Quaderni giuridici

The Prospectus Regulation

The long and winding road

S. Alvaro, R. Lener, P. Lucantoni; in collaboration with V. Adriani, F. Ciotti, A. Parziale

Introduced by Carsten Gerner-Beuerle

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Abstract

This study focuses on three main topics: it firstly goes through the purposes of mandatory disclosure, it then develops an analysis on prospectuses and supplements approved in seven EU countries, and it finally sets out the new regulatory framework.

The first part highlights the twofold importance of prospectuses, as a means of reducing informational asymmetry and helping investors make informed investment decisions. This chapter compares all the pros and cons of mandatory disclosure and some of the main scholars' viewpoints on this topic. There is plenty of literature supporting the idea that information overload is counterproductive while others maintain that it is crucial to well-functioning markets. Above all, empirical research shows that market efficiency is also undermined by behavioural biases, which is typical of both retail and sophisticated investors. For all these reasons, policymakers have gradually addressed these problems introducing a *simplified prospectus* with Directive 2001/107/EEC (UCITS III), the *Key Investor Information Document* (KIID) with Directive 2009/65/EU (UCITS IV), the *prospectus summary* with Prospectus Regulation 1129/2017. Therefore, it is certainly true that standardization - while preserving the content of disclosed information - is a core challenge that policymakers are currently facing.

Since the two main objectives of Prospectus Regulation 1129/2017 are market efficiency and investor protection, the second part presents an overall assessment of whether and to what extent it has achieved its original purposes. Market efficiency was measured through prospectus activity while investor protection was assessed by looking at the number

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of pages and the dimensions of prospectuses and supplements. Data was compared from seven EU countries. Overall, the total number of approved prospectuses in the years 2006-2018 fell dramatically and the number of prospectuses passported in and out of the countries analysed presents substantial differences. The research also reveals substantial discrepancies in the average number of pages of the documents approved in each country. Above all, the macroscopic divergencies highlight the different levels of complexity in the operations underlying the placement of securities, and consequently the need for an alternative market disclosure.

The third part concerns the new regulatory framework and it deals with all the main innovations brought about by the latest Prospectus Regulation 1129/2017 such as: the new prospectus summary, the new rules on risk factors, the simplifying disclosure regime for SMEs and SMEs growth market and the Universal Registration Document. Despite its primary intent of achieving harmonization in the prospectus regime, the Regulation does not determine a common set of rules in terms of liability. This means that securities litigation and liability regimes related to securities issuances are largely based on national law, thus resulting in a highly fragmented framework. Especially with regard to civil liability regimes related to national supervisory authorities, the national legislations of the countries analysed seem to follow divergent paths. This work analyzes and compares those differences, and then offers some final tips for avoiding liability fragmentation within the EU countries, which is finally recognized as one of the main obstacles to achieving regulatory harmonization while at the same time granting market efficiency and investor protection.

Key words: Prospectus Regulation, market efficiency, investor protection, regulatory harmonization.

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Introduction

by Carsten Gerner-Beuerle

The advantages and disadvantages of a mandatory disclosure regime have been discussed controversially since at least the watershed reforms of the New Deal in the United States, which transformed securities regulation and introduced the first comprehensive, detailed and binding disclosure regime in the world. Several empirical studies that compared returns to investors before and after the reforms of 1933 and 1934 found no significant increase in average returns after the introduction of the Securities Act of 1933 and the Securities Exchange Act of 1934.[1] Other studies even indicated that mandatory disclosure was harmful and investors in firms not disclosing certain accounting information did better than those that disclosed the information voluntarily before disclosure became mandatory.[2] Yet other, more recent, studies were more positive in their evaluation of disclosure regulation and provided evidence of a statistically significant association between stronger regulation and a lower cost of capital of issuers.[3] The debate, therefore, remains largely unresolved, mainly because good control groups are generally not available and a clean identification of causal channels between disclosure regulation and financial outcomes, therefore, proves difficult.[4] Nevertheless, one fairly consistent result that emerges from the empirical studies is that the variance of returns is lower with mandatory disclosure than without.[5] If nothing else, this effect of a mandatory disclosure regime should justify its existence, since investors, at least if they are risk-averse, will regard lower variance, all else being equal, as beneficial. This finding, of course, does not answer the question of *how much* firms should be required to disclose, that is, when the marginal benefit of disclosure can be expected to equal its marginal cost. Most policy makers around the world, and certainly in the EU, operate on the assumption that

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1 G. A. Jarrell, *The Economic Effects of Federal Regulation of the Market for New Security Issues*, in 24 *Journal of Law and Economics* 613 (1981); C. J. Simon, *The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues*, in 79 American Economic Review 295 (1989); G. J. Stigler, *Public Regulation of the Securities Market*, in 37 *Journal of Business* 117 (1964).

2 G. J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities and Exchange Act of 1934*, in 63 *American Economic Review* 132 (1973).

3 L. Hail and C. Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, in 44 *Journal of Accounting Research* 485 (2006).

4 C. Leuz and P. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, in 54 *Journal of Accounting Research* 525 (2016).

5 See the references in n 1 above and, more recently, A. Ferrell, *Mandated Disclosure and Stock Returns: Evidence from the Over-the-Counter Market*, in 36 *Journal of Legal Studies* 213 (2007).

some level of mandated disclosure has a positive effect on financial development. The devil, as always, is in the detail: how much and what information issuers should be required to disclose, how they should disclose the information, and what the consequences are of incorrect disclosures.

The present article addresses all of the above questions, and many more, in Parts 1 and 3. It gives a thorough, comprehensive overview of the mandatory disclosure debate, the incentives on the part of issuers and investors that are at play in financial markets, and the likely effect of disclosure, given informational asymmetries, bounded rationality, and systemic behavioural biases. Importantly, the article also addresses the question of how much information should be disclosed and assesses recent efforts at the European level to approximate the marginal condition mentioned above. These efforts include the requirement to publish a non-technical summary of offering prospectuses and other disclosures, which has existed since the first Prospectus Directive (Directive 2003/71/EC), reduced disclosure requirements for certain types of issuers and issues, for example a simplified prospectus for secondary issues and a so-called EU growth prospectus pursuant to the revised Prospectus Regulation (Regulation (EU) 2017/1129), and a proportionate disclosure regime for seasoned issuers, the 'Universal Registration Document', which was also introduced by the revised Prospectus Regulation. The latter mechanism is similar to shelf registration pursuant to SEC Rule 415, although it falls short of the US regime in important respects, for example by requiring the additional approval of the securities note and summary when securities are offered to the public or admitted to trading on a regulated market.[6] The article discusses the benefits and shortcomings of these features of the European regime with admirable clarity, offering important critical insights that policy makers are well advised to heed in order to further improve disclosure regulation in the EU and alleviate the regulatory burden on issuers where it is not outweighed by the benefits of disclosure.

The article tells a second important story. In contrast to disclosure regulation in the United States, the European regime pursues two objectives: enhancing investor protection and promoting market integration.[7] The latter, arguably, is only an ancillary objective of federal securities regulation in the United States, where capital markets were already well integrated when the federal securities laws were adopted in 1933 and 1934. In the EU, on the other hand, a 'single rulebook' for the capital markets and the creation of a level-playing field are essential steps towards the effective functioning of an internal market for securities and the completion of a Capital Markets Union.[8] So far, market integration is woefully inadequate.[9] This is a problem not only for issuers, who face difficulties in accessing financing if their home markets dry up, but for the very existence of European Economic and Monetary Union, since demand shocks that affect Member States asymmetrically are redistrib-

6 Regulation (EU) 2017/1129, Art. 10.

7 Ibid. recital 1.

8 Ibid. recital 3.

9 See European Central Bank, Financial integration in Europe (May 2018), statistical annex, in particular charts S22-S25 (debt and equity securities markets).

uted insufficiently by capital markets in the EU through the international diversification of portfolios of financial assets.[10] The result is that Member States have to absorb a shock largely themselves by increasing government spending or accepting a contraction in economic activity, with potentially disastrous consequences for firms and people, as could be seen in the aftermath of the sovereign debt crisis.

In Part 2, the article presents original data that seeks to assess whether the Prospectus Directive and implementing legislation, in particular the Prospectus Regulation of 2004,[11] have achieved the objective of enhancing market integration. The authors collect data on the number and size of prospectuses and supplements in the seven EU countries with the highest numbers of approvals. They observe large differences within and between the seven Member States in terms of the number of approved prospectuses, passporting activity, and the length of prospectuses, distinguishing between debt and equity issues. The considerable variation in the length of prospectuses, they argue, runs counter to the goal of creating an integrated capital market, since prospectuses cannot be compared easily. There is indeed substantial anecdotal evidence that national competent authorities have taken markedly different approaches to interpreting and applying the prospectus regime, but I am not sure the data allow us to draw any conclusion on the market integration goal of the prospectus regime. Prospectuses, of course, differ in length depending on the complexity of the issuer's operations and whether debt or equity securities are issued, as acknowledged by the authors. In addition, the Prospectus Directive of 2003 and Prospectus Regulation of 2004 sought to calibrate the applicable disclosure obligations more finely in light of the type of security issued and the type of issuer, notably by allowing for incorporation by reference[12] and introducing different schedules and building blocks for different types of security and issuer, for example shares, debt securities with a denomination per unit of less than EUR 100,000, debt securities with a per-unit denomination of at least EUR 100,000, asset-backed securities, depositary receipts, derivative securities, securities issued by closed-end investment funds, and public bodies.[13] Thus, the fact that prospectuses differ in length and size both within and between countries may be interpreted as an indication that the prospectus regime *is* responsive to differences in the informational needs of the market and, hence, operates as intended. Of course, this does not mean that the existing regime strikes a reasonable balance between regulatory costs and benefits. However, I would think that the ineffectiveness of the regime has not been shown either on the available evidence. It would be interesting to investigate whether the inclusion of additional controls, such as the issuer's total assets as a proxy for the complexity of its operations, its age, industry, number of years since its initial listing, schedule and building blocks under the Prospectus Regulation of 2004 used to com-

10 It has been shown that only about 10 percent of an asymmetric shock to gross domestic product are redistributed by capital markets in the Eurozone, whereas US capital markets redistribute about 47 percent, see C. Alcidi, P. D'Imperio, and G. Thirion, *Risk-sharing and Consumption-smoothing Patterns in the US and the Euro Area: A comprehensive comparison*, CEPS Working Document No 2017/04 (2017), p. 12.

11 Commission Regulation (EC) No 809/2004.

12 Directive 2003/71/EC, Art. 11.

13 Commission Regulation (EC) No 809/2004, Annex I-XVII.

pile the prospectus, etc., corroborates the findings presented in the article or qualifies them.

The authors advance another interesting claim that concerns specifically data from Italy. They observe that the number of prospectuses passported out from Italy (the number of applications for approval of a prospectus in Italy, with securities then also offered to the public or listed outside of Italy) is very low (one or two per year from 2014-2018) and the average number of pages in an equity prospectus approved by Consob far exceeds that in other countries (406 versus 298 in the country with the second highest average, Germany). The authors posit that this may be explained with the Italian law on liability of the market regulator. They present what is, to my knowledge, the most detailed comparative analysis of state liability in major EU Member States available in the literature and conclude that Italy is (or was until a recent decision of the Court of Appeal of Milan of January 14, 2019) an outlier. In supervising the capital markets, Consob is regarded as acting in the interests of both the general public and private, individual investors. It is, thus, not only responsible for ensuring that a prospectus is complete, but also that it does not contain any mistakes that the supervisor, given the competence and experience of its staff, should have recognised. This approach potentially gives rise to extensive liability exposure, and Consob has indeed been found liable in cases where it is difficult to imagine that a regulator would face liability in another Member State, for example, where a company was significantly overvalued in its IPO.

The authors argue that these legal differences 'fundamentally undermine the pursuit of a true capital markets union and encourage forum shopping …, since the de facto immunity granted to certain supervisory authorities may induce them to exercise less stringent controls and approve prospectuses faster.' The data seem to support this conclusion, but I am not sure that the liability exposure of the public regulator can fully explain the low level of passporting activity out from Italy. At least from the perspective of orthodox law and economics, we may expect to observe precisely the opposite effect. High quality issuers would certainly not aspire to take advantage of 'less stringent controls' and may actually be drawn to a regulator that stringently vets prospectuses, since this would give investors additional assurances and should therefore translate into a lower cost of capital. In any case, the point is well taken that differences in supervisory practices undermine market integration. I would go even further than the authors and argue that the absence of a common, fully competent supervisor for the primary and secondary market, not only legal differences, represents the main shortcoming of the European regulatory regime, and that European markets will remain fragmented in comparison with the United States as long as this does not change. Alas, given political dynamics, the prospects of a reform of the supervisory architecture in the EU seem to be rather remote.

1 Purposes of mandatory disclosure

1.1 Prospectus disclosure aims to reduce informational asymmetry and enables investors to make informed decisions when purchasing securities

Mandatory disclosure related to prospectuses to be published when securities are offered to the public or admitted to trading is a cornerstone of EU financial market regulation[1]. It governs market-based capital raising activities by providing mandatory disclosure rules that impose a duty to provide information on securities (and issuers) to prospective purchasers on the assumption that *more information* would lead to better investment decisions[2].

The main purpose of the disclosure mandated by the Prospectus Regulation is to protect investors and investors' confidence in the proper functioning of the market. In turn, it ensures market efficiency and integrity. Such logic has been widely mentioned as the rationale behind many pieces of regulation; the Prospectus Regulation itself provides that "[d]*isclosure of information in cases of offers of securities to the public or admission of securities to trading on a regulated market is vital to protect investors by removing asymmetries of information between them and issuers*"[3], thereby allowing them to make informed choices, and that "[t]*he aim of this Regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital. The provision of information which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision ensures, together with rules on the conduct of business, the protection of investors*[4]*. Moreover, such information provides an effective means of*

1 On mandatory disclosure under the European Prospectus Regulation see P. Lucantoni, *Prospectus Directive,* in M. Lehmann – K. Kumpan, *European Financial Services Law, Article by Article Commentary,* Nomos-Beck-Hart, 2019, p. 941 – 1032; H. T. C. Hu, *The disclosure paradigm*: *conventional understandings and modern divergences*, in D. Busch – G. Ferrarini – J.P. Franx, (edt by), *Prospectus Regulation and Prospectus Liability,* Oxford, 2020, 23 ff.

2 For sake of clarity, it is worth mentioning that transparency is an issue of paramount importance in the legal architecture of financial markets in Europe, but is *not* the sole available legal strategy that can be pursued to ensure investor protection. Indeed, in the context of the MiFID directive review, the European legislator introduced much-awaited product intervention powers by the ESAs and NCAs, which have been implemented through the MiFIR Regulation (see art. 40 MiFIR, Reg. (EU) 600/2014). The introduction of *ex post* intervention powers is certainly significant but, at the same time, does not constitute a major paradigm shift in the European financial legislation, which is still centered on disclosure. See P. Lucantoni, *L'informazione da prospetto. Struttura e funzione nel mercato regolato*, 2020, Milano; Annunziata, *Il recepimento di MiFID II: uno sguardo di insieme tra continuità e discontinuità,* in *Riv. Soc.*, 2015, 4, 1100; M. Ventoruzzo – S. Alvaro, I poteri di vigilanza e intervento della Consob, ne in Il Testo unico finanziario, a cura di Cera, Presti, Bologna, 2020, 2095; V. C., *Product Intervention: A Cross-Sectoral Analysis*, in V. Colaert - D. Busch - T. Incalza (edt by), *European Financial Regulation. Levelling the Cross-Sectoral Playing Field, Oxford,* Oxford, 2019, p. 399 ss. ; F. Guarracino, *I poteri di intervento sui prodotti finanziari (la c.d. product intervention*), ne *La MiFID II,* a cura di Troiano – Motroni, 2016, p. 232 ff.; M. E. Salerno, *La disciplina in materia di protezione degli investitori nella MiFID* II: *dalla disclosure alla cura del cliente?,* in *Diritto della banca e del mercato finanziario*, 2016, 3, p. 458 ff.

3 Rec. (3) of Prospectus Regulation 2017/1129.

4 See also Rec (10), Rec (27), Rec (87) Prospectus Regulation 2017/1129. The rationale is often mentioned by other pieces of legislation belonging to the financial market ecosystem. Market Abuse Directive (Directive 2014/57/EU) clearly states that its primary purpose is to "*ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets*" (Art. 1; "*Subject matter and scope*"). The concept has been reiterated by the European Court of Justice, which, in the context of a decision adopted in 2009 on the interpretation of Article 2(1) of Directive 2003/6/EC on insider dealing and market manipulation (then repealed by the Market Abuse Regulation (Regulation (EU) No 596/2014)), clarified that "[t]*he question whether that person has infringed the pro-*

increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets"[5].

The regulator ensures that all the relevant information on the securities offered is conveyed to investors by requiring issuers to publish a prospectus. Moreover, by requiring that all the relevant information is publicly disclosed, the regulator places sophisticated and unsophisticated investors on an "*equal footing*". Equal access to all the relevant information concerning the issuer and the securities offered to the market should be aimed at creating a level playing field among investors and preventing unsophisticated investors from being exploited by professional investors[6]. Nonetheless, this reasoning has been strongly criticized by academic scholars, who argued that unsophisticated investors are protected by Fama's efficient markets hypothesis, *i.e.* by the fact that prices should already reflect all available information[7]

hibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information" (*Spector Photo Group and Van Raemdonck*, Case C-45/08 [2009] ECR I-12073). This judgment in turn adopted the findings set out in Case C-391/04 Georgakis [2007] ECR I-3741, paragraph 38, and Case C-384/02 Grøngaard-Bang [2005] ECR I-9939, paragraphs 22 and 33. *See* also Case C-19/11 Markus Geltl V Daimler AG [2012] EU:C:2012:397. Investor confidence should be achieved by "*ensuring a minimum degree of perceived fairness in the securities markets (eg, by banning insider trading and by guaranteeing a minimum level of 'equal access' to information*" (*see* L. Enriques and S. Gilotta, *Disclosure and Financial Markets Regulation*, in *The Oxford Handbook of Financial Regulation*, in N. Moloney - E. Ferran - J. Payne, Oxford University Press, 2015, p. 38 ff. Nonetheless, investors' perceived level of fairness depends also on the swift response to unlawful behavior of those who are required to supervise and enforce such rules, as well as on the sanctions imposed on those who are held accountable for breaching the law. Recent scandals, such as the collusion among major banks to manipulate Libor *for profit*, can seriously "*erode public trust*" into the financial markets, independently from the fines imposed on manipulators, because "*trillions of dollars of financial instruments were priced at the wrong rate*" (*see* F. Guerrera, *What's Next to Watch in Libor Drama*, The Wall Street Journal, 2012). Indeed, "*even the smallest of changes to LIBOR can result in millions of dollars of profits or losses*" (the same idea is shared by A. Youngblood, *Aftermath of the Libor scandal*, in 35 *Rev. Banking and Fin. L.* 61 (2015). Finally, the increased complexity and interconnectedness of the global markets and the associated "*difficulty in detecting and investigating manipulation*", already recognized by IOSCO in 2000 (IOSCO, *Investigating and Prosecuting Market Manipulation*, May 2000; available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD103.pdf), may equally play a role in hindering investors' trust.

5 Similarly, Rec. (18) of Prospectus Directive (Directive 2003/71/EC) clarifies that "[t]he provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors" and "an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus".

6 F. H. Easterbrook - D. R. Fischel, Mandatory Disclosure and the Protection of Investors, in 70 Virginia Law Review 669 (1984). "The justification most commonly offered for mandatory disclosure rules is that they are necessary to 'preserve confidence' in the capital markets. It is said that investors, especially small and unsophisticated ones, withdraw their capital to the detriment of the markets and the economy as a whole when they fear that they may be exploited by the firms or better-informed traders. Disclosure rules both deter fraud and equalize 'access' to information, restoring the necessary confidence".

7 F. H. Easterbrook - D. R. Fischel, ibid., 694. "This argument is as unsophisticated as the investors it is supposed to protect. It disregards the role of markets in impounding information in prices. So long as informed traders engage in a sufficient amount of searching for information and bargains, market prices will reflect all publicly available information".

The notion of efficient markets hypothesis was first formalized by E. F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work, in 25 Journal of Finance 384 (1970*). In particular, Fama identifies three variations of the efficient capital markets hypothesis, which in turn represent three different forms of market efficiency. The *weak* form of efficiency assumes that the prices of securities reflect all historical public information, but may not reflect new information that is not yet publicly available. Additionally, it assumes that past information regarding price, volume, and returns is independent of future prices. The semi-strong form of the theory dismisses the usefulness of both technical and fundamental analysis. The *semi-strong* form of efficiency incorporates the weak form assumptions and expands on this by assuming that prices adjust quickly to any new public information that becomes avail-

even if the idea of market efficiency has then fallen into disrepute as a result of market events and growing empirical evidence of inefficiencies[8]. In other words, the fact that stocks should always reflect all available information should protect investors from buying a *mispriced* stock. Nonetheless, investors will also be empowered to independently assess the value of a stock and thus understand whether an investment is valuable or not.

A separate question is whether, once such access is provided, investors are actually able to assess the value of a stock. Therefore, the creation of a level playing field seems more designed to allow unsophisticated investors to be in a position to potentially assess the value of an investment rather than to protect them from professional investors' exploitation[9].

It is worth noting that securities are so-called 'experience goods', and investors' confidence is based on information provided by the seller, which must be reliable to be effective. The need to protect investors stems (in part) from the nature of the asset in question. Securities cannot be inspected in the same way as other consumer products. Additionally, the value of the asset does not depend on what has happened to it to date, but is largely contingent on the expected future performance of the issuing company. Naturally, companies cannot make a binding promise on the promising future of the company. Nevertheless, directors and managers of a company are in a better position[10] than prospective investors to assess the likely nature of the risks that the company will face, and how it is likely to fare under them[11]. Mandatory disclosure addresses this issue, i.e. it is based on the rationale that the primary mar-

able. Therefore, it assumes that market prices always reflect all the publicly available information. Finally, *the strong* form of efficiency assumes that prices always reflect both public and private information. This includes all publicly available information, both historical and new, or current, as well as insider information. By assuming that even inside/confidential information is embedded within market prices, the strong form of efficiency maintains that not even insiders can outperform the market. Some point out the common inability of professional investors to beat the market as a form of evidence of market efficiency. See *M. Rubinstein, Rational Markets: Yes or No? The Affirmative Case, in 57 Financial Analysts Journal,* 3 (2001). This view relies on the assumption that prices reflect the fundamental value of a stock. For a thorough analysis, N. Barberis - R. Thaler, *A survey of Behavioral Finance*, in *the Handbook of Economics and Finance*, 2002, p. 1053 ff.In this scenario, where agents are rational and market is frictionless, prices should be "fundamentally correct". Indeed, the circumstance that market is efficient "*does not amount to stating that the market is 'fundamentally' efficient, ie that its prices reflect real value*" (see, L.Enriques and S.Gilotta, Id.,6).

8 *See* L. A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, Cornell Law Faculty Publications, Paper 450, 2003. In particular, according to the author, the weaknesses of the efficient market theory are, and were, apparent from a careful inspection of its initial premises. The article explores three important strands of today's finance literature: (1) the expanding body of work on asset pricing when investors have heterogeneous expectations; (2) recent theoretical and empirical scholarship on how and why arbitrage may move certain types of publicly available information into price more slowly and incompletely than earlier writings suggested; and (3) the exploding literature in behavioral finance, which examines what happens to prices when market participants do not all share rational expectations.

9 On this issue see P. Lucantoni, *L'informazione da prospetto. Struttura e funzione nel mercato regolato*, 2020, Milano; P. Lucantoni, *Prospectus Directive*, in M. Lehmann – K. Kumpan, *European Financial Services Law, Article by Article Commentary*, ibid., p. 945.

10 *Ça va sans dire*. Even the Nasdaq, the second-largest stock exchange in the world for market capitalization, admits that "*following the insiders*" can be a valuable strategy to "*beat the market*" – yet stating the obvious, *i.e.* that "[t]*he trick is choosing the right stocks*" (D.Goodboy, *5 stocks with heavy insider buying*, 2018, https://www.nasdaq.com/article/5-stocks-with-heavy-insider-buying-cm946222).

11 L. Gullifer – J. Payne, *Corporate Finance Law, Principles and Policy*, 2nd edn, Hart Publishing, 2015, p. 486 ff.

ket is characterised by information asymmetry between issuers and investors[12]. Therefore, prospectus disclosure aims to reduce the informational asymmetry and enables investors to make informed decisions when purchasing securities. Mandatory disclosures also help high-quality issuers because disclosure enables issuers and investors to compare high-quality and poor-quality issuers and securities in the marketplace[13].

Mandatory disclosure is used to regulate both the ongoing market, once securities have been issued, and situations in which securities are offered to the market for the first time. Nonetheless, the rationale for mandatory disclosure is different in these two scenarios. Mandatory disclosure for the ongoing market primarily ensures market efficiency; mandatory disclosure in relation to securities offered to the market for the first time is mainly based on the informational asymmetry that exists between the issuer's insiders and outsiders.

1.2 Mandatory and voluntary disclosure

A mandatory disclosure regime is costly[14]. It entails significant compliance costs, as well as costs related to the fact that it may require issuers to disclose information earlier than they would otherwise have chosen to do. Additionally, the absence of a mandatory disclosure regime would not leave investors without information. Indeed, issuers with above-average quality securities have an incentive to differentiate themselves from the 'lemons' by signalling to the market that they represent a good investment opportunity. This might be achieved in a variety of different ways: for instance, by selecting a well-known and distinguished bank to bring the issuer's securities to the market, or by employing an accountancy firm to certify the accuracy and truthfulness of the company's representation[15]

Nonetheless, a voluntary disclosure regime has its own weaknesses.

First, the incentives on the insiders (*i.e.*, managers and controlling shareholders) to disclose information are weak; if disclosure is not mandatory, those who ultimately decide how much to disclose are likely not to disclose all the relevant information to investors, since companies need to weigh up the advantages and disadvantages of disclosing certain information. More importantly, in a world with anti-fraud rules but no mandatory disclosure system, firms could remain silent with impunity; thus, a mandatory disclosure regime substantially limits the ability of firms

12 In support of disclosure as an essential prerequisite for strong public securities markets see J. C. Coffee jr, *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, in 25 *J Corp L* 1 (1999); Id., *The impact of Enforcement?,* in 156 *UPaLR* 229 (2007); B. S. Black, *The legal and Institutional Preconditions for Strong Securities Markets*, in 48 *UCLA LR* 781 (2001) and R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *What Works in Securities Law?*,in 61 *J Fin* 1 (2006).

13 See G. Akerlof, *Market for Lemons: Quantitative Uncertainty and the Market Mechanism in 222 Q L Econ 488* (1970).

14 On this issue see P. Lucantoni, *L'informazione da prospetto. Struttura e funzione nel mercato regolato,* 2020, Milano; P. Lucantoni,t, *Prospectus Directive*, in M. Lehmann – K. Kumpan, *European Financial Services Law, Article by Article Commentary, ibid.*, p. 946.

15 J. Payne, *The Role of Gatekeepers* in N. Moloney - E. Ferran - J. Payne, *The Oxford Handbook of Financial Regulation*, *ibid.*

to remain silent[16].

Secondly, disclosure can potentially harm a company, for instance by revealing commercially sensitive information to the company's competitors. Moreover, disclosure would be related to the company's need to raise money from capital markets; whenever the issuer is not eager to raise fresh capital, the incentives to disclose information are particularly weak.

Finally, insiders will not have an incentive to disclose bad news, *i.e.* information that would benefit investors by leading the markets to appropriately price a security but would negatively affect them directly[17]. Mandatory disclosure (partially) solves the underproduction of information problem in relation to a voluntary disclosure regime; if every company is obliged to disclose the same information to the market as well as to its investors, there are mutual advantages for each company's investors, even if the company may find itself in the uncomfortable position of disclosing information that is valuable to its competitors.

Additionally, mandatory disclosure requires a significant degree of standardisation, meaning that rules specify how disclosure should be made; this, in turn, improves the comparability of companies and enhances markets efficiency. Indeed, absent mandatory disclosure, each firm would be free to set the timing and the format of its own disclosures, thus impairing data comparability[18].

Whether a mandatory disclosure regime creates net benefits for the market – and society as a whole – will ultimately depend on the scope and the extent of the mandated disclosure; there is always a trade-off between price informativeness and dynamic efficiency[19].

1.3 Information "overload" and "boilerplate" disclosure

While scholars agree on the fact that disclosure is of paramount importance in financial markets, there is some disagreement on the *right amount* of such disclo-

16 F. Easterbrook – D. Fischel, *Mandatory Disclosure and the Protection of Investors, ibid.*, 680.

17 M.B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is not Investor Empowerment,* in 85 Va. L. R. 1335 (1999). More comprehensively on the benefits and costs of mandatory disclosure, see also M.B. Fox, *Securities Disclosure in a Globalizing Market*: *Who Should Regulate Whom, in 95 Mich. Law Rev.,* 2498 (1997). In general terms, Fox identifies at least three kinds of rationales that can be put forward for forcing issuers to disclose any given kind of information, suggesting three possible benefits from greater disclosure: (1) the market will be a fairer place in which to invest; (2) the market will be a less risky place to invest; and (3) resources will be allocated more efficiently. Fox acknowledges that mandatory disclosure involves costs as well. In particular, private costs of disclosure to the individual issuer (operational costs, interfirm costs), as well as costs of disclosure to issuers as a class and to the economy as a whole.

18 L. Enriques – S. Gilotta, *Disclosures and Financial Markets Regulation*, in N. Moloney – E. Ferran – J. Payne, *The Oxford Handbook of Financial Regulation, ibid.,* 524-5.

19 J. Armour – D. Awrey – P. Davies – L. Enriques – J. N. Gordon, C. Mayer – J. Payne, *Principles of Financial Regulation*, Oxford University Press, 2016, p. 166. On this matter, see Z. Goshen - G. Parchomovsky, *The Essential Role of Securities Regulation*, in 55 Duke Law Journal 711 (2006); C. Leuz – P. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, in 54 *Journal of Accounting Research* 525 (2016). For a critique of the mandated disclosure regime, O. Ben-Shahar – C. E. Schneider, *The Failure of Mandated Disclosure*, in 159 *University of Pennsylvania Law Review* 647 (2010).

sure. Over time, some[20] have cast doubts on the assumption that more information is better than less in financial markets.

In particular, an extensive body of literature seems to show that people can become overloaded with information and make worse decisions with more information. In such cases, the mandatory disclosure model may be counterproductive.[21] This approach has been contested by other scholars,[22] who believe that whenever the information environment becomes very rich or the decision task becomes very complex relative to the consumer's available time or expertise, the consumer "*satisfices*",[23] meaning "*do*[ing] *well as one can, given the circumstances*", rather than "*optimizes*", *i.e.* choose the best from the full set of market choices.[24] According to the authors, one form of satisficing, which stems from high costs of acquiring information and results in the risk of choosing the best that an unexhausted search reveals rather than the best from the full market choice, can be (partially) mitigated if the regulator focuses on reducing the costs to consumers of inspecting product attributes.

The above-mentioned critiques do not strike at the heart of mandatory disclosure rules:[25] quite the contrary, they confirm that mandatory disclosure is indeed crucial in well-functioning markets. The usefulness of mandatory disclosure is at least twofold: on one hand, it is of utmost importance for analysts and professional/institutional investors, who *need* easily available information to assess the quality of a stock[26]; on the other hand, if analysts and professional/institutional investors

20 T. Paredes, *Blinded by the light: information overload and its consequences for securities regulation*, in 81 Wash. U. L. Q. 417 (2003).

21 Similarly, L. Enriques - S. Gilotta, *Disclosure and Financial Markets Regulation, cit, "Problems of bounded rationality and information overload (the incapacity of the individual investor to "handle" large amounts of information) prevent the unsophisticated investor from really benefiting from mandatory disclosure and may even make matters worse, relative to a situation of less available information*". See also N. Linciano, *Finanza comportamentale e scelte di investimento. Implicazioni per la vigilanza, in AA.VV., La finanza comportamentale e le scelte di investimento dei risparmiatori. Le implicazioni per gli intermediari e le Autorità, Atti del convegno Consob-LUISS, Roma, 4 giugno 2010*, in *Quad. Consob* n. 68/2012.

22 D. Grether, - A. Schwartz - Wilde, "*Irrelevance of information overload: an Analysis of Search and Disclosure*", 59 *Southern California Law Review* 277 (1986).

23 In particular, the author argues that "*Consumers satisfice by (a) failing to choose the best when considerable product diversity exists, because the costs of acquiring information preclude consumers from inspecting the full market choice set; or (b) failing to choose the best when the costs of processing information preclude consumers from fully exploiting an optimal search strategy*". Nonetheless, the authors acknowledge that "[*t]he presence of irrelevant information can be harmful to consumers, however, if it raises the costs to them of observing attributes in which they are interested*". See also R. Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, Faculty Scholarship Series, 1986, Paper 1945, who is "*persuaded by GSW's contention that information overload is not a serious issue for consumer law*".

24 D. Grether - A. Schwartz - L. Wilde, *cit*, p. 59.

25 As D. Grether - A. Schwartz - L.Wilde, ibid., acknowledge themselves: "*We therefore claim that the information overload idea should be dropped from legal discourse, in the sense that decisionmakers should not be especially concerned with the amount of information that they or markets might require consumers to process. Instead, attention should focus on the difficulties that actually do attend disclosure solutions, the processing problems traceable to cognitive error or other factors that now are occupying the psychologists, and how markets can be made more competitive given consumer search strategies*". D. Grether -A. Schwartz - L. Wilde, ibid., 301.

26 In the context of an initial public offering, the existence of an offer that is exclusively aimed at institutional investors carried out pursuant to Rule 144A or Reg S requires the publication of an international offering circular, that contains information generally in line with the the one included in the prospectus published according to the rules of the jurisdiction in which the company intends to offer its shares to the general public. Whenever the pro-

perform their function within the markets and market prices embed such disclosed information, then retail investors are indirectly protected, as they are only the last cog in the financial markets' machine. Rather, such critiques shed light on a different aspect of mandatory disclosure, namely that regulators must adapt mandatory disclosure to consumers' biases and gauge the right amount of disclosure, working on its depth, extent and framing. In an effort to understand the substance of such critiques, as well as whether the issue is equally present in different EU Member States, we processed data on the average number of pages and dimensions per equity and debt prospectuses (and supplements) across various European jurisdictions.

Information overload is often related to boilerplate language. The technique of using standardized, recycled or general language borrowed from disclosure documents published by other issuers and related to previous capital markets transactions is commonly known as "boilerplate" disclosure. It is a ubiquitous feature of prospectuses, both in Europe and in the US. In particular, the nature of boilerplate language is twofold[27]: boilerplate is both the amount of overlap between documents related to different transactions (*i.e.*, common language that is reproduced in multiple prospectuses) and copied language that conveys only generic – rather than firm-specific – information about the issuer.

The reason why boilerplate language is used is generally related to the process itself, and serves to reduce transaction costs between the contracting parties (issuer, underwriters, issuer's counsel and underwriters' counsel). Capital markets transactions – and especially IPOs – involve a lengthy drafting process, in which

cess involves the offering of shares to institutional investors on the primary market, however, disclosure rules play an ancillary role, and it is indeed the bookbuilding process that performs an "information-revelation mechanism" (for an analysis of the bookbilding process and its role in the context of an initial public offering, *see* Boreiko, D., Lombardo, S., *Lockup clauses in Italian IPOs*, in *Applied Financial Economics*, Vol. 23, 2012, pp. 221-232; for an Italian perspective, *see* also P. Giudici, S. Lombardo, *La tutela degli investitori nelle IPO con prezzo di vendita aperto*, in Riv. soc., 2012, 907). On the other hand, in the context of a "direct listing" (*i.e.*, a company's outstanding shares are listed on a stock exchange without either a primary or secondary underwritten offering), mandatory disclosure's role becomes crucial for both institutional and retail investors. Indeed, while there may be many reasons for a company to use the direct listing, one of the key goals is generally enable market-driven price discovery, bypassing the bookbuilding process. One of the recent examples of direct listing is the Spotify case ("*institutional buyers tend to feature prominently in the initial allocation. In the Spotify direct listing, no fixed number of shares was being sold to the public and no allocations were available at a set public offering price; rather, any prospective purchasers of shares could place orders with their broker of choice, at whatever price they believed was appropriate and that order would be part of the price-setting process on the NYSE. This open access feature and the ability of virtually all existing holders to sell their shares, and of any investor to buy their shares, created a powerful market-driven dynamic for the opening of trading* […] [t]*he cover page of the preliminary prospectus explained that the opening public price of Spotify's shares would be determined by buy and sell orders collected by the NYSE from broker-dealers. The NYSE's designated market maker, in consultation with a financial advisor to Spotify (as discussed further below) and pursuant to applicable NYSE rules, would use those orders to determine an opening price for the shares. Additionally, in line with its goal of conducting the listing process transparently, Spotify disclosed recent high and low sales prices per share in recent private transactions on the cover page of the preliminary prospectus and the final prospectus*", *see* Marc D. Jaffe, Greg Rodgers, and Horacio Gutierrez, *Spotify Case Study: Structuring and Executing a Direct Listing*, Harvard Law School Forum on Corporate governance and Financial Regulation, July 2018). For an analysis on whether the direct listing is possible in Europe, see Latham & Watkins, *Could Spotify's Direct Listing Process Be Used In Europe?*, May 2018, available at https://www.latham.london/2018/05/could-spotifys-direct-listing-process-be-used-in-europe/. Recently, the NYSE put forward changes to its listing rules to allow fundraising in a direct listing, while Nasdaq, according to the press, would be making a similar proposal soon (*see* M. Kruppa, *Exchanges pitch alternative to IPOs for corporate fundraising*, Financial Times, 26 November 2019).

27 J. McClaine, Boilerplate and the Impact of Disclosure in Securities Dealmaking, in 72 Vanderbilt Law Review 208 (2019).

lawyers, the issuer and underwriters are caught up in long drafting sessions; in this context, boilerplate language provides a good starting point from which parties can negotiate. The language is usually borrowed from similar deals, and specifically prospectuses related to securities offerings of companies active in the same sector – and subject to similar macro-risks. Additionally, boilerplate language may help to speed up the process, since the wording of certain risk factors has already been reviewed and approved by the relevant supervisory authorities, and to find an *equilibrium* between the conflicting forces involved in an IPO process.[28] It can be also thought as a form of language that is easily understandable by the various market participants.

Nonetheless, boilerplate language can be harmful for investors and for market efficiency. Indeed, it strikes at the very heart of the function of prospectuses, which is to mitigate asymmetries of information between the issuer and investors. Indeed, it shifts the burden of due diligence directly to investors, since boilerplate language is largely general rather than firm-specific. Such practice is a serious source of concern for regulators and supervisory authorities, which usually ask for the language to be amended tailored to the issuer's business model, avoiding the copying of generic statements from previous deals. Indeed, research has shown that boilerplate disclosure is, *inter alia*, associated with lower legal costs on average, but is also associated with higher average losses to issuers from mispricing[29] and more securities fraud litigation[30]. One of the techniques for correcting biases is to standardize and streamline the disclosure, so that it can be easily read by investors. Pursuing standardization while preserving the content of the disclosed information and avoiding boilerplate language is a core challenge that regulators face and will continue to face.

1.4 Irrationality, systemic biases and (unsophisticated and sophisticated) rational investor decision-making: evidence from behavioural economics

The contribution of mandatory disclosures to market efficiency[31] has been heavily contested. Policymakers have always designed regulatory frameworks assum-

28 The prospectus is defined as a "*schizophrenic document*" having two purposes: it is both a "*selling document*" used to sell securities to the public and a "*disclosure document*", which serves as an "*insurance policy against liability*"; C. W. Schneider - J. M. Manko - R. S. Kant, *Going Public: Practice, Procedure, and Consequences*, in 14 *Vill. L. Rev.* 1 (1981). In such respect see also H. Teerink, *The IPO Process, IPO Disclosure, and the Prospectus Regulation*, in D. Busch - G. Ferrarini - J.P. Franx (edt by), *Prospectus Regulation and Prospectus Liability*, cit., clearly outlining the drafting and publication process.

29 "[L]*arge quantities of boilerplate are associated with more information asymmetry, which costs issuers amounts far outweighing any savings in fees, on average. Specifically, a 10% increase in boilerplate in certain important sections of a registration statement is associated with as much as a 5.1% to 6.2% increase in deal underpricing—a phenomenon by which IPO's are sold at prices below what the market will bear, and which is thought to be in part a product of information asymmetry*" (J. Mc Claine, ibid., 198).

30 "[A] 10% increase in the amount of boilerplate in the some sections of the prospectus is associated with a 1.5% to 4% increase in the probability of being sued for securities fraud related to the offering" (J. Mc Claine, ibid., 198).

31 For the Capital Markets Efficiency Hypothesis, *see* E. F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, in 25 *J. Financ.* 383 (1970).

ing the rationality of investors. The theory of rational choice assumes that, when making decisions, retail investors take into account all the available information and make rational decisions. Nonetheless, market irrationality and systemic biases often distort the rational investor's decision-making process.[32] Therefore, from a policy perspective and in order to pursue *effective* policy-making strategies and intervention, policymakers have to rely on realistic assumptions about people's behaviour.[33]

In particular, investors are subject to 'behavioural biases', *i.e.* specific ways in which normal human thought systematically departs from being fully rational. Biases can cause people to misjudge important facts or to be inconsistent, for example by changing their choices for the worse when essentially the same decision is presented in a different way. In other words, the normal human thought processes can lead to choices that are predictably mistaken.[34] In a nutshell, irrationality and biases (among other things[35]) undermine efficiency in capital markets.

One might initially be tempted to believe that only retail and unsophisticated investors suffer from behavioural biases. Research has shown, however, that also professional investors suffer from behavioural biases[36]. There is growing evidence that professional financial intermediaries and investors also suffer from irrationalities and behavioural biases[37]. Indeed, financial intermediaries and professional investors have shown that they are subject to at least *some* of the most common behavioural biases.

The first – and most obvious – is overconfidence as well as overconfidence in the rating and assessment by rating agencies. In other words, managers in banks and financial intermediaries have confidence in their own assessment of risks. The financial crisis, however, has shown a poor understanding of the pre-crisis systemic risks that were widespread in the financial sector and the interconnectedness of financial institutions.

32 R. J. Gilson – R. Kraakman, The Mechanism of Market Efficiency' in 70 *Va LR* 549 (1984). According to Richard Thaler, EMH is not entirely accurate and almost impossible to test: prices can diverge significantly from intrinsic value, even when intrinsic value is easily measured and reported daily. *See* R. H. Thaler, *Misbehaving: The Story of Behavioral Economics*, W.W. Norton & Company, Inc, 2015, and R. H. Thaler, - C. R. Sunstein, *Nudge: Improving Decisions on Health, Wealth, and Happiness*, Yale University Press, 2008.

33 European Commission Report, *Behavioral Insights Applied to Policy*, 2016, 8

34 Financial Conduct Authority, Applying behavioral economics at the Financial Conduct Authority, 2013, 4.

35 Efficiency in capital markets is also undermined by algorithmic trading. See, in particular, Y. Yadav, *How Algorithmic Trading Undermines Efficiency in Capital Markets*, in 68 Vanderbit L. R. 1607 (2015), who argues that algorithmic trading is transforming how markets process and interpret information, and shows that conventional assumptions in securities law doctrine and policy also break down. In particular, Y. Yadav shows that, "*while algorithmic trading fosters more short-term informational efficiency by rapidly showcasing incoming news and data, it creates costs for longerterm, fundamental allocative efficiency*" and that "*algorithmic markets generate costs for informed investors seeking to make investments in fundamental research*".

36 CFA Institute, *Designing a European Summary Prospectus Using Behavioral Insights*, March 2017, available at: https://www.cfainstitute.org/-/media/documents/article/position-paper/designing-a-european-summary-prospectus.ashx?la=en&hash=05868EC687A61ED02F78FC9644B04F0C28B989FA.

37 G. Spindler, *Behavioural Finance and Investor Protection Regulations*, in *Journal of Consumer Policy*, 34, 2011, 321. "[T]*he financial crisis forces us to reconsider the traditional paradigms of rational of market participants. Obviously, even professionals of financial intermediaries suffered from irrationalities and psychological effects thus aggravating other factors of the crisis*".

At the same time, while the use of credit rating has led to increased information efficiencies (*e.g.*, reduced asymmetries of information between buy side and sell side participants),[38] it has also led, as a consequence of the professional investors' overconfidence in these gatekeepers, to mechanistic reliance on credit ratings by market participants, to the detriment of internal qualitative and multi-sourced credit worthiness assessments,[39] as well as pro-cyclical cliff and contagion effects.[40] These negative effects were on full display during the 2008-2009 financial crisis and during the subsequent 2011-2012 sovereign debt crisis, with abrupt downgrades spiralling into destabilizing credit crises[41].

Herding behaviour (*i.e.*, following the "main stream") is also a behavioural bias affecting both retail and professional investors[42]. In particular, the existence of herding behaviour in professional investors[43] seems to be related to certain common predispositions (education, experiences, methods), which lead them to receive the same information, to interpret it in the same way and to conclude comparable investment decisions[44]. Additionally, research has shown that managers tend to mimic the investment decisions of other managers, ignoring substantive private information due to reputational[45] concerns[46].

38 *See*, *ex multis*, IOSCO Code of Conduct for Credit Rating Agencies (2004) (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf) and FSB Principles on Reducing Reliance on Credit Ratings (2010): http://www.fsb.org/wp-content/uploads/r_101027.pdf

39 See Rec. 10 of the Credit Rating Agencies n. 1060/2009: "Credit rating agencies are considered to have failed, first, to reflect early enough in their credit ratings the worsening market conditions, and second, to adjust their credit ratings in time following the deepening market crisis. The most appropriate manner in which to correct those failures is by measures relating to conflicts of interest, the quality of the credit ratings, the transparency and internal governance of the credit rating agencies, and the surveillance of the activities of the credit rating agencies. The users of credit ratings should not rely blindly on credit ratings but should take utmost care to perform own analysis and conduct appropriate due diligence at all times regarding their reliance on such credit ratings."

40 See, *ex multis*, IOSCO Code of Conduct for Credit Rating Agencies (2004) (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf) and FSB Principles on Reducing Reliance on Credit Ratings (2010): http://www.fsb.org/wp-content/uploads/r_101027.pdf.

41 The risks related to mechanistic reliance on credit ratings by market participants led to calls by industry bodies and regulators such as IOSCO to examine the need to regulate CRAs as early as 2003 (*See* IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies (September 2003). https://www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf). The Commission adopted a communication to this effect in 2006 (*See*: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:059:0002:0006:EN:PDF). These calls were reiterated with renewed urgency during the financial crisis (*See* Speech of Commissioner Charlie McCreevy (12 November 2008): http://europa.eu/rapid/press-release_SPEECH-08-605_en.htm), and led the EU Commission to adopt a legislative proposal with respect to CRAs in November 2008 (*See*: http://europa.eu/rapid/press-release_IP-08-1684_en.htm), which in turn resulted in the adoption of CRAR in 2009. CRAR was subsequently amended to take into account (i) the creation of ESMA as the single EU CRA supervisor and (ii) the specific nature of sovereign ratings following the sovereign debt crisis of 2011-2012.

42 D. S. Scharfstein - J. C. Stein, *Herd Behavior and Investment*, in 80 The American Economic Review 465 (1990).

43 Even if, according to certain scholars, "*herd behavior amounts to no more than an indicator to raise awareness*"; *see* H. W. Mickliz, *Herd behavior and third party impact as a legal concept, in Contract Governance. Dimensions in Law and Interdisciplinary Research*, Oxford University Press, 2015, 152.

44 G. Spindler, ibid., 25. See also K A. - Froot - D. S. Scharfstein – D.C. Stein, *Herd on the street: Informational inefficiencies in a markt with short-term speculation*, in *The Journal of Finance*, 1992, 1461–1484.

45 D. S. Scharfstein - J. C. Stein, *ibid.*, 465. The point was raised by J. M. Keynes, *The General Theory of Employment*, Macmillan, 1936; "[f]*inally it is the long-term investor, he who most promotes the public interest, who will in practice come in for most criticism, wherever investment funds are managed by committees or boards or banks[4]. For it is in the essence of his behaviour that he should be eccentric, unconventional and rash in the eyes of average opinion. If he is successful, that will only confirm the general belief in his rashness; and if in the short run he is unsuccessful, which*

While retail investors may suffer from overconfidence, they are more subject to different types of biases, in line with their nature of unsophisticated investors. In particular, they seem to struggle in contexts where they are provided with too much information or where they face too much choice (information and choice overload); they suffer from "over-extrapolation", *i.e.* extrapolating future returns from just a few years' investments; they let emotions play a role in investment decisions, e.g. stress, anxiety, fear of losses and regret can drive decisions rather than the costs and benefits of the choices; they seek to avoid losses to a far greater extent than they prefer equivalent gains (i.e. they are loss averse).[47]

1.5 Recent trends

Do these findings have any impact on how policymakers should act? Are regulators in a position to identify and "protect" consumers from their own biases? Some of the most common biases may be identified, and policymakers should focus on how to tackle these biases and make consumer choices more informed. Being of the opinion that behavioural economics and psychology play a major role in market efficiency does not mean undermining the need for mandatory disclosure. Investors should be *put in a position* to price in all the available information and make informed decisions. Within this context, policymakers should use different tools to direct people towards better choices, without using bans or other expensive and time-consuming alternatives.

In light of the academic debate on the matter, the European legislator has identified potential tools to mitigate the above-mentioned issues. In particular, the legislator has turned the spotlight on the need to provide investors with lighter, and clearer information in addition to the traditional information included in prospectuses, in order to facilitate product comparability.

is very likely, he will not receive much mercy. Worldly wisdom teaches that it is better for reputation to fail conventionally than to succeed unconventionally". Accordingly, research has shown that "*a newsletter analyst is likely to herd on Value Line's recommendation if her reputation is high, if her ability is low, or if signal correlation is high*" (see also J. R. Graham, *Herding Among Investment Newsletters: Theory and Evidence, The Journal of Finance*, 1, 1999, p. 237).

46 A recent example of herding behavior in the context of an IPO probably includes Snapchat stocks' price (Snap Inc). The IPO price per stock was set at 17$ and it soared by 44% on the first day of trading, valuing the company at more than $24bn. The upside has proven to be only a form of herding among unsphisticated and sophisticated investors, since the stock price, in the next two years (Feb 2017-Feb 2019) fell to around $9/stock (for a $12bn market capitalizazion) in a context in which tech stocks (and especially Facebook, Amazon, Netflix and Google, collectively known as "FANG") did pretty well. In light of the current company's valuation, one can seriously question how the valuation that set a $17/stock price was carried out in the first place and whether herding bias played a role even before the company was publicly traded. It comes as no surprise that on May 2018 some shareholders sued Snap, alleging the company made "*false and/or misleading statements and/or failed to disclose that: (1) Snap's reported user growth was materially false and misleading; and (2) as a result, Snap's public statements were materially false and misleading at all relevant times*" (see The Rosen Law Firm, Press Release of January 11, 2019, *SNAP JAN 31 DEADLINE: Rosen Law Firm Announces January 31, 2019 Deadline in Snap Inc. Securities Class Action – SNAP*, available at: https://www.rosenlegal.com/cases-1126.html).

47 *See* European Commission Report, *ibid.*, 9. Financial Conduct Authority, *ibid.*, 6. See also R. Roll, *Orange Juice and Weather*, in 74 *Am Econ. Rev.* 861 (1984), showing that the futures market for oranges was often more accurate than the National Weather Service in forecasting the weather.

The first step in this direction was the third update of Directive 2001/107/EEC ("UCITS III"), which introduced the "simplified" prospectus. According to Recital (15) of UCITS III directive, "[t]o take into account developments of information techniques, it is desirable to revise the current information framework [...] [i]n particular, it is desirable to introduce, in addition to the existing full prospectus, a new type of prospectus for UCITS (simplified prospectus). Such a new prospectus should be designed to be investor-friendly and should therefore represent a source of valuable information for the average investor. Such a prospectus should give key information about the UCITS in a clear, concise and easily understandable way". It is clear that this new, simplified prospectus was introduced in order to convey crucial information on UCITS in a way that the average investor can understand.

Following the introduction of the simplified prospectus, with the fourth update of UCITS Directive (*i.e.*, Directive 2009/65/EU; "UCITS IV") the European legislator introduced the *Key Investor Information Document* (KIID), which is intended to provide investors in an investment fund with all the key information in a two-page document.

All the various versions of the Prospectus Directive are also consistent with this approach. The first Prospectus Directive (2003/71/EC), the 2010 version (2010/73/EU) and, finally, the Prospectus Regulation (2017/1129) now require a summary to be part of the prospectus, conveying the essential elements of the securities being offered. The rationale behind this regulatory choice is that although fully informed investment decisions cannot rely solely on the information provided in the summary, it is nonetheless a regulatory tool that is expressly intended to partially mitigate – and not definitively solve – the problem.

Similarly, the Regulation on Packaged Retail Investment and Insurance Based Investment Products (PRIIPs)[48] and the proposal for a pan-European Personal Pension Product (PEEP)[49] focused attention on the way in which information is disclosed and require a Key Information Document (KID). Again, the clarity and conciseness of these documents should improve the comparability of financial products for an average investor[50].

To such end, it is worth mentioning that Article 21 of the Prospectus Regulation provides that the prospectus "shall be deemed available to the public when published in electronic form on any of the following websites: (a) the website of the issuer, the offeror or the person asking for admission to trading on a regulated market; (b) the website of the financial intermediaries placing or selling the securities, including paying agents; (c) the website of the regulated market where the admission to trading is sought, or where no admission to trading on a regulated market is sought, the website of the operator of the MTF". Additionally, ESMA should provide a centralised storage mechanism of prospectuses allowing access free of charge and

48 Regulation no. 1246/2014.

49 Proposal COM/2017/0343 final.

50 On the role of such documents and their contents see A. Lupoi, *Il tramonto dell'informazione letterale, l'alba dell'informazione numerica?*, in Riv. dir. banc., 4, 2017, 1.

appropriate search facilities for the public.[51] As a result, whenever national competent authorities send the electronic versions of approved prospectuses to ESMA, the related data (type of issuer, type of security, exchange, primary or secondary offer etc.) will help investors, scholars, and practitioners to analyze relevant precedents.

More specifically, the European Commission, following a similar approach to that pursued by the Transparency Directive, proposed the development of a central register with direct access to national databases. Under this proposal, national competent authorities would not be allowed to publish only a list of prospectuses, instead they would instead be required to publish the entire prospectus, which will remain available for five years.

Indeed, Article 21 of the Transparency Directive (as amended by Directive 2013/50/UE) provides that before January 1st, 2018 a web portal will be developed and operated by ESMA, and serve as a European electronic access point ('the access point') for the search for regulated information at Union level.[52]

2 The comparability of prospectuses: evidence from national data analysis (Germany, France, Ireland, Italy, Luxembourg, Sweden, United, Kingdom)

The European discipline on prospectuses obliges issuers to publish prospectuses whenever financial products are offered to the public or admitted to trading. The duty to release information on the issuer and its financial products throughout prospectuses stems from the generally accepted idea that the greater the quantity of information available to the public, the better the investment decision.

The main objective of the Regulation is to protect investors and their confidence in the proper functioning of the market. However, in recent years the idea that the information itself (expecially quantitative information) is essential to protect investors has been replaced by some new ideas from the field of behavioural economics.

EU lawmakers have gradually reached the conclusion that for investors to able to assimilate all the information received and to compare it with that on other

51 See, Rec. (63). The centralized storage mechanism already exists; such register, however, only includes hyperlinks to the relevant dedicated website sections of the competent authority of the issuer's home Member State.

52 More specifically, Recital (15) of the Transparency Directive provides that "[t]o facilitate cross-border investment, investors should be able to easily access regulated information for all listed companies in the Union. However, the current network of officially appointed national mechanisms for the central storage of regulated information does not ensure an easy search for such information across the Union. In order to ensure cross-border access to information and to take account of technical developments in financial markets and in communication technologies, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to specify minimum standards for dissemination of regulated information, access to regulated information at Union level and the mechanisms for the central storage of regulated information. The Commission, with assistance of ESMA, should also be empowered to take measures to improve the functioning of the network of officially appointed national storage mechanisms and to develop technical criteria for access to regulated information at Union level, in particular, concerning the operation of a central access point for the search for regulated information at Union level. ESMA should develop and operate a web portal serving as a European electronic access point ('the access point')".

similar financial products available on the market: a) they should not receive too much information; b) they should receive well-structured information presented through standardized templates; c) they should receive appealing information along with visual support aids[53]. For this reason, there is a tendency in Europe towards the creation of key standardized document structures that better deliver the essential information to the end-clients. "Building confidence and trust will be crucial to the expansion of the Single Market in this area. To achieve these objectives, services and products must be comprehensible: in other words, information on their function, their price and how they compare to other products should be available in a way that consumers can understand"[54].

Investor protection is necessary for market efficiency. The EU lawmakers have been promoting market efficiency and integrity through the harmonization of prospectus rules. That is why the Prospectus Regulation represents one of the core ideas of the Capital Markets Union.

In the past, the rules merely dealt with investor protection and they were not considered as a means of promoting market efficiency. This is why, the European Commission has changed its approach. It realized that divergent national approaches would fragment the internal market "since issuers, offerors and persons asking for admission to trading on a regulated market would be subject to different rules in different Member States and prospectuses approved in one Member State could be prevented from being used in other Member States. In the absence of a harmonised framework to ensure uniformity of disclosure and the functioning of the passport in the Union it is therefore likely that differences in Member States' laws would create obstacles to the smooth functioning of the internal market for securities. Therefore, to ensure the proper functioning of the internal market and improve the conditions of its functioning, in particular with regard to capital markets, and to guarantee a high level of consumer and investor protection, it is appropriate to lay down a regulatory framework for prospectuses at Union level"[55].

Therefore, the two abovementioned objectives (investor protection and market efficiency) are deeply interconnected. In order to assess whether the Regulation has actually achieved its main goals, this study intends to analyze and compare data on prospectuses and supplements in the seven EU countries with the highest number of approvals in 2006 – 2018. This work will focus on the idea that: while the new European rules on prospectuses have harmonized the criteria for drafting the documents, the national competent authority's liability has not yet been harmonized. For this reason, each authority is free to shape its national legislation in terms of supervision. Art. 20(9) specifies that: "This Regulation shall not affect the competent authority's liability, which shall continue to be governed solely by national law". For this reason, each Member State may determine its own supervision activities and applica-

53 V. Colaert, *Investor Protection in the Capital Markets Union*, in D. Busch - E. Avgouleas - G. Ferrarini (edt by), *Capital Markets Union in Europe*, Oxford, 2018, p. 341 ss.

54 Commissione Europea, *Libro Verde servizi finanziari al dettaglio: prodotti migliori, maggiore scelta e più opportunità per consumatori e imprese*, COM (2015), 630 final (n. 161), 10 dicembre 2015.

55 Rec. 4 Prospectus Regulation 2017/1129/EU.

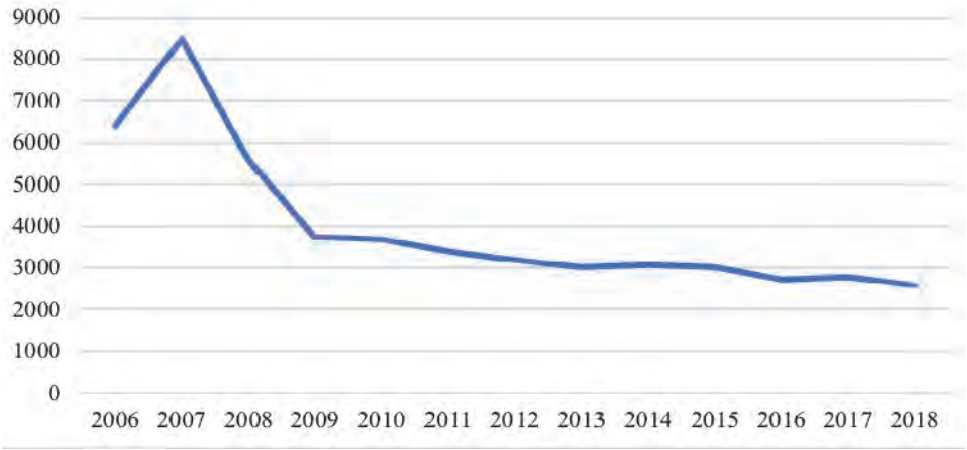
tion practices taking into account its own specific liability regime, thereby determining different consequences for prospectus activities.

The following analysis examines two core areas: market efficiency and investor protection. The former is measured through prospectus activity and it has been assessed by looking at: the overall number of approved prospectuses in the years 2006 - 2018, the numbers of equity standalone, non-equity base and non-equity standalone prospectuses approved in the years 2014 – 2018, and passporting activity in the years 2014 – 2018. Investor protection is achieved thorough concise but at the same time effective prospectuses, which contain all the relevant information but omit irrelevant information as this makes them longer and serves no useful purpose. It was assessed by looking at the number of pages and the dimensions of the prospectuses and their supplements.

2.1 Number of prospectuses approved in the years 2006-2018

ESMA publishes data on prospectuses (equity and non-equity) approved by each national competent authority (NCA) within the European Economic Area (EEA) on an annual basis. According to this data, in the thirteen-year period 2006 – 2018[56] in the seven countries with the highest number of approved prospectuses (namely Germany, France, Ireland, Italy, Luxembourg, Sweden and the United Kingdom), the overall number of approvals fell from 6,418 to 2,590, with an overall decrease of nearly 60%.

Figure 1 – European total number of approved prospectuses from 2006 to 2018



Source: Graph based on data from EEA Prospectus Activity 2018 (ESMA).

Figure 1 shows the overall trend of approvals. It is immediately apparent that prior to the 2007 financial crisis there was a considerable increase in the number of approved prospectuses. In 2007, the seven countries approved more than 8,000 documents, which represents the peak in the trend for the entire period considered.

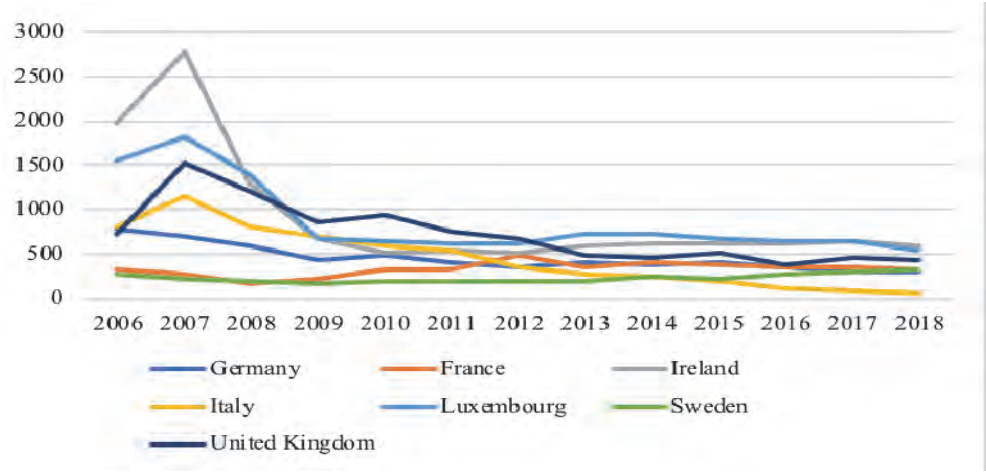
56 ESMA, EEA Prospectus Activity 2018, 31 October 2019 | ESMA 31-62-1360.

However, it recorded a dramatic decline in 2007 – 2009, when less than 4,000 prospectuses were approved. This means that in two years alone the financial crisis cut the number of approvals recorded prior to this extraordinary event by more than 50%.

From 2009 onwards, there was an almost constant decline in the approvals and even the release of the *Amending Prospectus Directive 2010/73/EU* was not able to halt the continuous reduction of prospectus activity.

Figure 2 and Table 1 highlight the position of the seven countries in this trend.

Figure 2 – Total number of approved prospectuses from 2006 to 2018



Source: Graph based on data from EEA Prospectus Activity 2018 (ESMA)

Table 1 – Total number of prospectuses approved per year

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
DE	785	700	585	442	493	409	364	396	377	399	345	299	303
FR	320	268	153	222	320	324	484	357	394	374	345	358	325
IE	1982	2789	1279	677	509	543	518	604	631	625	614	653	595
IT	793	1161	798	705	584	541	362	264	241	191	117	77	65
LU	1542	1823	1393	668	640	630	606	736	722	684	649	634	542
SE	261	227	185	178	184	195	200	180	232	212	279	310	323
UK	735	1515	1200	852	947	764	658	477	471	516	383	459	437
Total	6418	8483	5593	3744	3677	3406	3192	3014	3068	3001	2732	2790	2590

Source: EEA Prospectus Activity 2018 (ESMA)

A detailed analysis of this data shows that in 2006 – 2018:

a) The number of prospectuses approved in Italy fell from 793 to 65, with an overall decrease of almost 92%; in Ireland the approvals decreased by nearly 70%, in Germany by more than 60%, in Luxembourg by approximately 65%;

b) In France the approvals rose by 1.5% and in Sweden by almost 24%;

c) The countries are ranked below according to the overall number of approvals in each country, in decreasing order: 1. Ireland 12,019; 2. Luxembourg 11,269; 3. United Kingdom 9,414; 4. Italy 5,899; 5. Germany 5,897; 6. France 4,244; 7. Sweden 2,966;

d) Despite the fact that Ireland and Luxembourg have the lowest populations (i.e. just over 5,000,000 and 500,000 inhabitants respectively), they are still the countries with the highest number of approved prospectuses.

The percentage variations in the number of approvals are calculated on an annual basis and they always refer to the previous year. They highlight the unrelenting decline registered by most of the countries analysed along with the reverse tendency of France and Sweden. Table 2 shows the percentage variations in the number of approvals and they are based on data from Table 1

Table 2 – % variation in prospectuses approved

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
DE	-	-0.11	-0.16	-0.24	0.12	-0.17	-0.11	0.09	-0.05	0.06	-0.14	-0.13	0.01
FR	-	-0.16	-0.43	0.45	0.44	0.01	0.49	-0.26	0.10	-0.05	-0.08	0.04	-0.09
IE	-	0.41	-0.54	-0.47	-0.25	0.07	-0.05	0.17	0.04	-0.01	-0.02	0.06	-0.09
IT	-	0.46	-0.31	-0.12	-0.17	-0.07	-0.33	-0.27	-0.09	-0.21	-0.39	-0.34	-0.16
LU	-	0.18	-0.24	-0.52	-0.04	-0.02	-0.04	0.21	-0.02	-0.05	-0.05	-0.02	-0.15
SE	-	-0.13	-0.19	-0.04	0.03	0.06	0.03	-0.10	0.29	-0.09	0.32	0.11	0.04
UK	-	1.06	-0.21	-0.29	0.11	-0.19	-0.14	-0.28	-0.01	0.10	-0.26	0.20	-0.05

Source: Calculations based on data from EEA Prospectus Activity 2018 (ESMA)

Looking at this data, it is clear that starting from 2006 which was a record year in terms of approvals, the competent authorities of Ireland and Luxembourg issued just under 2,000 and around 1,500 prospectuses, respectively. The next year (2007), both countries experienced an increase in the overall number of approvals, thus reaching their peaks in the thirteen years considered (Ireland and Luxembourg approved 2,789 and 1,823 respectively)

Despite showing lower figures, Italy still recorded a huge number of approvals in 2006. The following year, with a + 46-percentage variation, it reached its highest number (1,161 approvals).

In 2007, the UK recorded outstanding results in terms of percentage variation. It issued 1,515 prospectuses, thus recording a 106% increase on the previous year.

The devastating consequences of the 2007-2008 financial crisis clearly emerge from Table 1: the data recorded in 2008 shows that all the seven countries experienced a dramatic reduction in approvals.

The downward trend continued in 2009, with the sole exception of France which recorded a +45% in the approvals.

In 2010, there was a small recovery in Germany, Sweden and the UK, when they recorded an increase of a few percentage points in the number of approvals. On the contrary, France recorded a substantial increase of 44%.

2011 is the year with the smallest variations (both positive and negative). In the same year, the Italian downward trend continued and it recorded a 7% reduction in the number of approvals. The following year (2012), there was a dramatic reduction of 33%, which reduced the number of prospectuses approved in the last six years by more than 50%.

In 2017, despite a small recovery from the previous year, the oveall number of approvals stayed almost constant. While in 2018, the seven countries together approved the lowest number of prospectuses (2,590), thus recording a reduction of almost 70% as compared to 2007.

In order to analyse the prospectus activity of each country in greater depth by looking at the number of equity and non-equity prospectuses (and splitting the latter into Base and Standalone), it is necessary to reduce the time horizon to the last five years. This means that we can focus on the years between 2014 and 2018 because since 2014 the NCAs have been required to send this data to ESMA (Directive 2014/51/EU).

When comparing Table 1 and 3, the reader may find some differences in the figures related to the total number of approvals. This is due to the fact that data contained in Table 1 is taken from the last "EEA prospectus activity in 2018", while the data contained in Table 3 comes from each year's specific report. What happens is that with the issue of each new report ESMA reviews and updates the data published in the previous years, which may result in slight differences between the aggregate numbers contained in the abovementioned tables. However, it is immediately clear that, although different, the numbers only vary by a few units. Since the discrepancies are so small, we can disregard them and focus on the overall trend, which is what really matters when analysing how the EU countries reacted to the issue of new regulations and general economic conditions.

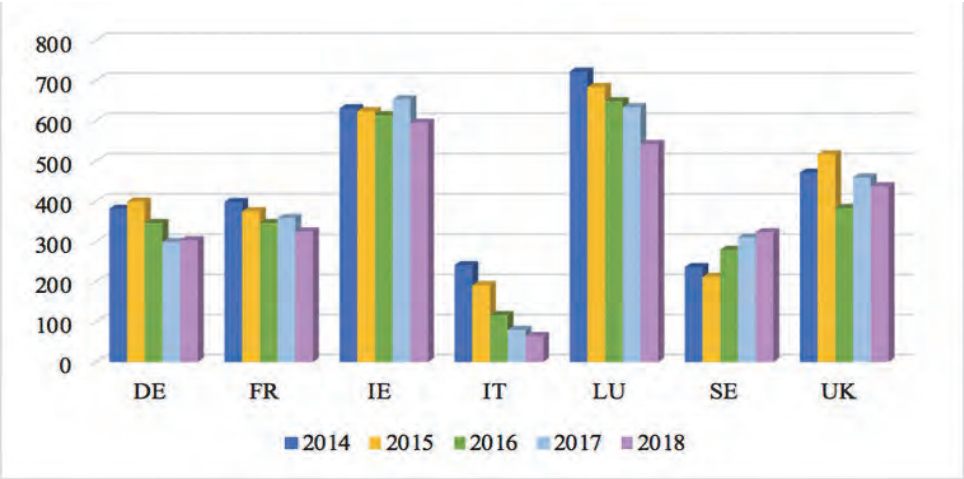
Table 3 – Prospectuses approved as Standalone versus Base Prospectuses

	2014				2015				2016				2017				2018			
	Equity	Non-equity		Total sum	Equity	Non-equity		Total sum	Equity	Non-equity		Total sum	Equity	Non-equity		Total sum	Equity	Non-equity		Total sum
	Standalone	Base	Standalone		Standalone	Base	Standalone		Standalone	Base	Standalone		Standalone	Base	Standalone		Standalone	Base	Standalone	
DE	70	261	50	381	89	270	40	399	72	244	30	346	51	226	22	299	72	202	29	303
FR	195	72	131	398	190	76	109	375	190	90	66	346	198	88	72	358	172	99	54	325
IE	15	221	395	631	13	213	398	624	15	224	375	614	10	263	380	653	8	243	344	595
IT	55	171	15	241	48	131	12	191	29	84	4	117	27	49	4	80	31	32	2	65
LU	12	318	392	722	5	313	366	684	12	306	331	649	9	310	315	634	5	296	241	542
SE	114	64	58	236	112	57	43	212	144	61	74	279	166	75	69	310	170	72	81	323
UK	208	193	70	471	228	204	84	516	170	191	22	383	191	211	57	459	163	202	72	437

Source: EEA prospectus activity 2014-2018 (ESMA)

Figure 3 shows the total number of prospectuses approved in each country in the time period 2014 – 2018

Figure 3 – Approved prospectuses in 2014 – 2018



Source: Graph based on data from EEA Prospectus Activity 2014-2018 (ESMA)

What emerges is that Ireland and Luxembourg are the countries with the highest number of approvals, despite the fact that they have the smallest populations (at least among those analysed).

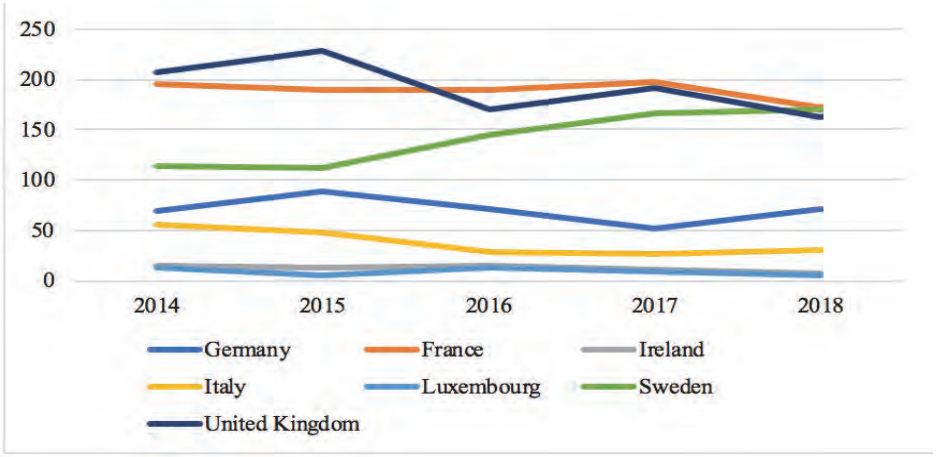
Thanks to the principle of mutual recognition, many European companies choose to apply for approval in these countries and then passport them to one or more other countries (this topic will be developed in greater detail in the following paragraphs).

2.2 Equity prospectuses in 2014-2018

Figure 4 shows the trend of approvals of equity standalone prospectuses. France, Sweden and the UK are outliers, as their figures are the highest in the five years considered. Starting from 2015, Sweden presents an uptrend and almost reaches the UK's level in 2017 until it finally exceeds it in 2018. Overall, in the same year these three countries recorded the highest figures.

German figures range between 50 and 100 units, it reached its peak in 2015 and its lowest figure in 2017. Classifying the countries on the basis of the approved equity standalone prospectuses, Italy comes third to last, just above Ireland and Luxembourg which never exceeded 15 approvals in any year. This result is at odds with the extremely high number of non-equity prospectuses approved in the same years.

Figure 4 – Approved Equity (Standalone) Prospectuses

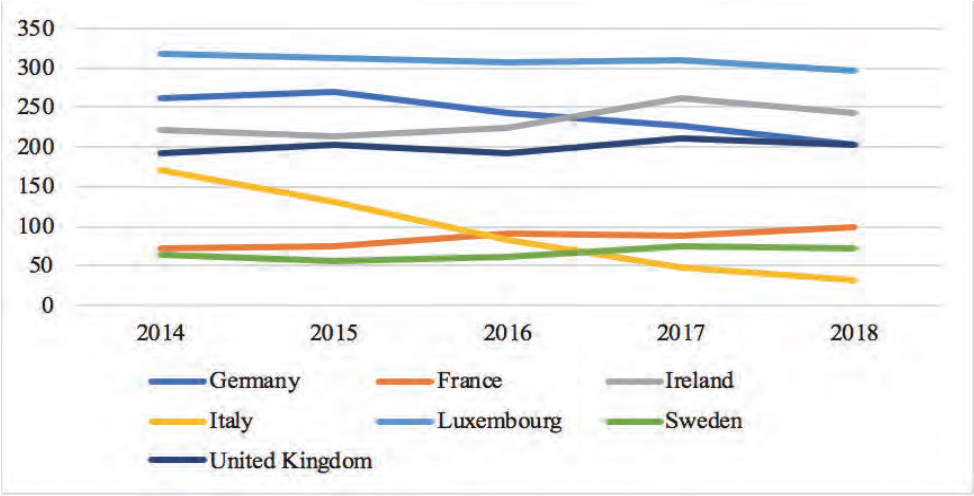


Source: Graph obtained using data from EEA Prospectus Activity 2014-2018 (ESMA).

2.3 Debt prospectuses in 2014-2018

Figure 5 shows the non-equity base prospectuses approved by the seven European counties considered. In this case, Luxembourg is an outlier, as its figures never drop below 300 units until 2017, although they fall beneath this value in the subsequent year. The Italian trend plummeted over the five years, with figures that range between 171 and 32 units approved in 2014 and 2018, respectively. The United Kingdom did not present huge fluctuations, with figures of around 200 units. Similarly, France and Sweden confirmed their regular trends, and they both showed a slight increase throughout the years.

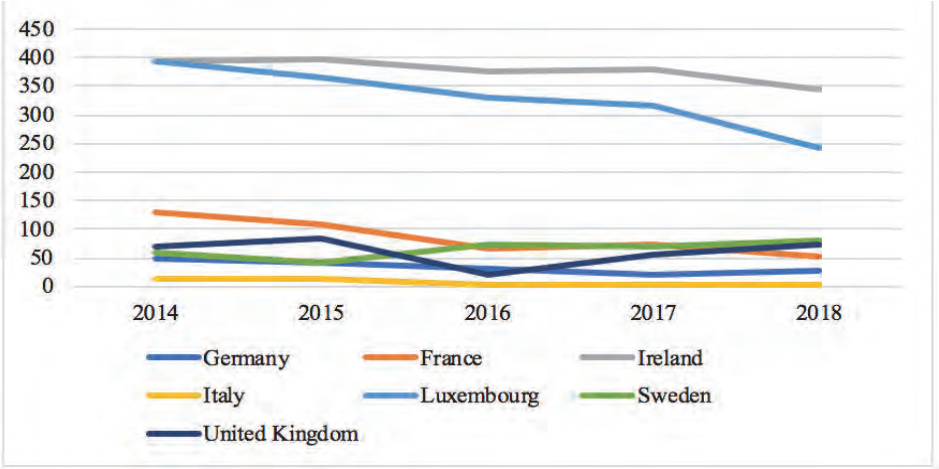
Figure 5 – Approved Non-Equity (Base) Prospectuses



Source: Graph based on data from EEA Prospectus Activity 2014-2018 (ESMA)

Figure 6 shows the trend in approved non-equity standalone prospectuses. Ireland and Luxembourg present exceptional trends, with figures ranging between 300 and 400 units. France shows a downward trend. Italy approved a very low number of non-equity standalone prospectuses, never higher than 15 units.

Figure 6 – Approved Non-Equity (Standalone) Prospectuses



Source: Graph based on data from EEA Prospectus Activity 2014-2018 (ESMA).

2.4 Passporting activity in 2014–2018

There is freedom of movement of capital and services in the European Union, as well as the free movement of people and goods (this is also referred to as the "four freedoms").

The expression "*European passport*" refers to the system in which, in the harmonized sectors, the European companies of each Member State offer their financial products to one or more Member States merely based on authorization by the Home Member State (i.e. the "*home country control principle*"): that is the case of prospectus passporting. Essentially, this means that issuers (or offerors) may apply for their prospectus to be approved by the national competent authority of their Home Member State, which then issues a certificate of approval known as a *prospectus passport*. Therefore, harmonising the disclosure principles "*allows for the establishment of a cross-border passport mechanism which facilitates the effective functioning of the internal market in a variety of securities*"[57].

The following paragraphs present data on the passporting of prospectuses approved by the seven countries analysed in 2014 – 2018.

The figures reported here below do not include supplements, and prospectuses passported to more than one country are counted once, as the main focus is on the activity of the home country. For this reason, the number of prospectuses pass-

57 Rec. 3 Prospectus Regulation 2017/1129/EU.

ported out does not correspond to the number of prospectuses passported in, as the same country can passport the same document to several host countries.

Prospectuses passported out

Table 4 shows the number of prospectuses passported out, i.e. "information about the number of prospectuses in relation to which EEA countries provided one or more other EEA countries with a certificate of approval"[58] in 2014 – 2018.

The very first trend that emerges from this table is that **Germany**, **Ireland** and **Luxembourg** are those with the highest number of prospectuses passported out over the entire period considered. **Italy**, instead, presents the lowest figures throughout the five-year period.

Table 4 – Prospectuses passported out

	2014	2015	2016	2017	2018
DE	257	287	251	223	212
FR	44	92	64	87	70
IE	117	99	76	77	98
IT	2	1	1	2	1
LU	360	291	283	318	248
SE	21	18	28	23	20
UK	49	51	37	36	43

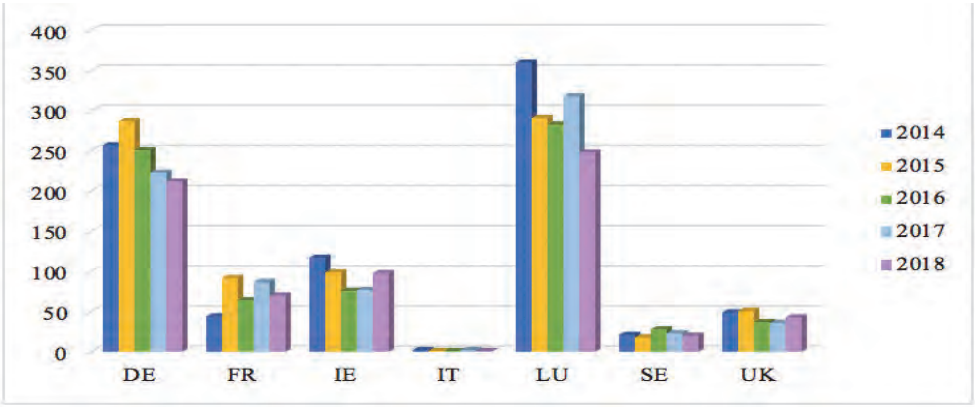
Source: EEA prospectus activity 2014 - 2018 (ESMA)

The histogram in Figure 7 shows the passporting activity towards other countries in 2014 – 2018. Germany and Luxembourg are certainly the countries that passported out the most prospectuses. The German figures are relatively stable and range between 200 and 300 units. In 2014, Luxembourg reached a peak of more than 350 prospectuses passported out. In subsequent years, the number fluctuates at around 300 units while all the other countries present lower numbers.

The French and Irish data varies at around 100 units, while figures for Sweden and the UK are slightly less than 50 units. Italy, instead, presents extremely low numbers, which highlights the lack of propensity of Italian and foreign companies to apply for the approval of their prospectuses in Italy and then to passport them outside this country.

58 ESMA, EEA Prospectus Activity 2018, 31 October 2019 | ESMA 31-62-1360

Figure 7 – Prospectuses passported out in 2014 – 2018



Source: Graph obtained using data from EEA Prospectus Activity 2014 – 2018 (ESMA

Prospectuses passported in

Table 5 shows the numbers of prospectuses passported in, i.e. "the number of certificates of approval each EEA country received"[59] in 2014 – 2018. Once again **Germany** and **Luxembourg** passported in well over 200 prospectuses per year over the time frame considered. Ireland, instead, is the country with the lowest numbers of inwards prospectuses.

Table 5 – Prospectuses passported in

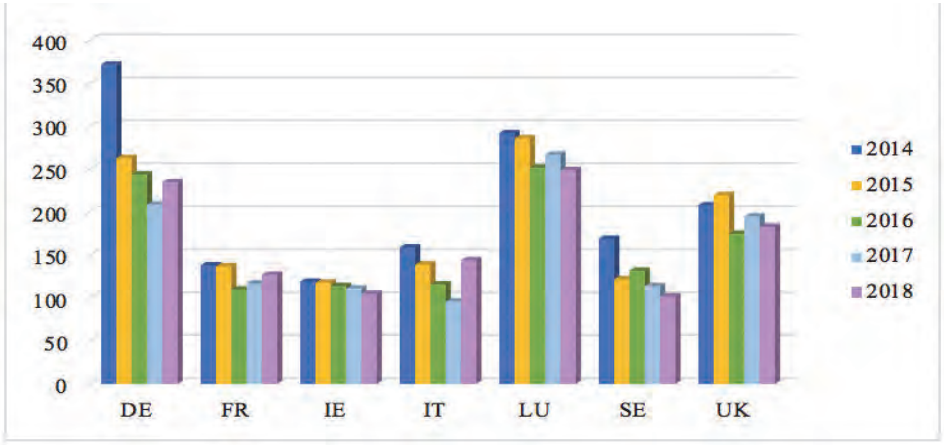
	2014	2015	2016	2017	2018
DE	372	263	244	209	235
FR	138	137	110	117	127
IE	119	118	114	111	105
IT	159	139	116	96	144
LU	292	286	252	267	249
SE	169	122	132	114	102
UK	208	220	175	195	183

Source: EEA prospectus activity 2014 - 2018 (ESMA)

The histogram in Figure 8 shows how each country performed in terms of prospectuses passported in over the period 2014 – 2018. In 2014, Germany recorded surprising results as it passported in more than 370 prospectuses. Immediately after Germany comes Luxembourg, whose number of prospectuses passported in ranges between 250 and 300 units. In the UK approvals are around 200 units. The figures for France and Ireland are quite stable in the relevant period. Swedish values vary at around 125 units, with an outstanding result in 2014. Italy, instead, presents a downward trend between 2014 and 2017, but it well recovered in 2018 with 144 prospectuses passported in.

59 ESMA, EEA Prospectus Activity 2018, 31 October 2019 | ESMA 31-62-1360.

Figure 8 – Prospectuses passported in over the period 2014 – 2018



Source: Graph obtained using data from EEA Prospectus Activity 2014 - 2018 (ESMA)

The difference between the number of prospectuses **passported out** and **passported in** is negative for all the countries except **Luxembourg**, which passported out 1,500 prospectuses while passporting in 1,346 documents thus recording a positive balance of 154 units.

The countries with the greatest negative balance are: the **United Kingdom** (-765) and **Italy** (-647). The difference in the other countries was: –93 in Germany, -272 in France, -100 in Ireland and -529 in Sweden.

2.5 Dimensions of prospectuses and supplements

Dimensions of prospectuses

In order to compare the prospectus activity of the seven countries in the European Economic Area with the highest number of approvals (equity and non-equity) in 2006 - 2018, we considered the dimensions of the prospectuses; this takes account of the length of the documents in terms of number of pages and the dimensions (expressed in megabytes - MB) of the PDFs (*portable document format).*

This analysis is essential to capture the degree of harmonization in the way the European Prospectus regulation is actually applied by each Member State.

We took a sample of 20 prospectuses for each issue type (i.e. equity and debt) for each of the countries analysed except Ireland and Luxembourg due to the absence of available data. We took the most recent documents available going backwards from 03/10/2018[60] and obtained an overall sample of 251 documents. The data was filtered using Single Documents for both equity and debt issues[61]. All the

60 The decision to focus on a one-year period is due to fact that some of the EU countries (such as Ireland and Luxembourg) update their online databases daily, which means that only approvals made within their borders in the last year are available on their websites.

61 The latter refer to issues higher than or equal to €100,000.

documents were taken from the ESMA *single access point* which contains links to the PDFs gathered at national level[62].

From a methodological viewpoint, it is necessary to specify that prospectuses often contain: a duplication of some of the paragraphs (in the original language and also in English), some or part of the issuer's financial statements and/or the auditors' valuations, and figures, which increases the overall dimensions of the single PDF file. All these factors - which in any case demonstrate that there is no single practice for drawing up prospectuses - inevitably affect the comparison of the dimensions of the documents.

For this reason, we decided to focus mainly on the number of pages, while still taking into consideration the dimensions of the files.

The data below refers to each of the seven countries under analysis.

In the timeframe considered, the length of the documents approved by:

1. the German NCA (BaFin) ranges between 58 and 867 pages for debt prospectuses and between 77 and 806 pages for equity prospectuses, while the average number of pages for debt and equity prospectuses is 283.5 and 298.1 respectively (see Table 2.1 in the Appendix).
2. the French NCA (AMF) ranges between 33 and 309 pages for debt prospectuses and between 51 and 339 pages for equity prospectuses, while the average number of pages for debt and equity prospectuses is 93.15 and 131.85 respectively (see Table 2.2 in the Appendix).
3. the Irish NCA (Central Bank of Ireland) ranges between 25 and 396 pages for debt prospectuses and between 70 and 218 pages for, while the average number of pages for debt and equity prospectuses is 195.85 and 126 respectively (see Table 2.3 in the Appendix). The analysis showed that issuers from all over the world choose Ireland to apply for approval for their prospectuses: North Carolina, Kingdom of Jordan, Italy, Netherlands, Republic of South Africa, Japan, Germany, Turkey, Bulgaria, Sweden, and Luxembourg are some of the examples extrapolated from the sample.
4. the Italian NCA (CONSOB) ranges between 28 and 458 pages for debt prospectuses and between 190 and 716 pages for equity prospectuses, while the average number of pages for debt and equity prospectuses is 179.75 and 406 respectively (see Table 2.4 in the Appendix).
5. the Luxembourg NCA (CSSF) ranges between 34 and 346 pages for debt prospectuses and between 42 and 645 pages for the equity's, while the average number of pages for debt and equity prospectuses is 126.15 and 242.75 respectively (see Table 2.5 in the Appendix). Like Ireland, the analysis shows that issu-

62 For what concerns Italy, data on debt releases was taken from the CONSOB webpage as the ESMA database did not contain any information for issues higher than or equal to €100,000. However, with the aim of getting an idea of debt prospectus activity in Italy, we decided to collect data on bond issues over the relevant period (03/10/2017 – 03/10/2018) disregarding the amount of the issue itself.

ers from all over the world choose Luxembourg for the approval of their prospectuses, such as: Germany, Netherlands, France, UK, Italy, Portugal, Turkey, and Switzerland.

6. the Swedish NCA (FI) ranges between 35 and 107 pages for debt prospectuses and between 39 and 236 pages for equity prospectuses, while the average number of pages for debt and equity prospectuses is 66.85 and 105.3 respectively (see Table 2.6 in the Appendix).

7. the UK NCA (FCA) ranges between 22 and 737 pages for debt prospectuses and between 32 and 525 pages for equity prospectuses, while the average number of pages for debt and equity prospectuses is 256.6 and 241.75 respectively (see Table 2.7 in the Appendix).

The data in Tables 2.1 to 2.7 in the Appendix highlights the considerable differences between and also within the countries.

The length of the approved debt prospectuses in the seven countries ranges between 22 and 867 pages, while that of the approved equity prospectuses varies between 32 and 806 pages.

The macroscopic divergences witness the different degree of complexity in the operations underlying the placement of securities. The same divergences also demonstrate the extreme flexibility of the European rules on prospectus content, which has inevitably led to different application practices, i.e. application on a case-by-case basis of the same general, abstract rules.

Equally interesting – despite the evident lack of uniformity of the operations underlying the placement of securities – is the comparison of the average length (expressed in pages) of the prospectuses approved in the countries analysed here.

As regards debt prospectuses, Sweden approved documents with an average length of 66.8 pages in reference year (03/10/2017 - 03/10/2018): the shortest of all those examined.

On the contrary, Germany approved debt prospectuses with an average length of 283.5 pages: the longest.

Italy lies in the middle (fourth), with an average length of 179.75 pages.

As regards equity prospectuses, Sweden is the country that approved the documents with the shortest average length, i.e. 105.3 pages, in the reference year (03/10/2017 - 03/10/2018).

On the contrary, Italy approved the longest equity prospectuses with an average length of 406 pages.

Table 6 – Average number of pages and dimensions per prospectus

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

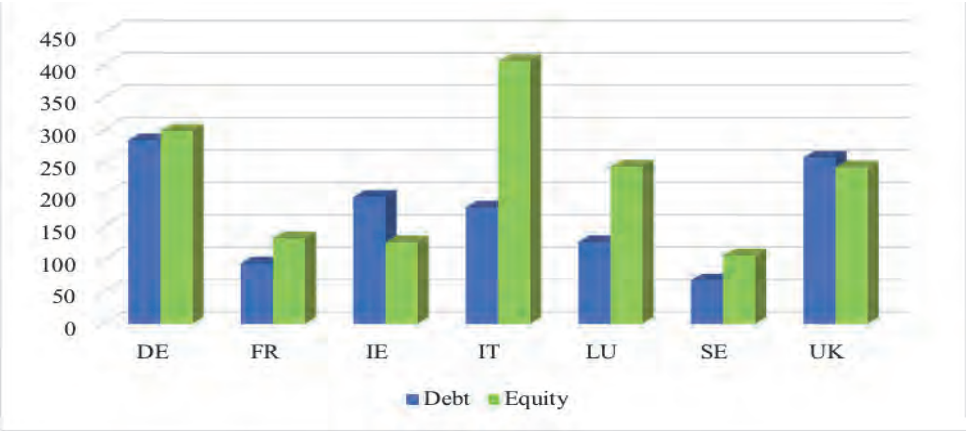
Source: Authors' own findings.

The figures in Table 6 are then displayed in Figure 9, which is a histogram with double columns for each country. The y-axis shows the number of pages, the x-axis the countries considered.

The graph demonstrates that while in Germany, France, Sweden, and the UK the figures are approximately the same in both documents (debt, equity), Ireland, Italy, and Luxembourg show huge discrepancies in the two averages considered.

Overall, five (i.e. Germany, France, Italy, Luxembourg, Sweden) of the seven countries considered show higher averages for equity prospectuses, while for the others (i.e. Ireland, UK) the reverse is true.

Figure 9 – Average number of pages in debt and equity prospectuses



Source: Graph based on data from Table 6

The two pyramids below rank the averages from lowest to highest and give a clear picture of how each of the countries analysed is positioned in terms of the length of their debt and equity prospectuses.

Figure 10 – Ranking of debt prospectuses s

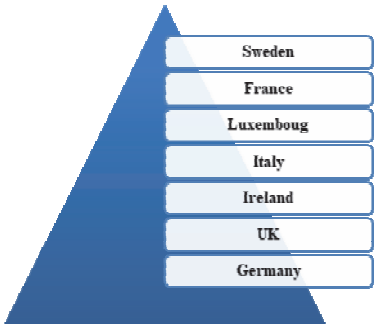
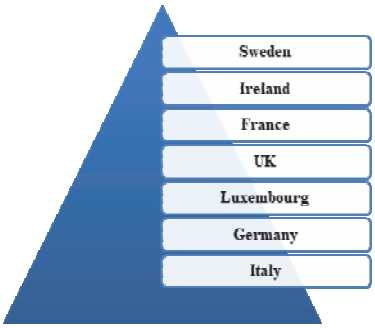


Figure 11 – Ranking of equity prospectus



Dimensions of supplements

To assess the frequency with which each prospectus gets supplemented we looked at the overall number of supplements and prospectuses[63] (Table 7) approved in the reference period (03/10/2017 – 03/10/2018)[64]. We applied the same methodology explained in the previous paragraph. Therefore, with the aim of getting an idea of debt prospectus activity in Italy, we decided to collect data on bond issues over the relevant period (03/10/2017 – 03/10/2018) disregarding the amount of the issue itself. In this counting we considered all the bond prospectuses approved in the relevant period but Registration Documents. We eventually found that Italy approved 23 bond prospectuses and 21 supplements to them.

Table 7 – Supplements to equity and debt prospectuses issued between 03/10/2017 and 03/10/2018

	Debt		Equity	
	Total number of approved prospectuses	Supplements	Total number of approved prospectuses	Supplements
DE	47	67	67	9
FR	104	53	169	4
IE	114	90	7	1
IT	23	21	22	2
LU	344	271	8	3
SE	98	18	150	23
UK	153	64	85	58

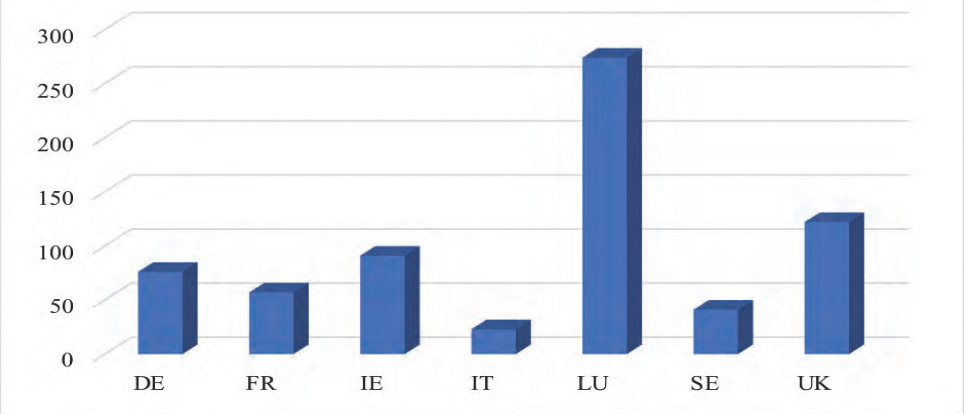
Source: Authors' own findings.

63 The total number of approved prospectuses and supplements refers to both standalone and base prospectuses.

64 These figures are obtained by opening all the individual links to the prospectuses listed on the ESMA website.

Figure 12 contains the total number of supplements (both debt and equity) issued between 03/10/2017 and 03/10/2018. Overall, Luxembourg stands out as it is clearly the EU country (of those analysed) with the highest number of issued supplements (around 270 units). The UK comes second with just over 120 units in a single year, which is less than half the supplements approved in Luxembourg. Figure 12 shows the overall number of supplements (both debt and equity) issued between 03/10/2017 and 03/10/2018.

Figure 12 – Total number of supplements issued between 03/10/2017 and 03/10/2018



Source: Authors' own graph and findings

Table 8 shows the percentages of supplements as compared to the overall number of prospectuses approved in any given country. These figures show that in some countries supplements are more frequent than in others. For example, in Germany on average each debt prospectus comes with more than one supplement (this result is unique as it is the only one that exceeds 100%).

As regards Italy, the number of supplements is high as compared to the overall number of prospectuses approved there: 91% for bond prospectuses and 9% for equity prospectuses. This means that on average almost all bond prospectuses get supplemented, while equities' roughly one in ten approved prospectuses has a supplement.

Table 8 – Percentages of supplements in relation to the total number of prospectuses approved between 03/10/2017 and 03/10/2018

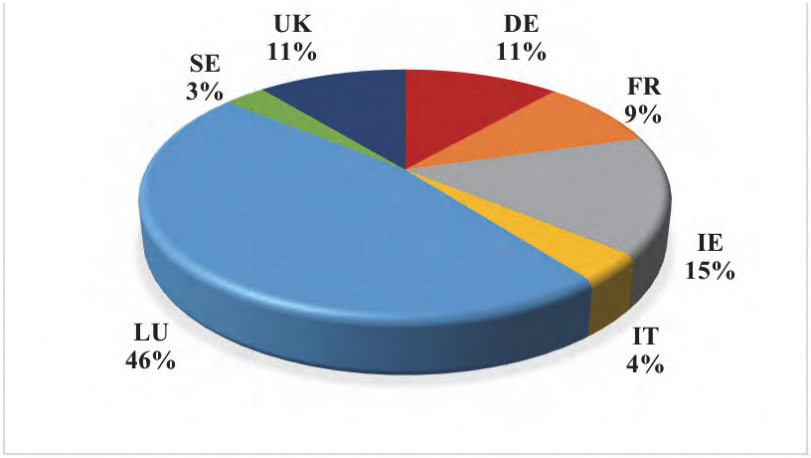
	Debt	Equity
DE	143%	13%
FR	51%	2%
IE	79%	14%
IT	91%	9%
LU	79%	38%
SE	18%	15%
UK	42%	68%

Source: Authors' own findings.

The two pie-charts below show the percentage of supplements published by each NCA in relation to the overall amount issued by the seven countries as a whole.

Figure 13 clearly shows that Luxembourg is the country with the highest number of supplements issued for debt prospectuses. From this perspective, this country alone covers almost 50% of the entire chart. It is followed by Ireland with 15%, UK and Germany represent 11% of the graph. Italy has the lowest percentage as it issued only 4% of the supplements of all the countries considered.

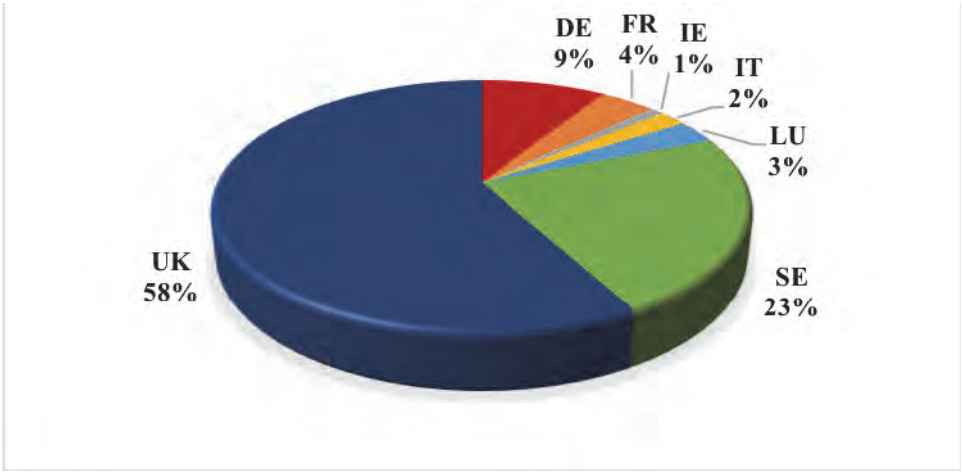
Figure 13 – Supplements in debt prospectuses issued between 03/10/2017 and 03/10/2018



Source: Authors' own graph and calculations.

Figure 14 shows that the UK issued the highest number of supplements in equity prospectuses (58%). It is followed by Sweden, which issued 23% of the overall amount. This time Ireland has the smallest slice (1%), just after Italy with 2% of the entire pie-chart.

Figure 14 – Supplements in equity prospectuses issued between 03/10/2017 and 03/10/2018



Source: Authors' own graph and calculations

It is possible to develop the same analysis on the length and dimension of prospectuses to their supplements. We applied exactly the same methodology but considered all the supplements to debt and equity prospectuses (478 and 50 documents respectively) approved in the time period 01/12/2017 - 31/10/2018[65]. Results of this analysis are presented in the following two paragraphs.

Supplements to debt prospectuses

Over the time period 01/12/2017 - 31/10/2018:

1. the German NCA approved 43 supplements to debt prospectuses (see Table 2.8 in the Appendix).
2. the French NCA approved 51 supplements to debt prospectuses (see Table 2.9 in the Appendix).
3. the Irish NCA approved 78 supplements to debt prospectuses (see Table 2.10 in the Appendix).
4. the Italian NCA approved 6 supplements to bond prospectuses (see Table 2.11 in the Appendix), we followed the same methodology explained in the previous paragraph.
5. the Luxembourg NCA approved 248 supplements to debt prospectuses (see Table 2.12 in the Appendix).
6. the Swedish NCA approved 11 supplements to debt prospectuses (see Table 2.13 in the Appendix).
7. the UK NCA approved 41 supplements to debt prospectuses (see Table 2.14 in the Appendix).

Supplements to equity prospectuses

Over the time period 01/12/2017 - 31/10/2018:

1. the German NCA approved 13 supplements to equity prospectuses (see Table 2.15 in the Appendix).
2. the French NCA approved 6 supplements to equity prospectuses (see Table 2.16 in the Appendix).
3. there is no available data on supplements to equity prospectuses for the Irish, Italian, and Luxembourg NCAs.
4. the Swedish NCA approved 22 supplements to equity prospectuses (see Table 2.17 in the Appendix).
5. the English NCA approved 9 supplements to equity prospectuses (see Table 2.18 in the Appendix).

65 We covered this time period as the ESMA database did not allow to go one year backward anymore.

Table 9 shows considerable divergences in the approval of supplements to debt and equity prospectuses between the countries considered.

As regards supplements to debt prospectuses, ranking the countries based on the length of the documents (from the shortest to the longest), the following list emerges: UK, Sweden, Ireland, France, Luxembourg, Germany, Italy. Italy in particular seems to have the longest and largest supplements to debt prospectuses, with an average length of 35 pages and average dimensions of just under 1 MB. On the contrary, the English NCA seems to approve the shortest (3 pages) and lightest (150 KB) supplements to debt prospectuses.

As regards supplements to equity prospectuses, there is no available data for countries like Ireland, Italy, and Luxembourg for the period 01/12/2017 - 31/10/2018.

The following table shows that the UK once again approves the shortest and smallest documents, just over 6.5 pages long and just under 270 KB. On the contrary, France is the country which approved the largest and longest documents: supplements to equity prospectuses are on average 27 pages long and just over 1 MB. Ranking the countries according to the previous methodology, we obtain the following: UK, Germany, Sweden, and France.

Table 9 – Average number of pages and dimension of debt and equity supplements

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

Source: Authors' own findings

2.6 Considerations on the data collected

Based on the data on prospectuses (equity and non-equity) approved by each NCA within the European Economic Area and published annually by ESMA, over the thirteen years 2006 – 2018 the overall number of approvals fell from 6,418 to 2,590, with an overall decrease of almost 60%.

A detailed analysis of this data shows that in 2006 – 2018:

a) The number of prospectuses approved in Italy **decreased** from 793 to 65, with an overall drop of almost 92%; in Ireland, approvals fell by nearly 70%, in Germany by more than 60%, in Luxembourg by approximately 65%;

b) In France, approvals **rose** by 1.5% and in Sweden by almost 24%;

c) The overall number of approvals in each country ranked from highest to lowest is as follows: 1. Ireland 12,019; 2. Luxembourg 11,269; 3. United Kingdom 9,414; 4. Italy 5,899; 5. Germany 5,897; 6. France 4,244; 7. Sweden 2,966;

d) Despite the fact that Ireland and Luxembourg are the countries with the lowest populations (just over 5,000,000 and 500,000 inhabitants respectively), they are still the countries with the highest number of approved prospectuses.

As regards passporting activity (approval in one country and placement in another), the data collected shows that Germany, Ireland and Luxembourg are the countries with the highest number of prospectuses passported out over the entire period considered. Italy, instead, presents the lowest figures throughout the five-year period, which highlights the lack of propensity of Italian and foreign companies to apply for the approval of their prospectuses in Italy and then to passport them outside Italy. The countries that passported in the greatest number of prospectuses are Germany and Luxembourg. Ireland, instead, is the country with the lowest numbers of inwards prospectuses.

The difference between the number of prospectuses **passported out** and **passported in** is **negative** for all the countries except **Luxembourg**, which passported out 1,500 prospectuses while passporting in 1,346, thus recording a positive balance of 154 units. The countries with the **highest negative balance** are: the **United Kingdom** (-765) and **Italy** (-647)

From the analysis on the length of prospectuses, it emerges that in the seven countries considered the length of the approved debt prospectuses ranges between 22 and 867 pages, while that of the approved equity prospectuses varies between 32 and 806 pages.

The macroscopic divergences feature the different complexity in the operations underlying the placement of securities, and consequently the necessity of an alternative market disclosure. The same divergencies also demonstrate the extreme flexibility of the European rules on prospectus content, which has inevitably led to different application practices, i.e. application on a case-by-case basis of the same general, abstract rules.

Equally interesting – despite the evident lack of uniformity of the operations underlying the placement of securities – is the comparison of the average length (expressed in terms of pages) of the prospectuses approved in the countries analysed here.

As regards debt prospectuses, Sweden approved prospectuses with an average length of 66.8 pages in the reference year (03/10/2017 - 03/10/2018): the shortest among all those examined. On the contrary, Germany approved debt prospectuses with an average length of 283.5 pages: the longest. Italy lies in the middle (fourth), with an average length of 179.75 pages.

As regards equity prospectuses, Sweden is the country that approved the documents with the shortest average length, i.e. 105.3 pages, in the reference year

(03/10/2017 - 03/10/2018). On the contrary, Italy approved the longest equity prospectuses with an average length of 406 pages.

Finally, analysing the total number of supplements (both debt and equity) issued between 03/10/2017 and 03/10/2018, Luxembourg stands out, it clearly is the EU country (of those analysed) with the highest number of supplements issued (around 270 units). The UK comes in the second place with just over 120 units in a single year, which is less than a half of the supplements approved in Luxembourg. Finally, Italy is the country with the lowest figure, just over 10 units.

Therefore, why are Italian prospectuses so long?: 1) The explosion of "risk factors" after the 2007 financial crisis and the Santa Teresa di Gallura judgement; 2) prospectus liability; and the fact that 3) law firms often entrust juniors instead of seniors with the process of drawing up prospectuses.

The reasons why some countries approve more non-equity prospectuses might include: 1) the fact that the debt market is much more developed in Ireland and Luxembourg; 2) speed of bureaucracy and associated costs.

As a first general consideration, the creation of the European Single Market for financial instruments through the harmonization of the prospectus content has not been completed and is still in progress.

As mentioned in the previous paragraphs, the prospectus content (at least from a quantitative perspective) varies considerably between and even within European countries.

This means that prospectuses and, as a result, the financial products to which they refer cannot be compared, which goes against one of the original main goals of the Prospectus Regulation[66].

In order to make the prospectuses easily available and comparable in Europe, the Prospectus Regulation introduced the rule whereby the document will be considered *available to the public when it is published in the electronic format* on the website of the issuer, offeror or person asking for admission to trading (in case of a financial intermediary responsible for the placement of the financial instruments, the document shall be published either on the website of the regulated market on which the admission to trading is actually sought, or on that of the MTF's operator[67]).

Under the Regulation, ESMA will develop an online storage mechanism with a search tool that EU investors can access free of charge[68]. In order to organize the documents received and allow investors to easily access this database, the national competent authorities send ESMA an electronic version of the approved prospectus

66 Moloney, N. (2014). *EU securities and financial markets regulation.* Third edition - Oxford University Press, p. 108 and ff.

67 Prospectus Regulation, Art. 21(2): "The prospectus, whether a single document or consisting of separate documents, shall be deemed available to the public when published in electronic form".

68 There is already a register which contains notifications from the national competent authorities, with the links to the national registers where the prospectuses are actually published.

along with a series of metadata (such as kind of issuer, security, trading venue, amount of the offer, issue type: primary or secondary, etc.).

According to the opinion of the European Economic and Social Committee to the European Commission and Parliament of 8th March 2016 on what at that time was a proposal for the Prospectus Regulation, this provision "should boost the development of European capital markets, increase investors' confidence and allow for a greater diversification of financial products. In order to be effective, this database shall be projected to be easily available for the users, thus using formats that allow to effortlessly access and use this information".

Moreover, the European Commission Services proposed establishing a centralised register at the EU level following a similar approach to that of the central European electronic access point (EEAP) of the Transparency Directive, which is similar to a "meta-database" at the level of ESMA with direct access to national databases. The Transparency Directive (amended by Directive 2013/50/UE) provided that (Art. 21) by 1 January 2018 there should be a portal, managed by ESMA, operating as a European electronic access point for the storage mechanism of this regulated information[69].

Second consideration: Europe is currently heading towards a simplification of prospectuses (KID). Since retail investors do not seem to read them, and they are only used by institutions, why not take the same approach as in private placement, i.e. institutional investors get more detailed information while retailers only receive simplified information?

Third consideration: since prospectus rules are harmonized in all but one aspect, i.e. civil liability arising from publication of a prospectus (attached to the approving authority and the issuer who drew it up, as well as to all the parties involved), we have to ask ourselves whether the factors that determine divergences in the quantity of information contained in the prospectus include a separate operating and administrative practice arising from the different civil liability regime in force in each Member State.

For example, in countries where the civil liability for damages is higher, both the issuers and the national competent authorities could possibly be induced by the national judicial authorities to include a considerable amount of information in the

69 Rec. 15 of the Transparency Directive clarifies that "to facilitate cross-border investment, investors should be able to easily access regulated information for all listed companies in the Union. However, the current network of officially appointed national mechanisms for the central storage of regulated information does not ensure an easy search for such information across the Union. In order to ensure cross-border access to information and to take account of technical devel opments in financial markets and in communication technologies, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to specify minimum standards for dissemination of regulated information, access to regulated information at Union level and the mechanisms for the central storage of regulated information. The Commission, with assistance of ESMA, should also be empowered to take measures to improve the functioning of the network of officially appointed national storage mechanisms and to develop technical criteria for access to regulated information at Union level, in particular, concerning the operation of a central access point for the search for regulated information at Union level. ESMA should develop and operate a web portal serving as a European electronic access point ('the access point')".

document (especially in relation to issuer and product risks) with the aim of preventing possible legal actions.

This possibility undermines the creation of a Capital Market Union (Art. 26 TFEU) as it is at odds with the principle – developed over recent years in Europe – that prospectuses must be simple and comprehensible.

This topic is already well known and it has been recently observed that: "*financial regulators are required to make difficult judgements on the basis of imperfect information on an almost daily basis. Many of these judgements must strike a balance between competing societal interests. Where these decisions are made in the shadow of potential ex post legal action from affected constituencies, we might expect this to translate into an overly cautious approach towards regulatory intervention. We might also expect it to divert regulators' time and attention away from the pursuit of regulatory objectives and towards limiting their potential liability*"[70].

3 The new regulatory framework

3.1 The path to a new Prospectus regulation

The obligation to publish a prospectus was first imposed on issuers in 1979 by the Admission Directive, whose aim was to facilitate admission to a stock exchange by harmonising the conditions applicable to official listing. The 1980 Listing Particulars Directive harmonised the disclosure requirements for admission to listing. In 1989, the Public Offers Directive introduced a prospectus regime for offers of securities to the public. The result was a complex regime based on a fragmented system that was partially overcome by the 1994 Eurolist Directive which gave Member States the power to exempt issuers from the listing particulars regime if their securities had previously been officially listed in another Member State's exchange for at least three years. Nevertheless, this regime proved to be inadequate to ensure an equal access to capital markets across Member States, an important goal of the EU legislation. The 2000 Lisbon European Council highlighted the critical importance of disclosure reforms.

2003 saw the issue of the 'Prospectus Directive', no. 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. It governed market-based capital raising activities by providing mandatory disclosure rules that impose a duty to provide important information concerning securities, and issuers of securities, to prospective purchasers. The main purpose of the Prospectus Directive was to ensure the efficiency of the securities markets' function of allocating capital to issuers, and to reduce the cost of capital as well as the complexity arising from discrepancies in rules across EU Mem-

70 J. Armour - D. Awrey - P. Davies - L. Enriques - J.R. Gordon - C. Mayer - J. Payne, The Political Economy of Financial Regulation, in J. Armour - D. Awrey - P. Davies - L. Enriques - J.R. Gordon - C. Mayer - J. Payne, Principles of Financial Regulation, Oxford University, 2016, p. 574.

ber States. Accordingly, under Recital 18 of the Prospectus Directive, 'The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus'.

The 2003 Prospectus Directive[71] was first amended in 2008 by Directive 2008/11/EC and incorporated changes to its delegation of authority to make administrative rules.[72] However, the changes made in 2008 were overridden by the 2009 Lisbon Treaty settlement on administrative rule-making. The 2003 Prospectus Directive was then revised by the 2010 Omnibus I Directive,[73] which granted authority to propose administrative rules to ESMA, along with a series of supervisory powers, and the authority to adopt such rules to the Council. The administrative rules which the relevant parties mentioned above are empowered to adopt include a series of Regulatory Technical Standards (RTSs) and Implementing Technical Standards (ITSs). More substantive revisions were made by the 2010 Prospectus Amending Directive[74] towards reforming the rules governing the qualified-investor exemption, retail cascading, employee share offerings, and small and medium-sized issuers. Furthermore, the 2013 Amending Transparency Directive[75] revised the Prospectus Directive, and the 2014 Omnibus II Directive[76] provided for additional delegated authority to make administrative rules.

The 2010 Prospectus Amending Directive contains a clause which required the Commission to review the Prospectus Directive by January 2016.

The disclosure requirements provided by the 2003 Prospectus Directive were further specified by the 2004 Commission Prospectus Regulation[77], revised in 2006 by the Commission Regulation (EC) No 1787/2006[78] with respect to the disclosure requirements for issuers with complex financial histories or significant financial commitments. The 2004 Prospectus Regulation was amended a second time by Commission Regulation (EC) No 211/2007 in 2007,[79] with respect to the financial reporting regime, and a third time, in 2008, by the Commission Regulation (EC) No 1289/2008[80] as regards elements related to prospectuses and advertisements[81].

71 Directive 2003/71/EC [2003] OJ L345/64.

72 Directive 2008/11/EC [2008] OJ L76/37.

73 Directive 2010/78/EU [2010] OJ L331/120.

74 Directive 2010/73/EU [2010] OJ L327/1.

75 Directive 2013/50/EU [2013] OJ L294/13.

76 Directive 2014/51/EU [2014] OJ L153/1.

77 Commission Regulation (EC) No 809/2004 [2004] OJ L149/1.

78 Commission Regulation (EC) No 1787/2006 [2006] OJ L337/17.

79 Commission Regulation (EC) No 211/2007 [2007] OJ L61/24.

80 Commission Regulation (EC) No 1289/2008 [2008] OJ L340/17.

81 Commission Regulation (EC) No 1289/2008 [2008] OJ L340/17.

New regulations were introduced by the Commission in 2011 when it adopted the Commission Delegated Regulation (EU) No 310/2012[82] and No 311/2012,[83] amending the 2004 Prospectus Regulation and implementing some elements of the Prospectus Directive related to prospectuses and advertisements. New regulations were introduced in 2012 when the Commission Delegated Regulation (EU) No 486/2012[84] was adopted, which addresses the format and content of prospectuses, summaries, and final terms, and again by the Commission Delegated Regulation (EU) No 862/2012,[85] which addresses multiple issues including the following: (i) the written agreement required before intermediaries use a prospectus, (ii) disclosures in relation to structured securities, and (iii) the obligation of independent auditors and accountants to produce a report, particularly when a complete set of financial statements is not available. In 2013, the Commission Delegated Regulation (EU) No 759/2013[86] was promulgated to address the disclosure requirements for convertible and exchangeable debt securities, including with respect to mandatory disclosures related to underlying shares, and it addresses the applicability of the proportionate disclosure regime to rights issues and offerings by small and medium-sized enterprises (SMEs) or companies with a reduced market capitalization. In 2015, the Commission Delegated Regulation (EU) No 2015/1604[87] was promulgated to amend the Prospectus Directive as regards elements related to prospectuses and advertisements.

ESMA proposed the first set of Regulatory Technical Standards supplementing the Prospectus Directive in 2013, and they were then adopted in the Commission Delegated Regulation (EU) No 382/2014 in 2014.[88] ESMA promulgated additional Regulatory Technical Standards regarding approval and publication of prospectuses and dissemination of advertisements, and an amendment to the 2004 Prospectus Regulation, in 2016, in the Commission Delegated Regulation (EU) No 301/2016[89].

Since 2015 another review of the Prospectus Directive was conducted in the context of the Commission's action plan for a Capital Markets Union[90]. The objective

82 Commission Delegated Regulation (EU) No 310/2012 [2011] OJ L103/11, amending Regulation No 1569/2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council.

83 Commission Delegated Regulation (EU) No 311/2012 [2011] OJ L103/13.

84 Commission Delegated Regulation (EU) No 486/2012 [2012] OJ L150/1.

85 Commission Delegated Regulation (EU) No 862/2012 [2012] OJ L256/4.

86 Commission Delegated Regulation (EU) No 759/2013 [2013] OJ L213/1. See also the Commission Delegated Regulation (EU) No 621/2013 of 21 March 2013 [2013] OJ L177/14 correcting the Polish version of the Prospectus Regulation as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

87 Commission Delegated Regulation (EU) No 1606/2015 [2015] OJ L249/1.

88 Commission Delegated Regulation (EU) No 382/2014 [2014] OJ L111/36.

89 Commission Delegated Regulation (EU) No 301/2016 [2016] OJ L58/13.

90 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, Brussels, 30.9.2015 COM(2015) 468 final.

On this issue, see C. *Kumpan, Market-based financing in the Capital Markets Union: The European Commission's Proposals to Foster Financial Innovation in the EU* 14(2) *ECFR 336* (2017*); N.Moloney, Institutional Governance and*

of the review was to identify ways to reform the current prospectus regime in order to make it easier for companies to raise capital throughout the EU, and to lower the associated costs while maintaining effective levels of protection for consumers and investors. Indeed, the current regime is seen today by SMEs and companies with a low market capitalization as burdensome and not effective at facilitating access to capital markets. The review of the Prospectus Directive found that the directive needed updating to reflect market and regulatory developments including the development of multilateral trading facilities (MTFs), the creation of SME growth markets and organised trading facilities (OTFs), and the introduction of 'key information documents' for packaged retail and insurance-based investment products (PRIIPs) under Regulation (EU) No 1286/2014[91].

The Commission launched a public consultation from 18 February to 13 May 2015[92]. The purpose of the consultation was to gather various views regarding the functioning of the Prospectus Directive and its implementing legislation. The public consultation covered a broad range of issues, such as the scope of the prospectus requirement and the exemptions thereto, the appropriate level of investor protection, ways to reduce administrative burdens and unnecessary costs, cross-border issues, and making the regime more appropriate for SMEs and companies with reduced market capitalisation.

On 30 November 2015[93], the European Commission presented a proposal for a regulation to change the current prospectus rules. The regulation aims to make it easier and less expensive for SMEs to access capital, and introduces simplified rules and flexibility for all types of issuers, in particular for secondary issuances and frequent issuers familiar to capital markets. It improves prospectuses for investors by introducing a retail-investor-friendly summary of key information, and ensures that the rules are well-suited to companies of various sizes and capacities, from start-ups to mature companies, which issue securities on regulated markets.[94]

Capital Markets Union: Incrementalism or a "Big Bang"? in 13(2) ECFR 376 (2016); *M. Parmentier, 'Capital Markets Union – One Year On From the Action Plan'* in 14(2) ECFR 242 (2017).

91 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) [2014] OJ L352/1.

92 http://ec.europa.eu/finance/consultations/2015/prospectus-directive/docs/consultation-document_en.pdf

93 Proposal for a Regulation on the European Parliament and Council on the prospectus to be published when securities are offered to the public or admitted to trading, 30.11.2015, COM/2015/0583 final - 2015/0268 (COD).

94 On this issue, see ESMA, Report EEA Prospectus Activity in 2015, 28 July 2016 (2016/ESMA/1170), showing (i) general information on prospectus and supplement approval activity in each EEA country in 2015 as compared to 2014 and presenting the trends in prospectus approval activity since 2006 and providing (ii) granular data on the structure and content of prospectuses approved in 2015 and presenting information on passporting activity both out of and in to EEA countries during 2015 as compared to 2014; ESMA, Peer Review on Prospectus Approval Process, 30 June 2016 (ESMA/2016/1055), conducted in accordance with Article 30 of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESMA Regulation) and the revised Review Panel Methodology (ESMA/2013/1709), and providing an opportunity to (i) assess how the single rulebook is supervised, including the assessment of national practices and the methodologies employed by National Competent Authorities (NCAs) in their scrutiny of prospectuses and to (ii) identify areas that could potentially benefit from greater supervisory convergence; and L. Enriques, *EU Prospectus Regulation: Some Out of the Box Thinking*, *ibid.* In such respect, according to P. Horsten , *"Light" Disclosure Regimes: Secondary Issuances*, in D. Busch - G. Ferrarini - J.P. Franx (edt by), *Prospectus Regulation and Prospectus Liability*, cit., p. 243 ss. ,p. 247, in practice the simplified regime might be seldom used, considering that, on the one hand, very often secondary issuances are also made on the north ameri-

In June 2017, as part of its Capital Markets Union Action Plan, the EU adopted Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the '2017 Prospectus Regulation'). The 2017 Prospectus Regulation aims to improve the prospectus regime as designed by the Prospectus Directive. In particular, the Regulation: (i) gives easier access to capital markets for SMEs (e.g. prospectus obligations does not apply to offers below 1 million, and a potentially less onerous EU 'Growth' prospectus will be available for small and medium-sized companies and under certain circumstances non-SMEs for eligible issues up to 20 million); (ii) introduces simplification and flexibility for all types of issuers, specifically for secondary issuances[95] and frequent issuers which are already known to capital markets (e.g. "fast track" approval for frequent issuers and lighter prospectus for issuers whose securities are already traded); (iii) new exemptions to the obligation to publish a prospectus[96] (iv) improves prospectuses for investors by, *inter alia*, setting out a new regime under which a shorter and more user-friendly prospectus summary must be issued – which should be particularly useful for retail investors – and the prospectus shall only mention specific and material risk-factors, i.e. risks which the issuer considers to be of most relevance to the investor when the investor is making an investment decision.

The 2017 Prospectus Regulation provisions will begin to apply on a rolling basis, with full application from July 21, 2019, after which the Prospectus Directive

can market (and therefore are subject to the laws applicable in those jurisdictions; on the other, secondary issuances may take place in the context of an issuance program and, presumably, the market might not appreciate a reduction in transparency.

95 Companies already listed on a public market that wish to issue additional shares (secondary issuance) or raise debt (corporate bonds) are now able to benefit from a simplified prospectus. In other words, the regulator has acknowledged that issuers with listed securities are already obliged to ongoing transparency obligations and it is therefore logical to consider such existing disclosure obligations when they decide to tap capital markets. *See* European Council, New rules on prospectuses: improving access to capital markets for companies, Prospectus Regulation at a glance, available at: https://www.consilium.europa.eu/en/policies/capital-markets-union/prospectus/.

96 Under the Prospectus Directive regime, issuers of convertible bonds (*i.e.* potentially new shares) often avoided publishing a prospectus by taking advantage of the exemptions contemplated in the Directive (*e.g.*, issuing convertible bonds in wholesale denominations and admitting them to MTFs). In particular, ESMA Q&As on Prospectus Directive set out ESMA's views on the application of Article 4 .2 (g) of the Prospectus Directive and how it believes this exemption use to apply under the previous regime, and states that if an issuer has previously issued a convertible bond, the exemption will apply and the underlying securities can be admitted to trading without the need for an additional prospectus (provided the underlying shares are of the same class as shares already admitted to trading on that regulated market) . ESMA also suggested that competent authorities should consider taking enforcement action or cancel the transactions in cases where the issuer appears to be "*abusing the exemption*" – *i.e.* interposing an artificial convertible to avoid producing a prospectus. Therefore, ESMA itself was aware that the loophole was *prone* to be "exploited". Under the Prospectus Regulation regime, this exemption is now capped at 20% of the class of shares already admitted to trading ("*The obligation to publish a prospectus set out in Article 3(3) shall not apply to the admission to trading on a regulated market of any of* [...] *shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20 % of the number of shares of the same class already admitted to trading on the same regulated market*"). At the same time – and the rationale is quite clear – "*securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/EU*" will be exempted from the obligation to publish a prospectus. Consistently with this approach, the requirement that the resulting shares represent, over a period of 12 months, less than 20 % of the number of shares of the same class already admitted to trading on the same regulated market shall not apply "*where the shares qualify as Common Equity Tier 1 items* [...] *and result from the conversion of Additional Tier 1 instruments* [...] *due to the occurrence of a trigger event*".

will cease to have effect. More specifically, certain significant provisions (such as the 1 million threshold, under which no prospectus is required, or the 8 million threshold, beyond which a prospectus is mandatory – increasing from 5 million) will apply from July 2018, but the majority of the provisions will apply as from 21 July 2019. The new regime will not apply retroactively.

Level 2 of the Prospectus Regulation includes (i) the Commission Delegated Regulation (EU) 2019/980[97] as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 and (ii) Commission Delegated Regulation (EU) 2019/979[98] with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301.

As regards Level 3, on 12 July 2019, ESMA issued (i) the Questions & Answers on Prospectus Regulation[99] and, on 29 March 2019, (ii) the Guidelines on risk factors under the Prospectus Regulation[100].

3.2 The new Prospectus summary regime

The Prospectus Regulation sets out a new regulatory framework for summaries. Typical summaries under the Prospectus Directive were often dozens of pages long[101]. According to the new regime, the length of the summary is limited to seven sides of A4[102]; the summary must contain no more than 15 of the most material risk factors, and it must be laid out in a way that is "*easy to read*", "*in language which is clear, nontechnical, concise and comprehensible*" with content that is "*accurate, fair, clear and not misleading*". The new summary will be made up of four sections, containing an introduction, key information on the issuer, key information on the securities and key information on the offer.

Our view on these new provisions is, on the whole, positive, albeit with some room for improvements. These innovations go in the right direction of making prospectuses more flexible and comparable, with a strong focus on accessibility. Currently, summaries included in prospectuses are generally quite long and confus-

97 Commission Delegated Regulation (EU) 2019/980 of 14 march 2019 [2019] OJ L166/26.

98 Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 [2019] OJ L166/1.

99 ESMA, Questions & Answers on Prospectus Regulation, ESMA/2019/ESMA31-62-1258, Version 2, Last Updated on 12 July 2019.

100 ESMA, Guidelines on risk factors under the Prospectus Regulation, ESMA/2019/ESMA31-62-1257, 29 March 2019.

101 Regarding the length of the summary, art. 24(1) of the 2004 Prospectus Regulation imposed a general limit of 7 per cent of the length if the prospectus or 15 pages, whichever was shorter, but provided that the length of the summary should take into account the complexity of the issuers and of the securities offered.

102 Eight if the summary contains information about a guarantee attached to the securities.

ing[103]. Therefore, amending the current regime in order to make it more flexible and with the aim of creating an easy (or easier)-to-read summary, is a good starting point from which to pursue the final goal of mandatory disclosure. Nonetheless, some of the amendments seem to be too ambitious, and will continue to be costly for issuers without truly benefitting investors[104]. More specifically, they do not seem to be informed by behavioural economics findings – which would have been a step in the right direction –, which suggests presenting information in a specific way. The specific summary of the EU Growth prospectus is shorter than the summaries for other types of prospectuses (six sides of A4 paper), but again without mandating information to be presented according to suggested behavioural economics techniques.[105]

Indeed, as evidenced above and as recently highlighted[106], in light of the many biases that have been identified by empirical studies and that make the decision-making process inherently flawed, "framing" has become crucial for prospectus summaries. How information is framed has a direct impact on the level of engagement of consumers. In other words, the way in which information is presented is directly linked with *how much* of such information investors are able to absorb. Therefore, rather than focusing on length, main sections, general headings and other minor differences, the new regime should have focused *more* on how the information must be framed, and specifically for instance on the use of a different colour for each risk factor relating to both the likelihood of the risk occurring and the potential impact on the business.[107]

A possible side-effect of an effective prospectus summary is that it can generate overconfidence in consumers, thus leading them to ignore the full prospectus; it can actually be either a drawback or an advantage, depending on the idea that one may have of the effectiveness of the disclosure. While views may differ on the usefulness of disclosure for retail investors ("*a mythological non-professional prospectus reader*"[108]), making retail investors read and fully understand *at least* the summary would be already a success for policymakers.

103 As acknowledged by the Commission itself; "*Currently, instead of being a document which is short, simple, comparable and easy for targeted investors to understand, a summary tends to be lengthy, generic and technical and does not help much to improve the knowledge of the average investor about potential investment opportunities and risks*", Commission. Commission Staff Working Document, Impact Assessment, COM(2015) 583. See also Ten Have, The summary and risk factors, in D. Busch - G. Ferrarini - J.P. Franx (edt by), Prospectus Regulation and Prospectus Liability, cit., 267 ff.

104 For instance, according to ten Have (*ibid.*), from the issuer's perspective, the new rules will lead to a tension between, on the one side, the requirement that the summary will have to be "*accurate, fair and not misleading*" and, on the other, the limits to size and contents of the summary itself. The risk of overconfidence is also highlighted in A. Perrone, *Il diritto del mercato dei capitali,* 2018, 84.

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

106 S. Rosov, Designing a European summary prospectus using behavioral insights, CFA Institute, 2017.

107 For a detailed representation, *see* S. Rosov, *Designing a European summary prospectus using behavioral insights*, CFA Institute, 2017, 26.

108 L. Enriques, *EU Prospectus Regulation: Some Out-of-the-Box Thinking, ibid.*

Conceptually, the summary is now much more modelled on the key information document under the PRIIPs regulation.[109] This would allow investors to benefit from a disclosure document which is "*much shorter and from which it is much easier to grasp the relevant information than it is currently in a prospectus summary*"[110] as well as improving the comparison of different investment products. It may also benefit issuers insofar as the document itself will be shorter and thus require less administrative effort.

Nonetheless, KID is thought to work as "*a stand-alone document*", clearly separate from marketing materials and it will not contain cross-references to marketing material (even if it may contain cross-references to other documents including a prospectus)[111]. This raises an additional question: if summaries mirror the KIDs required under PRIIPs Regulation, and if KIDs are thought to be self-standing pieces of disclosure provided to investors, we should ask ourselves whether a prospectus for retail investors is needed *at all*. In other words, if the document – like the KID – is thought to work as a stand-alone document focused on the investment features of the product, should non-professional investors be provided with a prospectus in the first place? If not, the selling intermediary will only be held liable in the case of breach of conduct of business rules, mis-selling the financial product. Therefore, it is currently not entirely clear what the role and the purpose of the summary should be in the context of the prospectus. Probably, only to "*ensure that investors are not deterred from reading it* [...]"[112].

Additionally, the thresholds of seven pages and (more importantly) 15 risk factors are arbitrary numbers. It is clear that the role of the supervisory authorities will become of utmost importance in the context of the selection of the 15 risk factors which will be included in the summary. Indeed, a hard threshold may not be appropriate for all transactions, the issuers, and, ultimately, investors themselves. Rather, a flexible threshold approach (not based on an absolute number of pages, but on a percentage of the prospectus's pages) would make the summary shorter or longer depending on the length and complexity of the document.[113] If the 7% threshold has proven to be ineffective, a lower (but flexible) threshold would be more appropriate.

From a comparative perspective, the United States Form S-1 requires issuers to publish a summary, which contains certain selected information already included the prospectus. This information is presented at the beginning of the prospectus on pages that are marked with a box border, which is why the summary section is re-

109 "Advantages *resulting from the reform of the prospectus summary and the introduction of a searchable prospectus database are more difficult to quantify: the impact assessment relies on a more qualitative assessment in these respects. Nevertheless, the rationale for reforming the prospectus summary builds on the work already carried out, including consumer testing, in the context of the key information document for packaged investment products. (PRIIPS KID)"*, Commission Staff Working Document, Executive Summary of the Impact Assessment, COM(2015) 583.

110 Commission. Commission Staff Working Document, Impact Assessment, COM(2015) 583, p. 38.

111 Regulation (EU) 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), Article 6.

112 Prospectus Regulation, Whereas (30).

113 Assuming that a positive correlation between the complexity and the length of the document exists.

ferred to as the summary box, or the "box." The "box" sets out the issuer's history and value proposition in a few easy-to-read pages[114]. The extent of the information required to be included in a summary prospectus by Form S-1 is similar to that which has to be included in the summary under the EU regime; nonetheless, no specific framing is required (except for the "box" itself).

3.3 New rules on risk factors

According to the new regime, disclosure must be limited to risk factors "*which are specific to the issuer and/or to the securities*", categorized, and ordered by materiality ("*The risk factors shall be presented in a limited number of categories depending on their nature. In each category the most material risk factors shall be mentioned first* [...]"[115]).

The specificity requirement clearly aims to avoid the inclusion of general or boilerplate risk factors[116]. Most of the supervisory authorities, however, already required issuers to only include risk factors specific to the issuer in the prospectus, and thus the practical impact of this (positive) amendment will be limited in certain jurisdictions. Nonetheless, issuers often tend to adopt an overly inclusive approach, in order to try to limit their liability *vis-à-vis* investors. Such tendency will now be significantly reined in, with the regulator's intention to put the emphasis on investor protection preventing the recurrence of risk factors serving uniquely as disclaimers and harmonizing local practices. Moreover, from a comparative perspective with the U.S. (and in any case for issuers using Reg S and Rule 144A), this amendment is entirely in line with U.S. rules and with the SEC which require issuers to avoid generic and "boiler-plate" risk factors.[117]

Practitioners have argued that ordering risk factors by materiality would not provide "*any clear benefit* [...]" and that "*ordering risk factors by materiality will make it harder for issuers to order risk factors thematically or in a more logical way, which may end up making their presentation less helpful for investors*".[118] This would appear, however, to be one of the most useful - albeit imperfect - innovations by the new regime. First of all, readers may in practice be confused by the order in which risk factors are presented. Presenting risk factors in any other order than their materiality (*i.e.*, in a "logical" order or by "subject matter") would allow issuers to "hide" material

114 See for instance, in US law practice, Latham and Watkins LLP, *US IPO Guide*, 2019.

115 Prospectus Regulation, Art. 16, "*Risk factors*"

116 ESMA Guidelines on risk factors under the Prospectus Regulation, Final Report, 29 March 2019 I ESMA31-62-1217, 6. See also G. Strampelli, *The Contents of the Prospectus: Rules for Financial Informations*, in D. Busch – G. Ferrarini – J.P. Franx, *Introduction*, in D. Busch – G. Ferrarini – J.P. Franx, *Prospectus Regulation and Prospectus Liability*, cit., p. 167 ff. and V. de Serière, *The Contents of the Prospectus: Non-Financial Information and Materiality*, in D. Busch – G. Ferrarini – J.P. Franx, *Introduction*, in D. Busch – G. Ferrarini – J.P. Franx, *Prospectus Regulation and Prospectus Liability*, cit., p. 193 ff..

117 See Item 503(c) of Regulation S-K. See also Plain English Disclosure, SEC Release No. 33-7497 (Jan. 28, 1998); SEC Division of Corporation Finance, Updated Staff Legal Bulletin No. 7: Plain English Disclosure (June 7, 1999); and Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 33-10064 (April 13, 2016).

118 The new prospectus regime: impact on debt capital markets, Slaughter and May, July 2017

risk factors in the meshes of "a subject-based order" or a blurred "logical order" and make them harder to detect for investors. Instead, by requiring that "*the most material risk factors shall be mentioned first*", the Regulation has attempted to create a safe harbour for investors, who will be certain that all the material risk factors will be mentioned first, independent of any (obscure) "logical order" that the issuer would have otherwise followed. The "categorization" required by Article 16 of the Prospectus Regulation, however, does not entirely contribute to attaining this goal.

The materiality requirement increases the burden on issuers, and requires them to assess more accurately the weight and the potential consequences of each risk factor. In many ways, each risk factor is part of a larger universe and it is influenced by different variables; therefore, a subjective assessment of the "materiality" of each risk factor compared to others is complex. In the context of such assessment, issuers will probably have to clarify (or weight in the materiality of the risk factor itself?[119]) that certain risk factors are more or less likely to occur, independent of their materiality, also paying attention not to include any mitigating language[120]. Guidance from national authorities on this matter will be needed, at least to understand the interplay between materiality and the probability that a certain factor will occur.

Issuers are also allowed to disclose the assessment of materiality of the risk factors included in the disclosure documents by using "*a qualitative scale of low, medium or high*"[121].Such scale would be actually helpful for investors, and to an extent resembles the idea of pairing risk factors with colours, as suggested for the summary; law practioners have already pointed out, however, that issuers might be concerned with the potential liability attached to any failure to disclose adequately the risk factors in the required order, especially due to the risk of being judged in hindsight to have wrongly categorized a risk as having low materiality.[122]

The "categorization" requirement, which requires issuers to organize risk factors in (ten) different categories pertaining to the issuer and the securities, should, in theory, aid investors in navigating the risk factors section and improve prospectuses' comprehensibility.[123] The Guidelines now require, for instance, that risks related to the "*issuers' business activity and the industry*" are discussed within a single category.

119 Ten Have (ibid.). According to this Author, the inclusion of risk factors plays a double role: on the one side, it warns the investors about the risks; on the other, it also is "*an important line defence for the company*", and this latter aspect might lead the issuer to include a higher number of risk factors in order to avoid liability, in the future, in case of occurrence of events which might harm the investors.

120 "In ESMA's view mitigating language serves an additional and beneficial purpose of ensuring that prospectus risk factor disclosure is not overstated to such an extent that it would unnecessarily deter prospective investors. ESMA's approach, when preparing the draft and final guidelines, has been to try and strike a balance which ensures that risk factor disclosure allows the investor to correctly assess the risks"; see ESMA, Draft technical advice on content and format of the EU Growth prospectus, ESMA31-62-649, 6 July 2017, §56.

121 Prospectus Regulation, Art. 16(1), "Risk factors".

122 D. Polk & Wardwell, The new EU Prospectus Regulation and ESMA draft technical advice: impact on capital markets transactions, in https://www.davispolk.com/files/2017-07-21_new_eu_prospectus_regulation_esma_draft_technical_dvice_impact_capital_markets_transactions.pdf (2017).

123 ESMA Guidelines on risk factors under the Prospectus Regulation, Final Report, 29 March 2019 I ESMA31-62-1217, VI.4. Guidelines on Presentation of risk factors across categories, 37.

In the past, some prospectuses use to include completely separate sections related to the business and to the industry, which was hostile for investors.

In U.S. prospectuses, it is not uncommon to find risks related to the business and the industry in which a certain issuer operates discussed *together*, especially in light of the fact that they are deeply interrelated.

A separation between risk factors related to the issuers' business and the industry in which they operate might be useful only insofar as the business of the issuer is diversified, *i.e.* the issuer operates in many different unrelated sectors. For instance, for conglomerates (such as General Electric or Siemens, two of the largest US and EU conglomerates, respectively) active in many different sectors (*e.g.*, energy, healthcare, aviation etc.) it makes sense to categorize the risk factors and, in each category, present them in a materiality order. In other words, the categorization is useful when the issuer is *complex*. On the other hand, many other issuers' businesses are relatively straightforward; the two (old) categories of risk-factors are often interrelated and presenting them in different sections will only add confusion to an (already) complex document. In a nutshell, creating different categories of risks is not *always* a good idea, and does not *necessarily* facilitate the reading of the prospectus. Indeed, if two categories are strictly interrelated (such as the issuer's business and its industry), it might also undermine the value of the "materiality approach".

Complying with art. 16 of the Prospectus Regulation will not entail additional costs. During the drafting sessions, the parties involved in the process will still identify the material risk factors related to the issuer. Most of the job is thus already done, and the remaining effort would only consist in reflecting the order in the document. Secondly, from a comparative perspective, new rules will benefit issuers that are willing to offer their securities to international investors under Reg S and Rule 144A – and will therefore prepare an offering memorandum presenting risk factors according to their materiality. The result is a much clearer and easier-to-read document.

3.4 Simplifying disclosure for SMEs and SMEs growth market

Securities law reforms over the past years have greatly increased the regulatory burden for companies accessing public equity markets. The burden of this "*inflexible*" regulatory choice is magnified for smaller companies, since costs related to disclosure are mostly fixed (and thus overall costs do not vary in perfect direct proportion to the sums raised)[124] and weight more on smaller companies than on large, structured, issuers.[125] This has created, in conjunction with the credit crunch that

124 Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading SWD/2015/0255 final - 2015/0268 (COD), 3.2.1.

125 As illustrated in the Impact Assessment (SWD/2015/0255 final - 2015/0268 (COD)), a study estimates that listing costs can account for 10 to 15% of proceeds for IPOs of less than EUR 6 million and only 5 to 8% for IPOs above EUR 50 million. See European Issuers and the Federation of European Securities Exchanges, Guide to Going Public in Europe. For companies thinking of listing on a European exchange and their advisers, 2013.

occured in the aftermath of the 2008 financial crisis, a bottleneck in the access to liquidity and funding for SMEs, creating an additional obstacle to accessing capital markets.

Acknowledging the need for a "proportionate disclosure" (in respect of the economic capabilities of the issuer), the regulator has tried to reduce the associated administrative costs, in order to ease access to markets for smaller issuers. The Prospectus Regulation, its relating technical provisions and the subsequent reforms occurred in recent years are somehow an example of this trend, as the European legislator tried to create a more favourable environment for small issuers.

The cornerstone of this more flexible approach is the new "EU Growth Prospectus" regime, which allows SMEs to draw up a simplified, lighter and standardized document when offering securities to the public. This is a step forward in the context of allowing SMEs to access capital more easily, even though much more could have been done in terms of regulating SMEs markets (but this is a somewhat different issue)[126].

With this goal in mind, art. 15 of the Prospectus Regulation sets out new rules intended to simplify disclosure for SMEs, which include, *inter alia*, eliminating the requirement to publish accounts in IFRS, which can be very onerous for a small issuer and was considered to be a barrier to entry to capital markets[127]. Based on the proportionality approach, the Commission Delegated Regulation (EU) 2019/980 provides content and format of the EU Growth prospectus and requires that certain additional disclosure requirements only apply to equity issuances by companies with market capitalization higher than Euro 200 million[128].

Article 14 of the Prospectus Regulation did not allow the use of a simplified prospectus for issuers whose equity securities have been admitted to trading on either a regulated market or an SME growth market continuously for at least the last 18 months and that would seek to issue securities giving access to equity securities

126 See Perrone, A., "Light" disclosure regimes: the EU growth prospectus, D. Busch - G. Ferrarini - J.P. Franx (edt by), Prospectus Regulation and Prospectus Liability, cit., p. 229 ff. extensively on the problems of SME market-based finance, including (a) higher asymmetry of information and moral hazard risk; (b) general illiquidity of the secondary market; (c) costs of compliance for issuers; (d) opposition from the banking market; Id., Small and Medium Enterprises Growth Markets, in D. Busch - E. Avgouleas - G. Ferrarini (edt by), Capital Markets Union in Europe, cit., 253-267, that suggests the creation of a "centralized pan-European SME market promoted by the European Commission (hereafter EC) and a single mandatory regime featuring a strong focus on liquidity and investor protection". According to Enriques, What should qualify as a 'SME Growth Market'?, in Oxford Business Law Blog, January 26 (2018); https://www.law.ox.ac.uk/business-law-blog/blog/2018/01/what-should-qualify-sme-growth-market), "a better way to favour SMEs' access to public markets by building upon the new SME Growth Market label would be to allow regulated markets or segments thereof to be treated as such but at the same time to restrict new admissions to SMEs only". Some risks relating to the issuance of simplified disclosure documents must be considered, however. In such respect, it is worth mentioning an analysis carried out in the Canadian SME stock exchange, that highlighted that the link between a lighter disclosure regime and "very poor returns for investors" see C. Carpentier - J.M. Suret, Entrepreneurial Equity Financing and Securities Regulation: An Empirical Analysis, in International Small Business Journal (2012), p. 41.

127 Issuers are allowed to use the annual financial statements prepared under national accounting standards, which in some cases may not include the same level of information required under IAS/IFRS. See, ESMA, Draft technical advice on content and format of the EU Growth prospectus, ESMA31-62-649, 6 July 2017, §70.

128 For instance, the strategy performance and business environment (including structure, trends, and operating and financial review), working capital statement and statement of capitalization and indebtedness.

fungible with equity securities previously issued. Such provision was considered to be excessively burdensome, and the issue has been fixed by the SME Listing Package (Regulation (EU) 2019/2115; *see* Whereas 14 and Article 2(2)). Equally, the SME Listing Package allowed issuers whose securities have been offered to the public and admitted to trading on an SME growth market continuously for at least two years, and who have fully complied with reporting and disclosure obligations throughout the period of being admitted to trading, and who seek admission to trading on a regulated market of securities fungible with existing securities which have been previously issued, to avail themselves of the simplified disclosure regime under Article 14 of the Prospectus Regulation (*see* Whereas 15 and Article 2(2) of the SME Listing Package).

It is worth noting that also the U.S. has been moving in the same direction with the Jumpstart Our Business Startups ("JOBS") Act aimed at reducing the regulatory burden for "emerging growth companies", defined in the Securities Act and the Exchange Act as an issuer with "total annual gross revenues" of less than $1 billion[129] The JOBS Act, for instance, allows emerging growth companies to provide only two years of financial information in the IPO prospectus, when at least five years of financial information was previously required[130], extended compliance periods for some new accounting standards, and reduced the requirements relating to executive compensation disclosure.

3.5 Universal Registration Document

One of the useful innovations included in the Prospectus Regulation is the Universal Registration Document ("URD"). The URD is based on and has the same rationale as the "shelf registration" regime under U.S. law, and as the *document de référence* in France.[131] The aim is to ensure that the issuer can have the disclosure documents available "on the shelf", tapping the market whenever they believe it is best, including by taking advantage of favourable market conditions. In other words, information relating to the issuer in the registration document can be prepared and kept up-to-date "on the shelf", to be used at a later stage.

The characteristics and rules related to the URD could significantly shorten approval times across the EU, thereby alleviating the burden of disclosure for frequent issuers, since the document can also be used to fulfil the obligation to publish the annual or half-yearly financial report required under Articles 4 and 5 of Directive 2004/109/EC[132] (the Transparency Directive).

129 U.S. Securities and Exchange Commission, Spotlight on Jumpstart Our Business Startups (JOBS) Act. Available at: https://www.sec.gov/spotlight/jobs-act.shtml

130 Lori Schock, Outline of Dodd-Frank Act and JOBS Act, June 9, 2012 – speech. This may mean that investors may not have more financial history to consider, but companies may find this revised requirement less of a burden

131 Commission. Commission Staff Working Document, Impact Assessment, COM(2015), 5.2.2. See also D. Fischer-Appelt, *Prospectus Formats and Shelf Registration*, cit., p. 304 ff. E R. ten Have, *The Summary and Risk Factors*, in D. Busch – G. Ferrarini – J.P. Franx, *Prospectus Regulation and Prospectus Liability*, cit., p. 267 ff.

132 Article 9(12) of the Prospectus Regulation.

Under the EU regime, frequent issuers will be required to file a universal registration document "*every financial year*" (Article 9(2) of Prospectus Regulation). It is quite rare, however, that issuers will need a prospectus "every financial year" for an equity issuance, and thus the obligation to publish a universal registration document every financial year may prove to be inefficient. At the same time, updating a universal registration document which has already been filed and approved by the national competent authority will probably not require a huge effort, and thus *some* issuers which are willing to tap the market multiple times over the course of long period, may choose to use the universal registration document tool.

A cause of concern under the new regime is that the disclosure standards for the universal registration document should be based on those for equity securities, the reason being that it "*should be multi-purpose insofar as its content should be the same irrespective of whether the issuer subsequently uses it for an offer of securities to the public or an admission to trading on a regulated market of equity or non-equity securities*" (Recital (39) of the Prospectus Regulation). Nevertheless, such feature could dissuade debt issuers, especially because the level of disclosure required for equity issuances is higher than that required for debt issuances, which would probably more likely to use universal registration documents.[133]

From a comparative perspective, it seems that the U.S. "shelf registration" regime is less burdensome and quicker for issuers. It does not require the filing of a document "each financial year"; instead, if eligibility conditions set out under Form S-3 are met, issuers are only required to file an initial registration statement that contains a "core prospectus". The core prospectus in the registration statement contains only general information and omits certain specific types of information. The omitted information, and any more specific information about a particular offering, are included in the registration statement using either a prospectus supplement or a post-effective amendment to the registration statement. When the company believes that the market has the right momentum to offer its securities, it then takes them "off the shelf". Moreover, unlike the EU regime, where the securities note and the summary must be approved by the relevant NCA, in US securities can be taken off the shelf for issuance without SEC review and without the need for a prospectus supplement relating to the takedown to be declared effective.[134]

3.6 Liability regimes across Member States (Germany, France, Ireland, Luxembourg, United Kingdom, Italy)

Securities litigation and liability regimes related to securities issuances in Europe is largely based on national law.

133 See: https://www.esma.europa.eu/sites/default/files/library/esma31-62-532_cp_format_and_content_of_the_prospectus.pdf. For instance, information regarding compliance with relevant corporate governance regime(s) and details of audit committee members, or information concerning the last 2 (instead of 3) financial years are not required for retail non-equity issuances as their importance for debt investors is significantly lower. See also D. Fischer-Appelt, Prospectus Formats and Shelf Registration, in D. Busch – G. Ferrarini – J.P. Franx, Prospectus Regulation and Prospectus Liability, cit., p. 295 ss.

134 Morrison & Foerster LLP, Understanding Shelf Registration Offerings, 2009.

The absence of a harmonized prospectus liability regime has been one of the most debated issues in relation to the prospectus liability regime in Europe. In particular, while the Prospectus Directive established an harmonized framework for disclosure, it did not contain any harmonized provision in respect of civil liability for incorrect information included in a prospectus or other infringements relating to prospectuses,[135] and the Prospectus Regulation framework, which repealed the Prospectus Directive, did not introduce any noticeable amendment on the matter.

Indeed, the Prospectus Directive merely stated that Member States shall ensure that national provisions related to prospectus civil liability apply to those who are responsible for the information included in the disclosure document. In particular, under Article 6(2) of the Prospectus Directive – and Article 11 of the Prospectus Regulation –, Member States are only required to ensure that that their "*laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus*"; moreover, one of the few substantive provisions related to prospectus civil liability included in the Prospectus Directive referred to liability attached to the prospectus summary, which has not changed under the current regime[136].

Therefore, civil liability for prospectuses has developed and evolved over the years under national regimes and still remains a matter of national law. This has led to the development of significant differences in the way prospectus liability is regulated in European jurisdictions, on several key aspects.

For instance, in certain EU Member States the burden of proof is reversed. In other words, the claimant has no obligation to invoke or prove fault on the part of the wrongdoer, but rather, in order to be exonerated, the latter must prove that the damage was not the result of his fault[137].This is the case, for instance, of Greece or Netherlands. Indeed, in Greece the "*persons responsible for the completeness and accuracy of the prospectus are liable unless they can prove that they did not know about the untrue or missing information and that their ignorance is not caused by fault (intent or negligence)*"[138]. In the Netherlands, whenever the claim falls within the scope of an unfair commercial practice or misleading advertisement, the burden of proof is also reversed[139]; in particular, "*the defendant is assumed to be liable for the*

135 ESMA's Report, Comparison of liability regimes in Member States in relation to the Prospectus Directive, 30 May 2013 | ESMA/2013/619.

136 Article 6(2) of Prospectus Directive provided that "*However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus*" and Article 11 of Prospectus Regulation clarifies that "*However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof, unless: (a) it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus; or (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities".*

137 ESMA, *Comparison of liability regimes in Member States in relation to the Prospectus Directive, Individual Responses from EEA States*, Annex III, 30 May 2013 | ESMA/2013/619, Greece, 100.

138 *Id.* Article 25(3) of Greek Law 3401/2005.

139 *Id.* Section 6:193j of the Dutch Civil Code and section 6:195 of the Dutch Civil Code. See also Arons, T.M.C, & Pijls, A.C.W, Prospectus liability in the Netherlands: Consequences of the Unfair Commercial Practice Rules, in *Financial*

damages incurred due to the prospectus unless he proves these damages are not incurred due to his fault" and "*that the prospectus was materially correct and complete*"[140].

Also worthwhile, in some jurisdictions the fault of the defendant does not even need to be established, since strict liability regime applies[141]. Moreover, since the civil liability regime is based on national laws, the time limit to file a claim also differs quite significantly across countries. The range is between the one year from the date when the public offer was closed in Romania, to the thirty-year limitation period in Luxembourg. The time limit varies also significantly on the basis of when the limitation period begins, with different States having different rules (from the knowledge/occurrence of damage or from the date the securities are offered, the date of publication of the prospectus or the date on which the securities were bought, from the term of validity of the prospectus or the date of the closing of the offer)[142].

On top of this, legal consequences for incorrect prospectus information also vary. Generally, speaking, in most European countries the plaintiff can request the reimbursement of the difference between the acquisition price and the disposal price for the shares or the actual value of the security as damage. In some jurisdictions, however, the plaintiff may also request to rescind the contract, thus requesting the restoration of the *status quo ante* (restitution in kind)[143].

An equally important legal tool in the context of prospectus liability is the impact of class action; liability arising from false or misleading information included in a prospectus is naturally inclined to be subject to class actions. Leaving aside the fact that the regulatory frameworks of some Member States do not even contemplate the class action tool (or, if such instrument exists, it is deemed as not applicable to

Law in the Netherlands / Edited by Marcel C.A. van den Nieuwenhuijzen (cop. 2010), 2010, 15.6.3 and Arons, T., *Prospectus Liability in Europe. Within the EU, the burden of proof for misleading statements varies significantly,* International Focus, 2017.

140 In a normal case, the investor bears the burden of proof to assert the damage and causality necessary to establish liability. The milestone judgement in the Netherlands is Vereniging van Effectenbezitters c.s. / World Online International c.s (HR 27 November 2009, JOR 2010/43), in the context of which much relevant information was not (and should have been) disclosed in the prospectus. In particular, World Online floated on the Amsterdam Stock Exchange in early 2000. The IPO was priced at €43 per share. Even if the offer was largely oversubscribed and that in pre-launch trading in London's grey market shares hit a price of €72, on its second day of trading World Online tumbled 16% below its listing price. By end of March the stock was trading at €30 and continued to fall over the next days, its value plunging from an original valuation of €12 billion to €5 billion in just a few days. The issue revolved around the fact that shareholder Nina Brink sold her stake prior to the flotation for $6.04 per share, and the circumstance was not disclosed in the prospectus. More specifically, the prospectus included the information that Nina Brick "transferred" her stake, but did not contain any information on the selling price. The Dutch Supreme Court held that the IPO prospectus was incorrect and incomplete, that World Online disseminated misleading information before the IPO, and that the lead managers had taken insufficient action to correct the misleading information (*see* Ouwehand, Teerink, Graaf, Beerlage, *Key implications of Supreme Court ruling in World Online*, International Law Office, March 2010, available at: https://www.internationallawoffice.com/Newsletters/Litigation/Netherlands/Clifford-Chance-LLP/Key-implications-of-Supreme-Court-ruling-in-World-Online).

141 For instance, in Czech Republic, Estonia and Ireland. See ESMA, Comparison of liability regimes in Member States in relation to the Prospectus Directive, Individual Responses from EEA States, Annex III, 30 May 2013 | ESMA/2013/619, 14.

142 ESMA, *Id.*, 15-16.

143 See R. Veil, *European Capital Markets*, Hart, 2017, p. 307.

securities litigation)[144], where the tool is available the conditions that must be met in order to actually file a class action suit against the issuer are significantly different. This, again, hinders the idea of a level playing field in Europe, and creates asymmetries among Member States on a crucially important matter: the protection of investors.

Having a complete, coherent and – more importantly – single and common regulatory framework on liability related to securities to be offered to the public would be of great importance[145] for issuers as well, especially in light of the implications of the Kolassa Case[146,] where the Court of Justice of the European Union clarified that a securities issuer from one EU Member State which notifies a prospectus in another Member State may face civil actions by investors for prospectus liability in the courts of that second Member State[147].This implies that an issuer may potentially face liability in different jurisdictions with different rules, and may, paradoxically, be held liable in certain jurisdictions and avoid liability in others. It also implies that investors are more or less protected depending on the policy chosen by the single Member State. Therefore, the above-mentioned discrepancies in civil liability as well as those in administrative and criminal liability regimes create distortions both on the offering side and on the investors' side, and a harmonized regime would be a step in the right direction.

Equally convoluted is the governmental liability regime. In suh respect, a detailed analysis is included in paragraph g. below.

As mentioned, the new Prospectus Regulation has not changed the liability regime at issue. The new set of rules was intended to make prospectuses more comparable, which in turn may help the future creation of a more uniform case law on prospectus liability across Europe, but it has not changed the substance of liability provisions (which, still, entails the fields of civil, administrative and criminal liability,

144 For instance, Belgium, Austria, Cyprus, Czech Republic. For Italy and Germany, see the paragraphs below.

145 The European Banking Federation, in the context of its response to consultation document on the review of the Prospectus Directive, clarified that a harmonized liability framework across Europe would be more appropriate than the existing framework; "*The Prospectus Directive as currently in force leaves the specific manifestation of the liability and sanctions regime to the Member States. For the sake of both clarity to market participants (including investors) about the different regimes in place, and a level playing field among issuers the EBF would highly appreciate a common framework to address administrative, criminal, civil and governmental liability. Such common framework does not necessarily require a full harmonisation of existing liability and sanctions regimes. We are well aware that any prospectus related administrative, criminal, civil and governmental liability is deeply embedded in the legal system of each Member State and closely interacts with other liability and sanctions regime, e.g. advisory liability, misselling etc., a full harmonisation would imply a disproportionate interference with the national system. On the other hand divergent sanction regimes across Member States may generate distortive markets. Therefore, in order to achieve a level playing field among issuers we need further harmonisation of all legal sanctions by way of minimum harmonisation which sets forth principle rules. It should be clarified that any liability attached to this prospectus follows the laws of the EU Member state under which the securities are issued*"; see European Banking Federation, EBF response to consultation document on the review of the Prospectus Directive, 27 May 2015, EBF_014393, 17. Available at: https://www.ebf.eu/wp-content/uploads/2017/01/EBF_014393H-EBF-response-to-CP-on-Prospectus-Directive.pdf.

146 Harald Kolassa v Barclays Bank plc., C-375/13; ECLI:EU:C:2015:37.

147 For an analysis of the decision, see M. Gargantini, Jurisdictional Issues In The Circulation And Holding of (Intermediated) Securities: The Advocate General's Opinion In Kolassa v. Barclays', in Riv. dir. inter. priv. e proc., 2014, p. 4; M. Lehmann, Prospectus *Liability and Private International Law - Assessing the Landscape after the CJEU Kolassa Ruling (Case C-375/13)*, in 12 *Journal of Private International Law*, 2 (2016); M. Haentjens & D.J. Verheij, *Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit*, in 6 *JIBLR* 346 (2016).

matters which have been traditionally left to Member States, being them core aspect of the structure and functioning of each jurisdictions).

In particular, the Prospectus Directive provisions on liability have also been included with no substantive changes in the Prospectus Regulation. Therefore, under the Prospectus Regulation regime, liability may only arise under different circumstances related to new, substantive provisions of the regulatory framework, while the liability rules themselves remained unchanged. For instance, one of the new provisions that worried issuers was the one related to the miscategorization of risk factors. And yet, these issues did arise and would have arisen under the directive as well. They only relate to the interpretation of the wording of a certain provision. Instead, what matters most is that a good opportunity to design and harmonize the prospectus liability regime in Europe, which was the most appropriate and efficient course of action, has been missed

The following paragraphs provide a snapshot of the relevant national rules on prospectus liability regimes. The Member States considered are those already indicated in the context of the previous analysis on the number of prospectuses approved between 2006 and 2017, and namely Germany, France, Ireland, Italy, Luxembourg, Sweden and the United Kingdom:

Germany

In Germany, a specific set of rules on prospectus civil liability have been embedded in the German Securities Prospectus Act[148]. These rules apply in addition to the general German legal framework on civil liabilities, which may still apply in residual cases[149].

Under these rules, the persons who assume responsibility for the prospectus, as well as those persons who are involved in its issuance, can be held responsible[150]

148 Wertpapierprospektgesetz or, hereinafter, *WpPG*.

149 See Sec. 25(2) WpPG. Currently, in Germany it is possible to detect three separate legal regimes for prospectus liability (i) the first is the one outlined in the WpPG for securities traded on organised markets; (ii) the second is a residual regime for all other securities under sec. 20 ff. of the *Vermoegensanlagengesets*; and (iii) a general civil prospectus liability under sec. 280 and 311 BGB. Regimes under par. (i) and (ii) ar however almost identical. See Mock, *Germany*, in *Prospectus Regulation and Prospectus Liability*, by Busch, Ferrarini, Franx (ed.), Oxford, 2020; Muelbert – Steup, *Haftung fur fehlerhafte Kapitalmarktinformationen*, in Habersack, Muelbert, Schlitt (ed.), *Unternehmensfinanzierung am Kapitalmarkt*, Koeln, 2019.

150 See sec. 21(1) WpPG. It is worth mentioning that, in case a person assumes only responsibility for a certain part (or certain parts) of the prospectus, this person would only be liable for the incorrectness of such parts. However, at least one person needs to be responsible for the prospectus as a whole. Persons who are responsible for the issuing of the prospectus are persons who have not signed the prospectus but who are nevertheless to be considered as the factual initiator of the prospectus, among other things because of their own economic interest in the issue (e.g., principal shareholders, members of the board of directors). Civil liability for failure to publish a prospectus under the Securities Prospectus Act attaches to the issuer and the offeror (See section 24 (1) WpPG). See ESMA, Comparison of liability regimes in Member States in relation to the Prospectus Directive, Individual Responses from EEA States, Annex III, 30 May 2013 | ESMA/2013/619, 88. Secondary actors (e.g., attorneys, auditors) are not addresees of the liability provisions mentioned above, However, it can be affirmed that such persons can be held liable for misrepresentations, omissions or other fraudulent conducts if they act wilfully and knowingly and, form the perspective of the purchaser, they perform a position of trust for the correctness of essential information on the offer and trade of the relevant securities (i.e., the legal advisers that issue a legal opinion in the context of an issuance while knowing that the underlying statements are false or incorrect can be deemed liable under sec. 826 BGB). See Mock, ibid..

vis-à-vis investors[151]. Generally speaking, such persons can be held responsible where information published in a prospectus and that are material for the assessment of the securities are proved incorrect or incomplete[152], and also where a prospectus has not been published (where no exemptions are applicable and, therefore, the relevant publications should have been made)[153].

In addition, general rules of civil law on breach of pre-contractual obligation to inform (so called *culpa in contrahendo*) may apply[154]. Moreover, further liability can be assessed for tort, in case of violation of protective law, *i.e.*, where a person commits a breach of a statute that is intended to protect another person[155].

Persons are liable for intent and gross negligence (*i.e.*, a violation of obvious standards of care)[156] but, in case damages are assessed the respondent, in order to be discharged, can prove (i) that it was not aware that the information contained in the prospectus was incorrect or incomplete, and (ii) that such lack of awareness was not the result of gross negligence[157].

In case of a failure to publish a prospectus, either intent or negligence is

151 It is also worth mentioning that, in Germany, a collective scheme for securities litigations, the Capital Investors Model Proceedings Act, has been established in 2005 (KapMuG). Among the most relevant cases it is possible to recall Deutsche Telecom (actually relating to allegedly false statements in a prospectus of 2000), see ref. OLG Frankfurt, 30.11.2016 - 23 Kap 1/06 .

152 See Sec. 21(1) WpPG. Informations are considered to be incorrect if not supported by facts or commercially justifiable. See Muelbert, Steup (ibid.). In such respet, information are also material when an average investor would probably change her or his investment decision on the basis of the correct information. BGH, 18 09 2012, XI ZR 344/11, in NJW 2013, S. 539

153 See sec. 24(1) WpPG.

154 See sec, 311(2) and (3) BGB.

155 See sec. 823 (2) BGB is *inter alia* section 264a of German Criminal Code (Strafgesetzbuch, StGB) which provides a specific provision for capital investment fraud. Moreover, a person can be held liable if it intentionally inflicts damage on another person in a manner contrary to public policy (section 826 BGB).

156 In case of an incorrect or incomplete prospectus, a person is not liable if it can prove (i) that it was not aware that the information contained in the prospectus were incorrect or incomplete, and (ii) that such lack of awareness was not the result of gross negligence (section 23 (1) WpPG). Moreover, a person is not liable if it can prove (i) that the securities have not been purchased on the basis of the prospectus (but on the basis of other reasons), (ii) that the circumstances which are subject to incorrect or incomplete information did not cause a decrease of the market price of the securities, (iii) that the purchaser knew that the information contained in the prospectus were incorrect or incomplete, (iv) that there was a clear and precise corrigendum published in Germany in the context of the annual report or the interim financial statements of the issuer, in an ad-hoc information or a similar publication before the purchase of the securities, or (v) the claim is solely based on information provided in the summary of the prospectus or a translation thereof, but only if the information is misleading, incorrect or inconsistent when read together with the other parts of the prospectus, or the summary does not contain (if read together with the other parts of the prospectus) all necessary key information (section 23 (2) WpPG). In case of a failure to publish a prospectus, a person is not liable if it can prove that at the time of the purchase the purchaser was aware of the obligation to publish a prospectus (section 24 (4) WpPG). Moreover, a person is not liable if it can prove that the purchaser would have purchased the securities even a prospectus was published. It is worth mentioning that for adviser liability, the sole proof of negligence (*i.e.*, the violation of ordinary standards of care) is required. See Schneider, B., *Security litigation in Germany,* in *lexology.com*, 2019.

157 Traditionally, in the German case law, the parameter of awareness and understanding of the prospectus relates to an average investor, which can understand a financial report but has no other specific knowledge; see BGH, 12 07 1982, II ZR 175/81 in NJW 1982, S. 2823; it must be considered, however, that this position seems to have been partly overruled by a subsequent judgement, according to which the Court stated that an average investor has no superior knowledge and does not have the ability to understand financial statements . Moreover, if the prospectus is aimed at inexperienced inverstors, those responsible for its drafting cannot assume that the recipients have a proper knowledge of the market; see BGH, 18 09 2012, XI ZR 344/11, in NJW 2013, S. 539.

sufficient for liability. The same applies to possible claims under tort and contract law.

The claim can be filed by the purchaser of securities in the primary market. It is still under debate the possibility for purchasers on the secondary market; nevertheless, it is noteworthy that claims can be filed only by persons who purchase within the first six months after the public offering[158]. For claims relating to prospectus liability, the general statute of limitations of 3 years apply[159].

It is worth mentioning that, unlike other European jurisdictions, in Germany investors can also demand specific performance, *i.e.*, the return of the securities against reimbursement of the acquisition price[160].

In addition to that, under German law the competent authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* or BaFin) has the power to impose administrative sanctions and/or fines in case of wilful and negligent or gross negligent violations of the applicable legal framework. It is worth highlighting that in such cases BaFin can impose the prohibition of public offer, revocation of approval of a prospectus, suspension and/or prohibition of advertisements[161].

Finally, even though there is no specific criminal prospectus regime in place, German criminal provisions on capital investment fraud are applicable[162].

France

In the French legal system, the assessment of civil liability relating to a prospectus relies entirely on the general legal framework of tort and civil liability[163].

Among the entities that can be held responsible, reference has to be made to the managers of the issuer (which can be held responsible for the entire prospectus[164]), the statutory auditors of the issuer and the investment service provider involved in the first admission to trading of the relevant securities.

158 See Mock, *ibid.*. See also sec. 21 (1) WpPG.

159 The limitation period commences at the end of the year in which (i) the claim arose and (ii) the purchaser obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence. Notwithstanding knowledge or a grossly negligent lack of knowledge, the claims become statute-barred ten years after the date upon which they arise (see sec. 199 BGB).

160 See art. 21(1) WpPG. See G. Veil, *European Capital Markets*, Hart, 2017, p. 307.

161 See sec. 26 WpPG.

162 See sec. 264a of the German Criminal Code.

163 See art. 1240 of the French Civil Code (formerly article 1382, before the 2016 reform). In addition, the Monetary and Financial Code (MFC) and the regulation issued by the market regulator (AMF) provide that investment services provider act "*honestly, farily and professionally*" and "*in the best interest of clients and the integrity of the market*" (see art. L. 533-11 of the Monetary and Financial Code and 314-3 of the relating regulation issued by AMF). It is worth mentioning that Article L 412-1 of the financial and monetary code implements in the the French legislation the provision of the Prospectus Regulation (and before, of the Prospectus directive), according to which no personal can be held liably solely on the basis of information provided in the prospectus summary. See Bonneau, *France*, in *Prospectus Regulation and Prospectus Liability*, by Busch, Ferrarini, Franx (ed.), Oxford, 2020.

164 It is worth highlighting that tue legal representative of the issuers and its executive managing director(s) can be also held liabile in accordance with the general rules on directors liability as provided in article 225/251 of the French Commercial Code.

The fault is ranging from simple negligence to deliberate tortious intent (depending on the case). As in many civil law jurisdictions, the action for civil liability must be grounded on the main 3 elements of the existence of a damage, the fault of the respondent, and the causal link among the two[165].

In France there is no difference between consumers/private investors and professional investors, therefore the liability regime is uniform[166]. In all cases, when the action is grounder on a defective information, proof of such "defectiveness" must be provided, meaning that the information must be proved to be false, misleading, incomplete or insincere.

Damages that are recoverable are material damages, even though the law does not provide specific provisions on the quantification of compensation[167]. French Courts have first adopted an approach in the evaluation of damages based on the "loss of opportunity" for the investor in the *Flammarion* case; subsequently, the Courts have shifted to a more abstract concept of "*general restriction of the freedom of choice*" in the "*Sidel*", "*Gaudriot*" and "*Marionnaud"* cases[168]. The respondent can try to reduce compensation by demonstrating the plaintiff has been in turn negligent (*i.e.*, the prospectus had been amended before the acquisition of the security took place and the plaintiff was not aware of such circumstance).

For claims brought against directors of the issuer, a statute of limitation of 3 years apply[169].

Also in France, the issuer and its senior managers can be subject to the application, by the competent authority (including the *Autorité des marchés financiaires*, *AMF*) of administrative liability rules for information included in the prospectus, as well auditors. Administrative liability in France is objective and, therefore, no intent must be demonstrated.

Moreover, criminal sanctions are provided for persons that publish false of deceptive information[170].

165 See P. Schammo, *EU Prospectus Law: new perspectives on regulatory competition in securities market,* CUP, 2011, p. 272.

166 See Bonneau, ibid.

167 In the Regina Rubens case of 2007, the Paris First Instance Criminal Court awarded compensation to shareholders; while some of the minority shareholders were awarded half of the purchase price of the shares, other were awarded the difference between the purchase price of their shares and the actual price, Ref. Paris First Instance Criminal Court (*Tribunal de Grande Instance de Paris*), 22 January 2007, *Regina Rubens*.

168 T. corr. Paris, 11e ch.1, section 12 (September 2006) no. 0018992026, *Sidel*; Cass. Com. (9 March 2010) nos. 08-21.547 and 08-21.793, *Gaudriot*, Cass. Com. (6 May 2014), nos. 13-17632 and 18437, *Société Marionnaud perfumeries et autres*.

169 See art. L.225-254 of the French Commercial Code. It must be also considered that, where the act is defined as a criminal offence, the said period shall be extended to ten years.

170 Article L.465-2 of the French Monetary and Financial Code. Punishment is thus incurred by whoever publicly disseminates, via whatever channel or means, any false or deceptive information concerning the prospects or the situation of an issuer whose securities are traded on a regulated market, or the likely performance of a financial instrument or asset, as within the meaning of paragraph II of Article L. 421-1, admitted to trading on a regulated market, which might affect the price thereof. There are also general criminal provisions against forgery and the use of forged documents (Article 441-1 of the French Criminal Code).

Ireland

In Ireland, civil liability can arise in case of tort for breach of the Irish rules on prospectus[171] (aside from other cases of contract liability which may arise in the context of an issuance of securities).

Indeed, in case of omission or misstatements in a prospectus, a number of entities, among which the issuer, its directors, and the offeror/promoter, can be held responsible.

The persons outlined above may be liable for loss or damage incurred by a person who acquires securities to which the prospectus relates which is occasioned by them, and which relates to either: (a) an untrue statement[172] or (b) an omission of information required by EU laws. Such persons however may be able to claim one or more exemptions, *e.g.*, the prospectus was issued without the relevant person's knowledge or consent and public notice of that fact was given forthwith on the person becoming aware of that fact[173]. Those persons are be held responsible under a regime of strict liability (i.e. there is no need to prove intent)[174].

The applicable limitation period is two years from the date of accrual of the cause of action, or the date of discovery of the necessary information to make a claim, whichever is later, with respect to a claim for a breach of duty

Also in Ireland, administrative sanctions can be levied by the competent authority (the Central Bank of Ireland) against entities having a certain role in the publication of a prospectus (including, again, the issuer and its directors, the offeror/promoter, for breach of their respective obligations.

Finally, specific offences are created also from a criminal law standpoint[175].

Luxembourg

In Luxemburg a specific liability regime has been established under its Prospectus Law[176], jointly with general Luxembourg provisions on civil liability.

171 The matter is regulated in paragraphs 1348 ff. of the Irish Companies Act 2014.

172 In claims under section 1349 of the 2014 Act the plaintiff must only establish a misstatement in or omission from a prospectus (and under 1369, a breach of Irish market abuse law). In a misrepresentation claim it must be established that the representee in fact relied upon the misrepresentation (McCaughey v IBRC [2013] IESC 17).

173 See sec. 1350 of the 2014 Act.

174 Specific defences (as outlined in the statute) can be brought, though. Indeed, a promoter may be capable of claiming the defence outlined at section 1350 to the 2014 Act which allows a person to avoid liability where: "*the prospectus was issued without [the promoter's] knowledge or consent, and that on becoming aware of its issue he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent*".

175 Irish criminal law generally requires that in order for an act or omission to incur criminal liability, the person concerned must have both committed the act or omission concerned and intended – or may be presumed to have intended – to do so. Separately, section 1357 of the 2014 Act prescribes statutory criminal liability for untrue statements in, and omissions from, a prospectus, which can apply to any person who 'authorised the issue of ' the prospectus. Furthermore, section 1348(6) of the 2014 Act provides that nothing in that Chapter shall limit or diminish any liability which any person may incur under the general law; consequently, if it could be shown to the satisfaction of an Irish court that an underwriter had 'authorized the issue' of the prospectus, criminal liability could be established under section 1357, unless a defence based on 'due diligence' could be successfully pleaded.; See L. Kennedy, C. Clarkin, D. Collins and S. King, section *Ireland* in *Ryan – Selendy*, *Securities Litigation 2017*, in Law Business Research 50 (2017).

Among the persons that may be held responsible, liability attaches to the issuer, the offeror, the person asking for the admission to trading[177]. Also in Luxembourg, at least one person must be liable for the entire prospectus.

Responsibility can be assessed for untrue information stated in the prospectus or for omission of any information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities[178].

No strict liability regime applies in this case, as the plaintiff has to prove a fault or a negligence, as well as the damage and the link among the two.

The time limit to initiate a legal claim on civil extra-contractual grounds before the Luxembourg Courts is of 30 years[179].

Administrative sanctions can be levied by the *Commission de Surveillance du Secteur Financier* (*CSSF*) against entities having a certain role in the publication of a prospectus (including, again, the issuer and its directors, the offeror/promoter), for breach of their respective obligations.

Finally, specific offences are created also from a criminal law standpoint[180].

Sweden

In Sweden, there are no express rules relating to prospectus liability, but under the Swedish Companies Act (2005) specific liability provisions are applicable to founders, board members, managing directors, auditors, general examiners and special examiners in a company that has prepared and issued a prospectus; interestingly, though, Sweden does not provide a possibility for claims against the issuer[181].

176 Luxembourg law on prospectuses for securities dated 16 July 2019 (repealing previous securities law dated 10 July 2005). See Hoffeld, *Luxembourg*, in *Prospectus Regulation and Prospectus Liability*, by Busch, Ferrarini, Franx (ed.), Oxford, 2020 (making reference to the previous regime of law 10 July 2005).

177 The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

178 See sec. 5 Prospectus Law. Pursuant to the Civil Code, provisions on extra-contractual liability, every plaintiff who can prove a fault pursuant to article 1382 of the Civil Code (or a negligence/imprudence in accordance with article 1383 of the Civil Code), a damage and a direct link between this fault or negligence/imprudence and his damage, should in principle be entitled to have a claim in indemnification. See Hoffeld, ibid.. It is worth mentioning that there is no case law on civil liability for prospectus, even though it seems possible to recall certain general case law principles relating to misleading advertisements. See Cour d'appel (référé commercial) 13 June 2007, book 34 (2008-201), 30; Cour d'appel, 2 February 2011, in *Bulletin d'Information sur la Jurisprudence*, 6/201127, September 2011.

179 Article 2262 of the Civil Code.

180 The Prospectus Law (article 13) provides for a criminal fine in case where a person would knowingly carry-out an offer of securities to the public within the territory of Luxembourg without a duly approved prospectus in accordance with the provisions of the Prospectus Law. In addition to the abovementioned specific criminal sanction, as set out under article 13 of the Prospectus Law, and subject to the specific facts and circumstances of the matter, certain other general and specific criminal law related provisions under respectively the Luxembourg *Code Pénal* and certain other particular statutory regimes could also apply.

181 See. G. Veil, *European Capital Markets*, Hart, 2017, 304. Apart from this, Swedish law does not contain any specific provisions as regards which parties can be held liable for false or misleading information, whether in a prospectus or

Potential prospectus liability for other persons (including an issuer) than the ones mentioned above, will be governed by general tort principles and the relevant provisions of The Swedish Tort Liability Act (1972).

In general, anyone who sues for damages under Swedish law[182] must prove that the losses suffered was caused by the defendant's intentional or negligent behaviour. Further, the plaintiff will normally also have to prove the extent of losses suffered.

According to the Swedish Statute of Limitations Act (1981), the time limit to file the claim is ten years from the date on which the cause of the claim originated.

Swedish law does not provide for administrative liability for misrepresentation or misstatements in a prospectus. Administrative sanctions may only be imposed for certain breaches of the Swedish prospectus rules[183].The Swedish Financial Supervisory Authority is the competent authority to impose administrative sanctions for breaches of the Swedish prospectus rules.

Criminal liability for prospectus related offences may arise pursuant to the provisions of the Swedish Penal Code (1962) (the Penal Code). There is no specific criminal prospectus regime[184].

United Kingdom

The uncertainties connected to the withdrawal of the United Kingdom as a Member State of the European Union are well known, and may also affect the matter of prospectus liability. For the purposes of this paper, we will consider the current

otherwise. The main rule under Swedish law is that, in the absence of a contractual relation or explicit statutory provisions, liability requires that the damage has been caused by a criminal offence. The exceptions from the main rule are to be developed by case law, and the Swedish Supreme Court has on several occasions made exceptions to this rule (See NJA 1987 s. 692, NJA 2001 s. 878 and NJA 2005 s. 608.). It remains to be seen what exceptions (if any) can be made in relation to false or misleading information in the field of securities law. See D. Ackebo, B. Kristiansson and J. Frank, section *Sweden* in Savitt, Securities Litigation Review, III ed., inLaw Business Research 2017.

182 The Swedish Group Proceedings Act (2002:599) enables class actions in IPO-related claims. However, such class actions, which could be described as 'opt-in' class actions, are not commonly used as a dispute-settling method in Sweden in general. The procedure for joint adjudication of similar cases under the Swedish Code of Judicial Procedure (1942:740) is more frequently used to settle disputes involving several claimants, and is thus of more significance. To date, no IPO-related case has been adjudicated applying the Group Proceedings Act. See Pousette, C., Tipner, M., *Initial Public Offerings – Sweden,* in gettingthedealthrough.com, 2019

183 The Swedish Financial Supervisory Authority may impose administrative sanctions on a party that has a duty to prepare a prospectus, if that party (i) fails to apply for approval of a prospectus, (ii) fails to apply for approval of a supplement to a prospectus or (iii) fails to publish a prospectus or a supplement to a prospectus pursuant to the provisions in Chapter 2 of the Financial Instruments Trading Act. Swedish law does not provide for administrative sanctions on a party regarding misrepresentations or misstatements in an advertisement. The Swedish Financial Supervisory Authority may, however, prohibit advertisements.

184 Infringements regarding the provisions regulating prospectuses can constitute different crimes depending on the circumstances in the specific case. For example, mis-representation or misstatements in a prospectus could be considered fraud or swindle pursuant to the provisions in the Penal Code. It could also be considered market manipulation due to the Swedish Market Abuse Act (2005) (the Market Abuse Act).

state of legislation (under which the Prospectus Regulation is considered as incorporated into UK domestic law)[185].

In the United Kingdom, there are 3 main sources of prospectus liability: a statutory regime in section 90 of the Financial Services and Markets Act 2000 (FSMA) (amended to cross-reference to the Prospectus Regulation)[186], common law negligence and common law deceit.

In such jurisdiction, the issuer (and its managers), as well as other persons involved (including prospective directors and any person responsible for drawing up or approving the prospectus) can be held responsible in case of untrue or misleading statement in the prospectus, omission of any matter required to be included (s.90(1))[187]. Separately, a person who suffers a loss may bring an action in respect of losses suffered as a result of a contravention of the prohibition on making an offer or seeking admission without an approved prospectus (Section 85(4)).

With reference to the above, reasonable belief that the statement is true is a defence therefore the applicable standard is, approximately, negligence. It is worth mentioning that, with reference to evidence to be produced, Schedule 10 FSMA imposes liability for misstatements and omissions on the basis of such negligence standard, but with a reverse burden of proof[188]

As per the statute of limitation, it is not specified with reference to prospectus liability in the relevant provisions of the FSMA, but, generally speaking, for cases of negligence and deceit, a limitation period of 6 years (starting from date cause of action accrued) should apply.

Even though there is no express reference regulation, a claim can be filed by any person who acquires the security, either directly from the issuero or its agents, on on the secondary market[189]

185 In consideration of the delays occurred in the withdrawal process, the Prospectus Regulation has entered into force when the UK were still effectively part of the EU; therefore, Prospectus Regulation falls within section 3(1) of the UK Withdrawal Act, according to which direct EU legislation, so fare as operative immediately before exit day, forms part of domestic law. It is interesting to to consider that, even though the rules of the Prospectus Regulation are part of the UK legal framework, following Brexit UK courts will not be bound by the interpretation of the CJEU and may also be amend by UK minister autonomously (and therefore its provisions and application might differ from the continental standard). See A. McMeel, *United Kingdom*, in *Prospectus Regulation and Prospectus Liability*, by Busch, Ferrarini, Franx (ed.), Oxford, 2020.

186 For sake of completeness, it is worth mentioning also the subsequent Section 90A, providing for a liability for securities bought, held or sold in reliance on untrue or misleading statements in or omissions from certain publications by listed companies. The main sources on prospectus liability are, in addition to Part 6 FSMA, also the Financial Services and Markets Act 2000 (Prospectus) Regulations 2019 and the FCA handbook: Prospectus Regulation Rules Sourcebook.

187 In all cases, in line with the provisions of the Prospectus Regulation, the omissions or misleading statements must be "*material to an investor for making an informed assessment of*" the matters at hand. It is noteworthy that claims brought under section 90 do not require a claimant to show that it relied on the alleged misstatements or omissions (or even show that they read the prospectus). This interpretation of the statute was followed in the RBS Rights Issue Litigation (see footnote below). See Thomas, K., and Jenkings, L., *Securites litigation – England and Wales* in gettingthdealthrough.com, 2019.

188 As a consequence of the above, if a defendant satisfies the court that he reasonably believed

189 See in such respect sections 90(1)(a), 90(4)(a) and 90(7) FSMA. In a recent analogous case (*The persons identified in Schedule 1 of the Claim Form v Tesco plc [2019] EWHC 2858 (Ch)*) relating to the disclosure of information in respect

There is still no significant line of decisions on the amount of damages to be calculated for a violation of Section 90 FSMA[190] According to legal literature, however, the claimant should be compensated for all losses incurred, *i.e.*, the difference between acquisition price and the actual value of the securities, even though no specific performance is expressly allowed[191].

In addition to the above, administrative sanctions can be levied by the competent authority – the *Financial Services Authority* or FSA- against entities having a certain role in the publication of a prospectus (including, again, the issuer and its directors, the offeror / promoter), for breach of their respective obligations.

Finally, specific offences are created also from a criminal law standpoint[192] .

Italy

In Italy article 94 (8) (9) of Legislative Decree no. 58/1998 (hereinafter, the "Consolidated Law")[193] provides for a specific civil liability regime vis-à-vis investors[194], which could arise as a result of the content and use of a defective prospectus.

Among the persons that can be held liable, the law expressly mentions the issuer, the offeror and any guarantor "*as well as any other persons responsible for the information contained in the prospectus*"[195].

Furthermore, according to article 94, paragraph 9, of the Consolidated Law: "*The intermediary responsible for the placement shall be liable for false information or omissions that could influence the decisions of a reasonable investor, unless said*

of shares, it has been determined that holders of intermediated securities have sufficient interest to bringa a claim (see McMeel, *ibid.*),

190 So far, the first and, to date, only claim brought under Section 90 is *Trustees of Mineworkers Pension Scheme Limited and Others v Royal Bank of Scotland Group plc (RBS)* (the RBS Rights Issue Litigation). The case, however, resulted in settlement.

191 See Davis, P. - Worthington, S., *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, 2016, p. 23ff.

192 It is an offence to make an offer or seek admission of securities without a prospectus where one is required. FSMA creates criminal liability for certain misleading statements and practices (S.397) that could be applied to publication of a misleading prospectus, but there is no specific offence. General criminal law offences of dishonesty such as conspiracy to defraud may well apply.

193 The entry into force of the Prospectus Regulation in Italy requested some adaptation of the existing legal framework (and, in particular of the Consolidated Law and its implementing issuer regulation no. 11971/1999 – *Regolamento Emittenti*). While some adaptation to the Regolamento Emittenti have been already been approved and are now into force (see Consob resolution no. 21016 of 24 July 2019), a public consultation has been launched for the reform of the Consolidated Law and has recently ended (consultation material is available on dt.mef.gov.it).

194 For Italy, please consider that a reform of class-action has been recently enacted in 2019 by means of Law no. 31 of 12 April 2019. However, the subject matter of class action should be "*acts and behaviours [of companies] in the execution of their respective business activities*" and therefore, according to first comments on this new piece of legislation, its subject matter should not include securities litigations (which cannot be considered as part of the business activity of companies). See Assonime, Circular no. 17 of 29 July 2019 (*Disciplina dell'azione di classe e dell'azione inibitoria collettiva nel Codice di procedura civile*) in www.assonime.it.

195 See art. 94, paragraph 8, of the Consolidated Law. It is worth mentioning that the current consultation proposes the introduction of a new "*paragraph 6*" according to which "*the persons responsible for the prospectus and of any supplement [...] are clearly identified in the prospectus with their names and their function or, in case of legal entities, with name and legal seat; moreover, [the prospectus] includes a certification form such entities according to which, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import*" in line with article 11 of the Prospectus Regulation.

intermediary proves that the diligence, provided for by the previous paragraph, was adopted". The provision of article 94, paragraph 8, of the Consolidated Law is also applicable to the person asking for the admission to trading as regards the prospectus required for the admission to trading on a regulated market[196].

Such persons are liable for both untrue information in a material aspect and omission of material information in the prospectus, provided that the damage and the causal link between this damage and the abovementioned breaches of duties are also established in accordance with the provisions of the Civil Code. Those persons are liable not only for intent but also for negligence (article 94, paragraphs 8 and 9, of the Consolidated Law).

In Italy fault is presumed and the respondent must prove that it have taken all reasonable care in order to ensure that information included in the prospectus was in line with the actual facts and that the disclosure document did not contain any omission likely to affect its overall meaning[197].

More specifically, the Italian Supreme Court, in a milestone judgement[198], clarified that, in theory, the claimant shall bear the burden of proof, and thus prove that the prospectus contained false or misleading information and that the investor *reasonably* relied on such misleading information in making the investment decision[199]. According to the decisions of the Supreme Court[200], prospectus liability is an extra-contractual civil liability (i.e. tortious liability)[201].

Claims for compensation may be brought within five years of publication of the prospectus, unless the investor can prove having discovered the false nature of

196 See art. 113 (1) of the Consolidated Law.

197 *Id*, 142. Article 94(8)(9) of the Italian Securities and Exchange Commission. See P. Giudici, *La responsabilità civile nel diritto dei mercati finanziari*, Milano, 2008, p. 231; G. Facci, *Il danno da informazione finanziaria inesatta*, Bologna, 2009, p. 128 .; E. Macchiavello, *La responsabilità da prospetto degli intermediari finanziari tra passato, presente e futuro*, in *Contr. e impr.*, 2009, p. 929 ff.

198 Italian Supreme Court, June 11, 2010, no. 14056, Tessival S.p.A. /Intesa Sanpaolo S.p.A.. The ruling refers to the value of the shares of Banco di Napoli S.p.A., which were bought by Tessival S.p.A. in the context of Banco di Napoli's share capital increase. More specifically, the prospectus published in the context of the share capital increase included false and misleading information on Banco di Napoli's balance sheet.

199 More in detail, in the case at hand, the Italian Supreme Court assumed that the investor had had the opportunity to view the prospectus and had been made aware of the information provided therein and affirmed that "the falsehood of the prospectus, unless relating to minor aspects, naturally affects the choices that the recipient of the offer has been induced to made. It can be admissible that, where the false elements of the prospectus are limited and of minor size, their capacity to influence the investment choice is so limited that, in practice, becomes irrelevant; but excluding this case [...] where the prospectus is false it must be presumed that [its falsehood] had affected the investment choices of the investor".

200 See for example order no. 8034/2011 and ruling no. 14056/2010. The two decisions has been in general much commented. See, for instance, F. Anelli, *La responsabilità da prospetto fra novità legislative e sentenze della Suprema Corte*, in *Società,* 2011, 4, p. 414 ff. G. Afferni, *Responsabilità da prospetto: natura, danno risarcibile e nesso di causalità*, in in *Danno e responsabilità*, 2011,6, p. 625 ff. It is worth mentioning, however, that the subject of prospectus liability had been long existing in the Italian legal debate. See G. Ferrarini, *La responsabilità da prospetto delle banche,* in *Banca, borsa, tit. cred.* 1987, 4-5, p. 437 ff.

201 See art. 2043 of the Italian Civil Code. This position has been confirmed by recent case law: see Trib. Milano 18 May 2017, in *Società*, 2017, 12, p. 1361 ff., commented by M. Arrigoni, *Nesso di causalità e quantum del risarcimento nella responsabilità da prospetto.*

the information or the omission in the two years prior to the action is taken[202].

Administrative sanctions can be levied against entities having a certain role in the publication of a prospectus (including, again, the issuer and its directors, the offeror / promoter), for breach of their respective obligations by the CONSOB (*Commissione Nazionale per le Società e la Borsa*)[203].

Finally, specific offences are created also from a criminal law standpoint[204].

3.7 Civil liability related to functions performed by supervisory authorities across Member States *(Germany, France, Ireland, Luxembourg, Sweden, United Kingdom, Italy)*

Civil liability regimes related to national supervisory authorities vary considerably across Europe and are highly fragmented[205]. While the Prospectus Regulation harmonized the standards and criteria for drawing up prospectuses, it did not harmonize liability regimes across Europe, leaving a vulnerability and giving full discretion to Member States (see Article 20, Para. 9, Prospectus Regulation)[206]. In light of such differences between national liability rules on prospectuses, each national competent authority has autonomously shaped the scope of its supervisory activities, *inter alia* taking into account important rulings of national courts.

Prospectus approval is defined under Article 2(r) of the Prospectus Regulation as "*the positive act of the outcome of the security by the Home Member State's competent authority of the completeness, the consistency and the comprehensibility of the information given in the prospectus*". The Delegated Regulation 980/2019 establishes a list of controls that will be carried out by the national supervisory authorities in such context: Article 36 (completeness), Article 37 (comprehensibility), Article 38 (consistency). Additionally, Article 40 states that "[w]*here necessary for investor protection, the competent authority may apply criteria in addition to those laid down in Articles 36, 37 and 38 for the purpose of scrutinising the completeness, comprehensibility and consistency of the information in the draft prospectus*". Article 41 introduces a proportionate approach to the scrutiny of draft prospectuses and review of the universal registration document. The Delegated Regulation 980/2019 leaves to ESMA the development of guidelines that the National Competent Authorities will follow in terms of supervision and correct application of EU provisions on prospectuses.

202 See art. 94 paragraph 11 of the Consolidated Law. The said time limit can be interrupted by an action before court. On the contrary, it is debatable whether or not this term could be either suspended or interrupted for causes different from an action brought before a competent Court.

203 As far as public offers are concerned, article 191 of the Consolidated Law provides for the application of administrative sanctions against "whoever" violates the provisions on prospectus referred to in such article.

204 See art. 173-bis of the Consolidated Law provides criminal sanctions to punish prospectus related offences.

205 The source of a significant portion of the data included in this paragraph is R. Dijkstra, *Liability of Financial Supervisory Authorities in the European Union*, in *Journal of European Tort Law* – JETL, 2012, p. 346 ff.

206 Article 20(9) of the Prospectus Regulation clarifies that "[t]*his Regulation shall not affect the competent authority's liability, which shall continue to be governed solely by national law*".

The following paragraphs provide a snapshot of the relevant national rules on prospectus liability applicable to national supervisory authorities. The Member States considered are those already indicated in the context of the previous analysis on the number of prospectuses approved between 2006 and 2017, and namely Germany, France, Ireland, Italy, Luxembourg, Sweden and the United Kingdom [207].

Germany

The German *Federal Financial Supervisory Authority*, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (*BaFin*) is an independent public body.

According to Article 839 of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB), which regulates the liability of public officers and employees liability in the execution of their duties, public bodies may only be held liable for damage caused to third parties under specific circumstances; namely, only if individual interests affected by the infringement are included among those explicitly protected by the relevant public body (so-called *Schutznormtheorie*)[208].

In order to mitigate the number of legal actions initiated against the BaFin, in line with the prescriptions of the 1984 the banking law reform for all public supervisory authorities, Paragraph 4.4 of the *Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht* (the law that, on 22 April 2002 established the *BaFin*) required BaFin to perform its functions and tasks solely and exclusively in the public interest (*Die Bundesanstalt nimmt ihre Aufgaben und Befugnisse nur im öffentlichen Interesse wahr*).

207 *See https://www.esma.europa.eu/sites/default/files/library/esma31-62-1114_eea_prospectus_activity_in_2017.pdf.* For a comparative analysis of the different regimes applicable to national supervisory authorities, *see* D. Nolan, *The liability of Financial Supervisory Authorities*, in 3 *Journal of European Tort Law* 190 (2013); R. Dijkstra, *Liability of Financial Supervisory Authorities in the European Union*, in 3 *Journal of European Tort Law* 346 (2012); E. De Kezel - C. Van Dam - I. Giesen - C.E. du Perron, *Financieel toezicht en aansprakelijkheid in internationaal verband* (Financial supervision and liability from an international perspective), deLex, 2009, p. 155 ff..; M. Andenas - D. Fairgrieve, *To Supervise or to Compensate? A Comparative Study of State Liability for Negligent Bank Supervision*, in *Judicial Review in International Perspective, Liber Amoricum in Honour of Lord Slynn of Hadley*, by M. Andenas - D. Fairgrieve, Kluwer Academic Publishers, 2000, p. 343 ff.; S. Dempegiotis, *The Hard-to-Drive Tandem of Immunity and Liability of Supervisory Authorities: Legal Framework and Corresponding Legal Issues*, in 9 *Journal of Banking Regulation* (JBR) 140 (2008); M. Tison, *Challenging the Prudential Supervisor: Liability versus (Regulatory) Immunity*, in WP *Financial Law Institute Working Paper Series*, 2003, n. 4, p. 1 ff.; R. D'Ambrosio, *La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica*, in AA.VV., *Diritto delle banche e degli intermediari finanziari* (a cura di E. Galanti); Padova, 2008, p. 263 ff.; P. Athanassiou, *Financial Sector Supervisors' Accountability. A European Perspective*, European Central Bank, Legal Working Paper Series, n. 12, agosto 2011; I. Giesen, *Regulating Regulators through Liability: The case of Applying Normal Tort Rules to Supervisors*, in 2 (1), *Utrecht Law Review* 8 (2006).

208 § 839 of the BGB states: "(1) *If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way. (2) If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function.(3) Liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal*". On the liability of supervisory authorities in Germany, see R. D'Ambrosio, *La responsabilità delle autorità di vigilanza*; R. D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, in Quaderni di Ricerca Giuridica della Banca d'Italia, 2015, n. 78; M. Poto, *Le Autorità di vigilanza sul mercato mobiliare. I custodi incustoditi*, Napoli, 2008, p. 217.

In this context, BaFin was essentially granted a form of immunity against legal actions brought by individuals and such immunity that was confirmed by courts and scholars. In other words, public authorities could only be held liable if they were charged with a specific duty of care towards certain specific individual interests -- instead of the public interest in general[209].

Such approach has been implicitly endorsed by the European Court of Justice in its 12 October 2004 decision, C-222/0. The Court stated that "*[i]f the compensation of depositors prescribed by Directive 94/19 on deposit-guarantee schemes is ensured, Article 3(2) to (5) of that directive cannot be interpreted as precluding a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority*" [210], although such interpretation may be reconsidered in light of Directive 2014/49UE, which repealed Directive 94/19/CE, introducing a new deposit guarantee scheme.

In Europe, only Austria has adopted a similar approach (following the 2008 global financial crisis), in that even if the Austrian Financial Market Authority (FMA; *Finanzmarktaufsichtsbehörde*) is liable for damage caused to supervised entities, it is *de facto* protected from liability for damage caused to third parties.

The Austrian Financial Market Authority liability is now regulated by the *Act on the Institution and Organization of the Financial Market Authority* (FMABG 97/2001), as last amended by the *Federal Law Gazette* I No. 62/2019, Section 3, Paragraph 1, of which provides that: "[t]*he Federal Government shall be liable in accordance with the provisions of the Public Liability Act (AHG - Amtshaftungsgesetz), as published in Federal Law Gazette No. 20/1949, for any damage caused by the FMA's bodies and employees in the enforcement of the federal acts specified under § 2 including damages pursuant to § 29 para 1 of the Data Protection Act 2018 (DSG 2018 -*

209 See R. Dijkstra, *Essays on financial supervisory liability*, 2015, in *https://pure.uvt.nl/ws/portalfiles/portal/13415553/Dijkstra_Essays_13_10_2015_emb_tot_13_10_2016.pdf*; Case law: see the decision of the *Bundesgerichtshof* (BGH, urteil vom 20.1.2005, III ZR 48/01 (OLG Koln), in *NJW*, 2005, 11, rejecting the claim of certain depositors againts the BaFin. On this matter, see M. Poto, in R. Miccù – D. Siclari (a cura di), *Advanced law for economics selected essays*, Torino, 2014, p. 133.

210 In Foro it., 2005, IV, 101; in Giur. It., 2005, 390, with a comment by D. Siclari, *Drittezogenheit del dovere d'ufficio, offentlichen interesse ed esclusione della responsabilità dell'autorità di vigilanza bancaria nell'ordinamento tedesco;* in *Riv. it. dir. pubbl. com.,* 2005, 3 with a comment by M. Poto, *La Corte di giustizia e il sistema tedesco di vigilanza prudenziale: la primauté si scontra con il vecchio adagio ubi maior, minor cessat.* More generally, on this matter, see M. Poto, *La responsabilità degli organi di vigilanza nel sistema tedesco*, in *Resp. civ e prev.*, 2006, 28. According to G. Carriero, *La responsabilità civile delle Autorità di vigilanza*, in *Foro it.*, vol. 131, n. 9, settembre 2008, p. 221, the German liability regime related to supervisory authorities has been implicitly endorsed by the European Court of Justice ("*paradossalmente, l'immunità delle autorità di supervisione nei confronti dei risparmiatori (non nei confronti degli intermediari, che sono considerati i soli diretti destinatari dell'attività commissiva o omissiva di vigilanza) trae – nonostante la manifesta diversità rispetto agli altri paesi dell'Unione – maggiore forza dalla giurisprudenza della Corte di giustizia europea. Ed invero, sottoposta al giudice di Lussemburgo la questione pregiudiziale afferente i rapporti tra disciplina nazionale tedesca e direttive in materia di vigilanza prudenziale, l'affermazione che il diritto bancario europeo contemplato da quegli atti comunitari non confligge con la norma nazionale che riconduca l'attività dell'autorità nazionale di vigilanza sotto l'egida dell'interesse pubblico ha indubbiamente conferito maggiore legittimazione a tale sistema e favorito il recente rigetto dell'azione risarcitoria di alcuni depositari nei confronti della BaFin per supposta omessa vigilanza*").

Datenschutzgesetz 2018). Damages as defined in this provision are such that have been directly caused to the legal entity subject to supervision in accordance with this federal act. The FMA and its employees and bodies shall not be liable towards the injured party".

France

In 2010, France's supervisory model was changed and two different public authorities - the *Autorité de Contrôle Prudentiel* (whose name was changed by Law no. 672 of July 26, 2013 to *Autorité de Contrôle Prudentiel et de Résolution*, "ACPR") and the *Autorité des Marchés Financiers* (AMF) - were created with with different activities[211]. Pursuant to Article L. 621-1 of the French *Code monétaire et financier*, the AMF is a public independent body with legal personality; as such, it is fully liable for its actions, lawsuits can be brought against it and it has its own funds and assets. Therefore, the AMF is fully liable *vis*-à-vis injured third parties, and such liability is a direct consequence of its legal personality[212], which was attributed to the AMF by the French legislator[213]. Unlike the AMF, the ACPR is an administrative independent body lacking legal personality (Article L. 621-1 s of the French *Code monétaire et financier*); therefore, it is not directly liable for damages caused to third parties. The absence of legal status means that injured third parties may only claim damages *vis-à-vis* the State according to the general rules governing the public administration's civil liability[214]. In this context, and in the absence of a specific legal framework governing the potential civil liability of French supervisory authorities, the *Conseil d'Etat* (the French Supreme Administrative Court) clarified that the benchmark against which the public administration's liability must be measured is gross negligence (*faute lourde*) or fraud, taking into account *inter alia* the nature and complexity of the supervisory activities[215].

211 B.Beignier, *Droit des Assurances*, Domat, droit privé, II Ed., LGDJ, p. 90

212 N. Decoopman (Professor at the *Université de Picardie Jules Verne*), 1510: *Autorité Des Marchés Financiers* (AMF) – *Statut Juris Classeur Banque - Crédit - Bourse*, 20 October 2009, updated on 21 September 2018.

213 Paris Administrative Court of Appeal, 24 March 2017, 14PA04956, Racc. Lebon.

214 P. Terneyre, *Interventions économiques, contrôle public économique, Répertoire de la responsabilité de la puissance publique*, 2019, Dalloz clarified that, so far, there are no legal precedents related to the civil liability of the ACPR. "*À ce jour, si le contentieux administratif de la légalité des décisions des différentes composantes de l'ACPR est abondant, celui de la responsabilité est, à notre connaissance, inexistant. C'est pourquoi on continuera à rendre compte des solutions antérieures dégagées à propos de l'activité de contrôle des institutions remplacées par l'ACPR dont rien n'indique qu'elles ne seront pas transposées à l'activité des différentes composantes de l'ACPR. Ainsi, eu égard à la mission du comité des établissements de crédit, qui consiste à délivrer ou retirer l'agrément des établissements de crédits, toute faute commise par ce comité dans l'exercice de cette mission est susceptible d'engager la responsabilité de l'État*".

215 As confirmed by several decisions of the early '60 and, more recently, the decision of the *Conseil d'Etat* of 30 July 2003, as well as of the 30 November 2001. This last decision concerns the functions once carried out by the *Commission bancarie*. In general, on the liability of the public administration for groos negligence in France, see the decisions of the *Conseil d'Etat* of 26 December 2018, 16 March 2012, 14 December 2011, 30 March 2011, 23 March 2011, 13 January 2010, available at *https://www.conseil-etat.fr*. Among scholars, on the liability of French supervisory authorities, see R. Dijkstra, *Essays on financial supervisory liability*,ibid., p. 20; D. Nolan, *The liability of Financial Supervisory Authorities*, ibid., p. 200; R. Dijkstra, *Essays on financial supervisory liability*, *ibid.*, p. 200 ff.; G. Carriero, *La responsabilità civile*, *ibid.*; D'Ambrosio, *La responsabilità*, *ibid.*

Ireland

The Central Bank of Ireland (CBI)[216] is charged with banking and financial supervision in Ireland. Such civil liability is regulated by Paragraph 33AJ(2) of the Central Bank Act No. 22 of 1942 (as lastly amended on July 3, 2016)[217], according to which the CBI cannot be held liable for damage caused to third parties, even if such damage is caused by an omission on the part of the supervisory body -- except in cases of bad faith[218].

Luxembourg

Since January 1st, 1999 the *Commission de Surveillance du Secteur Financier* (CSSF) has been responsible for supervisory activities in Luxembourg, with the exception of the supervision of insurance companies, which are supervised by the *Commissariat aux Assurances* (CAA). According to Article 20 of the law of December 23 1998, No. 112, which regulates CSSF civil liability regime, "[T]*he supervision carried out by the CSSF is not intended to safeguard the individual interests of the companies or professionals subject to supervision or of their clients or third parties, and shall be carried out solely in the public interest. (2) For the CSSF to assume civil liability for individual damage incurred by the companies or professionals subject to its supervision, their clients or third parties, it must be demonstrated that the damage was caused through gross negligence in the choice and application of the means implemented to carry out the CSSF's public service remit. (3) Paragraph 2 shall also apply to the CSSF's members of the Executive Board or of the staff individually, where the latter carry out the CSSF's public service remit within bodies, institutions, committees, authorities or independent agencies*".

In other words, CSSF is solely dedicated to the public interest and its supervision "*is not intended to safeguard the individual interests of the companies or professionals subject to supervision or of their clients or third parties*"; therefore, it would be hard to initiate a legal proceeding against the CSSF. Even if investors succeed in proving that the CSSF did not act in the public interest, the CSSF will only be liable if it acted with *gross negligence* or, in the French version of the law, *une négligence grave*[219].

216 See Central Bank Reform Act (23/2010). CBI has repealed the former supervisory authorities, the *Central Bank and Financial Services Authority of Ireland* (CBFSAI) and the *Financial Regulator*.

217 Whose text is available at the following link: *https://www.centralbank.ie/docs/default-source/publications/lrc-legislation/ftr-1-5-en_act_1942_0022.pdf?sfvrsn=6*

218 "*A person to whom this section applies is not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith*" – and the person includes "*the Bank, the Governor; the Heads of Function; the Secretary General of the Department of Finance, in his or her capacity as an ex-officio member of the Commission; the appointed members of the Commission; the Registrar of Credit Unions; the Registrar of the Appeals Tribunal; employees of the Bank; agents of the Bank*". See: J. Doherty, N. Lenihan, *Central Bank Independence and Responsibility for Financial Supervision within ESCB: The Case of Ireland, in Legal Aspects of the European System of Central Banks, Liber Amoricum Paoli Zamboni Garavelli, European Central Bank, 2005, p. 219 ff.; R. Dijkstra, Essays on financial supervisory liability*, 2015, p. 21.

219 For additional information, see R. Dijkstra, *Essays on financial supervisory liability*, 2015, p. 22; D. Nolan, *The liability of Financial Supervisory Authorities*, p. 200; R. Dijkstra, *Essays on financial supervisory liability*, ibid., p. 27; M. Tison,

Sweden

Since 1991, the *Finansinspektionen* ("SFSA") has been charged with supervisory powers on the Swedish banking and financial system. Given the absence of specific rules regulating liability related to prospectus approvals, investors can claim damages in accordance with the 1972 *Swedish Tort Liability Act*. More specifically, SFSA (and the public administration in general) may only be held liable if it carried out its activities with simple negligence (Art. 3(2))[220].

United Kingdom

The *Financial Services Act* of December 19, 2012, assigned supervision of the UK financial system to the *Financial Conduct Authority* and the *Prudential Regulation Authority* of the *Bank of England*, while before the Financial Services Act the function now performed by both authorities was performed solely by the *Financial Services Authority* (FSA).

According to the 2000 *Financial Services and Markets Act* (as last amended on March 21, 2016), Schedule 1ZA ("*The Financial Conduct Authority*"), Part 4:

"1. None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA's functions

a) the FCA;

b) any person ("P") who is, or is acting as, a member, officer or member of staff of the FCA;

c) any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P's conduct.

2. Anything done or omitted by a person mentioned in sub-paragraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA's functions.

3. Sub-paragraph (1) does not apply

a) if the act or omission is shown to have been in bad faith, or

b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998"[221].

Challenging the prudential supervisor – liability versus (regulatory) immunity: lessons from the EU experience for Central and Eastern European countries, in M. Balling – F. Lierman – A. Mullineux (a cura di), *Financial Markets in Central and Eastern Europe*, Londra, 2004, p. 133 ff.

220 On the matter, see R. D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, ibid., p. 41; D. Nolan, *The liability of Financial Supervisory Authorities*, p. 200; R. Dijkstra, Essays on financial supervisory liability, p. 27.

221 Human Rights Act 1998, c. 42.

In a nutshell, in the UK the civil liability of supervisory authorities is limited to cases of *bad faith* (meaning *intentional torts*, committed with wilful intent) or to the infringement of the Human Rights Act (for instance: due process rights)[222]. More specifically, the *misfeasance tort in public office* may be caused both by the *intention of injure* (wilful intent) and by the infringement of the law together with a demonstrated indifference towards the potential damage caused to third parties – which appears to be more serious than the gross negligence, and is in any case closer to the so-called *dolus eventualis*, which is a sort of conscious and reckless negligence, where the person who causes the damage foresees the possibility of the result and reconciles herself to this very possibility[223]. English courts have adopted a restrictive approach on the matter, clarifying that the simple negligence or violation of the duty of care is not sufficient to uphold a claim of damage suffered by an investor, but it is instead necessary to prove a "*deliberate and dishonest abuse of power*"[224].

Italy [225]

In Italy, supervisory activities are carried out by the *Consob* (*Commissione Nazionale per le Società e la Borsa*) and the civil liability attached to the misuse of its supervisory powers is strictly related to certain Italian constitutional provisions[226]. In

222 D. Nolan, *The liability of Financial Supervisory Authorities*, ibid., p. 203; R. Dijkstra, *Essays on financial supervisory liability*, p. 28.

223 Per maggiori dettagli cfr. R. Chieppa, G.P. Cirillo (cura di), *Le Autorità amministrative indipendenti*, in *Trattato di diritto amministrativo*, 2010, pag. 247, footnote 288.

224 See the decision of the *House of Lords; Three Rivers Dc and others v. The Governor and Comnpany of the Bank of England 2000*] 2 WLR 1220, that explicitly refers to a "*deliberate and dishonest abuse of power*".

225 See S. Alvaro, M. Ventoruzzo, *I poteri di vigilanza e di intervento della Consob (Mercati ed emittenti*), in *Il Testo Unico Finanziario*, a cura di Mario Cera e Gaetano Presti, 2020, 2080.

226 See G. Alpa, *Prospetto informativo. Orientamenti della dottrina*, in Riv. *critica dir. priv.*, 1988, 366 ff.; B. Andò; F. Anelli, *Quale limite per la responsabilità delle c.d. autorità di vigilanza?*, in Soc. 2011, 7, p. 793; P. Anello, S. Rizzini Bisinelli, *Responsabilità della Consob per omissione di vigilanza e risarcibilità del danno*, in Soc., 2001, p. 576; S. Bruno, *L'azione di risarcimento per danni da informazione non corretta sul mercato finanziario*, Napoli, 2000; id., *La nuova responsabilità da prospetto verso il pubblico, in Banca borsa*, tit. cred. I, 2008, p. 789; R. Caranta, *La responsabilità dell'autorità di vigilanza per mancato o insufficiente esercizio dei loro poteri,* comment to the decision of the Italian Supreme Court May 2, 2003, no. 6719, in *Foro it.*, 2003, I, p. 1685; Carnevali, *In tema di responsabilità da prospetto*, in *Corr. giur.*, 1989, p. 1002; S. Cassese, *Fondamento e natura dei poteri della Consob relativi all'informazione del mercato*, in AA.VV., *Sistema finanziario e controlli: dall'impresa al mercato*, Milano, 1986; G.E. Colombo, *Tutela del risparmio e controllo della Consob*, in Riv. soc., 1988, 19 ff.; M. Clarich, ibid.; L. Enriques – M. Gargantini, *La Consob: natura, organizzazione e funzioni*, in *Il Testo Unico Finanziario,* a cura di Mario Cera e Gaetano Presti, 2020, p. 279; G. Ferrarini, *La responsabilità da prospetto. Informazione societaria e tutela degli investitori*, in *Quaderni di Giur. Comm.*, n. 78, Milano, 1986; M. Franzoni, *La responsabilità civile delle Authorities per omissione di vigilanza*, in Galgano e Visintini (a cura di) *Mercato finanziario e tutela del risparmio*, in Galgano (diretto da) *Trattato di dir. comm. e dir. pubbl. econ.*, Padova, 2006, p. 267 ff.; E.M. Lombardi, *La responsabilità delle autorità di sorveglianza del mercato finanziario: regola aurea o "all that glitters is not good"?*, in *Nuova giur. comm.,* 2016, 10, p. 1409; G. Lombardo, *Autorità amministrative indipendenti e risarcimento del danno: una nuova frontiera per la responsabilità civile*, in Giorn. dir. amm., 2001, p. 1135 ff.; N. Marzona, *Le posizioni soggettive del risparmiatore secondo il giudice della giurisdizione: una difficile tutela,* in *Banca borsa,* 1992, II, p. 393; P. Montalenti, *Responsabilità civile*, ibid., p. 255 ff.; N. Pecchioli, *Incoraggiamento del risparmio e responsabilità delle autorità di vigilanza*, Torino, 2007, p. 179 ff.; A. Perrone, *Informazione al mercato e tutela dell'investitore*, Milano, 2003; G. Romagnoli, *La Consob e la sollecitazione all'investimento: esercizio di poteri ed obblighi verso gli investitori*, in *Giur. comm.*, 2001, I, p. 751 ff.: R. Rordorf, *Sollecitazione all'investimento: poteri della Consob e tutela degli investitori*, in *Foro it.*, 2001, p. V, c. 270; G. Scognamiglio, *La responsabilità civile della Consob*, in Galgano e Visintini (a cura di), *Mercato finanziario e tutela del risparmio*, in Galgano (diretto da) *Trattato di dir.comm. e dir.pubbl.ec.*; XLIII; Padova, 2006, p. 281 ff.; G.M. Santucci, *Responsabilità della Consob per omessa vigilanza colposa,* in *Contratti*, 4, 2004, p. 377 ff.; A. Tina, *Responsabilità della Consob per*

particular, the Italian constitution tries to strike a balance between the interests of a party damaged by the unlawful exercise of powers by a public body (Article 28 of the Italian Constitution) and the risk that such liability in effect prevents public bodies from properly exercising their functions (Article 97 of the Italian Constitution). Additionally, Article 91 of the Italian Securities and Exchange Act explicitly provides that the *Consob* shall carry out its activities taking into account *inter alia* investors protection[227].

The history of Consob's potential civil liability in relation to damage incurred by investors in the context of public offerings is shaped by two crucial decisions of the Italian Supreme Court, which completely changed the – now – consolidated view on the matter. Before the decisions, Italian courts used to believe that Article 97 of the Constitution should be given more weight when considering the two conflicting interests involved. In other words, supervisory authorities were charged with a highly important activity which was primarily carried out in the public interest, and the private interests of investors were not considered to be of great relevance or importance. Investors were only protected indirectly, *i.e.* by virtue of the control exercised over the proper exercise of supervisory functions, which should ensure the pursuit of collective interests[228].

Two decisions of the Italian Supreme Court, however, changed the view on the matter[229].

With the decision of July 22 1999, No. 500, the Italian Supreme Court first clarified that public bodies may be held liable *vis-à-vis* private investors if investors hold a relevant legal interest protected by the legal framework, even if such generally defined "relevant legal interest" cannot be formally qualified as a "subjective right"[230][231]. Following this decision, the Court, on March 3rd 2001, with decision No.

omessa vigilanza sulla veridicità delle informazioni contenute nel prospetto informativo, in *Corr. giur.*, 7, 2004, p. 933; F. Vella, *ibid.*

227 F. Sclafani, *La responsabilità civile delle autorità indipendenti nelle funzioni di regolazione e vigilanza dei mercati: molti interrogativi e poche certezze*, in *Riv. reg. mercati*, 2017, 1, p. 8 ff.

228 Italian Supreme Court 29 March 1989 no. And Italian Supreme Court 14 January 1992, no. 367. See also: Italian Supreme Court 22 July 1993, no. 8181, Italian Supreme Court 15 March 1989, no. 1303, Court of Milan 9 January 1986, in *Giur. comm.*, 1986, II, p. 427 ff. and Court of Rome 6 March 1991, in *Foro. It.*, 1991, I, 2906; Court of Appeal of Genoa, 15 January 1958, *in Banca, borsa, tit. cred.*1958, II, p. 52 ff., with a comment by P. Pallini, *Improponibilità dell'azione aquiliana. Carattere interno delle norme della legge bancaria*; Court of Rome, 30 April 1963, *in Banca, borsa, tit. cred.,* 1964, II, p. 106 ff.; Court of Rome, 27 April 1977, in Banca, borsa, tit. cred., 1978, II, 90 ff., with a comment by Capriglione, *Discrezionalità del provvedimento amministrativo di messa in liquidazione coatta di un'azienda di credito e pretesa risarcitoria del socio.*

229 Some scholars anticipated the reasoning later endorsed by the Italian Supreme Court. See M. Cera, *ibid.* p. 145; *id.*, *Insolvenza del Banco Ambrosiano e responsabilità degli organi pubblici di vigilanza*, in *Giur. comm.*, 1986, II, p. 431 ff.; G. Castellano, *I controlli esterni*, in Colombo e Portale (a cura di) *Trattato delle S.p.a.*, Torino, 5, 1988, p. 333; F. Galgano, *Quattro note di varia giurisprudenza*, in *Contratto e impresa*, 1992,p. 535 ff.;, Scognamiglio, *Responsabilità dell'organo di vigilanza bancaria e danno meramente patrimoniale*, in *Banca borsa, tit. cred.* 1995, II, p. 534.

230 Italian Supreme Court 22 July 1999, no. 500 in *Foro it.*, 1999, I, 2487.

231 "[L]*'area della risarcibilità non è definita da altre norme recanti divieti e quindi costitutive di diritti (con conseguente tipicità dell'illecito in quanto fatto lesivo di ben determinate situazioni ritenute dal legislatore meritevoli di tutela), bensì da una clausola generale, espressa dalla formula "danno ingiusto", in virtù della quale è risarcibile il danno che presenta le caratteristiche dell'ingiustizia, e cioè il danno arrecato non iure, da ravvisarsi nel danno inferto in difetto di una causa di giustificazione (non iure), che si risolve nella lesione di un interesse rilevante per l'ordinamento (...) Ne consegue che la norma sulla responsabilità aquiliana non è norma (secondaria), volta a sanzionare una condotta vie-*

3132, formally ordered Consob to pay for damage incurred by certain private investors in relation to the breach of its supervisory duties in the context of a public offering. The decision was taken in a context in which, according to the Court, it was clear, from the documents provided to the supervisory authority, that the data included in the prospectus was untruthful, and the supervisory authority itself should have noticed and carried out the necessary activities to ensure the truthfulness of the data – instead of merely ensuring that the procedure was formally compliant with the law. On that occasion, the Court also clarified that the supervisory authority has a duty to act both in the interests of the general public *and* in the interests of private, individual investors[232]. In other words, Consob should not only exercise its functions and powers to ensure the smooth functioning and integrity of the market, but also to safeguard the private, individual interests of those who operate on such market[233].

The decision was later confirmed by the Court of Appeal of Milan on October 21, 2003; the Court of Appeal also had the chance to shed light on the role of the supervisory authority, whose activity, according to the Court, is crucial in providing investors with information on the issuer, and thus indirectly contributes to the decision taken by the investors to buy or sell the relevant security[234][235].

tata da altre norme (primarie), bensì norma (primaria) volta ad apprestare una riparazione del danno ingiustamente sofferto da un soggetto per effetto dell'attività altrui. In definitiva, ai fini della configurabilità della responsabilità aquiliana non assume rilievo determinante la qualificazione formale della posizione giuridica vantata dal soggetto, poiché la tutela risarcitoria è assicurata solo in relazione alla ingiustizia del danno, che costituisce fattispecie autonoma, contrassegnata dalla lesione di un interesse giuridicamente rilevante". On this matter, see L. Torchia, *La risarcibilità degli interessi legittimi: dalla foresta pietrificata al bosco di Birnam*, in *Giorn. dir. amm.*, 1999, p. 844 ff.

232 F. Sclafani, ibid.,14. On the Consob liability regime, see, among others: D. Siclari, *La limitazione della responsabilità civile delle autorità di vigilanza sui mercati finanziari recata dall'art. 24, comma 6-bis, della legge n. 262/05: un primo monito della Cassazione?,* in *Riv. Dir. bancario*, Dicembre 2009; M. Clarich, *La responsabilità della Consob nell'esercizio della funzione di vigilanza: due passi oltre la sentenza della Cassazione n. 500/99*, in *Danno resp.*, 2, 2002, p. 223 ff.; *id., Funzione di vigilanza e responsabilità civile della pubblica amministrazione: aperture giurisprudenziali dopo la sentenza a sezioni unite della Corte di cassazione* 500/99, in *Studi in onore di Giorgio Berti,* Napoli, 2005, II, p. 871; F. Vella, *La responsabilità civile delle autorità di vigilanza sui mercati finanziari: alla ricerca di un equilibrio tra "immunità" e tutela degli investitori*, in AGE, 2002, 1, p. 295 ff.; R. Caranta, *Responsabilità della Consob per mancata vigilanza e futuri problemi di giurisdizione*, in Resp. civ. prev., 2001, p. 571 ff.; M. Mengozzi, *Un caso di responsabilità civile della Consob*, in Giur. cost., 2001, p. 3031 ff.; G. Giacalone, *Prospetto non veritiero e responsabilità della CONSOB*, in *Giust. civ.*, 2001, p. 913 ff.; M. D'Auria, *La responsabilità civile della Consob. Profili civilistici*, in *Giur. it.,* 2001, p. 2269 ff.; M. Pinardi, *La responsabilità per danni da informazione nel* mercato finanziario, in *Nuova giur. civ. comm.*, 2002, II, p. 349 ff.; B. Andò, *Responsabilità della Consob per inadeguato controllo di prospetto falso alla luce della l. n. 216/1974 (Commento a Cass., 3 marzo 2001, n. 3132*), ibidem, 2002, I, p. 161 ff.; P. Montalenti, *Tutela dell'investitore e del mercato: false informazioni da prospetto e autorità di vigilanza, ibidem,* 2002, II, p. 449 ff.; id., *Responsabilità civile e mercato finanziario: organo di controllo e false informazioni da prospetto*, in AGE, 1, 2002, 255 ff.; G. Visentini, A. Bernardo, *La responsabilità della Consob per negligenza nell'esercizio dell'attività di vigilanza*, in *Corr. giur.*, 7, 2001, p.880 ff.; A. Perrone, *Falsità del prospetto e responsabilità civile della Consob*, in *Banca, borsa, tit. cred.*, II, 2002, p. 10 ff.; G. Scognamiglio, *La responsabilità civile della Consob*, in *Riv. dir. comm.*, 2006, I, 695; F. Savasta, *La responsabilità da prospetto: omesso controllo e ...(prima parte),* nonché *La responsabilità da prospetto: ritorno in Cassazione (seconda parte)*, entrambe in info.leges.it, 2010 .

233 Così F. Sclafani, *ibid.*, p. 15.

234 The matter was later settled out-of-court.

235 See the decision of the Court of Milan, July 25, 2008 ("*pur considerando Consob come soggetto che concorre a dare l'informazione agli investitori sullo strumento finanziario e sull'emittente nella fase della sollecitazione all'investimento [...] e quindi come soggetto che concorre a formare la volontà dell'investitore, la sua posizione di autorità amministrativa pubblica di controllo esclude che si possa ritenere la sua partecipazione al procedimento come partecipazione volontariamente assunta, con la conseguenza che la sua responsabilità, se sussistente, andrà ricondotta nell'ambito di quella extracontrattuale*").

The above-mentioned decision of the Italian Supreme Court is of utmost importance not only due to its national consequences, but also because it is a unique decision in the European context. On a national level, it is the decision that caused the "deep pockets liability" phenomenon in Italy, a mechanism whereby lawyers and claimants attempt to extend liability to indirectly involved parties with "deep pockets" independent of their causal contribution to the investors' loss. In order to avoid the "deep pockets" phenomenon, which led to the Consob being sued in many different cases such as those related to the offering of securities of Banca Popolare di Vicenza, Uniland, Banca Marche, Cassa di Risparmio di Chieti, Banca Popolare dell'Etruria e del Lazio, Banca MPS, Fondiaria SAI, Freedomland and Deiulemar, the national regulator approved the Law of December 28, 2005, No. 262, limiting Consob's liability (as well as that of its staff) to cases of gross negligence or wilful intent (Article 24, Paragraph 6-*bis*)[236]. The amendments were also inspired by the *Core principles* formulated by the Basel committee on banking supervision in 1999[237].

Such newly introduced limitations, however, did not yield the intended effect. The Italian supervisory authority was sued several times even after the amendments that limited its liability to cases of gross negligence and wilful intent, and, as a consequence, civil courts had the opportunity to shed more light on the matter. On July 25, 2008, in decision No. 9828 the Court of Milan ordered the supervisory authority to pay damages in the "Freedomland case", in which a company was significantly overvalued in its IPO. Although the court acknowledged that the functions and activities of the supervisory authority only relate to the completeness and internal coherence of the prospectus and not to the substantial truthfulness of the data

236 Such limitation was already part of the legal framework but only applicable to Consob's staff and not to the authority itself. Ai sensi dell'art.1, comma 1, legge 14 gennaio 1994, n. 20 *«La responsabilità dei soggetti sottoposti alla giurisdizione della Corte dei conti in materia di contabilità pubblica è personale e limitata ai fatti ed alle omissioni commessi con dolo o con colpa grave, ferma restando l'insindacabilità nel merito delle scelte discrezionali. In ogni caso è esclusa la gravità della colpa quando il fatto dannoso tragga origine dall'emanazione di un atto vistato e registrato in sede di controllo preventivo di legittimità, limitatamente ai profili presi in considerazione nell'esercizio del controllo. Il relativo debito si trasmette agli eredi secondo le leggi vigenti nei casi di illecito arricchimento del dante causa e di conseguente indebito arricchimento degli eredi stessi».* According to the Italian Court of Auditors (Corte dei Conti) *«La limitazione della responsabilità ai fatti commessi con colpa grave è un vantaggio per il danneggiante sottoposto alla giurisdizione della Corte dei conti perché il legislatore ha voluto valutare favorevolmente lo svolgimento di attività in strutture complesse, dove, talvolta, vi sono errori e manchevolezze in altre parti degli apparati amministrativi che possono incidere sui risultati di chi si trova ad agire e, quindi, la limitazione alla colpa grave attenua il rischio di rispondere per fatti che non si è in grado di controllare integralmente, consentendo di attribuire la responsabilità a chi ha agito in tale stato, proprio perché la gravità dello scostamento dal paradigma del buon funzionario permette di addebitare il danno anche in presenza di eventuali difetti dell'apparato organizzativo»* (Corte Conti, sez. I App., 14 gennaio 2016, n. 18). As pointed out by F. Sclafani, *ibid.*, p. 13, footnote 13, "*il prevalente orientamento della giurisprudenza contabile identifica la colpa grave in una sprezzante trascuratezza dei propri doveri attraverso un comportamento caratterizzato da elevata negligenza o imprudenza ovvero ad una particolare trascuratezza degli interessi pubblici; il relativo giudizio deve ispirarsi ad una considerazione globale di tutti gli elementi di fatto e di diritto che assumono rilevanza nella fattispecie compreso, nelle ipotesi di vigilanza e direzione, l'impegno profuso nel ridurre le deficienze organizzative*" (Corte Conti, 14 June 1997, No. 58; 21 August 1997, no. 64; Sez. I, 7 October 1997, No. 185).

237 International Monetary Fund, *Financial System Stability Assessment, including reports onthe Observance of Standards and Codes on the following topics: Banking Supervision, Payment Systems, Insurance, Securities Regulation, Securities Settlement and Payment Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering and Combating the Financing of Terrorism*, Country Report No. 6/112, Washington, D.C., March 2006, 8. On this issue see. also F. Capriglione, *Poteri dell'A.G. in presenza di azioni per danni nei confronti della Consob*, in *Mondo Bancario*, maggio-giugno 2001, 68 and G. Carriero, La responsabilità civile delle Autorità di vigilanza, in Foro It., vol. 131, n. 9, settembre 2008, p. 221 ff.

included in the offering documents, it also stated that the supervisory authority is made up of experienced and competent employees, who have the relevant technical knowledge and should have noticed that the company was clearly overvalued – including in comparison to other similar companies. Indeed, according to the court, although Consob's activities only relate to the completeness and internal coherence of the prospectus and not to the substantial truthfulness of the data included in the offering documents, they must not be considered to be of a "*merely formal nature*". Indeed, if the authority's duty were intended as "*of a merely formal nature*", it would be at odds with one of the ultimate goals of the supervision, *i.e.* to allow investors to take a fully informed decision, and thus would ultimately be inconsistent with Article 91 of Italian Exchange and Securities Act[238].

The same case has been recently re-examined by the Court of Appeal of Milan (decision of January 14, 2019, No. 127), which again changed its view on the matter and found in favour of the authority, recognising that the authority is not bound by a "substantive assessment" on the financial instruments offered to the public. In a nutshell, the supervisory authority has specific duties related to the completeness and internal coherence of the prospectus, but it does not guarantee (to investors and the market in general) the truthfulness of the information included in the prospectus (for which other parties involved in the IPO process are responsible). Above all, its scrutiny is intended as an "ultimate backstop", while the truthfulness of the information included in the prospectus must be assessed by the different parties involved in the IPO process and the chain of controls performed by such parties. Consob's duties and functions must not overlap with those performed by the issuer, the underwriters, the sponsor and the auditors. On the basis of such reasoning, the court concluded that Consob did not act negligently and correctly performed its functions[239].

238 The decision of the Court of Milan No. 9828/2008 was later repealed by the decision of the Court of Appeal of Milan of 28 September 2012, No. 3113, that found that an out-of-court settlement entered into by and between Gruppo Banca Leonardo s.p.a. (*sponsor* and underwriter) and investors [...]. The same matter has been analyzed by other courts, the decisions of which, however, not always include useful contributions (Trib. Milano, 12.5.2014, n. 6085, as well as Italian Supreme Court., 14.6.2018, No. 15707 (*Abrami+al.*)], while others rejected the claims brought by investors on the basis of a lack of proof of the causal relationship between the untruthfulness of the information included in the prospectus and the damage suffered (Court of Milan, 18.5.2014, No. 6450 (*Paolozzi+Nofri*); the court clarifies that the claimants "*non hanno assolto, in particolare, l'onere di provare che la decisione di acquistare azioni Freedomland in concreto sia stata assunta (..) a causa delle false indicazioni desumibili dal prospetto informativo*". The Judgement by the Court of Milan, 4.5.2018, n. 4973 (*Calzati+altri*) states that "*osta (..) all'accoglimento delle domande risarcitorie di parte attrice il fatto che la stessa non sia riuscita a provare che l'acquisto delle azioni per cui è lite sia dipeso dalla lettura del prospetto informativo che ha preceduto l'offerta pubblica di sottoscrizione e/o che i dati falsi in esso contenuto abbiano avuto una pregnanza eziologicamente rilevante nell'avere orientato le scelte degli investitori ad acquistare le azioni Freedomland*".

239 The Italian watchdog's liability is recognized as an issue also by Giudici, P., *Prospectus Liability and Litigation. Italy*, in D. Busch - G. Ferrarini - J.P. Franx (edt by), *Prospectus Regulation and Prospectus Liability,* cit., 510, who states "a further issue concerns the securities watchdog's liability for negligence in the prospectus authorization process. The law makes it clear that the authorization process does not require to provide the regulator with a deep analysis of the prospectus contents and an assessment on the merits of the prospectus. However, according to some decisions of the [Italian Supreme Court], the securities regulator can be held liable in tort when the misstatements and omissions in the prospectus were so patent that any reader would have spottet them. Following those decisions, a specific statutary provision established that independent authorities' liability can exclusively be based on gross negligence and willful intention, i.e. standard negligence in not sufficient to support a claim of tort liability against the supervisor".

Spain

The Spanish supervisory authority (CNMV) is liable for damage caused to third parties according to the general rules on civil liability (Law No. 40/2015, of October 1st (Articles 32-37), as supplemented by the Law No. 39/2015, of October 1st, concerning the common administrative procedure (Articles 91 and 92)[240]. According to Law No. 40/2015, injured third parties are entitled to claim damages against the Spanish public administration insofar as the damage is caused by an inappropriate exercise of the powers of the public administration, and cannot be claimed if caused by *force majeure*.

Additionally, whenever a member of the staff of the Spanish supervisory authority is ordered to pay damages, the Spanish public administration is jointly liable and can in turn claim back the damages to the employee. The Spanish Supreme Court has clarified that the liability of Spanish supervisory authorities is based on the following conditions: a) a direct relationship between the damage suffered and claimed by investors and the unlawful omission or unlawful exercise of the functions of the authority (in the case of omissions, the authority cannot be held liable if it did not have a legal obligation to act); b) a quantifiable loss. As mentioned in the passage, as of today the CNMV has never been ordered to pay damages caused by its supervisory activities.

3.8 The issues arising from a lack of harmonization of the liability regimes across Europe

The analysis carried out in the previous paragraphs shows a great variety of different regimes across Europe; such differences are even more important when it comes to the psychological elements of the liability[241]. In short: i) in Germany and Luxembourg[242] supervisory authorities appear to be substantially immune from legal actions initiated by injured third parties, since their ultimate function is to safeguard general public interests instead of those of private, individual, investors[243]; ii) in Ireland and in the United Kingdom, supervisory authorities are only liable in cases of bad faith or wilful intent (or breach of the Human Rights Act)[244]; iii) in Italy and France, supervisory authorities can only be held liable in cases of gross negligence or wilful conduct[245]; iv) in Sweden, the supervisory authority can be held liable for

240 Redonet Sanchez del Campo, J., *Prospectus Liability and Litigation. Spain*, D. Busch - G. Ferrarini - J.P. Franx (edt by), *Prospectus Regulation and Prospectus Liability*, cit., 527, makes reference to the CNMV being liable whenever it "*has not displayed an appropriate degree of diligence in their supervisory review of the prospectus*".

241 In certain European countries as the Czech Republic, Greece, Lithuania, Poland and Slovakia, the psychological element of the supervisory authority (negligence, gross negligence, wilful intent etc.) is irrelevant and they may only be held liable if damage is suffered by investors. See D. Nolan, *The Liability of Financial Supervisory Authorities*, in 3 *Journal of European Tort Law* 198 (2013), .

242 In Luxembourg, the supervisory authority pursues public interests, and does not safeguard the private, individual interests of the investors. Therefore, a claimant must demonstrate that the Authority did in fact harm public interests and acted with gross negligence.

243 Austria has a similar regime.

244 Bulgria, Estonia and Malta have a similar regime.

245 Netherlands, Latvia and Cyprus have a similar regime.

simple negligence[246]. Many different factors have influenced this great variety of regimes, though they mainly derive from the civil and/or public law approaches of the various Member States[247], together with the input of courts that have shaped civil liability over the years. The European legislator is well aware of this wide range of approaches, such that with respect to ESMA's civil liability Regulation No. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) clarifies that "[i]*n the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Union shall have jurisdiction in any dispute over the remedying of such damage*" (Article 69(1))[248].

The absence of a level playing field, the unequal treatment of investors[249] (and public bodies), and different compliance costs for issuers in the various Member States across Europe are the main, direct consequences of the different civil liability regimes; they fundamentally undermine the pursuit of a true capital markets union and encourage forum shopping behaviours, since the *de facto* immunity granted to certain supervisory authorities may induce them to exercise less stringent controls and approve prospectuses faster[250]. Moreover, if supervisory authorities are held liable more frequently, this in turn becomes a cost for the general public or the market itself (depending on the funding sources of the supervisory authorities)[251], at the expense of law-abiding supervised entities or the taxpayer. Moreover, the different interpretations of the law developed by the courts of the various Member States play an additional role in accentuating the differences between the regimes. For instance, although Spain and Italy have a nearly identical legal framework, the *Spanish Comisión Nacional del Mercado de Valores* has never been ordered to pay damages to third parties in the context of an offering[252], while the Italian Consob, as clarified above, has been sued several times.

246 Spain, Denmark, Portugal and Slovenia have the same ragime.

247 On this matter, see also M. Tison, *Challenging the Prudential Supervisor: Liability Versus (Regulatory) Immunity, in Financial Law Institute Working Paper*, aprile 2003; *id*., *Do not attack the Watchdog! Banking Supervisor's liability after Peter Paul, in 42 Common Market Law Review* 639 (2005), , C. Proctor, *Regulatory Liability for Bank Failures: The Peter Paul Case*, in *Euredia 2005* and R. Dijkstra, *Essay on financial supervisory liability*, S.l., 2015.

248 Regulation no. 1095/2010 *establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.*

249 M. Tison, *Challenging the Prudential Supervisor: Liability Versus (Regulatory) Immunity*, in *Financial Law Institute Working Paper*, April 2003

250 On the matter, see P. Davies, *Damages Actions by Investors on the Back of Market Disclosure Requirements*, in D. Busch - E. Avgouleas - G. Ferrarini (edt by), *Capital Markets Union in Europe*, Oxford, 2018, 318 ff.

251 R. Lener, *L'autorizzazione alla prestazione dei servizi di investimento*, in *Atti dei seminari celebrativi per i 40 anni dall'istituzione della Commissione Nazionale per le Società e la Borsa*, Quaderno Giuridico Consob n. 9, 2015, p. 136 ff.. The author points out that a 2013 decision of the German Federal Administrative Court clarifies that the amount paid by BaFin for damages to investors can be "indirectly" claimed back to supervised entities in the form of additional contributions. The court also clarified that the exercise of supervisory powers goes hand in hand with its possible liability stemming from the exercise of those powers.

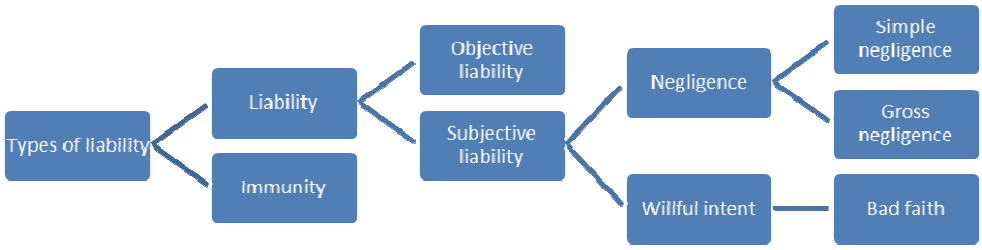
252 According to the Spanish law that implemented the Prospectus Directive in Spain, the issuer and its directors are primarily liable for the securities offered to the public, as well as the underwriters and any legal person accepting responsibility for the content of the prospectus (Article 38 of the Spanish Law).

In this context, an issue that has been thoroughly analyzed by scholars especially in the US, with its differences between federal and state laws, concerns the so called "issuer choice" or "market approach", *i.e.* whether it would be more efficient to have a single, "centralized" legal framework or different legal frameworks across States and leave to the issuer the choice as to which is more suitable. In the absence of a single legal framework, some argue that a self-standing beneficial mechanism may arise, that may make issuers choose the legal framework that provides an extra layer of protection to investors; in turn States will compete to find the most appropriate regime to ensure investors protection and thus the very absence of a single, centralized, regime, may foster the creation of a framework that perfectly meets investors' needs. Such approach, however, is based on the theoretical assumption that both issuers and investors are perfectly informed on the nuances and legal differences of the various regimes, and underestimates the costs embedeed in such condition[253].

For all the reason illustrated above, it would be important to harmonize the liability regimes in Europe on the civil liability of supervisory authorities. It has become not only a matter of unfair competition among national regimes, but – more importantly – a matter of equity and justice for European supervised entities and taxpayers, especially if Europe wants to move towards a single, integrated and transnational financial market.

3.9 Final remarks

The various types of liability associated with the different civil liability regimes applicable to supervisory authorities across Europe can be summarized in the following chart.



253 C.M. Tiebout, *A Pure Theory of Local Expenditure*, in 64 Journal of Pol. Ec. 1416 (1956). The market approach, as opposed to the "centralized" approach, is shared by P.G. Mahoney, *The Exchange as Regulator*, 83 Va. L. Rev. 1453 (1997); S.S. Choi – A.T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, in 71 *S. Cal. L. Rev.* 903 (1997); R. Romano, *Empowering Investors: A Market Approach to Securities Regulation, in* 107 *Yale Law J.* 2358 (1998) e R. Romano, *The Need for Competition in International Securities Regulation*, in 2 *Theoretical Inquires in Law* 387 (2001). M.B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is not Investor Empowerment*, in 85 *Va. L. R.* 1335 (1999) criticizes the market approach.

According to the majority of the scholars, extremes (for instance, immunity) are not ideal regulatory choices[254]. The existence of a form of liability for independent authorities arises from the fact that supervisory authorities are often independent and exercise a certain level of discretion within their functions; in a way, discretion and liability can be seen as two sides of the same coin. Additionally, liability offsets the fact that independent authorities suffer from a "democratic deficit", i.e. they are not subject to the "scrutiny" of the electorate[255]. Finally, liability serves a practical purpose: it ensures that the authorities carry out their functions with a high level of diligence, and thus liability tries to prevent negligent behaviour[256] and incentivizes employees to act in the public interest[257]. Therefore, the immunity of supervisory authorities could stymie these goals[258][259]. At the same time, scholars have pointed out that "full" liability regimes related to the activities of supervisory authorities are equally flawed and are ultimately inefficient insofar as supervisory authorities take complex decisions, often trying to strike a balance between conflicting interests and parties; if the regulatory framework is too strict, authorities may fear the negative consequences of their actions, and thus opt for a more "defensive" approach (such as in medicine[260]) or form of supervision, which is not always directed towards public interests[261]. Additionally, authorities would probably dedicate time and resources to

254 None of the Member States mentioned has a legal framwork that explicitly contemplates immunity for supervisory authorities; however, certain States (Germany and Austria) have a regime that *de facto* ensures immunity for supervisory authorities, since their activities and powers are only exercised in the public interests rather than in investors' interests.

255 P. Athanassiou, *Financial Sector Supervisors' Accountability: A European Perspective, in European Central Bank Legal Working Paper Series*, n. 12, 2011.

256 I. Giesen, *Regulating regulators through liability. The case for applying normal tort rules to supervisors,* in 2(1), *Utrecht Law Review* 8 (2006).; C.C. Van Dam, *Liability of Regulators. An analysis of the liability risks for regulators for inadequate supervision and enforcement, as well as some recommendations for future policy*, in *British Institute of Comparative and International Law*, London , 2006; E. De Kezel, C.C. Van Dam, I. Giesen, I., C.E. du Perron, *Financieel toezicht en aansprakelijkheid in internationaal verband (Financial supervision and liability in international perspective*), Hoofddorp, 2009; D. Busch, *Naar een beperkte aansprakelijkheid van financiele toezichthouders? [Towards a limited liability for financial supervisors?]*, Deventer: Kluwer, 2011.

257 R. Cooter, T. Ulen, (2008), *Law & Economics*, fifth edition, California: Pearson Addison Wesley, 2008.

258 R.J. Dijkstra, *Liability of Financial Regulators: Defensive Conduct or careful Supervision?,* in Journal of Banking Regulation (2009) 10 (4), p. 269 ff.; I. Giesen, *Regulating Regulators through Liability: The case of Applying Normal Tort Rules to Supervisors*, in 2 (1) *Utrecht Law Revie* 8 (2006).

259 Various tools can be used to pursue these goals. Among others, we can mention liability vis-à-vis parliament, liability vis-à-vis government, the market, financial liability and liability assessed via a judicial proceeding. See E.H.G. Hüpkes, M.G. Quintyn, M.W. Taylor, *The Accountability of Financial Sector Supervisors: Principles and Practice*, IMF Working Papers, No 05/51, marzo 2005 e J. Black, S. Jacobzone, *Tools for Regulatory Quality and Financial Sector Regulation: A CrossCountry Perspective*, OECD Working Papers on Public Governance, No. 16, OECD Publishing, 2009; C. Goodhart, *Regulating the Regulators – An Economist's Perspective on Accountability and Control'* in Ferran and Goodhart (eds.), Regulating Financial Services and Markets in the 21st Century (Hart Publishing, Oxford 2001), p. 151 ff.

260 S. Shavell, *Economics and Liability for Accidents*, in *The Harvard John M. Olin Discussion Paper Series*, Discussion Paper No. 535, 2005; C.C. Van Dam, *Liability of Regulators. An analysis of the liability risks for regulators for inadequate supervision and enforcement, as well as some recommendations for future policy*, British Institute of Comparative and International Law, London, 2006; I. Giesen, *Regulating regulators through liability. The case for applying normal tort rules to supervisors*, in 2(1) *Utrecht Law Review* 8 (2006) ; W.H. Boom, *Compensating and preventing damage: Is there any future left for tort law?*, in *Festskrift till Bill W. Dufwa – Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa, Vol. I*, Stockholm: June 2006, p. 287 ff.; L.T. Visscher, *Tort Damages*, Rotterdam Institute of Law and Economics, Working Paper n. 2, 2008.

261 See, for instance, Articles 5(1) and 91 of the Italian Securities and Exchange Act. See also: M. Tison, Challenging the Prudential Supervisor*: Liability versus (Regulatory) Immunity*, in *Financial Law Institute Working Paper*, n. 4, 2003; I. Giesen, *ibid.*; Van Dam, *ibid.*; S.I. Dempegiotis, *The hard-to-drive tandem of immunity and liability of supervisory au-*

avoiding potential legal actions initiated by third parties[262], which can ultimately compromise their independence, or lead to an abuse of rights by shareholders, bondholders or depositors, initiated against the supervisory authority on the base of the "deep pockets" liability doctrine or could, in any case, encourage investors to make less informed decisions by relying heavily on the control of the supervisory authorities[263].

From the regulator's perspective, it is extremely difficult to strike a balance between the right level of liability of public bodies and at the same time to ensure their sound management. While the lack of accountability of the public administration has been shown to produce negative consequences, losses suffered by third parties as a result of the negligence of supervisory authorities should not be borne by private investors. Liability, however, must not be designed in such a way to be excessively strict, with a potentially paralyzing effect on its activities and functions. Clearly, every path has its own drawbacks[264].

From an economic perspective, scholars have built a model based on the following assumptions[265]: i) the higher the quality (and the costs) of the supervisory activities, the lower the probability that a supervised entity may behave unlawfully and cause damage to investors (line y1 on the graph below); ii) there is a direct proportionality relationship between the diligence with which supervisory functions are performed and the costs of the supervision. In other words, every additional employee dedicated to supervisory activities has a cost (p), and if (x) people are allocated to supervisory activities, then proportionally costs increase by a measure of (x)(p) (shown with a straight line with a positive slope on the graph below, line y3). Social costs are represented by the total cost of the supervision and the total amount of damage caused to third parties by supervised entities.

In the following graph, social costs have been calculated by adding line (y1) and line (y3). The result is a third line, (y2), which represents the optimal level of diligence achieved by minimizing social costs, *i.e.* the level at which marginal costs and marginal benefits of supervision are equal.

thorities: Legal framework and corresponding legal issues, in 9(2), *Journal of Banking Regulation* 131 (2008),; E. De Kezel et al., *ibid.*; L. Dragomir, *European Prudential Banking Regulation and Supervision: The legal dimension,* New York: Routledge, 2010; D. Busch, *ibid.*; Athanassiou, *ibid.*; D. Nolan, *The Liability of Financial Supervisory Authorities*, in 4(2) *Journal of European Tort Law* 191 (2013)

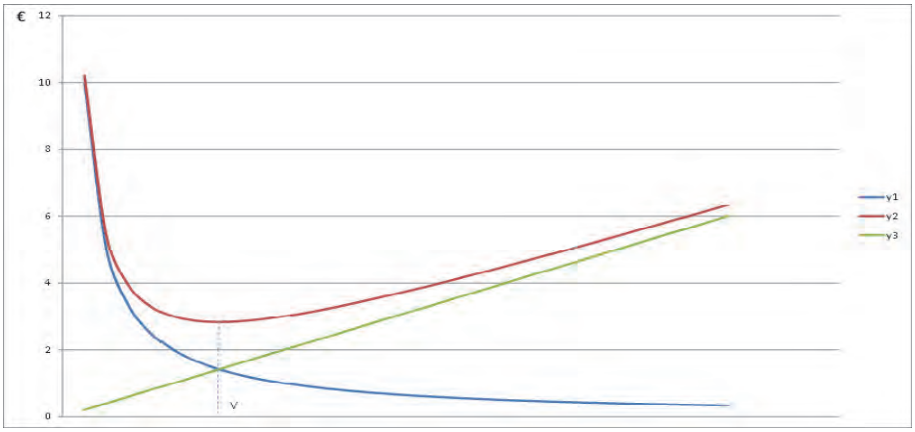
262 M. Tison, *Challenging the Prudential Supervisor: Liability versus (Regulatory) Immunity*, Financial Law Institute Working Paper n. 4, 2003; C. Proctor, *The Liability of Financial Regulators for Bank Failures, Amicus Curae*, Vol. 52, 2004, p. 23 ff.; C. Booth, D. Squires, *The Negligence Liability of Public Authorities*, Oxford, 2005; D. Singh, *Banking Regulation of UK and US Financial Markets*, Aldershot: Ashgate Publishing, 2007; R. Delston, A. Campbell, *To protect or not to protect, that is the question: statutory protections for financial supervisors. How to promote financial stability by enacting the right laws*, in IMF, *Current developments in monetary and financial law*, Vol. 5, Washington, D.C., 2008;

263 F. Rossi, *Tort Liability of Financial Regulators: A Comparative Study of Italian and English Law in a European Context, 14 European Business Law Review* 643 (2003); A. Scarso, *Tortious Liability of Regulatory Authorities*, in Helmut Koziol, Barbara Steiniger (eds.) *European Tort Law 2005*, Springer-Verlag, 2006.

264 F. Sclafani, *La responsabilità civile delle autorità indipendenti nelle funzioni di regolazione e vigilanza dei mercati: molti interrogativi e poche certezze*, in *Riv. Regolazione dei mercati*, 2017, p. 8 ff.

265 R. Dijkstra, *Essay on financial supervisory liability*, S.l., 2015, p. 41 ff.

Figure 15 – Graphical representation of social cost



Even if the practical application of the concepts illustrated by the graph is much harder than their theoretical explanation, the graph is nonetheless useful to understand that both a low level of supervision and a very high level of supervision lead to inefficiencies, and that different liability regimes lead to different supervisory costs for the relevant member State.

From a legal perspective, as mentioned above, it would be important to harmonize the liability regimes in Europe on the civil liability of supervisory authorities, especially if Europe wants to move towards a single, integrated and transnational financial market. A solution might be to allocate the power to approve prospectuses published within the EU to the European Securities and Markets Authority, as suggested by certain scholars[266]; "*centralization would not only simplify admission to listing in the CMU* [...] *but it would also offer the right signal in terms of market integration*". Indeed, the resulting single liability regime, valid for all Member States and third parties, would be the right step toward a single, integrated European market.

In the absence of a common approach across Europe, Member States in which the current liability regime has proven ineffective against third parties (like Italy), especially in light of the "deep pockets liability" doctrine, should move towards a more "protective" approach for supervisory authorities to ensure the sound management of the public administration, either listing specific cases in which the authority will be liable for its actions or with a regulatory change clarifying that the supervisory authority shall be liable only in cases of wilful conduct.

266 E. Avgouleas, G. Ferrarini, *A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA*, in D. Busch - E. Avgouleas - G. Ferrarini, *Capital Markets Union in Europe*, cit., 77.

Appendix

All the tables in the Appendix result from the authors' own research.

Under the file dimensions columns, the symbol * means that the prospectus contains a lot of images, graphs, and copies, which increases the overall "weight" of the document.

Tables from 2.1 to 2.7 make reference to the paragraph on the dimensions of prospectuses (Chapter e).

Table 2.1 – GERMANY

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

Table 2.2 – FRANCE

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

Table 2.3 – IRELAND

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

Table 2.4 – ITALY

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
104	80	2.5	124	238	4.823
105	64	1.8	125	716	15.591
106	50	617 KB	126	565	29.283
107	63	885 KB	127	391	4.420
108	458	5.2	128	352	4.848
109	52	2.1	129	359	3.999
110	210	5.5	130	369	4.049
111	85	435 KB	131	317	4.203
112	310	6.6	132	682	8.711
113	40	698 KB	133	429	5.900
114	28	281 KB	134	545	15.863
115	34	765 KB	135	405	4.458
116	444	13.3	136	278	3.119
117	53	2.4	137	271	3.546
118	370	8.9	138	295	5.786
119	36	289 KB	139	215	2.517
120	311	2.7	140	534	7.827
121	300	2.3	141	658	7.178
122	321	8.7	142	311	6.990
123	286	13.2	143	190	3.235
Mean	179.75	3.959	Mean	406	7.317

Table 2.5 – LUXEMBOURG

Debt	Pages	Dim (MB)	Equity	Pages	Dim (MB)
144	87	870 KB	164	462	2.118
145	225	3.882	165	645	7.102
146	132	1.070	166	238	10.983
147	106	1.491	167	94	877 KB
148	122	1.182	168	211	2.374
149	195	1.871	169	108	1.112
150	36	992 KB	170	142	1.539
151	68	387 KB	171	42	519 KB
152	49	337 KB			
153	34	256 KB			
154	84	1.844			
155	228	1.954			
156	346	7.317			
157	171	2.340			
158	121	1.192			
159	80	4.500			
160	159	1.714			
161	103	604 KB			
162	117	1.656			
163	60	434 KB			
Mean	126.15	1.795	Mean	242.75	3.328

Table 2.6 – SWEDEN

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

Table 2.7 – UK

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

Table 2.8 – GERMANY (debt supplements)

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

Average number of pages 34.8
Average of dimensions 728.923

Table 2.9 – FRANCE (debt supplements)

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

Average number of pages 19.8
Average of dimensions 564.314

Table 2.10 – IRELAND (debt supplements)

Debt	Pages	Dim (KB)	Debt	Pages	Dim (KB)
95	8	460	134	3	169
96	5	111	135	2	100
97	75	975	136	70	533
98	68	903	137	4	256
99	62	1.154 MB	138	37	646
100	3	32	139	3	38
101	2	88	140	3	89
102	3	29	141	3	31
103	2	77	142	3	99
104	38	501	143	3	166
105	2	28	144	5	142
106	53	1.280 MB	145	5	63
107	2	42	146	2	28
108	2	153	147	5	619
109	3	295	148	2	118
110	3	114	149	4	122
111	3	143	150	22	470
112	3	61	151	8	169
113	63	1.084 MB	152	2	92
114	14	198	153	3	271
115	3	39	154	2	153
116	65	558	155	46	633
117	3	109	156	4	66
118	3	59	157	3	44
119	7	430	158	37	272
120	22	443	159	21	1.570 MB
121	2	44	160	4	57
122	2	215	161	19	332
123	42	676	162	4	253
124	3	482	163	3	134
125	77	1.105 MB	164	2	70
126	3	159	165	3	106
127	62	975	166	5	348
128	4	121	167	2	157
129	4	67	168	61	1.106 MB
130	4	182	169	3	39
131	3	40	170	6	241
132	2	85	171	3	99
133	4	43	172	2	19

Average number of pages 14.7
Average of dimensions 301.026

Table 2.11 – ITALY (debt supplements)

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

Table 2.12 – LUXEMBOURG (debt supplements)

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

Table 2.12 – LUXEMBOURG (debt supplements)

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

Table 2.12 – LUXEMBOURG (debt supplements)-segue

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

Average number of pages 20.8
Average of dimensions 304.950

Table 2.13 – SWEDEN (debt supplements

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

Table 2.14 – UK (debt supplements

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

Average number of pages 3.3
Average of dimensions 150.732

Tables from 2.15 to 2.18 make reference to the paragraph on the dimensions of supplements to equity prospectuses Chapter e).

Table 2.15 – GERMANY (equity supplements)

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

Table 2.16 – FRANCE (equity supplements)

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

Table 2.17 – SWEDEN (equity supplements)

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

Average number of pages 8
Average of dimensions 604.136

Table 2.18 – UK (equity supplements)

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

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