Łukasz Chyla*
ORCID: 0000-0001-7353-8125
Uniwersytet Jagielloński
Uniwersytet Warszawski

DOI: 10.19195/1733-5779.28.1

New prospectus regime: A critical analysis of chosen key changes**

JEL Classification: G14, G15, K33

Keywords: prospectus obligations, Prospectus Regulation, Regulation EU 2017/1129

Słowa kluczowe: obowiązki prospektowe, rozporządzenie prospektowe, rozporządzenie UE 2017/1129

Abstract: The 2015 Impact Assessment Working Document evaluation has identified numerous issues which seemed to hinder the efficiency of the EU capital markets. To address those issues, the new prospectus regime was introduced by the Prospectus Regulation (PR) (EU) 2017/1129, which replaced the previous Prospectus Directive and will be directly binding and fully applicable in all EU Member States from 21 July 2019. The main aim of the PR is to ensure investor protection and market efficiency while enhancing the internal EU market for capital. In order to achieve this goal, Regulation 2017/1129 introduces a number of significant changes, in particular the form of regulation, the scope of the prospectus regime, and exemption thresholds from the prospectus obligation. It also introduces new institutions (e.g. the universal registration document) and completely new types of prospectuses (EU growth prospectus, prospectus for secondary issuances) under the proportionate disclosure regime. The aim of this article is to analyze and evaluate the chosen changes introduced by the new prospectus law.

Nowe prawo prospektowe: analiza krytyczna wybranych istotnych zmian

Abstrakt: Dokument roboczy Służb Komisji Europejskiej z 2015 roku wskazał wiele problemów utrudniających efektywność rynków kapitałowych UE. W celu poprawy sytuacji wprowadzono

---

* Scientific Tutor (Opiekun naukowy) — prof. dr hab. Andrzej Szumański

** The article was written as part of the Polish National Center for Science scientific grant “Preludium” No. 2018/29/N/HS5/02977 (Artykuł realizowany w ramach grantu Narodowego Centrum Nauki „Preludium” nr 2018/29/N/HS5/02977).

Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne 28, 2019
© for this edition by CNS

nowe prawo prospektowe, zastepując wcześniejszą dyrektywę prospektową rozporządzeniem prospektowym (UE) 2017/1129. Rozporządzenie będzie bezpośrednio wiążące we wszystkich państwach członkowskich UE od dnia 21 lipca 2019 roku. Jego zadaniem jest zapewnienie ochrony inwestorów i poprawa efektywności rynków a także wzmocnienie wewnętrznego rynku kapitałowego UE. W tym celu rozporządzenie wprowadza szereg istotnych zmian, w szczególności dotyczących formy regulacji, zakresu obowiązywania czy progów zwolnienia z obowiązku publikowania prospektu emisyjnego. Wprowadza również nowe instytucje (np. uniwersalny dokument rejestracyjny) i zupełnie nowe rodzaje prospektów emisyjnych (prospekt emisyjny UE, prospekt emisyjny dla emisji wtórnych) w ramach proporcjonalnego systemu obowiązków informacyjnych. Celem tego artykułu jest analiza i ocena wybranych zmian wprowadzonych przez nowe prawo prospektowe.

Introduction

The 2015 Impact Assessment Working Document[1] evaluation has identified numerous issues which seemed to hinder the efficiency of EU capital markets. The costs of compliance with the previous prospectus law and disclosure requirements were extremely high (on average EUR 1 million and up to 15% of the capital raised),[2] investor protection was perceived as ineffective[3] because of the information overload, and the regulatory framework under the Prospectus Directive[4] was neither flexible nor suitable for SMEs as well as some types of securities.[5] In consequence, in 2014 the EU-wide average rate of using equity as a source of funding for SMEs was only 3% — even below the world's average.

To address those issues, the new prospectus regime was introduced by the Prospectus Regulation (EU) 2017/1129[6] (hereinafter referred to as "PR"). This new prospectus law, which replaced the previous Prospectus Directive, will be directly binding and fully applicable in all EU Member States from 21 July 2019.[7] The new

[1] European Commission, *The Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading*, Brussels 30.11.2015.

[2] Ibid., pp. 8–9.

[3] Ibid., p. 9.

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

[5] Ibid., p. 9.

[6] 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.

[7] The PR was published in the Official Journal on 30 June 2017 and came into force on 20 July 2017. However, the vast majority of its provisions will have effect from 21 July 2019. Articles 1(5)(a)(b)(c) and 1(5) subparagraph 2 are subject to an earlier application date than the majority of the provisions of the PR and have become applicable on 2 July 2017 (prospectus exemption for the admission to trading of additional securities of the same class as, and amounting to 20% of the number of, those already admitted to the same regulated market). Articles 1(3) and 3(2) are subject

© for this edition by CNS

legislation is a realization of the European Capital Markets Union Plan (hereinafter referred to as "CMU"),[8] the flagship EU project which reflects a long-term ambition to expand and diversify sources of funding alternative to bank lending and to help EU companies to better finance their expansion and therefore to create jobs and growth.[9] The regulation is also part of the European Commission's (hereinafter referred to as "EC") more general commitment to simplifying EU laws and making them more efficient (REFIT).[10]

The main aim of the PR is to ensure investor protection and market efficiency while enhancing the internal EU market for capital.[11] In order to achieve this goal, the PR introduces a number of changes, including, in particular, the form of an EU regulation, the scope of the prospectus regime, exemption thresholds from the prospectus obligation. It also introduces new institutions (e.g. the universal registration document) and completely new types of prospectuses (EU growth prospectus, prospectus for secondary issuances). However, it seems that despite numerous voices calling for a groundbreaking revolution, everything points to the fact that the new regulation is merely an evolution of the previous system. The aim of the article is to analyze some of the most important — according to the author — changes in the prospectus law, introduced by the PR.

1. The Regulation replacing the Directive

Replacing the existing Prospectus Directive with a regulation means that its provisions will be applicable in each Member State (hereinafter referred to as "MS") directly, without further implementation. It fits the growing tendency in the EU to achieve harmonization through regulations.[12]

According to the EC, the legislative form of regulation ensures that provisions directly imposing obligations on persons involved in offers and admissions of securities are applied in a uniform manner throughout the EU.[13] This is due to the fact that even small divergences on the approach to specific and precise prospectus requirements could affect cross-border offers of securities, multiple listings

---

to an earlier application date than the majority of the provisions of the PR and have become applicable on 21 July 2018 (exemption thresholds below which prospectus is not required).

[8] Capital Markets Union — Communication of the Commission of 30 September 2015, entitled *Action Plan on Building a Capital Markets Union*; European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, Annex 3, p. 6.

[9] Recital (1) of the PR.

[10] The European Commission's regulatory fitness and performance (REFIT) programme. Available online: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en (accessed: 20.06.2019).

[11] Recital (7) of the PR.

[12] W. Nowosad, "Nowe rozporządzenie prospektowe — analiza wybranych zmian legislacyjnych," *Przegląd Prawa Handlowego* 10, 2018, p. 43.

[13] Recital (5) of the PR.

© for this edition by CNS

on regulated markets and consumer protection. Therefore, the direct application of prospectus rules would reduce the risk of divergent national measures and ensure a consistent approach and greater legal certainty. The use of regulation will strengthen confidence in transparency, reduce regulatory complexity and compliance costs for companies. According to the EC, the PR harmonized framework is the only way to ensure uniformity of disclosure and the functioning of the EU passport.[14]

As a consequence, dictated by the need for harmonization, unification, and defragmentation of the legal framework at the EU-wide level, the PR will reduce the MS' freedom in shaping the prospectus regime. This is believed to have a positive effect on the passport procedure by facilitating cross-border public offers.[15] Much attention is paid to the potential benefits, such as the "springboard effect" for weaker markets.[16] However, there are also some risks that need to be pointed out. W. Nowosad notes that markets of individual MS differ significantly from each other by the degree of development, structure, value of turnover, and type of financial instruments.[17] Some argue that there may be insufficient interpretative discretion and greater interpretative scrutiny of the PR language and provisions in many MS.[18] Moreover, the potential interpretation of the PR by the Court of Justice of the European Union would be binding on all courts within the EU which would lead to an even greater lack of national flexibility.

At the same time, National Competent Authorities (hereinafter referred to as "NCAs"), especially in more developed countries, may push for far-reaching uniformity in the application of the PR provisions in less developed countries whose NCAs would be more susceptible to being influenced. This would constitute a threat to the internal integrity of capital markets in certain MS, provided that NCAs would be less willing to take into consideration the specific environment and special needs of the national companies.[19] Another threat to the CMU integrity may stem from the multiplicity of delegated acts (level I, II, III) and differences in their application by individual countries, which may lead to further market fragmentation as well as uncertainty for market participants.

In my opinion, however, this solution is the most reasonable because it marks the next step for the full implementation of the CMU, potentially reducing the disproportions between prospectus requirements and stimulating the weaker economies of the region. One can only regret that still many aspects of the regulation

[14] Recital (4) of the PR.

[15] W. Nowosad, op. cit., p. 43.

[16] Ibid.

[17] Ibid.

[18] R.S. Panasar et al., "The New Prospectus Regulation — The story so far," *Cleary Gottlieb* 7.03.2019, p. 7, https://www.clearygottlieb.com/-/media/files/alert-memos-2019/the-new-prospectus-regulation-the-story-so-far-v2.pdf (accessed: 1.07.2019).

[19] Ibid.

© for this edition by CNS

of the new prospectus law remain in the hands of national lawmakers who — sometimes desperately — try to preserve as much unjustified impact on the fate of issuers and investors as possible.

In my view, harmonization regarding capital markets should be as far-reaching as possible. Unfortunately, the PR stopped short on harmonizing liability principles as well as the administrative and criminal sanctions related to prospectus obligations. Differences in this respect are huge across the MS,[20] despite the fact that the civil liability model is crucial from the perspective of issuers considering public offering.[21] Harmonization in this area is significantly difficult due to differences between private law systems across the EU. At the same time, it is indispensable to achieve a true and unified, well-functioning CMU.

2. Exemption thresholds

According to the previous Prospectus Directive 2003/71/EC, the obligation to publish a prospectus shall not apply to the offering of securities with a total consideration of less than EUR 100,000 over 12 months ("lower exemption threshold").[22] Under the Prospectus Directive, there was also an exemption from prospectus obligation for securities included in an offer of less than EUR 2.5 million, calculated over a period of 12 months[23] ("upper exemption threshold"). Later, the Prospectus Directive was amended by the Directive 2010/73/EU,[24] which established a higher upper threshold — EUR 5 million instead of EUR 2.5 million. Between EUR 100,000 and EUR 5 million (earlier, EUR 2.5 million) it was fully up to the MS whether EU prospectus or alternatively another type of national disclosure was required.

The latest landmark change to this regime was established under the PR which raised the lower threshold to EUR 1 million and the upper threshold to EUR 8 million. For offers of less than EUR 1 million, the cost of producing a prospectus is likely to be disproportionate to the envisaged proceeds of the offer.[25] Therefore,

---

[20] ESMA/2013/619 document, *Report on Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive*, 30.05.2013.

[21] M.B. Fox, "Initial public offerings in the capital markets union: A US perspective," [in:] *Capital Markets Union in Europe*, eds. D. Busch, E. Avgouleas, G. Ferrarini, Oxford Scholarship Online 2018, p. 287.

[22] Article 3(2)(e).

[23] Article 1(2)(h).

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

[25] Recital (12) of the PR.

© for this edition by CNS

EU lawmakers decided that the obligation to produce a prospectus should exclude offers of such small scale.

Article 1(3) of the PR establishes that the regulation — thus, the obligation to publish a prospectus — does not apply to an offer of securities to the public with a total consideration in the Union of less than EUR 1 million (over 12 months). According to Article 1(3) subparagraph 2, MS shall not extend the obligation to draw up a prospectus below EUR 1 million. However, in those cases, MS may require other disclosure requirements at the national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden.

Additionally, pursuant to Article 3(2) of the PR, MS may decide to exempt offers of securities to the public from the obligation to publish a prospectus provided that the total consideration of each such offer in the Union shall not exceed EUR 8 million over 12 months. Such offers cannot be subject to the notification procedure[26] and cannot benefit from the passporting regime under this regulation.[27] Moreover, the exemption thresholds are not applicable to the admission to trading on regulated markets.[28] Importantly, below that threshold MS should be able to require other disclosure requirements at the national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden in relation to such exempted offers of securities.[29] Upholding the MS discretion in setting out a threshold between EUR 1 and 8 million (as well as national disclosure rules below that threshold), according to their perception of the appropriate level of domestic investor protection, was motivated by the varying sizes of financial markets across the EU.[30] MS are required to notify the EC and ESMA of whether and how they decide to use the exemption in Article 3(2), as well as of any subsequent changes to that policy. Articles 1(3) and 3(2) have become applicable on 21 July 2018.

Raising the lower threshold from EUR 100,000 to EUR 1 million is a laudable change. This solution lowers the regulatory burden on offerings within the range and would directly benefit small issuers and equity crowdfunding which on average raises EUR 250,000. In my view, raising this threshold to EUR 2 or 3 million could have been considered — especially taking into account that in many MS offers around this level require very limited disclosure, if any.

Raising the upper exemption threshold should also be considered a desired, yet insufficient, solution as the PR could have been more ambitious in that matter. It is roughly estimated that the number of approved prospectuses for offers between

[26] Article 25 of the PR.

[27] Recital (130) of the PR.

[28] A. Casale, M. Bianchi, P. Spatola, "The New Prospectus Regulation: A missed opportunity?", *Oxford Business Law Blog* 16.03.2017, https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/new-prospectus-regulation-missed-opportunity (accessed: 1.07.2019).

[29] Recital (12) of the PR.

[30] Recital (13) of the PR.

© for this edition by CNS

EUR 5 million and EUR 10 million in the years 2013–2014 is around 3% of all approved prospectuses and for offers between EUR 10 million and 20 million, additional 3%.[31] Even though these numbers look small, increasing the upper threshold to EUR 10 or 20 million would probably give significant incentives to hesitant issuers and naturally provoke a rapid growth in the number of prospectuses. In the US, the Regulation A prospectus regime establishes a two-tier system with significantly higher exemption thresholds of USD 20 and 50 million.[32] I believe that there is still a need for further liberalization of the exemption thresholds across the EU which is reflected by the clear tendency among the MS.

The numbers speak for themselves. Within the last 3 years, at least 12 MS have used the opportunity to raise their thresholds.[33] At least 7 countries have done so solely for the purpose of the exemptions provided by the PR and another 7 are considering such a solution.

Table 1. Threshold above which MS require an EU prospectus to be drawn up (2016)

Threshold (EUR)	100,000	250,000	1,000,000	1,500,000	2,500,000	5,000,000
Member States	Belgium, Bulgaria, Cyprus, France*, Germany, Hungary, Latvia, Romania, Slovakia Slovenia	Austria	Czech Republic, Denmark, Romania	Luxembourg	Finland, The Netherlands, Poland, Sweden	Croatia, Estonia, Greece, Ireland, Italy, Lithuania, Malta, Portugal, Spain, The UK

Expressed as the total consideration of the offer in the EU over 12 months. (*) Only for offers representing more than 50% of the share capital of the issues.

Source: ESMA.

Belgium, France, and Germany have raised their thresholds from EUR 100,000 to EUR 8 million. Denmark and Romania from 1 million to 8 million and 5 million, respectively. Finland and the Netherlands have raised the thresholds from 2.5 million to respectively, 8 and 5 million. Italy and the UK have decided to maintain the highest possible non-prospectus threshold, therefore raising the thresholds from 5 million to 8 million. Finally, Austria and Luxembourg have raised thresh-

[31] Based on the available 2013–2014 data, European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015.

[32] US Regulation A (17 C.F.R. §230.251 et seq.).

[33] Ł. Chyla, "Is 2.5 million EUR prospectus exemption threshold enough?," *Przegląd Prawno-Ekonomiczny* 47, p. 6.

© for this edition by CNS

olds to 5 million, from in sequence, EUR 250,000 and EUR 1.5 million, while Slovenia has raised its threshold from EUR 100,000 to EUR 3 million.[34]

Interestingly, Poland is one of the two countries (the other being the Czech Republic) which have not raised the exemption threshold — although in some countries such a change was automatic due to the directly applicable provisions of the PR. Moreover, Poland is one of the two countries (the other being Hungary) which have already changed the law to adopt the threshold under the PR, and still refused to raise it.

Table 2. Threshold above which MS require an EU prospectus to be drawn up (2019)

Threshold (EUR)	1,000,000	2,500,000	3,000,000	5,000,000	8,000,000
Member States	Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Slovakia	Poland, Sweden	**Slovenia**	**Austria**, Croatia, Estonia, Greece, Iceland, Ireland, Lithuania, **Luxembourg** Malta, **The Netherlands**, Norway, Portugal **Romania**, Spain	**Belgium, Denmark, Finland, France, Germany, Italy, The UK**

Expressed as the total consideration of the offer in the EU over 12 months. Some members of the EEA are also included in this table. The countries that have raised the exemption thresholds since 2016 are marked in bold font.

Source: ESMA.

As of 2019, in Belgium, Denmark, Finland, France, Germany, Italy, and the UK, the threshold is EUR 8 million. In Austria, Croatia, Estonia, Greece, Iceland, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, and Spain the threshold is EUR 5 million.[35] In Romania there is a EUR 5 million threshold for offers made exclusively in the MS other than Romania,[36] and EUR 1 million threshold for offers made within Romania.[37] In Slovenia, the threshold is EUR

[34] Ibid.

[35] ESMA 31-62-1193 document, 8.02.2019.

[36] See Article 5, paragraph 2, Romanian Regulation no. 5/2018 on issuers of financial instruments and market operations.

[37] See Article 5, paragraph 1(h), Romanian Law no. 24/2017 on issuers of financial instruments and market operations.

© for this edition by CNS

3 million. In Poland and Sweden, the threshold is EUR 2.5 million. In Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, and Slovakia the threshold is EUR 1 million (the PR minimum).

Several countries (eight), namely Bulgaria, Cyprus, Estonia, Greece, Iceland, Latvia, Lithuania, and Luxembourg are currently still in the process of adopting a specific threshold under Article 3(2) of the PR.[38] Therefore, it is expected that some of them may increase the exemption thresholds even further, especially those who already had the maximum exemption under Prospectus Directive (Estonia, Greece, Iceland, Lithuania, Luxembourg).

This shows that raising the upper threshold reflected the general policy of many MS. There are, however, two big problems related to that matter. Firstly, the thresholds differ significantly, ranging from EUR 1 to 8 million, often regardless of the economic development of the particular states. Moreover, the MS policy below the threshold is extremely diverse, which leads to fragmentation and uncertainty in the markets. Some of them do not require any particular disclosure, some require press releases or short information notes. Others require information documents including relevant information, memoranda or even special national prospectuses. In some MS the NCA's prior approval of the documents is required, while in some MS not. All this unnecessary diversity and lack of coherence can have a negative effect, hindering the achievements of the PR towards the CMU.

In the following nine countries there are no national rules applicable to offers below the exemption threshold: Bulgaria, Cyprus, Czech Republic, Denmark, Portugal, Romania, Slovakia, Spain, and Sweden. In those countries, public offerings under the threshold do not require providing any additional information — neither to the public nor to the competent national authorities.[39]

Taking into account high exemption thresholds combined with lighter disclosure requirements in Denmark (EUR 8 million), Portugal (EUR 5 million), Romania (EUR 5 million), or Spain (EUR 5 million), it can be noted that from the issuers' perspective small capital raisings seem to be especially attractive in those countries. Particularly noteworthy are the liberal approaches of relatively smaller markets, such as Croatia, Estonia, Finland, Lithuania, Portugal, Romania (offerings outside Romania), which decided to set up a limit of EUR 5 million, and Slovenia of EUR 3 million.

At the same time, raising funds in countries such as Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Romania (public offerings within Romania), and Slovakia is particularly inconvenient because of the low exemption threshold which was established at the permissible PR minimum of EUR 1 million. Some of these countries require some disclosure even below this threshold.[40]

---

[38] ESMA 31-62-1193 document, 8.02.2019.

[39] Ibid.

[40] Ł. Chyla, op. cit.

© for this edition by CNS

In Poland, tapping the market is also troublesome for smaller issuers because of the harsh disclosure requirements between EUR 1 and 2.5 million. According to the Polish Act on Public Offering,[41] for offers between EUR 1 million and EUR 2.5 million (over 12 months) a prospectus is not required as long as the information memorandum, as stated in Article 4, is submitted and published — after prior approval of the KNF (competent national authority). Although shorter than the regular prospectus, the memorandum still constitutes a significant burden for Polish issuers, often running into more than 100–150 pages. According to the proposed amendments (due to the PR), being still discussed in the Ministry of Finance, for offers between 100,000 and EUR 1 million, the issuer must publish a document containing essential information about the issuer, conditions and rules of the offer (securities, use of proceeds, risk factors, etc.) as well as a statement that the information is true, reliable and in accordance with the facts.

As a consequence, in numerous countries, such as Belgium, Denmark, Finland, Germany, France, Italy, the UK, issuers offering securities to the public with a total consideration of EUR 7,999,999 will face significantly fewer obstacles than when conducting public offerings with a total consideration of EUR 1 million in, for example, Poland or Hungary. For instance, in Denmark[42] there are no specific disclosure requirements at all. Short information documents (notes) in Belgium,[43] Finland[44] (6 pages), Germany[45] (WIB[46] — 3 pages), France[47] (summary information document — 8–10 pages), Italy[48] (press releases) are considerably shorter and easier to produce than the Polish memorandum (50–150 pages), not to mention that they do not require approval from competent national authorities. Some of them do not even require prior submission (Italy). Only in France, in case of Initial Public Offering (IPO) admitted on a multilateral trading facility (MTF) is the information document (average size of 100 pages) required.

In Croatia, Ireland, Lithuania, Netherland, Portugal, Spain, in turn, issuers offering securities to the public with a total consideration of EUR 4,999,999 will

---

41 Polish Act of 29 July 2005 on Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies.

42 ESMA 31-62-1193 document, 8.02.2019.

43 The New Belgian Prospectus Law (Loi du 11 juillet 2018 relative aux offres au pub lic d'instruments de placement et admissions d'instruments de placement à la négociation sur des marchés réglementés). See also: Article 7, Belgian Royal Decree of 23 September 2018.

44 Finnish Ministry of Finance Decree.

45 German Securities Prospectus Act, Wertpapierprospektgesetz (WpPG), available online: http://www.gesetze-im-internet.de/wppg/index.html (accessed: 20.06.2019). See also: Section 3(2) sentence 1 no. 6 and section 3a of the WpPG .

46 Wertpapier-Informationsblatt.

47 https://www.amf-france.org/en_US/Actualites/Communiques-de-presse/AMF/annee2018?-docId=workspace%3A%2F%2FSpacesStore%2F3e1b1302-b11d-471b-9fde-0f773295b760&langS-witch=true (accessed: 20.06.2019); the specific content is defined in the AMF Instruction 2018-07.

48 According to Italian Consob Regulation 11971/1999.

© for this edition by CNS

face significantly fewer obstacles than those conducting public offering with a total consideration of EUR 1 milion in Poland or Hungary. In Denmark, Portugal, and Spain there are no specific disclosure requirements for these sub-EUR 5 million issuers at all. Short information documents in Ireland,[49] Lithuania,[50] the Netherlands[51] do not require prior approval, whereas in Croatia[52] mere notification of the exemption use, submitted to the Hanfa,[53] is sufficient.

Unfortunately, some MS' regulatory approaches can be seen as a textbook example of a national "gold-plating"[54] which deepen the divergencies across EU. As seen above, it seems that the PR missed the main point with regards to the exemption thresholds. The diversity of MS' national approach regarding the prospectus requirements below the upper threshold results in market fragmentation and thus higher compliance costs for issuers seeking capital across EU, therefore representing the biggest threat to cross-border financing in the CMU.[55] A great and diverse array of national approaches shows the creation of favorable conditions in one MS and at the same time disadvantages companies in other MS which embrace a strict national prospectus regime. Accordingly, the uncertainty regarding national rules hinders the investors' confidence in the markets and undermines their information safeguards. Although companies would, in theory, still be eligible to prepare a public offering under the more liberal national regime (in different MS), this kind of solution is almost never preferable, nor is it convenient when it comes to SMEs because it requires a thorough and often costly country-by-country analysis in the search for the better venue. Besides, fueling the practice of "regulator shopping" was not the primary intention and undoubtedly runs counter to the objective of the CMU.

To address these issues, the harmonization of not only thresholds should be considered but also further unification of the national rules applicable to offers in the range of the lower and upper thresholds.[56] Alternatively, a special EU prospectus, being subject exclusively to ESMA scrutiny and approval, could have been established as one of the options for issuers, in order to minimize the negative

---

49 Section 1361, Irish Companies Act 2014.

50 Law on Securities of the Republic of Lithuania. Resolution No 03-45 of the Bank of Lithuania.

51 Dutch Financial Supervision Act (Vrijstellingsregeling Wft). See: Article 53, paragraphs 2–8.

52 Croatian Capital Markets Act, Article 409, 412.

53 Croatian Financial Services Supervisory Agency.

54 In operational terms, the European Commission defines gold-plating as "an excess of norms, guidelines, and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such regulation."

55 European Commission, *The Commission Staff Working Document Impact Assessment*…, Brussels 30.11.2015, pp. 20–22.

56 A Casale, M. Bianchi, P. Spatola, op. cit.

© for this edition by CNS

effects of national "gold plating."[57] Especially the last solution would create a safe harbor for issuers being "virtually persecuted" by the harsh national regulatory framework on prospectus obligations.

The last thing worth noting is that the PR retained the maximum number of non-qualified investors[58] (150) to whom an offer can be addressed in each MS without a prospectus (quasi-private placement threshold). Many suggestions were made that the "150 persons" threshold could be increased to 300, 400 or even 500 persons, which would be beneficial to the development of EU crowdfunding because it reflects the average number of investors on crowdfunding platforms. However, there were two main arguments against such a solution. Firstly, the EU lawmakers feared that even now 150 non-qualified investors per MS can already amount to 4,200 across the entire EU, which has the potential to exceed even the upper exemption threshold and therefore pose a significant deterioration to the investors' protection. I consider this remark to be partially legitimate. However, to reduce the scale of potentially fraudulent behavior, I would rather suggest increasing the threshold to 400 or 500 non-qualified investors per MS and lowering the maximum number of non-qualified investors across the EU to 2,000. Secondly, the 150 non-qualified investors threshold was considered enough in combination with the upper exemption threshold, based on the estimate that the average fundraising on crowdfunding platforms in the EU was about EUR 250,000[59] and thus still way below the EUR 8 million threshold.[60] This argument would be valid if not for the above-mentioned MS' discretion regarding offers between EUR 1 and 8 million which distorts the meaning of the regulation and leads to legal fragmentation hindering the development of European equity crowdfunding.

In conclusion, in my opinion, the considerable solution regarding exemption thresholds would be:

— to increase the threshold to 500 non-qualified investors per MS (and lower it to 2,000 across EU);

— to increase the upper threshold to EUR 10 million or even higher;

— to increase the lower threshold to EUR 2 million;

— to bar MS from requiring NCA prior approval for offers of total consideration below EUR 3–5 million.

Additionally, application of the exemption thresholds to the securities admission to trading on regulated markets should be considered.

---

57 Ibid.

58 Previously under Prospectus Directive (PD) Article 3(2)(b). This threshold was raised from 100 to 150 persons by the amending Directive 2010/73/EU.

59 ESMA's report *Investment-Based Crowdfunding: Insights from Regulators in the EU* of May 2015.

60 European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, p. 20.

© for this edition by CNS

3. The universal registration document

The registration document is generally the largest part (60–80%) of a prospectus as well as the most burdensome one due to the extensive scrutiny and approval process by competent authorities. Therefore, alleviating some of the burden for frequent issuers was recognized as essential to promoting raising funds on the capital markets.

Under the new PR rules, there will be a special fast-track and simplified frequent issuer regime, similar to the "shelf registration" process known in the US[61] or France (*document de référence*).[62]

To fulfill the registration document requirement, issuers whose securities are admitted to trading on a regulated market or an MTF[63] may draw up every financial year a universal registration document (hereinafter referred to as "URD") describing the company's organization, business, financial position, earnings and prospects, governance and shareholding structure.[64]

After the issuer has had a URD approved by the competent authority of the home MS for two consecutive financial years, subsequent URDs may be filed without prior approval (they are still subject to review). According to the Annex to the Delegated Regulation, issuers should state in their URD whether it had been approved by the competent authority or filed and published without prior approval. The URD can be passported. Some argue that URDs should not be subject to prior approval the first time but I believe this additional safeguard should be evaluated positively.[65]

Issuers that regularly maintain an updated URD with their NCAs can obtain "frequent issuer" status and can benefit from a faster prospectus approval process (5-day fast-track, instead of 10-day process).[66] Issuers will find it convenient when immediately seeking to raise capital on the markets. Importantly, issuers from outside the EEA can also produce a URD. The "frequent issuer" status can be lost if the issuer fails to submit the URD the next year.

This solution was aimed to speed up the process of preparing a prospectus and to facilitate access to capital markets in a cost-effective way.[67]

Moreover, if the approved URD is published at the latest 4 (3) months after the end of the financial year (first 6 months of the financial year), the issuer is deemed

61 "Prospectus regulation," https://www.nortonrosefulbright.com/en/knowledge/resources-and-tools/capital-markets-union/prospectus-regulation (accessed: 20.06.2019).

62 R.S. Panasar et al., op. cit., p. 4.

63 According to Article 2(u) of the PR, MTF means a multilateral trading facility as defined in point (22) of Article 4(1) of Directive 2014/65/EU.

64 Article 9.

65 A Casale, M. Bianchi, P. Spatola, op. cit.

66 Article 9(11).

67 Recital (43) of the PR.

© for this edition by CNS

to have fulfilled its obligation to publish the annual (half-yearly) financial report, provided that the URD contains the information required to be disclosed by Article 4(5) of Directive 2004/109/EC (Transparency Directive).[68]

Introducing the URD significantly reduces transactional costs and may encourage issuers to carry out public offerings more often.[69] URD will be particularly convenient for issuers who are considering public offering but who cannot anticipate the exact time of that happening. Thanks to this measure, during the validity period of URD they can carry out a larger amount of Initial Public Offerings (IPOs). As they consider appropriate, depending on the market momentum.[70]

At the same time, the URD upholds proper investor protection as it contains crucial information on the issuer, irrespective of the type of securities being issued. According to recital (39) of the PR, "the universal registration document should act as a source of reference on the issuer, supplying investors and analysts with the minimum information needed to make an informed judgement on the company's business, financial position, earnings and prospects, governance and shareholding."

Undoubtedly, the fast-track approval process for the approval of the securities note and the summary will provide frequent issuers with easier and faster access to capital markets by seizing the market window whenever a favorable opportunity occurs.[71]

Very importantly, frequent issuers, when eligible, are allowed to use a URD as a constituent part of a base prospectus, EU growth prospectus, a simplified prospectus under the simplified disclosure regime for secondary issuances or a wholesale prospectus for non-equity securities.[72] Using URD, instead of specific parts of other disclosure regimes, will make URD even more popular among SMEs and secondary issuers. To provide additional flexibility to the frequent issuers, Annex to The Delegated Regulation leaves the placing of the section on risk factors at the issuer's discretion.

The similar French system, having operated for 25 years, is considered a huge success and is regularly used by approximately 350 issuers annually. The numbers speak for themselves. In the EU, around 20% of equity prospectuses[73] and 32%

[68] Article 9(12).

[69] R.S. Panasar et al., op. cit., p. 4.

[70] W. Nowosad, op. cit., p. 46.

[71] According to recital (39) of the PR: "Drawing up a universal registration document should enable the issuer to keep the information up-to-date and to draw up a prospectus when market conditions become favourable for an offer of securities to the public or an admission to trading on a regulated market by adding a securities note and a summary"; European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, p. 25.

[72] Recital (44) of the PR.

[73] Excluding IPO prospectuses.

© for this edition by CNS

of non-equity prospectuses[74] were approved by competent authorities in less than 10 working days. In France — because of a tripartite prospectus and the "shelf registration" process — 50% and 55%, respectively.

According to ESMA estimates, introducing the URD can lead to a total of 370 equity and 838 non-equity prospectuses being approved every year in less than 10 working days which would constitute an increase of 150% for fast-track approvals of equity and by 70% of non-equity prospectuses.[75] This, by cautious estimates, would amount to at least EUR 50–100 million saved each year.

The usefulness of URD, however, may be limited mainly to equity securities. This is due to the fact that the URD, being functional for both equity and non-equity issuances, needs to be based on the more complex regime for equity securities — even when used for non-equity issuance.[76] At the same time, PR extends the institution of a base prospectus (Article 8) which is available for all non-equity securities, not only for those issued under an offering programme or in a continuous and repeated way, as under the Prospectus Directive.

Some aspects of the new URD regime raise doubts. If a frequent issuer publishes a URD without prior approval, it is possible for the authority to require amendments after the URD has been published,[77] which might result in liability issues and loss of face before investors. It is also worth noting that shortening the approval deadline to 5 days may prove impossible to implement in practice — in many countries the supervisory authorities far exceed those deadlines.

Despite these doubts, the introduction of the URD institution should nonetheless be assessed positively.

4. Supporting SMEs

European companies, and in particular SMEs, rely heavily on bank finance which, in the absence of an alternative, hinders the company's bargaining position and has severe adverse effects in the case of financial crises when banks are reluctant to lend money. It is estimated that around 20% of the funds raised by SMEs is obtained from capital markets. Moreover, on average 3% of SMEs in the EU have used equity as a source of funding. At the same time, there are enormous divergencies within MS, ranging from 1%[78] to 32%.[79] Also for SMEs, considerable differences between the MS exist: in Slovakia, Denmark, and Sweden 9 to 32% of SMEs have used equity as a source of funding, whereas in Hungary, Portugal,

---

74 Excluding base prospectuses.

75 European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, p. 27.

76 R.S. Panasar et al., op. cit., p. 4; recital (39) of the PR.

77 In case of "a material omission, a material mistake or material inaccuracy."

78 Hungary, Portugal and the Czech Republic being at the bottom of the ranking.

79 Denmark and Sweden being at the top of the ranking.

© for this edition by CNS

and the Czech Republic almost no equity funding was used and the EU average is at only 3%. This leads to financial fragmentation which is believed to have a significant effect on the possibility to share economic risks across borders — this is due to the fact that capital markets and bank credit markets play an important role in cushioning the impact of economic shocks.[80] There is a clear link between financial integration, risk sharing and higher economic growth through a "risk-amelioration" channel. Financial market fragmentation is believed to be one of the main causes of low economic growth within the EU.[81]

Because of the above, one of the core objectives of the CMU is to facilitate access to financing on capital markets for SMEs in the EU.[82] The 2015 Impact Assessment Working Document[83] evaluation has identified numerous issues which seem to hinder the raising of capital in the EU for SMEs. Crucially, the costs of compliance with the Prospectus Directive were extremely high (on average EUR 1 million, and up to 15% of the capital raised). Moreover, the 2018 Impact Assessment Working Document[84] identified a persistently low SME IPO activity in the EU. Europe is producing only half of the SME IPOs that it generated before the financial crisis (478 IPOs and EUR 13.8 billion raised on average yearly in the years 2006–2007 compared to 218 IPOs and EUR 2.55 billion raised between 2009 and 2017 on EU SME MTFs). Not to mention the fact that around 50% of all IPO values conducted on EU SME markets are conducted in the UK, which shows the potential scale of the problem after Brexit.

To promote SMEs (and to ensure legal consistency of EU laws) the PR extends the definition of SMEs,[85] including SMEs as defined in point (13) of Article 4(1)

---

80 N. Anderson et al., "A European Capital Markets Union: Implications for growth and stability", *Bank of England Financial Stability Paper* 2015, no. 33; Y. Demyanyk, C. Ostergaard, B.E. Sørensen, "Risk sharing and portfolio allocation in EMU," *DG ECFIN Economic Paper* 2008, no. 334.

81 M. Obstfeld, "Risk-taking, global diversification, and growth," *American Economic Review* 84, 1994, no. 5; G. Femminis, "Risk-sharing and growth: The role of precautionary savings in the 'Education' model," *Scandinavian Journal of Economics* 103, 2001.

82 Recital (51) of the PR.

83 European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015.

84 European Commission, *The Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 596/2014 and (EU) 2017/1129 as regards the Promotion of the Use of SME Growth Markets*, Brussels 24.05.2018.

85 According to the PR Article 2(f): "small and medium-sized enterprises" or "SMEs" means any of the following: (i) companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43,000,000 and an annual net turnover not exceeding EUR 50,000,000; (ii) small and medium-sized enterprises as defined in point (13) of Article 4(1) of Directive 2014/65/EU.

© for this edition by CNS

of Directive 2014/65/EU.[86] Therefore, companies that had an average market capitalization of less than EUR 200 million (not EUR 100 million, as under the Prospectus Directive) are considered as SMEs under PR. This solution significantly extends the list of companies with the SME status and increases the inclusiveness of the EU capital market.

To further boost the SMEs' presence and performance on the capital markets, the PR introduces a new EU growth prospectus under the proportionate disclosure regime — an alleviated standard of disclosure requirements.[87] The proportionate disclosure regime for SMEs and companies with the reduced market capitalization (the so-called SME PDR) was initially introduced in 2010 by Directive 2010/73/EU in order to make capital markets more inclusive for SMEs.[88] This solution has not achieved its goal as the proportionate disclosure was not popular among smaller entities. It is estimated that the SME PDR was only used in 143 prospectuses in 2013 and 2014 in the EU, representing around 2% of the total number of prospectuses approved in those years.[89] Unfortunately, the potential damage of being "stigmatized" because of making use of the SME PDR regime was greater than the benefits of the reduced prospectus costs.

Under the PR, The EU growth prospectus is available for the following entities, provided that they have no securities admitted to trading on a regulated market[90]:

a) SMEs;

b) issuers, other than SMEs, whose securities are traded or are to be traded on an SME growth market, provided that those issuers had an average market capitalization of less than EUR 500 million for the previous 3 years;

c) issuers whose offer to the public is of a total consideration not exceeding EUR 20 million (over 12 months) and the average number of employees is up to 499, provided that they had no securities traded on an MTF.

The EU growth prospectus is a document of a standardized format, written in a simple language and which is easy for issuers to complete. It consists of a specific summary,[91] a specific registration document and a specific securities note.[92] Its aim is to contain only information that investors might find relevant and materi-

[86] 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 (OJ L 173, 12.6.2014, p. 349). "Small and medium-sized enterprises" for the purposes of this Directive means companies that had an average market capitalization of less than EUR 200,000,000 on the basis of end-year quotes for the previous three calendar years.

[87] Article 15.

[88] European Commission, *The Commission Staff Working Document Impact Assessment*…, Brussels 30.11.2015, p. 35.

[89] Ibid.

[90] Article 15.

[91] Based on Article 7.

[92] Article 15(1)(2).

© for this edition by CNS

al.[93] The aim of this proportionate regime is to ensure the proportionality between the size of the company and the costs of prospectus obligations.[94] The EU growth prospectus is also passportable within EEA, which makes it more convenient for SMEs than the previous proportionate disclosure. The EU growth prospectus is not available for entities that already have securities admitted to trading on a regulated market. It is argued that the aim of this exclusion is to counteract the creation of a two-tier disclosure standard on regulated markets which might lead to investors' confusion and affect their confidence in the capital markets.[95]

The EU growth prospectus regime was intended to find a balance between cost-efficient access to finance and investor protection. There is generally some contradictory rationale related to SMEs' presence on the primary markets. On the one hand, SMEs usually need to raise relatively lower funds, which limits the overall risk impact on the markets. At the same time, the burdens of prospectus obligations create "barriers to entry," discouraging them from seeking funding via public offerings, which in turn affects the attractiveness of capital markets and disincentivizes investors from putting their savings to productive use. On the other hand, their lack of "cachet behind the name" and their shorter-track record means that SMEs are relatively risky compared to larger issuers and should disclose sufficient information for investors to take their investment decision wisely. Therefore, the final decision on the shape of prospectus obligations for SMEs shall be calibrated in a way that marginal social costs of issuers' disclosure requirements do not exceed the marginal benefits of minimizing the information asymmetry by providing investors with substantial information.[96] Whether the new growth prospectus is such an optimal solution is up for debate.

Creation of the new SME regime is a laudable move in the desired direction. A similar, albeit seemingly more ambitious, flexible, and liberal solution, has been functioning for years in the US, where "smaller reporting companies"[97] and "emerging growth companies"[98] are subject to alleviated scaled disclosure requirements. So far, it seems that the US regime successfully fulfills its primary role.

The EU Commission estimates that at least 320 prospectuses per year could be eligible for the new growth prospectus which would result in savings in administrative costs for issuers of EUR 45 million per year in total.[99] Moreover, the lighter prospectus regime should encourage more SMEs to tap the capital markets and reverse the poor trend of the recent years.

---

93 Recital (52) of the PR.

94 R.S. Panasar et al., op. cit., p. 6.

95 Recital (53) of the PR.

96 See: M.B. Fox, op. cit.

97 Item 10(f)(1) of Regulation S-K (17 CFR § 229.10).

98 Section 2(a)(19) of the Securities Act of 1933.

99 European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, p. 36.

© for this edition by CNS

However, I agree with the opinion that the SMEs' Proportionate Disclosure Regime (PDR) regime should have covered all SMEs without distinction between regulated markets and MTFs.[100] Also, the form of the EU growth prospectus should have been changed and adjusted to investors' needs (e.g. the "question and answer" format considered in the Commission Working Paper 2015).

The lack of a maximum threshold for conducting a public offer based on the EU growth prospectus can be considered controversial — especially since it may lead to a situation where some regular public offerings of securities to be admitted to trading on a regulated market are of lower consideration than those carried out within the simplified regime. This would mean unjustified incentives for entities with a shorter history and, consequently — relatively greater risk. There is no rational justification for requiring from reliable and well-known entities the provision of proportionally more information than smaller, freshly aspiring companies.

Therefore, it is regrettable that the EU legislator has not decided to fundamentally revise the form and shape of all prospectus obligations, to significantly minimize costs while maintaining the most important investors' safeguards (not necessarily in the form of information obligations).

At the same time it should be noted that, despite the fact that the PR is a step in the good direction, SMEs still suffer also from other EU laws which impose excessive obligations.[101]

5. Simplified prospectus for secondary issuances

The 2015 Impact Assessment Working Document[102] identified the problematic lack of differentiation between the prospectus required for IPOs and secondary issuances of the issuers already well-known to the market.[103] This led to excessive burdens for the latter ones who were already subject to thorough disclosure under the Transparency Directive, and reduced the chances to make use of the potential market windows.

The previous proportionate disclosure regime (hereinafter referred to as "PDR") was not widely used because of its too limited scope.[104] The alleviations

---

[100] A Casale, M. Bianchi, P. Spatola, op. cit.

[101] European Commission, *The Commission Staff Working Document, Feedback Statement for the Public Consultation on the Capital Markets Union, Mid-Term Review Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan*, Brussels 8.06.2017.

[102] European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015.

[103] Ibid., p. 24.

[104] Ibid., p. 23.

© for this edition by CNS

(such as the "tripartite prospectus"[105]) available to secondary issuances under the Prospectus Directive regime were not sufficient to reduce the burden for issuers. The PDR included "rights issues" which allowed for the subscription of new shares only by existing shareholders.[106] The PDR for rights issues established by Directive 2010/73/EU was only applied in 97 prospectuses in 2013 and 2014 in the EU (around 1.2% of prospectuses).[107]

To address this issue, the PR introduces a special simplified disclosure regime for secondary issuances, in the case of an offer of securities to the public or of an admission to trading of securities on a regulated market, designed for issuers who are continuously listed on a regulated or SME growth market for at least 18 months.[108]

A simplified prospectus must include a summary (in accordance with Article 7), a specific registration document and a specific securities note.[109] The information contained in the simplified prospectus shall be written and presented in an easily analyzable, concise and comprehensible form and shall enable investors to make an informed investment decision.[110]

To ease the burden for issuers, the simplified prospectus takes into account the regulated information that has already been disclosed to the public pursuant to Directive 2004/109/EC, where applicable, and Regulation (EU) No 596/2014.[111]

The simplified prospectus contains the relevant reduced information which is necessary to enable investors to understand: (a) the prospects of the issuer and the significant changes in the business and the financial position of the issuer; (b) the rights attached to the securities; (c) the reasons for the issuance and its impact on the issuer, including on its overall capital structure, and the use of the proceeds (the "necessary information" test).[112]

---

[105] According to the AI 2015 the tripartite prospectus is only widely used in France, Luxembourg, and Norway.

[106] Article 4(2)(a) of the Directive; European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, pp. 23–24.

[107] Ibid., p. 26.

[108] Article 14: "The following persons may choose to draw up a simplified prospectus under the simplified disclosure regime for secondary issuances, in the case of an offer of securities to the public or of an admission to trading of securities on a regulated market: a) issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued; b) issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities; c) offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months."

[109] Article 14(1)(2).

[110] Article 14(2).

[111] Ibid.

[112] Ibid.

© for this edition by CNS

The detailed content of the simplified prospectus is embodied in the Annex to the Delegated Regulation and includes, *inter alia*: (a) financial information; (b) a profit forecast or estimate; (c) a summary of disclosures made under MAR; (d) risk factors; and (e) working capital statement, statement of capitalization and indebtedness, relevant conflicts of interest and related party transactions, major shareholders.[113] Numerous items (such as financial review, organizational structure, capital resources, remuneration, and board practices), normally required in a regular prospectus, are not required under the simplified regime for secondary issuers.[114]

Equity prospectuses represented a quarter of all prospectuses approved in the EU in 2014 (935 prospectuses) and 70% of all equity prospectuses corresponded to secondary issuances.[115] Therefore, the EC estimates that approximately 700 prospectuses per year may make use of the PDR, which will increase the usage rate from 1.2 % to 17.5 %.[116] The simplified prospectus regime for secondary issuances is deemed to reduce the cost of prospectus obligations by 20–50% and EUR 200,000–500,000 per prospectus. This would result in EUR 130–350 million savings in administrative costs each year. In my opinion, introducing the simplified prospectus regime for secondary offerings is a great move, which was, however, long overdue, as such models successfully operate in many jurisdictions (e.g. Australia, Canada, US: the institution of "Well-Known Seasoned Issuer"[117]).

The acknowledgement that there is no argument for producing a full-scale prospectus for secondary issuances of securities listed on a regulated market, if the relevant information is easily searchable by investors, definitely took too long to be made. The reform in this regard could have been even more ambitious — one of the considered options was to extend the prospectus exemption to all fungible securities (equity and non-equity) already listed on a regulated market in the EU. This would have led to some major improvements for listed issuers, especially large issuers, while investors would have preserved access to information required under Market Abuse Regulation and the Transparency Directive. However, the EC

[113] Article 14(3).

[114] "New prospectus regime: Delegated regulation on format, content and scrutiny of prospectuses," http://www.elexica.com/en/legal-topics/equity-capital-markets/160319-new-prospectus-regime (accessed: 20.06.2019).

[115] European Commission, *The Commission Staff Working Document Impact Assessment…*, Brussels 30.11.2015, p. 26.

[116] Ibid.

[117] Under the Securities Act 1933 Rule 405, a WKSI is an issuer that meets the registrant requirements of Form S-3 or Form F-3 and either: (1) "as of a date within 60 days of determination date, has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more"; or (2) "as of a date within 60 days of the determination date, has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the [Securities] Act."

© for this edition by CNS

feared that this option would deprive investors of "comprehensive and well-structured information on the issuer[118] and securities[119]" which was not included under other disclosure regimes. This was believed to allegedly undermine investor confidence, discouraging them from entering the markets. Instead, the EC decided to extend the PDR to all secondary issuances of securities and at the same time to reduce the information burden for well-known issuers by taking into account all information that issuers on a regulated market or on an SME growth market have already published pursuant to the Market Abuse Regulation, the Transparency Directive and the market rules.[120]

Conclusion

In conclusion, the PR cannot be considered the revolution it was expected to be. Although a firm sign of a promising trend, the solutions proposed by the PR are too cautious and not ambitious enough as the reform of the EU capital markets requires definitely more revolutionary and ground-breaking measures in order to compete with more efficient and booming capital markets, such as those in the US or Asia. Some of the measures worth considering (such as resigning from itemized prospectus disclosure) are too radical in the present EU regulatory environment[121] and would most probably be blocked by the NCAs, not to mention the ESMA.

In my opinion, there is still a growing need to propose a landmark and original vision of the framework of the prospectus obligations in public offerings so they can best address the particular needs of numerous market players — including the companies' need for cheap and easy funding, the need for appropriate investor information protection, and finally — the general need to increase the competitiveness and attractiveness of the EU CMU. Appropriate solutions and legal policy in this area would not only contribute to strengthening and increasing the capitalization of the markets but also promote the sector of SMEs, and consequently — help to unlock the deeply hidden growth potential for the entire EU economy.

Despite the fact that the major issues of the public offerings market have been properly identified, the European legislator lacked the courage to use the available momentum and to fully follow the international trends in the field of liberalization of prospective obligations. Given that the US is undergoing another reform of prospect duties, the PR should be seen as a missed opportunity. It seems that in times

---

118 Shareholding structure, related party transactions, risk factors, etc.

119 Risk factors, use of the capital raised, etc.

120 This approach was also supported by the majority of respondents to the public consultation.

121 L. Enriques, "EU Prospectus Regulation: Some out-of-the-box thinking," https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/eu-prospectus-regulation-some-out-box-thinking (accesed: 1.07.2019).

© for this edition by CNS

of the aggressive phenomenon of regulator shopping some European lawmakers should bear in mind that if we stand still or move too slowly, it means that we are moving backward.

References

Anderson N., et al., "A European Capital Markets Union: Implications for growth and stability," *Bank of England Financial Stability Paper* 2015, no. 33.

Capital Markets Union — Communication of the Commission of 30 September 2015, entitled *Action Plan on Building a Capital Markets Union*.

Casale A., Bianchi M., Spatola P., "The New Prospectus Regulation: A missed opportunity?" *Oxford Business Law Blog* 16.03.2017, https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/new-prospectus-regulation-missed-opportunity (accessed: 1.07.2019).

Chyla Ł., "Is 2.5 million EUR prospectus exemption threshold enough?," *Przegląd Prawno-Ekonomiczny* 47.

Demyanyk Y., Ostergaard C., Sørensen B.E., "Risk sharing and portfolio allocation in EMU," *DG ECFIN Economic Paper* 2008, no. 334.

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

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

Enriques L., "EU Prospectus Regulation: Some out-of-the-box thinking," *Revista Lex Mercatoria Doctrina, Praxis, Jurisprudencia y Legislación* 2, 2017.

ESMA 31-62-1193 document, 8.02.2019.

ESMA, *Investment-Based Crowdfunding: Insights from Regulators in the EU*, May 2015.

ESMA/2013/619 document, *Report on Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive*, 30.05.2013.

The European Commission's regulatory fitness and performance (REFIT) programme, https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en (accessed: 20.06.2019).

European Commission, *The Commission Staff Working Document, Feedback Statement for the Public Consultation on the Capital Markets Union, Mid-Term Review Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan*, Brussels 8.06.2017.

European Commission, *The Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 596/2014 and (EU) 2017/1129 as regards the Promotion of the Use of SME Growth Markets*, Brussels 24.05.2018.

European Commission, *The Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading*, Brussels 30.11.2015.

© for this edition by CNS

Femminis G., "Risk-sharing and growth: The role of precautionary savings in the 'Education' model," *Scandinavian Journal of Economics* 103, 2001.
Fox M.B., "Initial public offerings in the capital markets union: A US perspective," [in:] *Capital Markets Union in Europe*, eds. D. Busch, E. Avgouleas, G. Ferrarini, Oxford Scholarship Online 2018.
"New prospectus regime: Delegated regulation on format, content and scrutiny of prospectuses," http://www.elexica.com/en/legal-topics/equity-capital-markets/160319-new-prospectus-regime (accessed: 20.06.2019).
Nowosad W., "Nowe rozporządzenie prospektowe — analiza wybranych zmian legislacyjnych," *Przegląd Prawa Handlowego* 10, 2018.
Obstfeld M., "Risk-taking, global diversification, and growth," *American Economic Review* 84, 1994, no. 5.
Panasar R. S., et al., "The new Prospectus Regulation — The story so far," *Cleary Gottlieb* 7.03.2019, https://www.clearygottlieb.com/-/media/files/alert-memos-2019/the-new-prospectus-regulation-the-story-so-far-v2.pdf (accessed: 1.07.2019).
"Prospectus regulation," https://www.nortonrosefulbright.com/en/knowledge/resources-and-tools/capital-markets-union/prospectus-regulation (accessed: 20.06.2019).
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.
US Securities Act of 1933.

New prospectus regime: A critical analysis of chosen key changes

Summary

The 2015 Impact Assessment Working Document evaluation has identified numerous issues which seemed to hinder the efficiency of EU capital markets. To address those issues, the new prospectus regime was introduced by the Prospectus Regulation (EU) 2017/1129 which replaced the previous Prospectus Directive and will be directly binding and fully applicable in all EU Member States from 21 July 2019. The main aim of the Prospectus Regulation is to ensure investor protection and market efficiency while enhancing the internal EU market for capital. In order to achieve this goal, Regulation 2017/1129 introduces a number of significant changes. First, it replaces the existing Prospectus Directive with a regulation, which means that its provisions will be applicable in each Member State directly, without further implementation. The legislative form of the regulation ensures that provisions directly imposing obligations on persons involved in offers and admissions of securities are applied in a uniform manner throughout the EU. Second, because the costs of producing a prospectus are likely to be disproportionate to the envisaged proceeds of the offer, the EU lawmakers decided that the obligation to produce prospectus should exclude offers of small scale. Therefore, the Prospectus Regulation 2017/1129 raises the lower exemption threshold to EUR 1 million (from EUR 100,000) and the upper exemption threshold to EUR 8 million (from EUR 5 million). Third, under the new Prospectus Regulation rules there will be a special fast-track and simplified frequent issuer regime**,** similar to the "shelf registration" process known in the US or France (*document de référence*). Fourth, to promote small and medium companies (SMEs), the Prospectus Regulation extends the definition of SMEs and broadens the list of companies with SME status to the inclusiveness of the EU capital markets. To further boost the SMEs' presence and performance on the capital markets, the Prospectus Regulation introduces a new EU growth prospectus under the proportionate disclosure regime — an alleviated standard of disclosure re-

© for this edition by CNS

quirements. Finally, the Prospectus Regulation introduces a special simplified disclosure regime for secondary issuances, in the case of an offer of securities to the public or of an admission to trading of securities on a regulated market, designed for issuers who are continuously listed on a regulated or SME growth market for at least 18 months. Although the changes are definitely a step in the right direction, it seems that instead of an expected groundbreaking revolution the new regulation will rather be a mere evolution of the previous system.

© for this edition by CNS