option to draw up an EU Growth prospectus is also extended to offerors of securities issued by issuers referred to in paragraph 10 (a) and (b) above."

The proportionate disclosure regime is meant to facilitate access to financing on capital markets for SMEs. The requirement to allow SMEs and other medium enterprises to provide reduced disclosure when drawing a prospectus takes into consideration, on the Authority's opinion, that the cost of preparing a prospectus can

[305] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Action Plan on Building a Capital Markets Union, Brussels 30.9.2015, COM(2015) 468 final

be relatively high and act as a deterrent for such issuers which normally have lower needs of funds compared to larger companies.[306]

The second subparagraph of Article 15 provides information about the format of the EU Growth prospectus. Applying the principle of proportionate disclosure, taken into consideration by the Commission when dealing with these specific situations as already said, the document shall have a standardised format, written in a simple language and it should be easy for issuers to complete it. The EU Growth prospectus shall consist of a specific summary, a specific registration document and a specific securities note. The provision also requires this prospectus to be presented in a standardised sequence in accordance with the Commission delegated act defined in paragraph 2 of the same article. The Commission asked to ESMA for technical advice in order to be able to fulfil the obligation drawn in Article 15(2). The third subparagraph of Article 15(2) of Prospectus Regulation provides a list of elements the Commission should focus on, when specifying the reduced content and standardised format and sequence of the EU Growth prospectus, to calibrate the requirements.

After the consultation ESMA published on 28 March 2018 a Final Report providing technical advice about various topics. ESMA analysed the answers of the respondents about the format and content of the EU Growth prospectus in point 3.2 of the Report. The Securities and Banking Authority clarified, in answer to a respondent proposing that all SMEs should be eligible for the EU Growth prospectus regardless the admission to trading on a regulated market, that Article 15(1) of Prospectus Regulation sets out which issuers may use the EU Growth prospectus. The aim of this distinction is clarified in Recital 53 of the Regulation stating that the EU Growth prospectus "*should not be available where a company already has securities admitted to trading on regulated markets, so that investors on regulated markets feel confident that the issuers whose securities they invest in are subject to one single set of disclosure rules*".

The Authority also explained in this paragraph the methodology adopted in order to identify the minimum information content of the EU Growth prospectus. At first ESMA considered the information that is necessary for investors to make an investment decision. It also considered the potential costs in providing information, weighing on issuers, that shows to be duplicated or too costly meanwhile they bring little or no added-value to investors. Finally, ESMA tried to balance these two mentioned objectives while drawing its draft technical advice. The wording of the information items was brought in line with the wording used under the full regime to provide certainty on the actual disclosure requirements of the EU Growth prospectus.[307]

[306] ESMA, 2017. Consultation Paper "*Draft technical advice on content and format of the EU Growth prospectus*", ESMA31-62-649, p. 13

[307] ESMA, 2018. Final Report "Technical advice under the Prospectus Regulation", ESMA31-62-800, p. 148

In Annex V of its Final Report ESMA, after a propter evaluation of the responses, laid down its technical advice. This advice is the basis of Chapter IV of the second Commission Delegated Regulation supplementing Prospectus Regulation.[308] Chapter IV of the delegated act "*addresses the content, format and sequence of the EU Growth prospectus, together with the content and format of its specific summary. In particular:*

- *the standardised format of the EU Growth prospectus under the proportionate disclosure regime is designed to be easy for issuers to complete, making it lighter, helping to minimise costs for SMEs and facilitating their access to finance while ensuring investor confidence;*
- *the specific summary of the EU Growth prospectus only requires relevant information already included in the EU Growth prospectus and is shorter than the summaries for other types of prospectuses.*"[309]

Another act to be mentioned when talking about SMEs is the Proposal for a Regulation amending Prospectus Regulation and Market Abuse Regulation[310] in favour of SMEs.[311] This proposal is an expression of one of the core principles of the Capital Market Union: broadening access to market-based sources of financing for European companies at each stage of their development.[312] Despite the progress made by EU from the

[308] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (Text with EEA relevance).

[309] Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004, Brussels, 14.3.2019 C(2019) 2020 final, p. 4

[310] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

[311] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, Brussels, 24.5.2018, COM(2018) 331 final, 2018/0165 (COD)

[312] As explained in Prospectus Regulation Proposal "*The prospectus reform aims to complement the Capital Markets Union objectives of reducing fragmentation in financial markets, diversifying financing sources and strengthening cross border capital flows. The Commission's top priority is to boost Europe's economy and stimulate investment to create jobs. Stronger European capital markets are an important part of the response to this pressing challenge, as it can increase the volume of finance available and channel it more efficiently to deserving investment opportunities across the EU.*

As part of the Capital Markets Union Action Plan is the conviction that capital market based finance, in all its forms, – including venture capital, crowdfunding and the asset management industry – can provide funding solutions to companies that need more capital to run or expand their business. The Capital Markets Union Action Plan also aims to enable more private investment in

launch of the Capital Markets Union Action Plan, through new rules to boost EU venture capital funds' investment in start-ups and medium-sized companies and the new rules in the Prospectus Regulation on the EU growth prospectus, EU public markets for SMEs are still struggling to attract new issuers. Because of this situation the Commission shows in its proposal the conviction that more needs to be done to develop a regulatory framework supporting access to public funding for SMEs. In order to do so it is fundamental to strike "*the right balance between investor protection and market integrity on the one hand, and avoiding unnecessary administrative burdens on the other*" and to focus on SME Growth Markets.[313] This legislative initiative is strictly confined to SME Growth Markets and companies listed on those trading venues to limit the beneficiaries of the relief to issuers admitted these markets. On the other side the Commission believe that the requirements imposed on regulated market issuers should instead apply regardless of the size of the company.

The Commission explains that this proposal brings only technical amendments to some provisions of Market Abuse Regulation and Prospectus Regulation in order to make the EU legal framework applying to listed SMEs more proportionate. The reason has to be found, for the Market Abuse Regulation, in the fact that since its entry into application in 2016 this regulation has been extended also to SME Growth Markets and mainly in the fact that the provisions,[314] laid down in this regulation, list requirements that should apply in the same manner to all issuers regardless of their size or where their instruments are admitted to trading. The regulation indeed contains only two limited adaptations to issuers listed on SME Growth Markets.[315] The amendment of Article 14 the Prospectus Regulation is linked to the problem that an issuer who wants to transfer its shares from an SME Growth Market to a regulated market, has to face. This issuer actually needs to produce a full prospectus being available no alleviated prospectus schedule to be used in this situation. Article 2 of the Proposal provides:

"*Article 14 of Regulation (EU) 2017/1129 is amended as follows:*

in the first subparagraph of paragraph 1, the following point d is added:

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infrastructure projects, to offer investors and savers additional opportunities to put their money to work more effectively, and to remove barriers to cross-border investment."

[313] "*SME Growth Markets are a new category of multilateral trading venues (MTFs) that were introduced by the Markets in Financial Instruments Directive II in January 2018*"

[314]Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, Brussels, 24.5.2018, COM(2018) 331 final, 2018/0165 (COD), p. 2

[315] Ibidem, pp. 2-3:

"*The first allows trading venues operating an SME Growth Market to post inside information on the trading venue's website (instead of the issuer's website). The second allows issuers listed on SME Growth Markets to produce insider lists only upon request from a national competent authority (NCA). However, the effect of this alleviation is limited because companies are still required to gather and store all relevant information to be able to produce insider lists on request*."

"*(d) issuers that have been admitted to trading on an SME Growth Market for at least three years and who seek admission of existing or new securities to trading on a regulated market.*";

in the second subparagraph of paragraph 2, the following sentence is added:

"*For issuers as referred to in point (d) of the first subparagraph of paragraph 1, the most recent financial statements, containing comparative information for the previous year included in the simplified prospectus, shall be prepared in accordance with the International Financial Reporting Standards as endorsed in the Union pursuant to Regulation (EC) No 1606/2002.*"

The objective of this provision is that this "*would help companies graduate from the SME Growth Market to the regulated market, by allowing them to produce a simplified prospectus*".

Article 1 of the Proposal indeed deals with the modifications, mainly aiming at lowering the administrative burden on SMEs, to the Market Abuse Regulation text.

3.1.2. Secondary issuances

The alleviated regime for secondary issuances applies to offers or admissions concerning securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months. Such companies are therefore subject to ongoing disclosure requirements under the Market Abuse Regulation and either the Transparency Directive or the rules of the operator of the SME growth market as required under Directive 2014/65/EU and its implementing measures. The alleviated prospectus will only contain minimum financial information.[316]

Article 14 of the Prospectus Regulation establishes the simplified disclosure regime for secondary issuances, setting out who can avail of such regime and the broad parameters as regards the content of the alleviated prospectus. The article makes it clear that, in terms of a derogation from the necessary information test included in Article 6(1) and without prejudice to Article 18(1) "*the simplified prospectus shall contain the relevant reduced information which is necessary to enable 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;

[316] 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, Brussels, 30.11.2015 COM(2015) 583 final, 2015/0268 (COD), p. 16

(c) the reasons for the issuance and its impact on the issuer, including on its overall capital structure, and the use of the proceeds."

According to Article 14(3) of the new Prospectus Regulation:

"*The Commission shall, by 21 January 2019, adopt delegated acts in accordance with Article 44 to supplement this Regulation by setting out the schedules specifying the reduced information to be included under the simplified disclosure regime referred to in paragraph 1.*

The schedules shall include in particular:

(a) the annual and half-yearly financial information published over the 12 months prior to the approval of the prospectus;

(b) where applicable, profit forecasts and estimates;

(c) a concise summary of the relevant information disclosed under Regulation (EU) No 596/2014 over the 12 months prior to the approval of the prospectus;

(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.

When specifying the reduced information to be included under the simplified disclosure regime, the Commission shall take into account the need to facilitate fundraising on capital markets and the importance of reducing the cost of capital. In order to avoid imposing unnecessary burdens on issuers, when specifying the reduced information, the Commission shall also take into account the information which an issuer is already required to disclose under Directive 2004/109/EC, where applicable, and Regulation (EU) No 596/2014. The Commission shall also calibrate the reduced information so that it focusses on the information that is relevant for secondary issuances and is proportionate."

In terms of who is eligible to use the simplified prospectus, Recital 49 provides that:

"*The simplified disclosure regime for secondary issuances should be available for offers to the public by issuers whose securities are traded on SME growth markets, as their operators are required under Directive 2014/65/EU of the European Parliament and of the Council to establish and apply rules ensuring appropriate ongoing disclosure.*" *More specifically the first paragraph of Article 14(1) contain the list of persons who may choose, in the case of an offer of securities to the public or an admission to a regulated market, to draw up a simplified prospectus under the secondary issuance disclosure regime. They are:*

"*(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 the mandate received from the Commission,[317] ESMA has been requested to provide technical advice on the content of the schedules applicable under the simplified prospectus regime for secondary issuances. In accordance with this request, ESMA has drawn up a proposal for a registration document and a securities note which can be used for issuance of both equity and non-equity securities. The registration document and securities note are proposed for issuers regardless of whether they are listed on a regulated market or an SME Growth Market.

The second subparagraph of Article 14(1) of Prospectus Regulation only requires, about the content of the simplified prospectus, the document to consist *of* "*a summary in accordance with Article 7, a specific registration document which may be used by persons referred to in points (a), (b) and (c) of the first subparagraph of this paragraph and a specific securities note which may be used by persons referred to in points (a) and (c) of that subparagraph.*" So since there is no specific annex in the new Prospectus Regulation regarding the secondary issuance registration document and securities note, ESMA considered, in its Consultation Paper, which information should be included in this simplified prospectus and proposed that the prospectus should consist of the list of "*(a) The disclosure requirements mentioned in Article 14(3); (b) Information required by the necessary information test under Article 14(2); and (c) The minimum information mentioned in Article 7*".[318]

In paragraph 6 of its Consultation Paper on Draft technical advice on format and content of the prospectus ESMA, after its analysis of Article 14, explained how the Authority designed the requirements to be subjected to public consultation. ESMA used the disclosure required for equity securities as a starting point to delineate the disclosure to be required. The Authority added also alternative requirements to facilitate the

[317] European Commission, 2018. *Request to ESMA for technical advice on possible acts concerning the 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 on a regulated market*, Ref. Ares(2018)3282605

[318] ESMA, 2017. Consultation Paper "Draft technical advice on format and content of the prospectus", ESMA31-62-532, p. 204-205

issuance of debt securities, both retail and wholesale. The requirements have been designed taking into account disclosures that are made by issuers under the Takeover Directive, or under the rules of the SME Growth Market operator, and under Market Abuse Regulation.

After an evaluation of the respondents' opinion of its proposal ESMA gave a definitive technical advice in Annex V of its Final Report of 28 March 2018.[319] On the basis of this advice some provisions about secondary issuances have been introduced in the Proposal for the second Commission Delegated Regulation supplementing Prospectus Regulation:[320] Article 4 about the registration document for secondary issuances of equity securities, Article 9 dealing with the registration document for secondary issuances of non-equity securities, Article 13 about securities note for secondary issuances of equity securities or of units issued by collective investment undertakings of the closed-end type and Article 17 about securities note for secondary issuances of non-equity securities. These articles refer to various Annexes of the same text in which are listed the information to be contained in each single document. This Delegated Regulation, as already said, is based on ESMA technical advice but "*in order to improve clarity and consistency, the Annexes about the simplified prospectus for secondary issuances, which in ESMA's technical advice were covering all types of securities, have been disaggregated to differentiate between equity and non-equity securities, in line with the prospectus for primary issuances.*"[321]

3.2 Frequent issuers

One of the objectives stated in the Proposal for Prospectus Regulation was the introduction of the proposed universal registration document for equity and non-equity issuances believing that it can result in faster prospectus approvals, increasing the number of prospectuses approved every year in less than 10 working days. In line with this objective Recital 43 of Prospectus Regulation affirming the importance of a faster approval for Universal Registration Documents drawn by frequent issuers.

Moreover in Recital 39 it is stated that "*Frequent issuers should be incentivised to draw up their prospectus as separate documents, since that can reduce their cost of compliance with this Regulation and enable them to swiftly react to market windows*" and to achieve this objective issuers whose securities are admitted to a regulated market "*should have the option, but not the obligation, to draw up and publish every financial year a universal registration document containing legal, business, financial, accounting and shareholding information and providing a description of the issuer for that financial year.*"

[319] ESMA, 2018. Final Report "*Technical advice under the Prospectus Regulation*", ESMA31-62-800

[320] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129

[321] Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004, Brussels, 14.3.2019 C(2019) 2020 final, p. 3

The same Recital provides a first definition of "*frequent issuer*" saying that an issuer should be considered to be a frequent issuer, when he fulfils the criteria set out in Prospectus Regulation, from the moment when this subject submits to the competent authority the universal registration document for its approval. Article 9(11) integrates this definition stating that an issuer has the status of frequent issuer, and so *benefits from a faster approval in 5 working days instead of 10 as drawn in Article 20(6),* when the conditions set out in Article 9(2) first or second subparagraph or in paragraph 3 of the same article are fulfilled. They are:

"*2. Any issuer that chooses to draw up a universal registration document every financial year shall submit it for approval to the competent authority of its home Member State in accordance with the procedure set out in Article 20(2) and (4).*
After the issuer has had a universal registration document approved by the competent authority for two consecutive financial years, subsequent universal registration documents may be filed with the competent authority without prior approval.
Issuers which, prior to 21 July 2019, have had a registration document, drawn up in accordance with Annex I to Commission Regulation (EC) No 809/2004, approved by a competent authority for at least two consecutive financial years and have thereafter filed, in accordance with Article 12(3) of Directive 2003/71/EC, or got approved such a registration document every year, shall be allowed to file a universal registration document without prior approval in accordance with the second subparagraph of paragraph 2 of this Article from 21 July 2019."
Moreover, in order the issuer will have the status "*provided that:*

> *(a) upon the filing or submission for approval of each universal registration document, the issuer provides written confirmation to the competent authority that, to the best of its knowledge, all regulated information which it was required to disclose under Directive 2004/109/EC, if applicable, and under Regulation (EU) No 596/2014 has been filed and published in accordance with those acts over the last 18 months or over the period since the obligation to disclose regulated information commenced, whichever is the shorter; and*
> *(b) where the competent authority has undertaken a review as referred to in paragraph 8, the issuer has amended its universal registration document in accordance with paragraph 9.*"

In the second subparagraph of paragraph 11 it is specified that if any of the conditions above is not fulfilled the issuer will lose the status of frequent issuer.

According to Article 13(2) of the new Prospectus Regulation requires the Commission to define the minimum information to be included in the Universal Registration Document adopting delegated acts. This has to be done setting out a schedule that "*shall ensure that the universal registration document contains all the necessary information on the issuer so that the same universal registration can be used equally for the subsequent offer to the public or admission to trading of equity or non- equity securities.*" The financial and

corporate governance information, according to the same paragraph, shall be in line with the information disclosure requirements linked to the annual and half-annual reports of Article 4 and 5 of the Transparency Directive.[322]

In order to fulfil its task in the best way, the Commission asked ESMA's opinion on this topic too through the mandate mentioned few times in the previous paragraphs. With regard to the content of the Universal Registration Document the Authority started from Recital 39 of the Prospectus Regulation which states that "*The universal registration document should be multi-purpose insofar as its content should be the same irrespective of whether the issuer subsequently uses it for an offer of securities to the public or an admission to trading on a regulated market of equity or non-equity securities. Therefore, the disclosure standards for the universal registration document should be based on those for equity securities*".

ESMA suggested that the disclosure requirements should be those for the standard registration document plus additional items deriving from Takeover Directive disclosure not replicated in the Prospectus Regulation. Article9(12) of the Prospectus Regulation gives the issuer the possibility to use the URD to fulfil its obligation under the TD to publish the annual and/or half-yearly financial report. In this case, in addition to the information required by the share registration document schedule, in order to fulfil the issuer's obligations under the Takeover Directive, the Universal Registration Document must include additional information.[323]

Talking about the format ESMA stated that it has to follow the one set for the share registration document while at the same time capturing the additional disclosures required for issuers adopting this kind of disclosure mean.
The Authority also affirmed the importance of clarifying in the Universal Registration Document if it was approved before its publication, considering that, under Prospectus Regulation, issuers which have had a Universal Registration Document approved in two consecutive financial years may file and publish their subsequent ones without prior approval.[324]

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[322] DIRECTIVE 2004/109/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

[323] "*the URD must include:*

- *the information required to be disclosed in the annual or half-yearly financial report referred to in Articles 4 and 5 of the TD;*
- *a cross reference list identifying where each item in the annual and half-yearly financial report required by the TD can be found in the URD;*
- *a responsibility statement in the terms required under Article 4(2)(c) and 5(2)(c) of the TD*".

[324] ESMA, 2017. Consultation Paper "Draft technical advice on format and content of the prospectus", ESMA31-62-532, pp. 198-201

In its Final Report[325] ESMA received from the consultation a positive feedback on its opinion about disclosure requirements. The majority of respondents agreed the Universal Registration Document requirements should be based on the share registration document and also agreed with the proposed additional disclosure items.

Among the points of the Prospectus Regulation detailed and clarified in the Explanatory Memorandum of the Proposal[326] for the second Commission Delegated Regulation there are:

> "*the minimum information to be included in the universal registration document, taking into account the need to ensure that it contains all necessary information on the issuer in order to be used equally for the subsequent offer to the public or admission to trading on a regulated market of equity or non-equity securities;*" and
>
> "*scrutiny criteria for the universal registration document and amendments to it, and the procedures for approving, filing and reviewing them. As regards the conditions for losing the status of frequent issuer, the conditions set out in Article 9(11) of the Prospectus Regulation were considered to be already exhaustive. Hence, no additional conditions were laid down in this Delegated Regulation.*"[327]

The minimum information to be included in the Universal Registration Document is set in Chapter II which deals with the content of the prospectus. Chapter V provides "*the criteria for scrutiny of the universal registration document and amendments to it, and the procedures for approving, filing and reviewing such documents.*"[328]

Recital 3 of the Proposal, in line with ESMA suggestion, requires issuers to state, in their Universal Registration Documents, if they were approved or merely filed.[329] In Recital 15 it is stated that "*due to the multipurpose character of the universal registration document, issuers who choose to draw up and publish a universal registration document every financial year should be granted more flexibility as regards the order of information to be provided in the universal registration document.*"

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[325] ESMA, 2018. Final Report "Technical advice under the Prospectus Regulation", ESMA31-62-800, p. 131

[326]Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004. Brussels, 14.3.2019 C(2019) 2020 final.

[327] Ibidem, pp. 1-2

[328] Ibidem, p. 4

[329] "*To ensure legal certainty and increase transparency for investors, issuers should state in their universal registration document whether the universal registration document has been approved by the competent authority or merely has been filed and published without prior approval*."

Article 3 of the Proposal disposes that a Universal Registration Document shall contain the information mentioned in Annex 2 of the same act. The first category of information *is* "*the information in accordance with the disclosure requirements for the registration document for equity securities*".[330] The second category depends on the fact if the universal registration document is approved or filed and published without prior approval. In the first case the statement about the approval, described in item 1.5 of Annex 1of the Proposal, "*shall be supplemented with a statement that the universal registration document may be used for the purposes of an offer to the public of securities or admission of securities to trading on a regulated market if completed by amendments, if applicable, and a securities note and summary approved in accordance with Regulation (EU) 2017/1129*". In the second *case* "*a statement that:*

(a) the universal registration document has been filed with the [name of the competent authority] as competent authority under Regulation (EU) 2017/1129 without prior approval pursuant to Article 9 of Regulation (EU) 2017/1129;

(b) the universal registration document may be used for the purposes of an offer to the public of securities or admission of securities to trading on a regulated market if approved by the [insert name of competent authority] together with any amendments, if applicable, and a securities note and summary approved in accordance with Regulation (EU) 2017/1129"[331]

shall replace the one described in item 1.5 of Annex 1.

Several other provisions refer to the Universal Registration Document. Among them Article 24(3) and 25(4) require the inclusion of additional information about risk factors when the registration document, respectively of a prospectus or a base prospectus, is drawn in the form of a Universal Registration Document. Whereas Article 41 deals with the proportionate approach in the scrutiny of draft prospectus and review of the Universal Registration Document.

Talking about frequent issuers under Prospectus Regulation there is also an exemption to be mentioned. This exemption regarding frequent bank issuers was already provided by Article 1(2)(j) under Prospectus Directive regime. This is more an exception that an exemption in fact it was listed among the cases falling outside the scope of the directive. It can be found in the Prospectus Regulation among the exemptions previously laid down in Article 3(2) and Article 4 of Directive 2003/71/EC. Based on the two dispositions, Art 1(4)(j) and Art 1(5)(i) of Prospectus Regulation, the obligation to publish a prospectus shall not apply to offers of securities to the public and to the admission to trading on a regulated market of:

"*non-equity securities issued in a continuous or repeated manner by a credit institution, where the total aggregated consideration in the Union for the securities offered is less than EUR 75 000 000 per credit institution calculated over a period of 12 months, provided that those securities:*

(i) are not subordinated, convertible or exchangeable; and

[330] Annex 2 of Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129

[331] Ibidem

(ii) do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument."

3.3 Issuers of non-equity securities

Prospectus Directive provided a wholesale regime for non-equity securities with a denomination per unit at least equal to €100.000. This regime relaxed some requirements of Prospectus Directive. A summary had not to be provided "*save where a Member State so requires in accordance with Article 19(4)*". In the Proposal for Prospectus Regulation it was stated the intention to have a uniform prospectus regime for non-equity securities listed on regulated markets in order to abolish the wholesale / retail dual regime in force under Prospectus Directive. As can be intuited from the provision applicable to SMEs, secondary issuances and frequent issuers, this distinction has been maintained under Prospectus Regulation. Moreover, Recital 21 of the regulation states that "*In order to ensure the proper functioning of the wholesale market for non-equity securities and increase market liquidity, it is important to set out a distinct alleviated treatment for non-equity securities admitted to trading on a regulated market and designed for qualified investors. Such alleviated treatment should comprise minimum information requirements that are less onerous than those applying to non-equity securities offered to retail investors, no requirement to include a summary in the prospectus, and more flexible language requirements*". This alleviated treatment is applicable to:

- non-equity securities traded only on a regulated market, or a specific segment of it, accessible only to qualified investors for the purposes of trading in such securities;
- non-equity securities with a denomination per unit of at least EUR 100.000.

As stated in Recital 35 and Article 8(1)[332] of the Prospectus Regulation, the issuer, offeror or person asking for the admission to trading on a regulated market can choose to draw up a prospectus in the form of a base prospectus for all non-equity securities. The content a base prospectus needs to have is laid down in the subsequent paragraphs of Article 8. Article 7(1) second subparagraph states that no summary is required for non-equity *issuances* "*provided that:*

(a) such securities are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities; or

(b) such securities have a denomination per unit of at least EUR 100 000"

[332] "*For non-equity securities, including warrants in any form, the prospectus may, at the choice of the issuer, offeror or person asking for the admission to trading on a regulated market, consist of a base prospectus containing the necessary information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market.*"

Meanwhile Article 27 provides a different and more flexible language requirements[333] for admission to trading on a regulated market. In fact, if the non-equity securities meet one of the two requirements drawn up in Article 7(1) and abovementioned, the issuer, the offeror or the person asking for admission to trading, in one or more Member States, can choose to draw the prospectus "*either in a language accepted by the competent authorities of the home and host Member States or in a language customary in the sphere of international finance*".

Notwithstanding the general favour for non-equity securities issuances, Article 5 of Prospectus Regulation provides that the resale to non-qualified investors should not be allowed for the non-equity securities, traded only on a regulated market or a segment of it, accessible only to qualified investors for trading purposes of such securities, unless a prospectus is drawn up in accordance with Prospectus Regulation standard regime.

In Recital 7 of the Proposal for the second Commission Delegated Regulation supplementing Prospectus Regulation it stresses how it is important to have proportionate information in prospectuses for non-equity securities. This information "*should be adapted to the level of knowledge and expertise of each type of investor.*" and as a consequence of retail investors' lower knowledge about financial markets and so defences "*Prospectuses for non- equity securities in which retail investors can invest should therefore be subject to more comprehensive and distinct information requirements than prospectuses for non-equity securities that are reserved to qualified investors*".[334]
The Delegated Regulation, while dealing with the registration document, the security note, the EU Growth prospectus and secondary issuances too, differentiate between equity and non-equity securities and among the latter category between wholesale and retail non-equity securities.

[333] For standard language requirements see Chapter 1

[334] Recital 7 of Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129

Chapter 3

Crowdfunding disclosure

Introduction

The previous chapters offered an overview of the prospectus law and its exemptions. Instead Chapter 3 aims at evaluating the interaction of Prospectus Law with Alternative forms of business financing. These financing forms rapidly increased their popularity in Europe in the last years. Especially for SMEs, having typically only limited resources to serve as collateral to loans and other financing provided by banking institutions thus facing significant challenges in qualifying for external financing, these new forms of business financing are fundamental. Among the different forms of these solutions Crowdfunding and Initial Coin Offerings (ICOs) warrant investigation.

Crowdfunding, which is the main focus of Chapter 3, has been subject to a surprising boom in Europe in recent years. The European Commission has actively engaged with the concept of Crowdfunding since 2013.[335] On the European Commission website it is possible to find a definition of Crowdfunding as "*an emerging alternative form of financing that connects those who can give, lend or invest money directly with those who need financing for a specific project. It usually refers to public online calls to contribute finance to specific projects*".[336]

Opinions of different scholars about disclosure through prospectuses as well as through other means when Crowdfunding offer is at stake will be analysed. Some national regimes will be taken into consideration in order to highlight differences between these legal systems and Crowdfunding under European Law. An overview on the importance of disclosure in Crowdfunding campaigns, even when a prospectus is not required, will be given as well.

[335] Gutfleisch, 2018, p. 73

[336] https://ec.europa.eu/info/business-economy-euro/growth-and-investment/financing-investment/crowdfunding_en

1. Capital Market Union and Digital Single Market: implications on FinTech instruments

The European Commission described its willingness to create "*fully integrated European capital markets*".[337] This objective is described in the 2015 Commission's Capital Markets Union Action Plan. The Plan aims, in fact, at making easier the possibility for providers and receivers of funds "*to come into contact with one another within Europe, especially across borders*".[338] An interesting aspect is the irrelevance of the means used in order to gain funds. The capital should flow easily across Member States borders "regardless of whether it is arranged through the intermediary of a bank, through the capital markets, or through alternative channels such as crowdfunding". The main objective of the Action Plan is so the free flow of capital across borders.[339] This main objective has been subdivided into six specific objectives. Among them it is possible to find the diversification of funding sources and the reduction of costs related to the access to capital.[340] One of the aims of the Prospectus Regulation, legislative act falling within the Capital Market Union reformation project, is, not surprisingly, the reduction costs linked to capital raising. Exemptions for small offers, the 1 million threshold altogether with the 8 million optional one, the specific provisions introduced in order to lower the too high costs hindering SMEs and frequent issuers, all described in Chapter 2, are provisions traceable to this rationale. As analysed, dealing with SMEs, the Commission clarified in the Impact Assessment accompanying the Prospectus Regulation Proposal the excessive costs companies have been bearing under the previous regime. The seek for proportionality and lowering costs, carried out with the Prospectus Law reformation, is linked to Crowdfunding campaigns too. In fact, Crowdfunding is usually chosen by SMEs in order to raise capital.

Altogether with the Capital Market Union the Commission set the goal of creating a Digital Single Market. The need for a Digital Single Market comes from, in the Commission's opinion, the growing importance of online platforms because of their influence on digital economy and their positive effects on digital society.[341]

FinTech ("*technology-enabled innovation in financial services*"[342]) is strongly linked to both goals. FinTech fast and considerable development in recent years "*is impacting the way financial services are produced and*

[337] BUSCH, D., AVGOULEAS E., FERRARINI G., *Capital markets union in Europe*, Oxford University Press, 2018, p. 71

[338] Ibidem

[339] BUSCH, D., AVGOULEAS E., FERRARINI G., *Capital markets union in Europe*, Oxford University Press, 2018, p. 72

[340] Ibidem

[341] European Commission, 2015. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Online Platforms and the Digital Single Market Opportunities and Challenges for Europe",* COM/2016/0288 final, p. 2

[342] European Commission, 2018. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions "*FinTech Action plan: For a more competitive and innovative European financial sector*", COM/2018/0109 final, p. 2

delivered".[343] The proof that FinTech is affecting the Capital Market Union structure is given by the release of the Capital Markets Union (CMU) mid-term Review. On this occasion, the Commission, taken into consideration the capital markets transformation occurring due to FinTech, is proposing as a solution a competition increase coupled with "*lower costs for businesses and investors*".[344]

Moreover, as stated by the Commission, "*The financial sector is the largest user of digital technologies and represents a major driver in the digital transformation of the economy and society*" and this makes clear the connection with the Commission's Digital Single Market Strategy.

Crowdfunding has been probably the FinTech solution getting more attention from the Commission, which "*has acknowledged that crowdfunding can contribute to the CMU Action Plan objective to mobilise capital and channel it to all companies, including SMEs. Cross-border crowdfunding business is thus very significant in the context of the CMU project*"[345] in its 2017 Final Report. The 2018 *Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business*[346] might be considered to be a further proof of the Commission's willingness to regulate this new important aspect of the financial sector.

[343] Ibidem

[344] European Commission, 2017, Factsheet: Mid-term review of the capital markets union action plan

[345] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 14

[346] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European Crowdfunding Service Providers (ECSP) for Business (Text with EEA relevance) {SWD(2018) 56 final} - {SWD(2018) 57 final}, Brussels 8.3.2018, COM(2018) 113 final, 2018/0048 (COD)

2. Crowdfunding and Prospectus Law

2.1 Crowdfunding and Prospectus Directive

In a Prospectus law perspective, the situation under Prospectus Directive regime has to be examined at first. Under this regime in the various Member States different prospectus laws were applicable to issuances with a value between €100.000 and €5 million. This situation had some consequences for issuers raising capital through crowdfunding. The standard prospectus regime applied, in all the EU, to transferable securities issuances, through crowdfunding or not, for a total consideration higher than €5 million. Between €5 million and €100.000 the exemption applied if so disposed by the Member State where the offer took place, whereas under €100.000 the exemption was mandatory due to a Prospectus Directive express provision. The EU prospectus regime did not apply and it was up to domestic law to require a prospectus to be published or other disclosure requirements when the offer referred to investment contracts not qualified as transferable securities.[347] The majority of the offers through crowdfunding platforms, reaching an amount between €250,000 to €500,000, triggered prospectus requirements in several Member States. As a consequence, issuers wishing to raise capital in this way needed to do some research about the applicable regulation in each state before offering securities there.

2.2 Crowdfunding and Prospectus Regulation

Under Prospectus Regulation, offers under 1 million are always exempted but, for issuances between 1 million and 8 million it is up to the Member State to grant an exemption and eventually to fix the threshold for it. Considering the cross-border nature of crowdfunding, operating through the internet and so reaching potential investors everywhere, it is difficult to restrict the offering to a single Member State. In this situation the issuer will benefit from the exemption of offers between 1 and 8 million only if not disposed otherwise by the various Member States reached by the offer.[348]

Crowdfunding issuances can also benefit from the other exemptions, provided by the regulation for offers of a limited amount, or Alternative Regimes rules, such as EU Growth Prospectus and other provisions applicable to SMEs,[349] when respecting the required conditions.

Any issuance through a Crowdfunding platform, not falling under the abovementioned exemptions, triggers the obligation to draw and publish a prospectus. At least in these cases, the Prospectus Regulation grants a detailed information disclosure about Crowdfunding offers and so investors' protection.

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[347] Klöhn, 2018

[348] Härkönen, 2017, p. 129

[349] See paragraph 3.1.1 of Chapter 2

Moreover, Prospectus Regulation received the support of The European Crowdfunding Network (ECN). ECN considered the new regulation to be "*a harmonised, fit-for-purpose tool to enhance cross-border investments in Europe*", highlighting the Prospectus Regulation "*potential to support the continuing growth of the European crowdfunding sector*".[350]

[350] European Crowdfunding Network, 2016, p. 1

3. Crowdfunding Regulation under European Law

Altogether with Prospectus Directive and now Prospectus Regulation other relevant pieces of European legislation are MIFID, Market Abuse Directive, Transparency Directive, Takeover Directive.[351] Notwithstanding the fact that there is not yet an all-encompassing Crowdfunding regulatory framework, the abovementioned legislative acts provide rules applicable at least to *equity* and *lending* Crowdfunding. and Legal and contractual interactions with the crowd investors, operating this form of financing on the internet, are subject to E-Commerce Directive too. [352]

One of MiFID goals was establishing "*a comprehensive regulatory regime governing the execution of transactions in financial instruments*", [353] in order to increase markets transparency, markets accessibility and investors' protection and, moreover, to grant an effective price discovery process,[354] "*irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system*".[355] The fact that the harmonized provisions were meant to be applicable "*irrespective of the trading methods used to conclude those transactions"* suggests the applicability to FinTech and, among them, to Crowdfunding.

It has to be taken into consideration the fact that from 2018 financial instruments and the markets where they are traded in are governed by MiFID II, which replaced MiFID, coupled with MiFIR.[356]

Specific mandatory disclosure obligations are provided by MiFID II for equity crowdfunding. These provisions would be applicable in case of platforms administrated by traditional intermediaries. In the opposite case, Crowdfunding platform managed by non-traditional intermediaries, the platform could benefit from the optional exemption, from MiFID and MiFID II provisions, drawn in Article 3 of MiFID

Behaviours hindering Financial Markets integrity are now laid down in Market Abuse Regulation. Correspondent penalties are provided by the 2014 new Market Abuse Directive (MAD II[357]). These provisions apply whether any infringement occurs, Crowdfunding campaigns included.

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[351] CONSOB - Divisione Strategie Regolamentari – Ufficio Analsi di Impatto della Regolamentazione, *Relazione Preliminare Sull'analisi Di Impatto,* Annex 1. pp. 1-3

[352]Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

[353] Recital 5 of Directive 2004/39/EC

[354] Gomber, Pierron, 2010, p. 7

[355] Recital 5 of Directive 2004/39/EC

[356] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 Text with EEA relevance

Takeover Directive provisions might be applicable to a Crowdfunding platform when any modification in the ownership of a company take place through it.

Periodical disclosure obligations stemming from Transparency Directive provisions might be applied too.

Even though still a proposed legislation from the Commission, another act warrants discussion. The even though is still a proposed legislation from the Commission. The Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business the Commission submitted in 2018 has to be placed into the Capital Markets Union framework. In this perspective, the Commission highlighted how "*crowdfunding cannot reap the benefit of the internal market*" at the moment "*due to the absence of a dedicated and coherent regulatory and supervisory regime*". [358] This situation stems from the fact that "*While some Member States apply the current financial services framework to crowdfunding service providers, others allow them to stay outside the regulatory regime whilst operating under exemptions*".[359] Moreover, the divergent national regimes applied to these providers throughout the Union is considered to be a factor hindering the flourishing of Crowdfunding activities at an Union level.[360]

The Proposal is also meant to reduce the problems related to the excessive costs small companies have to face due to MiFID II and MiFIR regime. Here we find again, as well as we noticed examining Prospectus Regulation norms, a legislative initiative whose roots lies in the broader pro-SMEs vision the Commission is carrying on.

The proposed Regulation provides "*A stand-alone voluntary European crowdfunding regime*" allowing platforms to choose between operating *"under the label of a European Crowdfunding Service Provider",* and thus conducing a cross-border business, and dealing only with businesses at national level. Platforms choosing the first option would benefit from lower market entry costs, since they would need to be authorized only once.[361]

The acquisition of the ESCP label is not automatic. The providers need to meet some criteria in order to be authorized by ESMA. [362] In fact, platforms need to have "*governance arrangements that ensure effective*

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[357]Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

[358] European COMMISSION, *Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business* – COM (2018) 113 final, p. 3

[359] Ibidem

[360] Ibidem

[361] European Commission, *Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business* – COM (2018) 113 final, p. 5

[362] European Commission, *Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business* – COM (2018) 113 final, p. 9

and prudent management", a management of good repute with "*adequate knowledge and experience*" and "*procedures to receive and handle complaints from clients*".[363]

It has also to be noted that Recital 12 of the Proposal provides a threshold for the maximum consideration of each crowdfunding offer and set it at €1 million. The reason of the choice of this specific amount has to be found in the fact that it corresponds to the threshold set out in Prospectus Regulation for the mandatory drawing of a prospectus above that.

[363] European Commission, *Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business* – COM (2018) 113 final, Recital 18.

4. Crowdfunding in different legal systems

In order to talk out the criticalities of Crowdfunding regulation at European level it might be useful to analyse the differences, both between non-EU and EU legal systems and among Member States, that might hinder cross-border Crowdfunding industry. Different legal approaches and the complexities consequently "*arising out of a significantly fragmented regulatory landscape*" [364] are shown to be, in the Commission's opinion,[365] source of transaction costs.[366]

As it has be noted in the FinTech Action Plan, 11 out of 28 Member States do have any *equity* and *lending-based* crowdfunding regulation.[367]

It is useful to analyse some of them in order to stress on some differences, focusing on disclosure tools, in particular, provided by the legislation in force in Italy and UK. Moreover, aspects of US Crowdfunding legislation will be examined too. It might be useful to do so being the US regulation the first one to provide for the possibility to use these platforms as an alternative business financing tool[368] and, developing through the years, became a potential role model for the newest ones. Finally, we will focus on the peculiarities of the divergent approaches taken by the two Common Law countries to tackle Crowdfunding challenges in highly developed financial markets.

4.1 Italy

Italy was the first European Member State to develop an *equity* crowdfunding regulation. The rules dealing with *equity* crowdfunding were placed into *III-quater* section of the T.U.F. and the d. l. 18-10-2012, n. 179 (so called "*Decreto Sviluppo*"). [369]

The *Decreto Sviluppo* provided the possibility for innovative start-ups[370] to raise capital through Crowdfunding. The definition of platform was based on this function.[371] The d. l. 24-01-2015 n. 03 extended

[364] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 32

[365] Ibidem

[366] Transaction costs economics theory can be summed up with: "*In line with the original argument developed by Coese firms exist because, in some cases, the costs of internal coordination are lower than the costs of market transactions*" from Douma and Schreuder, 2017, p. 187

[367] European Commission, 2018, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions "*FinTech Action plan: For a more competitive and innovative European financial sector*", COM/2018/0109 final, p. 5

[368] De Luca, 2017, p. 161

[369] De Luca, 2017, p. 164 and Macchiavello, 2018, p. 1

[370] The definition of "innovative start-ups" was provided by Art. 25 of the d.l. 18-10-2012, n. 179

[371] The only kind of portal mentioned in Article 30 of d.l. 18-10-2012, n. 179 is meant to allow innovative start-ups to raise capital

the possibility to raise capital through a Crowdfunding platform to innovative SMEs.[372] In 2017 this possibility has become available for all SMEs[373] irrespective of their innovative nature or not.[374] Moreover in 2018 has been introduced the possibility for Crowdfunding platforms to offer debt securities too.[375]

The activities and duties of the Crowdfunding platforms raising risk capital are dealt with in Consob[376] Regulation no. 18592 of 26 June 2013.[377] As already mentioned,[378] there are further disclosure obligation[379] to be met if the Crowdfunding platform is managed by traditional intermediaries.[380]

It is important to highlight that the maximum amount of capital allowed to be raised through a Crowdfunding platform under Italian regulation corresponds to the maximum threshold provided by Prospectus Directive before and then by Prospectus Regulation. Therefore, it follows that no prospectus is required to be published by companies falling under this legal framework.[381]

Notwithstanding this exemption, platforms have to comply with various disclosure obligations. Article 15(1) of the Consob Regulation lists the Information on investment via portals in financial instruments. Article 16(1)[382] instead lists the Information on the offer to be disclosed.[383] Letters (b) to (d-bis) of Article

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[372] The SMEs definition of SMEs here was the one provided by the Commission Raccomandation n. 2003/361/EC. The requirements in order to be classified as "innovative" were the ones given by and the d.l. 18-10-2012, n. 179.

[373] Here the SMEs definition used is the one analysed in Chapter 2

[374] Because of d. l. 15-06-2017 n. 50

[375] CONSOB, 2019, *Modifiche al Regolamento n. 18592 del 26 Giugno 2013 sulla Raccolta di Capitali di Rischio Tramite Portali On-Line - Documento di consultazione*, p. 1

[376] "Commissione Nazionale per le Società e la Borsa". CONSOB is "the public authority responsible for regulating the Italian financial markets". See http://www.consob.it/web/consob-and-its-activities/consob

[377] Consob Regulation no. 18592 of 26 June 2013 - The collection of risk capital via on-line portals (as amended by Resolution no. 20264 of 17 January 2018)

[378] Paragraph 3 of this Chapter

[379] MiFID II specific provisions for *equity* crowdfunding

[380] Crowdfunding platform managed by non-traditional intermediaries could benefit from the optional exemption, from MiFID and MiFID II provisions, drawn in Article 3 of MiFID

[381] Macchiavello, 2018, p. 6

[382] Article 16(1) of Consob Regulation no. 18592:

"1. For each offer, the portal manager must publish:

a) the information indicated in Annex 3 and the relative updates provided by the bidder, also in the case of significant changes that may occur or material mistakes found in the offer, simultaneously informing the individuals who have adhered to the offer of each update[59];

b) the identification details of the entities that receive and complete the orders and the identification details of the account contemplated by article 17, paragraph 6[60];

c) details of the procedures for the exercise of the right of revocation contemplated by article 25, paragraph 2[61];

d) the frequency and procedures by which the information on the state of the adhesions, the amount underwritten and the number of adherents will be provided;

16(1) provide disclosure obligations arising from Crowdfunding special characteristics (functioning of the platform in general and the right of revocation provided by Article 25), on the other hand Article 16(1)(a) requires the information described in Annex 3 of this regulation to be disclosed and eventually updated. Looking at Annex 3 is possible to notice how the Consob regulation basically demands much of the information Article 6 and 7 of the Prospectus Regulation impose on issuers to disclose in the prospectus.[384] To be noted that a "*Description of the specific risks of the bidder and of the offer*" has to be provided.[385] This requirement allows retail investors to assess pros and cons in a more accurate way and responds to the same investors' protection rationale that lies behind Article 7 of Prospectus Regulation.[386] Such a consideration suggests that, even though the capital limits preclude the application of the Prospectus Regulation, under the Italian Crowdfunding legislation quite efficient information requirements are applied to equity Crowdfunding campaigns anyway.

Another investors' protection tool provided by the regulation is the *tag along* right, i. e. the withdrawal right, within seven days starting from the investment, in case of changes or events occurred meanwhile that might affect the investor's decision.[387][388]

The specific disclosure standards (list of information to be disclosed are specified in the regulation) imposed by the Italian Crowdfunding regulation shows how consistent is the amount of information to be provided in this regime. This situation enhances the level of investors' protection in relation to *equity crowdfunding,* notwithstanding prospectus obligation inapplicability.

4.2 UK

Being the UK the European country where equity crowdfunding has developed most[389] with a continuous growth in recent years,[390] also thanks to take tax incentives granted to who decide to invest in high risk

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d-bis) the indication of the possible alternative system for the transfer of the stakes representing the capital of small and medium-sized enterprises established as limited liability companies pursuant to Article 100-ter, paragraph 2-bis, of the Consolidated Law and the relative procedures to exercise the choice of system to be applied[62]."

[383] De Luca, 2017, pp. 159-160

[384] Annex 3 requires information on risks, on the bidder and on the financial instruments offered, on services offered in relation to the offer by the portal manager, on the control body (where present), on legal or financial advisors, the description of the individual in charge of the statutory audit (where present) with his personal data and of the opinions issued by him to be disclosed.

[385] Annex 3 of Consob Regulation no. 18592

[386] This Article impose risk information to be disclosed in the prospectus summary

[387] Article 25 of Consob Regulation no. 18592 of 26 June 2013

[388] De Luca, 2017, p. 167

[389] De Luca, 2017, p. 162

campaigns, a brief analysis of its regulation is preparatory to check the efficiency of the European Crowdfunding framework. The Financial Conduct Authority (FCA[391]) has focused on *lending crowdfunding, equity crowdfunding* and investors' protection provisions. The UK financial markets regulation is not applicable to *donation* and *reward crowdfunding*. As a consequence, an FCA authorisation is required only for the first two models.[392] Given this long-term commitment to regulate the field, as opposed to the Italian legislator, no tailor-made Crowdfunding regulation have been adopted in UK but, pre-existent acts have been adapted. Chapter 4 of the Conduct of Business Sourcebook, in which provisions on communication with clients (including financial promotions) can be found, and the amended version[393] of the 2000 Financial Services and Markets Act, dealing with platforms activities, provide the legislative framework.

Focusing on information to be disclosed under the UK regime, it has to be noted that in this country the widest exemption from Prospectus Directive has been applied. All issuances, addressed to less than 150 investors, in order to offer to the public or look for admission to the market, within 12 months, for securities with a total amount lower than £ 5.000.000 were exempted. The clear aim of this choice is to lift economic and bureaucratic burdens. This happens because a higher threshold leads to fewer offerors required to publish a prospectus and consequently less issuers paying high time and monetary costs linked to the drawing up of this document. With the new Prospectus Regulation[394] providing the possibility to set an optional threshold between the mandatory €1.000.000 one and a maximum of €8.000.000, the UK exercised this right in 2018 raising the threshold from €5.000.000 million to €8.000.000 million.[395] Enlarging the exemption is meant to benefit UK companies reducing the costs they must bear but, might have negative effects under an investors' protection perspective. Lower disclosure requirements benefit companies for sure, meaning lower costs linked to the disclosure itself, but might hinder investors, meaning that the amount of information available might be lower and a consequently the investors' assessment on the investment less accurate.

It has to be taken into consideration that, notwithstanding this exemption, Crowdfunding platforms, which are intermediaries subject to an FCA authorization according to the assessment procedure described in

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[390] UK is the European country with the higher number of regulated platforms and the one this data increased most between 2014 and 2016. See ESMA, *Response to the Commission Consultation Paper on Fintech: A more competitive and innovative financial sector*, 07/06/2017, ESMA 50-158-457, pagine 9-18.

[391] The Financial Conduct Authority is the conduct regulator for financial services firms and financial markets in the UK. See https://www.fca.org.uk/about/the-fca

[392] EUROPEAN CROWDFUNDING NETWORK, *Review of Crowdfunding Regulation 2017, Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel*, October 2017, pp. 653-674.

[393] Amended to be in line with European regulation on Alternative Investment Fund Managers and prospectuses

[394] FCA Handbook, PRR provides for the applicability of Prospectus Regulation

[395] Sharein blog, 2018

sections 185 to191 of the 2000 Financial Services and Markets Act,[396] have to comply with the FCA Code of Conduct[397] and are required to disclose information[398] in order to give to the investors the possibility to assess the offer. It can be stated anyway that in this case companies need to face lower requirements in terms of disclosure with the potential negative effects mentioned just few lines above.

There are other two investors' protection tools under the UK Crowdfunding regime. The first one is the authorization to be requested from FCA for each offer addressed to retail investors through a Crowdfunding platform. The second tool is the imposition of a threshold to be applied to the amount retail investors might invest in equity crowdfunding campaigns. This second legislative strategy has been implemented in US regulation two.[399]

One of the positive aspects of the UK regulation is the balance achieved between the removal of barriers to entry affecting particularly the ability to raise finance for platforms, through a "*"Light touch" regulation for Crowdfunding platforms*",[400] and appropriate standards of investors' protection as shown by the disclosure provisions analysed in this paragraph. In the end it is possible to state that "*the UK financial services regulatory environment is clearly favourable for Crowdfunding generally*". [401]

4.3 US

As mentioned at the beginning of this paragraph, US was the first country to provide an *equity crowdfunding* regulation. In 2012, in fact, with the JOBS Act[402] Crowdfunding was already taken into consideration as an alternative business financing strategy. In fact, section 304 of the JOBS Act[403] provides a definition of Crowdfunding platform as "*funding portal*". The same act introduced, together with small offerings exemptions, a *crowdfunding exemption* from prospectus requirements. This exemption "*covers smaller offering amounts where the aggregate offering amount of the securities does not exceed $ 1 million during a*

[396] Secc. 185-191 Financial Services and Markets Act 2000.

[397] Code of Conduct (COCON) 2019

[398] FCA Handbook, COBS 4-7-10., 2013, 38.

[399] De Luca, 2017, pp. 162-163

[400] European Crowdfunding Network, 2017, pp. 672

[401] European Crowdfunding Network, 2017, pp. 672-673

[402] Jumpstart Our Business Startups (JOBS) Act of 2012

[403]Sec. 304 JOBS Act:

"[…].

IN GENERAL.—The Commission shall, by rule, exempt, conditionally or unconditionally, a registered funding portal from the requirement to register as a broker or dealer under section 15(a)(1), provided that such funding portal—

''(A) remains subject to the examination, enforcement, and other rulemaking authority of the Commission;

''(B) is a member of a national securities association registered under section 15A; and

''(C) is subject to such other requirements under this title as the Commission determines appropriate under such rule"

12-month period".[404] In order to compensate the potential negative effects linked to a lower disclosure, to grant investors' protection and grant a check on the Crowdfunding offer, the transaction deriving from the exempted offer shall take place "*through an intermediary that is registered as a broker or a funding portal*",[405] in this second case the portal must comply with the requirements for crowdfunding portals introduced by Title III of JOBS Act.[406] Disclosure obligations applicable to issuers conducting an offer according to the crowdfunding exemption shall disclose information in an offering statement to investors and provide the same information to the SEC. Information about the offer, about the issuer's business, the target amount of the offer and a detailed description of its potential use, the mechanism used to determinate the price, material risk factors and an assessment about the issuer's financial conditions shall all be included in the offering statement.[407] Issuers benefitting from this exemption are required to send to the SEC annual reports and to publish the same documents on their website. This requirement shows a peculiar characteristic US disclosure regulation: prospectus requirements and ongoing disclosure are stricter in this country than under EU law.[408] When benefitting from certain prospectus exemptions some issuances, if not falling under other regulations, might not need any further disclosure. On the other hand, under US system, even for issuances exempted from the obligation to publish a prospectus, some ongoing disclosure is mandatory.[409]

In relation to a Crowdfunding campaign, under an investors' protection perspective, the US regime always imposes on issuers the obligation to disclose the necessary financial information concerning the situation of the undertaking and a detailed description of the offer together with its business plan.[410] It is important to highlight anyway that in case the offer does not fall under the Crowdfunding or any other exemption the stricter obligations provided by prospectuses regulation would take the place of the disclosure ones described in this paragraph.

As can be inferred by the rules analysed above, Title III of the JOBS Act, introduced in 2016, deals with *equity crowdfunding*. Moreover, it has to be noted that the act as a whole supplies norms which became a role model for many countries. Italian Crowdfunding regulation took inspiration from this American act too since its entrance into force in 2012.

[404] Härkönen, E., 2017, pp.136-137

[405] Härkönen, E., 2017, p.137

[406] 17 CFR § 227.100 (2016); see also 15 USC 77d and 77d-1 (2016)

[407] 17 CFR § 227. 201 (2016)

[408] Härkönen, E., 2017, p.137

[409] Härkönen, E., 2017

[410] De Luca, 2017, pp. 161-162

This regulation sets a couple of thresholds. At first issuers can raise maximum $ 1.000.000 within 12 months from retail investors. Secondly, as well as UK regulation, the US one provides the maximum amount that investors can allocate in equity crowdfunding.[411] This threshold is proportional to their income.[412]

The strengths and weaknesses of the US Crowdfunding regime vary based upon the characteristics of the entrepreneur raising the capital. Crowdfunding might be a convenient tool or not depending on the amount to be raised or on the issuer. It is possible to say that Title II, being the oldest and considering the continuous growth of the Crowdfunding market, has been beneficial for issuers. On the other hand, there are still probably not enough data to assess if Title III has the same effect.[413]

The common trend in the two Common Law countries we took into consideration is getting the Crowdfunding regulation as light as possible in order to enhance an already flourishing industry. Notwithstanding prospectus obligations are stricter, "*US capital markets are deeper and provide an easier access to capital than the EU markets*".[414] So flourishing markets deem lighter regulation or a lighter regulation is what markets need to flourish? It is like the question of whether it was the chicken or the egg that came first. The only thing that we have for certain is that there is a direct correlation between the two factors.

[411] 17 CFR § 230.251 d 2 i C:

" *Sales.* (i) No sale of securities may be made:

[…]

(C) In a Tier 2 offering of securities that are not listed on a registered national securities exchange upon qualification, unless the purchaser is either an accredited investor (as defined in Rule 501 (§230.501)) or the aggregate purchase price to be paid by the purchaser for the securities (including the actual or maximum estimated conversion, exercise, or exchange price for any underlying securities that have been qualified) is no more than ten per- cent (10%) of the greater of such purchaser's:

(*1*) Annual income or net worth if a natural person (with annual income and net worth for such natural person purchasers determined as provided in Rule 501 (§ 230.501)); or

(*2*) Revenue or net assets for such purchaser's most recently completed fiscal year end if a non-natural person."

[412] U.S. Code: 15 U.S.C.A. §§ 77d(a)(6)(A-B)

[413] European Crowdfunding Network, 2017, pp. 701-702

[414] Härkönen, 2017, p. 137

5. The importance of Disclosure in a Successful Crowdfunding Campaign

Some of the steps considered useful in order to launch a successful Crowdfunding campaign are based on the disclosure of some kind of information. Four out of nine steps described by Entrepreneur's article[415] deal with information in different ways.

The first step is "*Share your story*". Giving information about the offeror, the products, any business project for the future, budget, the source of the project idea and why it was chosen is considered a good technique to prove the credibility and legitimacy of the project. The better way to share a story to get potential funders' attention seems to be use imagery and mainly the video used to launch the Crowdfunding campaign.[416] Here giving important information about the product, the offeror, the story behind the project and whatever else might help, not only to explain details that otherwise would have never been disclosed in case of a campaign not falling under mandatory disclosure provisions, but also and mainly helps to connect emotionally with a potential backer and to explain what problems might be solved by the product.[417] The importance of disclosure in this case is not only of an investors' protection nature. It seems not a logical evaluation of information by potential investors, feeling otherwise not safe enough about financing a project, but an empathy feeling to be the main reason of the choice. It is possible to explain these findings using the concept of bounded rationality, elaborated by the Behavioural Economics School,[418] and thus to confirm how the human behaviour often falls far short from the neoclassical paradigm.[419]

Another step related to information disclosure is the campaign promotion. Providing targeted information is inherent in each promotional initiative.[420] The ability to deliver the right information to catch the eye of

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[415] Entrepreneur, 2017

[416] Ibidem

[417] Ibidem

[418] This theory "*is not based on the "full rationality" assumption of standard microeconomics but instead uses the concept of "bounded rationality" which emphasizes cognitive and informational limits to rationality*", see Douma and Schreuder, 2017, p. 135

[419] According to the neoclassical paradigm consumers, workers, and firms, when taking a decision, make a rational calculation and choose what is in their own best interests. Consumers and producers take decision on the basis of objective functions. Consumers consider their utility curve, expressing the level of satisfaction deriving from the consumption of particular services and goods, and their indifference curve in order to compare goods and services. In this model the price mechanism always leads to equilibrium price (price at which supply and demand meet and the market is at equilibrium). Underpinning this model there is a view of the human decision-making process, named "homo economicus", which assumes people to be always rational and selfish. See Douma and Schreuder, 2017, pp. 27-31, 119

[420] Entrepreneur, 2017

potential investors seems to be fundamental in order to reach achieve the target of a Crowdfunding campaign. Social media, blogs and events are good channels of communication.[421]

The third step which is based on information disclosure is about updating backers about the progresses of the project. Potential investors need to be informed about the campaign development to keep their interest. Using the instruments provided by the platforms is possible to communicate easily with backers, boost their curiosity, show commitment and gain their trust.[422] Here information shows to be important also during the campaign and not only at the beginning.

The last step to be taken into consideration at this point is the necessity of making changes on the basis of the received feedbacks.[423] Feedback information flows in the opposite direction compared to the abovementioned situations. Here information provided by potential investors is beneficial to a successful Crowdfunding campaign, giving the possibility to improve products on the basis of investors and consumers' interests.[424]

Some platforms give similar hints on its website. In the Kickstarter's Creator Handbook,[425] for example, is possible to find tips about how to get money through Crowdfunding in an efficient way.

Disclosure about Crowdfunding campaigns can be framed in a signalling perspective.[426] In a Crowdfunding context it is important to give signals in order to reduce the lever of uncertainty backers (in reward-based Crowdfunding) and investors (in equity-based Crowdfunding) have to face when interacting with crowdfunding platforms. These signals include references to investment terms and detailed information about the risks linked to the project.[427] Tirdatov, after examining rhetorical tools employed in Kickstarter successful Crowdfunding campaigns, found out that three types of rhetorical tools have been used by the majority of the campaigns that received more funds. These findings demonstrate that signals need to be delivered, for the campaign to succeed, through a communication that places emphasis on the credibility of the speaker (so called *ethos*), arouses emotions in the potential investors (*pathos*), and uses logical argumentations to support reasonings (*logos*).[428]

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[421] Ibidem

[422] Ibidem

[423] Ibidem

[424] Ibidem

[425] Kickstarter's Creator Handbook, Available at: https://www.kickstarter.com/help/handbook

[426] In this context signaling means distributing a particular kind of information in order to demonstrate a certain quality. In order to demonstrate the quality of the given information sellers might invest, for example, in advertising and reputation.

[427] Kaartemo, 2017, p. 14, see also Ahlers , 2015, Hobbs, Grigore, Molesworth, 2016, and Mollick, 2014

[428] Kaartemo, 2017, p. 14 and Tirdatov, 2014

6. ICOs and white papers

ICOs could be seen as a new concept but also a very popular one. There have been more ICOs coming from European-based entities and founders in 2017 than any other region of the world according to a recent survey.[429] Going to the concept itself ESMA defined an Initial Coin Offer as "*an innovative way of raising money from the public, using 'coins or tokens'. An ICO can also be referred to as an 'initial token offering or token sale'. In an ICO, a business or individual issues coins or tokens and puts them for sale in exchange of traditional currencies, such as the Euro, or more often virtual currencies, e.g. Bitcoin or Ether.*" It is also noted that "*The features and purpose of the coins or tokens vary across ICOs. Some coins or tokens serve to access or purchase a service or product that the issuer develops using the proceeds of the ICO. Others provide voting rights or a share in the future revenues of the issuing venture. Some have no tangible value. Some coins or tokens are traded and/or may be exchanged for traditional or virtual currencies at specialised coin exchanges after issuance.*" and, talking about the technical means of these campaigns, it has to be taken into consideration that *they* "*are conducted online, using the Internet and social media. The coins or tokens are typically created and disseminated using distributed ledger or blockchain technology (DLT). ICOs are used to raise funds for a variety of projects, including but not limited to businesses leveraging on DLT. Virtually anyone who has access to the Internet can participate in an ICO.*"[430]

While Crowdfunding was subject to more comprehensive legislative efforts by states and European Institution it can be considered a development in ICOs regulation the European Commission adoption of a proposal for the amendment of the 4th Anti-Money Laundering Directive,[431] to cover virtual currency exchanges and wallet providers, and subsequently the amendment of the directive, with the aim of tackling risks associated with virtual currencies, by the 5th Anti-Money Laundering Directive.[432] ESMA however issued two statements on the implications of ICOs in Europe in November 2017. The first was a warning for investors regarding the high risks linked to ICO investments.[433] The second was a reminder dealing with

[429] Gutfleisch, 2018, p. 73 and Atomico & Slush, "*The State of European Tech Report*", 2017, pp. 94–95

[430] ESMA, 2017. Statement "ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements", ESMA50-157-828

[431] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

[432] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU

[433] ESMA, 2017. Statement "ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements", ESMA50-157-828

existing EU laws applicable to ICOs.[434] In this second statement the Authority affirmed that "*Depending on how the ICO is structured, the coins or tokens could, potentially, fall within the definition of a transferable security, and could therefore necessitate the publication of a prospectus which will be subject to approval by a Competent Authority*".[435] Considering that an ICO pursues two major aims that are using it to put a new virtual currency in circulation or for project financing, as clarified by ESMA, the analysis of ICOs might differ depending on which of the two aims and so how the offer is structured.[436] This position have been taken in relation to Prospectus Directive but considering the investors' protection purpose of the prospectus it could be affirmed that ESMA's opinion has to be considered maintained under Prospectus Regulation. As affirmed talking about Crowdfunding, ICOs might benefit from prospectus exemptions like the one applicable to offers of a limited value, offers to a limited number of investors or offers to qualified investors. There are some practical problems anyway considering that ICOs enable global access to blockchain-related products even for retail consumers. An exemption for offers to fewer than 150 persons per Member State could be implemented but poses the problem of verification of the location of all the investors.

While the potential application of the Prospectus Directive on financial return ICOs has been confirmed by the ESMA there is still a major discussion concerning whether the EU regulation on financial services and securities should include utility tokens too. Some scholars[437] addressed this issue and concluded that equity and securities tokens do fall within the definition of 'securities' under MIFID II and so Prospectus Directive, utility tokens instead do not. Good arguments to support their inclusion[438] have emerged too. Even considering the exchange for products and services as the final purpose of utility tokens, it could be argued that the mere possibility of trading these tokens gaining a profit could be sufficient in order to qualify them as "*securities"*.

Even when there is no legal obligation, companies have incentives to provide information voluntarily to reduce information asymmetry they face because some of them are still in the idea stage. Most ICO issuers use a "*white paper*" to solve this problem providing information about their early stages. Similar to a prospectus drawn for an Initial Public Offer, the white paper usually describes the project, the type of blockchain technology used, the token distribution, the use of funds, the rights given to investors and the background of the founding team. Quite often the white paper determines a minimum and a maximum amount of coins that need to be subscribed. Some white papers are technically-oriented, some others are more business-oriented. Issuers can use white papers to fill the information gap between them and

[434] ESMA, 2017. Statement "ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements", ESMA50-157-828

[435] Ibidem, p. 2

[436] Barsan, 2017, p. 55

[437] Hacker and Thomale, 2018, pp. 645-696

[438] Shin, 2017

prospective buyers but, in some cases these documents have been used to hype the ICOs. The demonstration is given by the enforcement actions pursued by the SEC in the Us against ICO-related frauds.[439]

Finally, it has to be considered that ICOs are a relatively new phenomenon and this could be the reason why regulators around the world are still debating in order to find the appropriate legal framework. European law on Crowdfunding have been initially addressed by the national laws of the Member States but now the Commission seems to be willing to provide a propter regulation, on the other side specific national legislation on ICOs still lacks in the EU Member States.[440]

[439] Feng et al., 2018

[440] Gutfleisch, 2018, p. 81

7. Is European Law keeping pace with these new technologies?

After an analysis of European legal framework and the special features of some national regulations, it is possible to take stock of the efficiency of European Law in relation to Crowdfunding. As already mentioned, he different legal approaches Member States adopted through the years and the consequent fragmentation of the legal landscape within the Union led, in the Commission's opinion,[441]to complexities and transaction costs.

Different regulations also because of different interpretation of the national transposition of other European legal acts. The Commission took into consideration the MiFID and the Prospectus Directive in order to explain this phenomenon, focusing on the fact that it is up to national financial market authorities, with consequent differences among states, to interpret broadly or strictly definitions such as *investment activities/services* in the MiFID framework or *transferrable securities* in MiFID and Prospectus Directive context so determining whether an equity crowdfunding platform falls under these categories.[442]

National regulatory frameworks, and mainly the fact that different regulations[443] means a greater amount of laws and market authorities dispositions to comply with when trying to raise capital in more than one Member State, are perceived as burdensome by stakeholders[444] and by the Commission itself.[445] Notwithstanding this consideration "*platforms support the high standards set by the national regulators, which reflect the importance of consumer protection and are a means of increasing the trust of consumers towards the industry*".[446]

Altogether with the lack of harmonisation on a legal basis the European crowdfunding industry and its development on a transnational level is hampered by market barriers, stemming from the nature of the industry itself, resulting in *information*, *measurement* and *market making* transaction costs.[447]

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[441] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 32

[442] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 34

[443] Both Crowdfunding regulations and other private law national provisions. See European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 35

[444] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 60

[445] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 33

[446] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 60

[447] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, p. 22

Information costs worth noting in this context. This is a problem affecting mainly SMEs. Information asymmetries, affecting both the capital supply side and the demand one, might preclude a match between SMEs and capital providers. On the supply side there is a "*lack of standardised, verifiable and accessible credit information about SMEs that creates a significant barrier for alternative finance providers to invest in European SMEs*" because leaves the investors in an either-or position: either looking for information suffering the costs or decide not to invest in the project. On the demand side, the lack of knowledge about alternative financing sources that SMEs usually suffer "*limits the use of alternative financing options for SMEs*".[448]

Problems stemming from digitalisation need to be taken into consideration too. The Commission detected that times were changing as it is possible to notice looking at the FinTech Action plan. The importance of Digitalisation is commonly recognised nowadays and the possibility to communicate, transfer money or buy almost everything using the internet, deriving from this phenomenon, is without any doubt relevant in relation to Crowdfunding industry. "*A well- developed and internationally coordinated regulatory strategy for the digital transformation of financial services by the EU*" institutions seems to be fundamental in order to reap the benefits of digitalisation. This is not provided at the moment. The Commission detected four obstacles preventing "a truly digital investment experience that could enable unfettered access to capital across borders" (Cybercrime, Data privacy and protection, Confirming identity and Users' understanding of new technologies). A harmonisation of the actual differences among countries internet infrastructures and regulation is deemed to be necessary to allow cross-borders Crowdfunding to develop.[449]

All the considerations mentioned above raised the Commission awareness on the necessity of a European piece of legislation providing a common Crowdfunding regulation. This is what the Proposed Regulation on ECSP is meant for. This Proposal deals only with *lending* and *equity crowdfunding* because of the Commission's belief that higher risks are linked to these two types and so a stricter regulation is needed. Even though the distinction might be useful, we can detect here a first gap which would survive after the law entry into force.

A regulation to be applied in all the Member States instead of a fragmented legal framework is clearly a positive step in the right direction, but some criticalities persist as argued by the European Crowdfunding Network. Some suggestions in order to solve critical aspects of the Proposal are given in its Position Paper on the Proposed Regulation and the amendments proposed by the Parliament. As example, it is noted that Marketing and communication restrictions are too strict to be applied to situations in which advertising is

[448]European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, pp. 25-27

[449] European Commission, 2017, Final Report *Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU*, pp. 22-24.

fundamental,[450] that the definition of "*crowdfunding services*" is not aligned with existing practice[451] and that an amendment, ensuring national licence requirements not to prevent the use of platforms authorised under the Regulation by project owners and investors, need to be approved in order "*to create a truly pan-European framework*".[452]

In order to answer the question "*Is European Law keeping pace with these new technologies*?", mainly under a disclosure point of view, some points have to be considered.

The € 1.000.000 threshold, in line with the mandatory Prospectus Regulation one, avoid the application of this second regulation requirements to ESCP. The maximum amount enterprises might raise under the Proposal regime, which is quite too low to grant enough finance also for SMEs, is anyway exempted from the obligation to draw a prospectus. The amendment proposed by the Parliament might change the situation: it consists in raising the amount to a maximum of € 8.000.000.[453] After such of amendment there would be situations in which prospectus obligations apply, in fact, having Member States the possibility to fix a threshold between € 1.000.000 and € 8.000.000, in all the countries not making use of this option or doing so fixing a threshold in between there would be space for Prospectus Regulation to apply to all offers with a total value falling between the chosen optional threshold and the € 8.000.000 maximum amount under the amended Crowdfunding regulation. This change would enhance investors' protection which could be otherwise at an unsatisfactory level. In order to confirm this criticism is useful to consider that ESCP platforms would be exempted by MiFID II[454] thanks to the amendment to this Directive described in the Commission Impact Assessment on the ESCP Regulation.[455]

Another critical aspect is the absence of rules dealing with ICOs. The Parliament acknowledged the need for an "*efficient regulation on the emerging ICO technology*", but to do so "*the Commission could in future propose a comprehensive Union-level legislative framework*" considering the fact that "*service providers*

[450] European Crowdfunding Network, 2018, p. 13

[451] European Crowdfunding Network, 2018, p. 2

[452] European Crowdfunding Network, 2018, p. 5

[453] European Crowdfunding Network, 2018, p. 4

[454] Schedensack, 2018, p. 3:

"the proposal directly aims at making it easier for ECSP to engage in crowdfunding activities without having to comply with the full MiFID II regime"

[455] European Parliament, BRIEFING Initial Appraisal of a European Commission Impact Assessment, p.1 and Impact assessment (SWD(2018) 56, SWD(2018) 57 (summary) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on European crowdfunding service providers (ECSP) for business COM(2018) 113 and a Commission proposal for a directive of the European Parliament and of the Council amending Directive 2014/65/EU on Markets in Financial Instruments COM(2018) 99

that use ICOs on their platform should be excluded from" the proposed regulation.[456] This intervention seems to be fundamental in the light of the legal uncertainty (described in paragraph 6) that can easily detected in this sector at the moment.

It seems that, notwithstanding the remarkable intervention, considerable improvements are still needed. ICOs demand a propter regulation, the proposed Crowdfunding Regulation should be aligned with the needs of the small issuers, e. g. raising the maximum amount, and loopholes need to be avoided in the mandatory disclosure regime. Both the two Common Law countries seem to have found a balance, at least regulations giving platforms the possibility to grow. The UK legal system seems to be more focused on the economic growth and can benefit from strong trust in capital markets. It can be useful to remind that the London stock exchange survived, notwithstanding the British legislative reaction (contained in The Bubble Act) consisting of a ban on joint stock companies unless provided with an authorization of the Parliament, to The South Sea Company[457] bubble meanwhile in France the reaction to the Mississippi bubble had led to complete distrust in the Capital Market.[458]

Anyway, under an investors' protection point of view the US regulation shows to be the best one: higher disclosure standards coupled with lighter crowdfunding rules. Stricter prospectus requirements and ongoing disclosure benefitting investors and a streamlined experienced Crowdfunding regulation which met with broad approval. It must not be forgotten that Italian Crowdfunding regulation, such as other European ones, took inspiration from the US one and that the majority of the provisions contained in the ESCP Proposal are the result of Member States rules transposition.

[456] Recital 15a of Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business (COM(2018)0113 – C8-0103/2018 – 2018/0048(COD))

[457] It was a deliberate imitation in Britain of the *Compagnie d'Occident* that led to Mississippi bubble bust

[458] Morck and Steier, 2005

8. Conclusions

After an analysis of the prospectus law evolution in the direction of a reorganized and more clear disclosure obligations linked to the nature itself of this document, filling the gaps left by the Prospectus Directive regime and taking into account the differences among the subjects who have to comply with this regulation, it is possible to detect the importance recognised by the European legislator, to mandatory disclosure in order to protect investors. The idea of the prospectus as the best tool to grant investors' protection is still alive in Europe as well as in the US, where prospectus regulation is even stronger, but the application of the principle of proportionality led to remarkable results in this field. The Alternative Regimes, enhanced or introduced by Prospectus Regulation, show a progress in easing the economic and bureaucratic burden some companies have to bear. It has been analysed how much work has been done in order to boost SMEs growth through the lighter regime of the EU Growth prospectus, with the proposal of *ad hoc* regulations and drawing up the new proposed Crowdfunding framework in order to incentive the use of this new capital source by small enterprises.

We framed the Prospectus Regulation and the Proposed Regulation on Crowdfunding in the context of erasing borders and legislative fragmentation in order to build a Capital Markets Union. Following this goal, the European legislator tried to foster development within the union, across and inside national borders, balancing the investors' need for stricter disclosure and the too high costs suffered by smaller issuers. It this perspective the national regulations examined as well as the European Proposal show Crowdfunding regimes struggling between investors' protection and the attempt to foster a young growing industry.

The picture that emerges is a developing European Capital Markets regulatory system, which has improved consistently in the last years but, still need to evolve in order to keep pace with new necessities coming from new technologies and old necessities, such as SMEs issues, getting even stronger in an uncertain economic scenario, without forgetting the need to strike a balance between the various stakeholders' interests.

The US seems to have found this balance or at least is what comes to mind looking at its Capital Market and its related legislation being an undisputed role model. So far, it is probably too soon to evaluate tangible positive or negative effects of the examined European regulations but, time will tell if the EU will manage to catch up.

References

Ahlers, G.K.C., Cumming, D., Günther, C. and Schweizer, D. (2015), "Signaling in Equity Crowdfunding", *Entrepreneurship Theory and Practice*, 39(4): p 955–980. Available at SSRN: https://ssrn.com/abstract=2564121. [Downloaded: 28th September 2019].

Armour, J., 2016. *Principles of Financial Regulation.* 1st Edition ed. Oxford: Oxford University Press.

Atomico & Slush, 2017. *The State of European Tech* Report. Available at: https://2017.stateofeuropeantech.com/. [Downloaded: 8th March 2019].

Barsan, M., 2017. Legal Challenges of Initial Coin Offerings (ICO). *Revue Trimestrielle de Droit Financier,* 3, pp. 54-65. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064397. [Downloaded: 17th March 2019].

Breslin, B., Rabinowitz, D., 2004. The Prospectus Directive. *Journal of financial services marketing,* 9(1), pp. 91-103. Available at: https://doi.org/10.1057/palgrave.fsm.4770144. [Downloaded: 10th March 2019].

Bush D., Avgouleas E., Ferrarini G., 2018, *Capital Markets Union in Europe*, 1st Edition ed. Oxford: Oxford University press

CONSOB - Divisione Strategie Regolamentari – Ufficio Analsi di Impatto della Regolamentazione, *Relazione Preliminare Sull'analisi Di Impatto,* Annex 1. Available at: http://www.consob.it/cnbarchives/documenti/Regolamentazione/lavori_preparatori/consultazione_crowdfunding_20130329_relazione.pdf. [Accessed: 26th September 2019]

CONSOB, 2019, *Modifiche al Regolamento n. 18592 del 26 Giugno 2013 sulla Raccolta di Capitali di Rischio Tramite Portali On-Line* - Documento di consultazione. Available at: http://www.consob.it/cnbarchives/documenti/Regolamentazione/lavori_preparatori/consultazione_crowdfunding_20190620.pdf. [Downloaded: 27th September 2019].

De Bondt W. F. M. and Thaler R., 1985. Does the Stock Market Overreact?. *The Journal of Finance*, 40(3), pp. 793-805. Available at: https://www.jstor.org/stable/2327804. [Downloaded: 7th July 2019].

De Bondt W. F. M. and Thaler R., 1990. Do Security Analysts Overreact?. *The American Economic Review*, 80(2), pp. 52-57. Available at: https://www.jstor.org/stable/2006542.
[Downloaded: 7th July 2019].

De Luca, N., 2017, *"Equity Crowdfunding*", Estratto da: DIGESTO delle Discipline privatistiche, sezione commerciale, Utet, Torino, 2017, 159-169. Available at: http://www.ddavvocatiassociati.com/wp-content/uploads/2017/07/08a_Equity-Crowdfunding-_de-Luca.pdf. [Downloaded: 27th September 2019].

Douma S. W. and Schreuder H., 2017. *Economic approaches to organizations.* 6th Edition ed. Harlow, England; New York: Pearson Education

Entrepreneur, 2017, "*9 Steps to Launching a Successful Crowdfunding Campaign".* [Online] Available at: https://www.entrepreneur.com/article/288277. [Accessed: 26th September 2019].

ESMA, 2013. Final Report "*Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus*", 2013/1970. Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-1970_report_on_draft_rts_for_supplements_to_prospectuses.pdf. [Downloaded: 25th May 2019].

ESMA, 2013. Opinion "*Format of the base prospectus and consistent application of Article 26(4) of the Prospectus Regulation"*, ESMA/2013/1944. Available at: https://www.esma.europa.eu/search/site/ESMA%20consults%20UCITS%20renumeration?solrsort=ds_created%20asc&f%5B0%5D=im_field_document_type%3A48. [Accessed: 20th April 2019].

ESMA, 2017. Consultation Paper "*Draft technical advice on format and content of the prospectus*", ESMA31-62-532. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-532_cp_format_and_content_of_the_prospectus.pdf. [Accessed: 12th April 2019].

ESMA, 2017. Consultation Paper "*Draft technical advice on scrutiny and approval of the prospectus*", ESMA31-62-650. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-650_cp_scrutiny_and_approval.pdf. [Accessed: 12th April 2019].

ESMA, 2017. Consultation Paper "*Draft technical advice on content and format of the EU Growth prospectus*", ESMA31-62-649. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-649_cp_eu_growth_prospectus.pdf. [Downloaded: 12th April 2019].

ESMA, 2017. Statement "*ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements*", ESMA50-157-828. Available at: https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf. [Downloaded: 16th March 2019].

ESMA, 2017. Response *to the Commission Consultation Paper on Fintech: A more competitive and innovative financial sector*, ESMA50-158-457. Available at: https://www.esma.europa.eu/sites/default/files/library/esma50-158-457_response_to_the_ec_consultation_on_fintech.pdf. [Downloaded: 25th September 2019].

ESMA, 2018. Consultation Paper "*Draft technical advice on minimum information content for prospectus exemption*", ESMA31-62-962. Available at: : https://www.esma.europa.eu/sites/default/files/library/esma31-62-962_consultation_paper_on_minimum_information_content_for_prospectus_exemption.pdf. [Accessed: 26th April 2019].

ESMA, 2018. Final Report "*Draft regulatory technical standards under the Prospectus Regulation*", ESMA31-62-1002. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1002_final_report_on_draft_rts_under_the_new_prospectus_regulation.pdf. [Downloaded: 10th March 2019].

ESMA, 2018. Final Report "*Technical advice under the Prospectus Regulation*", ESMA31-62-800. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-800_final_report_on_technical_advice_under_the_pr.pdf. [Downloaded: 10th April 2019].

ESMA, 2019. Final Report "*Technical advice on Minimum Information Content for Prospectus Exemption*", ESMA 31-62-1207. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1207_final_report_on_technical_advice_under_prospectus_exemption.pdf. [Downloaded: 8th April 2019].

ESMA, 2019. *National thresholds below which the obligation to publish a prospectus does not apply*, ESMA31-62-1193. Available at: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1193_prospectus_thresholds.pdf. [Accessed: 10th March 2019].

European Commission, 2002. Press Release "*Financial Services: Commission welcomes Council's political agreement on prospectuses proposal"*, IP/02/1607, Brussels: s.n. Available at: https://europa.eu/rapid/press-release_IP-02-1607_en.htm?locale=en. [Accessed: 10th March 2019].

European Commission, 2015. Commission staff working document 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,* SWD(2015) 255 final, Brussels: s.n. Available at: https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/SWD-2015-255-F1-EN-MAIN-PART-1.PDF. [Downloaded: 2nd April 2019].

European Commission, 2015. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Online Platforms and the Digital Single Market Opportunities and Challenges for Europe",* COM/2016/0288 final, Brussels: s.n. Available at: https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-468-EN-F1-1.PDF. [Accessed: 12th March 2019].

European Commission, 2016. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Action Plan on Building a Capital Markets Union",* COM(2015) 468 final, Brussels: s.n. Available at: https://ec.europa.eu/digital-single-market/en/news/communication-online-platforms-and-digital-single-market-opportunities-and-challenges-europe. [Accessed: 26th September 2019].

European Commission, 2018. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions "*FinTech Action plan: For a more competitive and innovative European financial sector*", COM/2018/0109 final, Brussels: s.n. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF [Accessed: 26th September 2019].

European Commission, 2017, Factsheet: *Mid-term review of the capital markets union action plan.* Available at: https://ec.europa.eu/info/publications/mid-term-review-capital-markets-union-action-plan_en. [Accessed: 28th September 2019].

European Commission, 2017, Final Report *"Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU"*. Available at: https://ec.europa.eu/info/sites/info/files/171216-crowdfunding-report_en.pdf. [Accessed: 28th September 2019].

European Commission, 2018. *Request to ESMA for technical advice on possible acts concerning the 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 on a regulated market*, Ref. Ares(2018)3282605. Available

at:
https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/prospectus-regulation-esma-mandate_en.pdf. [Accessed: 10th April 2019].

European Crowdfunding Network, 2016, *"Crowdfunding is a vital source of financing for European high-tech and digital businesses*", Available at: https://eurocrowd.org/wp-content/blogs.dir/sites/85/2016/12/ECN-position-paper-on-the-Prospectus-Directive-2016.pdf. [Accessed: 30th September 2019].

European Crowdfunding Network, 2017, *Review of Crowdfunding Regulation 2017, Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel*. Available at: https://eurocrowd.org/wp-content/blogs.dir/sites/85/2017/10/ECN_Review_of_Crowdfunding_Regulation_2017.pdf. [Downloaded: 26th September 2019].

European Crowdfunding Network, 2018, Position Paper of the European Crowdfunding Network *on the Proposed Regulation on European Crowdfunding Service Providers (ECSP) for Business*. Available at: https://eurocrowd.org/wp-content/blogs.dir/sites/85/2018/09/ECSP-Position-Paper_Proposed-Regulation-on-European-Crowdfunding-Service-Providers-ECSP-for-Business_8October2018.pdf. [Downloaded: 26th September 2019].

European Parliament, BRIEFING Initial Appraisal of a European Commission Impact Assessment, p.1 and Impact assessment (SWD(2018) 56, SWD(2018) 57 (summary) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on European crowdfunding service providers (ECSP) for business COM(2018) 113 and a Commission proposal for a directive of the European Parliament and of the Council amending Directive 2014/65/EU on Markets in Financial Instruments COM(2018) 99

Feng, C., 2018. Initial Coin Offerings, Blockchain Technology, and White Paper Disclosures. Available at SSRN: https://ssrn.com/abstract=3256289 or http://dx.doi.org/10.2139/ssrn.3256289. [Downloaded: 6th March 2019].

Fischer-Appelt, D., 2014. Amendments to the EU prospectus directive regime. *Business Law International*, 15(2), pp. 95-114. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/blawintnl15&collection=journals&id=99&startid=99&endid=118. [Downloaded: 6th March 2019].

Gomber, P. and Pierron, A., MiFID - Spirit and Reality of a European Financial Markets Directive (September 2010). Available at:
SSRN: https://ssrn.com/abstract=1858605 or http://dx.doi.org/10.2139/ssrn.1858605. [Downloaded: 26th September 2019].

Gutfleisch, G., 2018. Crowdfunding and Initial Coin Offerings Under the EU Legal Framework. *European Company Law Journal,* 15(3), pp. 73-82. Available at: https://www.kluwerlawonline.com/document.php?id=EUCL2018012&PHPSESSID=08i1v007gfhen4cfkrdonk7k84. [Downloaded: 6th March 2019].

Hacker, P. and Thomale, C., 2018. An Analysis of the Prospectus Regime: Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law. *European Company and Financial Law Review,* 15(4), pp. 645-696. Available at SSRN: https://ssrn.com/abstract=3075820 or http://dx.doi.org/10.2139/ssrn.3075820. [Downloaded: 18th April 2019].

Härkönen, E., 2017. Crowdfunding and the Small Offering Exemption in European and US Prospectus Regulation: Striking a Balance Between Investor Protection and Access to Capital?. *European Company and Financial Law Review,* 14(1), pp. 121-148. Available at: https://doi.org/10.1515/ecfr-2017-0005. [Downloaded: 5th March 2019].

Hobbs, J., Grigore, G. and Molesworth, M., 2016, Success in the management of crowdfunding projects in the creative industries. *Internet Research*, 26 (1). pp. 146-166. ISSN 1066 2243 Available at http://centaur.reading.ac.uk/75559/. [Downloaded: 28th September 2019].

Howell, E., 2018. An Analysis of the Prospectus Regime: The EU Reforms and the 'Brexit' Factor. *European Company and Financial Law Review*, 15(1), pp. 69-100. Available at: https://doi.org/10.1515/ecfr-2018-0003. [Downloaded: 5th March 2019].

Kaartemo, V. (2017). The elements of a successful crowdfunding campaign: A systematic literature review of crowdfunding performance. *International Review of Entrepreneurship*, 15(3). Available at: https://www.academia.edu/34482768/The_elements_of_a_successful_crowdfunding_campaign_A_systematic_literature_review_of_crowdfunding_performance. [Downloaded: 25th September 2019]

Kickstarter's Creator Handbook, Available at: https://www.kickstarter.com/help/handbook

Klöhn, L., 2018. The Regulation of Crowdfunding in Europe. In Cumming, D., Hornuf, L. (eds.) *The Economics of Crowdfunding.* 1st Edition ed. Cham: Palgrave Macmillan. Available at: https://doi.org/10.1007/978-3-319-66119-3_10. [Downloaded: 6th March 2019].

Leuz, C. and Wysocki, P. D., 2016. The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research. *Journal of Accounting Research*, 54(2), pp. 525–622. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/1475-679X.12115. [Downloaded: 22th July 2019].

Macchiavello E., La travagliata evoluzione normativa dell'equity crowdfunding in Italia, il nuovo regolamento CONSOB e la prospettiva di regolazione del crowdfunding a livello europeo: una disciplina destinata a breve vita?, in *Rivista di Diritto Bancario*, n.3/2018. Available at: https://rivista.dirittobancario.it/la-travagliata-evoluzione-normativa-dellequity-crowdfunding-italia-il-nuovo-regolamento-consob-e-la. [Downloaded: 30th September 2019].

Mollick, E. (2014), "The dynamics of crowdfunding: An exploratory study", *Journal of Business Venturing*, 29(1): p 1–16. Available at: https://doi.org/10.1016/j.jbusvent.2013.06.005. [Downloaded: 28th September 2019].

Morck, R. K. and Steier, L., 2005. The Global History of Corporate Governance: An Introduction. *NBER* Working Paper No. 11062, JEL No. G3, N2. Available at: http://www.nber.org/papers/w11062. [Downloaded: 16th April 2019].

Richter, J., 2018. EU Regulatory Developments. *Law and Financial Markets Review,* 12(1), pp. 44-51. Available at: https://doi.org/10.1080/17521440.2018.1471785. [Accessed: 7th March 2019].

Schedensack, J., Berlin, 2018, Proposed changes to the European Commission Proposal for a Regulation on European Crowdfunding Service Providers, COM(2018) 113 final. Available at: https://ec.europa.eu/info/law/better-regulation/feedback/11561/attachment/090166e5baa28ddc_hr. [Downloaded: 30th September 2019].

Schammo, P., 2011. *EU Prospectus Law*. 1st Edition ed. Cambridge: Cambridge University Press.

Sharein blog, 2018, *UK Increases Prospectus Exemptions Up To €8m.* [Online] Available from: https://www.sharein.com/blog/uk-increases-prospectus-exemptions-up-to-e8m/. [Accessed: 2nd October 2019].

Shin, L., 2017. Are ICOs for Utility Tokens Selling Securities? Prominent Crypto Players Say Yes. *Forbes Magazine.* [Online] 2nd October. Available at : https://www.forbes.com/sites/laurashin/2017/10/02/are-icos-for-utility-tokens-selling-securities-prominent-crypto-players-say-yes/#43b270e334fa.
[Accessed: 19th April 2019].

The Committee of Wise Men, 2001. *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*.

Tirdatov, I., 2014, "Web-Based Crowd Funding: Rhetoric of Success", *Technical Communication*, 61(1): p 3–24.

Wymeersch, E., 2018. Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit. *Journal of Financial Regulation,* 4(2), pp. 209-275. Available at: https://academic.oup.com/jfr/article-abstract/4/2/209/5125699. [Downloaded: 7th April 2019].

Legal References

Annexes to the Commission Delegated Regulation (EU) .../... supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004. Brussels, 14.3.2019 C(2019) 2020 final.

Code of Conduct (COCON) 2019

Code of Federal Regulations (CFR) 2016

Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301. Brussels, 14.3.2019 C(2019) 2022 final.

Commission Delegated Regulation (EU) .../... of 14.3.2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004. Brussels, 14.3.2019 C(2019) 2020 final.

Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/30.

Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (Text with EEA relevance).

Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises

Commission regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (Text with EEA relevance).

Common position (EC) No 25/2003 adopted by the Council on 24 March 2003 with a view to adopting Directive 2003/. . ./EC of the Parliament and of the Council of . . . on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC C 125 E/51.

Consob Regulation no. 18592 of 26 June 2013 - The collection of risk capital via on-line portals (as amended by Resolution no. 20264 of 17 January 2018)

Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31989L0298.

Decreto-Legge 18 ottobre 2012, n. 179 (GU n.245 del 19-10-2012 - Suppl. Ordinario n. 194).

Decreto-Legge 24 aprile 2017, n. 50.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU

Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business (COM(2018)0113 – C8-0103/2018 – 2018/0048(COD))

European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Prospectuses to Be Published When Securities are Offered to the Public or Admitted to Trading. Brussels, 30.11.2015 COM(2015) 583 final.

European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business. Brussels, 8.3.2018 COM(2018) 113 final 2018/0048 (COD).

FCA Handbook

Financial Services and Markets Act 2000

Jumpstart Our Business Startups (JOBS) Act of 2012

Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

U.S. Code

Web Sources

https://www.consilium.europa.eu/en/policies/capital-markets-union/prospectus/

http://www.consob.it/web/consob-and-its-activities/consob

https://ec.europa.eu/info/business-economy-euro/growth-and-investment/financing-investment/crowdfunding_en

https://ec.europa.eu/info/node/11713/#documents

https://www.fca.org.uk/about/the-fca

https://www.nortonrosefulbright.com/en/knowledge/resources-and-tools/capital-markets-union/prospectus-regulation