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Reform of the Prospectus Regime

Diploma Thesis

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Date: 18 July 2016

Declaration

I hereby declare that I compiled this diploma thesis independently, using only the listed resources and literature. I further declare that this thesis has not been used for obtaining any previous university degree.

In Prague, on 18 July 2016

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Acknowledgments

I would like to thank my supervisor, doc. JUDr. Michael Kohajda, Ph.D., for his willingness to lead a thesis on such a specific topic and for his patience and understanding throughout the process.

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Glossary of terms

The glossary of terms below contains definitions and explanations of capitalized terms and abbreviations used in this diploma thesis. All capitalized terms and abbreviations used in this thesis shall have the meaning provided herein.

Term	Definition
Brussels Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
CMU	Capital Markets Union: the CMU is a plan of the European Commission that aims to create deeper and more integrated capital markets in the EU. The objectives of CMU are to help businesses tap into more diverse sources of capital from anywhere within the EU, make markets work more efficiently and offer investors and savers additional opportunities to put their money to working in order to enhance growth and create jobs. ¹
Commission	European Commission.
Council	Council of the European Union.
Draft Regulation	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, presented by the Commission on 30 November 2015, document number COM(2015) 583 final.
EBF	European Banking Federation, a representative of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4.500 banks, which employ about 2.5 million people. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic

¹ European Commission. *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* [online]. 2015 [cit. 2016-05-22]. Available online at WWW: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015SC0255>> (further referred to as “European Commission. *Impact Assessment*”).

	growth. Website: www.ebf-fbe.eu . ²
EEA	The European Economic Area: The European Economic Area unites the EU Member States and the three EEA/EFTA States (Iceland, Liechtenstein, and Norway) into an Internal Market governed by the same basic rules. These rules aim to enable goods, services, capital, and persons to move freely about the EEA in an open and competitive environment, a concept referred to as the four freedoms. ³
ESMA	European Securities and Markets Authority: the European Securities and Markets Authority ESMA is an independent EU Authority that contributes to safeguarding the stability of the European Union's financial system by ensuring the integrity, transparency, efficiency and orderly functioning of securities markets, as well as enhancing investor protection. In particular, ESMA fosters supervisory convergence both amongst securities regulators and across financial sectors by working closely with the other European Supervisory Authorities. ⁴
EU	European Union.
EUR	The lawful currency of the member states of the European Union that adopted the single currency in accordance with the Treaty of Rome establishing the European Economic Community, as amended.
GBIC	The German Banking Industry Committee is the joint committee operated by the central associations of the German banking industry. Collectively, these associations represent approximately 1.700 banks. ⁵
Impact Assessment	A European Commission Working Staff Document: The 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

² European Banking Federation. *EBF response to Consultation Document on the Review of the Prospectus Directive* [online]. 2015 [cit. 2016-05-29]. Available at WWW: <http://www.ebf-fbe.eu/wp-content/uploads/2015/06/EBF_014393H-EBF-response-to-CP-on-Prospectus-Directive.pdf>.

³ European Commission. *Impact Assessment*, Annexes, p. 1.

⁴ *Ibid*, p. 2.

⁵ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation* [online]. 2016 [cit. 2016-05-29]. Available at WWW: <https://bankenverband.de/media/files/2016-02-24-lb-Prospekt-RL-Anl01.pdf>, p.1.

to the public or admitted to trading. Available online at WWW: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015SC0255>>.

Implementing Regulation

Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.⁶

IPO

Initial Public offering: The first sale of stock by a private company to the public.⁷

Market Abuse Directive

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

Market Abuse Regulation

Regulation No 596/2014 on market abuse will enter into application in July 2016. The new rules on market abuse update and strengthen the existing framework to ensure market integrity and investor protection provided by the existing Market Abuse Directive which will now be repealed.⁸

Member State

A member state of the European Union.

MTF

Multilateral Trading Facility: an MTF is a system, or “venue”, defined by MiFID (Article 4) which brings together multiple third party buying and selling interests in financial instruments in a way that results in a contract. MTFs can be operated by investment firms or market operators and are subject to broadly the same overarching regulatory requirements as regulated markets (e.g. fair and orderly trading) and the same detailed transparency requirements as regulated markets.⁹

NCA

National Competent Authority: an official body designated by each Member State, which has the legally delegated or invested authority and power to perform designated functions, especially regarding the approval of prospectuses and supervision

⁶ The commonly used term “Prospectus Regulation” was intentionally avoided in this diploma thesis to prevent confusion with the Draft Regulation.

⁷ European Commission. *Impact Assessment*, Annexes, p. 2.

⁸ *Ibid*, Annexes, p. 3.

⁹ European Commission. *Impact Assessment*, Annexes, p. 3.

	of the prospectus regime. ¹⁰
PRIIPs Regulation	Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).
Presidency Proposal	The Council's Presidency proposal for a general approach on the Draft Regulation, published on 3 June 2016 and approved by the Council on 17 June 2016, i.e., the Draft Regulation as amended by the Council and representing their negotiating stance for the next steps in the legislative process.
Prospectus Directive	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 (Text with EEA relevance).
Prospectus Directive II	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).
Regulated market	A regulated market is a multilateral system, defined by MiFID (Article 4), which brings together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments in a way that results in a contract. Examples are traditional stock exchanges such as the London Stock Exchange. ¹¹
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual

¹⁰ Compare European Commission. *Impact Assessment*, Annexes, p. 3; Draft Regulation, Recital (11).

¹¹ European Commission. *Impact Assessment*, Annexes, p. 4.

obligations (Rome II).

SMEs

Small and medium-sized enterprises: Recommendation 2003/361/EC defines small and medium-sized enterprises as 'enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million'. In the context of financial services SMEs are defined in MiFID II with regard to their market capitalisation: “‘small and medium-sized enterprises’ for the purposes of this Directive, means companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years”.¹²

Transparency Directive

Directive 2004/109/EC of the European Parliament and of the Council which lays down rules for the publication of financial information and major holdings.

¹² Ibid, Annexes, p. 5.

Introduction

Companies in the EU rely heavily on bank loans, which provide the vast majority (some sources state up to 80 per cent.) of companies' financing, while the capital markets in the EU are underdeveloped.¹³ The situation in the United States is almost reversed: up to 80 per cent. of companies' financing comes from capital markets.¹⁴ I was quite surprised by this contrast. I realize that this is primarily caused by a smaller pool of available funds for investing in the EU and a greater appetite for risk in the United States business culture,¹⁵ I nevertheless started wondering whether it is also the legal and institutional environment in the EU, which prevents further development of its capital markets. Indeed, for example fragmentation and the number of different applicable laws was revealed as one of the main barriers to growth of capital markets in the EU, with market participants citing differences between countries and the applicable rules as a discouraging investment in the EU.¹⁶

The original goal of this diploma thesis was to analyse the legal regulation of capital markets in the EU in general, compare the institutions with their equivalents in other jurisdictions, primarily the United States, and arrive at conclusions in what ways the legal environment could be amended to bolster development of capital markets in the EU. However, this goal proved to be too ambitious and extensive to cover in this diploma thesis alone. That is why I chose one notable legal instrument only: the prospectus.

The requirement to prepare a prospectus when offering securities to the public or when seeking admission of securities to trading on regulated markets is a key characteristic of capital markets in the EU and around the world. The prospectus is a gateway to capital markets financing and an instrument, which can significantly influence access

¹³ See for example European Commission. *Impact Assessment*, p. 12. For a detailed comparison of the differences between the capital markets in Europe and in the United States please see AFME, Boston Consulting Group. *Bridging the growth gap* [online]. 2015 [cit. 2016-04-23]. Available at WWW: <<http://www.afme.eu/WorkArea/DownloadAsset.aspx?id=12509>>.

¹⁴ AFME, Boston Consulting Group. *Bridging the growth gap*, p. 6-7.

¹⁵ Compare AFME, Boston Consulting Group. *Bridging the growth gap*, p. 6-7.

¹⁶ *Ibid*, p. 18.

to these markets, the cost of raising finances there, their attractiveness among investors (including retail investors) as well as investor protection.¹⁷

The Commission appears to be aware of this: in 2015, it presented its plan for a Capital Markets Union (called also just the *CMU*). The primary goal of the CMU is to facilitate raising of financing on capital markets and developing alternatives to bank lending.¹⁸ One of the first steps of the CMU is a reform of the EU prospectus regime: on 30 November 2015, the Commission published its proposal of a new legislative act, a regulation, which is to replace the current Prospectus Directive. The goal of the reform of the prospectus regime corresponds to the goal of the CMU: to increase access to capital markets, especially for SMEs, increase investor protection and generally – make markets operate more efficiently.

The primary aim of this diploma thesis is to identify the shortcomings of the Prospectus Directive, compare the Commission's proposal (in this thesis called the *Draft Regulation*) with the current Prospectus Directive and analyze the changes. The main conclusions of the thesis should be whether the changes address the identified shortcomings and present a general improvement of the prospectus regime or, alternatively, whether other changes should be made. The goal of the thesis therefore is not to give a comprehensive description of the prospectus regime and its functioning in the EU (neither under the Prospectus Directive nor under the Draft Regulation), emphasize is put only on the most important proposed changes and the majority of the provisions which remain unchanged in the Draft Regulation are outside the scope of this thesis.

It is necessary to add that the wording of the Draft Regulation as proposed by the Commission is by no means final. The proposal has been submitted to the European Parliament and the Council of the European Union, who are, together with the European Commission, scheduled to start official tripartite negotiations of the proposal in September 2016. Working documents of the Council of the European

¹⁷ Ibid, p. 21.

¹⁸ European Commission. *Explanatory Memorandum to the 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* [online]. 2015 [cit. 2016-05-24]. Available online at WWW: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0583>>, p. 4. (further referred to as “European Commission. *Explanatory Memorandum to the Draft Regulation*”).

Union (which are covered in this thesis as well) already suggest that changes, even quite significant ones, are to be expected, therefore the final wording of the regulation might differ from the Commission's Draft Regulation as analysed in this thesis. It logically follows that once this occurs, some parts of this thesis will be outdated. Nevertheless, I believe that the majority of the analysis and conclusions will remain valid when examining the EU prospectus regime in the future and that it is now, during the creation and negotiation of the new prospectus regime when it is absolutely crucial to examine and analyse the proposed changes in order to determine, whether they present an improvement, so that they potentially can be changed.

Regarding methodology, the diploma thesis intends to use a combination of several methods. Firstly, I intend to analyse the current prospectus regime to determine its shortcomings, primarily by researching data provided by market participants, mainly within the consultation process undertaken by the Commission in early 2015. Secondly, I intend to compare the Prospectus Directive with the Draft Regulation and analyse the changes proposed by the Commission. The starting point will always be Commission documents, such as the Draft regulation itself, its explanatory memorandum or the accompanying Impact Assessment. Information from various market participants will then be added to critically analyse the proposed changes. Finally, I plan to confront the proposed changes with the identified shortcomings to conclude whether the Draft Regulation presents an improvement of the current prospectus regime.

As indicated by the above, the initial sources of information will be official EU documents related to the Commission's proposal, which are then critically confronted with data received from market participants, provided either during the consultation process or published as a response to the Draft Regulation. As the topic is fairly new, not many academic articles were available, but scholastic literature on the subject was used when appropriate, mainly in the first introductory sections of the diploma thesis.

The first part of the thesis (chapters 1 and 2) will describe securities prospectuses in general, their purpose and contents as well as the current prospectus regime under the Prospectus Directive. The second part (chapters 3 and 4) is the pivotal part of the thesis: it will describe and analyse the Commission's proposal, summarize

stakeholder feedback and attempt to come to conclusions about the proposed changes, their impact and overall usefulness. The third and final part (chapter 5) of the thesis will address certain aspects of prospectus liability, which remains largely outside the scope of the Draft Regulation, and ask the question whether a specific conflict-of-law rule should be introduced to EU law.

1. What is a prospectus

This first part of the chapter introduces a securities prospectus: its purpose and governing principles together with reasons for and against mandatory disclosure. The second part of the chapter then analyses the costs related to the preparation of a prospectus and provides basic prospectus data, such as the number of prospectuses approved in the EU annually or their division between Member States, in order to describe the environment in which the EU prospectus regime exists.

1.1 Definition and purpose of a prospectus

As Philip Wood aptly says, financial assets are not like bananas or cars, they cannot be displayed to show their qualities and can only be sold by describing them.¹⁹ Therefore when a company intends to seek financing on capital markets by issuing securities such as shares or bonds, it is legally required to create and publish a document presenting information about the company and the securities it plans to issue so that investors can make an informed decision whether to invest in the company or not.²⁰

This document is most commonly known as a *prospectus*, which is the term also used by the Prospectus Directive, the Draft Regulation or the United States Securities Act of 1933. However, other terms such as offering circulars, offering memorandum, placement memorandum, offer documents or listing particulars can be encountered in certain jurisdictions or used by the market.²¹

Lawyers often claim that the prospectus is the most important document of the entire transaction, while others (especially the investment bankers) might disagree and state that it is the road presentation.²² Irrespective of who is right in this slightly comical discussion, the prospectus is one of the key aspects of the procedure of seeking financing on capital markets.

¹⁹ WOOD, Philip. *Law and Practice of International Finance*. University Edition. London : Sweet & Maxwell, 2008. p. 372.

²⁰ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 2.

²¹ WOOD, Philip. *Law and Practice of International Finance*, p. 372.

²² See for example PANASAR, Raj, et al. *European Securities Law*. Second Edition. Oxford : Oxford University Press, 2014, p. 97.

Typically, a prospectus has the following defining characteristics: it contains prescribed information, it discloses everything material, it attracts liability for errors and personal liability for persons other than the issuer, for example directors, and it is often approved by a regulator.²³

Prospectuses are regulated by prospectus law, which is based on the principle of full disclosure: the purpose of the law is to ensure that investors are provided with complete information so that they can make up their own mind.²⁴ However, the role of the regulator or supervisor role is not to verify whether the information is correct (which is why approval of the prospectus does not exclude liability)²⁵ nor is it to judge the merits of the particular investment, which can be the case under state law in certain states in the United States.²⁶

Building on the above, it can be concluded that the purpose of a prospectus is to: (i) create confidence in the market by containing necessary and prescribed information and attaching liability to such information, (ii) provide investors with all necessary information to assess the investment, that is the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attached to the security in question and (iii) differentiate between retail investors (who need more protection) and sophisticated investors.²⁷

1.2 Reasons for and against mandatory disclosure

As experts seem to agree that mandatory disclosure is necessary, the question therefore is not if disclosure is necessary, but rather how much disclosure is necessary, the level of scrutiny of the supervisor and the liability attached to the prospectus.²⁸

Reasons for mandatory disclosure include the reduction of fraud,²⁹ increased public confidence in the market (as insiders often prefer to suppress negative news

²³ WOOD, Philip. *Law and Practice of International Finance*, p. 373.

²⁴ Ibid, p. 372.

²⁵ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union. *Law and Financial Markets Review*. November 2011. p. 450.

²⁶ WOOD, Philip. *Law and Practice of International Finance*, p. 372.

²⁷ See for example Financial Conduct Authority. *Availability of information in the UK Equity IPO process. Discussion Paper DP16/3* [online]. 2016 [cit. 2016-05-30]. Available at WWW: <<https://www.fca.org.uk/your-fca/documents/discussion-papers/dp16-03>>, p. 18.

²⁸ WOOD, Philip. *Law and Practice of International Finance*, p. 373.

from the public, which mandatory disclosure combined with liability prevent),³⁰ efficient operation of markets,³¹ reduction of losses due to insolvencies, comparability of investment opportunities and reduction in the volatility of stock returns.³²

Reasons against mandatory disclosure include primarily the costs related to producing a prospectus (see chapter 1.3 *Costs of producing a prospectus* below for more information), but also delays and the believe that the disclosure rules should be determined by the market itself and that law against misleading behaviour is sufficient for investor protection.³³ This opinion seems to bear merits as market participants responded to a EU survey that a majority of the costs related to the preparation of a prospectus would be incurred in the absence of any mandatory disclosure anyway due to the fact that investors require a minimum standard of disclosure and because issuers have to undertake the necessary due diligence when raising capital from the public.³⁴

The issue becomes more contentious when dividing investors between retail and sophisticated (also called *institutional*, *professional* or *wholesale*). For example Luca Enriques, the Allen & Overy Professor of Corporate Law at the University of Oxford, argues that it is reasonable to discuss whether markets operate more efficiently due to mandatory provision of information to research analysts and sophisticated investors, however adds that there is a clear body of evidence showing that retail investors are unable to make better investment decisions based on the provision of more and better information. He even says “*it is a mystery why policymakers keep deluding themselves with the idea that issuer disclosure is a useful tool to protect retail investors*”. Professor Enriques claims that mandatory disclosure is performs three roles in three different contexts. These contexts are: (i) an offer made with the intention to have the security admitted to trading on a regulated market (i.e., an IPO), where the provision of information ensures correct price discovery; (ii) a public offer by a financial intermediary without a parallel offer to institutional

²⁹ Ibid.

³⁰ HERTIG, Gérard, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. 2 edition. Oxford : Oxford University Press, 2009. p. 278.

³¹ WOOD, Philip, p. 373.

³² HERTIG, Gérard, et al. *The Anatomy of Corporate Law*, p. 278.

³³ WOOD, Philip. *Law and Practice of International Finance*, p. 373.

³⁴ European Commission. *Impact Assessment*, Annexes, p. 24.

investors, where the information supports an investment decision, nevertheless does not form it; and finally (iii) screening for fraud in case of “fringe” offers marketed at the public. However, retail investor benefit from the mandatory disclosure to a limited extent in scenarios (ii) and (iii) only³⁵

Nevertheless, the bottom line is that mandatory disclosure is still widely accepted as the most efficient way of ensuring investor protection and capital market efficiency and an essential feature of capital markets regulation.³⁶

1.3 Costs of producing a prospectus

The importance of a balanced and well-functioning prospectus regime becomes evident when considering what the process entails for issuers, in particular the high costs connected to the preparation of a prospectus. These costs directly impact the costs of raising capital in the EU and can serve as an incentive for larger companies to seek financing through private placements instead of public issuances.³⁷

The exact costs of producing a prospectus are difficult to determine and huge differences exist between sources. A 2008 EU report studying the impact of the prospectus regime states that market participants quoted difficulty in determining which costs are attributable to the Prospectus Directive alone and which are attributable to other regulation. They also stated that there are huge variations in costs depending on the issuer, the amount raised or the particular security.³⁸

Commissioner Hill in his speech announcing and introducing the Draft Regulation in November 2015 only generally stated that a prospectus “*can be extremely expensive to produce - costing anything between tens of thousands of euro to one million euro*”.³⁹

³⁵ ENRIQUES, Luca. *EU Prospectus Regulation: Some Out-of-the-Box Thinking* [online]. 2016 [cit. 2016-05-22]. Available at WWW: <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/eu-prospectus-regulation-some-out-box-thinking>>.

³⁶ Compare for example HUSTÁK, Zdeněk, et al. *Zákon o podnikání na kapitálovém trhu. Komentář*. Prague: C. H. Beck, 2012, p. 347.

³⁷ Compare AFME, Boston Consulting Group. *Bridging the growth gap*, p. 48.

³⁸ Internal Market and Services Directorate General of the EU. *Study on the Impact of the Prospectus Regime on EU Financial Markets: Final Report* [online]. 2008 [cit. 2016-05-29]. Available at WWW: <http://ec.europa.eu/finance/securities/docs/prospectus/cses_report_en.pdf>. p. 47.

³⁹ HILL, Jonathan. *Opening speech given by Commissioner Jonathan Hill on the overhaul of prospectus rules for the Capital Markets Union* [online]. 2015 [cit. 2016-05-22]. Available at WWW: <http://europa.eu/rapid/press-release_SPEECH-15-6202_en.htm?locale=en>.

The Commission in its Impact Assessment concluded that the costs of equity prospectuses and non-equity prospectuses are roughly EUR 1 million and EUR 250.000, respectively.⁴⁰ Market participants estimated that the costs of preparing an equity prospectus to be EUR 900.000, of a non-equity prospectus EUR 63.000, of which 82 per cent. and 69 per cent., respectively, relate to accounting and legal expenses.⁴¹ The costs of preparing a base prospectus were estimated to be EUR 145.000.⁴² These amounts include in-house costs of the issuer as well expenses for legal advisors, accountants, financial advisers, regulatory fees and other expenses.⁴³ Other sources quote costs such as EUR 500.000⁴⁴ or EUR 2-4 million⁴⁵ for an equity prospectus, EUR 700.000 for an IPO prospectus,⁴⁶ EUR 160.000-1.6 million for a non-equity prospectus⁴⁷ and EUR 120.000-160.000 for a base prospectus.⁴⁸

Of these costs, 25-40 per cent. are internal costs, 15-40 per cent. audit costs, 20-30 per cent. legal fees, 2-15 per cent. competent authorities' fees and unspecified other costs of up to 15 per cent.⁴⁹ Another report examining IPOs in London states that the total costs of an IPO are 5.5-11 per cent. of the entire proceeds of the IPO, with the biggest costs being underwriting costs (3-5 per cent.), costs of financial advisers (1-2 per cent.), legal expenses (1-2 per cent.) and accounting and auditing expenses (0.5-1.5 per cent.).⁵⁰

The 2008 EU report also attempted to determine the cost-effectiveness of the prospectus requirements as the costs incurred due to these requirements should be proportionate to the benefit and not pose as a barrier to market efficiency. To determine cost-effectiveness, the report inquired how prospectuses are actually used by market

⁴⁰ European Commission. *Impact Assessment*, p. 8.

⁴¹ Internal Market and Services Directorate General of the EU. *Study on the Impact of the Prospectus Regime on EU Financial Markets*, p. 48.

⁴² *Ibid*, p. 48.

⁴³ *Ibid*, p. 47.

⁴⁴ Association of Investment Companies. *Lowering barriers to accessing capital markets: AIC submission on Prospectus Directive reform* [online]. 2015 [cit. 2016-05-29]. Available at WWW: <<http://www.theaic.co.uk/sites/default/files/hidden-files/AICProspectusDirectiveConsultationsubmissionMay15%20pdf.pdf>>. p. 2.

⁴⁵ European Banking Federation. *EBF response to Consultation Document*, p. 2-3.

⁴⁶ Association of Investment Companies. *Lowering barriers to accessing capital markets*, p. 2.

⁴⁷ *Ibid*, p. 2-3.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*, p. 2.

⁵⁰ Internal Market and Services Directorate General of the EU. *Study on the Impact of the Prospectus Regime on EU Financial Markets*, p. 51.

participants. In case prospectuses truly serve as basis for investment decisions, then the costs involved in preparing a prospectus would have to be weighed against the benefit of investor protection. The report concluded that it appears that retail investors, as opposed to institutional investors, on average do not rely on prospectuses when making investment decisions. Nevertheless, the report adds that issuers and offerors would likely still prepare a prospectus even if there was no obligation to do so (i.e., voluntarily) because of the legal protection a prospectus offers.⁵¹

1.4 Prospectuses in the EEA

In order to set further discussions of the current and proposed EU regulation of the prospectus regime into context, it is appropriate to show the structure of the EU capital market, especially in terms of prospectuses approved and their type and distribution between Member States. That is why this subchapter presents an overview of some basic prospectus data. This data was collected and published by ESMA⁵² and relates to prospectus activity in the EEA in the year 2014, which is the most recent year with available data.

Firstly, it is important to realize the enormous differences between national markets, particularly in terms of volume. In 2014, a total of 3.931 prospectuses were approved by the NCAs in the EEA.⁵³ The five Member States with most approved prospectuses accounted for approx. 66 per cent. of that: Luxembourg's NCA approved 722 prospectuses, Ireland's 631, United Kingdom's 471, France's 394 and Germany's 377.⁵⁴ In comparison, the Czech Republic's NCA approved 21 prospectuses, Slovenia's 8 and Estonia's 1.⁵⁵ This, of course, does not mean that so few companies from these countries issued securities, as these issuers may have offered securities to the public in another Member State or have them admitted to trading on a regulated market in another Member State.

⁵¹ Ibid.

⁵² ESMA. *Report: EEA Prospectus Activity in 2014* [online]. 2015 [cit. 2016-06-04]. Available at WWW: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-1136_eea_prospectus_activity_in_2014.pdf>.

⁵³ Ibid, p. 7.

⁵⁴ Ibid, p. 6-7.

⁵⁵ Ibid. For the sake of clarity, these are not the Member States with the lowest numbers of approved prospectuses.

Of the total of 3.931 prospectuses, 1.003 were equity prospectuses (i.e., for shares, depositary receipts or closed-end funds) and 2.944 (or 75.1 per cent.) were non-equity prospectuses (i.e., for debt securities, asset backed securities or derivatives).⁵⁶ The slight discrepancy in the total is due to the fact that some of the prospectuses were in respect of both equity and non-equity securities.⁵⁷

Regarding debt securities, approximately the same number of prospectuses across the EEA were in respect of debt securities with nominal value above EUR 100.000 and in respect of debt securities with nominal value below EUR 100.000.⁵⁸ This is also true for Member States with the biggest number of prospectuses approved, including the United Kingdom, France, Luxembourg and Ireland with Germany's data actually showing a significant prevalence of debt securities with nominal value below EUR 100.000.⁵⁹

To show the usage of prospectus passporting, a total of 965 prospectuses⁶⁰ were passported out ("*number of prospectuses in relation to which EEA Member States provided one or more other Member States with a certificate of approval*")⁶¹ and a total of 2.800 prospectuses⁶² were passported in ("*number of certificates of approval which Member States received*").⁶³ This means that one prospectus was passported on average into almost three Member States. While the most prospectuses were passported out of Luxembourg, Germany and Ireland (these three Member States accounted for 76.1 per cent. of all prospectuses passported out),⁶⁴ the data regarding prospectuses passported in shows an even distribution between Member States.⁶⁵

However, the only (and perhaps the main difference) is not the number of approved prospectuses: there are also more fundamental differences between Member States in the source of financing and the proportion between bank and capital markets financing. Using the example of SMEs, in some Member States including Denmark

⁵⁶ Ibid, p. 12.

⁵⁷ Ibid, p. 11.

⁵⁸ Ibid, p. 17.

⁵⁹ Ibid.

⁶⁰ Ibid, p. 19.

⁶¹ Ibid, p. 18.

⁶² Ibid, p. 22.

⁶³ Ibid, p. 18.

⁶⁴ Ibid, p. 19.

⁶⁵ Ibid, p. 21-22.

and Sweden, almost a third of SMEs used equity as a source of financing, while in others including the Czech Republic and Hungary there was essentially none at all.⁶⁶

⁶⁶ European Commission. *Impact Assessment*, p 12.

2. Current prospectus regime in the EU

The following chapter provides a brief overview of the current prospectus regime and its regulation in the EU. The first part of the chapter introduces the main legislative act regulating the prospectus – the Prospectus Directive – and its history. The second part of the chapter describes the shortcomings of the Prospectus Directive, which have been identified mainly by the Commission and market participants.

2.1 *The Prospectus Directive*

The main EU legislative act regulating the prospectus regime, the Prospectus Directive, replaced two directives upon entering into force: the directive on listing particulars from 1980 and the directive on prospectuses from 1989. The major shortcoming of these directives was the widely varying regulation across Member States.⁶⁷ From this situation stemmed the need for a single passport for prospectuses in order to make it easier and cheaper for companies to raise capital across the EU.⁶⁸

The Prospectus Directive was a top priority of the Financial Services Action Plan formulated in 1999⁶⁹ and it came into force on 31 December 2003, with the deadline for implementation passing on 1 July 2005. The Prospectus Directive was accompanied by level 2 implementing legislation, the Implementing Regulation.

Recital (10) of the Prospectus Directive declares its objectives: to ensure high investor protection and market efficiency.⁷⁰ Investor protection is primarily achieved through mandatory disclosure, while taking into account the different nature of investors, particularly qualified investors who are considered to be capable of protecting themselves.⁷¹ Market efficiency is achieved mainly by the so-called *single passport*, which allows issuers to have their prospectuses approved by the NCA in their country only and then use the prospectuses passport for cross-border offers and listing without

⁶⁷European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 11; MOLONEY, Niamh. *EU Securities and Financial Markets Regulation*. Third Edition. Oxford : Oxford University Press, 2014, p. 71.

⁶⁸European Commission. *Impact Assessment*, p. 5.

⁶⁹Ibid, p. 8.

⁷⁰Compare Ibid, Annexes, p. 11.

⁷¹Ibid, Annexes, p. 11.

the need for any further approvals.⁷² Around a quarter of all prospectuses are passported to at least one other Member State,⁷³ which was, in the words of the Commission, “*simply impossible prior to the Prospectus Directive*”.⁷⁴

Article 1 of the Prospectus Directive states its goal, which is to “*harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State*”. The harmonized rules were to ensure equally high, but also flexible investor protection across the EU, promote market efficiency and create a single EU market of securities to facilitate easier access to capital in other Member States.

The Prospectus Directive was amended multiple times and its major review occurred in 2009. The review concluded that overall the Prospectus Directive “*was meeting its objectives of market efficiency and investor protection*”,⁷⁵ however it identified several shortcomings of the Prospectus Directive, especially the issue of summaries, which were to be made simpler and easier understandable for investors.⁷⁶ The main changes to the Prospectus Directive included, among others, the introduction of less comprehensive disclosure requirements for certain types of issuances (including those by SMEs), attempt to eliminate overlaps between the Prospectus Directive and particularly the Transparency Directive, amendment of the format and contents of the summary and clarification of the exemption from the prospectus requirement in case securities are sold through intermediaries (the so-called “*retail cascade*”).⁷⁷ Nevertheless, the 2009 review was not successful at solving these shortcomings, because the solution was either not included at all, was ineffective or not ambitious enough.⁷⁸

⁷² Ibid, p. 5.

⁷³ Compare Ibid, Annexes, p. 16.

⁷⁴ Compare Ibid.

⁷⁵ Ibid, p. 5.

⁷⁶ Ibid, p. 5.

⁷⁷ Ibid, p. 5-6.

⁷⁸ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 11.

2.2 Shortcomings of the Prospectus Directive

While it is considered that the prospectus regime as established by the Prospectus Directive functions well overall, several shortcomings have been identified by market participants. These should be kept in mind as the Draft Regulation primarily attempts to address these.

All of these make capital market less attractive for both issuers and investors. However, it is necessary to add that many of these related issues might be not only an issue solvable through new regulation, but also through market practice.

2.2.1 High compliance costs

Foremost and figuring as an overarching shortcoming of the Prospectus Directive are the often enormous costs related to the preparation of the prospectus.⁷⁹ As described above (see chapter 1.3 *Costs of producing a prospectus* for more information), preparing a prospectus commonly requires expenses of hundreds of thousands of euros (or even millions) and can be disproportionate to the expected proceeds of the issue, therefore preventing access to capital markets, especially for SMEs.

As some of these costs are fixed and not proportional to the amount raised, the high costs of preparing a prospectus is a bigger burden on issuers raising smaller amount, typically SMEs.⁸⁰ The consequence of this is that capital markets are an unattractive source of financing for many companies, especially SMEs, as the costs outweigh the benefits of listing.⁸¹

2.2.2 Inflexible disclosure requirements for certain types of issuances

The Prospectus Directive has been criticized for insufficiently differentiating disclosure requirements for specific types of issuances and issuers, especially IPOs, secondary

⁷⁹ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 10; or European Banking Federation. *EBF position on the proposal for a Regulation*, p. 1.

⁸⁰ European Commission. *Impact Assessment*, p. 8.

⁸¹ *Ibid*, p. 11.

issuers and SMEs, which results in higher costs and creating barriers to accessing capital markets.⁸²

In its Impact Assessment, the Commission also describes the exemption from the prospectus requirement for securities with denomination above EUR 100.000 as unsatisfactory, as it supposedly creates incentives for issuers to issue securities with such high per unit denomination.⁸³ Citing an OECD report, the Commission claims that this reduces liquidity of the secondary market and prevents investors from entering the market.⁸⁴

2.2.3 *Ineffective retail investor protection*

While prospectuses created pursuant to the Prospectus Directive are considered to provide high investor protection, they are also criticized for doing so in an ineffective manner.⁸⁵ The prospectuses have been described as being user-unfriendly: they often run for hundreds of pages, contain complex language and are difficult to understand, especially for retail investors.⁸⁶ This leads to investors, especially retail investors, avoiding them and not reading even the summaries.⁸⁷ For example, the Dutch NCA's conducted research of Dutch retail investors, which indicated that less than 40 per cent. of retail investors use prospectuses when making investment decisions while more than 50 per cent. of them rely on information on websites and in brochures instead.⁸⁸ The Commission's findings confirm this practice.⁸⁹

However, this issue is more fundamental and goes to the very core of the Prospectus Directive. Investor protection and especially retail investors protection is one

⁸² European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 11; European Commission. *Impact Assessment*, p. 9.

⁸³ Ibid.

⁸⁴ Ibid, p. 10.

⁸⁵ Ibid, Annexes, p. 16.

⁸⁶ Source to come.

⁸⁷ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 11.

⁸⁸ The Netherlands Ministry of Finance, the Netherlands Authority for the Financial Markets and the Dutch Central Bank. *Response of the Netherlands – European Commission consultation document on the review of the Prospectus Directive* [online]. 2015 [cit. 2016-05-29]. Available at WWW: <<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/05/13/the-netherlands-response-to-ec-consultation-prospectus-directive/the-netherlands-response-to-ec-consultation-prospectus-directive.pdf>>, p.2.

⁸⁹ European Commission. *Impact Assessment*, Annexes, p. 17.

of the defining features of the Prospectus Directive.⁹⁰ In reality, prospectuses are primarily addressed to professional investors and the wholesale market and must contain all the information required by this market, which can handle extremely complex information.⁹¹

Further, prospectuses tend to disclose essentially all information to address any potential liability and future litigation, which of course increases their length and complexity.⁹² The term *liability shield* was used to describe this usage of the prospectus. As the Impact Assessment points out, this is particularly evident in the risk factors section of the prospectus, which often includes risk factors which fail to be specific and material, as required by Article 2(3) of the Prospectus Regulation, but rather include generic (or *boiler-plate*) risk factors.⁹³ This can prevent potential investors reading the section from correctly evaluating the risk factors and distinguish between the ones they should be aware of.⁹⁴ Overall, this tendency undermines investor protection⁹⁵ and increases the prospectus costs through the necessity of more legal advisory.⁹⁶

Both these incentives (to satisfy the wholesale market and manage liability) cause the prospectus to be dense, lengthy, complex and hard to understand for retail investors.

2.2.4 *Diverging implementation and processes across Member States*

Also, as the current prospectus regime is in the form of a directive, there are cases of different implementation of certain provisions in the law of Member States.⁹⁷ The Prospectus Directive itself also gives Member States a choice of rules in certain aspects, primarily the option to exempt offers to public with consideration below EUR 5 million from the requirement to publish a prospectus, which results in the prospectus requirement applying from different levels across the EU. Combined, this creates different rules across the EU, making cross-border transactions

⁹⁰ MOLONEY, Niamh. *EU Securities and Financial Markets Regulation*, p. 94.

⁹¹ Ibid.

⁹² European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 11; European Commission. *Impact Assessment*, p. 9.

⁹³ European Commission. *Impact Assessment*, p. 17.

⁹⁴ Compare Ibid.

⁹⁵ Ibid, Annexes, p. 16.

⁹⁶ Ibid, p. 8.

⁹⁷ Ibid, p. 8.

more difficult, risking the level playing field concept and creating uncertainty among investors.⁹⁸ ESMA's peer review also showed that the approval procedures by the individual NCAs vary across Member States,⁹⁹ which has been an issue of the EU prospectus regime from the very beginning.¹⁰⁰

On a higher level, the issue of diverging laws and rules in general (i.e., not only rules regulating prospectuses) in the EU has been identified as a major barrier to development of capital markets in the EU.¹⁰¹ Markets participants suggest that further harmonization of rules relating to for example insolvency or taxes might promote growth. In the United States, it is easier for companies to secure funding as they do not face language and legal barriers like companies in the EU do.¹⁰²

2.2.5 Lack of alignment of the Prospectus Directive and other legislation

The financial crises and other developments introduced multiple new EU acts, such as the Transparency Directive, the Market Abuse Directive or MiFID II. The Prospectus Directive has been criticised for insufficiently aligning with these directives, thereby creating overlap, inconsistent definitions and inconsistent rules.¹⁰³

⁹⁸ European Commission. *Impact Assessment*, p. 9.

⁹⁹ ESMA. *Peer Review on Prospectus Approval Process* [online]. 2016 [cit. 2016-07-12]. Available at WWW: <https://www.esma.europa.eu/sites/default/files/library/2016-1055_peer_review_report.pdf>, p. 8. This peer review was published shortly before this thesis was handed in, therefore its findings were not completely accounted for.

¹⁰⁰ See for example MOLONEY, Niamh. *EU Securities and Financial Markets Regulation*, p. 76.

¹⁰¹ AFME, Boston Consulting Group. *Bridging the growth gap*, p. 8.

¹⁰² Ibid.

¹⁰³ European Commission. *Impact Assessment*, p. 10.

3. The CMU and the proposed reform of the prospectus regime

The following chapter shortly introduces the project of the Capital Markets Union, the place of the reform of the prospectus regime within in and the current and future process of adopting a new legislative act regulating the prospectus regime in the EU.

3.1 Capital markets reform: the Capital Markets Union

In 2015, the Commission presented its plan for a Capital Markets Union (or CMU), which is to be one of the “*flagship projects of this Commission*”.¹⁰⁴ The aim of the CMU aim is to create alternatives to bank lending by facilitating raising on capital markets with the overarching goal to enhance growth and create jobs.¹⁰⁵ In the words of former commissioner Jonathan Hill, who was the driving force behind the project: “*My goal and the goal at the heart of the CMU is to make it easier for companies of all sizes in Europe to get funding on the capital markets.*”¹⁰⁶ The CMU should help develop a wider range of sources of financing for business including equity markets, securitisation, business angels, bond markets, private placements and crowdfunding.¹⁰⁷

The revamp of the prospectus regime is an important part of this reform as a prospectus is a considered *gateway* to accessing EU capital markets.¹⁰⁸ That is why it is included in the Investment Plan for Europe and the Capital Markets Union Action Plan.¹⁰⁹ The Commission states that the 2009 review of the Prospectus Directive, resulting in the Prospectus Directive II, was limited only to a limited number of areas. The current review resulting in the Draft Regulation is a more complete and ambitious

¹⁰⁴ European Commission. *Impact Assessment*, Annexes, p. 6.

¹⁰⁵ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 4.

¹⁰⁶ HILL, Jonathan. *Opening speech given by Commissioner Jonathan Hill on the overhaul of prospectus rules for the Capital Markets Union*.

¹⁰⁷ European Commission. *Impact Assessment*, Annexes, p. 6.

¹⁰⁸ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 2; or European Commission. *Impact Assessment*, Annexes, p. 6.

¹⁰⁹ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 2.

overhaul of the prospectus regime, which should be simpler, faster and cheaper.¹¹⁰ Another statement by commissioner Hill, comparing the volume of capital markets in the European Union and United States (“*while companies in the EU raised some 370 billion euro through the issuance of shares or corporate bonds, companies in America raised over three times that amount*”)¹¹¹ might suggest that another goal is to increase the amount of finance raised on capital markets overall.

However, the new prospectus regime is only one of the elements of a well-functioning CMU, also because prospectuses cover only part of the traded financial instruments.¹¹² Also, it remains to be seen how the process will be affected by United Kingdom’s vote to leave the European Union on 23 June 2016, after which the abovementioned Jonathan Hill, commissioner for financial stability, financial services and the CMU, resigned.¹¹³

3.2 Consultation process

In order to evaluate the current prospectus regime, the Commission conducted an online public consultation between 18 February 2015 and 13 May 2015. A total of 182 responses were submitted by stakeholders across the financial sector, including investment banks, NCAs, other public authorities, various organizations and associations as well as private individuals.¹¹⁴ The subject of the review was very broad and included basic questions such as whether a prospectus is still necessary when offering securities to the public or for their admission to trading.

In its submission to the consultation review, ESMA states that a review is appropriate and that important aspects of the review should especially be the following: when a prospectus is needed, an efficient approval process, the contents of a prospectus and care that a prospectus does not serve as a barrier to raising capital.¹¹⁵ ESMA further

¹¹⁰ HILL, Jonathan. *Opening speech given by Commissioner Jonathan Hill on the overhaul of prospectus rules for the Capital Markets Union*.

¹¹¹ Ibid.

¹¹² Compare European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 9.

¹¹³ Jonathan Hill’s statement is available online at WWW: <https://ec.europa.eu/commission/2014-2019/hill/announcements/statement-lord-hill-25062016_en>.

¹¹⁴ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 8.

¹¹⁵ ESMA. *Response to public consultation. ESMA response to the European Commission consultation on the review of the Prospectus Directive* [online]. 2015 [cit. 2016-06-04]. Available at WWW:

states that while the Prospectus Directive II did solve part of the shortcomings of the Prospectus Directive, a more “back-to-basics” approach is needed so that the prospectus regime aligns with the needs of the real economy.¹¹⁶ It is therefore firstly necessary to determine whether the prospectus regime, as a whole, is fit to ensure investor protection, because evidence suggests that prospectuses do not aid investors in making investment decisions and do not promote investor protection, but are rather used as liability management tools.¹¹⁷ The information presented in a prospectus to investors needs to be digestible and too much information can be counterproductive, especially for retail investors.¹¹⁸

While I acknowledge the benefit of the thorough consultation process undertaken by the Commission, I admit that I expected the level of data at the Commission’s disposal to be higher. For example, the Commission in its Impact Assessment states that ESMA’s statistics do not include data such as total consideration of past issuances, the average lengths of prospectuses or their summaries or the number of prospectuses affected by the increase of certain thresholds by the Prospectus Directive II.¹¹⁹ Given that the Draft Regulation attempts to address most (if not all) of these issues, I cannot but wonder if this task can even be achieved without the appropriate data.

3.3 Proposal and future steps

The Commission published the Draft Regulation on 30 November 2015 and submitted it to the European Parliament and the Council for adoption under the co-decision procedure. The Council discussed the proposal and issued five compromise proposals, the latest on 23 May 2016,¹²⁰ continually incorporating changes into the Draft Regulation of varying complexity and significance. On 8 June 2016, the Permanent Representatives Committee (Coreper) agreed on a negotiating stance regarding

<https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-857_response_to_the_ec_public_consultation_on_the_review_of_the_pd.pdf>.

¹¹⁶ Ibid, p. 3.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ European Commission. *Impact Assessment*, Annexes, p. 16.

¹²⁰ All documents to be found online at WWW: <http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-9306-2016-INIT>.

the Draft Regulation,¹²¹ which the Council confirmed on 17 June 2016,¹²² resulting in the Presidency Proposal. The Presidency Proposal suggests the areas of the Draft Regulation which are most likely to be negotiated in the upcoming legislative process and result in amendment of the Draft Regulation, which is why it is covered in this thesis. Once the European Parliament has decided its position, it will discuss the proposal together with the Council will and the Commission.

The regulation might be approved as soon as in the first half of 2016. The regulation is to commence application 12 months after its entry into force.¹²³ The Prospectus Directive and its implementing regulation will be repealed and new implementing measures will be adopted.

However, many market participants voiced concerns about the application date as level 2 legislation is crucial and often delayed. This causes problems to the addressees of such legislation. Stakeholders therefore advocate an application date 24 months after the Draft Regulation enters into force or, alternatively, 12 months after all level 2 legislation is prepared.¹²⁴

¹²¹ Council of the EU. *Capital markets union: Council agrees its stance on prospectus rules* [online]. 2016 [cit. 2016-06-24]. Available at WWW: <http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642289_en.pdf>.

¹²² The meeting minutes can be found online at WWW <<http://www.consilium.europa.eu/en/meetings/ecofin/2016/06/17/>>.

¹²³ Draft Regulation, Article 47(2).

¹²⁴ See for example German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 9; or European Banking Federation. *EBF position on the proposal for a Regulation*, p. 12.

4. Description and analysis of the Draft Regulation

The following chapter of the thesis deals with the proposed Draft Regulation itself. However, it does not comprehensively cover the entire prospectus regime and its functioning under the Draft Regulation, but rather concentrates on the changes proposed to the current prospectus regime. Further, it analyses certain provisions which remained unchanged in the Draft Regulation, but where arguments may be made in favour of amending them. While the Commission states that the Draft Regulation focuses primarily on secondary issuers, SMEs, frequent issuers and issuers of non-equity securities,¹²⁵ the structure of this chapter, for the sake of comprehensibility, follows the structure of the Draft Regulation, i.e., covers the proposal and the changes contained therein from front to back. That means that this section does not address the most important or significant changes at first and the least at last.

The chapter is divided into several parts and each deals with a different aspect of the prospectus regime with (and, generally, one or more articles of the Draft Regulation): the form of the proposed legislative act, when to publish a prospectus (describes situations when issuers are required to publish a prospectus and exemptions from this requirement), regimes for special types of issuers (SMEs and secondary issuers), composition of a prospectus (analysis of options to compose a prospectus of several documents), contents of a prospectus (changes in the Draft Regulation related to what a prospectus must contain) and finally other, primarily procedural aspects of the prospectus regime.

4.1 *Form: Regulation instead of a directive*

A major difference is that the legislative act proposed by the Commission is in the form of a regulation as opposed to the current state, when the main legislative act, the Prospectus Directive, is a directive. EU regulations are, as opposed to directives, directly applicable in all Member States.¹²⁶ The declared reason for the change is that

¹²⁵ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 3.

¹²⁶ For more information on the legislative acts of the EU and difference between them see for example DE BÚRCA, Gráinne, CRAIG, Paul. *EU Law. Text, Cases and Material*. Fifth Edition. Oxford : Oxford University Press, 2011, p. 103-120.

the Prospectus Directive has been implemented differently into national legislation by individual Member States.¹²⁷ This is a common issue that normally arises when directives are transposed into the national laws of Member States.¹²⁸ The change in form is intended to address this issue as directives favour maximum harmonization and make legislation more coherent and comparable across Member States.¹²⁹

Replacing the Prospectus Directive with a regulation is definitely a positive change and one, which is widely supported by stakeholders,¹³⁰ not only because it prevents various implementation across Member States, thus ensuring a level playing field, but also because issuers will be independent of national legislation (regarding prospectus regulation) and will not have to search such national legislation to ensure the particular directive was properly implemented and that they correctly understood the rules.

4.2 When to publish a prospectus

4.2.1 Basic prospectus rule and its exemptions

Article 3 of the Draft Regulation is the heart of the EU prospectus regime. It is entitled “*Obligation to publish a prospectus and exemption*” and it contains the two most basic rules: (i) “*Securities shall not be offered to the public in the Union without prior publication of a prospectus*” in paragraph 1; and (ii) “*Securities shall not be admitted to trading on a regulated market situated or operating within the Union without prior publication of a prospectus*” in paragraph 3. Currently, these rules are contained in Article 5 of the Prospectus Directive.¹³¹

Interesting to note here is that in a typical IPO process, the admission to trading on a regulated market follows a so-called “book-building” exercise, open only to institutional investors, and a private placements, therefore the obligation to publish

¹²⁷ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 7; Draft Regulation, Recital (5).

¹²⁸ Ibid.

¹²⁹ Compare European Commission. *Impact Assessment*, p. 48.

¹³⁰ See for example European Banking Federation. *EBF position on the proposal for a Regulation*, p. 2.

¹³¹ For a brief comparison of the corresponding rules in the United States please see KARMEL, Roberta. The EU Challenge to the SEC. *Fordham International Law Journal*. 2007, vol 31, no. 6, p. 1694-1697.

a prospectus is triggered relatively late in the process.¹³² Further, prior to the approval of the prospectus, information from its draft is typically already circulated with the analysts and the draft prospectus itself is sometimes circulated with cornerstone investors, subject to a non-disclosure agreement.¹³³

However, there are numerous exemptions to this obligation to publish a prospectus.¹³⁴ The purpose of these exemptions is to strike a balance between appropriate investor protection and unnecessary administrative burden.¹³⁵ They are mainly contained in Article 1 of the Draft Regulation, which lists situations when a prospectus is not required, either due to the nature of the issuer, the purchaser or the securities and/or issue. Compared to the Prospectus Directive, the provisions are more logically ordered, as the Prospectus Directive covered the same issue in Article 1 (entitled “*Securities outside the scope of the directive*”), Article 3 (entitled “*Obligation to publish a prospectus*”) and Article 4 (entitled “*Exemptions from the obligation to publish a prospectus*”). As the explanatory memorandum to the Draft Regulation states, Article 1 consolidates the current provisions pertaining to the scope of the prospectus requirement.¹³⁶

As the provisions all deal with the related situations when a prospectus is not required, consolidating them into one Article is a positive change, making the Draft Regulation more comprehensible and easier to navigate.

A related exemption not included in Article 1 is included in Article 3(2) of the Draft Regulation. It gives Member States discretion whether to require a prospectus for domestic public offers of securities with consideration between EUR 500.000 and EUR 10 million. As it is related to the exemptions included in Article, it is included in the next section as well.

Many of the exemptions remain unchanged and there were no significant calls for their amendments. Specifically, Article 1(2) of the Draft Regulation lists the types

¹³² See for example Financial Conduct Authority. *Availability of information in the UK Equity IPO process*, p. 12-13.

¹³³ *Ibid*, p. 13-14.

¹³⁴ The obligation to publish a prospectus is also called “requirement to publish a prospectus” or “prospectus requirement” in this thesis. There is no difference between these phrases as used in this thesis.

¹³⁵ European Commission. *Impact Assessment*, p. 17.

¹³⁶ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 13.

of securities, which are not subject to the Draft Regulation. No changes were made to this list, so it still includes for example non-equity securities issued by Member States, shares in the capital of central banks of Member States or units issued by collective investment undertakings other than the closed-end type. The same applies to any of the exemptions contained in Article 1(3) of the Draft Regulation, such as the exemption for public offers of securities addressed solely to qualified investors or to investors who acquire securities for a total consideration of at least EUR 100.000 per investor.

That is why the following section does not cover these unchanged and uncontentious exemption, but rather concentrates on the changes made and on the exemptions which remained the same, but where some stakeholders advocated for their amendment.

4.2.2 Exemption: Offers to public with consideration between EUR 500.000 and EUR 10 million

While the rule regarding the requirement of a prospectus for admission of securities to trading on a regulated market remains the same, the Draft Regulation introduces a change regarding prospectuses for offers of securities to the public. It proposes that Member States shall have the option to allow no prospectus to be published for domestic offers of securities to the public with total consideration between EUR 500.000 and EUR 10 million, thus increasing both the lower and upper limits.

Pursuant to Article 1(2)(h) of the Prospectus Directive, Member States could choose to require a prospectus for domestic offers of securities to the public with consideration between EUR 100.000 and EUR 5 million, which is an option 17 of them currently make use of.¹³⁷ It is interesting to note that there appears to be no correlation between the size of the national capital market and the exercise of this discretion, as for example both France and Germany currently require a prospectus to be drawn up for any offer above EUR 100.000 (i.e., they set the limit at the allowed minimum), while the United Kingdom, Luxembourg and Ireland do the exact opposite, meaning they set the limit

¹³⁷ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 13.

at the maximum and do not require any prospectus for public offers of securities with consideration below EUR 5 million.¹³⁸

The Commission's Impact Assessment concludes that the real impact and potentially benefit of this change would depend on the actions of Member State and whether they will introduce national disclosure requirements to compensate for their absence on the EU level.¹³⁹ It also adds that this change would not affect large issuers as they do not issue such small amounts and that only 3 per cent. of all prospectuses approved by NCAs in 2013 and 2014 were for amounts between EUR 500.000 and EUR 10 million.¹⁴⁰

However, the majority of consulted stakeholders are in favour of keeping the original rule, as these smaller offerings commonly target retail investors and are issued by SMEs, which, by their nature, present riskier investments, therefore the prospectus requirement is appropriate.¹⁴¹

It has also been criticized that while one of the main objective of the CMU is to create a single pan-European market, this proposal goes in the opposite direction and creates further fragmentations across Member States.¹⁴²

As retail securities markets are still largely national with their own characteristics,¹⁴³ I believe that giving Member States larger discretion is beneficial because it allows them to take into account the state of the domestic market, the unique characteristics of domestic issuers and investors and in case they come to the conclusion that investor protection can be ensured for offers with consideration between EUR 5 and 10 million by other means than a requirement to publish a prospectus, they should be allowed to set such higher limit.

¹³⁸ European Commission. *Impact Assessment*, Annexes, p. 19.

¹³⁹ *Ibid*, p. 22.

¹⁴⁰ *Ibid*, p. 19.

¹⁴¹ The Netherlands Ministry of Finance, the Netherlands Authority for the Financial Markets and the Dutch Central Bank, p. 2.

¹⁴² German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 8; LANOO, Karel. *More Union for the EU's IPO Market* [online]. 2016 [cit. 2016-05-25]. Available at WWW: <http://aei.pitt.edu/73775/1/KL_Prospectus_Directive_Review.pdf>, p. 1.

¹⁴³ The Netherlands Ministry of Finance, the Netherlands Authority for the Financial Markets and the Dutch Central Bank, p. 5.

4.2.3 Exemption: Public offers to less than 150 not qualified investors

The rule that no prospectus is required in case of public offers of securities to less than 150 not qualified investors per Member State remains in the Draft Regulation unchanged (see Article 1(3)(b) of the Draft Regulation). The assumption upon which this exemption is based is that such offers are targeted at a small group, often relatives and acquaintances of the issuer and as this proximity ensures investor protection, no prospectus should be required.¹⁴⁴

The majority of the stakeholders seem to favour retaining status quo,¹⁴⁵ however the opinion that the number should be raised was not uncommon.¹⁴⁶ Some stakeholders stated that raising the limit to for example 400 persons would allow further development of crowdfunding, where the typical circle of investors is up to 500 people.¹⁴⁷ However, the Commission submits that, based on the responses to the consultation from the crowdfunding sector, these initiatives typically rely not on this exemption, but on the exemption based on the total consideration of the offers, i.e., EUR 5 million (or less as per legislation of the individual Member State).¹⁴⁸ Other stakeholders submit that compliance is difficult to monitor, therefore the number should refer to the actual number of purchasers of the security.¹⁴⁹

Given that the logic of the exemption is to target the offer at a small circle of investors, I would agree with the view that 150 is already a sufficiently large number and further increasing it might risk investor protection and the assumption upon which this exemption is based.

¹⁴⁴ Draft Regulation, Recital (14).

¹⁴⁵ See for example The Netherlands Ministry of Finance, the Netherlands Authority for the Financial Markets and the Dutch Central Bank, p. 6; European Commission. *Impact Assessment*, p. 19.

¹⁴⁶ See for example London Stock Exchange Group. *CONSULTATION DOCUMENT Review of the Prospectus Directive* [online]. 2015 [cit. 2016-05-29]. Available at WWW: <http://www.lseg.com/sites/default/files/content/documents/LSEG%20FULL%20response%20to%20the%20Prospectus%20Directive%20review_0.pdf>, p. 8-9; European Association of Co-operative Banks. EACB position regarding on the proposal for a Regulation to revise the European Prospectus regime [online]. 2016 [cit. 2016-07-09]. Available at WWW: <http://www.globalcube.net/clients/eacb/content/medias/publications/position_papers/financial_markets/PRIPS/EACB_PP_Prospectus_Regulation.pdf>, p. 4.

¹⁴⁷ European Commission. *Consultation on the Prospectus Directive 18/02-2015 – 13/05/2015 - Feedback statement on the public online consultation -* [online]. 2015 [cit. 2016-05-29]. Available at WWW: <http://ec.europa.eu/finance/consultations/2015/prospectus-directive/docs/summary-of-responses_en.pdf>, p. 2.

¹⁴⁸ European Commission. *Impact Assessment*, p. 20.

¹⁴⁹ European Banking Federation. *EBF response to Consultation Document*, p. 3.

However, in order to put this exemption into context, it is interesting to look at market data to realize this exemption is not used as often as would be appropriate. Using the example of SMEs financing, it is estimated that only 5 per cent. of their financing comes from family or friends.¹⁵⁰ In comparison, a 2011 study estimates that in the United States “60% of firms relied on personal or family savings for start-up capital, while over 25% of firms using expansion financing relied on personal/family savings.”¹⁵¹ It therefore seems that the real issue related to this exemption is not the legal environment, but the lack of interest or perhaps knowledge of retail investors to invest into start-ups and of start-ups and SMEs to seek funding in this manner.

4.2.4 Exemption: Offers below EUR 500.000

The Draft Regulation increases the limit of the current exemption under Article 3(2)(e) of the Prospectus Directive, which states that the obligation to publish a prospectus does not apply to offers of securities to the public with total consideration in the EU of less than EUR 100.000 over a period of 12 months (i.e., Member States cannot require a prospectus to be published for such offers). The Draft Regulation increases this limit to EUR 500.000.

The Commission argues that otherwise the costs of preparing a prospectus would be disproportionate to the proceeds of the issue¹⁵² and that this change would particularly benefit securities-based crowdfunding platform as the average amount of these issues is EUR 250.000¹⁵³ as most crowdfunding initiatives and offers would fall within its scope and would help its development.¹⁵⁴

This was however disputed by EU crowdfunding associations, which claim that the average fundraise size in the EU was approximately EUR 450.000 in 2015 (rising from approximately EUR 300.000 in 2014).¹⁵⁵

¹⁵⁰ AFME, Boston Consulting Group. *Bridging the growth gap*, p. 27.

¹⁵¹ *Ibid.*

¹⁵² European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 13.

¹⁵³ European Commission. *Impact Assessment*, p. 20.

¹⁵⁴ *Ibid.*

¹⁵⁵ European Crowdfunding Network, et al. *The European Crowdfunding Industry Response to: 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* [online]. 2016 [cit. 2016-07-09]. Available at WWW: <<http://eurocrowd.org/wp->

Evidence suggests that market reacts quickly to such changes of the regulation,¹⁵⁶ the increase of this exemption should therefore quickly affect the crowdfunding market in Member States currently requiring a prospectus above the minimum limit, that is EUR 100.000 (for example Germany and France). This change will make capital markets financing more accessible to many smaller issuers and will certainly address part of the issue of high costs related to the preparation of a prospectus as part of the issues will fall outside this obligation.

However, given the increasing volume of crowdfunding issues and taking into account the Commission's statement about the support of crowdfunding, the amount should be reviewed.

4.2.5 *Removal of the exemption for high denomination securities*

Article 3(2)(d) of the Prospectus Directive contains an exemption from the obligation to publish a prospectus in case of public offers of securities (both equity and non-equity) with nominal (per unit) value above EUR 100.000. The exemption applies only to public offers of securities, not to admission of securities to trading on a regulated market, and it is the most commonly used of the Prospectus Directive's exemptions from the obligation to publish a prospectus.¹⁵⁷ Article 7(2)(d) of the Prospectus Directive contains a related exemption for summaries: no summary is required in case of admission of non-equity securities with nominal value above EUR 100.000 to trading on a regulated market. Further, the Implementing Regulation contains lighter disclosure requirements in case of admission to trading on a regulated market of such securities (see Annex IX and XIII of the Implementing Regulation for more information). This regime is based on the assumption that retail investors are not interested in acquiring these securities with such high per unit denomination.¹⁵⁸

content/blogs.dir/sites/85/2016/04/Prospectus-Proposal_European-crowdfunding-industry-response.pdf>, p.5.

¹⁵⁶ HORNUF, Lars. *SHOULD SECURITIES REGULATION PROMOTE CROWDINVESTING?* [online]. 2015 [cit. 2016-07-10]. Available at WWW: <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2412124>. p. 6.

¹⁵⁷ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation – Recommendations to put good ideas into practice* [online]. 2016 [cit. 2016-05-29]. Available at WWW: <https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2016-02-26_Position_Prospectus_Deutsches_Aktieninstitut_EN.pdf>. p.9.

¹⁵⁸ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 10.

This exemption basically created a wholesale and retail market with non-equity securities.¹⁵⁹ The treatment of this wholesale bond market throughout the Prospectus Directive is one of the defining characteristics of the EU prospectus regime.¹⁶⁰

The Commission claims that this treatment has had unintended consequences (and “*potential adverse unintended effects*”¹⁶¹) in that it distorted the structure of the bond market: the provisions supposedly served as an incentive for companies issuing investment grade bonds to issue only denominations in excess of EUR 100.000 (instead of lower, “retail-friendly” denominations)¹⁶² to avoid the requirement to prepare a prospectus.¹⁶³ This, according to the Commission, has led to lower liquidity of the secondary market and investors having fewer investment opportunities, therefore this regime is viewed as a barrier to proper diversification of investors’ portfolios.¹⁶⁴ The Commission, citing data from the Organisation for Economic Co-operation and Development, states, that 70 per cent. of all bonds have per unit denomination above EUR 100.000.

That is why the Commission has decided to drop this favourable treatment and the Draft Regulation does not contain this exemption for high-denomination non-equity securities anymore. The Commission argues that issuers will have no incentive to issue non-equity securities with high denominations and choose freely, which, in turn, will make the bond market more attractive for investors in general.¹⁶⁵ Nevertheless, the Commission admits that the proposal will result in higher costs for issuers who have been using the exemption under the Prospectus Directive, but also adds that such issuers can still make use of the exemptions for offers solely to qualified investors and for offers to investors who acquire securities for at least EUR 100.000.¹⁶⁶

¹⁵⁹ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

¹⁶⁰ MOLONEY, Niamh. *EU Securities and Financial Markets Regulation*, p. 89.

¹⁶¹ European Commission. *Impact Assessment*, p. 28.

¹⁶² *Ibid.*

¹⁶³ European Commission. *Impact Assessment*, p. 28; Draft Regulation, Recital (47).

¹⁶⁴ European Commission. *Impact Assessment*, p. 28; European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 3.

¹⁶⁵ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 6.

¹⁶⁶ European Commission. *Impact Assessment*, p. 33; European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 7.

Several statements in the Impact Assessment suggest that the Commission had also objectives other than market efficiency in mind when preparing the proposal: the Commission for example states that secondary market liquidity is detrimental to retail investors “*at a time when a growing portion of them needs to have access to appropriate debt securities to invest their savings in anticipation of their retirement*”.¹⁶⁷

The Commission’s assumptions are based on the analysis contained in the Impact Assessment, where it looks at five large non-equity securities issuers and concludes that these would choose lower denominations if it were not for the said exemption.¹⁶⁸

This proposal created the biggest backlash among stakeholder who strongly argue that this exemption needs to be maintained¹⁶⁹ and that it would not lead to higher secondary market liquidity.¹⁷⁰ ESMA only conservatively states that the treatment did in fact create incentives to issue bonds with denomination above EUR 100.000, however there is no evidence to suggest that lowering this threshold would improve liquidity as institutional investors represent most of non-equity securities trading.¹⁷¹

The EBF agrees that the development of the retail market is important, but should not be at the expense of the wholesale market.¹⁷² Wholesale investors are dominant in the bond market and typical bond investors trade amounts between EUR 200.000 and 500.000¹⁷³ and the removal of the effective distinction of the retail and wholesale bond market may negatively impact its effective functioning.¹⁷⁴ Further, retail investors can still acquire these securities through funds.¹⁷⁵

¹⁶⁷ European Commission. *Impact Assessment*, p. 29.

¹⁶⁸ *Ibid*, p. 28.

¹⁶⁹ See for example Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 1; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

¹⁷⁰ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2; Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9.

¹⁷¹ ESMA. *Response to public consultation*, p. 7.

¹⁷² See also German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2-3.

¹⁷³ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9.

¹⁷⁴ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

¹⁷⁵ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9.

Also the assumption that issuers do not issue investment-grade bonds with lower denominations was challenged, such as by the example of Daimler, who “*issued approximately 64 percent of its corporate bond volume in 1,000 euro denominated non-equity securities in the last five years.*”¹⁷⁶

Further, stakeholders insist that the wholesale regime makes sense for issuers also for other reasons than the absence of the requirement to prepare a prospectus: issuers issuing non-equity securities with value above EUR 100.000 do so also because they target the more easily manageable wholesale market and not the retail market.¹⁷⁷ The Commission appears to be aware of this consideration, when it states that another reason for issuing these high denominations is that the issuers doing so can easily find funding from institutional investors.¹⁷⁸ Also, certain types of securities issued under this exemption are not suitable for retail investor anyway (for example the so-called CoCos or certain asset backed securities),¹⁷⁹ therefore the wholesale regime actually in some cases contributes to the protection of retail investors.¹⁸⁰

A factor to be considered is also the inherently low liquidity of the bond market as bonds are typically used to balance riskier investments and follow a buy-and-hold strategy.¹⁸¹

Also the related exemption to publish a summary in case admission of non-equity securities with denominations above EUR 100.000 to trading on a regulated market is highly contested, mainly on the grounds that professional investors have no need for a summary.¹⁸²

Based on the information provided by both the Commission and the stakeholders, it seems that to determine the validity of the proposed change one must look

¹⁷⁶ Ibid.

¹⁷⁷ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 11; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 4; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

¹⁷⁸ European Commission. *Impact Assessment*, p. 30-31.

¹⁷⁹ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2; The Netherlands Ministry of Finance, the Netherlands Authority for the Financial Markets and the Dutch Central Bank, p. 6.

¹⁸⁰ Compare German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

¹⁸¹ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 12.

¹⁸² German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 3.

at the Commission's assumptions, particularly issuers' behaviour. The Commission claims that the only incentive to issue non-equity securities with high-denomination is to avoid the prospectus requirement altogether or to avoid the requirement to publish a summary and be subject to less burdensome disclosure requirements.¹⁸³ If this were correct, the Commission's point about secondary market liquidity would be valid. However, if one agrees with the arguments made by some of the stakeholders, pointing to the fact that issuers issue such securities for other reasons than to avoid the prospectus requirement, especially because they target the wholesale market, the Commission's argument is less valid. To me, the arguments in favour of maintaining the exemption seem more convincing and in the absence of more empiric data to the opposite, the wholesale market exemption should be maintained. Further, I agree with the fact that investors purchasing non-equity securities of denominations in excess of EUR 100.000 do not need a prospectus.

The question also is whether there is (or would be) a demand of retail investors for non-equity securities with low denominations. The view that if there was such a demand, the managers would recommend issuing such amounts¹⁸⁴ seems rather persuasive.

Also, at a time when the Commission is attempting to promote seeking financing on capital markets and experts recommend steps how to develop a private placement market in the EU (whose main benefit is no disclosure requirement),¹⁸⁵ I believe that taking steps which could make the debt markets in the EU less attractive is a risk that should not be taken right now.

However, it should be noted that the original draft of the Prospectus Directive included no special treatment for the wholesale bond market, but the strongly represented lobby, especially from London and Luxembourg let to a considerably more favourable regime.¹⁸⁶ Something similar may be happening now, as the Presidency Proposal reinstates the exemption from the obligation to publish a prospectus for securities with per unit denomination above EUR 100.000.¹⁸⁷

¹⁸³ European Commission. *Impact Assessment*, p. 29.

¹⁸⁴ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9.

¹⁸⁵ Compare AFME, Boston Consulting Group. *Bridging the growth gap*, p. 11.

¹⁸⁶ MOLONEY, Niamh. *EU Securities and Financial Markets Regulation*, p. 89-90.

¹⁸⁷ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 9.

4.3 *Special regime for certain types of issuers*

The following sub-chapter describes the provision relating to special types of issuers, namely secondary issuers and SMEs.

4.3.1 *Secondary Issuers*

A secondary issuer is an issuer already known to the market as it already has securities admitted to trading on a regulated market or an MTF, it therefore had a prospectus approved at the occasion of an IPO.¹⁸⁸ Around 70 per cent. of all prospectuses annually relate to secondary issues.¹⁸⁹ These issuers are subject to ongoing disclosure requirements under the Transparency Directive and the Market Abuse Directive.¹⁹⁰

It is generally accepted that secondary issues should be subject to certain alleviations from the standard disclosure requirements.¹⁹¹ The reason for this is that some of the information required by the Prospectus Directive can be found in the annual financial reports, which issuers with securities admitted to trading on a regulated market are required to publish pursuant to the Transparency Directive. Also, the majority of the originally disclosed information remains unchanged and is not relevant to investors, who, however, still need coherent and consolidated information. The Commission therefore designed a special disclosure regime, which includes only some of the information such as use of proceeds, risk factors, working capital statement, board practices, directors' remuneration, related party transactions and shareholding structure.¹⁹²

The Prospectus Directive already contained certain alleviations for secondary issues, which were mainly introduced by the Prospectus Directive II, such as the option to draw up a prospectus as separate documents (tripartite prospectus) or the proportionate disclosure regime for rights issues.¹⁹³

¹⁸⁸ Draft Regulation, Recital (42); European Commission. *Impact Assessment*, p. 22.

¹⁸⁹ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 3.

¹⁹⁰ Draft Regulation, Recital (40).

¹⁹¹ Draft Regulation, Recital (42); European Commission. *Impact Assessment*, p. 22.

¹⁹² Draft Regulation, Recital (40).

¹⁹³ For more information see European Commission. *Impact Assessment*, p. 23-24.

The Draft Regulation takes these attempts further and makes secondary issuers subject to even less onerous disclosure requirements and provides them with the possibility to draw up a lighter prospectus for secondary issuances, primarily in order to avoid duplicative disclosure.

A considered option was to relieve secondary issues from the prospectus requirement altogether.¹⁹⁴ The main argument against this is that a prospectus contains information, which is not disclosed on a regular basis pursuant to the Market Abuse Directive or the Transparency Directive.¹⁹⁵ It seems correct to require the issuer to disclose information in case it issues new securities, which cannot be found anywhere else.

The topic of secondary issuances was the main point raised during the consultation process by several major stakeholders. ESMA argued that the disclosure requirements of an IPO should be clearly distinguished from secondary issues, that is from offers of any new or existing shares or a class already admitted to trading on a regulated market. The secondary issues should contain only relevant and material information and should essentially be just an update, excluding information that is already in the public domain. ESMA states that full disclosure is not useful either to existing or potential new investors and that a shorter document might actually promote investor protection.¹⁹⁶ The London Stock Exchange Group submitted that secondary issuances fungible with existing securities admitted to trading on a regulated market should be exempt from the requirement to public a full prospectus.¹⁹⁷

The Draft Regulation proposes several changes connected to secondary issuances. Firstly, it raises the dilution threshold from 10 to 20 per cent and extends the exemption from share to all fungible securities.¹⁹⁸ The threshold was set at 20 per cent. because the Commission and market participants submitted that offers resulting in capital dilution of more than 20 per cent. are often “transformational” for the company, therefore a prospectus should still be required.¹⁹⁹ Secondly, it alleviates the prospectus regime for all secondary issuances by widening the scope of the proportionate

¹⁹⁴ Association of Investment Companies. *Lowering barriers to accessing capital markets*, p.1.

¹⁹⁵ European Commission. *Impact Assessment*, p. 25.

¹⁹⁶ ESMA. *Response to public consultation*, p. 4-5.

¹⁹⁷ London Stock Exchange Group. *CONSULTATION DOCUMENT*, p. 4.

¹⁹⁸ Draft Regulation, Article 1(4).

¹⁹⁹ European Commission. *Impact Assessment*, p. 25-26.

disclosure regime under Article 7(2)(g) of the Prospectus Directive to all secondary issuances and by taking into account all information disclosed under other directives and regulations. This means that the lighter regime would apply to offers of non-equity securities by issuers with shares admitted to trading on a regulated market as well.²⁰⁰ Thirdly, it redesigns the tripartite prospectus by introducing the universal registration document, which can also be used by secondary issuers (see chapter 4.4.1 *Universal Registration Document* below for more information).

4.3.2 *Disclosure regime for SMEs*

Financing of SMEs has been identified as one of the barriers to growth and a problematic aspect of capital markets in the EU: SMEs suffer from lack of available sources of financing, especially equity.²⁰¹ Traditionally, SMEs rely heavily on bank financing, which, however, is not accessible to at least some of them.²⁰²

SMEs have been traditionally deterred from entering the capital market and seeking financing here by the complexity of the process, the paperwork and the related costs. As SMEs typically raise lower amounts, the costs can be disproportionate to the proceeds. However, as investing in SMEs carries higher risk than for example investing in blue chip companies, investor protection is very important and a correct balance has to be found. Facilitating access of SMEs to capital markets is one of the key points of the Capital Markets Union.²⁰³

The Prospectus Directive currently contains a lighter disclosure regime in Article 26b, which has been used in only 1.8 per cent. of prospectuses approved in 2013 and 2014 and did not deliver its declared objectives as the advantages of the regime were seen as too small and the issuers feared to appear giving less information to potential investors.²⁰⁴

The Draft Regulation contains two main changes relating to SMEs: alleviated disclosure requirements and an alternative prospectus format.

²⁰⁰ Ibid, p. 26.

²⁰¹ AFME, Boston Consulting Group. *Bridging the growth gap*, p. 8.

²⁰² AFME. *Unlocking funding for European investment and growth*, p. 3.

²⁰³ Draft Regulation. Recital (43).

²⁰⁴ ESMA. *Response to public consultation*, p. 7; European Commission. *Impact Assessment*, p. 35.

The distinct disclosure regime and a tailor-made prospectus is, however, is available only for public offers, not for admission to trading on regulated markets. The Commission states that otherwise this would create a two-tiered disclosure standard on regulated markets, which might harm investor confidence.²⁰⁵ SMEs with securities listed on a regulated market therefore benefit only from the lighter disclosure requirements for secondary issuances (see chapter 4.3.1 *Secondary Issuers* above for more information), but not from this disclosure regime.²⁰⁶ This is seen as a step backwards by some stakeholders.²⁰⁷

The Commission also proposed a new optional “question and answer” prospectus format (called “*Modified alternative presentation (MAP) prospectus*” in the Impact Assessment)²⁰⁸, which is supposed to help SMEs to draw up their own prospectuses with no or only limited legal help. The template will include standardised language so that the issuers do not have to draft the prospectus from scratch. This standardized language is then completed by issuer specific information. For this purpose the template will include guidance in the form of questions, which are supposed to help the SME issuer to understand what information exactly is being sought.²⁰⁹

Overall, the SME disclosure regime should result in lower costs (especially legal advisory as the SMEs could draw up large parts of the prospectuses themselves using in-house capacity)²¹⁰ and, by extension, in more SMEs entering the capital markets and providing investors with investment opportunities and options to diversify their portfolios.

However, some experts say that the costs for SMEs are unlikely be lowered as SMEs are often unaware of their potential investor base, therefore will hire a placing agent,

²⁰⁵ Draft Regulation. Recital (44).

²⁰⁶ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 6; European Commission. *Impact Assessment*, p. 35.

²⁰⁷ Autorité des marchés financiers. *Revision of the Prospectus Directive* [online]. 2016 [cit. 2016-07-17]. Available at WWW: <http://www.amf-france.org/en_US/Reglementation/Dossiers-thematiques/Marches/Union-des-marches-de-capitaux/La-revision-de-la-Directive-Prospectus.html>.

²⁰⁸ European Commission. *Impact Assessment*, p. 35.

²⁰⁹ Draft Regulation, Recital (46); European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 3, 6; European Commission. *Impact Assessment*, p. 35.

²¹⁰ European Commission. *Impact Assessment*, p. 36.

who will require the prospectus to be legally vetted or prepared by lawyers, therefore they consider it unlikely that the regime will be realised in practice.²¹¹

The contentious issue of the Draft Regulation is the extension of the prospectus requirements to MTFs. Some stakeholders argue that the entire premise is wrong, as MTFs are clearly differentiated from regulated markets and there should be no prospectus requirement at all.²¹² Others believe that regulation should be venue-neutral so that inventors receive the same level of protection everywhere.²¹³ ESMA states that extending the scope of the prospectus regime to MTFs would close the regulatory gap and create a level playing field between them. The point of investor protection balanced with access of SMEs to capital markets is raised in favour of the extension, mainly because companies on MTFs do not have to adhere to the same transparency rules and corporate governance principles as traditionally listed companies.²¹⁴

However, it seems that the special nature of MTFs should be taken into account when for example balancing the need for investor protection: investors cannot receive nor expect such protection on MTFs, therefore a proportionate disclosure regime on MTFs seems to be appropriate.

In my opinion, the proposal introduces several beneficial instruments, however, as with several more issues, the changes need to be more fundamental. Most importantly, SMEs appear to be often unaware of capital markets as a viable alternative to bank loans and potential investors are often unaware of what risks and benefits relate to investing in SMEs. Therefore, to increase usage of capital markets by SMEs, both businesses and potential investors need be more educated about the market.

²¹¹ YOUNG, Tom. *EC Prospectus Regulation cautiously welcomed* [online]. 2015 [cit. 2016-07-05]. Available at WWW: < <http://www.iflr.com/Article/3510745/EC-Prospectus-Regulation-cautiously-welcomed.html>>.

²¹² For example London Stock Exchange Group. *CONSULTATION DOCUMENT*, p. 20-21.

²¹³ See for example CFA Institute. *Consultation on the review of the Prospectus Directive* [online]. 2015 [cit. 2016-07-04]. Available at WWW: <<https://www.cfainstitute.org/Comment%20Letters/20150513.pdf>>. p. 1.

²¹⁴ ESMA. *Response to public consultation*, p. 6.

4.4 *Composition of a prospectus*

The following sub-chapter describes the provision relating to the composition of a prospectus.

4.4.1 *Universal Registration Document*

Article 9 of the Draft Regulation contains a new institute called a *universal registration document*. It is part of the Commission's plan to promote tri-partite prospectuses, that is prospectuses which consist of multiple separate documents. This is considered to be more cost-effective and to allow issuers to quickly seize market windows.²¹⁵

According to the proposal, issuers with registered offices in a Member State and securities admitted to trading on a regulated market or a MTF will have the option to draw up every financial year a “shelf” registration document in the form of a universal registration document.²¹⁶ This document will contain all the general information about the issuer, its organization, financial position, business prospects, governance or shareholding structure, but no information about any particular securities.²¹⁷ Implementing legislation adopted by the Commission will set out the minimum information contained in the universal registration document.²¹⁸ This universal registration document has to be approved by the relevant NCA and published.²¹⁹ After approval or filing, the issuer may (voluntarily or if requested by the NCA) amend the universal registration document by filing an amendment with the NCA;²²⁰ this, however, does not apply when the universal registration document form a constituent part of an approved prospectus, in which case Article 22 of the Draft Regulation applies.²²¹

²¹⁵ See European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 15; Draft Regulation, Recital (32).

²¹⁶ Draft Regulation, Article 9(1).

²¹⁷ *Ibid.*

²¹⁸ Draft Regulation, Article 13(2).

²¹⁹ *Ibid.*, Article 9(2).

²²⁰ *Ibid.*, Article 9(7).

²²¹ *Ibid.*, Article 9(10).

The universal registration document is universal or “multi-purpose”, which means it can be used for the issue of any type of security: equity, debt as well as derivatives.²²² Based on the universal registration document, the potential investors should be able to assess the issuer’s company, its business, financial condition etc., however not the particular investment itself.²²³

Once the universal registration documents is filed with, and approved by, the NCA, the issuer then only has to prepare a summary and a securities note to have a complete prospectus ready.²²⁴ These, however, still need to be approved by the regulator.²²⁵ If a well-known issuers filed a universal registration document (i.e., without prior approval), the entire documentation is subject to approval by the NCA. Nevertheless, because the main part of the registration document is already approved by the NCA, this allows for time savings (the NCA is to approve such prospectuses in 5 days instead of 10)²²⁶ and enables issuers to quickly seize market opportunities.²²⁷

Further, once the issuer has had three consecutive universal registration documents approved by the NCA, further universal registration documents may be filed with the NCA without prior approval.²²⁸ Such issuers are called *well-known issuers*.²²⁹ It will also be possible to integrate the annual and half-yearly financial information into the universal registration document, thus fulfilling the ongoing disclosure requirements under the Transparency Directive.²³⁰

Market participants appreciate the Commission’s attempt to make the process more efficient for frequent issuers.²³¹ However, the EBF and the GBIC mainly criticize the need for further approvals in case the universal registration document is amended as this negates the declared special approval process for amendments of the universal

²²² Compare Ibid, Recital (32).

²²³ Ibid.

²²⁴ Ibid, Article 10(2).

²²⁵ Ibid.

²²⁶ Ibid, Article 19(5).

²²⁷ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 3.

²²⁸ Draft Regulation, Article 9(2).

²²⁹ Ibid, Recital (32).

²³⁰ Draft Regulation, Article 9(6), 18; Draft Regulation, European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 15.

²³¹ See for example European Banking Federation. *EBF position on the proposal for a Regulation*, p. 9-10; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

registration document and the advantage of this instrument overall.²³² Market participants also advocate for more dynamic incorporation by reference so that the most recent universal registration document automatically becomes part of all related prospectuses without the need for supplements.²³³

It is obvious that this new instrument may bring an advantage only to frequent issuers who often resort to capital market financing (as is declared multiple times by the Commission)²³⁴. I agree with the criticism voiced by several market participants, primarily the EBF – it appears that while the universal registration document is a good idea and might indeed result in significant savings for frequent issuer, the approval process included in Article 10(2) of the Draft Regulation negates almost its entire purpose.

I also share EBF’s view on the dynamic incorporation by reference – once a prospectus is approved and the universal registration document become its constituent part, it should not stay “frozen in time”, but should such prospectus should always refer to the most recent universal registration document.

4.4.2 *Base prospectus*

A base prospectus is an instrument used typically for non-equity securities, mainly bonds or derivatives, when these are offered in a continuous or repeated manner. It allows frequent issuers to register and continually update a “base” prospectus, which is the basis for subsequent sales, which do not require the compilation and approval of an entire prospectus. This allows issuers to act quickly and take advantage of market conditions.²³⁵

The base prospectus contains all information about the issuer and the securities offered, except for the final terms of the offer.²³⁶ When it is approved by the NCA, the issuer

²³² European Banking Federation. *EBF position on the proposal for a Regulation*, p. 10; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 2.

²³³ European Banking Federation. *EBF position on the proposal for a Regulation*, p. 10; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 3; European Association of Co-operative Banks. *EACB position regarding on the proposal for a Regulation to revise the European Prospectus regime*, p. 5.

²³⁴ See for example Draft Regulation, Recital (32).

²³⁵ WOOD, Philip. *Law and Practice of International Finance*, p. 374.

²³⁶ Draft Regulation, Article 8(1).

may issue in the following 12 months as many non-equity securities as it wishes²³⁷ and only needs to provide the NCA with the final terms of the offer, which are not subject to approval.

The final terms of the offer means information the relates to the securities note, i.e., information specific to the individual issue such as ISIN, price, maturity, redemption priced and other information unknown at the time the base prospectus is drawn up. Any new material information about the issuer is to be included in a supplement to the base prospectus, not the final terms.²³⁸

The base prospectus regime remains essentially the same in the Draft Regulation, but its scope is extended to include all types of non-equity securities.²³⁹ Also, it can consist of separate documents and use the universal registration document,²⁴⁰ meaning the base prospectus would consist of the universal registration document and information that would otherwise be in the relevant securities note except the final terms.

The most criticized part of the proposal is the requirement to include in the base prospectus a list of information that will be in the final terms, because this is complicated for the issuer and considered of no real benefit to potential investors.²⁴¹ Further, as timing is of key essence in case of base prospectuses, the requirement to distribute the final terms of the offer before the beginning of the offer is seen as limiting, taking into account that bonds are sometimes issue within one or two hours and the complete documentation is sent only afterwards.²⁴²

4.5 Prospectus contents

Key elements of the EU prospectus regime are the provisions governing the information contained in a prospectus. Harmonization of these requirements ensures equal investor protection across the EU.²⁴³ The disclosed information should be sufficient

²³⁷ Ibid, Article 12(1).

²³⁸ Draft Regulation, Article 8(3); Draft Regulation, Recital (29).

²³⁹ Compare Draft Regulation, Article 8(1).

²⁴⁰ Ibid, Article 8(5).

²⁴¹ See for example German Banking Industry Committee. Comments. *Commission proposal for a Prospectus Regulation*, p. 6; European Association of Co-operative Banks. *EACB position regarding on the proposal for a Regulation to revise the European Prospectus regime*, p. 8.

²⁴² Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 20.

²⁴³ Draft Regulation, Recital (21).

and objective, easily analysable, succinct and comprehensible.²⁴⁴ Description of the information as *succinct* is a new element in the provision and likely a reaction to the length of a typical prospectus, which is viewed as a problematic aspect of the current market practice. Essentially, only information relevant and specific to the issuer should be disclosed and in any case should not obscure the truly relevant information.²⁴⁵

This sub-chapter deals with several aspects regarding the contents of a prospectus that have been identified as problematic under the Prospectus Directive and have been amended in the Draft Regulation.

4.5.1 *Length of prospectuses*

One of the commonly criticized aspects of prospectuses today is their length (see chapter 2.2 *Shortcomings of the Prospectus Directive* above for more information). Prospectuses are commonly hundreds of pages long and prospectuses in excess of a 1000 pages are not unheard of. This is viewed as a real problem as such a lengthy document is overwhelming for investors, who resort to not reading it, which, ultimately, undermines the entire idea of mandatory disclosure and of a prospectus: to rectify the information asymmetry and provide potential investors with information so that they can make an informed investment decision.

During the consultation process, the Commission inquired whether the total length of prospectuses should be somehow limited. Multiple stakeholders were against this idea, arguing that the length and complexity of a prospectus depends on factors such as the nature of the issuer, the fields of business or the nature of the security. It was suggested that qualitative rather than quantitative criteria should be emphasised, as limiting the length of prospectuses may risk investor protection.²⁴⁶

I believe that the underlying issue is not so much one of exactly worded regulation, but of fostering proper market practice under the guidance of especially ESMA

²⁴⁴ Article 6(1) of the Draft Regulation. See also Draft Regulation, Recital (21) and (48).

²⁴⁵ Compare Draft Regulation, Recital (21).

²⁴⁶ See for example ESMA. *Response to public consultation*, p. 10; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 16; London Stock Exchange Group. *CONSULTATION DOCUMENT*, p. 26.

and NCAs, but also the main stakeholders. Experts agree that the persons, especially lawyers, who draft the prospectus must not lose sight of its overarching purpose while satisfying the contents requirements.²⁴⁷ In my opinion, this is a point, which needs to be stressed more and issuers need to be guided and informed about an appropriate practice.

Having said that, I also agree that setting the maximum length might force the persons preparing a prospectus inappropriately shorten, simplify or even omit information which may be relevant to investor decision. The NCAs, when reviewing and approving a prospectus, should focus on the qualitative criteria and lead issuers and offerors to adhere to the criteria a prospectus set out mainly in Art 6(1) of the Draft Regulation.

4.5.2 Summary

The purpose of a prospectus summary is to provide investors with key information about the issuers and the securities offered in a concise, non-technical and easily understandable manner.²⁴⁸ Summaries are used especially by retail investors, who can on their basis decide which investment opportunities to consider further. The consultation process showed that currently, the summaries fail to meet this goal as they tend to be lengthy and written in technical and complex language.²⁴⁹

The Draft Regulation limits the maximum length of the summary to six A4 pages written in easily readable font²⁵⁰ so that investors are encourage to read the entire summary. Content-wise, the summary should not be a mere compilation of excerpts (“copy-pastes”) from the prospectus, but should be a logically ordered, coherent and independent document. It cannot contain cross-references to other parts of the prospectus or any other document.²⁵¹ The summary is to consist of three sections: issuer, the security and the offer/admission.²⁵² The Commission states that a uniform summary structure would be appropriate to make summaries easier to analyse and compare. That is why headings such as “*Who is the issuer of the securities?*”

²⁴⁷ See for example PANASAR, Raj, et al. *European Securities Law*, p. 98.

²⁴⁸ Draft Regulation, Article 7(1)-(3).

²⁴⁹ European Commission. *Impact Assessment*, p. 38.

²⁵⁰ Draft Regulation, Article 7(3).

²⁵¹ Ibid, Article 7(10).

²⁵² Ibid, Article 7(4).

or “*What are the key risks that are specific to the issuer?*”²⁵³ and indicative content will be provided in the implementing legislation.²⁵⁴ Overall, the prospectus summary should be modelled after the KID+, the key information document prepared according to PRIIPs.²⁵⁵

Some stakeholders criticize the Draft Regulation for removing the exemption currently contained in Article 5(2) of the Prospectus Directive which states that no summary is necessary in case of non-equity securities with denomination above EUR 100.000, which is seen as burdensome for issuers and unnecessary as retail investor would not purchase securities with such high denominations anyway.²⁵⁶

Further, the page limitation is contentious as it may, in certain cases, prove restrictive and misleading. It was said that the length is appropriate for shares, but may be problematic in case of bonds or derivatives.²⁵⁷

Regarding the decision to require a summary for admissions of non-equity securities with denominations above EUR 100.000 to trading on a regulated market, the ideas expressed above (chapter 4.2.5 *Removal of the exemption for high denomination securities*) apply similarly here. The Commission’s assumptions seem to be flawed and in my opinion, the functioning of the wholesale bond market should not be endangered.

4.5.3 *Risk factors*

The section of a prospectus that deals with risk factors together with the business description and financial and operating information is of most interest to investors²⁵⁸ as it provides them with information of all risk factors pertaining to the issuer and its securities. The main problem of the current market practice is that prospectuses contain too many risk factors, which are often generic and essentially serve as a disclaimer

²⁵³ Ibid, Article 7(6).

²⁵⁴ European Commission. *Impact Assessment*, p. 38.

²⁵⁵ Ibid, p. 38.

²⁵⁶ See for example European Banking Federation. *EBF position on the proposal for a Regulation*, p. 4; German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 3-4.

²⁵⁷ Deutsches Aktieninstitut. *Proposal for a Prospectus Regulation*, p. 17-18.

²⁵⁸ See for example PANASAR, Raj, et al. *European Securities Law*, p. 98.

or a liability shield.²⁵⁹ This may obscure and draw attention away from some of the more specific risk factors potential investors should be aware of.

The Commission therefore proposes to refocus on risk factors that are material and specific to the issuer²⁶⁰ and its securities and introduces the idea to group risk factors into three distinct categories by their materiality, which shall be based upon the likelihood of their occurrence and the magnitude of their impact.²⁶¹ ESMA is to develop guidelines to help issuers and NCAs to assess and group the risk factors.²⁶² Further, no more than five most prominent risk factors are to be included in the summary.²⁶³

While the multiple stakeholders acknowledge the issue, they are also strongly opposed to this idea.²⁶⁴ They primarily argue that grouping and classifying risk factors is a subjective exercise and that issuers cannot always quantify the risks and group them into categories.²⁶⁵ Further, it was submitted that the risk factor section of a prospectus does not become shorter and more readable simply by allocating risk factors into categories²⁶⁶ and that grouping risk factors together may be confusing as related risks need to be grouped together and several smaller risks together may create a bigger risk. Overall, stakeholders state that substance should not be sacrificed for brevity²⁶⁷ and that the Commission's proposal would significantly increase the issuer's or offeror's liability, especially if it was showed in hindsight that the issuer allocated a risk factor into a group with low materiality and it still occurred.²⁶⁸

Also, an unintended consequence pointed out may be that investors would assess only the risk factors allocated to the most material group and would not consider all the risk

²⁵⁹ See for example European Banking Federation. *EBF position on the proposal for a Regulation*, p. 6.

²⁶⁰ Draft Regulation, Article 16(1).

²⁶¹ Ibid.

²⁶² Ibid, Article 16(2).

²⁶³ Ibid, Article 7(6)(c).

²⁶⁴ See for example German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 4-5; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 6.

²⁶⁵ European Banking Federation. *EBF position on the proposal for a Regulation*, p. 6.

²⁶⁶ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 5.

²⁶⁷ See for example European Banking Federation. *EBF position on the proposal for a Regulation*, p. 6.

²⁶⁸ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 5; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 6.

factors in their complexity.²⁶⁹ Investors with access to global capital market would have to prepare different disclosure in the EU and for example in the United States.²⁷⁰

Regarding the summary, limiting the summary to five risk factors only is viewed as unnecessary and arbitrary, also because the summary length is already limited to six A4 pages and there is an overarching obligation that a prospectus is to be easily analysable and comprehensible and NCAs can refuse to approve prospectuses when they fail to meet these criteria.²⁷¹

While I acknowledge the issue of current prospectuses, that is too many generic risk factors, it is not, in my opinion, a good idea to force issuers to group them. As voiced by several market participants, the issuers themselves cannot always assess the risk and the likelihood of its occurrence properly and wrong classification might impact investor protection as the potential investors will logically pay attention mainly (perhaps even only) to the group of risk factors with highest materiality. Instead, I believe that existing tools should be used to fix the situation, such as ESMA guidelines for both issuers and NCAs, which can in the course of the approval process lead issuers to stress the specific and most material risk factors and leave out or denote the generic ones.

Also, risk factors are often grouped according to their subject (for example risk relating to the issuer's company, the industry or the country),²⁷² re-grouping them according to materiality may make the risk factors less comprehensive.

The Council appears to share these concerns and the Presidency Proposal, in Article 16, abolishes the grouping of risk factors according to materiality and instead states that risk factors must be sorted according to their nature and the most material risk factor, according to the issuer's assessment, should be in each category mentioned first.

²⁶⁹ Ibid.

²⁷⁰ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 5.

²⁷¹ German Banking Industry Committee. *Comments. Commission proposal for a Prospectus Regulation*, p. 5; European Banking Federation. *EBF position on the proposal for a Regulation*, p. 7.

²⁷² See also PANASAR, Raj, et al. *European Securities Law*, p. 98.

4.5.4 Taxes

The Prospectus Directive and the Implementing Regulation prescribed that a prospectus contains also information on applicable taxes, primarily income taxes.²⁷³ The problem was, however, that taxes regarding the income from the securities differ in every jurisdiction and that the prospectus is required to cover the country where the registered office of the issuer or offeror is located and the country where the offer is made or the admission to trading on a regulated market sought.²⁷⁴ This disclosure obligation makes cross-border offers more difficult and costly.²⁷⁵

That is why the Draft Regulation abandons this requirement and states that the prospectus may contain only a warning that the tax legislation may have an impact on the income from the securities and only if there is a specific or favourable tax regime, the information should be included.²⁷⁶

This change is positive for the issuers and offerors as it decreases their legal expenses by eliminating the need for legal advisors from every relevant jurisdiction on the applicable taxes.

4.5.5 Incorporation by reference

Incorporation by reference means the use of information, which has already been published and filed with the supervisor, is therefore in the public domain and including it again in a prospectus would be an unnecessary duplication. That is why it is permitted to include (or *incorporate*) certain information, which meets the criteria above by referencing it instead of repeating it.²⁷⁷

The consultation process revealed that there still remains duplicative disclosure under the Prospectus Directive and the Transparency Directive and that better streamlining may benefit market participants.²⁷⁸ That is why the Draft Regulation widens the scope of information that may be incorporated by reference. The information

²⁷³ See Annex I, Par. XI and Annex III., Par. VI. of the Prospectus Directive.

²⁷⁴ Draft Regulation, Recital (39).

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ See for example European Commission. *Fact Sheet*.

²⁷⁸ See for example European Banking Federation. *EBF response to Consultation Document on the Review of the Prospectus Directive*, p. 13-14.

may come from: (i) prospectuses, supplements and final terms; (ii) documents prepared in the context of takeovers, mergers and divisions; (iii) regulated information which needs to be disclosed under the Transparency Directive and the Market Abuse Regulation; (iv) annual and interim financial information, audit reports and financial statements, management reports and corporate governance statements, for those issuers outside the scope of the Transparency directive, or exempted from some of its disclosure requirements and (v) memoranda and articles of association.²⁷⁹

Making the process incorporation by reference more efficient is a welcome change, which should result in lower costs for issuers.

4.6 Prospectus approval, notification and publication

The following sub-chapter deals with the procedural aspects of the prospectus regime and addresses the issues of the prospectus approval by the NCA, the passporting procedure, the publication of the approved prospectus and the proposal for a single online database of all prospectuses approved in all Member States.

4.6.1 Approval and publication of the prospectus²⁸⁰

A prospectus has to be approved before it is published by the competent NCA,²⁸¹ which has to be clearly appointed and identified by each Member State.²⁸² The NCA's role is to verify the completeness of the minimum disclosure requirements, its consistency and lack of contradictions and comprehensibility of the prospectus. However, the NCA does not verify the accuracy or truthfulness of the information, it is not a due diligence process.²⁸³

²⁷⁹ See for example European Commission. *Fact Sheet*.

²⁸⁰ For information on the approval process in the United States, please see JOHNSON, Charles J. Jr., et al. *Corporate Finance and the Securities Laws*. Fifth Edition. New York : Wolters Kluwer, 2015, §3.06.

²⁸¹ Draft Regulation, Article 19(1).

²⁸² Ibid, Recital (62).

²⁸³ European Commission. *Revamping the prospectus, the gateway to European capital markets* [online]. 2015 [cit. 2016-07-10]. Available at WWW: <http://europa.eu/rapid/press-release_MEMO-15-6198_en.htm?locale=en> (further referred to as "European Commission. *Fact Sheet*").

The time limit for the NCA to notify the issuer, offeror or person seeking admission to trading on a regulated market of the approval decision is 10 working days,²⁸⁴ which can be extended to 20 working days in case of a first time issuer.²⁸⁵ If the draft prospectus does not meet the prescribed requirements, the NCA notifies the applicant of this, in which case the time limit commences again from the date of the submission of the amended draft prospectus.²⁸⁶

A new provision in the Draft Regulation states that NCAs are to provide guidance on the approval process on their website and contact points so as to facilitate direct communication and interaction between the person seeking approval and the staff of the NCA,²⁸⁷ which is the case also in the United States.²⁸⁸

To fulfil this supervisory role, the NCAs have a set of minimum supervisory and investigative powers, including, for example, access to premises.²⁸⁹ Further, the NCAs can ask for information and documents; suspend or prohibit public offers, advertising activities and admission to trading on regulated markets; require the issuer to disclose all material information to ensure investor protection; and carry out on-site inspections.²⁹⁰

Once the prospectus is approved, it is to be made available to the public. This should occur at “*a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or admission to trading of the securities involved*”.²⁹¹

However, it is crucial to note that the approval and publication process works differently in practice. Persons preparing the prospectus are likely to circulate drafts of the prospectus with the NCA prior to the formal submission in order to receive and incorporate their feedback.²⁹² For example, in a typical IPO process in the United Kingdom, the issuer would submit a draft of the prospectus to the NCA around six

²⁸⁴ Draft Regulation, Article 19(2).

²⁸⁵ Ibid, Article 19(3).

²⁸⁶ Ibid, Article 19(4).

²⁸⁷ Ibid, Article 19(6). See also Draft Regulation, Recital (53).

²⁸⁸ JOHNSON, Charles J. Jr., et al. *Corporate Finance and the Securities Laws*, p. 3-93.

²⁸⁹ Draft Regulation, Recital (63)-(64).

²⁹⁰ European Commission. *Fact Sheet*.

²⁹¹ Draft Regulation, Article 20(1).

²⁹² Compare Financial Conduct Authority. *Availability of information in the UK Equity IPO process*, p. 14.

weeks before announcing the intention to float.²⁹³ Also, as already stated above (chapter 4.2.1 *Basic prospectus rule and its exemptions*), prior to the approval of the prospectus, information from its draft is typically already circulated with analysts and the draft prospectus itself is sometimes circulated with cornerstone investors, subject to a non-disclosure agreement.²⁹⁴ For these reasons, in a typical IPO process, the approved prospectus is not the document that provides investors with the information they require to assess the investment as the first investment decision takes place prior to the approval of the prospectus, which is a cause for concern.²⁹⁵

It has also been criticized that the approval process and scrutiny may differ between Member States, which makes the process more complicated for issuers.²⁹⁶ The claimed reasons for this are the different administrative procedures and law, supervisory practices and liability regimes. This leads to some NCAs taking a more formalistic approach and some NCAs a more pragmatic and practical approach.²⁹⁷

Stakeholders in the consultation process for example suggested that the NCAs should return clear comments on the draft of the prospectus.²⁹⁸ ESMA argued that introduction of further regulation is unnecessary, but rather the existing tools such as “Q&As” or guidelines should be utilized to promote regulatory convergence and ensure a level playing field across the EU.²⁹⁹

The Draft Regulation, among others, seems to have essentially adopted ESMA’s approach as it states that each NCA should scrutinise the prospectus and its completeness, consistency and comprehensibility the same way, which should be accomplished through guidance and supervision of ESMA.³⁰⁰

²⁹³ Ibid, p. 13.

²⁹⁴ Ibid, p. 13-14.

²⁹⁵ Compare Ibid, p. 18-19.

²⁹⁶ Draft Regulation, Recital (53).

²⁹⁷ European Banking Federation. *EBF response to Consultation Document*, p. 18.

²⁹⁸ Ibid.

²⁹⁹ ESMA. *Response to public consultation*, p. 11.

³⁰⁰ Draft Regulation, Article 19(11).

4.6.2 Notification procedure

Article 24 of the Draft Regulation essentially maintains the current notification regime. The issuer therefore is obligated to request a certificate of approval from the home NCA and then notify the NCA in each host Member State.

Certain market participants state that this procedure should be simplified, arguing that one of the goals of the CMU is creating a single pan-European market with securities. However, this regime could require up to 30 notifications and also translations of summaries.³⁰¹ It was therefore suggested that a single notification to ESMA should be sufficient in order to offer securities to the public or have them admitted to trading in all Member States.³⁰²

4.6.3 Prospectus database

Pursuant to the Prospectus Directive and its implementing legislation, every NCA publishes each prospectus it approved on its website.³⁰³ The prospectus is also published electronically on the website of the issuer, offeror, person seeking admission to trading, financial intermediaries, regulated market and/or the operator of the MTF.³⁰⁴ The Draft Regulation makes no changes to these requirements.³⁰⁵

However, there is currently no single official database of all prospectuses approved in the EEA/EU, therefore to efficiently search prospectuses across Member States is difficult. The Draft Regulation therefore proposes that ESMA will establish such single database and provide free online access to all market participants.³⁰⁶ The proposal received broad support from stakeholders as it would bring a great amount of information to investors and allow comparing prospectuses across the EU more easily.³⁰⁷ The online database EDGAR in the United States maintained by the Securities

³⁰¹ LANNOO, Karel, p. 2.

³⁰² Ibid.

³⁰³ Prospectus Directive, Article 14(2), 14(4).

³⁰⁴ Ibid.

³⁰⁵ See Draft Regulation, Article 20(3), 20(5).

³⁰⁶ Ibid, Article 20(6).

³⁰⁷ European Commission. *Impact Assessment*, p. 43.

and Exchange Commission was cited during the consultation process as a viable example.³⁰⁸

In my opinion, the biggest advantages of this single database (and one also mentioned by the Commission)³⁰⁹ is that it will allow ESMA to gather and evaluate prospectus data, trends and developments on a more granular level. This, in turn, will allow a more informed regulation of the capital markets and the prospectus regime in the EU. Further, it will be easier (or perhaps even for the first time possible) for issuers to search for appropriate past prospectuses across all Member States which they might use as precedents for their own prospectuses, thus decreasing the drafting efforts and decreasing the costs of preparing a prospectus.

³⁰⁸ Ibid, p. 41.

³⁰⁹ European Commission. *Explanatory Memorandum to the Draft Regulation*, p. 18.

5. Prospectus liability: a case for a special conflict-of-law rule in Rome II

This last chapter of the thesis deals with an aspect of the prospectus regime, which often remains outside the scope of mainstream interest, namely liability attached to the prospectus. The chapter introduces the concept of prospectus liability, its current regulation in the both the Prospectus Directive and in national laws with emphasis on civil liability, addresses the question of which law is applicable to prospectus liability and conflict-of-law rules which determine it and argues that a special conflict-of-law provision for prospectus liability should be introduced in EU law.

5.1 Introduction to prospectus liability

Prospectus liability logically complements the prospectus requirements, particularly mandatory disclosure: as the prospectus is prepared by insiders (typically the issuer's management) for outsiders, liability in cases of misleading information or omissions is necessary to prevent fraud by the insider.³¹⁰

Generally speaking, there are various sources of liability: (i) traditional general criminal fraud; (ii) traditional general civil liability; (iii) specific rules regarding criminal fraud and civil liability in connection with securities; and (iv) specific laws regarding misrepresentation in a regulated prospectus.³¹¹ This suggests the main types of prospectus liability: civil, administrative and criminal. As already mentioned above (see chapter 1.1 *Definition and purpose of a prospectus*), approval of a prospectus by the regulator does not exclude liability as the regulator is not responsible for verifying the truthfulness of the disclosed information.³¹² The text below concentrates mainly on the type of liability that is usually of most interest: civil liability.

Civil liability deals with losses suffered by investors, who in good faith invest in particular securities relying on the information in the prospectus, which turns

³¹⁰ GULLIFER, Louise, PAYNE, Jennifer. *Corporate Finance Law: Principles and Policy*. Oxford : Hart Publishing, 2011, p. 421.

³¹¹ WOOD, Philip. *Law and Practice of International Finance*, p. 377.

³¹² *Ibid*, 372.

out to be inaccurate or misleading. As the market becomes aware of the defect, the price of the security falls, thus causing damage to the investor.³¹³ Civil liability provisions ensure that these investors receive compensation for their losses, but it functions also ex ante, by decreasing the incentive for issuers to mislead investors.³¹⁴

Prospectus liability may attach to the following persons: the issuer or offeror, its auditor, valuers, lawyers and other experts, but also the underwriters, arrangers or managers of a security. The liability may be joint, several, or joint and several, which is often used as the risk falls on the biggest pocket, typically the underwriters.³¹⁵ One of the differences between the EU Member States and the United States is that according to Section 11 of the United States Securities Act 1933, underwriter liability is the norm.³¹⁶

5.2 Prospectus liability in the Prospectus Directive

Despite its importance, prospectus liability is an area of prospectus law where very little harmonization has been done so far: the Prospectus Directive provides only few elements of civil and administrative liability, therefore the specific manifestation of liability and sanction regimes is left to the national laws of Member States, leading to vastly different regimes.³¹⁷ During the preparation of the Prospectus Directive, Germany suggested harmonization of civil liability regimes, which, however, did not receive much support from other parties.³¹⁸

The only substantive provision common for both administrative and civil liability is Article 6(2) of the Prospectus Directive, which states that liability attaches at least to persons responsible for the preparation of the prospectus, which, pursuant to Article 6(1) of the Prospectus Directive, is the issuer or its administrative, management and supervisory bodies, the offeror, the person asking for admission to trading or a guarantor.

³¹³ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 450.

³¹⁴ Ibid.

³¹⁵ WOOD, Philip. *Law and Practice of International Finance*, p. 379.

³¹⁶ HUSTÁK, Zdeněk, et al. *Zákon o podnikání na kapitálovém trhu*, p. 383.

³¹⁷ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 450.

³¹⁸ SCHAMMO, Pierre. *EU Prospectus Law: New Perspectives on Regulatory Competition in Securities Markets (International Corporate Law and Financial Market Regulation)*. Reissue Edition. Cambridge : Cambridge University Press, 2011, p. 241.

Regarding administrative liability, Article 25 of the Prospectus Directive ensures that administrative sanctions can be imposed against persons where the provisions adopted in the implementation of the Prospectus Directive have not been complied with. This does not prejudice the right of Member States to impose criminal sanctions. Regarding civil liability, the Prospectus Directive further states that liability does not attach to a person solely on the basis of a summary.

The Draft Regulation made no changes to these provisions of the Prospectus Directive. However, further harmonization is favoured among market participants.³¹⁹

5.3 Prospectus liability in the legal systems of Member States

Laws relating to prospectus liability vary significantly between Member States.³²⁰ This was also demonstrated by the ESMA report published in 2013, which compared the different civil, administrative, criminal and governmental liability regimes in Member States.³²¹ The text below deals with civil liability.

In most Member States, prospectus liability is regulated by rules governing general civil liability (general tort law). In others, prospectus liability is subject to special rules, which differ from general civil liability in aspects such as burden of proof or prescription of actions and is generally more favourable to the person who has suffered detriment.³²²

A total of 24 countries describe specific persons who can be liable for damages caused by the defective information contained in a prospectus, only several countries go further (for example distributors of the securities, auditing firms or independent experts).³²³

Prospectus liability arises when the prospectus contains false or misleading information or omits material information, either under specific provisions or general tort or contractual liability regime. Basically anyone who suffered damage causally linked

³¹⁹ See for example CFA Institute. *Consultation on the review of the Prospectus Directive*, p. 12.

³²⁰ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 450.

³²¹ ESMA. *Report: Comparison of liability regimes in Member States in relation to the Prospectus Directive* [online]. 2013 [cit. 2016-05-29]. Available at WWW: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf>.

³²² *Ibid.*, p. 12.

³²³ *Ibid.*

to the breach (the misleading or omitted information) may claim compensation, that is primarily investors who bought the security in the primary or secondary market. However, in nine Member State including Germany, Ireland and the United Kingdom only investors may claim damages.³²⁴ The burden of proof is generally on the plaintiff, nevertheless in some countries the fault is presumed.³²⁵

Time limits to file the claim also vary: the majority of Member States however have a limit of up to five years.³²⁶

Regarding administrative liability, the biggest difference between administrative liability as regulated by the national laws of Member States is the maximum fines the relevant authority might impose: multiple Member States have cap up to EUR 100.000, others up to EUR 500.000 or 5 million, France EUR 100 million and the United Kingdom has no limit at all.³²⁷

5.4 Law applicable to prospectus liability in the EU Part I: pre-Kolassa

Given the significant differences in prospectus liability among Member States, determining the law applicable in a cross-border transaction is a key question.³²⁸ For example, if a company registered in the Czech Republic issues non-equity securities, the prospectus is approved by the Czech NCA, then passported to Germany and the United Kingdom, the rules determining the governing law of the liability attached to the prospectus become of enormous importance.³²⁹

These rules are called conflict-of-law rules and the relevant conflict-of-law rule is determined by the legal nature of the issue.³³⁰ Certain jurisdictions have special conflict-of-law rules provision, relating to specific issues, such is the case of Switzerland. As Francisco Garcimartín points out, “*Article 156 of Switzerland’s Federal Code on Private International Laws provides: “1. Claims arising from the public issuance of equity and debt instruments by means of a prospectus,*

³²⁴ Ibid, p. 13.

³²⁵ Ibid, p. 14.

³²⁶ Ibid, p. 15.

³²⁷ Ibid, p. 19.

³²⁸ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 451.

³²⁹ Compare *ibid*.

³³⁰ *Ibid*.

*circular, or similar publications shall be governed by the law applicable to the company or that of the State in which the issuance is made.*³³¹ Pursuant to this rule, the person suffering the harm may choose between the law of the state of the issuer or of the state where the issuance is made.³³²

However, there is no specific conflict-of-law provision regarding prospectus liability in EU law (as opposed to for example unfair competition,³³³ environmental damage³³⁴ or product liability³³⁵), therefore firstly the issue has to be characterised to determine the applicable law: if prospectus liability is characterised as a contractual issue, Rome I applies, while if it is characterised as a tort, that is a non-contractual claim, Rome II applies. It is generally accepted that prospectus liability claims have a non-contractual nature, primarily because this is the common approach between Member States and because a prospectus is addressed to the market as such, it is a market oriented institution and not a contractually oriented institution.³³⁶

As already stated above, there is no special conflict-of-law provision in Rome II applicable to prospectus liability, which is why the place where the harmful effect occurred or may occur (*lex loci damni*) pursuant to Article 4(1) of Rome II applies: the applicable law is the law of the Member State where the damage occurs.³³⁷ The problem is that in case of prospectus liability, the damage is not as easy to locate as may be the case with physical damage.³³⁸

Francisco Garcimartín summarizes the option as follows: (i) the location of the securities (the damage is evidenced by a decrease in the value of the securities to which the defective prospectus relates, therefore the decisive factor is the location of the securities), (ii) the connection to the market (this approach links the damage to the place of the market where the securities were either offered to the public

³³¹ Ibid.

³³² compare Ibid.

³³³ Rome II, Article 6.

³³⁴ Rome II, Article 7.

³³⁵ Rome II, Article 5.

³³⁶ Ibid or HUSTÁK, Zdeněk, et al. *Zákon o podnikání na kapitálovém trhu*, p. 385.

³³⁷ compare GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 451; LEHMANN, Matthias. Prospectus Liability and Private International Law – Assessing the Landscape After the CJEU Kolassa Ruling (Case C-375/13). *Journal of Private International Law*. August 2016, vol 12, no. 2.

³³⁸ GARCIMARTÍN, Francisco. The law applicable to prospectus liability in the European Union, p. 452.

or admitted to trading on a regulated market), and (iii) state-of-origin principle (the applicable law is based on the Home Member State of the issuer as defined by the Prospectus Directive).³³⁹

Garcimartín makes two conclusions. Firstly, the Rome II Regulation does not give a clear answer which law is applicable to prospectus liability and as this uncertainty comes at a price to market participants, Rome II should include a special conflict-of-law provision for prospectus liability. Secondly, this rule should be based on “*lex loci damni but interpreted under a market-oriented test*”³⁴⁰ as “*the interests of the offeror and the investors meet in a market and accordingly the law of this market should govern the civil liability of the former vis-à-vis the latter, ie prospectus liability must be linked to the lex mercatus*.”³⁴¹

This is sufficiently clear in case securities are offered to the public or admitted to trading on a regulated market in only one Member State, however in case of multiple Member States an additional element needs to be added: the relevant market is the market where the securities were acquired.³⁴²

5.5 Law applicable to prospectus liability in the EU Part II: Impact of the CJEU Kolassa Case

The situation was dramatically altered by a recent court decision. *Harald Kolassa v Barclays Bank plc*.³⁴³ is a landmark judgment of the Fourth Chamber of the Court of Justice of the European Union handed down in January 2015. While primarily relating to the Brussels Regulation, it has also major implications for the law applicable to prospectus liability under Rome II.

A brief overview of the facts of the case may help illustrate the typical jurisdiction

³³⁹ Compare Ibid; HUSTÁK, Zdeněk, et al. *Zákon o podnikání na kapitálovém trhu*, p. 385; HUBER, Peter. *Rome II Regulation: Pocket Commentary (Pocket Commentaries on European Regulations and International Conventions)*. Munich : sellier european law publishers, 2011, p. 84.

³⁴⁰ GARCIMARTÍN, Francisco. *The law applicable to prospectus liability in the European Union*, p. 455.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Court of Justice of the European Union. *Case C375/13: Judgment of the Court (Fourth Chamber) dated 28 January 2015 (Request for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria)) – Harald Kolassa v. Barclays Bank plc* [online]. 2015 [cit. 2016-07-10]. Available at WWW: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0375>>.

complexity, quite common for issues related to capital markets disputes. In this particular case, Mr. Kolassa, an investor domiciled in Austria, bought certificates issued by the bank Barclays, registered in the United Kingdom. However, Barclays did not sell them to Mr. Kolassa directly, but sold them to institutional investors, who in turn sold them to their client, in this case the German bank DAB, who sold them to Mr. Kolassa through its Austrian subsidiary *direktanlage.at*.³⁴⁴

As part of its analysis of the place where the harmful event occurs, the court reminds that the “*place where the harmful event occurred or may occur*’ in that provision is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (judgment in *Coty Germany*, EU:C:2014:1318, paragraph 46)”.³⁴⁵

In determining the *loci damni*, the court stated that it is the place where the investor suffered the damage. The court said that: “*The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant’s bank account held with a bank established within the area of jurisdiction of those courts.*”³⁴⁶ However, the judgment is unclear as to what would happen in a case where the domicile and the location of the bank account were different (in this case, both the investors domicile and location of the bank account were Austria).

Lehmann interprets the judgment as giving primary importance to the location of the bank account of the investor.³⁴⁷ However, I would point out that the court also repeats the need for a particularly close link between the dispute and the courts of the place where the harmful event occurred or may occur³⁴⁸ and that the court is clearly aware of the importance of the domicile of the investor, but also states that one must also look at where the events giving rise the loss took place and where the damage occurred.³⁴⁹

It is likely that the court would use the approach expressed in the Kolassa case when

³⁴⁴ Court of Justice of the European Union. *Case C375/13*, par. 12-18.

³⁴⁵ *Ibid*, par. 45.

³⁴⁶ *Ibid*, par. 55.

³⁴⁷ LEHMANN, Matthias. *Prospectus Liability and Private International Law*, p. 27.

³⁴⁸ Court of Justice of the European Union. *Case C375/13*, par. 46.

³⁴⁹ *Ibid*, par. 49-50.

determining applicable law and the place of damages in the context of the Rome II Regulation, because the language in Article 4(1) of the Rome II Regulation is actually taken from Article 5(3) of the Brussels I Regulation and because the Preamble to the Rome II Regulation calls for consistency between the two regulations.³⁵⁰

However, given the statements of the court above, it is in my opinion not likely that the court would in a case involving (for example) a bank registered in Germany, an investor domiciled in France, who paid for the securities sold by the German bank from a bank account in the Cayman Islands come to the conclusion that there is such a link between the dispute and the Cayman Islands to justify Cayman law as the applicable law. This opinion is supported by another judgment of the Court of Justice of the EU from June 2016, where the court said that financial damage occurring in the bank account alone cannot be qualified as a relevant connecting factor.³⁵¹

However, I agree with Lehmann's conclusion that "*if Kolassa is bad for conflict of jurisdiction, it is a real nightmare when applied to conflict of laws.*"³⁵² The reason for this is that it has universal application and in determining the applicable law, it may point not only to the law of a Member State, but to the law of any jurisdiction (irrespective of whether giving importance to the domicile of the investor or the location of the bank account). The application of the Kolassa judgment on the determination of applicable law could result disperse the applicable law and the issuer may not be able to foresee the applicable law as essentially anyone can acquire its securities on the secondary market.³⁵³ Another problematic aspect (which is also problematic in case of using the domicile of the issuer as the decisive criterion) is that it provides different investors with different levels of protection, for which there is

³⁵⁰ Ibid.

³⁵¹ Court of Justice of the European Union. *Case C-12/15: Judgment of the Court (Second Chamber) dated 16 June 2016 (Request for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 9 January 2015, received at the Court on 14 January 2015, in the proceedings) – Universal Music International Holding BV v Michael Tétéreault Schilling and Others* [online]. 2016 [cit. 2016-07-10]. Available at WWW: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=180329&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=162462>>, par. 36-38, 40.

³⁵² Ibid.

³⁵³ Ibid, p. 28.

no reason.³⁵⁴ If truly interpreted that the decisive factor is the location of the bank account, the Kolassa case would enable incredible forum shopping.

5.6 Law applicable to prospectus liability in the EU Part III: De Lege Feranda Suggestion

While the exact consequences of the Kolassa case are not entirely clear and even though the Universal Music International Holding BV v Michael Tétréault Schilling case mentioned above seems to have ruled out the most feared consequences of the Kolassa case (i.e., the location of the bank accounts determines the applicable law), there still remains a great deal of undesirable uncertainty, which may create complications for both issuers and investors. Some expert therefore argue that the regulator should intervene and introduce at least a conflict-of-law provision in the Rome II Regulation, applying to prospectus liability laws of the country where the security was traded on a regulated market or offered to the public or over the counter.³⁵⁵

Given the current state, I would also argue that a specific conflict-of-law rule should be introduced in EU law, which would state that the law applicable to prospectus liability is the law of the state where the market, on which the securities were purchased, is located. In my opinion, this solution makes sense as it is based on the intentional actions of both the issuer and the investor. The investor chose the market, therefore was (or at least could have been) aware of the prospectus liability regime of that place and the protection it offers. At the same time, it is foreseeable for the issuer.

³⁵⁴ Ibid, p. 27.

³⁵⁵ Ibid, p. 31; European Commission. Consultation on the Review of the Prospectus Directive, p. 23.

Conclusion

The goal of this thesis was to firstly identify shortcomings of the current prospectus regime as regulated by the Prospectus Directive, secondly to compare the Commission's proposal for a new prospectus regulation, that is the Draft Regulation, with the Prospectus Directive, and finally to determine whether the changes address the identified shortcomings of the current prospectus regime and present a more appropriate regulation in general.

I identified the following main shortcomings of the current prospectus regime under the Prospectus Directive: (i) the often high costs connected to the preparation of a prospectus and high total compliance costs with the Prospectus Directive; (ii) inflexible disclosure requirements for certain types of issuers, especially for SMEs and secondary issuers; (iii) ineffective protection of investors, caused primarily by increasingly long and complex prospectuses; (iv) diverging implementation of the Prospectus Directive and procedures, especially approval, across Member States; and (v) lack of alignment of the Prospectus Directive and other legislation.

These shortcomings are addressed in the Draft Regulation in the following way:

- High costs of the prospectus are addressed primarily by an amendment of several exemptions from the obligation to prepare a prospectus, a new "question and answer" prospectus format for SMEs, the promotion of tripartite prospectus, the new so-called universal registration document and improving the incorporation of information into the prospectus by reference. The Draft Regulation represents an improvement in this direction and the new regime should be cheaper for many issuers to comply with, however the abolition of the exemption from the obligation to prepare a prospectus for securities with denomination above EUR 100.000 will increase transaction costs of the wholesale bond market and risks its effective functioning.
- Inflexible disclosure requirements are addressed by further alleviations of the requirements for secondary issuers and by the introduction of new instruments specifically tailored to the needs of SMEs to make capital markets

more accessible. While there is still opportunity to better the proposed changes, they present an improvement upon the current regime.

- Ineffective investor protection is addressed mainly by reforming the prospectus summary, which should become a more useful tool for retail investors. However, the issue of prospectus length and complexity is left to be solved by ESMA using existing regulatory tools. Overall, the Draft Regulation does not appear to provide any major improvements in this regard and it will depend whether the market practice under the supervision and guidance of ESMA and the national regulators will change.
- The issue of diverging implementation and processes across Member States is addressed by changing the directive into a regulation. However, maintaining and extending the discretion of Member States as to the level from which to require a prospectus is opposed to the idea of further integration and of the CMU. The Draft Regulation presents an improvement upon the current regime, however further harmonization beyond the prospectus regime is required for development of capital markets in the EU.

Overall, I arrive at the conclusion that while the Commission's proposal addresses most of these shortcomings and definitely represents an improvement of the current regime, the Draft Regulation should be more ambitious, creative and introduce more significant changes in order to achieve increasingly efficient, accessible and attractive capital markets in the EU. However, it should be added that while there is certainly room for improvement, the current prospectus regime is considered to function well overall.

Further, I arrive at the following specific conclusions:

- The exemption from the obligation to publish a prospectus in case of public offers of securities with denomination in excess of EUR 100.000 should be maintained.
- The requirement of further approvals of the universal registration document should be eliminated.

- The requirement to categorize risk factors into three categories based on their materiality should be dropped as well as the limitation of five risk factors in the summary.
- ESMA should actively monitor the prospectus approval process in the EU in order to achieve a level playing field.
- A single prospectus database to be created by ESMA is a change expected to be of great benefit to the market.

I also come to the conclusion that a specific conflict-of-law rule regarding prospectus liability should be introduced into the Rome II Regulation, which would state that the law applicable to prospectus liability is the law of the state where the market, on which the securities were purchased, is located.

Finally, I feel that while the Commission often proposed changes that would address the shortcomings of the current prospectus regime, the real issues are more fundamental and rooted deeper in the nature of EU capital markets. To illustrate this on the example of prospectus length and comprehensibility: even if the changes are effective, ESMA guides both issuers and NCAs towards shorter, simpler and more user-friendly prospectuses, but both potential issuers and investors are not educated about the possibilities of capital markets, these attempts are doomed to fall short of making capital markets more attractive. It appears that a well-functioning and efficient prospectus regime is just one piece of the puzzle: by itself, it cannot promote the development of capital markets in the EU in any major way, other steps need to be taken, for example further harmonization and unifications of rules across the EU regarding rules such as insolvency or tax.

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Abstract and key words

Abstract in English

This diploma thesis explores the ongoing reform of the prospectus regime in the European Union. On 30 November 2015, the European Commission presented a proposal for a new regulation, which is to replace the current so-called Prospectus Directive. The primary aim of this thesis is to determine the shortcomings of the current prospectus regime and to critically analyze the proposal in order to determine, whether it addresses these shortcomings and whether it improves the prospectus regime in general. The thesis consists of three main parts: the first introduces the prospectus, its characteristics and current regulation in the EU; the second explores and analyses the proposal itself and makes conclusions on the proposed changes; the third and final part explores the topic of prospectus liability and conflict-of-law rules. Based on the conducted research I arrive at the conclusion that the biggest issues of the current prospectus regime are the high costs connected to the preparation of a prospectus, inflexible disclosure requirements for certain types of issuers, ineffective retail investor protection and diverging implementation of the Prospectus Directive across EU member states. While the European Commission's proposal addresses most of these shortcomings and certainly represents an improvement of the current regime, it should be more ambitious and attempt further changes. However, it should be added that while there is certainly room for improvement, the current prospectus regime is considered to function well overall. Also, the development of EU capital markets requires more fundamental changes, such as further harmonization of tax and insolvency law, spreading knowledge among both persons seeking finance and potential investors and finally changing the overall business culture to be more prone to approach the capital markets.

Abstrakt v českém jazyce

Tato diplomová práce se zabývá probíhající reformou režimu prospektu v Evropské unii. Dne 30. listopadu 2015 představila Evropská komise návrh nového nařízení, jež by mělo nahradit stávající Směrnici o prospektu. Hlavním cílem této práce je zjistit

nedostatky současné právní úpravy prospektu a kriticky zanalyzovat návrh Evropské komise za účelem určení, zda tyto nedostatky řeší a zda celkově představuje zlepšení právní úpravy prospektu. Práce sestává ze tří hlavních částí: první popisuje prospekt cenného papíru, jeho hlavní charakteristiky a současnou právní úpravu v EU; druhá zkoumá a analyzuje text samotného návrhu nařízení a činí závěry ohledně vhodnosti navržených změn; třetí a závěrečná část práce se zabývá otázkou odpovědnosti za obsah prospektu s ohledem na určení rozhodného práva. Na základě provedeného výzkumu dospívám k závěru, že hlavními nedostatky současné právní úpravy jsou vysoké náklady spojené s přípravou prospektu, neflexibilní požadavky na zveřejnění pro určité typy emitentů, neefektivní ochrana retailových investorů a rozdílné procesy a implementace Směrnice o prospektu v členských státech EU. Návrh Evropské komise většinu těchto nedostatků řeší a představuje zlepšení současného režimu, současně by však měl být více ambiciózní a zavést další změny. Současně je však třeba říci, že stávající režim je obecně hodnocen pozitivně. Vyjma toho další rozvoj kapitálových trhů v EU bude potřeba provést více fundamentální změny, jako například další harmonizaci daňového nebo insolvenčního práva, rozšiřování informací o kapitálových trzích a celkově změna názoru na kapitálové trhy a přístupu k nim.

Key Words

prospectus, prospectus directive, prospectus reform, EU law, capital markets

Klíčová slova

prospekt, směrnice o prospektu, reforma prospektu, právo EU, kapitálové trhy

Teze v českém jazyce

Úvod

Společnosti v Evropské unii (dále jen „EU“) spoléhají převážně na banky jako na zdroj financování. Banky poskytují až 80 % finančních potřeb společností, zatímco ve Spojených státech amerických až 80 % finančních potřeb společností poskytují kapitálové trhy. Evropská komise (dále jen „Komise“), vědoma si důležitosti rozvoje alternativních zdrojů financování, představila v roce 2015 plán Unie kapitálových trhů (v angličtině *Capital Markets Union*), jejímž hlavním cílem je právě zvýšení přístupu k financování na kapitálových trzích a jejich atraktivitu. Jedním z prvních kroků Unie kapitálových trhů je reforma režimu prospektu, jelikož prospekt je jeden z klíčových nástrojů kapitálového trhu. V listopadu 2015 Komise představila návrh nového nařízení (dále jen „Návrh nařízení“),¹ které by mělo nahradit současnou Směrnicí o prospektu.²

Hlavní cíl této diplomové práce je zjistit nedostatky současného fungování prospektu v EU, srovnat a zanalyzovat hlavní změny, které Návrh nařízení přináší ve srovnání se Směrnicí o prospektu a dospět k závěrům, zda Návrh nařízení tyto problémy řeší a zda celkově představuje lepší právní úpravu.

Je nutno dodat, že v současné době se jedná pouze o návrh Komise, který byl v listopadu 2015 zaslán Evropskému parlamentu a Radě Evropské unie, která v červnu 2016 zveřejnila svou upravenou verzi návrhu, o které bude vyjednávat v nadcházejících fázích legislativního procesu se zbývajícími dvěma orgány orgány. Je tedy možné (či dokonce pravděpodobné), že konečné znění nařízení, které lze očekávat nejdříve v první polovině roku 2017, spíše však později, se bude od Návrhu nařízení, jež je analyzováno v této práci, lišit i v podstatných ohledech. Toto nicméně neznamená, že v práci obsažené analýzy by tím ztrácely na platnosti nebo použitelnosti. Domnívám se, že je to právě ve chvíli vyjednávání nového legislativního aktu, kdy je naprosto

¹ Návrh Nařízení Evropského parlamentu a Rady o prospektu, který má být zveřejněn při veřejné nabídce nebo přijetí cenných papírů k obchodování. Dostupné online včetně důvodové zprávy z WWW: <<http://eur-lex.europa.eu/legal-content/CS/TXT/HTML/?uri=CELEX:52015PC0583&from=EN+>>.

² Směrnice Evropského parlamentu a Rady 2003/71/ES ze dne 4. listopadu 2003 o prospektu, který má být zveřejněn při veřejné nabídce nebo přijetí cenných papírů k obchodování, a o změně směrnice 2001/34/ES. Konsolidovaná verze dostupná online z WWW: <<http://eur-lex.europa.eu/legal-content/CS/TXT/HTML/?uri=CELEX:02003L0071-20140523&qid=1468265096648&from=EN>>.

důležité se jím zabývat, neboť již schválený akt lze sice okomentovat, ale již ho nelze změnit.

První část diplomové práce (kapitoly 1 a 2) stručně rozebírá prospekt cenného v obecné rovině, včetně jeho účelu a současného režimu prospektu v EU a jeho hlavní legislativní akt: Směrnici o prospektu se zaměřením na její nedostatky. Druhá část diplomové práce (kapitoly 3 a 4) představuje její stěžejní část – představuje projekt Unie kapitálových trhů a rozebírá samotný návrh nařízení Komise, shrnuje reakci od účastníků trhu a dospívá k závěrům ohledně vhodnosti navržených změn. Poslední část diplomové práce (kapitola 5) se zabývá odpovědností za obsah prospektu, jež je zatím na úrovni EU harmonizováno jenom minimálně.

Prospekt cenného papíru a jeho současná právní úprava v EU

Prospekt cenného papíru je dokument, který musí připravit společnost, pokud se chystá získat financování na kapitálových trzích veřejnou nabídkou cenných papírů nebo jejich přijetím k obchodování na kapitálových trzích. Prospekt popisuje zejména emitenta, předmět jeho podnikání, historii, trh na němž se pohybuje a také cenné papíry, které emituje. Účel prospektu je poskytnout potenciálním investorům dostatek informací, aby se mohli informovaně rozhodnout, zda chtějí do společnosti investovat či nikoli. Prospekt by tedy měl obsahovat všechny předepsané a materiální informace a často vyžaduje předchozí schválení regulátorem. Je s ním také typicky spojena odpovědnost osob jiných než pouze emitenta, například také jeho statutárních orgánů či členů managementu.

Současný režim prospektu je upraven Směrnicí o prospektu, jež vstoupila v platnost 31. prosince 2003. Jejím hlavním účelem bylo dosažení vysoké úrovně ochrany investorů, jež měla být zajištěna skrze povinnost zveřejnit v prospektu předepsané informace, a tržní efektivita, jež měla být primárně zajištěna skrze systém jediného schválení (v angličtině *single passport*). Směrnice o prospektu byla několikrát měněna, hlavně v rámci revize v roce 2009. Přestože se má obecně za to, že režim prospektů zakotvený touto směrnicí funguje celkově dobře, určité nedostatky byly identifikovány. Jedním z největších problémů současné regulace prospektu v EU (a jedním z důvodů změny regulace) jsou vysoké náklady spojené s přípravou prospektu. Náklady ve výši

stovek tisíc až milionů eur mohou být disproporční k plánovanému výnosu emise, přímo ovlivňují cenu financování na kapitálových trzích a činí tyto trhy pro mnoho společností neatraktivními či dokonce nedostupnými. Přestože výzkumy naznačují, že existují výrazné rozdíly v nákladech v závislosti na typu emitenta, velikosti chystané emise a typu cenného papíru, Komise odhaduje, že náklady spojené s přípravou prospektu kapitálového cenného papíru jsou až 1 milion euro a nekapitálového cenného papíru až 250.000 euro.

Další problémy současné regulace prospektu spočívají zejména v neefektivní ochraně investorů (způsobená uživatelsky nepřátelskými, dlouhými a složitými prospekty, které způsobují, že je investoři, zejména retailový, nechtou a nespolehají na ně, což popírá jeden ze základních účelů prospektu) a neflexibilní úpravě náležitostí prospektu pro zvláštní typy emitentů (právní úprava nedostatečně zohledňuje zvláštní povahu sekundárních emitentů či malých a středních podniků). Mimo to je Směrnice o prospektu kritizována za rozdílnou implementaci Směrnice o prospektu, celkově nedostatečná míra harmonizace a nesrovnalosti mezi ustanoveními Směrnice o prospektu a jinými právními akty EU.

Analýza Návrhu nařízení

Návrh nařízení spadá do plánu Komise na vytvoření Unie kapitálových trhů, který představila v roce 2015. Unie kapitálových trhů by měla pomoci rozvinout alternativy k úvěrovému bankovnímu financování a ulehčit společnostem všech velikostí zajištění financování na kapitálových trzích. Reforma režimu prospektu je důležitou součástí tohoto projektu, jelikož prospekt je klíčovým dokumentem zajišťujícím přístup k těmto trhům.

Důležitou částí procesu přípravy Návrhu nařízení byl konzultační proces, který proběhl na jaře roku 2015. V jeho rámci Komise obdržela 182 vyplněných dotazníků od účastníků kapitálových trhů včetně regulátorů, burz, investičních bank či obchodních asociací.

Hlavní část diplomové práce se zabývá samotným textem Návrhu nařízení, které však práce nepopisuje a nerozebírá komplexně celé, ale soustředí se na změny navržené oproti Směrnici o prospektu. Kromě toho se zabývá ustanoveními, která sice změněna

nebyla, u nichž však byly vzneseny argumenty pro jejich změnu. Kapitola je rozdělena do několika podkapitol dle toho, jakým aspektem režimu prospektu se zabývá (a každý aspekt se většinou vztahuje k jednomu nebo několika článkům Návrhu nařízení): forma navrženého aktu, situacemi kdy je vyžadován prospekt, speciální režim prospektů pro zvláštní typy emitentů, složení prospektu z více dokumentů, obsahové náležitosti prospektu a procesní aspekty režimu prospektů, zejména proces schválení a publikace.

Novinka reformy je, že režim prospektu bude nadále upraven na evropské úrovni ve formě nařízení namísto směrnice. Tato změna by mělo vyřešit (a do budoucna zabránit) různorodé implementaci v národních právních řádech členských států EU. Toto považuji za pozitivní změnu také proto, že dojde ke snížení transakčních nákladů, neboť při přeshraničních emisích již nebude potřeba angažovat místní právní poradce pro kontrolu, zda byla směrnice správně implementována.

Zásadní pravidla ohledně povinnosti připravit a zveřejnit prospekt zůstala zachována: dle článku 3 Návrhu nařízení se nadále zakazuje nabízet cenné papíry veřejnosti v EU bez předchozí publikace prospektu a zakazuje se přijmout cenné papíry k obchodování na regulovaném trhu v EU bez předchozí publikace prospektu.

Z této povinnosti však existuje řada výjimek: s ohledem na druh emitenta, investora nebo cenný papír jsou zakotveny případy, kdy prospekt vyžadován není. Řada těchto výjimek zůstala zachována, práce se proto zaměřuje na ty, které byly změněny nebo diskutovány.

Dle Směrnice o prospektu není prospekt vyžadován pro veřejné nabídky cenných papírů s hodnotou nižší než 100.000 euro. Pro veřejné nabídky cenných papírů s hodnotou mezi 100.000 eury a 5 miliony euro mají členské státy EU diskreci, zda budou prospekt vyžadovat (což v současnosti 17 z nich činí). Návrh nařízení stanoví, že prospekt nebude vyžadován pro veřejné nabídky cenných papírů s hodnotou nižší než 500.000 euro a stanoví diskreci členských států EU pro veřejné nabídky cenných papírů s hodnotou mezi 500.000 a 10 miliony euro. Komise argumentuje, že pro nabídky s hodnotou pod 500.000 euro je cena přípravy prospektu disproporční k předpokládanému výnosu emise a že množství prospektu s hodnotou mezi 500.000 a 10 miliony eury je zanedbatelná (pouze 3 procenta). Dle mého názoru je zvýšení diskrece členských států EU vhodná, jelikož národní kapitálové trhy mají často rozdílné

charakteristiky a toto ustanovení umožní členským státům EU tyto charakteristiky zohlednit. Navíc je nikdo nenutí tuto diskreci změnit.

Komise dále navrhuje zrušit výjimku z povinnosti připravit prospekt obsaženou v Nařízení o prospektu pro cenné papíry s kusovou hodnotou nad 100.000 euro. Tato výjimka byla zdůvodněna tím, že do cenných papírů (zejména dluhových cenných papírů) investují takřka výlučně institucionální investoři, kteří ochranu poskytovanou prospektem nepotřebují. Komise však tvrdí, že neplánovaným účinkem této výjimky bylo, že mnoho společností emitovalo tyto cenné papíry pouze pro to, aby se vyhnulo povinnosti připravit prospekt, čímž se zmenšila nabídka pro retailové investory a snížila likvidita sekundárního trhu s dluhopisy. Tato změna byla hlavním bodem kritiky ze strany mnoha účastníků trhu, kteří argumentují zejména tím, že tato výjimka je zásadní pro efektivní fungování velkoobchodního (tzv. *wholesaleového*) trhu s dluhopisy a že jejím zrušením se likvidita sekundárního trhu a dostupnost dluhopisů pro retailové investory nezlepší, jelikož emitenti využívají těchto nominálních hodnot z jiných důvodů (zejména pro to, že cílí na profesionální investory). V této otázce dospívám ke stejnému závěru: analýza Evropské komise není zcela přesvědčivá, ke zvýšení likvidity sekundárního trhu by nejspíše nedošlo a navíc by bylo ohroženo efektivní fungování *wholesaleového* trhu s dluhopisy.

Návrh nařízení dále reformuje režim prospektu pro zvláštní druhy emitentů. Za prvé se jedná o sekundární emitenty (tzn. trhu již známý emitent s cennými papíry přijatými k obchodování na regulovaném trhu). Až 70 procent emisí jsou emise sekundárních emitentů. Jelikož jsou tito emitenti povinni zveřejňovat různé informace dle jiných předpisů EU, obsahuje Návrh nařízení různé úlevy a celkově zakotvuje méně komplexní povinné zveřejnění informací v prospektu. Za druhé se jedná o malé a střední podniky, pro které jsou kapitálové trhy často nedostupné kvůli vysokým nákladům spojených s přípravou prospektu a složitosti celého procesu. Komise z toho důvodu navrhuje dva nové instrumenty: méně zatěžující režim zveřejňování v případě veřejné nabídky cenných papírů a zejména možnost využít nový šablonu prospektu, která bude obsahovat standardní informace a nápovědu, jak přidat pro ně specifické informace. Tento nástroj by měl umožnit malým a středním podnikům si připravovat prospekty samostatně a snížit náklady na právní poradce.

Návrh nařízení také obsahuje změny ohledně kompozice prospektu. Za prvé upravuje nový nástroj, tzv. *univerzální registrační formulář*. Emitenti, kteří se často uchylují k financování na kapitálových trzích, budou mít možnost každý finanční rok připravit univerzální dokument, který bude obsahovat veškeré obecné informace ohledně jejich společnosti, historii či finanční situaci, ale žádné informace ohledně konkrétních cenných papírů. Tento dokument bude schválen regulátorem. Až poté bude chtít emitent vydat cenné papíry, připraví pouze souhrn a popis cenných papírů. Toto by mělo umožnit rychlý přístup na kapitálové trhy a pružnou reakci na aktuální příznivé podmínky. Na institutu je však několik aspektů kritizováno, zejména nutnost další schválení v případě změn. Za druhé Návrh nařízení mění lehce režim základního prospektu: nyní bude možný pro všechny druhy nekapitálových cenných papírů.

Co se týče obsahu prospektu, Návrh nařízení se snaží vyřešit jeden ze základních nedostatků současného režimu, tedy délku a komplexnost prospektů, která způsobuje jejich přílišnou složitost a nesrozumitelnost pro investory, zejména retailové, kteří z toho důvodu často rezignují na používání prospektů jako základu pro investiční rozhodování. Návrh nařízení proto omezuje délku souhrnu prospektu na šest stran velikosti A4 a upravuje formální stránku souhrnu, aby byl pro investory přehlednější a srozumitelnější.

Dále Návrh nařízení reformuje sekci rizikových faktorů, jelikož dle Komise se tato důležitá sekce prospektu nevhodně rozrostla a často obsahuje příliš generická a obecná rizika, což může způsobit nezpozorování specifických a materiálních rizik. Komise proto navrhuje rozdělit rizikové faktory do tří kategorií dle materiality. V souladu s mnoha aktéry toto nepovažují za vhodné, zejména proto, že objektivní vyhodnocení rizik je pro emitenty velmi složité, rizika, že se budou investoři soustředit pouze na rizikové faktory obsažené v nejvíce materiální skupině a nezáváží rizikové faktory v jejich komplexnosti.

Mimo to toho Návrh nařízení ruší povinnost zahrnout do prospektu informace ohledně zdanění výnosů z cenných papírů, rozšiřuje režim informací, které lze začlenění informací do prospektu formou odkazu a zefektivňuje proces schvalování dodatků.

V neposlední řadě mění také jiné aspekty týkající se režimu prospektu, hlavně proces schvalování prospektu národním regulátorem. Terčem kritiky byly odlišnosti v procesu

schvalování prospektů mezi členskými státy, což způsobuje komplikace emitentům. Návrh nařízení neobsahuje v tomto směru žádná konkrétní ustanovení, ale Komise stanoví, že by ESMA měla za pomoci existujících nástrojů vést národní regulátory k jednotnému přístupu v celé EU. Positivní změnou je, že Návrh nařízení zřizuje volně přístupnou online centrální databázi prospektů, kterou povede ESMA a která bude obsahovat všechny prospekty schválené regulátory ve všech členských státech EU. Toto umožní investorům a emitentům hledat informace efektivně a porovnávat prospekty.

Rozhodné právo pro odpovědnost za obsah prospektu

Poslední část diplomové práce se zabývá odpovědností za obsahu prospektů a otázkou rozhodného práva, tedy částí režimu prospektů, která je jen minimálně harmonizována na úrovni EU. Ve Směrnici o prospektu je pouze stanoveno, že správní a občanskoprávní odpovědnost za obsah prospektu je spojena alespoň s emitentem, členy jeho správních, řídicích či dozorových orgánů, s předkladatelem nabídky nebo osobou, která žádá o přijetí k obchodování na regulovaném trhu, nebo ručitelem. Odpovědnost za obsah prospektu proto zůstává prakticky v rukách národního práva členských států a velké rozdíly v této regulaci mohou být pro emitenty při přeshraničních transakcích problematické. Tuto situaci nemění ani Návrh nařízení.

Problémy navíc způsobil rozhodnutí Soudního dvora Evropské Unie ve věci Kolassa³, který ve svém důsledku stanovilo, že za místo, kde vznikla škoda (*lex loci damni*) se považuje domicil investora, zejména pokud je v této jurisdikci sídlo bankovní instituce, u níž je veden bankovní účet, ze kterého byly příslušné cenné papíry uhrazeny. To znamená, že by se odpovědnost emitentů mohla řídit prakticky jakýmkoli právním řádem na světě, aniž by na to měli emitenti vliv. Souhlasím s experty na dané téma, že důsledky tohoto rozhodnutí jsou krajně nežádoucí a že by měla být zaveden speciální hraniční ukazatel v Římu II, který by stanovil, že odpovědnost za obsah prospektu se řídí právem státu, ve kterém je umístěn trh, na němž cenné papíry byly nabyty.

³ Věc C-375/13: Rozsudek Soudního dvora (čtvrtého senátu) ze dne 28. ledna 2015 (žádost o rozhodnutí o předběžné otázce Handelsgericht Wien – Rakousko) – Harald Kolassa v. Barclays Bank plc. Dostupné online z WWW: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd8fec7c1e2b17415fb3c7a9de28bbbcf0.e34KaxiLc3qMb40Rch0SaxuTbxr0?text=&docid=161845&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=46561>.

Závěr

Na základě studia Návrhu nařízení, dalších oficiálních dokumentů EU a dokumentů početných účastníků trhů vztahujících se k Návrhu nařízení dospívám k závěru, že Návrh nařízení se snaží adresovat většinu nedostatků současného režimu prospektu a představuje nepochybné zlepšení mnoha z nich. Současně však není v mnoha ohledech dostatečně ambiciózní a nedostatečně kreativní.

Současně dospívám k několika konkrétním závěrům ohledně ustanovení, která by měla být v Návrhu nařízení změněna: výjimka z povinnosti zveřejnit prospekt v případě veřejné nabídky cenných papírů se jmenovitou hodnotou nad 100.000 euro by měla být zavedena zpět, kategorizace risk faktorů by neměla být vyžadována, ESMA by měla aktivně monitorovat proces schvalování prospektů za účelem dosažení a mělo by dojít k úpravě základních prvků odpovědnosti za obsah prospektu na EU úrovni.

Na konec musím dodat, že zatímco efektivní regulace prospektu v rámci úpravy kapitálových trhů sice důležitá otázka, neodvratně však docházím k závěru, že skutečné překážky rozvoje kapitálových trhů v EU jsou více fundamentální: pro jejich rozvoj bude třeba zejména rozšířit povědomí o nich, jak mezi emitenty a investory, zvýšit důvěru v kapitálové trhy a povzbudit mezi obyvateli chuť investovat své úspory. Jinými slovy, dobře fungující režim prospektu je pouze jeden kousek skládačky, který samotný nedokáže dramaticky zvýšit atraktivitu evropských kapitálových trhů a další změny jsou vyžadovány.