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ADMISSION TO LISTING IN THE EUROPEAN UNION

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INTRODUZIONE

L'Unione Europea affonda le sue radici nell'ambizioso tentativo e nella condivisa volontà di creare un mercato unico che potesse favorire la libera circolazione di merci, persone, servizi e capitali. Nello specifico, per quanto concerne la regolamentazione dei mercati finanziari, negli ultimi decenni, si è assistito ad una progressiva evoluzione finalizzata al raggiungimento della massima armonizzazione a livello sopranazionale e comunitario. Nel tempo, la legislazione è progressivamente aumentata, affinandosi e perfezionandosi con il fine ultimo di adeguare la disparata normativa nazionale dei singoli stati membri ad un singolo modello condiviso a livello comunitario.
Il presente elaborato si pone l'obiettivo di analizzare approfonditamente la disciplina che la normativa europea dedica all'ammissione a quotazione delle società e dei relativi strumenti finanziari, sviscerandone alcuni degli aspetti di maggiore rilievo ed interesse, anche alla luce di un'analisi empirica in merito all'evoluzione della regolamentazione e della supervisione delle borse e dei mercati dei capitali.

Il primo capitolo è incentrato sulla normativa europea in materia di società quotate e mercati finanziari, due concetti che, come si vedrà, sono indissolubilmente legati tra loro. Nello specifico, la prima parte del capitolo è dedicata ad una breve analisi delle disposizioni legislative comunitarie che si sono susseguite in questo campo. Dopo una quasi "assordante" assenza di norme che ha caratterizzato i primi anni dalla creazione della Comunità Economica Europea, le istituzioni europee, a partire dagli anni '60 del secolo scorso, comprendendone l'assoluta indispensabilità, hanno dato il via ad una progressiva proliferazione normativa.
Prendendo le mosse dal quadro storico di riferimento, i primi paragrafi passano in rassegna i primi tentativi di regolamentazione del fenomeno, partendo dal "*Segrè Report*" del 1966. Attraverso le riforme introdotte dal "*Financial Services Action Plan*" e dal "*Lamfalussy Report*", il capitolo compie un breve cenno alla riorganizzazione normativa avvenuta nei primi anni del duemila, la quale ha condotto all'approvazione di direttive centrali in materia di società quotate con riferimento all'ammissione a quotazione, al prospetto informativo e alle norme in materia di

manipolazione del mercato e trasparenza. L'analisi storica si chiude con un richiamo a due riforme recenti e fondamentali che verranno analizzate ed approfondite nei capitoli successivi: l'introduzione della Direttiva "MiFID II" e del "*Capital Markets Union Action Plan*".
La seconda parte del capitolo è incentrata sulle norme in materia di ammissione a quotazione e sullo status di società quotata, ponendo centrale attenzione alla Direttiva 2001/34/CE. Tale direttiva, assumendosi un arduo compito di riorganizzazione in questo ambito, ha introdotto un omnicomprensivo strumento legislativo in grado di dettare le condizioni e gli obblighi che le società (e i relativi strumenti finanziari) devono rispettare per ottenere la quotazione nei mercati finanziari europei. Una società che intenda ottenere tale qualifica, infatti, dovrà presentare una richiesta all'autorità nazionale competente dalla cui accettazione derivano una serie di conseguenze legislativamente stabilite e previste. La normativa è il risultato di un compromesso tra la volontà di favorire e rendere appetibile la quotazione come strumento e mezzo per la raccolta di "capitale di rischio" tra il pubblico (in contrapposizione ad una storica tendenza delle società europee ad affidarsi al "capitale di debito" tipicamente prestato da banche) e la necessità di garantire che tale processo si svolga in maniera trasparente e in tutela degli investitori che vengono a contatto con la società stessa. Tale esigenza viene garantita tramite l'introduzione di una serie di norme che dispongono le condizioni che le società devono rispettare sia in termini di *governance* che di *disclosure* informativa. Il capitolo analizza le singole disposizioni di questa direttiva, focalizzate principalmente su una capitalizzazione di borsa minima, la pubblicazione preventiva di bilanci con riferimento a tre esercizi precedenti, la libera negoziabilità delle azioni e un c.d. "flottante" minimo. Le singole autorità nazionali competenti dovranno poi decidere sull'ammissione stessa, disponendo di un grado di discrezione ben definito e prestabilito. L'ultimo paragrafo è poi dedicato al c.d. "*cross-listing*", ossia la pratica secondo la quale una società decide di quotarsi ufficialmente su più mercati finanziari diversi, dovendo per tale motivo rispettare le norme che ciascuno di essi detta.

Il secondo capitolo si focalizza sull'introduzione della Direttiva "MiFID II" e la nozione di ammissione alla negoziazione sui mercati regolamentati ("*admission to trading*"). Lo strumento legislativo entrato in vigore nel 2014 ha introdotto novità

cruciali in relazione alla regolamentazione dei mercati finanziari in Europa. Dopo aver brevemente analizzato alcuni di questi interventi, l'elaborato si concentra sulla disciplina dell'ammissione a negoziazione nei mercati regolamentati, andandone a sviscerare i requisiti fondamentali con riferimento anche alle possibilità di successiva sospensione e rimozione da parte dell'autorità competente e con l'intento di compiere una comparazione con il concetto di ammissione a quotazione ("*admission to listing*") analizzato nel capitolo precedente.

Tale confronto rappresenta il fulcro dell'elaborato e viene svolto analizzando i due concetti alla luce di tre prospettive diverse, tentando di comprendere se tale distinzione possa assumere una rilevanza da un punto di vista non solo linguistico, ma anche normativo e pratico. In primis, questi due concetti possono essere intesi come riflessi nella contrapposizione tra borse valori ("*stock exchanges*") e *altri* mercarti regolamentati ("*other regulated markets*"). L'ammissione a quotazione farebbe riferimento alle sole borse valori tradizionali, mentre l'ammissione a negoziazione ai mercati regolamentati. Questa prima analisi viene svolta alla luce dell'esistenza, in seguito all'introduzione dell'impianto MiFID, di una sorta di monopolio legislativo del concetto di "*mercato regolamentato*", con una conseguente e progressiva scomparsa del termine "*borsa*". In secondo luogo, la distinzione in oggetto può essere intesa come riferita a due fasi di uno stesso di procedimento di ammissione. La prima fase consiste nell'ammissione a quotazione disposta da un'autorità pubblica, la seconda nell'ammissione a negoziazione disposta, in un secondo momento, dal gestore del mercato regolamentato. Questo è l'approccio che, a partire dal 2000 e dalla "de-mutualizzazione" del *London Stock Exchange* ("LSE"), è stato adottato nel Regno Unito, dove l'ammissione a quotazione è disposta dall'autorità pubblica, mentre gli strumenti finanziari sono successivamente ammessi alle negoziazioni su provvedimento dell'LSE. Dopo aver richiamato brevemente la disciplina normativa inglese, l'elaborato analizza la possibilità di applicare questo sistema ai mercati finanziari europei in genere, ponendo l'attenzione sulla proposta, avanzata nel passato, di un "*listing comunitario*". In ultima istanza, la distinzione tra ammissione a quotazione e ammissione a negoziazione può essere intesa come distinzione tra ammissione su domanda dell'emittente e ammissione disposta unilateralmente dal gestore del mercato. In particolare, l'ammissione a quotazione, a differenza

dell'ammissione a negoziazione, implica in ogni caso la domanda del soggetto emittente. Tale postulato può essere ricavato da una serie di considerazioni normative che l'elaborato richiama ed analizza e ponendo come punto di partenza l'articolo 51 comma 5 della nuova direttiva MiFID II. In esso viene data, al gestore di un mercato regolamentato, la possibilità di ammettere alle negoziazioni sul proprio mercato gli strumenti finanziari di un'emittente che siano già negoziati su un diverso mercato regolamentato, anche senza (o addirittura contro) la volontà espressa dell'emittente. Al contrario, tale facoltà non potrebbe essere concessa in caso di ammissione a quotazione. Essa, infatti, implicando la conseguente applicazione di una serie di stringenti norme in termini di organizzazione societaria interna e informativa esterna, presuppone necessariamente una volontà espressa in tal senso dall'emittente che tali conseguenze subisce.

In conclusione, il terzo capitolo incardina l'attuale panorama europeo dei mercati finanziari attraverso la trattazione delle maggiori novità introdotte dalla direttiva MiFID II in materia di regolamentazione, sorveglianza e concorrenza degli stessi. In primo luogo, viene analizzato lo sforzo di riordino normativo attuato dalla direttiva, la quale prevede una specifica disciplina per tre c.d. "sedi di negoziazione" ("*trading venues*"), in contrapposizione alle contrattazione c.d. fuori listino ("*over the counter*"). Si sottolinea che l'idea su cui si fonda tale impianto è quella di creare un sistema che sia in grado di stare al passo con gli sviluppi tecnologici, andando a regolamentare i vari fenomeni sviluppatisi nella prassi e garantendo un'effettiva concorrenza tra i vari mercati e un'adeguata protezione degli interessi degli investitori. Di conseguenza, la prima parte di questo capitolo analizza approfonditamente la disciplina introdotta, delineando le peculiari caratteristiche di ciascuna tipologia di mercato. Successivamente, il capitolo si propone di compiere un'analisi concreata dell'attuale scenario dei mercati regolamentati in Europa, ponendo rilievo sulla tendenza ad organizzarsi nella forma di imponenti gruppi soprannazionali verticalmente organizzati. Nello specifico, vengono analizzati i più rilevanti mercati regolamentati europei, con una particolare attenzione verso il gruppo "Euronext", il quale, a seguito dell'acquisizione di Borsa Italiana S.p.A., ha assunto una struttura particolarmente estesa, divenendo il più rilevante dei mercati pan-europei. I paragrafi successivi passano in rassegna gli effetti e le ripercussioni che i fenomeni della de-

mutualizzazione e della cooperazione su base europea hanno portato alle luce in relazione alla regolamentazione dei mercati finanziari. In primis, per quanto concerne l'ammissione a quotazione, la configurabilità di punto d'accesso unico per le società che aspirano ad ottenere la quotazione ufficiale in Europa, nonché di un'unica autorità con competenza decisoria a livello europeo, nel più ampio prospetto del *Capital Markets Union Action Plan*. In particolare, viene messa alla luce la centralità che l'autorità di regolamentazione dei mercati finanziari a livello europeo, l'ESMA, potrebbe assumere. Successivamente, la possibile contaminazione del ruolo tipicamente assunto dagli operatori dei mercati di regolamentazione e supervisione degli stessi. In particolare, tenuto conto delle diverse risposte fornite dalla dottrina e dalla legislazione, la parte finale del capitolo si pone l'obiettivo di delineare i punti a favore ed a sfavore legati ad una possibile configurazione di tale ruolo in relazione a soggetti ormai qualificabili a tutti gli effetti come imprese a scopo di lucro. La contrapposizione di vedute si crea poiché, da un lato, essi sarebbero spinti dalla necessità di garantire uno standard qualitativo elevato che possa assicurare un vantaggio competitivo rispetto agli altri soggetti che svolgono la stessa tipologia di attività. Al contrario, invece, tali imprese potrebbero tentare di raggiungere il medesimo obiettivo imponendo requisiti meno stringenti ed una lasciva regolamentazione in grado di attrarre una più vasta gamma di emittenti.

INTRODUCTION

The European Union finds its roots in the ambitious attempt and shared hope to create a single market that could enable the free movement of goods, people, services and capital. In particular, with reference to the regulation of financial markets, the past decades have witnessed a gradual evolution aimed at achieving enhanced harmonization at a European level. Over time, legislation has gradually increased, refined and evolved with the ultimate goal of adapting the disparate national regulations of individual member states to a single shared European model.
The aim of this work is to analyse in depth the discipline that European legislation devotes to the *admission to listing* of companies and their financial instruments, dissecting some of its most relevant aspects, also in light of an empirical analysis regarding the evolution of the regulation and supervision of stock exchanges and capital markets.

The first chapter focuses on the European regulation of listed companies and financial markets, two concepts that, as will be seen, are inextricably linked. In particular, the first part of the chapter is devoted to a brief analysis of the evolution of European legislation in this field. After a "deafening" absence of regulations which characterized the first years since the creation of the European Economic Community, the European institutions, starting from 1960s, realized how essential and needed a regulation was and progressive legislative proposal on the subject flourished.
Taking the historical framework as a starting point, the chapter briefly reviews the first attempts to regulate the phenomenon, beginning with the "*Segrè Report*" of 1966. Through the reforms introduced by the "*Financial Services Action Plan*" and the "*Lamfalussy Report*", the chapter also gives a brief nod to the regulatory reorganization that took place in the early 2000s, which led to the approval of crucial directives concerning listed companies with reference to admission to listing, prospectus to be published, and rules on market abuse and transparency. The historical analysis closes with a reference to two recent and fundamental reforms that will be

analysed in subsequent chapters: the introduction of the so-called "MiFID II" Directive and the "*Capital Markets Union Action Plan*".

The second part of the chapter focuses on listing rules and listed company status, paying special attention to Directive 2001/34/EC. This directive, taking on an arduous reorganization task in this field, introduced an all-encompassing legislative instrument capable of dictating the conditions and obligations that companies (and their financial instruments) must meet in order to obtain listing on European financial markets. Pursuant to the newly introduced legal framework, a company wishing to obtain such status will have to submit an application to the national competent authority, from the acceptance of which derive a series of legislatively established and prescribed consequences. The legislation is the result of a compromise between the desire to encourage official listing as a crucial tool to raise "equity capital" from the public (as opposed to a historical tendency of European companies to rely on "debt capital" typically lent by banks) and the need to ensure that this process takes place in a transparent manner and in protection of the investors. This need is guaranteed through the introduction of a series of regulations laying down the conditions that companies must meet in terms of both internal governance and external disclosure. The chapter analyses the individual provisions of this directive, focusing mainly on: minimum market capitalization, prior publication of financial statements, free negotiability of shares, and a minimum percentage of "free float". Individual national competent authorities will then have to decide on admission itself, having a well-defined and predetermined degree of discretion. The last paragraph focuses on the so-called "cross-listing", *i.e.*, the practice whereby a company decides to officially list on more than one financial market, for that reason having to comply with the rules attached to each of them.

The second chapter focuses on the introduction of the "MiFID II" Directive and the concept of *admission to trading on regulated markets*. This legal framework introduced crucial innovations in relation to the regulation of financial markets in Europe. After having briefly analysed some of these novelties, the paper pinpoints the regulation of admission to trading on regulated markets, going on to dissect its basic requirements with reference also to the possibilities of subsequent suspension and

removal by the competent authority. The aim of the chapter is to make a comparison with the concept of admission to listing analysed in the previous chapter.
The correlation is carried out by analysing the two concepts in the light of three different perspectives, attempting to understand whether this distinction may be relevant from a regulatory and practical point of view. First, these two concepts can be understood as reflected in the contrast between stock exchanges and other regulated markets. Admission to listing would refer only to traditional stock exchanges, while admission to trading to regulated markets. This first analysis is made in light of the existence, following the introduction of the MiFID framework, of a legislative monopoly of the concept of "*regulated market*", with a consequent and progressive disappearance of the term "*exchange*". Secondly, the distinction in question can be understood as referring to two stages of the same of admission process. The first stage is represented by the admission to listing disposed by a public authority, while the second stage by the admission to trading disposed by the operator of the relevant regulated market in which the instrument will be traded. This is the approach that, starting from 2000 and since the demutualization of the London Stock Exchange, has been followed in the United Kingdom, where admission to listing is ordered by the public authority, while the financial instruments are subsequently admitted to trading by order of the LSE. Following a brief recall of the British regulatory framework on the topic, the paper analyses the chances to apply this implant to European financial markets in general, focusing on the past proposals for an "*European listing*". Ultimately, the distinction between admission to listing and admission to trading can be understood as a distinction between admission upon application by the issuer and admission arranged unilaterally by the market operator. In particular, admission to listing, unlike admission to trading, implies the application of the issuing entity. This postulate can be derived from a number of regulatory considerations that the paper recalls and analyses and by setting as a starting point article 51 paragraph 5 of the new MiFID II directive. This provision provides the operator of a regulated market with the chance to admit to trading on its market the financial instruments of an issuer that are already traded on a different regulated market, without (or even against) the express will of the issuer. In contrast, such a power could not be granted in the case of admission to listing. Indeed, since it implies the application of stringent rules in terms

of internal corporate organization and external information disclosure, it necessarily presupposes an expressed will to that effect on the part of the issuer suffering such consequences.

In conclusion, the third chapter hinges the current European capital markets landscape through a discussion of the major innovations introduced by the MiFID II directive regarding the regulation and supervision of and competition between financial markets. Firstly, it is analysed the regulatory reorganization effort implemented by the directive, which provides specific regulation for three "*trading venues*", as opposed to so-called *over-the-counter* trading. It is emphasized that the idea behind this legal framework is to create a system that is able to keep pace with technological developments, thus regulating the various phenomena that have developed in practice and ensuring effective competition between the various markets and adequate protection of investors' interests. Accordingly, the first part of this chapter takes an in-depth look at the regulations introduced, outlining the particular characteristics of each type of market. In the following paragraphs, the chapter aims to highlight the actual scenario of European capital markets from a concrete point of view, emphasizing the shift that has occurred in favour of massive vertically organized cross-border entities groups. As a consequence, exchanges ceased to have a sort of public role and became proper *for-profit* companies, with diffuse shareholders and an expansive line of business. In particular, the chapter introduces several case studies with a focus on the "Euronext" group which, following the acquisition of Borsa Italiana S.p.A., has become the largest of the European markets, being able to rely on a particularly extensive structure. In conclusion, the chapter analyses the consequences that de-mutualization and cooperation on a European basis have caused in relation to the regulation of financial markets. Firstly, as far as admission to listing is concerned, the paragraphs investigate the feasibility of a single-entry point for European companies wishing to be officially listed, as well as of a single authority with decision-making competence at the European level, in the broad outline of the "*Capital Markets Union Action Plan*". Secondly, the last paragraphs investigate the possible contamination of the role typically assumed by market operators, historically involved in regulating and supervising their own financial markets. In particular, taking into account the various responses provided by doctrine and legislation, the final part of the chapter aims to

outline the strengths and weaknesses related to a possible configuration of such a role in relation to entities that are now qualified in all respects as *for-profit* enterprises. The clash of views arises from the fact that, on the one hand, market operators would be driven by the need to ensure a superior quality standard that could provide a competitive advantage over other entities performing the same type of activity, thus assuming a "*premium brand*" identity. By contrast, on the other hand, such firms might attempt to pursue and achieve the same goal by imposing less stringent requirements and lascivious regulation that may be able to attract a wider range of issuers.

CHAPTER 1 – EUROPEAN CAPITAL MARKETS AND ADMISSION TO LISTING

1.1. Introduction

This first chapter is designed to provide an overall introduction on the evolution of the legal frameworks concerning the regulation of the capital and financial markets in the European Union and to depict the figure of the ***listed*** **company**.

Siems argued that securities law may be seen as having "two branches"[1]. The first side is represented by companies. In particular, a company may be regarded, among other definitions, also as an issuer of shares, bonds and other securities. These financial instruments represent "goods traded in specialised markets, generally known as stock exchanges"[2]. Therefore, financial markets constitute the second leg of securities law. These places were historically physical. In the last few years, internet and technology have vertiginously increased the use of electronic and virtual networks, assuring a speeder and cheaper process. On the markets, investors are attracted by the chance to sell and acquire any kind of instruments, granted by transparency protection and certainty on prices.

Nowadays the harmonization of the laws on this topic at a European level has become sensitively higher than in the earlier stages of the Union. In particular, the initial European Economic Community (ECC) Treaty did not provide any specific provision on capital markets law. As one of the principal aim of the new born institution was to create a **unique internal market** able to achieve the free movement of capitals, proposals on the subject started to flourish.

The first part of this chapter will briefly analyse the phases through which the European Union has made efforts to achieve a sufficiently high level of harmonization as regards financial markets law. The second part will be focused on *listed* companies

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[1] SIEMS, M. M. (2009) *Foundations of Securities Law*, p. 141.

[2] DE LUCA, N. (2021) *European Company Law,* p. 421.

with reference to the process through which they must go in order to be admitted to *official listing* and the requirements established by existing European provisions.

1.2. Historical Background

1.2.1. Segrè Report and first legislative measure on stock exchanges

The long journey started when the EEC Commission instructed a group of twelve independent experts in order to publish a report on the situation of European capital markets. The 350-page report, named after his president (Carlo Segrè), underlined remarkable gaps and deficiencies of the national legislations in terms of market integration, harmonization, disclosure information and public enforcement[3]. Three different aspects were considered: the familiarization with the security investment for the public, a permanent flow of information coming from the issuers in addition to the annual accounts and, lastly, a comprehensive information in occasion of the issuance of shares or the introduction of securities on a stock exchange[4]. However it remained vague on the criticalities that it laid down, calling for a certain minimum requirement, but lacking of more specific provisions.

The recalled report captured the attention on the matter for the first time after the EU creation, but in order to reach the objective of regional harmonisation a stronger commitment was needed. Following this embryonic stage, the European institutions made efforts to draw up a first project on how the European capital markets should be regulated. The concept of "*minimum harmonization*" was predominant, as a complete one was seen to be unpracticable. The legislative measures were aimed at creating a minimum degree of conformity throughout Europe and between the Member States by eliminating the most consistent divergences, without the presumption to immediately achieve a completely uniform set of rules[5]. In particular, the council enacted three

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[3] SEGRÉ, C. (1966) The Development of a European Capital Market. Report of a Group of Experts Appointed by the EEC Commission. 30.
[4] *Ibid.*
[5] See recitals of Directive 80/390/ECC: "…*Whereas these differences should be eliminated by coordinating the rules and regulations without necessarily making them completely uniform, in order to achieve an adequate degree of equivalence in the safeguards required in each Member State to ensure the provision of information which is sufficient and as objective as possible for actual or potential security holders; whereas at the same time, taking into account the present degree of liberalization of capital movements in the Community and the fact that a mechanism for checking at the time the securities are offered does not yet exist in all Member States, it would appear sufficient at present to limit the coordination to the admission of securities to official stock exchange listing*".

different directives: Directive 79/279/EEC[6] coordinating conditions for securities to be admitted to official stock exchange listing, Directive 80/390/EEC[7] coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars and Directive 82/121/EEC[8] on information to be regularly published by listed companies.

1.2.2. Towards the harmonization

After this first wavering steps, the European Institutions acknowledged that it was necessary to go further, since total harmonization was still far from being reached. In 1985, a White Paper[9] of utmost importance was published, entitled "*Completing the Internal Market*"[10]. In particular the idea behind the paper was connected with the so-called principle of "*home country control*"[11]. This meant that Member States should have complete authority and jurisdiction over financial markets activities, by lifting barriers and granting an higher level of liquidity. However, national legislations were not sufficiently coordinated yet. Therefore, it was followed by a renewed series of Directives concerning different relevant topics: transparency[12], prospectuses[13], insider dealing[14] and investment services[15].

1.2.2.1. Financial Services Action Plan (FSAP)

In 1999, thanks to the contextual introduction of the new common currency (Euro), the Commission took advantage of the favourable situation to supply the European Community with a modern financial system, thus reducing "costs of capital and intermediation"[16]. The Financial Services Action Plan[17] was published with the aim to reduce the leftover fragmentation in the field of the capital markets and to reduce the cost related to the collect of equity capital in Europe. By both referring to

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[6] Council Directive 79/279/EEC of 5 March 1979.
[7] Council Directive 80/390/EEC of 17 March 1980.
[8] Council Directive 82/121/EEC of 15 February 1982.
[9] A white paper is an official government report concerning information or proposals on a specific legislative issue.
[10] European Commission, *Completing the internal market: White Paper from the Commission to the European Council Brusells*, 14 June 1985, COM(85) 310 final.
[11] *Ibid*., paragraph 103.
[12] Council Directive 88/6287/EEC of 12 December 1988.
[13] Council Directive 89/289/ECC of 17 April 1989.
[14] Council Directive 89/592/ECC of 13 November 1989.
[15] Council Directive 93/22/ECC of 10 May 1993.
[16] VEIL, R. (2017) *European Capital Markets Law*, p. 8.
[17] Communication from the Commission of 11 May 1999, "*Implementing the Framework for Financial Markets: Action Plan*" COMM (1999) 232 final.

existing legislative measures and directives and suggesting a renewal in the mechanisms, the communication praised for major changes regarding an easier and cheaper access for investors in a competitive and modern single-point entry financial market. In particular it was underlined the crucial relevance of an integrated EU infrastructure for retail and wholesale financial transaction together with an effective cooperation and information exchange between market supervisors within the territory of the Community.

1.2.2.2. The Lamfalussy Report

A decisive step was taken after the publication of a Report by a Committee, named after its chairman, Alexander Lamfalussy[18]. The committee's duty was to verify and evaluate the existing measures concerning the subject of capital markets law, propose and advise further development and address a renewed legislative procedure focused on a more rapid and effective enactment of European legislation. Therefore, in order to grant such a faster law-making process, the organization was based on four levels, each one focusing on a different step and issue at stake. The first two levels are the most relevant. On the first one, it is placed the development of framework directives or regulations by the Council of European Union and the European Parliament, followed by the adoption of a piece of legislation. By contrast, the second one is focused on delegated acts and complex technical standards on the basis of the principles established by the framework itself. In particular, as it will be seen in the next paragraphs, the task carried out by national authorities is crucial, together with the functioning of European Securities and Market Authority (hereinafter also "*ESMA*"). The third level involves the Member State and their representatives, who are called to vote on new regulations; while the last one regards the enforcement process of the law itself.

The Lamfalussy process represent a cornerstone not only of capital markets law, but generally for the law-making process of European Union. It improved the quality of the legislation and granted an enhanced harmonization among Member States.

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[18] Lamfalussy Final Report on *The regulation of European Securities Markets*. Bruxelles, 15 February 2001.

1.2.3. Reorganization of the laws

Thanks to the reorder's work of the Lamfalussy Committee, fostering the participation of shareholders and various stakeholders in the legislative procedure, a new era for European capital market law began. A reorganization process arose and brought to life a series of Directives concerning the most varied aspects in this area of legislation.

The first step was taken by the Directive 2001/34/EC which, as it will be seen in the next paragraphs, regulated and gathered together all the complex norms regarding the admission to official listing and the figure of the listed company.

Moreover, together with this Directive, in the first years of 21st century, four crucial Directives were enacted, becoming the cornerstones (together with the Takeover Regulation from 2004[19]) of European capital markets law. For the purpose of this work, a brief and concise overview of each legal tool will suffice.

1.2.3.1. Prospectus Regulation

On 4th November 2003, the European Parliament and the Council approved the Directive 2003/71/EC on prospectus law. It coordinated the requirements concerning the drawing-up, scrutiny and distribution of the *prospectus*, *i.e.* the document to published and presenting the fundamental facets of the financial instrument that will be offered to the public and traded in the regulated market. The aim was to create a renewed common set of standards regarding information and disclosure to be published and grating an higher level of investor's protection. It is clear how, on the one side, by providing this sort of "*single passport*"[20] investors are provided with a *minimal* and *sufficient* quantity (and quality) of information concerning the financial instruments they are buying, significantly reducing the so-called *asymmetry of information*. On the other side, companies themselves may received benefits from this piece of legislation, which ensure at the European level mutually recognized, and therefore legally certain, requirements to be respected if they want to trade their financial instruments in Europe. Nowadays this directive has been implemented in a

[19] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on *take-over bids*.
[20] DE LUCA, N. (2021), p. 434.

proper Regulation, Regulation 2017/1129/EU[21], which has granted even further harmonization. In particular, it recalled the concept of the prospectus as the "*visiting card*" of the company. Such a document must include assets and liabilities, the financial position of the company, profit and losses and a sufficiently clear description of the financial instruments issued. In particular, article 6 established the adequate amount of information to be disclosed in order to provide investors with an informed assessment on the investment they are making. The information must be *true*, *complete* and *update*, as any omission or misleading information will constitute a violation punishable by the national competent authority.

1.2.3.2. Market Abuse Regulation

Considering the purposes of this work, the Market Abuse Directive[22] (or MAD) deserves a rather brief citation. Published in January 2003, it was the European institutions' attempt to reach an higher integration of the laws concerning the protection of market integrity. In particular, it was intended to "fill loopholes in Community legislation which could be used for wrongful conduct and would have undermined public confidence"[23]. Many Member States even lacked of a specific legislation concerning market and price manipulation or dissemination of misleading information. Nowadays on this topic, European institutions have approved the Regulation (EU) No. 596/2014[24], modifying and adapting the provisions of the existing legislation. It is focused on three main aspects: insider dealing (article 8), unlawful disclosure of "*inside information*" (article 10) and market manipulation (article 12).

1.2.3.3. Transparency Directive

In 2004, the need for an accurate, comprehensive and timely disclosed set of information was acknowledged by the European institution. With the aim of a better

[21] 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.
[22] 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).
[23] VEIL, R. (2017), p. 10.
[24] 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.

protection of investors, the Directive 2004/109/EC[25] (the "Transparency Directive") was approved. When listed or publicly traded companies are involved it is necessary to assure not well informed investors with a series of details and particulars concerning the company's activities, thus enhancing their protection and confidence and market efficiency in general. After the 2008 crisis, the institutions felt the need to reshape this set of rules, by approving the new Transparency Directive (Directive 2013/50/EU)[26] and repealing the old one. Information disclosure doesn't involve only yearly or half-yearly reports, but it is underlined the great relevance of the periodic and on-going information.

1.2.3.4. Market in Financial Instrument Directive (MiFID)

The Directive 2004/39/EC, *Market in Financial Instruments* (or MiFID I)[27], enacted in 2004, made a decisive step towards the definition of the operational activities of the investment firms and introduced the legislative recognition of capital markets (such as the multilateral trading facilities) different from the traditional Official Stock exchange and regulated markets. Its successor, MiFID II[28], will be deeply analysed in the next chapters when the theme of the distinction between *admission to listing* and *admission to trading* will be touched.

1.2.4. Recent Legislative Measures

From 2009 on, the disruptive financial crisis caused serious distress and harm to the European and global financial markets. Therefore EU institutions decided for a circuit breaker by appoint another Committee of outstanding experts, whose chairman, Jacques de Larosière, gave the name to the report later published[29]. The focus was on the third pillar of the Lamfalussy method and suggested a strengthen of the cooperation between European capital markets authorities. In particular, the final report was divided between two attention poles. The first one, defined as "*macro-prudential*

[25] 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.
[26] 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.
[27] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.
[28] 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.
[29] The High-Level Group on *Financial Supervision in the EU* Report. Bruxelles, 25 February 2009.

supervision" encapsulated measures aimed at the creation of an European System of Financial Supervision (ESFS). This plan was effectively enacted on 1 January 2011, when three major authorities were established: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the aforementioned European Securities and Market Authority (ESMA).

ESMA replaced Committee of European Securities Regulators (CESR) in order to assume a more penetrating and insightful role as financial markets watchdog capable of performing its duties on a transnational level. ESMA's tasks and duties include its relevance in the law-making process and the regulatory field, in investors' protection and as a gatekeeper of the cooperation between national authorities. However, the doctrine has stressed the crucial relevance of ESMA to such an extent that they have argued how a line could be traced to divide the period before and the period after its establishment[30]. Others have pointed out a futural chance to assume a role as a proper single listing authority for the European capital markets. In any case, "the message was clear: the EU was ready to set higher and more stringent regulatory standards"[31]. During the following period, interventions in different fields have followed one another. In particular, following the birth of the project of a "*Single Rulebook*" on capital markets law, it was approved the regulation of the credit rating agencies, the new MiFID II, the regulation on short sales and of benchmarks.
In conclusion, a completely new era started with the approval, in 2015, of the ambitious "*Capital Markets Union Action Plan*"[32], as it opened a new frontier of Europe's single market. As it will be discussed in the third chapter, the aim of the former president of the European Commission, Jean-Claude Junker, was to further advance the then incomplete capital markets integration. The attention was shifted on the reduction of market fragmentation and the facilitation of cross-border capital-flows, by taking a closer look also on small and medium-size enterprises (SMEs). After the Brexit and the establishment of the new European Commission, the project was

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[30] See MOLONEY, N. (2018) *The Age of ESMA*, chapter 1.
[31] SERGAKIS, K. (2018) *The Law of Capital Markets in the EU: Disclosure and Enforcement*, p. 9.
[32] European Commission, *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*, 9 September 2015, COM(2015) 468 final.

not abandoned. The newly elected President Ursula von der Leyen has committed to finalise the plan and to take on a renewed long-term perspective on the topic[33].

This rather brief introduction on the history and the most relevant legislative measure in terms of European capital markets was intended to be propaedeutic to understand the close link between financial markets and listed companies, on which the remaining paragraphs will be focused.

1.3. Admission to Official Listing

The second part of this chapter will be focused on the status of ***listed*** (or *publicly traded*) company. Listed companies and official stock exchanges, as analysed above, are strictly related concepts. A company may be defined as "*listed*" only if its shares, bonds or other financial instruments are "admitted to *official listing* and traded in one or more regulated markets"[34].
A company may acquire the status of "*listed*" company only if it makes a request to the national competent authority (hereinafter, "*NCA*"). In particular, as listing brings with it a series of commitments in terms of compliance requirements and corporate governance aspects, the issuer must be well aware of the consequences. By this request, subject to the NCA approval, the issuer "commits itself to comply with the legislative rules of the Member State where official listing of the securities is sought and with the trading rules set forth in the market regulation of the chosen market"[35].

Most of the European securities laws are applicable only if shares (or debt securities) are offered to public, as opposed to private placements to a limited number of people. When a company's shares have never been offered to the public, the first issuance is generally made through an *Initial Public Offering* (or *IPO*). By contrast, in a second moment, *secondary offerings* take place, whenever an issuer issues new securities with respect to those already placed on the markets. The reasons why a company decides to go public and list its securities are the most disparate and predominantly relate to

[33] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan*, 24 September 2020, COM(2020) 590 final.
[34] DE LUCA, N. (2021), p. 422. On the topic see also: VICARI, A. (2021), *European Company Law*, chapter 12, "*Listed Companies*"; SERGAKIS, K. (2018), chapter 2.4.1, "*Issuers*"; VEIL, R. (2017), chapter 9, "*Market Partecipants*" - "*Issuers*".
[35] DE LUCA, N. (2021), p. 423.

complex economic analyses. However, the main advantages are connected with the primary goal of raising funds and the chance to increase visibility. On the one side, the issuer will be able to raise more easily huge amount of equity capital as against the more traditional and bound debt capital in order to reach ambitious business expansion purposes. Therefore, it "reduces a company's dependence on internally generated capital, its controllers personal resources, bank finance, trade finance (such as debt factoring), and venture capital"[36]. On the other, by listing its instruments the company will be able to attract a wide range of different investors, boosting the reputation on the market and the brand awareness.

By contrast, as other authors argued, "finance-raising in the EU is typically associated with bank finance rather than with market finance"[37]. This is mainly due to an historical reluctance towards this capital-raising method, whose throwbacks have always been considered at the expenses of the pros. In particular, as it will be seen in this chapter, when a company goes public it has to respect a specified set of strict rules, including the removal of statutory provisions concerning restrictions on securities, the appointment of independent non-executive directors and other formalities related to a good corporate governance conduct and information transparency towards shareholders. The main criticality is deep rooted in the fear of loss of control by the existing owners. In some countries, where the biggest companies have been historically founded, controlled and directed by one family this represents a major disincentive[38].

This chapter will thus analyse in detail the most relevant legal tool on this subject, the **Directive 2001/34/EC** of the European Parliament and Council from 28 May 2001, *on admission of securities to official stock exchange listings and on information to be published on those securities*. Starting from the reasons behind the adoption of this

[36] FERRAN, E., CHAN HO, L. (2014) *Principles of Corporate Finance Law*, p. 351. Deeper on the theme of the reasons why a company should go public, see: *Ibid*, chapter 13, "*Public Offers and Listings of Equity Securities*"; SINGH, R. K., SINGH, S. K. (2016) *Law and regulation of public offering of corporate securities*, chapter 3, "*Public offers and prospectuses*"; PAGANO, M., PANETTA, F., ZINGALES, P. (2002) *Why Do Companies Go Public? An Empirical Analysis*, p.28 et seq.
[37] MOLONEY, N. (2014) *EU Securities and Financial Markets Regulation*, p. 59.
[38] One of the greatest example is represent by the Italian market of listed companies. By taking a closer look to the report published by Consob with reference to the corporate ownership of the Italian listed companies (accessible from: https://www.consob.it/web/area-pubblica/abs-rcg/-/asset_publisher/D4UvV7Ug51WY/content/report-corporate-governance-2020/11973) this tendence is more than clear. At the end of 2019, the controlled companies were 196, affecting the market capitalisation for the 72%.

piece of legislation, the recitals and the most incisive definition, it will be depicted the figure of the listed company.

1.4. Directive 2001/34/EC

The Directive 2001/34/EC of the European Parliament and Council from 28 May 2001, *on admission of securities to official stock exchange listings and on information to be published on those securities* has applied since 26 July 2001. It was adopted as a result of the Financial Services Action Plan of 1999 and in line with the objectives that this document pursued. The need to ensure an integrated, open, competitive and efficient legislation among European financial services lies behind this legal framework. The directive aims to "coordinate the rules with regard to admitting securities to official stock exchange listing and the information to be published on those securities in order to provide equivalent protection for investors at EU level"[39].

The directive was also designed to consolidate the existing measures concerning the conditions for admission of securities to official stock-exchange listing and the financial information that listed companies must make available to investors. In particular such provisions were previously contained in:

- **Council Directive 79/279/EEC** coordinating the conditions for the admission of securities to official stock-exchange listing;
- **Council Directive 80/390/EEC** 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;
- **Council Directive 82/121/EEC** on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing;

[39] See Directive 2001/34/EC, Recital (2): "*The coordination of the conditions for the admission of securities to official listing on stock exchanges situated or operating in the Member States is likely to provide equivalent protection for investors at Community level, because of the more uniform guarantees offered to investors in the various Member States, it will facilitate both the admission to official stock exchange listing, in each such State, of securities from other Member States and the listing of any given security on a number of stock exchanges in the Community; it will accordingly make for greater interpenetration of national securities markets by removing those obstacles that may prudently be removed and therefore contribute to the prospect of establishing a European capital market*".

- **Council Directive 88/627/EEC** on the information to be published when a major holding in a listed company is acquired or disposed of.

This was the first concrete step towards the attempt of the European Union to reach the maximum harmonization in the field of capital markets and listing requirements.
Furthermore, the two aforementioned directives: Directive 2003/71/EC (the *Prospectus Directive*) and Directive 2004/109/EC (the *Transparency Directive*) consolidated the rules concerning the provision on information and investors' protection. In particular, they modified part of the provisions of the Listing Directive with the purpose of modernizing the discipline to a greater extent. As a result, articles 3, 4, 20 to 41, 65 to 104 and 108 of this directive were repealed and deleted.
A last relevant contribution was given by Directive 2004/39/EC (the original *Markets in Financial Instruments Directive*) by introducing the notion of "*admission to trading on a regulated market*".

1.5. Scope of application and general provisions

To properly kick off the discussion on the topic of the admission to listing, it is useful to recall the definitions provided by article 1 and the scope of application defined in article 2. For the purposes of this work the most relevant definition is established in article 1 letter (a) of the Directive 2001/34/EC on *admission to listing*. This provision specifies that an "*issuer* shall mean companies and other legal persons and any undertaking whose securities are the subject of an application for *admission to official listing on a* ***stock exchange***"[40]. Therefore, the concept of "*official listing on a stock exchange*" is central and crucial, albeit undefined. In particular, it is reproduced also in the article 2(1) of the directive while detailing that it "shall apply to securities which are admitted to official listing or are the subject of an application for admission to *official listing on a stock exchange* situated or operating within a Member State"[41]. The lack of a proper and precise definition of "*Official Listing*" and "*Stock Exchange*" has brought authoritative scholars to investigate this concept[42]. The discussion on this specific issue will be scrutinized in the further chapters, taking into account the

[40] Directive 2001/34/EC, article 1(a).
[41] Directive 2001/34/EC, article 2(1).
[42] See, among others, MOLONEY, N. (2014), p. 179-182.

distinction from "*other regulated markets*" and the critic view towards a concept often defined as outdated[43].

For the purposes of this chapter is crucial to mention the article 5 of directive in which the European Union establishes two main requirements referred to the **member states** and the **competent authorities**. The first is strictly related to the fact that the admittance of securities on any stock exchange is conditional to the satisfaction of the conditions laid down in the directive itself[44]. Secondly, it provides that issuers of securities admitted to such official listing, regardless of the date on which this admission takes place, are subject to the obligations set forth in it[45].
This clearly underlines how the European Union's intention was to create a single piece of legislation that could be able to encapsulate all the relevant features concerning the official listing in stock exchanges. Member States have been required to furtherly adapt their national legislation in order to reach a minimum level of harmonization. The second and arguably more relevant aspect that can be picked up from this provision is related to the concept of listing as a *choice* of the issuer and anyone else, albeit subject to the positive response of the national competent authority. This derives from the fact that the commitments arising from listing regime are highly onerous and capable of harshly influencing the internal structure of the issuer.

1.6. Conditions and Obligations

Firstly it must be neatly analysed the conditions and the commitments that the issuer must respect in order to obtain the admission to official listing and the status of *listed company*.

1.6.1. Conditions: conditions for companies

In order to grant effectiveness to the shareholders and investors' protection it is necessary that the companies for the shares of which admission to official listing is sought respect the various conditions provided by the Section 1 of Chapter II of the Directive 2001/34/EC. Therefore, if a company wants to obtain the admission to official listing and the status of *listed company*, it has to comply with such provisions.

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[43] FERRARINI, G. (2002) *Ammissione alla quotazione e ammissione alle negoziazioni: significato e utilità di una distinzione*, p.594-605.
[44] Directive 2001/34/EC, art. 5 letter (a).
[45] Directive 2001/34/EC, art. 5 letter (b).

In particular, they refer to two relevant aspects: *market capitalisation* and *publication of annual financial accounts*.

Article 43 is focused on *market capitalisation*. Firstly, a definition can be useful in order to understand the rationale behind this requirement. The market capitalization (or market cap) refers to the comprehensive value of the total amount of the company's shares. It is calculated by multiplying the price of a single share by the total number of outstanding shares. For example, if a company has issued a total amount of 50 million shares at a price of €1, its market cap would be of €50 millions. On the basis of this concept companies can be distinguished between:

- **large-cap** companies with a market value of €10 billion or more;
- **mid-cap** companies, with a market value between €2 and €10 billion of euros;
- **small-cap** companies, with a market value of less than €2 billion.

This is one of the most relevant concept to evaluate and understand a company's size and development. From this value investors may extract how much a company is worth on the open market and the other investors willingness to pay for its shares. It straightforwardly measures the company's stage in its business, the consideration of the market and also the future and possible evolvements.

Article 43(1) provides that, in order to obtain the admission to listing the *foreseeable* market capitalisation of the company's shares for which admission is sought must be at least **one million euro**. When this amount cannot be assessed, it must be referred to *net assets*. The net assets can be construed, as specified by the same article, with reference to the company's capital and reserves added to profit and loss as stated in the last year's financial account.
The worth of one million euro is nowadays considered to be anachronistic, taking into account the level of inflation and the impairment since this provision was firstly implemented. However, the second paragraph of the same article provides that the competent authorities may concede the admission to listing even if this condition is not fulfilled. In particular, when they are satisfied in accordance with a rather vague-sounding concept of "*adequate market*" for the shares[46].

[46] Directive 2001/34/EC, article 43(2).

In absence of a precise definition, this notion should be interpreted in an objective way in the sense that the authorities, even if the company does not reach the capitalization required, are persuaded that, according to a sophisticated and non-discretional economic analysis, the shares will be featured with a rather high attractiveness for the investors. Otherwise the threshold could be set overly downwards.
By contrast, it should be noted also that the third paragraph establishes the chance for the national authorities to set an higher threshold only provided that *another regulated, regularly operating, recognised open market* exists in that State and the requirements for it are equal to or less than those referred to in paragraph 1[47].

The second requirement is related to the financial situation of the company. In particular, according to article 44, a company must have published or filed its annual accounts in accordance with national law for the *three* financial years preceding the application for official listing[48].
As reiterated on several occasions, the European discipline in this field is harmonized and developed in light of the investors' protection and with the purpose to provide them with the most accurate and precise information available[49]. By requiring the requesting company to have published or filled in accordance with national law its annual accounts, the investors may have a sufficiently clear portrait of the financial situation not only in a short-term perspective but also in a long-term one. From the development (or envelopment) of the last three years, they can derive which are the prospects of growth for the future and the relative attractiveness of the shares.
In the second paragraph, the Directive once again provides for a rather high degree of flexibility for the national authorities. As an exception, they may depart from the condition established above if this is desirable in the *interests of the company or of investors* and where the "investors have the necessary information available to be able to arrive at an *informed judgement* on the company and the shares for which admission to official listing is sought"[50].

[47] This provision is a key one in order to distinguish the scope of application of this directive, focused on Official Stock Exchange Listing, as against other regulated markets.
[48] Directive 2001/34/EC, article 44(1).
[49] The concept of *informed assessment* as provided by article 5(1) of the Prospectus Directive (Directive 2003/71/EC) is highly significant of the EU's intentions.
[50] Directive 2001/34/EC, article 44(2).

1.6.2. Conditions: conditions for shares

The Section II of the same chapter of the Directive provides a series a provisions concerning the condition relation to the shares for which admission is sought, requiring that the legal position of them is in conformity with the law and regulations to which they are subject.

The first condition is established by article 46, which states that shares must be *freely negotiable*[51]. This is the basic condition when a company wants to go public and let its shares to be transferred on the market without any particular bond or limitation. In particular a share, or generally speaking an financial instrument, is negotiable when ownership is easily transferrable from one party to another, so that it can be transferred, exchanged or resold any time.

The second paragraph specifies how NCAs may treat *not fully paid* shares[52] as freely negotiable[53]. This can be done only if it is assured that the negotiability of such shares is not restricted, according to the arrangements made, and that the public is provided with all the relevant information.

The second prescription deals with the concept of *free float*. The free float, also known as public float, is represented by the portion of share that can be publicly traded because they are in the hands of the public investors. They are opposed to "*locked-in* shares held by controlling and other relevant shareholders and not available for the sale in the market"[54].

This number may be calculated by deducting from the number of outstanding shares[55] the total amount of *restricted shares*[56] (*i.e.* shares not transferable until certain specific conditions are met) and of *closely-held share*[57](*i.e.* shares typically held by certain shareholders on a long-term basis). The free float, as well as in the analysed directive,

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[51] Directive 2001/34/EC, article 46(1).
[52] This concept is strictly connected with the theme of the formation of capital. In particular, there is a difference between: authorised capital, subscribed capital and issued and paid-up capital. For the purposes of this document, an issue is fully paid up when, after the subscription to the capital (which can be defined as a sort of engagement to contribute to the company and a first-step), the company has also received from its shareholder, as a exchange for the issuance of the shares, the contribution (in cash or in other than in cash).
[53] Directive 2001/34/EC, article 46(2).
[54] DE LUCA, N. (2021), p. 427.
[55] See above, it refers to the number of shares issued by the company altogether.
[56] Generally held by the corporate management (i.e. *executives*, *directors* and sometimes *employers*).
[57] Generally held by the controlling shareholders, as against institutional investors.

is usually represented in percentage, which can be easily calculated by dividing the free float with the share outstanding. Therefore, if a company has a total amount of outstanding shares of 1 million and the free float stands at 600 thousands shares, the percentage is 40%.

The directive in question imposes, at article 48, that at the time of admission to listing the shares distributed to the public must be in *sufficient number*[58]. After having specified some further provisions on the subject[59], the fifth paragraph gives the definition of this undefined term. It sets the threshold for the concept of "sufficient number" to at least *25% of the subscribed capital*, *i.e.* the free float percentage. Alternatively, when there is a large number of shares of the same class and taking into account their distribution to the public, such a requirement can be satisfied also with a lower percentage if the market will *operate properly*.

The free float is a particularly relevant metric for the external investors when picking stocks. It indicates, very straightforwardly, the volatility of the shares of that specific company. This two concepts are inversely linked with each other. Generally speaking a company with a larger free float has a lower volatility in terms of shares price. This happens because more investors are constantly buying and selling those shares, making them also more attractive for institutional investors, as the risk of an abrupt impact on the price downward is significantly lower. By contrast, the share of companies with a small free float portion tend to be more influenced in terms of volatility. In particular, as there is a limited amount of shares on the market, the fewer number of trades has a considerable effect on the price.

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[58] Directive 2001/34/EC, article 48(1).

[59] "…
2. The condition set out in paragraph 1 shall not apply where shares are to be distributed to the public through the stock exchange. In that event, admission to official listing may be granted only if the competent authorities are satisfied that a sufficient number of shares will be distributed through the stock exchange within a short period.
3. Where admission to official listing is sought for a further block of shares of the same class, the competent authorities may assess whether a sufficient number of shares has been distributed to the public in relation to all the shares issued and not only in relation to this further block.
4. By way of derogation from paragraph 1, if the shares are admitted to official listing in one or more non-member countries, the competent authorities may provide for their admission to official listing if a sufficient number of shares is distributed to the public in the non-Member State or States where they are listed.
…"

Another important prescription is provided by article 49. It establishes that the application for the admission to official listing must cover *all the share of the same class* already issued[60].

The last two articles of this section provide rules concerning the admission to listing of companies with shares that have a physical form and that are nationals of non-member countries. In particular article 50 provides that, in case of paper certificates of shares, it is sufficient that the physical form complies with the standards laid down by the other member states[61]. However, following the almost complete dematerialization of the last few years, this provision has lost its relevance.

It is worth mentioning also the article 51, that underlines once again how the focus of the European discipline is strongly based on investors' protection. It provides that, when company national of a non-member country not listed in its state of origin requests the admission to listing, competent authorities must verify that the lack of listing is *not due to investor protection*[62].

1.6.3. Conditions: conditions for debt securities

As regard the conditions for debt securities, the Directive in its Section 1 ("*conditions relating to undertakings for the debt securities of which admission to official listing is sought*") and Section 2 ("*conditions relating to the debt securities for which admission to official listing is sought*") of this Chapter III basically mirrors the conditions provided in chapter analysed before.

However, it is worth mentioning the Section 3 which provides "*other conditions*". In particular article 58, states that the amount of the loan may *not be less than €200.000*. In the second paragraph is portrayed the exception to this rule, provided that NCAs reasonably believe that there will be a *sufficient market*[63] for the debt securities concerned.

One of the most relevant on this topic is represented by article 59 on *convertible* or *exchangeable debentures and debentures with warrants*. According to this provision, they may be admitted to official listing *only if* the related shares are *already listed* on

[60] Directive 2001/34/EC, article 49(1).
[61] Directive 2001/34/EC, article 50.
[62] Directive 2001/34/EC, article 51.
[63] See in this chapter, para. 1.6.1. on the definition of "*adequate market*".

the same stock exchange or on another regulated, regularly operating, recognised open market.
The forth chapter (from article 60 to article 63) is focused on particular conditions relating to the admission to official listing of debt securities issued by a State, its regional or local authorities or a public international body.

1.6.4. Obligations: obligations for companies whose shares are listed

Once the shares are admitted to official listing the Directive lays down a series of provisions concerning the issuer. In particular, as it will be further discussed in the next chapter, the status of *listed company* implies a series of consequences and restrictions. These provision are provided by the European legislation in order to grant a correct functioning of the markets and the best protection possible for the investors. The idea behind this protection is that between the investors and the issuers there is a so-called "*asymmetry of information*". Therefore, it is generally necessary to grant to the investors transparent and up-to-date information, so that they can evaluate consciously where and when to invest.
The first relevant obligation is the *equal treatment of shareholders* laid down in article 65. This means that shareholders that are in the same position must be treated in the same way, granting to the them all the necessary facilities to exercise their rights. The information should include: the holding of the meetings, circulars concerning the payment of dividends, the issue of new shares and the chance to designate as its agent a financial institution through which shareholders may exercise their financial rights[64]. This rule has been discussed in *Audiolux*[65] case, in which the Court has argued that this principle stands to regulate very specific situation and only certain obligations. Therefore it does not have a general and comprehensive character which, by contrast, is typical in general principles of law.
The following Section 3 provides specific provisions when the instrument of incorporation or the statute of the listed is amended. The Directive imposes stronger obligations if compared to the ones provided for non-listed companies. Other than all the typical steps that the company should take in order to modify the statute or the

[64] Directive 2001/34/EC, article 65.
[65] Case C-101/08, *Audiolux SA and Others v Groupe Bruxelles Lambert SA* (GBL) *and Others and Bertelsmann AG and Others*, [2009] ECR I-09823.

instrument of incorporation, it must communicate a draft thereof to the competent authorities of the Member States in which its shares are listed. This must be done at least before the calling of the general meeting that will vote and decide on the modifications.

As regards all the obligations concerning the financial (comprehensive of the year and half-year reports) and non-financial disclosure to which a listed is subject, the discussion is postponed in the further paragraph 1.8 where there will be a deep analysis.

1.6.5. Obligations: obligations of issuers whose debt securities are listed

Articles from 78 to 84 focus on the obligations related to the debt securities admitted to official stock exchange listing. As for the shares, the substance of the content is rather similar. The most relevant provisions are referred to the equal treatment (article 78[66]), the amendments of the statute (article 79[67]) and the disclosure of information to the public[68].

1.7. Powers of the national competent authorities

The admission to official listing, as it has been underlined, is disposed upon *request* of the issuer. The request itself is obviously not enough to directly obtain such admission. As the status of *listed company* brings with it a series of consequences and has an inherent public interest, a designated *competent* authority must neatly examine such request and decide whether the admission sought could be granted or not. The

[66] "1. The undertaking must ensure that all holders of debt securities ranking *pari passu* are given equal treatment in respect of all the rights attaching to those debt securities.
Provided they are made in accordance with national law, this condition shall not prevent offers of early repayment of certain debt securities being made to holders by an undertaking in derogation from the conditions of issue and in particular in accordance with social priorities.
2. The undertaking must ensure that at least in each Member State where its debt securities are officially listed all the facilities and information necessary to enable holders to exercise their rights are available. In particular, it must:
(a) publish notices or distribute circulars concerning the holding of meetings of holders of debt securities, the payment of interest, the exercise of any conversion, exchange, subscription or renunciation rights, and repayment,
(b) designate as its agent a financial institution through which holders of debt securities may exercise their financial rights, unless the undertaking itself provides financial services."

[67] "1. An undertaking planning an amendment to its instrument of incorporation or its statutes affecting the rights of holders of debt securities must forward a draft thereof to the competent authorities of the Member States in which its debt securities are listed.
2. That draft must be communicated to the competent authorities no later than the calling of the meeting of the body which is to decide on the proposed amendment."

[68] Directive 2001/34/EC, articles 72-78.

nature of such authority, if it should be a private or a public regulator, is not specified by the Directive. Article 105 only requires Member States to ensure that the selected one or ones (with the notification of details on the division of powers among them[69]) have the *necessary powers* to carry out their task.

This is why, among all the Member States, different legislative choices were made. They have a right to entrust either a public or a private (usually the market regulator of the market on which the control should be carried out) body. The first approach was adopted by the United Kingdom after the "*de-mutualization*" of the stock exchanges that has brought a change in the primary legislation, by implementing the *Financial Services and Markets Act 2000*. As a consequence the admission to official listing is now conceded by a public authority, the UK Listing Authority (the "UKLA")[70]. On the other side, an example of the second approach is represented by Italy, where the admission to official listing is disposed by Borsa Italiana S.p.A., *i.e.* the private market operator of the stock exchange in the country. The only exception is represented by the admission to listing of the shares of Borsa Italiana itself, the so-called "*self-listing*", which is disposed, for obvious reasons, by the Commissione Nazionale per le società e la Borsa (CONSOB), the public authority for listed companies and financial markets[71].

The choice between these two different systems should be guided by the necessity to assure legal certainty on a such delicate theme. The decision must be made taking into account both the pressing need for minimum and common standards for the admission to listing and the avoidance of an excessive freedom and margin of discretion for the market regulator, which may have destroying effects on potential issuers and investors. Scholars have underlined that, in contexts where the competition between different

[69] Directive 2001/34/EC, article 105(1).

[70] See chapter 2 for a further discussion on the topic and a focus on the distinction between admission to listing and admission to trading in the United Kingdom's approach.

[71] For a further discussion on the topic see FERRARINI, G. (2002) *L'ammissione a quotazione: natura, funzione, responsabilità e "self-listing"*, p. 11-49; See also DI NOIA, C. (2002) *Considerazioni sull'evoluzione della "governance" nelle borse e sul "self-listing"*, p. 51-68. In particular, see p. 62, the author anticipated the theme by underlying that the potential decision on the admission to listing should be referred to a public authority: "*La mera verifica di requisiti oggettivi di ammissione (bilanci in utile, flottante, ecc) non pone naturalmente alcun problema. È però regola delle principali borse quella di adottare valutazioni anche soggettive sui requisiti delle società quotande, in particolare del posizionamento strategico e delle prospettive economico-finanziarie: certamente, in tal caso, le normali procedure adottate nei confronti di normali società dovrebbero essere radicalmente modificate affidando le competenze a soggetti almeno organizzativamente esterni (quali un comitato ad hoc) ovvero all'autorità pubblica di vigilanza*.".

regulated markets is basically non-existent, the English model may be useful in order to grant a proper legislative impartiality in the conditions for the admission to official listing. By contrast, where the competition is set high, the *race to the bottom* may be the correct approach to grant better conditions for admission to listing.

In particular, de Luca argued that, instead of transposing the United Kingdom's approach in its entirety, it should be received a different interpretation of the admission to listing, at least with reference to the Italian jurisdiction[72]. The thesis is based on the construction of the admission to listing as a proper contract that is concluded between the requesting issuer and the market operator, even if subject to the condition precedent of the requirements' acknowledgment. The set of rules provided by the market regulator may be seen not only as general terms and conditions (referring to the *content* of the contract) but also as a proper offer to the public (referring to the *conclusion* of the contract)[73]. The two perspectives are not mutually exclusive. This viewpoint has some rather interesting outcomes, including the potential draft of a specific *right to listing*.

This neither means that the admission to listing is automatic nor that the market regulator does not preserve a margin of discretion on the application. In particular, on the "*negotiation*" point of view, whenever the company requesting the admission doesn't possess the requirements laid down by the company who runs the market, then this right can not be said to exist[74]. On the other side, when the requesting issuers has such requirements, this theory grants a better protection against the discretion eventually exercised by the market regulator. The manager preserves the chance to refuse the application only if the verification process is conducted in an objective and technical way, avoiding any opportunistic assessment of the merit.

In particular, the assessment must be referred only to article 11 of the Listing Directive, which requires that the rejection of an application for the admission to official listing may be justified only if such admission would be *detrimental to investors' interests*. This should be the only consideration that the market regulator should make while

[72] DE LUCA, N. (2009) *Sul "diritto" alla quotazione in borsa. Difesa di una tesi nella prospettiva del listing comunitario*, p.21-45.
[73] *Ibid.*, p. 25.
[74] *Ibid.*, p.41.

deciding on the admission[75]. Even when, according to article 12 of the Listing Directive, Member States may give the competent authorities power to make the admission of a security to official listing subject to any special condition considered appropriate, the reason could be only to seek enhanced investors' protection. Moreover, a legislative measures is required, since the Member States are the ones entitled to permit such derogation.

Another rather interesting outcome would be the positive remedy of a judicial control deriving from an unlawfully rejection of the request of admission to listing made by the market regulator with an abuse of authority. In case of unjustified denial, damages are not sufficiently satisfactory. This is why, article 19 has explicitly provided that the decisions of the competent authorities refusing the admission of a security to official listing or discontinuing such a listing shall be subject to the *right to apply* to the courts[76]. This right stands even when the refusal is a consequence of the expiry of the six months period after the receipt of the application, which is the maximum time span disposed by authorities in order to decide on the request[77].

National competent authorities, according to the European discipline, have other important powers and rights. Other than the ones related to a more than encouraged dialogue with competent authorities of different member states[78], they may request to the issuers whose securities are admitted to listing a series of information. In particular, NCAs may request any information they consider *adequate* in the light of *investors' protection* and the *smooth operation of the market*[79]. Moreover, according to article 17, without prejudice to any other action or penalties, in the event of failure on the part of the issuer to comply with the disposed obligations, they may make public the fact that an issuer is failing to comply with those obligations.

The most relevant remedy actionable by national competent authorities is provided by article 18. It establishes, in its two paragraphs, two particularly harsh solutions: suspension and discontinuance of the listing. The first may be disposed when the

[75] *Ibid.*, p. 39.
[76] This is also a crucial principal established by *recital n. (4)* that states as follows: "There should be the possibility of a right to apply to the courts against decisions by the competent national authorities in respect of the application of this Directive, concerning the admission of securities to official listing, although such right to apply must not be allowed to restrict the discretion of these authorities.".
[77] Directive 2001/34/EC, article 12(2) and article 12(3).
[78] Directive 2001/34/EC, article 13 and 14.
[79] Directive 2001/34/EC, article 16(1).

smooth operation of the market is, or may be, temporarily jeopardised or where protection of investors makes it necessary. The second one when NCAs, owing to special circumstances, are persuaded that normal regular dealings in a security are no longer possible.

1.8. Information to the public

1.8.1. Annual Accounts and Reports

Generally speaking, a company is a *profit taking* entity created by physical individuals in order to engage a business enterprise and gain as many profits as possible. When a company is a public company, potential investors may decide whether they should invest or not by looking at its capacity to generate profits and therefore dividends[80]. A comprehensive report of these information may be found in the annual financial account. In particular, it annually describes the operations and financial conditions of the company itself. Thanks to this document, shareholders and other stakeholders may evaluate the performance of the company[81] in the pasts years and eventually estimated futural progresses. European company law is particularly sensitive to this topic and has portrayed a discipline for both listed and non-listed companies.

The central and crucial legal tool on the subject is represented by Directive 2013/34/EU, focusing on annual account layouts, accounting principles and consolidated accounts. As it exceeds the purposes of this dissertation, it will be solely briefly analysed in light of the stronger requirements laid down for companies admitted to official listing.

The Directive, at article 4, provides that the annual financial statements, as a *composite whole*, must include at least: the balance sheet[82], the profit and loss account[83] and the

[80] It should be kept in mind that, according to article 17(1-3) of the Directive 2013/34/EU, European company law requires the performance of the so-called *balance sheet test*. This means that, in order to complete the distribution, the assets must correspond to the legal capital and the reserves which may not be distributed under the law or the statutes. By doing thus, the European Union avoids the distribution of the *nimble dividends* (i.e. dividends paid out of the net profits of a company).

[81] More specifically, including the company's ability to pay its debts, the profit or loss, next years expenses and earnings, the growth in a specified time span, the portion of earnings retained and distributed and so on.

[82] Directive 2013/34/EU, article 10 and annex III, IV.

[83] Directive 2013/34/EU, article 13 annex V, VI.

notes to the financial statements[84]. It is additionally required an annual report by the management board. The recitals of the Directive are focused on the principles in light of which these documents should be drafted. In particular, they must be prepared on a *prudent basis*[85] and should give a *true and fair view* of an undertaking's assets and liabilities, financial position and profit or loss. Other two important principles are represented by: *going concern* and the *accrual basis*. As regards consolidated accounts, these are the documents concerning a parent and its subsidiaries activities as a single economic entity (*i.e.* as a *group*[86]).

On this topic, the Directive on the admission to listing requires the company to make available to the public, as soon as possible, its most recent annual accounts and its last annual report, together with the consolidated account (if obliged to)[87]. Moreover, the third paragraph of the same article states that, when the information are not able to give a fair and true view of the financial situation, the company should add any other relevant information.

Financial information are not the only type of information which the public of a listed company may be interested in. This is why article 68, indexed "*additional information*" must communicate to the public as soon as possible of: any major new developments in its sphere of activity which could have the consequence to cause substantial movements in the prices of its shares, any changes in the rights attaching to the various classes of shares and of any changes in the structure (shareholders and breakdowns of holdings) of the major holdings in its capital as compared with information previously published on that subject as soon as such changes come to its notice.

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[84] Directive 2013/34/EU, article 16 (all companies) and articles 17-18 (medium-sized and large companies).

[85] See MALTBY, J. (2000) *The Origins of Prudence in Accounting*, p. 51-70, in which the author analyses the historical reasons for the dominance of the *prudence concept* in financial accounting, as "*prudent accounting represented the elaboration by the accounting profession of a distinctive competence - the determination of distributable profit - which enabled it to appear as the ally and advisor of large investors and management against ''speculators'', thereby ensuring an equal return for equal capital*".

[86] This situation generally occurs when a company (the parent) has the *control* of one or more companies (*subsidiaries*). This control derives from the fact that the parent holds the majority of the votes in the assemblies of the subsidiaries, but it can occur also when the percentage of shares held is minor or even non-existent. In particular it could happen that either the shares are widespread (for example in a huge public company) or there are agreements enacted between the parent and the subsidiaries so that the latter may exercise dominant influence.

[87] Directive 2001/34/EC, article 67.

As it will be seen in last paragraph of this chapter, there may be the case of company listed on stock exchanges situated or operating in more than one Member State. Such a company, according to article 69 should provide *equivalent information*. Therefore it must ensure that equivalent information is made available to the market at each of these exchanges.

1.8.2. Periodical information

The widespread and the constantly growing speed of trading and shares exchanging brings with it the necessity of a continuous flow of information coming from the issuer and received by the markets and the investors.

Article 70 provides the obligation to publish half-yearly reports on their activities and profits and losses during the first *six months of each financial year*. The annual financial account alone is not enough to deliver a precise and complete portrait of the company's situation.

The content of this document is specified by the Section 8 of the Listing Directive. In particular, if there are not duly specified circumstances that may justify the delay, it must be published no later than four months after the conclusion of the semester covered by the report itself. Generally speaking, it should be focused, as provided by article 73, on figures[88] (indicating at least "the *net* turnover and the *profit or loss before or after deduction of tax*") and an explanatory statement (including "any significant information enabling investors to make an *informed assessment* of the trend of the company's activities and profits or losses together with an indication of any special factor which has influenced those activities and those profits or losses during the period in question, and enable a comparison to be made with the corresponding period of the preceding financial year" [89]).

1.9. Dual and Cross Listing

The phenomenon of *cross-listing* occurs when a company's shares are listed not only on its home market (*i.e.* the country in which the company was incorporated) but also on a different market (or markets) subject to different legislations. Therefore

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[88] Directive 34/2001/EC, article 73(2).
[89] Directive 34/2001/EC, article 73(6).

the company must comply with all the requirements disposed by each of the stock exchange in which it is listed.
The so-called *primary listing* is generally made on the domestic market, while the *secondary listing* (or listings) occurs on different country's markets. This generally happens when a company grows from being a smaller one and adopts a strategy in order to enlarge its market value and shareholdings.

The decision to "cross-list serves a number of needs"[90] that scholars have enquired. Other than the most obvious ones, including lower cost of capital, expanded global shareholder base, prestige and publicity, authors have underlined four main reasons[91]. The first one is related to market segmentation, meaning that the cost of capital is significantly reduced as the shares are more accessible for European and international investors, overcoming international investment barriers. This is particularly evident in European markets, where the integration is favoured and boosted by legislative measures. In particular, according to the authors hypothesis, the more the home country's market is integrated in the world market, the more the valuation gain increases[92]. The secondary reason is represented by the increase in market liquidity (depending on the liquidity of the market on which the cross-listing is made), thus enhancing the liquidity of the stock[93]. The third reason is connected with information disclosure, taking into account a proper improvement of the firm's information environment[94]. This aspect has been underlined by other scholars as a possible deterrent for cross-listing. Companies may avoid a cross-listing in markets with stricter rules and may look for more "lascivious" stock exchanges. By contrast, others have pointed out that necessary repercussions on corporate governance and their internal organization based on stricter rule of the market on which the cross-listing is sought represent the price which the company is willing to pay in order to reach the advantages listed above[95]. Finally, the dual or multiple respect of requirements of various markets

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[90] MARANO, P., FERRETTI, I. (2006) *Cross-Listing, Global Shares and Dematerialized Shares*. p.267. On the theme see also: PAGANO, M., RÖELL, A. A., ZECHNER, J. (2002) *The Geography of Equity Listing: Why Do Companies List Abroad?*, p. 2651-2694.
[91] ROOSENBOOM, P., VAN DIJK, M.A. (2009) *The market reaction to cross-listings: does the destination market matter?*, p. 1898-1908.
[92] *Ibid.*, p. 1899.
[93] *Ibid.*, p. 1899.
[94] *Ibid.*, p. 1899.
[95] LICHT, N. (2003) *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, p.141-163.

or stock exchange may be seen also as a way to flag the quality of the company or of their financial instruments to external investors[96]. Licht listed a series of reasons why a company may want to be cross-listed: among all, increasing shareholders base, visibility and marketing motivations. Moreover, it should be borne in mind that, by cross-listing and spreading its shares, information on a company may be derived not only by its own disclosure, but also from a consequent increase of media attention, better and deeper analyst coverage and accuracy and higher quality of accounting information. The last advantage has been extrapolated by the "*bonding* theory"[97]. According to this hypothesis, cross-listing brings with it a rather more sophisticated and deeper investors' protection. In particular, by taking a closer look, especially to companies cross-listed in the United States, so-called *agency problems*[98] and conflicts of interests between corporate managements or controlling shareholders and public shareholders are relatively lower. This may be avoided by a strong commitment to an additional and stricter regime concerning managers and corporate governance. By doing this investors, especially those representing the minority of the shares, are deeply protected and the transparency is further enhanced, grating a greater standard of information flows.

The status just depicted must be distinguished from other and different phenomena. Firstly one must differentiate cross-listing from the decision to list the shares only on a market other than the one where the company has its registered office. This is generally know as *foreign listing*. In this second case the company decide to be subject only to one legislation and one market regulator, even if different from the State in which the company itself has been created or where it has the registered office.

Examples of this trend are historically represented by some Italian companies, such as Natuzzi S.p.A., that decided to be listed only on New York Stock Exchange (NYSE), avoiding other available markets. More recently, another Italian company, Zegna, has chosen to be admitted on the New York Stock Exchange[99]. Another outstanding

[96] *Ibid.*, p.144.
[97] *Ibid.*, p. 145.
[98] Agency problems are generally defined as a conflict of interest inherent in any relation in which one party must act in the best interest of another party. In corporate finance, it generally refers to the conflicting interests potentially arising from the managers duty to act as *agent* of the shareholders.
[99] The operation was conducted via an Italian Special Purpose Acquisition Company (SPAC), the Investindustrial Acquisition Corp, and it was concluded on December 2021. It was justified by the CEO

example is represented by Prada S.p.A., a luxury market leader and one of the most famous Italian fashion houses. In 2011, the company, after the failure of four listing attempts on the Italian markets between 2001 and 2002 due to adverse market conditions, made an historical move becoming the first ever European company to be listed on an Asian exchange. The IPO was carried out on the Hong Kong Stock Exchange (HKSE) on June 2011[100]. The listing, even though results did not meet the expectations[101], has been recognized as a turning point for global financial markets.
The decision to go public directly in a third country may be guided by the most varied reasons, generally attached to economic purposes. Certainly, one of the most interesting feature, underlined by various scholars[102], is the increased competition between different exchanges. As it will be seen in the third chapter, each market operator or trading venue has the chance, within the limit established by the law, to set "*listing standards*" that may be able to attract the largest number of firms possible.

Additionally, a company may adopt other methods to have its shares listed (or traded) in two different markets.
Firstly, there is the figure of the *dual listed companies*. This is typically a corporate structure according to which two separate companies (legal entities) have the chance to list their shares in different stock exchanges but grouped as a singe economic entity or operating business thanks to a contract called "*equalization agreement*". In this way, each company do not cease to exist (as in a merger or acquisition operation), but acknowledge to share, in a fixed proportion, risks and profits, ensuring a quasi-total equal treatment of both entities' shareholders[103]. Even if they usually share the board of directors and it can be defined to some extent as a joint venture for the entireness of the activities, they are different from cross-listed companies, as we have seen above.

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of the company by underlying the fact that the American market is more competitive, international and able to grant a greater exposure in the world.
On this topic, see CRIVELLI, G. (2021) Zegna e Bonomi: ecco le ragioni della quotazione e della scelta di New York. *Il Sole 24 Ore*, 20th December

[100] For further details on the transaction, see D'ASCENZO, M. (2011) Prada, parte l'Ipo da 2 miliardi. *Il Sole 24 Ore*, 21th May.

[101] BARRETO, E. (2011) Prada's $2.1 billion IPO makes modest HK debut. *Reuters.com*. 24th June.

[102] See CHEMMANUR, T.J, FULGHERI, P. (2006) *Competition and cooperation among exchanges*: *A theory of cross-listing and endogenous listing standards*, p.455-489.

[103] There are many examples of dual-listed companies in the world. One of the most relevant is represented by *Carnival Corporation* (listed on NYSE) and *Carnvial plc* (listed on LSE).

In Europe, a meaningful example of this distinction is represented by Unilever. This company, which was composed as a dual-listed company by *Unilever plc* (listed on London Stock Exchange) and *Unilever N.V.* (listed on Euronext Amsterdam), has announced on 30 November 2020 the merger and unification between the two distinct arms into a single London-based public limited company[104]. In Europe it has a primary listing on London Stock Exchange and a secondary one on Euronext Amsterdam.

In conclusion, cross-listing must be distinguished from the process of *admission to trading* on a different country's markets. The admission to trading may be depicted as the possibility for a share of a company to be traded and exchanged in a foreign market without being actually registered (or *listed*).
In particular, in European law, such a distinction was considered as strictly relevant and scholars have investigated it. After the MiFID I and II, it has lost some of its relevance, as the concepts of *admission to official listing* and *official stock exchanges* have become to some extent obsolete. These legislative measures, in order to take into account and regulate new economic and trading trends, have replaced these notions with the term "*regulated markets*". Moreover, the scenario of European trading venues has been completely renewed, by introducing a legislative regulation of some innovative platforms, developed in the trading practice and that could not be ignored any more.

[104] For further details on the operation, see Unilever's press release on the official website, available from: https://www.unilever.com/news/press-and-media/press-releases/2020/completion-of-unilevers-unification/.

CHAPTER 2 – ADMISSION TO TRADING

2.1. Introduction

The second chapter will focus on the definition of the concept of *admission to trading* in the regulated markets.

There will be a brief introduction on the most relevant concepts for the purposes of this dissertation, referring to the new legislative trends introduced with the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on *markets in financial instruments* ("MiFID II", substituting its predecessor Directive 2004/39/EC or "MiFID I"). Following the innovations concerning the subject of the capital markets and the novelties on the different types of trading venues, it will be proposed a rather interesting comparison with the notion of *admission to listing*, analysed in the previous chapter. It will be construed with reference to the distinction proposed by an authoritative scholar, Professor Guido Ferrarini, who divided these two opposed concepts on three levels. It will be strongly reaffirmed how the *admission to listing* must be a choice of the issuer, while the admission to trading may be conceived also as a "*unilateral*" choice of the trading venues or the market regulator. The legitimacy of this act and the consequences involved in this provision (starting from the company that is "subjected" to the unilateral decision) will be investigated.

2.2. Directive 2014/65/EU (Markets in Financial Instruments Directive)

The Directive 2014/65/EU of May 2014 on *markets in financial instruments* ("MiFID II"[105]) entered into force starting from 3 January 2018 and substituted the old MiFID I[106], which had brought significant changes in the European capital markets' scenario. The reasons why this newly created instrument was approved are quite

[105] 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 ("MiFID II").
[106] 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 ("MiFID I").

straightforward. The 2009 crisis have shaken European (and world's) financial stability from its deep-rooted organization, showing various gaps and deficiencies. In particular, there was a strong need for a further developed investors' protection and deeper markets' integrity and transparency[107]. The European Union institutions' intention is well underlined by the recitals number (3) and (4), in which it is specified the willingness to encompass the "*full range of investor-oriented activities*", including when trading takes place "*over the counter*" (OTC)[108]. Therefore, even if the MiFID I was on several occasion defined as the "*core pillar of financial market integration*"[109], an intervention on many levels was felt to be necessary. Together with this Directive, the Parliament also approved the Regulation (EU) 600/2014 ("MiFIR"[110]), providing a complete legal framework for securities markets, investment intermediaries and trading venues. Since many of the provisions contained in this legal tool overtake the purpose of this chapter, a simple recall may suffice.

Firstly, this Directive modified and reshaped the definition of *investment firms* and *investment services*, by reorganizing and extending the provisions disposed by MiFID I. As it will be seen while analysing the different types of financial markets, a new specific investment service was added to the list: the operation of an "*Organized Trading Facility*" (OTF).

This is a new execution venue created to limit "*dark pool*" operators (*i.e.*, privately organized financial forum or exchange for trading securities) and other alike platforms. It was conceived to trade *non-equity* (mainly debt) instruments (*e.g.*, bonds, derivatives, structured products). Therefore, nowadays this kind of operators and transactions are subjected to pre-trade and post-trade transparency requirements, thus creating a "level-paying field"[111]. A duty to act in the client's best interest was

[107] For a comprehensive review of the novelties introduced by this legal framework, see ANNUNZIATA, F. (2018) *Il recepimento di MiFID II: uno sguardo di insieme, tra continuità e discontinuità*, p. 1100-1133.
[108] Directive 2014/65/EU of May 2014, recitals (3) and (4).
[109] See European Commission, 20 October 2011, COM(2011) 656 final, *Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council* (Recast) (MiFID II), p. 1.
[110] 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 ("MiFIR").
[111] Wide doctrine on the theme: see, among others, ANNUNZIATA, F. (2018); MOLONEY, N. (2014); CLAUSEN, N. J., SØRENSEN, K. E. (2012) *Reforming the Regulation of Trading Venues in the EU under the Proposed MiFID II – Levelling the Playing Field and Overcoming Market Fragmentation?*, p. 275-306.

introduced[112] and the relevant provisions concerning the so-called "*personal advice*" enacted[113].

In addition to these innovations, in order to enhance investors' participation and protection (a significant part is disposed in favour of retail investors[114]), stricter corporate governance requirements, strengthened supervision and harsher sanctions have been introduced. For example, trade reports need to be published through Approved Publication Arrangement (APA) firms, which will also be subject to authorisation and certain organisational requirements.

However, the most interesting and relevant concept for the purposes of this work is related to the *admission to trading on regulated markets* and the innovations introduced by this Directive on this topic.

2.3. Admission to Trading on Regulated Markets

The Directive MiFID II disposes a series of provisions concerning three different types of trading venues, enriching the European scenario of financial markets. Nowadays, other than the traditional official stock exchanges, European legislation encompasses also: Regulated Markets ("RMs"), Multilateral Trading Facilities ("MTFs") and Organized Trading Facilities ("OTFs"). The most relevant part of this Directive provides norms concerning the process through which these trading venues may be established. It lays down the formal requirements and the characteristics that any Member State should evaluate while deciding on the authorisation to carry out this particularly critical activity. By doing this, European Union has harmonized the provisions in this field, granting a minimum level of control over these spreading phenomena. Whenever an undertaking is willing to exercise an activity as a market operator must compulsorily comply with all the requirements laid down in the directive. Depending on the type of trading venue it is going to be set up, such requirements may be stronger or flooder.

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[112] See ENRIQUES, L., GARGANTINI, M. (2017) *The Overarching Duty to Act in the Best Interest of the Client in MiFID II* in BUSCH, D., FERRARINI, G. (eds.) *Regulation of the EU Financial Markets: MiFID II and MiFIR*, chapter 4.

[113] Directive 2014/65/EU of 14 May 2014, recitals (71) and (72).

[114] Recital (86) establishes how to reach better investors' protection is necessary to create a distinction between three different categories: retail, professional and counterparties investors. However, the principles to "*act honestly, fairly and professionally and the obligation to be fair, clear and not misleading apply to the relationship with any clients*".

However, for the purposes of this dissertation, it is relevant to underline the conditions that the Directive establishes related to the ***admission of financial instruments to trading*** **on regulated markets**. As it will be underlined in the third chapter, regulated market may be defined as:

> "*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*"[115].

Regulated markets are "subject to the most onerous standards with respect to the issuer admission"[116], especially if compared with other different types of trading systems. This legal tool is focused also on the step further, establishing precise rules concerning the activity of a trading venues once it has been authorized.

As regards Regulated Markets (RMs), the most important provision is **article 51**. According to this provision, Member States must have a *clear* and *transparent* set of rules regarding the admission of financial instruments to trading. More precisely, financial instruments must be capable of being traded in a *fair, orderly* and *efficient manner*. This provision is manifestly inspired to the cornerstones of the European capital market law. It ensures that each regulated market operator disposes of regulations able to grant transparency on two sides. On the first one, an issuer seeking for admission to trading of its financial instruments may have a whole picture of the prerequisites. On the other, once the financial instruments are admitted, there is an assurance that its trading will be conducted efficiently and orderly, excluding any unfair and arbitrary disposal of the instruments. Moreover, it establishes that, in case of *transferable securities*, these must be *freely negotiable*[117]. The definition of whether this requirement may be satisfied is disposed by article 1 of the Delegated Regulation. In particular, a security may be deemed to be freely negotiable when it can be traded

[115] Directive 65/2014/EU on *market in financial instruments*, article 4 n. (21)

[116] MOLONEY, N. (2014), p. 171.

[117] Directive 2014/65/EU, article 51(1). These requirements seem to be similar to those analysed with reference to the admission to listing Directive. See further in this chapter on the debate concerning the parallelism between these two concepts.

between the parties to a transaction and subsequently transferred without restrictions. All the shares of the same class must be fungible, and no restrictions should be applied. The second paragraph is focused on *derivatives*. A derivative may be shortly defined as a type of financial instrument (or contract) whose price and value depends on an underlying asset or group of assets. Rules concerning these types of securities should grant not only an orderly pricing but also the existence of settlement conditions that must grant effectiveness[118].

Paragraph 3 reiterates the importance of the information flows and disclosure obligations, on the back of Prospectus and Transparency rules. In particular, it brings Member State to verify that regulated markets have installed (and continue to maintain) arrangements to investigate if issuer's obligations to comply with Union Law's in relation to "initial, ongoing or ad hoc disclosure and facilitation for members and participants in obtaining access to information" are effectively respected[119].

Connected with this theme, the fourth paragraph instructs regulated market to establish and maintain systems through which they may review and check the compliance of the issuers with the admission requirements, so that, in case of subsequent violation they may intervene[120].

As regards article 51(5), it will be deeply interpretated in the following paragraphs of this chapter. It establishes the chance for securities already admitted to trading in a regulated market to be admitted to trading in a *different* regulated market, even without the consent of the issuer. Therefore, as it will be seen, this type of admission to trading, generally defined as "*unilateral admission to trading*", does not require any particular information or disclosure obligation for the issuer.

The last paragraph, according to the Lamfalussy Report structure, delegates ESMA to develop a draft regulatory technical standard to be submitted to the European Commission. This document shall: specify the characteristics of different classes of financial instruments to be taken into account by the regulated market when assessing whether a financial instrument is issued in a manner consistent with the conditions; clarify the arrangements that the regulated market is required to implement so as to be considered to have fulfilled its obligations recalled above and clarify the arrangements

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[118] Directive 2014/65/EU, article 51(2).
[119] Directive 2014/65/EU, article 51(3).
[120] Directive 2014/65/EU, article 51(4).

that the regulated market has to establish in order to facilitate its members or participants in obtaining access to information[121]. These specifications brought to the adoption of the Delegated Regulation (EU) 2017/568 of 24 May 2016[122]. This delegated instrument elucidates and clarifies many important concepts, by not only giving the definition of *freely negotiable* securities but also by specifying whether trading may be considered *fair, orderly,* and *efficient* or not. In particular, as disposed by article 2, the regulator should look to information required to prepare the Prospectus (in relation with Prospectus Regulation) but also any otherwise publicly available information concerning: issuers in general, its historical financial data and its business overview[123]. By contrast, to assess whether a share is capable to be traded is such way, the operator should look at the distribution of the shares to the public. Moreover, there is an interesting link with the Listing Directive. Article 3 set out a principle, according to which, whenever a transferable security is admitted to official listing in accordance with the provisions of the relevant Directive, then it shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner[124].
From this set of rules is clear how market regulators and trading venues, through their admission to trading process, could grant a minimum level of protection for investors. Therefore, the key perimeter to control this highly technical system is based on issuer-disclosure regime. In particular, issuers are able to signal the quality of their instrument by passing the "*quality filter*" test disposed by the trading venue itself. Moreover, ongoing requirements, mandatory disclosure and corporate governance obligations should ensure, especially for large public trading venues to which investors are mostly exposed, a secure and well organized capital raising and resources allocation process.

2.4. Suspension and Removal of financial instruments from trading

To properly conclude the discussion on the admission to trading in the MiFID II Directive is necessary to take into account the trading venue's chamces, other than

[121] Directive 2014/65/EU, article 51(6).
[122] Commission Delegated Regulation (EU) 2017/568 of 24 May 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to *regulatory technical standards for the admission of financial instruments to trading on regulated markets*.
[123] Commission Delegated Regulation (EU) 2017/568, article 2.
[124] Commission Delegated Regulation (EU) 2017/568, article 3.

those of which the national competent authority disposes[125], once the instruments are admitted, to suspend or remove such admission.

The procedures governing this removal and/or suspension under the renewed MiFID Directive have been dotted and refined[126]. The aim was to enhance cooperation and communication between different NCAs, ensuring a sort of pan-European surveillance of trading of different regulated markets. In this way, it should be granted to investors all over Europe a quasi-universal coverage from any possible distortion of the fair and orderly trading on the market.

In particular, article 52(1) establishes whether the regulated market has the chance to do so. The check must be conducted in light of the evergreen principles of the *investors' protection* and *orderly functioning of the market*[127]. Whenever this instances at stake are preserved, then the regulator may decide to dispose the suspension or removal if the relevant financial instrument no longer complies with the rules of the regulated market.

In addition, according to article 52(2), Member States shall verify that, if it is necessary to support the objectives of the suspension or removal of the underlying financial instrument, also the derivatives connected with those instruments are subjected to the same suspension or removal. Moreover, the operator shall make public its measures and communicate any relevant decisions to the relevant competent authority[128]. In this way, the NCA in whose jurisdiction the suspension or removal originated, may require that other regulated markets, MTFs, OTFs and systematic internalisers, in which the same instrument or derivative is traded, take the same measure[129]. The interested authority should also make the measure public and communicate it to ESMA and other different Member States' NCAs.

2.5. Admission to Listing and Admission to Trading

The heart of this dissertation is based on the distinction, from both a terminological and legal discipline perspective, between ***admission to official listing***

[125] See article 69(2).
[126] MOLONEY, N. (2014), p. 178-179.
[127] Directive 2014/65/EU, article 52(1).
[128] Directive 2014/65/EU, article 52(2).
[129] This shall happen when the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing article 7 and 17 Regulation (EU) 596/2014.

and ***admission to trading***. This dichotomy will be deeply scrutinized to understand whether it can be still considered as a relevant and stimulant contraposition and to what extent admission to official listing (related in particular to traditional official stock exchange) may be seen as outdated and obsolete.
The requirements laid down by the European legislation for *admission to official listing*, originally incorporated in the Admission Directive of 1979 and later reproposed in the consolidated Listing Directive, remain valid, except for the measures repealed and modified by Prospectus and Transparency legal frameworks.
Therefore, the minimum standards (with the chance that each NCA may adapt them) enforced by that Directive are "persistent and live in parallel"[130] with the regime dictated by MiFID II.

As an authoritative scholar argued in one of his works focused on this matter[131], the difference between these two concepts has different interesting outcomes both on interpretative and legislative policy point of view. In particular, he proposed to distinguish *official listing* and *trading* on three different levels, each one bringing with it a different significance.
Firstly it may be investigated as a reflex of the distinction between traditional official stock exchange (*borse valori*) and *other* regulated markets. This perspective has been radically overturned by the discipline of both MiFID I and II, which have strongly affirmed the concept of regulated market at the expenses of traditional stock exchanges. Today more than ever, the concept of *stock exchange* itself should be examined and may be regarded to some extent as overtaken and anachronistic.
In addition, this distinction may be appreciated as two different "stages/steps" of the same admission process. As in the United Kingdom[132], the admission to official listing could be interpreted as the process (the "first step") in which the scrutiny is carried out by public authorities. By contrast, the "second step" related to the admission to trading is conducted directly by the market regulator (in the UK, the *London Stock Exchange* or *LSE*).

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[130] MOLONEY, N. (2014), p. 179.
[131] FERRARINI, G. (2002), p.583-605.
[132] See the *Financial Services and Markets Act*, 2000.

In conclusion, the third and arguably most interesting point of view of this distinction is based on the theme of the so-called *unilateral* admission to trading. This is the situation, conceived by MiFID I (article 49) and confirmed by MiFID II (article 51(5)), where instruments already admitted to trading on a regulated market may be admitted to trading (so-called "*dual trading*"[133]) on a different regulated market, without the consent (and even against the will) of the issuer, directly by the trading venue itself. Therefore, it can be derived that admission to listing, must be always accompanied by a request of the issuer as it entails a series of consequences on different levels for the issuer; while the admission to trading may be disposed unilaterally, even without such choice.

This structure is rather interesting and offers a wide range of points for reflection and discussion. It will be thus followed with the purpose to investigate how this distinction is reflected nowadays in the European capital markets.

2.6. Traditional Official Stock Exchanges and *other* Regulated Markets

The first theme connected with the dichotomy between admission to official listing and admission to trading is represented by the mirrored distinction between ***official stock exchanges*** and ***other regulated markets***. According to this distinction, the concept of admission to official listing must be linked with the admission on stock exchanges (*bourses*), while the admission to trading would regard regulated markets different from these ones.

This that we can define as a mere terminological difference is depicted and resumed by the scenario of legal frameworks on the subject of capital markets. In particular, at the European level, the term "*stock exchanges*", as it will be noted, is used only by the Listing Directive. By contrast, all the other directives and regulations use the more general and comprehensive term of "*regulated market*". The persistence of the concept of official listing is strictly related with an historically deep-rooted conception and assumption that securities that are "officially listed" may forge themselves of a higher overall quality if compared with securities only admitted to trading[134].

By looking at the scope of application of the Listing Directive as opposed to MiFID II and other legal tools on the subject and by comparing them on a national perspective,

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[133] As opposed to *dual/cross listing*, see chapter 1 paragraph 9.
[134] MOLONEY, N. (2014), p.179.

it will be underlined whether the admission to listing is to be considered as outdated or, at least, if a clarification on the terms should be given by the European institutions.

2.6.1. Legislative considerations

The distinction between admission to listing as connected with bourses and admission to trading as connected with other regulated markets may be derived from the setting that European legislation has depicted, at least in the past. In particular, it is sufficient to recall two provisions which precisely frame the issue: article 1 letter (a) and article 2(1) of the Directive 2001/34/EC.

The first measure, while aiming to the define what is an "*issuer"* for the purposes of the directive, it establishes that it shall mean "companies and other legal persons and any undertaking whose securities are the subject of an application for admission to official listing *on a stock exchange*"[135]. In addition, the second one, in order to define the scope of application of the directive itself, states that relevant articles "shall apply to securities which are admitted to official listing or are the subject of an application for admission to official listing on a *stock exchange situated or operating within a Member State*"[136].

It should be noted that, on the other side, the directive is only abstractly referring to the term "official stock exchange", but it lacks a precise and specific definition. However, for this purpose, article 43(3) may be helpful. While establishing the conditions from admission of shares to official listing[137], it gives the chance to Member States to set an higher market capitalisation (or capital and reserves) only if "*another regulated, regularly operating, recognised open market* exists in that State and the requirements for it are equal to or less than those referred to in paragraph 1 (*i.e.*, one million euro)"[138]. From this wording it can be presumed that, even without a specific definition, "*official stock exchange*" should be considered as a particular type of regulated market, from which *other* regulated markets (therefore not subjected to the provisions contained in the Directive 2001/34) should be divided and differentiated.

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[135] Directive 2001/34/EC, article 1 letter (a).
[136] Directive 2001/34/EC, article 2(1).
[137] See chapter 1 paragraph 6.1.2.
[138] Directive 2001/34/EC, article 43(3).

This theory, in the past, was also confirmed by the former Directive 93/22/CEE on *investment services* (now repealed and substituted by the MiFID implant) and its article 1. In particular, at number 13, while defining the concept of *regulated market*, it establishes that national competent authorities should define whether Directive 79/279/EEC (on the admission to official listing) was applicable or not. If not, NCAs should have disposed the conditions that must be satisfied by a financial instrument before it can effectively be traded in on the market itself[139].

By contrast, subsequent directives (including Prospectus, Transparency and MiFID) only referred to "*regulated markets*" concept, *de facto* restricting and limiting the use of term "*official stock exchange*" to the sole Listing Directive. The choice is easily referrable to the need of the European institutions to take into account that the phenomenon of the capital markets should be regulated in the broadest way, ascribing not only stock exchanges (in terms of cash trading of stocks and bonds) but also derivatives and "cash" markets (in terms of a wide range of financial instruments, including futures and options)[140]. Therefore, this distinction, at least from this point of view, may be defined as overtaken. With reference to the current European legislation, the term "*regulated market*" is able to be comprehensively inclusive of all the facets that financial markets offer in Europe. Moreover, legislation and market customs seem to be mostly aligned in accepting this transformation of legal concepts that has brought an expansion of the exchange business. As it will be underlined in the third chapter, the concept of stock exchange as traditionally interpreted, can be said to be disappeared. It keeps a rather limited relevance on a mere terminological point of view, as the concept of "*stock exchange*" or "*exchange*" may be still referenced to the *primary* market as opposed to secondary segments of the broader European financial

[139] Directive 93/22/CE, article 1(13): "*…regulated market shall mean a market for the instruments listed in Section B of the Annex which: appears on the list provided for in Article 16 drawn up by the Member State which is the home Member State as defined in Article 1 (6) (c); functions regularly,is characterized by the fact that regulations issued or approved by the competent authorities define the conditions for the operation of the market, the conditions for access to the market and, where Directive 79/279/EEC is applicable, the conditions governing admission to listing imposed in that Directive and, where that Directive is not applicable, the conditions that must be satisfied by a financial instrument before it can effectively be dealt in on the market; requires compliance with all the reporting and transparency requirements laid down pursuant to Articles 20 and 21;…*".

[140] AVGOULEAS, E., FERRARINI, G. (2018) *A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA: Costs, Benefits, And Legal Impediments* in BUSCH, D., et al. (eds.) *Capital Markets Union in Europe*, p. 63.

markets. By contrast, the heritage of this term, in terms of legislation and regulations, has been assumed by the wider concept of "*regulated market*".

2.6.2. Italian Perspective

To properly conclude the dissertation on the first distinction, it may be useful to inspect and examine if such a dichotomy has a parallel and a comparison mirrored in the national legislation. In particular, it could be interesting to understand whether, in Italy, a proper distinction between "regulated market" (*mercato regolamentato*) and "official stock exchange" (*borsa valori*) exists and has an effective weight on primary and secondary legislation or not.

As regards primary legislation, it must be taken into account the Consolidated Law on Finance (*Testo unico delle disposizioni in materia di intermediazione finanziaria*, breviter *testo unico della finanza*, hereinafter *t.u.f.*) approved with *decreto legislativo* of 24 February 1998 n. 58[141]. This legal tool represents the cornerstone of financial law and capital markets regulation.

The definitions incapsulated in the article 1 of the Law Decree may represent a good starting point. From those it can be derived how the distinction that seems to have been recognized by the communitarian legislation, at least in its primary stages, is not reproduced in the Italian one. In particular article 1 letter (w) states that listed issuers are: "…the subjects, Italian or foreign, including trusts, which issue financial instruments listed on a *regulated Italian market…*"[142] (*mercato regolamentato italiano*). From the reported wording it can be derived that Italian legislation do not (and did not even before MiFID implementation) recognized the contraposition between traditional stock exchanges and other regulated markets, but provides for an all-encompassing concept of *regulated market*, referring to both types[143]. Therefore, the so-called *borsa valori*, which may be considered as a proper translation of official stock exchange, does not have any definition or recognition on the primary legislation level.

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[141] Decreto legislativo 24 febbraio 1998, n. 58, Testo Unico delle disposizioni in materia di intermediazione finanziaria ("*Consolidated Law on Finance*").

[142] Commissione Nazionale per le Società e la Borsa (CONSOB) official website. Available from: https://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/fr_decree58_1998.htm.

[143] See FERRARINI, G. (2002), p. 585.

However, in order to depict properly and completely the regulatory scenario on this topic, it should be noted that secondary legislation goes in a partially different direction. Two crucial legal frameworks should be taken into account.

The first one is the comprehensive regulation for regulated markets approved by CONSOB (hereinafter *Regolamento Emittenti*)[144], the national public authority of securities and exchanges, in accordance with the relevant European provisions. In particular, its article 2 letter (a-*bis*)[145], while defining each of the terms included in the regulation itself makes a reference to the concept of bourse (*borsa*). In particular it establishes that bourses are regulated markets (or their segments) in which the admission to official listing is pursuant to conditions laid down in the Directive 2001/34.

The second relevant legal instrument is represented by the Regulation approved by the market regulator, Borsa Italiana S.p.A. (hereinafter *Regolamento di Borsa* (o *del Mercato*)[146]), whose definitions are related to both *admission to official listing* (pursuant to Directive 2001/34/CE provisions), *admission to listing* (which refers to the decision aimed at ensuring that all the relevant conditions laid down in that legal framework are respected) and *admission to trading* (pursuant to MiFID II and the request of the issuer or on the initiative of Bosa Italiana itself[147]). Another important distinction is the one made between "*Borsa*" with capitalized letters, meaning the market regulator (Borsa Italiana S.p.A.)[148] and "*borsa*" without the capitalized letter, meaning the place on which the official listing of instruments is made pursuant to Listing Directive[149].

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[144] Consob Regulation n. 11971 of 14 May 1999 implementing legislative decree of 24 February 1998, n. 58 on issuers' discipline (as updated by modifications done with draft resolution n. 22144 of 22 December 2021).

[145] "*… i mercati regolamentati, ovvero i relativi comparti o segmenti, nei quali l'ammissione a quotazione risponde alle condizioni fissate dalla direttiva 2001/34/CE*".

[146] "*Regolamento dei Mercati organizzati e gestiti da Borsa Italiana S.p.A.*" in force since 25 October 2021. Available from: https://www.borsaitaliana.it/borsaitaliana/regolamenti/regolamenti/regolamentoborsa-istruzionialregolamento.htm.

[147] This provision will be recalled in the next paragraphs as a outstanding example of the distinction between admission to listing, as presupposing a request by the issuer, and admission to trading as possibly disposed by the market regulator/manager also without such request.

[148] "*…Indica la società di gestione "Borsa Italiana S.p.A"*".

[149] "*…indica una borsa valori nella quale ha luogo la quotazione ufficiale di strumenti finanziari ai sensi della Direttiva 2001/34/CE o, nel caso di paesi non appartenenti all'Unione Europea, un mercato regolamentato e sorvegliato da autorità riconosciute dai poteri pubblici, funzionante in modo regolare,*

From this scenario it can be assumed that in the regulatory framework of Italian capital markets the notion of “official stock exchange” or “bourse” can be considered as disappeared. The last trace can be found only on secondary level legislation and market regulator’s rules.

In conclusion, it has been noted how the MiFID reform has lost a chance to make order on this legislative topic, by defining explicitly the difference in object. The doctrine has underlined that, even if the issue at stake has been brought in light by the European institutions, the problem was not properly addressed and solved. For example, it has been underlined that the relationship between MiFID I’s admission-to-trading rules and the official listing regime formed part of CESR’s MiFID Level 3 Work Programme[150], while ESME was commissioned to examine the official listing concept[151], but neither of those report brought to a final resolution on the matter[152]. In addition, de Luca underlined how neither of the directives aforementioned gives the definition of *official listing*[153]. It can be only derived *a contrario* by recital 23[154] of the Listing Directive, which counterposes *official listing* to *non-regulated* markets, *i.e.* on which the trading activities are carried out *over-the-counter* without any specific control of any public authority. Nevertheless, the same provision seems to implicitly mean that, regulations on prospectus and disclosure, must be applied also to *second tier* markets, if regulated[155]. The author goes on arguing that MiFID I has lost the occasion to specify the distinction between *official listing* and listing on regulated market. The only reference made by the European law-maker may be traced back in the recital 57[156], in which there is a general encouragement towards national legislators

direttamente o indirettamente accessibile al pubblico e definito con un termine equivalente a “borsa” dalla legislazione locale”.

[150] CESR’s MiFID Level 3 Work Programme (CESR/07–704c, 8).

[151] ESME, Report on MiFID and the Admission of Securities to Official Stock Exchange Listing (2007).

[152] MOLONEY, N. (2014), p. 182.

[153] DE LUCA, N. (2009), p.32-33.

[154] “*…Furthermore, many stock exchanges have second-tier markets in order to deal in shares of companies not admitted to official listing; in some cases the second-tier markets are regulated and supervised by authorities recognised by public bodies that impose on companies disclosure requirements equivalent in substance to those imposed on officially listed companies; therefore, the principle underlying Article 23 of this Directive could also be applied when such companies seek to have their securities admitted to official listing.*”.

[155] DE LUCA, N. (2009), p. 32-33.

[156] “*…The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities(14).*

not to prejudice, in the harmonization of the MiFID I Directive, the application of the Listing Directive[157].

2.7. The two "steps" theory

Secondly, the distinction at issue may be seen also as if admission to listing and admission to trading refer to two different stages (or steps) of the *same* admission process[158]. The first stage is represented by the admission to listing disposed by a public authority. Once the company may be considered as listed, then, in order to obtain the admission to trading, it will be the market operator itself (a private entity) to carry out the relevant process.

Therefore, two different evaluations are executed. The first one has the scope to verify that the minimum requirements laid down in the listing rules, pursuant to the provisions of the Listing Directive, are respected. The second one is in the hands of the market regulator, which may decide to apply even more stringent and demanding conditions, so that its market could be recognized as particularly keen on investors' protection. By raising the bar of its admission standards, the market may signal and put attention on the fact that the instruments traded on it dispose of a higher and better quality.

This is the case of United Kingdom which, after the demutualization of the London Stock Exchange (LSE), has decided to adopt this approach. For the purposes of this work, it may suffice to briefly recall how such a system works, in order to verify if it can be actable on a communitarian level.

2.7.1. The United Kingdom approach

2.7.1.1. LSE demutualization and the "*Financial and Markets Act 2000*"

In the late 90s, financial innovations, regulatory reforms and changes in investment strategies have increased competition between different stock exchanges. Therefore, many of them decided to demutualize and opted to go public[159].

A regulated market should not be prevented from applying more demanding requirements in respect of the issuers of securities or instruments which it is considering for admission to trading than are imposed pursuant to this Directive.".

[157] DE LUCA, N. (2009), p.32-33.

[158] FERRARINI, G. (2002), p. 589-595.

[159] In 2000 an informal survey conducted by the World Federation of Stock Exchanges (the FIBV) showed that 100% of is member were either: demutualized (45%), in the process of demutualizing (16%) or had formulated proposals being considered by the membership to do so (39%).

Demutualization is the word used to "describe the transition of a securities exchange from a *mutual association* of exchange members operating on a *non-for-profit* basis to a limited liability, *for-profit* company accountable to shareholders"[160]. Essentially it "separates ownership from the right to access to trading"[161].

London Stock Exchange (LSE) was one of the first[162] to take this step, formally demutualising and being fully listed. The decision was announced in July 1999, when the LSE decided to become a publicly limited company to operate on a fully commercial basis and respond to investors and issuers' needs[163]. The approval by shareholders arrived in March 2000, when the LSE became the "*London Stock Exchange plc*" and the company went public one year later[164].

Following this demutualization, United Kingdom authorities felt necessary to enact a crucial regulatory reform. Until 2001, London Stock Exchange was invested with two functions, according to a deep-rooted tradition of *self regulation*[165]. Its functioning was conceived not only to regulate trading on its markets, but also to regulate *listing* on the primary marker though the UK Listing Authority (UKLA). The latter function as market regulator for primary listings was considered to be incompatible with the status public limited company, as conflict of interests may have arisen. For example, a bland policy concerning the requirement to be admitted to listing could have been adopted in order to increase the number of issuers and by consequences profits deriving from the so-called *listing fees*.

Therefore, the British government and UK Economics and Finance Ministry (HM Treasury) enacted a rather revolutionary reform, enforcing the "*Financial and Market Services Act*" in 2000. In particular, *Part VI* (entitled "*Official Listing*") of this legal tool specified how the LSE would have maintained only its authority on the *admission to trading*, while the *admission to listing* would have been disposed by a public

[160] ELLIOTT, J. (2002). *Demutualization of Securities Exchanges: A Regulatory Perspective*, p.1.
[161] *Ibid*., p. 4.
[162] The first was Stockholm Stock Exchange in 1993, followed by Helsinki (1995), Copenhagen (1996) and Amsterdam (1997). For further details on the dates on which the various European stock exchanges has gone demutualized and eventually listed, see the chart proposed by DI NOIA, C. (2002), p. 52.
[163] ANGULO, L. P. et al. (2014) *The London Stock Exchange: Strategic corporate governance restructuring after demutualization*, p. 216.
[164] Its market capitalisation was assessed at 2164 USD billion with a rapid and outstanding increase of the institutional investors' presence from 15/20% at the earlier stages to 25% in 2002 until more than 66% in 2012.
[165] FERRARINI, G. (2002), p.591.

authority acting as UKLA, *i.e.*, the Financial Conduct Authority (FCA, and the former Financial Services Authority or FSA).

The reasons behind this decision have been underlined in the Consultation Paper No. 37 by the FSA, entitled "*The transfer of the UK Listing Authority to the FSA*"[166]. A rather interesting part of this paper is particularly relevant to understand how, even before the implementation of this Act, the distinction between admission to listing and admission to trading in the United Kingdom was to be intended *inherent in the law* and as two stages of the same process (carried out, from 2001 on, by two different authorities).

In particular, it states that:

> "*…the transfer of the UKLA to the FSA highlights an* ***underlying distinction between admission to listing and admission to trading****. The former refers to the process of being listed in accordance with the relevant European Community directives and UK legislation. This ensures that minimum standards are in place for investor protection and to allow mutual recognition of listing particulars within the EU...This is the responsibility that the FSA will take on with the transfer of the UKLA from the LSE. The LSE will retain separate responsibilities for admission to trading...The distinction between admission to trading and admission to listing has been* ***inherent in the law***"

This means that this distinction was already present in the law and that the new Act have simply moved the authority from the LSE to the public one[167].

2.7.1.2. Admission Process in the UK

This system is the one still adopted nowadays in the United Kingdom. In order to join the Main Market for *Premium and Standard Listing* the issuer must follow a scheme which involves two processes[168]. On the first side, responsibility for the approval of prospectuses and admission of companies to the Official List lies with the

[166] Financial Services Authority, *The Transfer of the UK Listing Authority to the FSA (Consultation Paper No.37)*. December 1999.
[167] FERRARINI, G. (2002), p. 590.
[168] For further details, see London Stock Exchange Group official website, available from: https://www.lseg.com/areas-expertise/our-markets/london-stock-exchange/equities-markets/raising-equity-finance/main-market/listing-process.

UK Listing Authority, a division of the Financial Conduct Authority (FCA)[169]. Therefore, the UKLA is responsible for drawing up and monitoring the FCA's Listing, Disclosure and Transparency, and Prospectus Rules for Main Market companies. The source of its powers is stated in the Part VI of the *Financial and Market Services Act* of 2000, in which, from article 72 to article 103 have been disposed the most relevant matter on the subject. The admission to listing process involves various phases, including a pre-float preparation: development of business plan, report on corporate governance, ownership and tax issues and investor relations strategy.

On the other side, London Stock Exchange is responsible for the admission to trading of companies to the Main Market. It has a duty to ensure that dealings in securities admitted to its markets are conducted in a proper and orderly manner. Therefore, companies must meet the requirements set out in the "Admission and Disclosure standards"[170]. An interesting system proposed by the LSE is the *Admission to Trading Only* (ATT Only)[171], which allows access only to trading only for some issuers who aspire to undertake a full listing in London but at the moment are unable to pursue it (*e.g.* for regulatory reasons). If compared with full listing, the status of issuer admitted to ATT Only is different and rather limited. For example, those issuers are not able to raise capital via public offer within the EEA and will have access to a restricted pool of investors, having the chance to be traded only in a special and designated segment. They must also comply with a set of requirements laid down by the LSE itself to ensure investors' protection and market efficiency.

From this implant, even if only briefly recalled, it is pretty clear how admission to official listing (in particular *premium listing*[172]) in the UK has still its relevance. The

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[169] It was launched on 1st April 2013 and replaced the previous regulator, the Financial Services Authority (FSA) in order to overtake deficiencies that this authority have shown after the financial collapse. The main difference lays in the fact that a conduct authority's primary function is to make sure that businesses are acting in the correct manner, rather than maintaining all sorts of financial services. This means that FCA is able to be more *costumer focused* and that it disposes of renewed powers (e.g., ban products if they feel there is sufficient reason to do so).

[170] See London Stock Exchange official website, listing standards, Section 2. Available from: https://docs.londonstockexchange.com/sites/default/files/documents/admission_disclosure_standards_01012021_website.pdf.

[171] *Ibid.*, Section 2.12. See also: https://www.lseg.com/sites/default/files/content/documents/att_only_factsheet.pdf#:~:text=Under%20this%20facility%2C%20known%20as,basis%20of%20a%20listing%20elsewhere.&text=Some%20issuers%20may%20chose%20to,precursor%20to%20their%20full%20listing.

[172] The main differences between the admission to standard and premium listing are related to the higher stringency of the latter: in particular higher standards are required concerning the business support of

renewed FCA has tried to maintain a continuing emphasis on quality by granting an adequate but not excessively high (in order to avoid the creation of an excessively onerous regime which may be detrimental for investors and issuers) decree of stringency. By doing this, the English legislator was able to grant to the admission to listing a proper *quid pluris* as opposed to the admission to trading, which is significantly different from the flattening of the European provisions on the theme.

The United Kingdom double-step system has some rather interesting outcomes, that many authoritative authors have investigated. In particular, in the past years proposals to extent the English process of admission on the European level flourished. The idea, never implemented, was to create a proper "*European Listing*", resembling the British implant. On the back of these developments, experiences generally known as "Pan-European markets" started to blossom. This particular type of cross-border entities, nowadays, are generally organized as Financial Market Infrastructure (FMI) groups.

2.7.2. "*European Listing*" and Pan-European Markets

The success of the British model and the orderly way in which admission to listing and admission to trading have been disposed has brought European institutions to interrogate themselves whether it could be the right system to adopt for European capital markets. The need to introduce a clear and faultless distinction between the concepts of admission to listing and admission to trading has been underlined in particular by the Committee of wise men's Report[173] within the priorities to be adopted.

The adoption of this model would have brought to a situation in which an issuer could have the chance to choose the country in which he would have been listed (and to whose rules and authorities he would have been subjected) and then, to decide to trade its instruments in a different country by submitting a request to the relevant market operator/regulator or trading venue of that country. For example, the company "A" may decide to be listed in Italy, its incorporation country. In order to do so the company

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3-year historical financial information, independence and the sponsor. For further details see also the comparison section of the LSE official website: https://www.londonstockexchange.com/raise-finance/equity/compare-markets-listing-equity.

[173] Lamfalussy Final Report on *the regulation of European Securities Markets*. Bruxelles, 15 February 2001, p. 13.

must file the request in front of the Italian competent authority (according to the British model, a public authority). After having eventually obtained the admission to official listing in Italy, the company obtains the status of *listed* company there, with the consequence of application of the relevant discipline and regulations. Afterwards, the company may also decide to trade its instruments in other different countries, Spain or Belgium for example. In order to do so, in accordance with the *European Listing* project, it would have been sufficient to file the request to be admitted to trading in those country in front of the private market operator of the chosen market, without the need to be subjected to listing requirements also there. At the same time, even if its securities are traded only in the foreign markets, the company would remain at the mercy of the country of incorporation (Italy in this example).

The project was never implemented neither by MiFID nor later by other legal instruments. Nevertheless, in the later stages of the last century, the technology developments brought to the flourishing of proposals concerning the creation of the so-called *Pan-European* markets based on the scheme analysed above. As part of the doctrine noted, the greatest boost was given by the introduction of the European common currency, the euro, whose absence represented the most insurmountable hurdle for the complete harmonization of the European financial markets in the years before[174].

The first attempts were made in 1998 by the LSE and the Deutsche Börse to form an alliance with the aim to achieve the creation of a common European *blue chips* market. Even other six major exchanges were ready to join but the venture failed shortly after. Other than this brief experience, it is worth mentioning other two main Pan European projects which have traced the distinction between the place of admission to listing and the place of admission to trading.

The first one is represented by the merger between the aforementioned bourses that brought to the creation of "*iX-international exchanges plc*". In May 2000, this newly launched market was announced with the headquarters in London and two main subsidiaries both in England and Germany. The idea was to create a system according to which the requesting issuer may obtain the admission to listing in its home country

[174] FERRARINI, G. et al. (2002) *Capital markets in the age of the euro: cross-border transactions, listed companies, and regulation*, p.241-288.

while the admission to trading could have been disposed in a different one without the application of the disclosure and information flow requirements. However, the merger did not go through because of a takeover bid launched by OM Gruppen[175] against LSE as it believes that LSE should have gone forward alone without any compromise.
The same implant was replicated in another arguably more relevant project: "*Virt-x*". This platform originated in July 2001 by the deal between Swiss Stock Exchange (SWX) and Tradepoint[176]. The structure was based on the fact that the issuers came from Switzerland (and usually were blue chips), in which they have been incorporated and in which the admission to listing has been defined. By contrast, the shares issued by the Swiss companies were traded solely on a market which was to be considered totally English. By doing this, the two processes were completely divided and stock, formally Swiss, could have been traded in England without any particular admission process. *Virt-x* changed its name in 2008, becoming "*SWX Europe*"[177]. Not much later than the next year, the trading activities ceased, and it was completely acquired by SIX Swiss Exchange.

This regulatory layout has many advantages for the issuer. In particular, it grants the chance to have its own shares and securities traded in a foreign market while it remains subjected only to the rules and regulations of the incorporation country. This means that the issuer may refer only to its national authorities and that it will be granted with the application of administrative requirements and disclosure regime of its own country, which is straightforwardly easier to apply.
The distinction between the two different types of admission allows a corresponding separation between the regulation of the issuer (in terms of the norms that must be applied to him according to company and financial law in his Member State of incorporation) and the regulation of the markets dictated by the Member State in which the market regulator has established, and the issuer is trading his financial instruments[178].

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[175] The operator of Swedish Stock Exchange.
[176] It was a London-based electronic exchange which traded small share of the LSE listed stock until it was taken over by a network of top-ranking investments banks, whose aim was to create the first pan-European market for the 300/400 highest and largest companies for market capitalization.
[177] Globan Custodian (2008) virt-x Changes Its Name To SWX Europe. *Globan Custodian*.
[178] FERRARINI, G. (2002), p. 594-595.

In conclusion, it must be noted that these Pan-European markets should be distinguished by the FMI groups in which nowadays the major European stock exchanges are concentrated. As it will be seen in the third chapter, that is a slightly different model. In particular, Euronext (and formerly the LSE-Borsa Italiana Group) on the one side brings together in a single-economic entity all the major European stock exchanges (Paris, Amsterdam, Lisbon, Dublin, Oslo and Milan in particular) by the integration of technology systems. On the other, it maintains separate each regulated market from a legal perspective. Therefore, it can be said that technology has boosted integration, but regulated markets are still from a legal point of view.

2.8. "*Unilateral*" Admission to Trading

The third perspective in which the distinction between *admission to listing* and *admission to trading* may be intended is strictly related with the concept of the so-called "*unilateral admission to trading*"[179]. This is the hypothesis in which an issuer is already admitted to trading in one country and a trading venue decides, *unliterally* and without any manifestation of willpower by the issuer itself, to trade its instruments on a different market in a different country.

This situation is fundamentally different from the two analysed in the previous paragraphs. Firstly, because the financial instruments of the issuer in question are already traded and negotiated, before the decision of the trading venue, even if only in one country. In particular, the so-called *pure listing* (*i.e.*, the admission to listing not followed by an effective trading activity) is rather rare. Secondly, the admission to trading is not disposed under a request filled or prepared by the issuer (as an act of its willingness), but unilaterally by the market operator of the second market.

As it will be seen, this chance has been introduced by MiFID I[180] and confirmed by MiFID II[181] and the regulatory consequences on this theme will be evaluated in the next paragraphs with reference also to the Italian jurisdiction.

In these earlier stages of the discussion, it can be immediately assumed a rather interesting outcome. On the one side, admission to listing always requires and presumes a choice by the issuer; while, by contrast, admission to trading may be

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[179] FERRARINI, G. (2002), p. 595-605.
[180] Directive 2004/39/EC, Article 40(5).
[181] Directive 2014/65/EU, Article 51(1).

disposed even if no choice has been expressed by the company whose instruments are traded and, maybe, even if an indication of contrary sign has been expressed.

2.8.1. Article 51(5) MiFID II

On this theme the article 51(5) is the key to understand the issue. The content has been basically reproduced from the former article 40(5). In particular, it states that:

> "*A transferable security that has been admitted to trading on a regulated market can subsequently be admitted to trading* ***on other regulated markets****,* ***even without the consent*** *of the issuer and in compliance with the relevant provisions of Directive 2003/71/EC. The issuer shall be* ***informed*** *by the regulated market of the fact that its securities are traded on that regulated market. The issuer shall* ***not*** *be subject to any obligation to provide information required under paragraph 3 directly to any regulated market which has admitted the issuer's securities to trading without its consent*."

The wording of this provision straightforwardly encompasses the heart of the issue at stake and suggests a good starting point to inspect and scrutinize the European Union institutions' view on the matter.

The communitarian legislator has provided with a regulatory framework something that was already a discussion subject among various exponents of the doctrine[182]. The situation depicted by this article is as follows: a transferable security, which is already admitted to trading in one regulated market, is admitted to trading, by the trading venue and without (even against) the consent of the issuer of such security in another regulated market. In order to do so, at least from what it can be extrapolated by the provision, it is necessary to respect some conditions and requirements laid down in the article itself.

Firstly, the "*second-unilateral*" admission must be prepared and acted in accordance with Prospectus Regulation[183]. The norm specifies that the *relevant provisions* of the former Directive 2003/71/EC must be satisfied and respected. The aim of this requirement is to protect potential investors in the new market, by granting that, even

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[182] See FERRARINI, G. (2002).

[183] 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.

if the request has not been made by the issuer, all the information, characteristics and potential risks concerning the relevant instrument are made available to the public. In this way the European regulator has granted market transparency and enhanced the effectiveness of information flow among the communitarian markets.

By setting this threshold, the lawmaker has clarified the doubts related to the investors protection. It has been acknowledged that, nowadays, thanks to the technology developments, the securities trading has almost completely shifted online and that exchanges are mostly completed through non-physical methods, while the traditional and physical stock exchange have *de facto* disappeared. As a consequence, every person approaching to investment trading has the chance to invest his resources, irrespectively of the amount, basically everywhere. By granting that the trading venue must comply with the common requirements concerning the information disclosure it is assured that the investor is able to form an *informed judgement* on the choice he is going to make. It does not make any particular difference that those instruments are coming from another regulated market, whose rules the issuer will remain bound.

By contrast, the other two conditions laid down by this provision are strictly connected with a need to protect the issuer whose securities, maybe even against its consent, are traded on a different market rather than the one to which he has made the request. At first instance, the market regulator must inform the company to which instruments belong. By doing this, it is assured a minimum degree of information in relation to the place where the securities are traded. The issuer coming to know that its instruments are traded elsewhere may decide to intervene on its business and organization in manner that he retains appropriate and convenient.

On the other side, since it was not a choice of the issuer to have its shares, bonds or securities traded in a different market, the law may not require the company to be subject to *any* obligation provided by the article 51. In particular, the issuer whose instruments are traded without its consent, it is, by all means, exempted from the burden of the initial, ongoing or *ad hoc* disclosure and from the commitments related on the back of Prospectus and Transparency rules, at least on the "new" market. Demanding to comply with those duties and constraints to an issuer that didn't even express his consent to that admission would be disproportionate.

A rather interesting outcome of this implant is represented by the fact that the admission to listing must be accompanied by a choice (and therefore a request) by the issuer, while the admission to trading, once this choice has been made, does not require the consent of the issuer. This is mainly due to the consequences related to the status of company admitted to listing, which brings a series of obligations that the issuer must respect, in terms of corporate governance, information disclosure and general organization of the business. This is also why the Directive explicitly requires that the instrument must be *already* traded in a different market. It is not possible for a market regulator to dispose unliterally the admission to trading of *non-publicly traded* instruments, as it would have the consequence to impose a set of strict rules to a person who has not decided to assume that specific status.

2.8.2. Implications on competition and investors' protection

On this delicate theme, authoritative doctrine has expressed its view by underlying that the possibility conceded to a trading venue to unilaterally admit to trading instruments of an issuers who has not given its consent may have relevant consequences and effects both on the competition between regulated markets and different trading venues and on investors protection.

Firstly Ferrarini argued how this chance could possibly help the formation and the development of the aforementioned Pan European markets[184]. In this way, for example, *Vit-x* may have introduced on its circuit not only blue-chips coming from Switzerland, but also other nationalities' similar instruments. The author made reference to the Belgian legislation that, already in 1999[185], implemented the opportunity to trade on a secondary regulated market of that country (whit a total or partial exempt from the obligation to publish the *prospectus*) instruments already admitted to trading in a foreign but regulated, legally recognized and open market. This system may boost and enhance the internationalization and the growth of European level, by granting a minimum level of compactification between different Member States. However, he was not sure on how these experiments could end. In any

[184] FERRARINI, G. (2002), p. 596.

[185] See article 1 *Arrête Royal* of 6 July 1999 which modified article 10 *Arrête Royal* of 31 October 1991.

case, he argued that the main effects would have been suffered by the competition between different trading venues[186].

Starting from the earlier stages of the European Union and of the capital markets regulation, the aim of the community was to implement a *mutual recognition* of listing and trading particulars that could create an adequate (or at least minimum) level of harmonization between different Member States in terms of admission rules. Here, the focus has gone further. The concept of *unilateral recognition* started to gain relevance[187]. It is basically what the article 51 lays down: the regulators allow the admission to trading on the basis of the fact that they find the foreign regime under which the issuer has fulfilled its duties as sufficiently equivalent to their national regime and thus unilaterally recognize it. By doing this, smaller trading venues could have access to "*superstar*" stocks, without having to negotiate a proper mutual recognition agreement, using this chance a sort of "*weapon*"[188] against bigger market regulator.

Ferrarini goes on by relating to this concept and saying that potentially every national market may have the chance to become international by unilaterally admitting instruments of foreign markets[189]. By contrast, the author argues that many regulatory problems may arise from this situation. However, he also adds that, by explicitly saying that those instruments are only admitted to trading on that specific market and are listed in another foreign market (whose rules are the ones with which they comply), investors are not exposed to any specific or particular risk. In particular, he strongly reiterates the necessity to understand how, in a globalized financial world (and this is valid nowadays more then ever), investors have an easy common access to every regulated market. Therefore, admitting to trading instruments whose issuers are subject only to foreign legislation does not involve any particular risk or "solicitation" to investment for investors of that specific country which may have the chance to purchase the same instruments on the foreign one[190].

[186] FERRARINI, G. (2002), p. 596
[187] LICHT, A. N. (2001) *Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation*, p. 588-589.
[188] *Ibid.*, p. 598.
[189] FERRARINI, G. (2002), p. 597.
[190] *Ibid.*, p. 597.

Given this scenario, as it has been already underlined, the difference between admission to listing and admission to trading may be portrayed as if the former always requires a request by the issuer, while the latter may be disposed even without such request. It is pretty clear that the admission to listing may be sought for a number of various reasons as it brings with it a number of valid advantages[191]. On the other side, assuming the status of *listed company* involves a series of burdens, requirements and costs. It means that the issuer whose intention is to go public must comply with a set of conditions, not only in the moment in which the admission is requested but also for the entire period in which its instruments remain listed and are traded in the relevant market. The company must respect certain thresholds in order to be listed. Moreover, once its admission has been disposed, it must continue to comply with provisions concerning different aspects of a legal person's day-by-day life: *e.g.*, internal organisation, corporate governance, information flows, disclosure requirements and financial reports, depending also on each national legislation.

Therefore, it is necessary that the request comes from the issuer itself. It cannot be bound to a series of obligations coming from a status that it didn't decide to have. This is why many European jurisdictions (*e.g.*, Italy) require that a relevant body of the issuer (usually the shareholders' meeting) has given its authorization to the request to go public.

By contrast, the admission to trading can be disposed unilaterally. Of course, it is necessary to take into account all the relevant instances at stake, especially those of the issuer. In particular, the instruments must be already traded, and the issuer informed of the "new" admission. From the depicted scenario it can be assumed that the choice of the issuer has already been expressed once it has decided to go public[192]. This means that the company has accepted all the consequences that from the *first* admission to trading derive. The issuer has *voluntarily* decided to be subject to the provisions concerning the listed companies in a way that, the simple admission to trading on a different market, would not have any "negative" or heavy outcome on its internal organization regime.

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[191] See chapter 1.

[192] DE LUCA, N. (2009), p. 27.

The distinction, as understood in its last and third significance, is mirrored in the chance that a European issuer may be not only admitted to ***dual*** (or *multiple*) ***listing*** but also to ***dual*** (or *multiple*) ***trading***. The dual listing, as defined in the previous chapter, is disposed whenever the issuer *decides* to be listed not only in the market and under the rules of its incorporation state, but also in another state. On the other side, a company's financial instruments may be defined as dual traded whenever, even without the consent of the issuer, they are exchanged and transferred in negotiations carried out not only in the country in which the issuer has decided to be listed (or *primary traded*) but also in a different country. As a consequence, the issuer will be recognized and ruled only by the regulatory requirements of the state thereof, as they are the only ones which he has decided to depend on. However, it should be noted that when the admission to trading is requested by the issuer and not by the trading venue this distinction is more blurred. Maybe a regulatory intervention by the European legislation could have been adequate.

To properly conclude the discussion on this theme, it may be useful to investigate also whether the distinction as understood above may be deemed to be relevant or not in the Italian legislation.

2.8.3. Italian perspective

For the purposes of this dissertation, it may be useful to recall provisions provided by the Italian legislator on the theme of the distinction between *admission to listing* (as requiring a request of the issuer) and *admission to trading* (as possibly disposed without this distinction). The analysis should firstly focus on primary legislation. In particular, Law Decree n. 58 of 24 February 1998 (the "Consolidated Law on Finance") represents the starting point.

From the structure of this legal tool, it can be concluded that the admission to listing must necessarily imply a request by the issuer and that it could not be otherwise. Firstly, there is no reference to the concept of stock exchange and "*listed issuers*" are defined by art. 1 letter (w) as "*the subjects, Italian or foreign, including trusts, which issue financial instruments listed on a regulated Italian market*"[193]. From the status of

[193] It should be noted that, within the definitions, the t.u.f. provides at article 1 letter (w-*quarter*) also the concept of "*listed issuers with Italy as home member state*" as the issuers with shares admitted to

listed company, the law derives a series of consequences which may be hardly imposed on a subject who has not chose to receive such a status. These aftermaths may be trace back in the Part IV of this legal tool, whose content is related to "*Issuers*". The Chapter II (from article 119), in particular, dictates the rules concerning the *listed companies*, specifying that the provisions of the chapter shall apply only to companies whose shares are listed on Italian or European regulated market. Such provisions provide a series of strict consequences to which a company is subject whenever it acquires that specific status. They involve strict provisions on ownership structure (notifications for major holdings, crossholdings and shareholders' agreements report on corporate governance, etc.), information on the adoption of codes of conduct[194], transparency on asset managers and specific shareholders rights concerning meetings and voting. Moreover, there are a series of norms concerning the corporate governance and the election, composition, requirements and duties of the management and the supervisory bodies.

By contrast, the Part III, entitled "*Regulation of markets*", provides rules in relation to the functioning and the organization of the trading venues and the admission on regulated market. Article 66 of the Section III ("*Admission, suspension and exclusion of financial instruments from listing and trading*") disposes general criteria concerning the admission to *listing* and *trading*. As a consequence, the request of the issuer is not necessary, as generally involving also derivatives, for which such request would not be necessary at all. It only requires that the regulated markets must be able to grant:

- *clear and transparent rules*, so that the information on prices and quantities exchanged is easily accessible;

trading on Italian regulated markets or of another Member State of the European Union, with registered office in Italy.
In addition, at article 101-*bis*, it also states that "*Italian listed companies*" shall mean companies with registered office in Italy and with securities admitted to trading on an EU regulated market, thus creating a rather confusing scenario. As de Luca argued, from each different status (to which it must be added the Italian issuer whose financial instruments are listed only on a regulated market of a non-member states) derives a different and more or less rigorous discipline, so that there is not a proper correspondence between the legislative treatment of a company listed in Italy and one listed abroad. This will be further investigated in the next chapter in light of the effective competition between different trading venues in Europe.

[194] In Italy, from January 2020, the adoption concerns the "*Codice di Corporate Governance*" provided by Borsa Italiana S.p.A. on a *comply or explain* model.

- *compliance with European Union law obligations* as regards initial, continuous, and specially issued information;
- *correct, efficient* and *order* trading of the financial instruments.

These requirements do not affect the issuer, whose consent, therefore, is neither required nor necessary. Moreover, it should be noted that whenever a financial instrument that has been admitted to trading in a regulated market it is *also traded* in a multilateral trading facility or in an organised trading facility *without the consent of the issuer*, said issuer is not subject to any obligation regarding this system as far as it concerns the initial, continuous, or specially issued financial information[195].

However, coming back to the status of the *listed* companies, other than the t.u.f. provisions, issuers are also exposed to the Civil Code ("*Codice Civile*") norms referring to venture capital companies ("*società che fanno ricorso al mercato del capitale di rischio* or *società aperte*"). These are opposed to the traditional stock companies whose shares are held by a relatively small number of persons (or "*società chiuse*") and they are represented, according to the article 2325-*bis*, by both companies with instruments widely distributed among the public (*"società con titoli diffusi tra il pubblico in misura rilevante*"[196]) and listed companies. Therefore, as de Luca argued (2009), the set of rules coming from the voluntarily request to be admitted to listing are applicable only to listed companies, considering that the status of company with instruments widely distributed descends precisely on a mere factual basis (i.e., the wide distribution of the instruments)[197].

However, if all the rules recalled above are not enough to understand the difference between admission to listing and admission to trading in the light of a *choice* of the issuer, analysing also the secondary legislation may be useful to fully appreciate this concept. In particular, listed companies, as it has been underlined above, are addressed also with two relevant legal tools: the *Regolamento Emittenti* by Consob and the *Regolamento di Borsa* by Borsa Italian S.p.A.

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[195] Consolidated Law on Finance, article 66(6).
[196] The thresholds applicable to this definition are contained in both t.u.f article 116 and *Regolamento Emittenti* article 2-*bis*.
[197] DE LUCA, N. (2009), p. 26.

The regulation disposed by Consob contains a relevant norm on the *exemption* from the obligation to publish the informative prospectus. In particular, in the past, before the implementation of the resolution number 22144, dated 22 December 2021, pursuant to article 57, the issuer whose instrument were admitted to trading was not committed to publish the prospectus. This is once again connected with the theme of the pressing need to consider that such *second* admission was neither requested nor wanted maybe by the issuer.
As regards the regulation of the market disposed by Borsa Italiana S.p.A., one of the most interesting norms, which recognizes and posits the distinction in object is the article 2.4.1, entitled "*Request of admission to listing and request of admission to trading*" ("*Domanda di ammissione alla quotazione e domanda di ammissione alle negoziazioni*"). This provision requires that the request must be forwarded to Borsa Italiana following the model attached in the schedule (so-called "*Istruzioni*"), *once* and *only if* a resolution of the competent body has been addressed. This means that respecting the model provided it is not enough. Borsa Italiana reserves to verify that the willingness of the issuer, as expressed by and personified in its competent body, has been effectively and correctly disposed. Form this requirement, on the one side, it is clear that the market regulator wants to certify that the issuer is aware and conscious, as a corporate entity and not a natural person, of the legislative and organization consequences he is about to undergo. Otherwise, to come back to the initial thesis, if this consent has not been expressed, such admission (and the related effects several times recalled) cannot be conceded.

It could be useful to look a concrete example of the distinction in object so that also the difference between *dual listing* and *dual trading* may be fully appreciated. Starting from 24 June 2006 and until 8 July 2016, Borsa Italiana has kept active, taking advantage of new MiFID provision, a completely new segment within its market: the *MTA International* (*MTAi*). MTAi permitted to trade, by using systems and costs of the Italian market, some of the most valuable instruments issued by European companies, in terms of liquidity and market capitalization, already admitted to trading in a different European market. Such admission could be requested either by the issuer

or by Borsa Italiana itself[198] and the main requirement was that the *first* admission to trading on the other European market should have been disposed more than 18 months before the admission on the Italian market. In this way was not necessary to publish a new listing prospectus, but only a brief summary document ("*documento di sintesi*") concerning the main characteristics of the instrument. During its ten years of activity, the shares of 36 companies have been admitted, including, among the others, Allianz, BNP Paribas, Crèdit Agricole, Deutsche Bank, Renault, Siemens, Unilever, and Vivendi.

The project, aimed at a generalized internationalization of the market and a fostered approach of smaller and private investors towards big international enterprises, went on with the replacement of the old MTA segment with the new *Global Equity Market* (*GEM*). Created in July 2016, it was implemented as a segment of the *Borsa Italiana Equity MTF*[199]. The novelty introduced was based on the transition from a regulated market to a multilateral trading facility, intended to grant a greater flexibility and an easier and wider admission of shares[200]. Nevertheless, its microstructure has been recognized as completely aligned with the methods of the classic regulated market, with the admission to trading of share already traded not only in the EU but also in the markets of other OSCE member states disposed on the request of the issuer or of Borsa Italiana. This new segment has seen a first listing of 30 companies in addition to the 36 already traded under MTAi, including blue chips as Adidas, EssilorLuxottica, Puma and Total. One of the most relevant steps was taken in October 2017 when 16 among the hugest American companies (such as, as a way of example, Apple, Facebook, Microsoft, Netflix, Tesla and Tripadvisor) were admitted and traded in Euros. Nowadays the shares traded on this segment belong to 88 big public companies, coming from mainly Europe and United States[201].

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[198] See Borsa Italiana S.p.A. official website. Available from: https://www.borsaitaliana.it/notizie/sotto-la-lente/mtainternational.htm.

[199] The other segment implemented was the *Trading After Hours* (*TAH*) which, as the name may suggests, allows the trading of shares beyond the classic opening hours of the trading market.

[200] As it was declared by Borsa Italian on its website when it was announced the change. Available from: https://www.borsaitaliana.it/notizie/trading-online-magazine/azionario/nuovo-mta-international.htm.

[201] The list is available from Borsa Italiana official website: https://www.borsaitaliana.it/borsa/azioni/global-equity-market/lista.html.

As already underlined, this distinction is clear when the admission is disposed unilaterally by the market regulator, while it becomes more blurred if it is the issuer to ask to be admitted. However, whenever the issuer decides to be not only traded in Italy, but also *officially listed*, then the dual trading is resolved in a *dual listing* and the issuer will be subject not only to the rules of the place in which it has been firstly listed but also to the ones disposed by Italian legislation and analysed above. By way of example, it can be cited the case of the old "*Settori Esteri*" in the former MTA, in which foreign companies were listed and not only traded. For instance, Banco Santander was listed, and it is now traded in the GEM; while the Luxembourgian company Tenaris as well as Stmicroelectronics, which were listed there, are now listed in main segment of the market controlled by Borsa Italiana, Euronext Milan (former MTA).

In conclusion on this theme, Notari[202], in the perspective of the *contractual* thesis connected with the admission to listing (a reference has been made in the first chapter), has gone further by analysing the chances of an *unilateral* admission to listing and of a sort of "*spontaneous*" admission directly provided by the shareholders' initiative.
Firstly, the scholar, with a conditional reference to further investigate the topic, acknowledges a chance to an admission to listing without the consent of the issuer. The hypothesis rests on a sort of comparison with the former, recognized before the demutualization of the capital markets, admission to listing *ex officio* ("*quotazione d'ufficio*"), *i.e.*, the case in which the admission to listing is disposed by an act of the public authority. This chance was provided by the Law 216 of 7 June 1974, whose article 3 letter (d) stated that Consob could, after having heard the management body, commanded the listing of one or more instruments regularly and widely traded in the market[203]. However, as underlined by dissenting parts of the doctrine[204], this provision has been construed as having a punitive and retaliatory effect towards the issuer which was subjected to it. In any case, the situation aforementioned is not comparable with

[202] NOTARI, M. (2003) *Contratto e regolamentazione nella quotazione in borsa*, p. 502.
[203] *"...d) dispone, sentiti gli amministratori della società o dell'ente emittente e previo parere delle deputazioni di borsa e dei comitati direttivi degli agenti di cambio competenti, l'ammissione d'ufficio alla quotazione in una o più borse di titoli abitualmente e largamente negoziati emessi da società o enti che abbiano i requisiti prescritti*.".
[204] See DE LUCA in "*Poteri delle società di gestione del mercato e poteri della Consob: la natura degli atti della società di gestione del mercato*" (2000) or COLTRO CAMPI in "*Lineamenti di diritto di borsa e rassegna di giurisprudenza*" (1985).

the unilateral admission to trading, as the status of listed company may not be buckle to a person who has not decided to be voluntarily exposed to it.
The second hypothesis brought forward by Notari is conceived as a "*spontaneous listing*" disposed by the company's shareholders. The author makes the example of a shareholder with a significant (but not controlling) participation in the company's capital that, in order to sell it as a whole and as a consequence of non-satisfying offers, with the aim to launch a public offering decided to list its shares without the consent of the issuer[205]. The main argument brought forward lies in the concept of the provisions concerning the companies with instruments widely distributed among the public. In his view, the set of rules analysed above and provided by t.u.f. and the Civil Code for these companies, which have not contributed with an act of willingness and which are a simple consequence of the factual circumstance that the relevant shares are held by a large number of investors, is symptomatic of the fact that the voluntary subjugation is not a proper requirement to undergo a series of norms affecting the internal organization and the external information of the company itself.
However, this rather interesting outcome should be reassessed in light of the concept of *listed company* as a proper and different status in respect of the simple company with shares widely traded, bringing with it a series of onerous and piercing obligations for the issuer. Moreover, it should be also added that a company has certainly a right to prevent and block a first admission to listing if it has not been declared by its general meeting[206]. In particular, article 133 of t.u.f. allows, subject to approval by an extraordinary shareholders' meeting and always providing equivalent protection to investors, Italian companies with shares listed on regulated markets in Italy to request that their own financial instruments be excluded from trading. Therefore, it can be argued *a contrario* that issuers have a sort of protection and chance to counter the unilateral decision of admission to trading on a different regulated market[207].

2.9. An obsolete distinction?

In conclusion, it could be interesting to investigate whether the distinction between *admission to official listing* and *admission to trading*, in light of each of the

[205] NOTARI, M. (2003), p. 504.
[206] DE LUCA, N. (2009), p. 27
[207] *Ibid.*, p. 27.

three perspectives analysed above, may be regarded as outdated and obsolete. In particular, doctrine has argued that official listing, as opposed to the admission to trading and as disposed and applied by the Listing Directive, may be to some extent anachronistic.
Concerning the first perspective, as it has been underlined, MiFID I and II have drastically changed the perspective towards the distinction between official stock exchange and regulated markets, by giving to the latter a sort of legislative monopoly. The concept of stock exchange or bourses as traditionally intended can be said to be disappeared in favour of the broader concept of regulated market and, as it will be seen in the next chapter, other different types of trading venues, such as MTFs and OTFs.
As it has already been underlined, neither the Listing Directive nor the MiFID gives any definition of official listing. He argued that they can be only derived by the recital number (23) that counterposes official listing to a type of trading, which can be considered to be non-regulated and done on the second tier of the stock exchange itself (*i.e.*, *over the counter*)[208]. He additionally underlines how the notion of official listing, as provided by the Italian market regulations seen in the paragraphs above, could be avoided and eliminated, as it is not recognized on a European level (MiFID only refers to national legislators encouraging them to avoid any confusion between the conditions laid down for regulated markets and those related to Listing Directive), and it does not provide for any useful practical outcome[209].

On the second one, Moloney has doubted whether the historical consideration of the securities admitted to official listing as having a sort of higher qualities with respect of the ones simply admitted to trading on regulated markets should be considered as still valid or not. He criticizes the fact that, if compared with UK listing (or "*premium listing*"), the regime laid down in the Listing Directive has two main issues. On the one side, the very limited harmonization achieved under that legal tool has brought to the consequence that *official listing* is not common across the European territory, in which the main regulated markets typically operate the admission process subject to MiFID II regime[210]. Therefore, listing standards are nowadays set to the minimum and

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[208] *Ibid.*, p. 32.
[209] *Ibid.*, p. 32-33.
[210] MOLONEY, N. (2014), p.180.

practically less rigorous of those established and applied by most of the regulated markets. On the other side, even if official listing is conceived to achieve "*something more*" with respect of the admission to trading, it is still unclear if it is effectively able to do so. This has been underlined also by other authors which has pointed out how, even if EU is moving firmly away from targeting officially listed segment of the market (generally defined within the concept of *regulated markets*), within UK legislation "*there remains quite a significant distinct body of regulation*"[211]. Nevertheless, authors, also suggests that the removal, if done in the absence of careful analysis, may be hazardous, as it remains a key concept in some Member States. However, he underlines that the difficulties arise more from a "conceptual untidiness" than from actual and practical issues: by utilizing the wide discretion they dispose, regulated markets, may operate distinct market segments with higher and harmonized requirements[212].

This means that, the English system may have a positive and practical outcome if the admission to listing is effectively able to bring, in terms of status and advantages, an effective payback if compared to the "simple" admission to trading.

For example, by looking once again at the Italian jurisdiction, even if, considering the low competition between different trading venues, a theorical "public" admission to listing divided by the private admission to trading may have some rather positive aftermaths, this has been expressively excluded by the secondary legislation. A directive reference to the paragraph 1 of the article 2.4.1 may be useful to fully understand the issue. Pursuant to this provision, except for the cases of letter (a) and (b) in which the two must be presented separately, the request of admission to trading is considered to be included in the request of admission to listing and they are managed within a *single procedure*[213]. Moreover, the public authority is involved in the sense that there must be a communication to Consob and no more.

Therefore, the third perspective seems to be the most relevant and with the most interesting practical outcomes. In particular, as recalled several times, the status of

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[211] FERRAN, E., CHAN HO, L. (2014), p. 364.

[212] See MOLONEY, N. (2014), p. 182.

[213] "*…Al di fuori delle ipotesi di cui alle precedenti lettere a) e b), la domanda di ammissione alle negoziazioni si considera ricompresa nella domanda di ammissione alla quotazione ed entrambe le domande sono gestite in un'unica procedura*".

listed company necessarily requires an express request of the issuer, as it provokes a series of consequences in terms of internal and external organisation. On the other side, the admission to trading of the instruments of a company whose instruments are already traded does not constitute any particular burden, especially if the issuer is not subjected to the publication of the prospectus and the other information obligations. Moreover, the issuer remains governed by the laws of the country in which it has disposed the first admission to trading, unless otherwise specified with a request to be dual-listed. The analysis arising on this topic on the investors' protection and the competition between different trading venues is particularly intriguing and open to a further development.

In conclusion, Ferrarini, has gone even further by explaining how a detailed and top-down regulation may be avoidable and anachronistic[214]. In particular, the requirements laid down in the Listing Directive, as reproposed from the implant of 1979, have been introduced to dispose a first harmonization on the European level and reflective of an outdated layout of the financial markets, which is radically different from the current scenario. The aim was to limit the power of the traditional stock exchange, as they could be defined as a proper legal (or natural) monopoly and to avoid any possible abuse of such power. By establishing a common set of rules, both investors and issuers could be adequately protected. Investors from the risks linked with any equity investment and the asymmetry of information; companies seeking to be admitted from any unlawfully damage or discrimination they could suffer from the market operators. If the markets would have left to themselves, in the idea behind the Directive, they would not reach the same objectives.

In the author's point of view, the simple increased competition between market operators, especially on a communitarian level, should be enough to grant that market regulators apply a relatively high level of openness towards the public and conditions that could be satisfactory. An analytic regulation of this phenomenon is not necessary, while general and outline standards towards which markets should look could be enough to grant investors protection and market liquidity and effectiveness. In a highly competitive scenario, where exchanges were starting a proper race for "*listing services*", they would hardly discriminate among issuers. In addition, if they still have

[214] FERRARINI, G. (1999) *The European Regulation of Stock Exchanges: New Perspectives*, p 569-598.

the power that the Directive assumes, then the relevant antitrust rules could apply to obtain the same result that the requirements laid down there aim to reach[215].

This theme is strictly connected with the subject of the third chapter, focused on the current scenario of European trading venues and exchanges and the challenges that the European legislator is facing and will face in the next years on the matter of capital markets law. In particular, an historical dichotomy divided the doctrine[216] on whether the regulation and supervision of markets should be addressed with a deeper centralization in the hands of common public authorities or with a greater decentralization in the hands of private exchanges as traditional regulators able to offer a more stringent supervision if pushed forward by competitive reasons.

[215] MOLONEY, N. (2014), p. 574-575.
[216] See MAHONEY, P. G. (1997) *The Exchange as Regulator*; or FERRARINI, G. (2002).

CHAPTER 3 – EUROPEAN STOCK EXCHANGES: REGULATION AND COMPETITION

3.1. Introduction

The third chapter will focus on the current European scenario of stock exchanges and trading venues. The novelties introduced by MiFID II ("*Markets in Financial Instruments Directive*"), together with MiFIR ("*Markets in Financial Instruments Regulation*"), have provided an updated and rather revolutionary regulatory framework on the theme.

Firstly, these legal frameworks introduced provisions concerning distinct types of trading venues and markets. The difference between *Regulated Markets* (*RMs*), *multilateral trading facilities* (*MTFs*) and *organized trading facilities* (*OTFs*) will be portrayed in the following paragraphs as opposed to the trading *over the counter* (*OTC*) and the *alternative trading platforms*.

The common features and the main relevant characteristic will be scrutinized to understand the idea of the European institutions behind the implementation of the various rules on the theme. The subtext was to establish a system capable of catching up with the technology by supervising the different trading alike experiences and regulating as far as possible every aspect of the pre-trade and post-trade operations, by enhancing investors protection and competition.

The third paragraph presents different and concrete case studies in order to figure out how the legislation innovations have been incorporated in practice and the current European scenario of capital markets. If a common line between Member States could be traced, this would be characterized by a push towards a relatively tiny number of massive Financial Market Infrastructure (FMI) groups, while traditional stock exchanges, as "*national flagship*", are slowly vanishing. As it will be underlined, these vertical and horizontal structures are able to offer a wide range of services, creating big conglomerates of financial services providers at a European level. Moreover, the last acquisition of Borsa Italiana S.p.A. by the Euronext group from the London Stock

Exchange has shaken the balances by bringing to the Dutch giant group (already controlling Amsterdam, Brussels, Dublin, Lisbon, and Paris bourses) even more control.

On the back of these changes, it will be discerned whether MiFID II was able to effectively acknowledge the possible risks and systemic implications connected with this rather new trend by granting adequate protection to any kind of investor.

Provisions concerning admission to listing and trading, regulation and supervision and pot-trade services will be analysed in order to verify how the European institutions have dealt and will deal with this renewed panorama. In addition, there will be a reference, as a conclusion to this dissertation, to the so called "*Capital Markets Union Action Plan*" ("CMU Action Plan"). This is an economic policy initiative launched in 2014 by the former European Commission President in order to create a single market by addressing the problems concerning insufficient integration of financial infrastructures. A list of priorities and legislative and non-legislative proposals was drawn-up and the new Commission President has committed to go on and the finalise the project. A new plan (the "*2020 CMU Action Plan*") and a new long-term and green perspective were presented.

3.2. Trading Facilities before and after MiFID II

The scenario and the regulation of the European capital markets has drastically changed during the past, bringing to a disappearance of the stock exchanges as traditionally intended. They were the physical places were issuers, intermediaries and investors may encounter their interests and transfer financial instruments with each other. Historically, they have also held a legal (or *de facto*) monopoly, as they operated as isolated entities[217], offering their services in the trading of listed securities basically alone in their respective home countries.

In addition, as authoritative doctrine suggested[218], the discipline of official listing have also been considered as, directly or indirectly, linked to the public sector. Therefore, stock exchanges, especially in the admission and on the supervisory activities, were

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[217] PAGANO, M. (1997) *The Changing Microstructure of European Equity Markets*, p. 4.

[218] See BAGHERI, M., NAKAJIMA, C. (2004) *Competition and Integration among Stock Exchanges: The Dilemma of Conflicting Regulatory Objectives and Strategies*, p. 2651-2694; BUSCH, D. (2017) *A Capital Markets Union for a Divided Europe*, p.. 262-279.

considered to perform a sort of quasi-public interest activity. The public interest lied in the importance connected with the theme of the investor's protection with reference to the already mentioned asymmetry of information.

Once technology began to spread, exchanges slowly started to lose their privileged position and markets participant were able to take advantage of various newly created electronic systems to directly conclude transactions. As a result, monopolies slowly disappeared and the competition between different exchanges and between exchanges and new trading platforms flourished. The services offered could not be limited to the listing admission and the exchange of instruments anymore. Hence, exchanges "come under pressure to reduce trading costs, to improve clearing and settlement facilities, to raise more capital to fund the development and maintenance of cutting-edge technological infrastructures and to adopt more transparent management structures that meet prevailing notions of good corporate governance practice"[219].

The response resulted in a widespread and generalized demutualization which converted traditional exchanges in organisation with an ownership structure and objectives aligned with a typical profit-taking company, aiming at shareholder-value maximization. In this period, part of the hugest exchanges in Europe also started to adopt strategies in order to create either alliances or even mergers on a transnational and European level. By using different legal forms, large group of exchanges coming from different member states sought a higher internationalisation and a more efficient capital raising system, creating the nowadays paradigm[220].

This has also caused a debate on whether the private interests of these *for-profit* entities could be misaligned in respect of the public interest underlying the management, regulation, and supervision of the markets. This is, for example, the reason why in the United Kingdom the authority to decide on listing of issuers was transferred from the LSE to a public authority[221], with a rather relevant content coming from the former

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[219] FERRAN, E. (2004) *Building an EU securities market*, p. 240. On this theme see also: FLECKNER, A. M., HOPT, K. J. (2013) *Stock exchange law: concept, history, challenges*.

[220] See paragraph 3 for further details.

[221] However, some scholars (*e.g.* see DE LUCA, 2009) have underlined how in this way, by repealing the provision pursuant to which LSE had the power to concede the admission to listing for every market (and this may be seen as a theoretically correct choice), the *race to the bottom* or *race to the top* that the conditions concerning the admission to listing (by favouring the competition) could have created has been zeroed.

market regulator. However, as authors pointed out[222], the idea that exchanges may be differentiated by the quality of their regulatory requirements concerning listing admission, did not bother the LSE[223].

An exchange is in the position to perform regulatory and supervisory in terms of quality admission criteria, initial and specified disclosure of information requirements and continuing obligations addressed to the issuer once it has been admitted. The literary criticism has been divided into two opposing sides.

On the one side, prominent authors have stressed the negative perspective related to several risks towards both investors and issuers. Issues were mainly related to the doubt concerning the credibility of the commitment of the regulators to a strong enforcement of rules and monitoring of respect of such rules. In particular, demutualisation may, in the "*race to the bottom/top*", have brought market regulator to lower their admission and information disclosure requirements in order to attract business and, as a consequence, ensure a higher profit coming from the so-called "*listing fees*". Exchanges might hesitate to check new applicants too closely or take enforcement action against their existing issuers for fear of losing business[224], as the suspension or removal of instruments from trading may decrease the liquidity of the market and the transactions earnings.

On the other side, part of the scholars has highlighted that the "*dropping of standards*" is not an inevitable consequence of increased competition between exchanges"[225]. For example, Mahoney, on the back of the aforementioned theory of the *race to the bottom/top*, stated: "*self-interested stock exchange members will produce rules that investors want for the same reasons that self-interested bakers produce the kind of bread that consumers want*"[226]. The establishment of stronger standards permits to that specific market to be associated with a premium brand to which issuers may want to be attracted.

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[222] FERRAN, E. (2004), p. 251.

[223] In particular, a statement from the Chancellor of the Exchequer (Gordon Brown MP) suggested that the transfer was at the initiative of the LSE: "But, in the light of its proposal to demutualise and turn itself into a commercial company, the Exchange has suggested that it *would no longer be appropriate for it to continue to exercise its Listing Authority function*."

[224] FERRAN, E. (2004), p 245.

[225] *Ibid.*, p 243-244.

[226] MAHONEY, P.G. (1997), p. 1459.

However, this topic will be further discussed in the next paragraphs. For the moment, it must be taken into account that traditional exchanges had to deal also with new trading technology and platforms. The intervention of both MiFID I and MiFID II should be regarded as particularly focused on this theme.

Trading venues started their development when, with the standardization of risk-management product, "the "*unbundling*" of the primary market *admission to listing* functions associated with cash markets from their secondary market trading functions, the demutualization of incumbent stock exchanges, the arrival of competition in the order execution market generally, and an array of other factors have created the conditions in which a great variety of different venues, which can operate under different trading functionalities (often reflecting the instruments traded) and provide different services, have developed"[227].

European institutions quickly understood that it was necessary to deeply regulate these kinds of activities. The aim was to grant market integrity, efficiency, transparency, and stability. The issues related to a possible lack and fragmentation of liquidity could cause a damage to the correct price formation processes. These risks were increased by the fact that these new venues, even if by delivering a tighter range of services, were effectively operating in parallel with the historically rooted stock exchanges.

The first legislative measure on the subject was the Directive 93/22/EC[228] (the "*ISD Directive*"), which for the first time since the Union establishment addressed the problems concerning investment services[229]. This legal tool provided the so called "*concentration rule*", later abolished. Such rule mandatory disposed that financial instruments orders must be concluded through a regulated market, *i.e.*, official stock exchanges. This meant that, even if new networks were growing, it was not possible to conclude transactions in places or platforms not legally recognised as regulated markets.

The revolutionary step was taken with MiFID I, whose accomplishment was to abolish the aforementioned rule and to introduce the regulation of the Multilateral Trading Facilities (MTFs). Even if the trading on these platforms was still based on *non-equity*

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[227] MOLONEY, N. (2014), p. 426-427.
[228] Council Directive 93/22/EEC of 10 May 1993 on *investment services in the securities field*.
[229] For further details on the theme, see FERRARINI, G. (1998) *European Securities Markets: The Investment Services Directive and Beyond*.

instruments, the idea behind this new legal framework was to grant a better trading concentration, "for example in order to boost liquidity and promote the correct price formation"[230]. This new regime was "much less far-reaching than the concentration rule as there remains sufficient scope for competition between different trading venues"[231]. More specifically, "MiFID I was accordingly designed to promote competition between different share-trading venues in the interests of innovation, price competition, and investor choice, and to support the transparency and efficiency of the new, competitive trading marketplace; it was also designed to support a related market in the consolidation and supply of transparency data"[232].

Considering the financial crisis and the various gaps and deficiencies, in terms of market supervision, price formation and liquidity risks, the European institutions felt necessary to intervene with a new legal tool. Some 10 years later, MiFID II (together with MiFIR) was adopted and the scenario of regulated markets and different trading venues (which in the meantime had gained space and relevance) changed drastically. For example, as dominating doctrine pointed out, fragmentation of different trading facilities could lead to the so-called phenomenon of "*price dispersion*"[233]. This means that it may happen that the same financial instrument in the same moment is traded at different prices on different platforms. As a consequence, market integrity and transparency are jeopardized. Informed investors may hide themselves better and look for the best price, increasing the market volatility and transaction costs.

Therefore, MiFID II's provisions cover the authorization, the organization and operation of different trading facilities, trading venues in particular. The scope of the directive was to capture and grapple all the different forms of trading venues, by adding the new concept of Organized Trading Facility (OTF).

3.2.1. Types of Trading Facilities

A *trading facility* may be defined as "the place where buyers and sellers meet to trade financial instruments (either securities or derivatives)"[234]. As it has been

[230] BUSCH, D. (2017) *MiFID II and MiFIR: stricter rules for the EU financial markets*, p.135.
[231] *Ibid*., p.135.
[232] MOLONEY, N. (2014), p. 437.
[233] SAGUATO, P., FERRARINI, G. (2015) *Regulating Financial Market Infrastructures*, p. 578.
[234] FERRARINI, G., SAGUATO, P. (2017) *Governance and Organization of Trading Venues: The Role of Financial Market Infrastructure Groups*, para 11.03, in BUSCH, D., FERRARINI G., (eds.) *Regulation of*

underlined above, the figure of the traditional stock exchange has disappeared and technology has made its way through, so that securities and derivatives are nowadays traded on the various platforms that the reshaped financial system offers. Scholars have made an effort to categorize all these different structures in order to give back a well-defined and organized overview of the rather confused European scenario on the topic.

The main distinction is generally made between **public** markets and **private** markets[235]. The discrimination between these two distinct types of markets is based on the intrinsic characteristic of each one.

In particular, **public** markets are:

- **formal**: regulated by a legal framework;
- **multilateral**: buyers' and sellers' interests come together facilitated by the regulator;
- **non-discretional**: executed according to pre-set rules and the trader does not intervene;
- **transparent**: subject to pre and post-trade transparency.

By contrast, **private** markets are:

- **informal**: not regulated by a legal framework;
- **bilateral**: there are only two parties in the transaction;
- **discretionary**: venues maintain the unilateral authority to decide on the admission;
- **dark**: no transparency requirements and no disclosure to the market.

Some scholars have argued that, between these two categories, in the recent years, another different type of market may be identified: the **hybrid** markets. As the classification name suggests, hybrid markets own characteristics of both private and public venues. A proper example is represented by OTFs. Even if they are formal,

the EU Financial Markets: MiFID II and MiFIR. See also: MACEY, J. R., O'HARA, M. (2005). *From markets to venues: securities regulation in an evolving world*, p. 563; FERRARINI, G., MOLONEY, N., (2012) *Reshaping Order Execution in the EU and the Role of Interest Groups: From MiFID I to MiFID II*, p. 557.

[235] FERRARINI, G., SAGUATO, P. (2017), para 11.08.

multilateral, and subject to a certain decree of pre-trade and post-trade transparency, their regulators maintain a certain amount of discretion in the execution of trades[236].
In connection with the aforementioned distinctions, authors have underlined that "non-discretionary trading venues generally attract highly standardised instruments, whereas the more complex products, designed to meet the personalised needs of the investor are traded in informal venues and on a bilateral basis"[237].
Another way to distinguish trading facilities, on the ground of services offered and on whether they are multilateral or bilateral or regulated or non-regulated, is between *trading venues*, *systematic internalisers* and *alternative trading platforms*. A trading venue is generally recognized in regulated markets, multilateral trading facilities and organized trading facilities. They regularly records information on prices, volumes, and time of the exchanges. As regard listing of securities, only certain trading venues provide this specific service.

3.2.1.1. Trading Venues and SME Growth Markets

Within the categories analysed above, a *trading venue* may be defined as multilateral and regulated facility that provides traders, issuers, brokers, investors, and other relevant subjects with a place where a to buy and sell financial instruments. It allows to reduce transactional costs and it facilitates the research of potential counterparties, by granting also a continuous flow of information concerning prices (or quotes), volumes and time of the deals. This type of facility also offers other additional services, such as listing of shares, regulation and monitoring of the market and post-trade utilities: clearing and settlement[238].

The organization and the regulation of trading venues has drastically changed during the past. They began as competitors of the traditional exchanges thanks to the technological developments and the novelties introduced. Once privatized and transformed into big public companies with diffuse shareholders, exchanges have started to reproduce the organizational and operational forms of the new technology-based systems.

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[236] FERRARINI, G, SAGUATO, P. (2017), para 11.11.
[237] LUCANTONI, P. (2016). *Trading equity financial instruments under MiFID II and MiFIR*.
[238] These services may be offered also by external entities, such as clearing and settlement agents and CCPs.

Therefore, MiFID II and regulators have gone towards two directions: on the one side, they acknowledged that exchanges and other trading venues are firms offering services in a competitive setting; on the other, the role of these institutions as regulators and supervisors of the listed issuers has been doubted[239].

This legal tool has brought significant and revolutionary reforms in terms of design, corporate governance, and organization of different multilateral trading system[240]. The aim of this directive is to capture "*full range of investor-oriented activities*"[241], by establishing "*comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions*"[242].

In order to take into account a new generation of organised trading systems, within the classification enacted by MiFID I, another trading venue was added: the *Organized Trading Facility*. Therefore, with the implementation of this legal framework, in the European legislation the trading venues recognized and regulated are three: *regulated markets* (RMs), *multilateral trading facilities* (MTFs) and *organized trading facilities*. The characteristics of each trading venue[243] is encapsulated in the article 4, entitled "*Definitions*", of MiFID II. It may be useful to neatly recall the major features of the three regulated system to highlight the differences among each other and how the current European scenario of trading venues has been influenced by the legal frameworks.

Other than the definition included in article 4, number (21), (22) and (23) each trading venue has a separate section in which the directive lays down the main features, including the admission to, the functioning, the supervision, and the regulation of this activity.

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[239] FERRARINI, G., SAGUATO, P. (2017), para 11.14.
[240] See, among others, CLAUSEN, N. J., SØRENSEN, K. E. (2012),p. 275-306.
[241] See Directive 2014/65/EU, recital (3).
[242] See Directive 2014/65/EU, recital (13).
[243] Directive 2014/65/EU, article 4(23) states: "'*trading venue' means a regulated market, an MTF or an OTF*".

- **<u>Regulated Markets</u> (RMs)**

The definition is provided by article 4(21):

> "***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 Title III of this Directive*.".

As the definition suggests, regulated markets are as the prototype of public markets, subject to non-discretionary rules and able to trade in a multilateral way. The main difference with the other platforms is that operating a regulated market is not considered as an investment activity. The MiFID II is strictly focused on the concept of "*market operator*", trying to align the requirements with those of the investment firms.

Even though regulated markets' legislation allows a certain decree of flexibility as concerns trading rules, access and operation of different market segments, the directive disposes also different operational and organizational (mainly on corporate governance) requirements.

The authorization is conceded by national competent authorities and may be exposed to a regular review[244]. The relevant NCA should verify the business plan of the requesting operator, including information and a programme of operation. Any withdrawal should be notified to ESMA. In addition, a new regime concerning corporate governance is disposed by the directive. According to article 45, the members of the board should be of *sufficiently good repute*, commit *sufficient time* to perform their duty and tasks; while the management board as a whole should possess *adequate collective knowledge*, *skills,* and experience[245]. The body should be able to define and oversee the implementation of arrangements to carry out a *prudent*

[244] Directive 2014/65/EU, article 44.
[245] Directive 2014/65/EU, article 45(2)(a) and 45(2)(b).

management and treat any possible conflict of interest[246]. The supervisory body must ensure that the services are performed efficiently and respecting the prudential requirements related to financial activities. Article 46 is focused on ownership structure. Persons able to exercise "*noteworthy influence*" should be suitable and transparency information must be provided to the NCAs, which may also refuse to approve changes in the controlling shareholders. By doing this the internal structure is permanently under control and the conflict of interest may be addressed in an easier way.

Moreover, article 47 requires that the regulated market must have arrangements to clearly identify and manage the potential adverse consequences for the operation of the venue or of any conflict of interest between the interests of the regulated market, its owners or its operator, and the sound functioning of the regulated market. Relevant room is dedicated to risk management and technical operations control[247].

In conclusion, as regards *market resilience* a regulated market must have in place effective systems, procedures, and arrangements to ensure its trading systems are resilient, have sufficient capacity to deal with peak order and messaging volumes, are able to ensure orderly trading under conditions of severe market stress, are fully tested to ensure such conditions are met, and are subject to effective business continuity arrangements[248].

Market access is governed by article 53, which requires regulated markets to establish, implement, and maintain transparent and non-discriminatory rules, based on objective criteria, which govern access to or membership of the regulated market and which cover the constitution and administration of the regulated market, transactions on the market, the professional standards imposed on those operating on the market, and clearing and settlement[249].

- **Multilateral Trading Facilities (MTFs)**

The definition is provided by article 4(22):

[246] Directive 2014/65/EU, article 45(6).
[247] Directive 2014/65/EU, article 47(1).
[248] Directive 2014/65/EU, article 48(1).
[249] Directive 2014/65/EU, article 53(1) and 53(2).

> "***multilateral trading facility*** *or* ***MTF*** *means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive.*".

The majority of the rules provided for MTFs apply also to OTFs. Therefore, a simple recall here may suffice. An MTF/OTF may be operated both by a market operator and an investment firm. The authorization process is overall applied, provided that a detailed description of the trading venue's functioning and a notification to ESMA are supplied.

Like all the other investment firms, an investment firm operating an MTF/OTF must necessarily comply with corporate governance obligations similar to those of the regulated markets. Article 18 is focused on a series of provisions concerning trading process, admission of financial instruments, venue access, conflicts of interest, and venue resilience. Fair and orderly trading must be accomplished and arrangements for the sound management of the technical operations of the facility must be effective and in place. In addition, as article 10 requires, investment firms operating MTFs/OTFs must inform and notify the NCAs on the identities of their shareholders or members, whether direct or indirect, natural, or legal persons, who have qualified holdings and the amount of those holdings.

As regards the organizational requirements, they are similar to the ones applied to investment firms in general, except for those specifically related to either MTF or OTF. In particular, for MTFs, the directive provides the establishment and implementation of "*non-discretionary rules for the execution of orders*" in the trading system[250]. Moreover, only MTFs must be adequately equipped to manage the risks to which their operating activities might be exposed and should not execute client orders against their proprietary capital nor engage in matched principal trading[251].

As regards rules concerning the admission to trading, MTFs (and OTFs) are not subject to detailed provisions. This is mirrored in their characterization under MiFID II as

[250] Directive 2014/65/EU, article 18.
[251] Directive 2014/65/EU, article 19(5).

secondary market trading-services providers, as opposed to regulated markets generally recognized as primary market capital-raising-services providers. The only specific prerequisite is to establish transparent rules regarding the criteria for determining the financial instruments that can be traded under their systems[252]. However, there must be granted a flow of publicly available information which could guarantee the investors a investment informed judgment[253].

In addition, article 32 provides a series of rules concerning suspension and removal of financial instruments from trading on both an MTF or an OTF. An investment firm or a market operator operating an MTF or an OTF may suspend or remove from trading a financial instrument which "no longer complies with the rules of the MTF or an OTF unless such suspension or removal would be likely to *cause significant damage* to the *investors' interests* or the *orderly functioning of the market*"[254]. The same article contains also the provisions regarding the cooperation and collaboration between NCAs of different countries analysed with reference to suspension and removal of financial instruments from RMs[255].

One of the most interesting part of the new MiFID II regime is represented by a renewed regulation of the financial markets related to SME enterprises. The 2014 Directive, in its Section 4 (article 33), introduced the so called "*SME Growth Markets*" ("*SME GMs*"). It should be considered that regulatory implications of designation as a regulated market venues that represents second-tier segment dedicated to SMEs "carry potentially heavy disclosure and other admission costs for these smaller issuers"[256]. Therefore, the concept of "*exchange-regulated markets*" developed, being "venues in the form of MTFS under the original MiFID I (now MiFID II/MiFIR classification)"[257].

MiFID's regulation aim in the field of SME GMs is may be traced back in two crucial objectives announced in the recitals. clearly stated in the Directive recitals. Firstly, the willingness to introduce specific quality label for MTFs focused on SMEs, thus

[252] Directive 2014/65/EU, article 18(2).
[253] Directive 2014/65/EU, article 18(2).
[254] Directive 2014/65/EU, article 32(1).
[255] Directive 2014/65/EU, article 32(2). See also Directive 2014/65/EU, article 52(1) and 52(2) and paragraph 4 of chapter 2.
[256] MOLONEY, N. (2014), p. 173.
[257] *Ibid*, p. 174.

creating, within the MTF category, a "*new sub-category*" of registered SME GMs, and raising the "*visibility and profile*" of trading venues specifically dedicated to SMEs[258]. On the other hand, the European law-maker intended to strike the correct balance "between maintaining a *high level of investor protection* and reducing *unnecessary administrative burdens for issuers*"[259]. However, the new regulatory framework has been defined as having a "*light touch approach*", designed to maintain the *status quo*[260].

Article 33 requires the relevant MTF seeking the registration as an SME GM to apply to NCA, with an application that satisfies the key requirements laid down by article itself[261]. In particular, Member States must ensure that: "at least 50% of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market and in any calendar year thereafter; and appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market"[262]. The initial and ongoing disclosure requirements are provided by the paragraph 3 of the article, including: sufficient information published to enable investors to make an informed judgment, appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market and effective systems and controls aiming to prevent and detect market abuse on that market[263]. The "*deregistration*" may be disposed if either those requirements are no longer respected or there is an explicit request by the market operator itself to conclude its activity[264].

A rather interesting provision is the one provided by paragraph (7), which is similar to the article 51(5) analysed with reference to RMs. It allows to trade a financial instrument, already traded on a SME GM to be traded on another SME GM, provided that "the issuer has been *informed* and has *not objected*" and that "the issuer is not be

[258] Directive 2014/65/EU, recital (132).
[259] Directive 2014/65/EU, recital (133).
[260] PERRONE, A. (2018) *Small and Medium Enterprises Growth Markets* in BUSCH, D., et al. (2018) *Capital Markets Union in Europe*, p. 254. On the theme of SME GMs see also: VEIL, R., DI NOIA, C. (2017) *SME Growth Markets* in BUSCH, D., FERRARINI, G. (2017), chapter 13.
[261] Directive 2014/65/EU, article 33(1) and 33(2).
[262] Directive 2014/65/EU, article 33(3) letter (a) and letter (b).
[263] Directive 2014/65/EU, article 33(3) letters (c), (d), (e), (f) and (g).
[264] Directive 2014/65/EU, article 33(5).

subject to *any obligation* relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the latter SME growth market"[265].

The new regime, has been widely criticised by authoritative part of the doctrine. Among all, Perrone has underlined four main issues[266]. The first one is connected with the fact that, rather than simplifying the existing system, MiFID has enhanced the market fragmentation and uncertainty. This was already underlined by other authors, who stressed the fact that the "market-based discipline appears to be operating well in the EU's second-tier market"[267] and that "providing a regulatory brand for less heavily regulated 'second-tier' venues which admit higher-risk securities can generate investor protection risks"[268]. Secondly, Perrone doubts of "the effectiveness of a strategy based on "*light*" disclosure"[269], basically left to the discretion of each NCAs. In addition, it highlights the fact that MiFID completely forgot to address the *liquidity issues* typically existent in SME secondary markets, on which it is tough to sell (or buy) quickly without offering a discount (or a *premium*), taking into account also the lack of interest by institutional investors. The author underlines that addressing the issue by solely enhancing the market visibility is "both unrealistic and simplistic"[270]. In conclusion, the scholar criticizes the fact that, by failing to acknowledge the interplay between the functioning of secondary markets and the other relevant aspects of the SME finance ecosystem and focusing only around aspects of listing and trading, the "SME GM regime largely lacks a systematic approach"[271]. In order to perfectionate the current legislative scenario, he additionally proposes an alternative regime based on the creation of "a centralized pan-European SME market promoted by the EC and provided with a regime featuring a strong focus on liquidity and investor protection,

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[265] Directive 2014/65/EU, article 33(7).
[266] PERRONE A. (2018), p. 261.
[267] MOLONEY, N. (2014), p. 176.
[268] *Ibid*, p. 176.
[269] PERRONE, A. (2018), p. 262.
[270] *Ibid*, p. 262.
[271] *Ibid*, p. 262.

to be extended also to local SME trading venues"[272]. However, it should be noted that the new CMU Action Plan seems to be highly focused on SME Growth Markets[273].

- **Organized Trading Facilities (OTFs)**

The definition is provided by article 4(23):

> "***organised trading facility*** *or* ***OTF*** *means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive*"

As already highlighted, the introduction of this new trading venue has been justified to capture all the several types of trading platforms. However, this objective has not been fully achieved[274]. From the definition is straightforwardly easy to understand that only *non-equity* (*i.e.*, debt, such as bonds, structured finance products, emission allowances and derivatives) are included in the instruments that can be traded on the OTFs[275]. Another peculiarity is represented by the fact that the operator is not subject to *non-discretionary* operation of the venue. It must conduct the orders on a "*discretionary basis*" (in terms of the decision on whether to place the order or not and when to place it), considering pre and post-trade transparency obligations and the best client interest rule.

The main characteristic of OTF regulation is the focus on the multilateral feature. Pursuant to article 20(1) their operators are precluded from executing client orders against their proprietary capital or the capital of any entity that is part of the same

[272] For further details on the topic and on the proposal of a comprehensive SME regime, see PERRONE, A. (2018) pp. 263-267.

[273] For further details, see Euoropean Union official website, "*Action 5 - Directing SMEs to alternative providers of funding*", available from: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan/action-5-directing-smes-alternative-providers-funding_en.

[274] BUSCH, D. (2017), p . 126.

[275] ANNUNZIATA, F. (2018), p. 1131. The author explains how this was a compromise solution adopted in the last stages of MiFID II preliminary works. Therefore, there was a lack concerning the treatment of those systems which are able to trade equity instruments on a discretionary basis. This is why, MiFIR article 23(2) states that: "*An investment firm that operates an internal matching system which executes client orders in shares, depositary receipts, ETFs, certificates and other similar financial instruments on a multilateral basis must ensure it is authorised as an MTF under Directive 2014/65/EU and comply with all relevant provisions pertaining to such authorisations.*".

group. A rather relevant is the one provided by article 20(4), which states that the operation of an OTF and of a systematic internaliser cannot take place within the same legal entity.

Therefore, with the intention to summarize the complex scenario introduced with MiFID II, the main differences between the three different types of trading venues are the following. Firstly, between the RMs and the MTFs the difference lies mainly on the firms that may manage each one, as for RMs it must be a *market operator*, while for MTFs it could be also an *investment firm*. Secondly, if MTFs require orders to be managed in a *non-discretionary* way, OTFs are generally based on *discretionary* rules[276].

3.2.1.2. Systematic Internalisers

MiFID II confirms, alongside MiFID I, the existence of another different type of trading facility: the *systematic internalisers*. Once again, the definition provided by the legal framework turns out useful to understand the functioning of this facility. Article 4(20) states that:

> "***systematic internaliser*** *means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system*."

However, this is not a separate investment service, but a "combination of trading on behalf of the client and trading on own account"[277]. In order to be defined "*systematic*" the activity must fulfil certain specific requirements and characteristics neatly laid down in the second paragraph of article 20.

Pursuant to this provision, the *frequent* and *systematic* basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account when executing client orders; while the *substantial basis* shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or

[276] ANNUNZIATA, F. (2018), p. 1125.
[277] BUSCH, D. (2017), p. 129.

by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument.
If compared with the definition provided by MiFID I[278], there is the addition of "*substantial basis*" and, very straightforwardly, of the newly provided "*OTFs*". As Busch pointed out again, the addition of the prohibition to operate a multilateral system seems to be unnecessary, as there are no multilateral facilities other than trading venues[279].

3.2.1.3. Alternative Trading Platforms

In the recent years, technological innovations, and regulatory arbitrage, have brought to the development of a series of *alternative trading platforms*, boosting the *over-the-counter* (*OTC*) competitive markets. Considering the freedom that characterizes their functioning, there is not an overall definition of these platforms. However, they are generally recognized to be the prototype of *private* markets, in which transactions are concluded bilaterally and without any particular transparency obligation. All the alternative trading systems are featured with *dark* trading, meaning that data on price, volumes and time of trading are not made available to the public. Moreover, the operation of the transactions is conducted on a total discretionary basis.

3.3. Current European scenario: cross-border entities and FMI groups

In the first part of this chapter, it has been underlined how in the last twenty/thirty years the exchanges platforms scenario and, together with them, the regulatory frameworks, have drastically changed. Three main factors have contributed: *regulation*, *competition,* and *technology*. The innovations introduced have brought traditional exchanges in Europe to be generally shaped, through different methods (*e.g.*, mergers and acquisitions), as *cross-border entities* in the form of Financial Market Infrastructure (FMI). These are generally defined as groups, with a parent company able to control every trading aspect and to deliver crucial services for the smooth and orderly functioning of the trading market. The services offered go from

[278] Article 4(7): "*systematic internaliser means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF*". On this topic, MOLONEY, N. (2014), p. 467: "*The 2014 MiFID II/MiFIR has tightened the SI venue classification to address the regulatory arbitrage difficulties associated with the primarily qualitative 2004 MiFID I SI definition; the definition now has a strongly quantitative quality*".
[279] BUSCH, D. (2017), p. 129.

the pre-trade to the central clearing houses[280] and even post-trade services, supporting trading liquidity and coordinating different activities. As a consequence, exchanges ceased to have a sort of public role and became proper *for-profit* companies, with diffuse shareholders and an expansive line of business either vertically or horizontally. This meant that on the side exchanges have become no longer rooted to the territory of a single member state or country; while on the other that they have been able to enhance the spectrum of the activities offered, abandoning their role as public regulators.

The cooperation between exchanges in different states started in the early 2000s, when the demutualization phenomenon spread. The alliances were seen to be the answer to the innovations brought forward by the newly created alternative platforms. It was a way to counterattack and to grant an international and global perspective of growth to European capital markets. When the bourses went public even the remaining legal barriers to mergers and alliances were demolished. Nevertheless, as underlined in the previous chapter, the majority of these projects turned out into a failure. Ventures such as *i-X* or *Virt-X* had a relatively short lifetime, putting the ambitious plan of a sort of *Euro Listing* in the drawer.
However, the tendency to be organized into huge European alliances has not ceased, but it rather became even stronger in the last two decades. It should be noted that these groups may be highly differentiated in terms of legal forms assumed and activities carried out. Therefore, cooperation can take on the most diverse facets. For the purposes of this dissertation, particularly relevant are the tasks performed in the field of the admission to listing and trading and the supervisory and regulatory roles eventually engaged by each exchange group.

Firstly, it is rather interesting to understand that alliances between stock exchanges may adopt the most disparate legal forms. In the past coalitions were weaker, as they generally rested on not legally binding tools such as *letter of intents*[281]. Therefore, the parties were free to negotiate and cooperate with other stock exchanges. The drive

[280] The intermediary in a transaction with carries out two main functions: *clearing* (i.e., reconcile orders between sellers and buyers) and *settlement* (i.e., the process of payment from the buyer and transfer of securities from the seller, the last step of the transaction after which it is concluded).
[281] CLAUSEN, N. J., SØRENSEN, K. E. (2002) *Competition and Co-operation between Stock Exchanges in Europe – Legal Aspects and Challenges*, p. 388-389.

towards a more rigid system was felt immediately and legally binding contracts emerged.

The most common legal form was the *acquisition*, through which an exchange acquires the majority of the shares of another exchange. For example, OM Group in August 2000 launched a bid for LSE. In the past these takeovers were generally blocked by the shareholders whose shares were generally listed on the exchange. There was a lack of interest in these external initiatives. In the recent period, the acquisition of Borsa Italiana S.p.A. by Euronext, which will be further analysed later, has shaken the European balances, by consolidating even more the hegemony of the Dutch group.

Another commonly used form has been the *merger* between exchanges coming from different member states. The most relevant example is represented by the aforementioned Euronext, whose birth is due to the creation of a holding company by Dutch, French and Belgian exchanges.

The authors have also suggested the chance to use *joint ventures* and *crossholdings*. However, the former has being intended to be limited to certain and specific activities; while the latter may not be defined as a sufficient basis to establish a strong and durable cooperation.

Cooperation is a wide-scope concept, which may involve a broad range of different activities. Therefore, as already mentioned, these alliances have assumed tasks and duties in several different areas during the years. In particular, the trend has moved towards huge conglomerates of companies headed by a parent company, generally listed. Exchanges are nowadays to be intended as cross-border and multi-business entities, in which primary markets, trading venues, information and IT services, pre-trade and post-trade coexist creating a comprehensive strategy for the group[282]. This situation has some rather interesting outcomes as regards the activities of the regulators. It will be investigated how this newly developed panorama has changed competences in terms of admission to listing and supervision and regulation of issuers. One of the most controversial features of the MiFID II directive is that it does not "explicitly take into account FMI groups"[283]. Trading venues, exchanges, CCPs and other financial operations are considered singularly as monoliths, dropping group

[282] FERRARINI, G., SAGUATO, P. (2017), para 11.05.

[283] *Ibid.*, para 11.73.

organization in the background. The choice is generally justified by considering the historical subdivision between trading and clearing, the former being part of the securities regulation and the latter of banking and financial one[284]. Lawmakers have deliberately chosen to keep divided and separate the various service related to both trade and post-trade, avoiding any possible contamination. However, as it will be underlined, the European legislation has a certain degree of consideration towards the FIM groups activities, considering three particularly relevant areas of possible contamination: conflicts of interests, transparency of ownership and rules on access.

Before doing so, it could be useful to analyse the current scenario of the biggest exchanges companies in Europe, especially in light of the acquisition by Euronext group of Borsa Italiana, thus becoming the most capitalized exchange in the region. As it will be seen there are three main exchanges in Europe: Euronext, London Stock Exchange, and Nordic Exchange group. Organization, corporate governance, activities performed, and tasks assumed will be depicted in order to understand how this system concretely works and the risks implied, with a focus on Euronext group. The Swiss exchange will be shortly recalled as it represents a quasi-unique example of a market implemented as a limited liability company.

3.3.1. Euronext N.V.

Euronext group, currently the biggest pan-European exchange, was founded on 22 September 2000 through an ambitious merger project brought forward by the Amsterdam, Bruxelles and Paris official stock exchanges[285]. The three companies merged and simultaneously created a holding company, called *Euronext N.V.* having its registered office in the Netherlands and the corporate headquarters in Paris. All the shares were transferred to the newly created parent and successfully listed with an IPO one year later, in July 2001[286]. In the meantime, the three founding companies also changed their names: the Dutch Bourse (former "*Amsterdamse effectenbeurs*") became "*Euronext Amsterdam*", the French Bourse (former "*Bourse de Paris*") became "*Euronext Paris*", and the Belgian Bourse (former "*Beurs van Brussel/Bourse de Bruxelles*") became "*Euronext Bruxelles*". The aim was to create a Europe's centre to

[284] *Ibid*., para 11.74.
[285] For further details: see Euronext official website, available from: https://www.euronext.com/it.
[286] "*20 years of Euronext*", available from https://www.euronext.com/en/about/media.

raise capital and to offer any kind of financial instruments and securities, trying to keep pace with the development and evolution of the financial markets with a strong transnational perspective In addition, in 2002, the Portuguese official exchange (former "*Bolsa de Valores de Lisboa e Porto*") was incorporated with an acquisition to the group, being named "*Euronext Lisbon*"[287].

However, a decisive step forward the internationalisation was made on 4 April 2007, when, through the merger with New York Stock Exchange, the first transatlantic exchange was created: "*Euronext NYSE*"[288]. The headquarters were in New York and the newly founded company could offer an outstanding 21-hours span of trading. The company remained in the group until 2013, when Intercontinental Exchange ("ICE"), one the leading networks for commodities and derivatives trading, acquired the company for a comprehensive price of 8,2 billion dollars of takeover[289]. With this ambitious project ICE was able to, on the one side, retain LIFFE and, on the other, to relocate the European exchanges on the market launching a new IPO on 20 June 2014[290].

Meanwhile, between 2012 and 2014, "*Euronext London*", after the recognition by the British FCA, was established, thus covering also the United Kingdom financial markets[291]. In addition, on 27 March 2018, the escalation in Europe continued with the announcement of the acquisition of the Irish Stock Exchange (former ISE, now *Euronext Dublin*) for almost 137 million of euros[292]. On 18 June 2019, a new acquisition was announced: the Oslo Stock Exchange ("*Oslo Børs"*) was incorporated by the purchase of the 97.8% of the outstanding shares and by consolidating the accounts[293].

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[287] This happened together with the acquisition of the London-based market for futures and options, the so-called LIFFE derivative market.

[288] TRAN, M. (2006) New York stock exchange and Euronext merge. *The Guardian***.** 2nd June.

[289] DAVID, J. E. (2012) ICE to Buy NYSE for $8.2 Billion, Ending Era of Independence. *CNBC.com*. 20th December..

[290] MILLER, C. (2014) Intercontinental Exchange Announces Closing of Euronext Initial Public Offering. *Business Wire*. 24th June.

[291] However, the project was not successful. Only one listing (Getlink) has been registered and in 2020 Euronext decided to shut down this exchange and to remain in London conducting different activities. See REUTERS STAFF (2020) Euronext shuts London exchange that had one listing. *Reuters*. 28th May.

[292] See Euronext press release, available from: https://www.euronext.com/en/about/media/euronext-press-releases/euronext-completes-acquisition-irish-stock-exchange. See also TURAK, N. (2017) Euronext acquires 100 percent of Irish Stock Exchange in 'strategic' move. *CNBC.com*. 31st December.

[293] See Euronext press release, available from: https://www.euronext.com/en/about/media/euronext-press-releases/euronext-completes-acquisition-oslo-bors-vps.

An historical step towards what it can be called for all intents and purposes a European exchange, taking also into account the Brexit, was made lately with the acquisition of the 100% of the shares of Borsa Italiana S.p.A. (the Italian Stock Exchange) from the London Stock Exchange group[294]. The exclusive and formal dialogues between the two behemoths started on 18 September 2020[295] and a first 4.3 billion of euros deal was announced in October. Actually, the acquisition was officially and formally announced on 29 April 2021 for a price of 4,444 billion of euros[296]. Borsa Italiana retained its name, but it is expected a rebrand in duly course, rebrand which has already occurred with reference to the various market segments (*e.g.*, MTA became "*Euronext Milan*").

This historical operation has confirmed how the project Euronext, born with huge perspectives, represents the future of the European capital markets. The group was able, in less than 20 years, to consolidate itself as a leader in the field by creating a strong union between Europe's most relevant business centres.

Nowadays the company, according to the welcome acquisition announcement[297] and the latest reports of 2021[298], may forge itself as the largest exchange in terms of listed companies on its markets (nearly 1890 listed companies) and a total worth of 6.9 trillion of euros in terms of market capitalization.

Moreover, in addition to the main regulated markets, Euronext disposes also of "*Euronext Growth*" and "*Euronext Access*", MTFs dedicated to the trading of instruments issued by small and medium-sized enterprises (SMEs).

In the past, the group was developed via a horizontal integration, by outsourcing post-trade services[299]. Following the 2021 acquisition of Borsa Italiana, *Cassa di Compensazione e Garanzia* ("CC&G") became part of the group, assuming the name

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[294] LSE became owner of Borsa Italiana through a takeover dated October 2007, thus creating the LSE group.

[295] JONES, H. (2020) LSE engages Euronext in exclusive Borsa Italiana talks. *Business Insider*. 18th September.

[296] REDAZIONE FINANZA (2021) Euronext chiude su Borsa, Intesa e Cdp entrano in aumento. A Bergamo il data center. *Il Sole 24Ore*. 29 th April 2021. See also: AMARO, S. (2021) Stock exchange group Euronext acquires Borsa Italiana in a deal worth over $5 billion. CNBC.com. 29th April.

[297] Available from: https://www.euronext.com/en/investor-relations/financial-calendar/acquisition-borsa-italiana--group.

[298] Available from: https://www.euronext.com/en/investor-relations/financial-information/financial-reports.

[299] FERRARINI, G., SAGUATO, P. (2017), para 11.47.

"*Euronext Clearing*" and granting the services of the clearing house to the company. Euronext also offers custody and settlement services thought its subsidiary "*Euronext Securities*". Euronext Securities is the new born Central Securities Depository (CSD) network, which combines under a unique commercial name the four different Euronext CSDs: Euronext VPS (Norway), Interbolsa (Portugal), Monte Titoli S.p.A. (Italy) and VP Securities (Denmark). Created in November 2021, it has assets under custody totalling more than 6.5 trillion of euros, more than 5.5 million of securities accounts and 7.8 thousand of issuers[300].

Euronext represents the best example of the renewed tendency of the exchanges to be organized in cooperation one with each other. However, it is not the only market operator in Europe which is characterized by this legal form. Since the demutualization phenomenon spread, exchanges have been brought to look for new opportunities to further develop their business. Another relevant example of pan-European exchange is represented by Nasdaq Nordic. On the other side, historically crucial marketplaces such as London and Frankfurt have tried to maintain their relevance by modernizing their operational and organizational model. Moreover, there is the unicum example of the Swiss exchange which has remained a limited liability company. A brief recall of these exchange structure may be useful to fully understand the current European scenario on the topic.

3.3.2. London Stock Exchange Group

The London Stock Exchange Group is a United Kingdom holding company, headquartered in the City of London. The main subsidiary, since the departure of Borsa Italiana, is represented by the London Stock Exchange (LSE), on which the parent is also listed. As to January 2022, the total market capitalization hovers around 3.9 trillion British pounds[301]. As it has been underlined in the previous chapter, there are two principal markets segment on which companies may trade their financial instruments: the Main Market and the Alternative Investment Market (AIM). The first

[300] For further details see Euronext official website, available from: https://www.euronext.com/it/post-trade/euronext-securities.

[301] https://www.statista.com/statistics/324578/market-value-of-companies-on-the-london-stock-exchange/.

one has approximately 1.300 listed companies, while the latter is designed for smaller companies, and it is organized in the form of the MTF[302].

As a vertically integrated firm, LSEG is able to provide also post-trade services, such as clearing and settlement. Those particular tasks are carried out by a subsidiary: LCH Ltd, based in London[303].

3.3.3. Deutsche Börse Group

The Deutsche Börse Group is the German most relevant market operator and the owner of the "*Frankfurt Stock Exchange*" and "*Xetra*". The company offers any kind of trading concerning shares and securities and it also recognized as a post-trade servicer provider[304]. As to March 2022, with its outstanding market capitalization of 33.17 billion of US dollars, the holding has the highest market value in Europe[305].

As it has been underlined, the parent company has tried several times to complete mergers and alliances with other stock exchanges (for example in 2000, 2001 and ultimately in 2016 there were attempts to merge with LSEG and in 2006 its offer to acquire Euronext was overtaken by NSYE). There was also an ambitious attempt to merge with NYSE Euronext, thus creating the biggest exchange in the world. Nowadays DBG seems to be satisfied with the position it has gained on the market. As a vertically integrated group, it also offers clearing a settlement service, through its fully owned company, "*Eurex Clearing*".

3.3.4. Nasdaq Nordic

Nasdaq Nordic is a fully owned company belonging to the giant *Nasdaq Inc.* and providing financial trading and services in the north of Europe. Between 2003 and 2007, the ascent of the then-named "*OMX AB*" brought to various alliances and acquisitions, making the Copenhagen, Stockholm, Helsinki, Reykjavik, Tallin, Riga and Vilnius under a single economic entity. In 2008, after a prolonged period of complex transactions, the group was taken over by NASDAQ, which also changed the name to all the subsidiaries[306]. It operates through a single rulebook for listing, offers

[302] See the LSE official website, available from: https://www.londonstockexchange.com/.
[303] See https://secure-area.lchclearnet.com/cash_equities/lse/.
[304] See DBG official English website, available from: https://deutsche-boerse.com/dbg-en/.
[305] https://companiesmarketcap.com/deutsche-boerse/marketcap/.
[306] See Nasdaq Nordic official website, available from: http://www.nasdaqomxnordic.com/

a growth market for SMEs and post-trade services thanks to the fully owned company of "*Nasdaq Clearing AB*" (incorporated in Sweden). As Euronext, each national market is authorised and supervised by the competent national authority.

3.3.5. SIX Swiss Exchange Ltd

In this panorama of profit-taking and generally self-listed companies, the utmost relevant Swiss stock exchange represents a unicum. It is based inn Zurich and owned by SIX Group, which is an unlisted public limited company participated and owned by 125 Swiss and non-Swiss financial institutions[307]. This is the concrete difference if compared to other relevant stock exchanges. However, as the other exchanges analysed, the company offers not only trading services (mainly equity and stock) but also post-trade services, through its division: SIX Securities Services.

3.4. Relevant outcomes

From the depicted scenario, it is straightforwardly understandable to what extent the trend with reference to stock exchanges and financial markets has changed in Europe. When they opened to the public, leaving behind their *quasi-public* nature and the monopoly status in which they laid, they became profit-taking companies, each one pursuing its own business interest. Therefore, these alliances have been developed to keep pace with technology innovations and to obtain an enhanced internationalization. A rather interesting outcome may also be an increased decree of harmonization, which on a legislative and regulatory level has not been achieved yet. As a consequence, stock exchanges may be seen no more as national flagships, as the most capitalized ones have assumed a proper European and even international dimension.

Scholars and doctrine have discussed the aftermath of this situation. On the one side, it has been underlined how the increased competition has influenced the regulatory and supervisory role of the market operator, by reducing the importance and the relevance of a public legal framework on the topic[308]. On the other, the increased

[307] See SIX Group official website, available from: http://www.six-group.com/.
[308] See, among others, MAHONEY, P. G. (1997).

concentration between exchanges coming from different countries has brought the critics to interrogate themselves on whether this competition is effective or not.

3.5. Common features and cooperation activities

The key element while considering the operational activities of those exchanges groups is represented by the common information and technology system. A shared, integrated, and comprehensive system is the basis through which these entities operate. On the one side, considering the trading activities, investors have a sort of "single gateway"[309] to the market; on the other issuers may deal with only one system. Common information concerning prices, volumes and time of the transactions are made available from one only source so that investors and financial intermediaries may not have to gather them from different systems. This may be achieved only by granting that the information circulates in the same form and respecting the same disclosure requirements.

A notable example of this is represented by the "*Single Order Book*" provided to the market participants of Euronext. In particular, the most important pan-European market disposes of centralized technologies capable of granting not only the operational activities of each market operator but also the circulation of comprehensive information in real time. As it can be captured from a special section of the website[310], technology has carved out a crucial role not only on Euronext, but generally in every trading platform, as it gives the chance to grant fair and orderly organized trading and investors constantly have at their fingertips every information they possibly need.

3.6. Regulation of admission to listing and trading

Another relevant feature is the chance to facilitate and enhance *cross-border* listings, by reducing costs and granting a mutual recognition of the issuers. The models described above have, from recent years, abandoned the idea of a single "*Euro listing*", whose failure has been connected to several number of factors. In the previous it has been underlined how the projects going in that direction have been put in the drawer, focusing on different perspectives.

[309] CLAUSEN, N. J., SØRENSEN, K. E. (2002), p. 391.

[310] See Euronext official website, "*Euronext Technology*", available from: https://www.euronext.com/en/technology.

Nowadays, the choice to form alliances and mergers has been justified on a commercial and opportunistic point of view. For example, as regards Euronext, an issuer whishing to be listed on its markets must decide the "*entry point*", *i.e.*, the country of one regulated market operated and managed by the company itself. This means that an issuer will be listed according to the rules, even if harmonized and aligned, of one country to which he will remain subjected for the entire duration of this corporate life, save that it does not go for a *cross* or *double* listing. Therefore, a company, even if Euronext is increasingly similar to a proper European bourse, will be listed in *one* country and not on European level. The organization and the harmonization granted by common rules and systems will easily permit trading of the issuer's instruments on various markets, but the issuer will be, in any case, subject to one specific market and country listing rules.
In this respect, Euronext provides specific information[311] to issuers whishing to go public. Therefore, they may carefully consider which of the markets controlled by the firm best suit their needs, being the "*ideal country which to list*"[312]. This section provides an overall description of the regulated markets (*Euronext*) and the MTFs (*Euronext Growth* and *Euronext Access*) managed by the company and some data concerning the number of issuers and the average deal size and market cap at the IPO. In particular, it suggests that *Euronext* (with its three compartments/segments and high level of eligibly criteria and liquidity) stands for large and established companies, *Euronext Growth* (with medium level of eligibility criteria and a high level of liquidity) for high-growth SMEs, while *Euronext Access* represents (with its low level of listing requirements) a very first step for start-ups and SMEs.

However, for the purposes of this dissertation, the rather interesting part is the eligibility criteria's chart. By focusing on *Euronext*, it is straightforward how by choosing one country rather than a different one, the requesting issuer will be subject to different accessing rules. For example, the free float required to be listed on *Euronext Dublin* is lower (€1m) than for all the other regulated markets (€5m or at least 25% of the market cap). Moreover, financial statements are required as audited

[311] See Euronext official website, "*How go public*" section: https://www.euronext.com/en/raise-capital/how-go-public/choosing-market.
[312] *Ibid*.

and for 3 years, except for *Euronext Expand*, to which the request could be made only by providing 1-year financial statement. As a last example, the intermediary must generally be a Listing Agent, except for Dublin (Listing Sponsor) and Oslo (on which it is not required). Those differences are even more pronounced for the MTFs[313], as the flexibility of the regulatory requirements permits to do so.

3.7. Capital Markets Union

The formation and the development of Pan-European and cross-border groups has been also interpreted as a way to foster capital markets integration from a private point of view. However, in the last few years attempts to further harmonize financial markets regulation have been done. One of the most ambitious projects on the theme is the "*Capital Markets Union* (CMU) *Action Plan*".

The first plan was launched in September 2015 by the former president of European Commission Jean-Claude Junker. The proposal was based on the intention to promote a series of economic policy initiatives aimed at the creation of a proper single market[314]. EU capital markets, as it has been underlined, are still excessively fragmented and companies are bond to banking and debt financing methods. The main objectives consisted in fostering cross-border and retail equity investments, encouraging a long-term perspective, supporting access to public markets for SMEs and helping collaboration in terms of supervision and regulation between different member states.

In the first five years (included three years after the 2017 *mid-term review*), even if some priorities have been added to the list, the project encountered some difficulties in going forward. Nevertheless, the newly appointed president Ursula Von der Leyen has decided to pursue the project in order to support a greener economy and to finally reach an integration of national capital markets and a genuine single market[315].

As to the present period, the European Parliament and Member States have agreed on some of the legislative measures proposed: among all the most relevant regards STS

[313] See the chart, *ibid*.
[314] For further details see European Union official website, available from: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/what-capital-markets-union_en.
[315] See: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan_en.

securitisation regulation, prospectus regulation, covered bonds, promotion of SMEs Growth Markets and European market infrastructure (EMIR) regulation[316].

3.7.1. CMU on admission to listing

The projects concerning a proper *European listing* may be defined as failed. Pan-European groups, such as Euronext, grant a common trading and technology system which helps for a further integration, but each market still remains separate and unique from a legal perspective. So, as it has been highlighted, even if private and profit-taking companies may have helped and fostered the harmonization on an economic point of view, legal barriers seem to be still unsurmountable. Some scholars, together with the advent of the CMU Action Plan, have theorized the proposal to centralize the scrutiny and the approval of the admission to listing (and trading) in the hands of a single European authority. This option has been brought forward several times in the past, but it succumbed mainly due to the unwillingness of the member states to lose their competence in the field of securities markets. In addition, the fragmentation, other than the experiences of Euronext and Nasdaq Nordic, is still a feature of the financial markets in Europe. There have been also many legal constraints and some practical considerations which have slowed down the feasibility of this ambitious project. May a central and single and pan-European admission authority be possible? Could it be useful to reach a higher level of harmonization?

3.7.2. Single listing authority?

The integration of capital markets in Europe has reached in the last few years, higher levels than in the past. The organization of the main exchanges in the form of cross-border entities has definitely fostered the process. However, issuers seeking to obtain an admission to listing still have to choose a point of entry between those offered by the holding company. This means that, harmonization is still far from being completed. However, the CMU Action Plan has given the necessary boost in order to make a final step towards a single market. In particular, some scholars have highlighted how the package of proposals by the Commission could be the best opportunity to re-open an historical debate on whether the European Union should be

[316] For further details on provisions already in force: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/legislative-measures-taken-so-far-build-cmu_en.

equipped with a single authority dealing with the scrutiny and the approval of the requests. The lack of a central authority and, therefore, the presence of a different NCA in relation to each of the member states, has always been a theme of discussion[317].
According to the authors' point of view, the current European capital markets' scenario should be taken into account. Firstly, Brexit has definitely shaken the balances of the European financial markets. The loss of such a dominant financial centre may represents a double-sided issue. On the one hand, the "single market" has lost its most relevant and capitalized market spot, leaving the other marketplaces (Paris, Frankfurt, Milan, and Amsterdam) in a situation in which no one has a predominance on the other[318]. At the same time, the United Kingdom leaving the EU, has left space to change the balance of powers and build a new securities market structure[319]. The authors, in particular, suggest that the "Single Rulebook" implemented by MiFID II represents a good starting point together with the creation of the European Securities and Markets Authority ("ESMA"), which is identified as the authority which should be the responsible for the scrutiny and the approval[320].
In addition, it should be noted that, the acquisition of Borsa Italiana, as analysed above, has brought Euronext to a further stage of its development. The holding is now able to count on another crucial marketplace, such as Milan, enhancing its predominance in Europe and creating a proper European market, even if without a centralized authority.

Before mentioning the advantages and disadvantages of the system proposed by the scholars, it could be useful to recall some of the ESMA's responsibilities and roles in order to understand whether it could be the right choice. ESMA, as it has been underlined in the first chapter, is an independent authority of the European Union based in Paris since January 2011, when it replaced the former Committee of European Securities Regulators (CESR)[321]. Its regulatory competences go beyond those of the other two ESAs, forming the European System of Financial Supervision. ESMA disposes of a wide range of tasks and duties, which make it the "nearest organization to a single listing authority for a single market"[322]. Firstly, it acts as regulator. The

[317] AVGOULEAS, E., FERRARINI, G. (2018), p. 56.
[318] *Ibid.*, p. .57.
[319] *Ibid.*, p. 57.
[320] *Ibid.*, p. 57-58.
[321] For further details see the ESMA official website, available at: https://www.esma.europa.eu/.
[322] MOLONEY, N. (2018).

most relevant assignment is to function as licensing registration authority for the Credit Rating Agencies (CRAs), which is also one of the reasons why it was created. The aim was to grant a reinforced transparency in the field of the RAs, following the crisis of 2009. In addition, ESMA has a role in licensing and supervision of Central Counterparties and Trade Repositories. According to these powers, ESMA may apply a prudential regime and corporate governance controls. Moreover, such authority has also the chance to issue technical standards, to implement emergency measures and, even sanctions in extreme cases.

Therefore, taking into account the wide scope and range of ESMA powers, nothing, at a primary level of legislation, impede to potentially assume a role as the single and centralized authority for the admission to listing in Europe[323]. An intervention on the secondary legislation should be enough to grant to ESMA a renewed position as *European Union Listing Authority* ("EULA").

After having considered all the potential obstacles to such a reform, both positive and negative aspects of this historical change must be investigated. The aforementioned authors tried to reconstruct whether a centralization of the scrutiny of issuers seeking the admission on regulated markets may gather and deepen the European capital markets integration. Their starting point is represented by the fact that, even if a decentralization may consent to each exchange to carry out the relevant function in an efficient way tailored to their business model, the chance to centralize the admission of IPOs and Seasoned Equity Offers (SEOs) does not affect the quality of the instruments and, in addiction, may avoid the conflicts of interest deriving from a profit-taking which decides on the admission[324].

The main advantage is definitely connected with the provision of a uniform and unique list of pre-set rules concerning the admission to listing. In this way, even if Listing Directive has set a minimum decree of harmonization between different member states, the differences still existing between member states would be eliminated. As it has been underlined in the first chapter, "*listing particulars*" contained in the Directive 2001/34 are considered mainly outdated and NCAs tend to establish different rules. Furthermore, pan-European markets, among all Euronext, would become effectively

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[323] AVGOULEAS, E., FERRARINI, G. (2018), p. 57-58.

[324] *Ibid.*, p. 64.

functioning. Their formation and development, which spread in the last few years, would be completed. In the meantime, they could remain responsible for the admission to trading on each segment, while EULA could easily enjoy economies of scale. Lastly, European Union could have the chance to create an own "*listing brand*", which can be associated to a prominent level of standards and quality features. By doing this, Europe may have the chance to compete with hugest securities market in the world, including United States and the City of London.
In conclusion the authors propose three main advantages: a reduction on transactional costs (costs related to administrative and cross-border activities will be automatically removed), a single entry point jointed to a single source of regulation (all the differences between member states on the theme will be eliminated) and a pan-European platform where biggest companies may have the opportunity to be listed and traded.

The last concept is the key one in the project proposed by the authors, as they intend to relate this system only to largest IPOs and issuers in general[325]. In this way, in their opinion, the main disadvantage (which is connected to the possibility to establish a minimum level of decree of competition between different exchanges) is eliminated. Thus, by maintain the "*federal*" system of admission with reference to the smaller issuers, exchanges and markets may have the chance to compete on different fronts. This is connected also with the provision of a new "SMEs Growth Prospectus" and the boost which the CMU is trying to give to SMEs listing and trading. In this way, while blue-chips companies may have the chance to be traded and listed according to a pre-set of standardized rules, growth markets may retain their position in a highly competitive market.

This theme is strictly connected with the theme of the admission to trading as distinguished from the admission to listing analysed in the previous chapter. In the project proposed by the authors a sort of renewed "*Euro listing*" is disposed. In particular, listing and trading are seen as two different stages of the same process, according to which *listing* has the task to act as a preliminary filter assuring a minimum

[325] In particular they make reference to three main features: issues of 5 billion euros and over; issuers with at least 10 billion euros of turnover; or those with cross-border activity/exposure that is at least 40 per cent of overall turnover when the issue is over EUR 1 billion.

quality of the instruments; while *trading* is more "specific and tailored to the needs of each financial market[326].

3.8. Regulatory and Supervisory role

One of the most discussed themes, immediately after the demutualization of the stock exchanges, has been the question on whether, as private and profit-taking entities, they should keep their regulatory and supervisory role or not.

To kick-off the discussion, it is firstly crucial to underline that *regulation* and *supervision* must be intended as two different activities, even if conducted by the same authority or body. Regulation is strictly connected with the rule-making process by the issuance of laws, regulations, and guidelines with reference to the activities and operations. By contrast, supervision entails the moment immediately after the regulation, *i.e.*, the monitoring of compliance with the regulation set out.

However, as it has been highlighted above, the answer was not unique in Europe, as any specific country decided to adopt a different strategy, taking account its historical approach.

For example, Italy maintained Borsa Italiana, the market operator; while LSE, as an evergreen example, shifted the competence for the *admission to listing* on the main market to a public authority. Another example is represented by the aforementioned German exchange: the admission to listing is decided by Board of Admissions within the *Frankfurt Stock Exchange*, which is a separate legal entity incorporated under German law and different from its parent Deutsche Börse AG and part of whose member should be not professionally involved in the exchange trade of securities[327].

However, there is not a "right solution"[328]. Therefore, even scholars have been divided on the topic, part of them arguing that its regulation on admission and supervision could be an incentive to obtain new portions of market, other saying that it could not be expected a meticulous control, with a possible lowering of standards.

On the one side, positive effects may derive from the fact that self-regulation may grant better standards as stock exchanges are incentivised by competitive advantages.

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[326] See, among others, MOLONEY, N. (2014).

[327] See the section on the admission to listing on the official website, available from: https://www.deutsche-boerse-cash-market.com/dbcm-en/primary-market/going-public/ipo-line-going-public/regulated-market/!ipo-21854-59780.

[328] FERRAN, E. (2004), p. 248.

Firstly, Mahoney has deeply argued on the theme in favor of the idea that exchanges should retain their role as regulators, on the ground of several reasons. He believes that "exchanges should be the primary writers and enforcers of rules relating to disclosure by listed companies, standards of conduct for member broker-dealers, and market structure"[329]. Keeping investors vested with benefits represents the major incentives for exchanges, which, as it has already been underlined, "are typically owned by their members, who are stockbrokers or other professional intermediaries and their incomes rise as the volume of transactions rises"[330]. Therefore, market managers should be pushed forward by the urgency to attract investors, by established rules and listing standards able to generate value for them "until the value investors attach to further benefits is outweighed by the cost of providing them"[331]. The author underlines also the fact that, public regulators place themselves in a position of substantial disadvantage in terms of "information, experience, and incentives compared to an exchange"[332]. Therefore, with the aim to associate their operational and rules system to a *premium brand*, exchanges may increase standards and enhance market supervision. In addition, their knowledge and expertise flanked with developed infrastructures and skill-based supervision are able to grant a direct access to market information and participants which could not be reached by public authorities and regulators[333]. Mergers and alliances bringing together exchanges from all across Europe should result in a corresponding transactional supervisory and regulatory role, enhancing international responsibilities[334]. One of the most positive outcomes, considering the level of harmonization reached by the MiFID II directive and the obligation of cooperation between different national authorities, which derives form the concentration of different exchanges in one single economic entity is represented by the facilitated dialogue between different countries regulators and authorities.

On the other side, there are also counter arguments to the provision to make stock exchanges as regulators and supervisors. As analysed above, the main concern regards

[329] MAHONEY, P. G. (1997), p. 1455.
[330] *Ibid.*, p. 1457. The concept according to which, exchanges cannot be defined as proper listed companies, as their shareholders are typically also their clients is supported by other scholars. Among all, see DI NOIA, C. (2002), p. 57.
[331] *Ibid.*, p. 1459.
[332] *Ibid.*, p. 1462.
[333] FERRAN, E. (2004), p. 255.
[334] LICHT, A. N. (2001).

a possible dropping of standards, as profit-taking companies may be discouraged to rigorously apply regulatory requirements. They may be tempted to be driven by self-interested purposes in the attempt to reach the maximization of shareholders' profits. This approach could lead to socially detrimental effects and market fragmentation.
For example, there may be negative aftermaths of exchanges as assuming a regulatory and supervisory role. Three main issues could come into existence: major exchanges usually face insufficient competition from other markets to deter them from acting like cartels (Euronext, for example, is a position not comparable to any other exchange in Europe); *restrictive rules* are inefficient; and that governmental regulators can identify and eliminate inefficient rules while keeping those that create wealth[335].
Other authoritative scholars, Di Noia, has investigated the potential aftermaths related to regulatory exchanges. believes that the entry of new potential investors other than issuers and intermediaries (*i.e.*, shareholders particularly focused on *profit maximization*) may cause a dropping of human, technological and financial resources dedicated to regulatory and supervisory activities. In particular, the scholar makes reference to the possible issues coming from the aforementioned listing fees amounts[336]. The scholar also raises concerns and issues related to the potential conflicts of interest regarding regulatory and supervisory set of rules established by "*self-listed*" exchanges. In particular, the author underlines that, especially with reference to *on-going* disclosure, which several times may involve also temporary suspension and removal of traded instruments, the authority and independence of the supervision could be weakened by a "fictitious" contraposition between two entities (the "*supervisor*", *i.e.* the exchange and the "*supervised*", *i.e.* the exchange management)[337].

However, it should be noted that since MiFID I and even more with MiFID II the trend has shifted towards a strong regulation of capital markets with the aim to reach a stronger harmonization.

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[335] For a comprehensive and deeper analysis, see MAHONEY, P. G. (1997), p. 1476-1496.
[336] For further details see DI NOIA, C. (2002), p. 60: "*...il tipico esempio è quello del listing nel quale gli incentivi ad avere il maggior numero di emittenti quotati (paganti listing fees) e il costo di avere strutture adeguate per le istruttorie e sufficientemente indipendenti per rigettare i lemons, potrebbero portare ad ammettere a quotazione titoli di emittenti senza adeguate garanzie.*".
[337] *Ibid*., p. 62.

3.8.1. Euronext regulatory and supervisory framework

In order to fully understand the issue and conclude the discussion on the topic, a practical example may be useful. With reference to Euronext, the company provides information on how each of the controlled market is regulated and supervised, according to MiFID II. In particular, as it has been underlined above, all the regulated market are connected via a single trading platform and a unique single order book, separated from the one dedicated to MTFs. In addition, as specified on the holding website[338], each national regulators of Euronext's markets are parties to a *Memorandum of Understanding*. From a legal point of view, a memorandum of understanding, even if not legally binding, is a formal agreement between two or more parties outlined in a document, which defines the scope and purpose of the relationship and entailing each party's roles and responsibilities.

The agreement creates the "*Euronext College of Regulators*" (CoR) and provides a framework to coordinate supervision and regulatory authorities of the financial markets controlled by Euronext. The bodies involved are the Portuguese CMVM and the Belgian (FSMA), British (FCA), Dutch (AFM), French (AMF) and Norwegian (FSA) financial authorities. These authorities have identified certain areas of common interest and have adopted a coordinated approach to the exercise of their respective national rules, concerning listing and prospectus disclosure requirements, on-going obligations of listed companies, takeover bid rules and disclosure of large shareholdings. Everything without prejudice to each other's domestic competencies and responsibilities and subject to any laws or regulatory requirements in force in, or applying to, their respective jurisdictions. For the purposes set out above a Committee of experts has been appointed, whose chairman changes on a regularly basis.

As regards specifically the Regulated Markets operated by Euronext (7 securities markets and 6 derivatives markets), the holding has disposed *single Euronext Rule Book* which governs trading. It contains both *harmonised* and *non-harmonised* (*i.e.*, local) rules. Therefore, it is divided between "*Book I*" which disposes the rules collectively and "*Book II*", which entails the rules related to each, approved by the regulators in Belgium, France, Ireland, the Netherlands, Norway, and Portugal[339]. In

[338] See https://www.euronext.com/en/regulation.

[339] See https://www.euronext.com/en/regulation/euronext-regulated-markets.

particular, the harmonised rules disposed in Rule Book I contains rules of conduct and of enforcement, designed to protect the markets, as well as rules on listing, trading, and membership; while the non harmonised rules provided by Rule Book II are divided with reference to each of the Euronext segments in each of the member countries.

3.8.2. CMU on regulation and supervision

On the back of the considerations made with reference to the centralization of scrutiny and approval of the admission to listing and prospectuses, it is rather interesting to understand whether a CMU fully fledged regulatory may exist. The feasibility of centralized regulation and supervisory single authority similar to the American Securities Exchange Commission (SEC) has been investigated[340].

The main improvement would be based on the elimination of the home country bias and the possibility of regulatory forbearance for the bigger firms. It would be granted a more efficient information flow with an enhanced supervisory enforcement trough out the entire Europe.

However, it poses several challenges in terms of viability and constitutionality of the reforms, as it would drastically change the current supervisory panorama with a complete substitution of the ESMA's position. The renewed EU-SEC should be able to impose sanctions and control the market abuses. In particular, this would mean that the new authority will be involved in areas concerning not only legal, but also natural persons. Therefore, it would be moved to a more litigious field and not only to fines and sanctions in general.

In conclusion, as suggested by the authors, the constitutionality of the project will be certainly evaluated[341], meaning that cross-border and multiple conflict of jurisdiction may arise. The ruling of courts assuring ESMA (and, as a consequence, a similar authority potentially created) with the chance to irrigate cross-border sanctions in emergency cases (*i.e.*, *short sales conduct*[342]) cannot be said to be a sufficient legal basis.

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[340] AVGOULEAS, E., FERRARINI, G. (2018), p. 69-72.

[341] *Ibid*, p. 72-76.

[342] See Case C-270/12 Judgment of the Court (Grand Chamber) *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (Regulation (EU) No 236/2012 [2012] OJ L86/1 (14 March 2012)—Short selling and certain aspects of credit default swaps—

3.9. FMI Groups and post-trade regulation

Nowadays, exchanges and market operators are generally organized not only as cross-borders entities, but also as vertically integrated groups. In particular, by simply looking at the services offered by each of the most important European financial market, they act also as post-trading facilities, such as clearing and settlement. The issue derives, as it has already been underlined, from the fact that securities regulation is historically not related to those subjects, which are more pertinent to banking legislation[343]. MiFID II was not able to grapple the deficiency, thus considering investment firms and market operators as single entities. However, there are three sectors in which a sort of embryonal consideration of FMI groups has been reached: conflicts of interest, transparency of ownership and rules on access.

Starting from the first theme, it is disposed under Article 18 (for MTFs and OTFs) and Article 47 (for regulated markets). In particular, paragraph (4) of Article 18 establishes that market operators shall: "…*have arrangements to identify clearly and manage the potential adverse consequences for the operation of the MTF or OTF, or for the members or participants and users, of* ***any conflict of interest*** *between the interest of the MTF, the OTF, their owners or the investment firm or market operator operating the MTF or OTF and the sound functioning of the MTF or OTF*"[344]. The same wording is utilized by Article 47(1)(a) of the MiFID II in terms of the requirements established to operate a RM. However, as underlined by Ferrarini and Saguato (2017)[345], the great lack is connected with the theme of the conflicts of interest between trade and post-trade activities. Even if the fact that those services once carried out by the same entity as a group may cause a series of consequences for both investors and issuers, MiFID does not provide any specific provision concerning the issue at stake.

As regards transparency over shareholders and ownership in general, the requirements laid down for regulated markets are similar to those disposed for MTFs and OTFS. In particular Article 46, entitled *"Requirements relating to persons exercising significant influence over the management of the regulated market*", requires not only to disclose

Article 28—Validity—Legal basis—Powers of intervention conferred on the European Securities and Markets Authority in exceptional circumstances), 22 January 2014.

[343] FERRARINI, G, SAGUATO, P. (2017), para 11.74.

[344] Directive 65/2014/EU, Article 18(4).

[345] FERRARINI, G, SAGUATO, P. (2017), para 11.76.

persons who are "*in a position to exercise, directly or indirectly, significant influence over the management of the regulated market*"[346], but also to be *suitable*. In addition, any change to the corporate structure must be communicated to the authorities, which shall refuse to approve proposed changes to the controlling interests when there is a "*threat to the sound and prudent management of the regulated market*"[347].

The theme of the access to the market has been detected by the European Union in order to avoid any possible distortive effects derived from the composition of FMI groups on investors and issuers. After the reform, it was introduced mandatory trading and clearing for derivatives. In particular article from 36 to 38 address the issue at stake.

In conclusion, as we have underlined above, MiFID does not provide for a comprehensive regulation and supervisory framework in relation to cross-border and vertically integrated groups. Operators, exchanges, and trading venues situated in different member states, even if within the same group, will be supervised by regulators of such countries in accordance with the "*obligations to cooperate*" principle, as stated in Article 79[348]. This is translated in the fact that the EU lacks a consolidated vision. This is the reason regulators should consider a regulatory intervention to fill the gap. Authoritative scholars suggested two ways: the colleges of CCPs under EMIR and the regulatory framework of the Financial Conglomerates Directive[349].

[346] Directive 65/2014/EU, Article 46(1).
[347] Directive 65/2014/EU, Article 46(3).
[348] Directive 2014/65/EU, Article 79(1): "*Competent authorities of different Member States shall cooperate with each other where necessary for the purpose of performing their duties under this Directive or under Regulation (EU) No 600/2014, making use of their powers whether set out in this Directive or in Regulation (EU) No 600/2014 or in national law.*".
[349] FERRARINI, G, SAGUATO, P. (2017), para 11.80-11.85.

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