Prospectus Regulation and Prospectus Liability

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The Approval of Prospectus

Competent Authorities, Notifications, and Sanctions

*Carmine Di Noia and Matteo Gargantini**

I. Introduction

The identification and role of competent authorities in the process of approving the prospectus, enforcing the applicable rules and, possibly, sanctioning market participants is of the utmost importance in the integration of financial markets in the EU and, therefore, in the completion of a true Capital Markets Union (CMU). **16.01**

In spite of this potential ability to foster integration, the overall structure of the new Regulation (EU) 2017/1129 (Prospectus Regulation)[1] is not substantially different from the previous Directive 2003/71/EC (Prospectus Directive),[2] mainly because of **16.02**

* Opinions expressed are personal and do not necessarily correspond to those of the authors' respective organizations. Although the chapter is the result of common reflections, sections I–V shall be attributed to Carmine Di Noia, and sections VI–IX to Matteo Gargantini.

[1] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (**Prospectus Regulation**).

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

the strong resistances by many Member States and National Competent Authorities (NCAs) to deeper innovations in this field.

16.03 In this chapter, we describe the most important characteristics of the prospectus approval process and point out some of the critical issues which, in our opinion, should be tackled either in the report which the EU Commission shall present to the EU Parliament and Council before 21 July 2022 or in the next review of the European Supervisory Authorities (ESAs).

II. Prospectus Approval and the Role of National Competent Authorities

16.04 A prospectus cannot be published unless the 'relevant competent authority' has approved it (Art. 20(1), Prospectus Regulation).[3] Interestingly enough, the Prospectus Regulation provides no express definition of 'relevant competent authority', but this is obviously the national competent authority, *rectius* the competent authority of the home Member State as defined in Article 2(1)(m) (see section VII 'Identifying the National Competent Authority', para. 16.90 below).[4]

16.05 Each Member State has to designate a 'single'[5] competent administrative authority' responsible for carrying out the duties resulting from the Prospectus Regulation and for enforcing it.

16.06 The monopoly of the single NCA has been strengthened by the Prospectus Regulation, compared to the Prospectus Directive. In fact, the Regulation no longer provides the possibility for Member States to designate more than a single NCA. On the contrary, the Prospectus Directive allowed a Member State, if required by national law, to designate other administrative authorities for the approval of prospectuses (Art. 21(1), Prospectus Directive). Furthermore, Member States were given the power to allow their competent authority (or authorities) to delegate specific tasks either to other administrative authorities or to other entities, such as stock exchanges.

16.07 On the one hand, this tightened regime is positive because a variety of NCAs in a Member State, bearing different responsibilities, might create unnecessary costs and overlapping of responsibilities without providing any additional benefit. Moreover, the designation of an NCA for prospectus approval should not exclude cooperation between that authority and third parties, such as banking and insurance regulators or

[3] For an analysis of the previous regime, see Pierre Schammo, *EU Prospectus Law. New Perspectives on Regulatory Competition in Securities Markets* (Cambridge: CUP, 2011), 213–26.

[4] For instance, Article 20 clearly relies on the assumption that the NCA is the authority designated by the relevant home Member State under Article 31 (see e.g. Art. 20(8), which allows the competent authority of the home Member State to transfer the approval of a prospectus to the competent authority of another Member State).

[5] The Prospectus Directive used the word 'central' instead of 'single'. The reasons for the amendment are not entirely clear, but the new wording may perhaps allow the identification of a 'local' competent authority in federal MS.

listing authorities, with a view to guaranteeing efficient scrutiny and approval of prospectuses in the interest of issuers, investors, markets participants, and markets alike (Recital (71), Prospectus Regulation).

16.08 On the other hand, the removal of any flexibility in the designation of multiple NCAs, especially with respect to third parties like stock exchanges, may limit the efficiency in the approval process due to the rigidity that public administrative authorities sometimes have, especially when it comes to hiring employees with sufficient expertise in the field directly from the market. In any case, the delegation of specific tasks in the Prospectus Directive was subject to stringent conditions, which reduced the risk of overly complex mechanisms and of circumvention of the supervisory regime.[6]

16.09 The only exception to the general ban on delegation of functions within the Prospectus Regulation is the possibility for Member States to delegate to third parties the tasks of electronic publication of approved prospectuses and related documents (Art. 31(2)), as was already the case in the Prospectus Directive.

1. The Transfer of Approval of the Prospectus

16.10 What remains possible, at least in theory, is the transfer of approval to another NCA (Art. 20(8), Prospectus Regulation).

16.11 Why is the transfer important? The first reason is obviously that, in some circumstances, the approval process by another NCA may prove more efficient. As we shall see in section VII 'Identifying the National Competent Authority' (para. 16.90), in some cases issuers may choose an NCA themselves, by selecting their own Member State. However, this might not always be possible, especially for shares. But there are other reasons why transfer of approval may prove useful. For example, a small or medium-sized enterprise (SME) might want to list only in a foreign exchange because it is too small for the listing requirements of the national exchange, or it might want to address the offer only to the residents in the Member State of the foreign exchange (for instance, with a view to investing the proceedings in that Member State).

16.12 That is why the transfer of approval has been historically considered by the European Commission as an essential tool for a Single Market of Financial Services. In its White Paper on Financial Services 2005–2010, the Commission included, as one of

[6] As per Article 21(2), Prospectus Directive, any delegation of tasks to entities other than the NCA had to be made in a specific manner, stating the tasks to be undertaken by the delegated entity and the conditions under which such tasks had to be carried out. These conditions included a clause obliging the delegated entity to act and be organized in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks was not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with the Directive and its implementing measures, and for approving the prospectus, lay with the competent authority or authorities designated by the Member State.

the supervisory challenges for that period, 'the need to explore delegation of tasks and responsibilities, while ensuring that supervisors have the necessary information and mutual trust',[7] in the context of a reinforced cooperation between supervisors. In this respect, the report specifically mentioned the possibility under the prospectus legislation of certain functions being transferred between supervisors. The 2006 Financial Services Committee (FSC) report on Financial Supervision[8] recommended increasing supervisory convergence in the implementation of the Financial Services Action Plan, and expressly mentioned the option of the transfer foreseen in the Prospectus Directive as an example of the cases included in the EU legislation of delegation of tasks and of responsibilities.

16.13 Then, CESR decided[9] that it would conduct a pilot study in 2007, on the delegation of powers under the Prospectus Directive as a measure of the cooperation between NCAs, and among other things, CESR requested from its members information on the option envisaged in Article 13(5), Prospectus Directive[10] on the transfer of approval. Apparently, there had been only ten cases of transfer since the entry into force of the Directive (half of them concerning shares, half debt securities).

16.14 Unsurprisingly, CESR concluded that 'the experience in these cases has proved satisfactory' for the issuers and the NCAs involved. Among the common aspects CESR observed, some are worth mentioning. In all the cases, the transfer process was initiated at the request of the issuer and there was an initial informal contact between the NCAs involved to make the process smoother during the subsequent stages. In their communications to the delegated NCAs, the delegating NCAs explained the factors taken into consideration when deciding on the transfer of the approval, and these communications were followed up by the delegated NCAs, which confirmed acceptance of the transfer. The delegating NCA duly informed the requesting issuer. Most importantly, the transfers of the prospectus approval had not led to an increase in the time for the approval of the prospectus, and the feedback from the issuers involved have been positive.[11] In spite of CESR's statement on the functioning of the transfer system, one may doubt whether ten cases is a sufficient number. To properly test the system, data should include the number of applications submitted to competent authorities, and perhaps

[7] European Commission, White Paper—Financial Services Policy 2005–2010 (COM(2005) 629 final), Brussels, 1 December 2005.

[8] Financial Services Committee, FSC Report on Financial Supervision (FSC 4159/06), Brussels, 23 February 2006.

[9] See CESR, 'CESR Welcomes the EU Financial Ministers' Political Backing for Greater Supervisory Convergence amongst Securities Regulators in the EU', press release CESR/06-198, 5 May 2006.

[10] The language of Article 13.5, Prospective Directive is quite similar to the Prospective Regulation:

> The competent authority of the Home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within three working days from the date of the decision taken by the competent authority of the Home Member State.

[11] CESR, 'Report on the Supervisory Functioning of the Prospectus Directive and Regulation', CESR/07-225, June 2017, 14.

not even this would include the rejections that may have been informally anticipated before formal requests were filed.

16.15 Now the Prospectus Regulation confirms the possibility. In particular, according to Article 20(8), Prospectus Regulation, on request of the issuer, the offeror, or the person asking for admission to trading on a regulated market (hereinafter also: applicants), the NCA of the home Member State may transfer the approval of a prospectus to the NCA of another Member State, subject to prior notification to ESMA and the agreement of that NCA. The NCA of the home Member State has to transfer the documentation filed, together with its decision to grant the transfer, in electronic format, to the NCA of the other Member State on the date of its decision. Such a transfer shall be notified to the applicant within three working days from the date of the decision taken by the NCA of the home Member State. Upon completion of the transfer of the approval, the NCA to whom the approval of the prospectus has been transferred shall be deemed to be the NCA of the home Member State for that prospectus for the purposes of the Regulation.

16.16 Unfortunately, the Prospectus Regulation (in line with the Prospectus Directive) sets neither the criteria NCAs should follow to decide on the transfer after the applicants' request, nor obliges them to transfer the approval in any circumstance, nor, finally, delegates power to the Commission or to ESMA to define such details. In this way, the maximum of discretion remains in the hands of NCAs.

16.17 Only a few NCAs identified explicitly some criteria, on a voluntary basis. One example is the Central Bank of Ireland—one of the most competitive NCAs in the approval of prospectuses. While confirming 'its sole and absolute discretion' on the final decision to transfer prospectus approvals, it lists some factors it shall take into account in considering the transfer request. These factors 'may include the domicile of the issuer, the country where the issuer's securities are admitted to trading and the location of any offer proposed by the issuer. This is not an exhaustive list and each transfer request is considered by the Central Bank on a case by case basis.'[12]

16.18 This lack of guidance by most NCAs is hardly compatible with any principles of good administration, as it deprives the applicants from any right to accountability (Art. 41, Charter of Fundamental Rights). The European Securities and Markets Authority should therefore press for more transparency on the transfer cases, whether accepted or nor, in entry or exit. Should it become evident that the transfer of approval remains substantially untapped, the Commission should also consider opening an infringement procedure against those Member States whose NCA has not identified any criteria concerning the decisions to transfer prospectus approvals (and to receive them).

[12] Central Bank of Ireland (CBI), *Prospectus Handbook, A Guide to Prospectus Approval in Ireland* (2016), 24, to https://www.centralbank.ie.. At the same time, no criteria is set for accepting the request by another NCA to approve the prospectus: 'the relevant competent authority in accordance with the requirements and procedures set out by that competent authority, will contact the Central Bank to confirm whether it is willing to agree to the proposed transfer.'

16.19 A critical issue that still makes the transfer of prospectus approval less appealing to issuers is the allocation of supervisory responsibility on (national provisions implementing) the Transparency Directive (Directive 2004/109/EC) in case the prospectus refers to securities listed on a regulated market (but the same applies to securities traded on any trading venue, with regard to Market Abuse Regulation (EU 596/2014) (MAR) obligations).[13] This responsibility remains, in fact, with the NCA of the home Member States, irrespective of any transfer of prospectus approval to another NCA. Overall, a more effective system would be, *de lege ferenda*, one where ESMA had the power to decide on transfers of prospectus approval procedures from an NCA to another. When the relevant securities are offered but not listed, the process should be much smoother and semi-automatic.

2. Prospectus Approval: Definitions

16.20 What is the approval of a prospectus, in theory and practice? According to the Prospectus Regulation, this is the 'positive act at the outcome of the *scrutiny* by the home Member State's competent authority of the *completeness*, the *consistency* and the *comprehensibility* of the information given in the prospectus' (Art. 2(r), emphasis added). These requirements are often referred to as 'the 3Cs'. The definition is similar to its equivalent in the Prospectus Directive, but it formally grants each of the 3Cs the same weight while, in the Directive, completeness seemed to have a prominent role.[14]

16.21 But what exactly is the scrutiny and what do the 3Cs mean? More particularly, in light of what should the prospectus be regarded as complete? With what should the prospectus be consistent? And, finally, to whom must the prospectus be comprehensible?

16.22 Answering these questions is not easy, in spite of the approval and publication by the Commission of the delegated act to supplement Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus (Commission delegated regulation (EU) 2019/980 (CPDR).

3. The Scrutiny

16.23 The scrutiny of the prospectus is an assessment by the NCA of the 3Cs. Strangely enough, it is an undefined concept in the Prospectus Regulation (as it was in the Prospectus Directive), but it is still recognized in the Regulation as the key problem of

[13] For more information on the interactions between the Prospectus Regulation and other European statutes, see Marieke Driessen, Chapter 4 'The Prospectus Regulation and other EU Legislation—the Wider Context for Prospectuses', this volume.

[14] Article 2(s), Prospectus Directive: ' "Approval" means the positive act at the outcome of the scrutiny of the completeness of the prospectus by the home Member State's competent authority including the consistency of the information given and its comprehensibility.'

approval, and the catalyst for scarce harmonization in the very different authorization processes by NCAs.

16.24 In fact, as clearly stated by Recital (60) Prospectus Regulation, 'not all issuers have access to adequate information and guidance about the scrutiny and approval process and the necessary steps to follow to get a prospectus approved, as different approaches by competent authorities exist in Member States'. Hopefully, the Regulation should eliminate those differences by harmonizing the criteria for the scrutiny of the prospectus and the rules applicable to the approval processes of NCAs. These processes should be more streamlined in the future, but—as the same Recital goes—the implementation of a convergent approach on the scrutiny of the completeness, consistency, and comprehensibility of the information contained in a prospectus will crucially depend on the attitude of each NCA towards the need for a proportionate approach in the scrutiny of prospectuses based on the circumstances of the issuer and of the issuance.

16.25 Finally, NCAs should apply transparency standards that are at least as high as those which they require from market participants: they should (approve and[15]) publish on their websites guidance on how to seek the approval of a prospectus, in order to facilitate an efficient and timely scrutiny (Art. 20(7), Prospectus Regulation). Such guidance shall include contact details for the purposes of approvals.[16] Unfortunately, there is no obligation to publish these guidelines in English but, hopefully, ESMA[17] could request this to NCAs.

16.26 The scope of the scrutiny (Art. 35, CPDR) includes the prospectus or any of its constituent parts, including a universal registration document (URD), whether submitted for approval or filed without prior approval, and any amendments thereto, as well as any supplements to the prospectus.

(i) Completeness

16.27 The first object of the scrutiny is the prospectus' completeness. While this concept is not defined in the Prospectus Regulation, the criteria for the assessment of the completeness of the information contained in the prospectus are fleshed out in Article 36, CPDR.

16.28 In particular, for the purposes of scrutinizing the completeness of the information in a draft prospectus, NCAs have to consider both the following conditions: (i) whether the draft prospectus is drawn up in accordance with the Prospectus Regulation and the

[15] This is not made explicit in the Prospectus Regulation.

[16] Furthermore, the issuer, the offeror, the person asking for admission to trading on a regulated market, or the person responsible for drawing up the prospectus shall have the possibility of directly communicating and interacting with the staff of the competent authority throughout the process of approval of the prospectus.

[17] Actually, ESMA is requested to conduct peer reviews covering activities of the competent authorities under the Prospectus Regulation within an appropriate time frame before its review and in accordance with its founding Regulation (Regulation (EU) 1095/2010). Market participants should be included among those interviewed during the peer reviews, so as to minimize the risk that mutual assessment may distort the outcome.

CPDR, depending on the type of issuer, the type of issuance, the type of security, and the type of offer or admission to trading; and (ii) whether the issuer has a complex financial history or has made a significant financial commitment.[18]

(ii) Consistency

16.29 For the purposes of scrutinizing the consistency of the information in a draft prospectus, the competent authority has to consider, according to Article 38, CPDR, all of the following:

(a) whether the draft prospectus is free of material discrepancies between the different pieces of information provided therein, including any information incorporated by reference;
(b) whether any material and specific risks disclosed elsewhere in the draft prospectus are included in the risk factors section;
(c) whether the information in the summary is in line with information elsewhere in the draft prospectus;
(d) whether any figures on the use of proceeds correspond to the amount of proceeds being raised and whether the disclosed use of proceeds is in line with the disclosed strategy of the issuer;
(e) whether the description of the issuer in the operating and financial review, the historical financial information, the description of the issuer's activity, and the description of the risk factors are consistent;
(f) whether the working capital statement is in line with the risk factors, the auditor's report, the use of proceeds and the disclosed strategy of the issuer, and how that strategy will be funded.

(iii) Comprehensibility

16.30 In order to be comprehensible, the draft prospectus must be capable of being understood, taking into consideration issuer features, type of securities, and type of targeted investors.

16.31 The criteria for the scrutiny of the comprehensibility of the information contained in the prospectus are contained in Article 37, CPDR.

[18] For the purposes of the scrutiny addressing issuers with a complex financial history or that have made significant financial commitments (Art. 18, CPDR), NCAs may require the issuer to include, modify, or remove information from a draft prospectus, taking into account:

(a) the type of securities;
(b) the information already included in the prospectus and the existence and content of information already included in a prospectus of the entity other than the issuer, as well as the applicable accounting and auditing principles;
(c) the economic nature of the transactions by which the issuer has acquired, or disposed of, its undertaking or any part of it, and the specific nature of that undertaking;
(d) whether the issuer can obtain with reasonable effort information about the entity other than the issuer.

In particular, for the purposes of scrutinizing the comprehensibility of the information in a draft prospectus, NCAs shall consider all of the following: **16.32**

(a) whether the draft prospectus has a clear and detailed table of contents;
(b) whether the draft prospectus is free from unnecessary reiterations;
(c) whether related information is grouped together;
(d) whether the draft prospectus uses an easily readable font size;
(e) whether the draft prospectus has a structure that enables investors to understand its contents;
(f) whether the draft prospectus defines the components of mathematical formulas and, where applicable, clearly describes the product structure;
(g) whether the draft prospectus is written in plain language;
(h) whether the draft prospectus clearly describes the nature of the issuer's operations and its principal activities;
(i) whether the draft prospectus explains trade- or industry-specific terminology.

However, competent authorities shall not be required to consider points (g), (h), and (i) where a draft prospectus is to be used exclusively for the purposes of admission to trading on a regulated market of non-equity securities, for which a summary is not required by Article 7, Prospectus Regulation. **16.33**

Competent authorities may, on a case-by-case basis, require that certain information provided in the draft prospectus be included in the summary. **16.34**

(iv) Stocktaking

The Level 2 regulatory effort to provide more detailed guidance on the assessment of the 3Cs is a commendable exercise. It provides issuers, other applicants, and investors with much more detailed indications than in the past. Unfortunately, however, the CPDR alone might not be able to ensure full harmonization of NCAs' supervisory practices. The aim of ensuring full harmonization is indeed jeopardized by the large recourse to general standards that go beyond the 3Cs. As a matter of fact, NCAs may ask further information, not only when the 3Cs are not met, but also when they deem that changes or supplementary information are needed (Art. 20(4), Prospectus Regulation). **16.35**

Article 40, CPDR also allows NCAs to use additional criteria for the scrutiny of the completeness, consistency, and comprehensibility of the information contained in the prospectus, where necessary for investor protection. **16.36**

Furthermore, while NCAs are not required to look at information outside the prospectus, they are not prevented from doing so on a case-by-case basis.[19] NCAs can raise **16.37**

[19] ESMA, 'Final Report Technical Advice under the Prospectus Regulation', ESMA31-62-800, 28 March 2018, 207–8, specifies that, on the basis of Articles 2(r), 20(4), 20(11), 32(1)(a), (b), and (c), Prospectus Regulation, as well as Recitals (60) and (71), NCAs are not required to look at information outside the prospectus in connection with their scrutiny or review of a prospectus/universal registration document (URD). They are only required to scrutinize/review the information contained in the prospectus/URD. However, this should not prevent each NCA

comments in relation to information outside the prospectus, whenever this appears to be relevant for the prospectus scrutiny. One of the critical issues in this respect was under the Prospectus Directive, and will likely be under the Prospectus Regulation: the relationship with regulated information, mainly originating from the Transparency Directive and the MAR.

16.38 Identical considerations apply to the general requirement that a supplement be published any time a significant new factor emerges relating to the information included in a prospectus. The assessment of the materiality of such developments remains, in fact, largely subjective (Art. 23, Prospectus Regulation).

4. Timing and Procedure of Prospectus Approval

16.39 A critical factor in the approval process is the timing. Apparently, this is strictly set in the Prospectus Regulation, as it was in the Prospectus Directive, so discrepancies among NCAs' practices should not be allowed in principle (Art. 20).

16.40 The default regime gives the NCA ten working days to scrutinize the prospectus. The NCA must notify the applicant (whether the issuer, the offeror, or the person asking for admission to trading on a regulated market) of its decision regarding the approval of the prospectus within ten working days of the submission of the draft prospectus. Furthermore, the NCA shall notify ESMA of the approval of the prospectus and any supplement thereto as soon as possible, and in any event by no later than the end of the first working day after that approval is notified to the applicant.

16.41 The term is extended to twenty working days for unlisted first offerors (i.e. where the offer to the public involves securities issued by an issuer that does not have any securities admitted to trading on a regulated market and that has not previously offered securities to the public), due to the absence of any past and/or present information about the company. For the same reason, the term is reduced to five working days—a novelty of the Prospectus Regulation—in case of frequent issuers, as defined in Article 9(11), Prospectus Regulation, that submit a prospectus consisting of separate documents using the URD. To take advantage of this special regime, frequent issuers shall inform the competent authority at least five working days before the date envisaged for the submission of an application for approval.

16.42 The critical issue, which had already affected the Prospectus Directive regime and remains largely unaddressed, is that these deadlines are not really binding on NCAs, because where these fail to take a decision on the prospectus within the time limits, such

from looking into information outside the prospectus in specific situations and on a case-by-case basis when it considers that it might be relevant to do so, nor should it stop the NCA from raising comments in relation to information outside the prospectus which would seem relevant for inclusion in the prospectus. When an NCA chooses to look at information outside the prospectus, rather, the NCA is looking at the information outside the prospectus to assess whether supplementary information is needed in the prospectus.

failure shall not be deemed to constitute approval of the application (Art. 20(2)).[20] This is understandable, given that the Prospectus Regulation does not (and could not in any way) harmonize the liability regime for NCAs. However, the fact remains that these time limits are a very weak instrument with respect to NCAs, especially if one considers the limitation in the choice of the home Member State (see Section VIII 'A Focus on Equity Securities', para. 16.97 below).

16.43 Where the competent authority finds that the draft prospectus does not meet the standards of completeness, comprehensibility, and consistency necessary for its approval and/or that changes or supplementary information are needed, it asks for the changes or supplementary information that are needed within the deadline.

16.44 If the changes are not made, or the supplementary information is not provided, the approval is refused, with a clear indication of the motivations. Otherwise, if the information is provided, the competent authority has a new deadline for approving the prospectus, identical to the initial one except for the unlisted first offerors whose deadline for approval of the revised prospectus is ten days.

16.45 There are, therefore, only two possible outcomes under the Prospectus Regulation, namely approval or rejection: *tertium non datur*. This is why the Regulation does not clarify what happens if the NCAs request further clarification after having asked already for changes or supplementary information. This omission has given rise to diverging behaviours by competent authorities. As reiteration of requests is not explicitly mentioned, but is not ruled out either, there is no harmonization on this crucial element. As a consequence, the supervisory style of every NCA becomes a key determinant of the length of prospectus approval. In the previous regime, some countries provided for a cap of working days, but it is not clear if this can be compatible with the Prospectus Regulation, even if it can be a safeguard for market participants. Other NCAs regulate the pre-filing period. Still others do not consider the filing (and the deadline) as running until they verify that the prospectus is ready to be considered complete.

16.46 But, given that the new framework is composed of Level 1 and 2 Regulations, there should be no margin for discretion. A more intense coordination effort by ESMA and perhaps a more stringent enforcement by the European Commission would help solve this lack of consistency.

III. Geographical Validity of Prospectus

16.47 The general rule of the Prospectus Regulation (as it was in the Prospectus Directive), in line with the free provision of services and home country control, is that once

[20] Paola Lucantoni, 'Art. 13 Directive 2003/71/EC', in: Matthias Lehmann and Christoph Kumpan (eds), *European Financial Services Law* (Baden-Baden, Munich, Oxford: Nomos, Beck, Hart, 2019), 1011–12.

a prospectus is approved in the home Member State, it should be valid in the whole European Economic Area (EEA) as well.

16.48 In particular, where an offer of securities to the public or admission to trading on a regulated market occurs in more Member States, or in a Member State other than the home Member State, the prospectus approved by the home Member State and any supplements thereto are valid for the offer to the public or the admission to trading in any host Member States, provided that ESMA and the NCA of each host Member State are notified accordingly (Art. 24, Prospectus Regulation). So, a cross-border offer or listing requires notification by the home NCA, within one day, to ESMA (but in any case, ESMA must be notified of an approval of a prospectus, even in a purely national offer/listing) and the host NCA (Art. 25).

16.49 An electronic copy of the prospectus (or supplement) must be translated (when required: see section IV 'Linguisitic Regime', para. 16.54 below) and notified, along with the certificate of approval. No fee can be charged from either home or host NCAs for notification (Art. 25(5), Prospectus Regulation).

16.50 Competent authorities of host Member States cannot undertake any approval or administrative procedures relating to prospectuses and supplements approved by the competent authorities of other Member States, or relating to final terms: this would violate the principle of home country control. There is a relevant exception provided in Article 37, however, which allows for precautionary measures. These are allowed when the host NCA believes the applicant has violated the prospectus regime. The procedure is designed as an escalation that starts with information by the host NCA to the home NCA that a violation has likely occurred, then continues with direct action by the host NCA, and, finally, with ESMA's action for the settlement of possible disagreements.

16.51 First, where the NCA of the host Member State has clear and demonstrable grounds for believing that irregularities have been committed by the issuer, the offeror, or the person asking for admission to trading on a regulated market or by the financial intermediaries in charge of the offer of securities to the public or that those persons have infringed their obligations under this Regulation, it shall refer those findings to the NCA of the home Member State and to ESMA.

16.52 Second, where, despite the measures taken by the NCA of the home Member State, the issuer, the offeror, or the person asking for admission to trading on a regulated market or the financial intermediaries in charge of the offer of securities to the public persists in infringing this Regulation, the NCA of the host Member State, after informing the NCA of the home Member State and ESMA, shall take all appropriate measures in order to protect investors and shall inform the Commission and ESMA thereof without undue delay.

16.53 Third, where a NCA disagrees with any of the measures taken by another NCA pursuant to paragraph 2, it may bring the matter to the attention of ESMA. The European

Securities and Markets Authority may act in accordance with the powers conferred on it under Article 19, Regulation (EU) 1095/2010.

IV. Linguistic Regime

16.54 For offers and listings only in the home Member State, the prospectus is drawn up in a language accepted by the home NCA (Art. 27, Prospectus Regulation).[21]

16.55 For offers and listings that occur only in one or more host Member States (but not in the home Member State), the prospectus is drawn up in the official language of the host Member States (or at least in a language accepted by them) or in English (at the choice of the issuer). The Summary is translated in either the official language of the host Member States (or in a language accepted by them) or in English (at the choice of the host NCA). No translation can be requested on the other part of the prospectus.

16.56 Finally, for offers and listings in both the home and (at least one) host Member State, the prospectus is drawn up in a language accepted by the home NCA (at the choice of the home NCA) *and* in a language accepted by the host NCA or in English (at the choice of the issuer). The Summary is translated in either the official language of the host Member State or in English (at the choice of the host NCA).[22]

16.57 Member States and NCAs have made different use of the flexibility allowed by the Prospectus Regulation.

16.58 In Italy, Consob allows the use of English for all non-equity prospectuses, provided that the summary is in Italian, while it does not allow it for equity offers, given that there is no chance for an offeror to choose a different competent authority changing the home Member State.[23]

16.59 In other EU countries, the implementation is more flexible.[24] The French Autorité des Marchés Financiers (AMF) issued a consultation document in May 2019 proposing to allow the use of English in all prospectuses, except for those offers authorized and made only in France, where the offeror/issuer could use English for prospectus but should add a summary note in French.[25]

[21] For a thorough analysis, see Paola Leocani, Chapter 15 'Omission of Information, Incorporation by Reference, Publication, and Language of the Prospectus', this volume.

[22] For the problems that occurred before the entry into force of the current regime—which reproduces that of the Prospectus Directive—see Schammo (n. 3), 112–15.

[23] See the new Consob issuers regulation, which entered into force on 6 August 2019, at http://www.consob.it/documents/46180/46181/reg_consob_1999_11971.pdf/bd8d1812-6866-473e-8234-c54c75c0363a .

[24] See Latham & Watkins, Linklaters, White & Case, Reply to Consob—Consultation for the Modifications to the Issuers Regulation due to EU Prospectus Regulation 2017/1129, 10 July 2019, http://www.consob.it.

[25] AMF, Consultation publique sur les modifications du Reglement General de l'AMF prevues a l'occasion de l'entrée en application, le 21 Juillet 2019, deu Reglement (UE) 2017/1129 dit 'Prospectus', 14 May 2019, https://www.amf-france.org.

16.60 In Germany, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) allows the use of English for all prospectuses, but requires a summary note in German. On a voluntary basis, some German issuers enclose with the English version of the prospectus a non-binding translation in German, with no legal value.[26]

16.61 In Spain, Comisión Nacional del Mercado de Valores (CNMV) allows the prospectus to be in English, except in the case of a retail offer in Spain, in which case the prospectus must be in Spanish.[27]

16.62 In Denmark, the Finanstilsynet (Danish FSA) allows the use of English for all prospectuses, except for those offers authorized and made only in Denmark, where the offeror or the issuer could use English for the prospectus but should add a summary note in Danish, only in case of public offers.

16.63 The Czech National Bank allows the use of English for all prospectuses, and only in case of public offers the offeror is required to add a summary note in Czech.

16.64 The same applies to Norway: the Finanstilsynet (Norwegian FSA) allows the use of English for all prospectuses, but the offeror should add a summary note in Norwegian in case of public offer.

16.65 In Luxembourg, the Commission de Surveillance du Secteur Financier (CSSF) allows the use of English for all prospectuses, and so does the Dutch Authority for the Financial Markets (AFM) in the Netherlands.[28]

V. Sanctioning Regime

16.66 The sanctioning regime is an important novelty in the Prospectus Regulation, as the Prospectus Directive only had one concise article with respect to sanctions.[29]

[26] See Article 21 (*accepted language*) of the recent Prospectus law implementing the Prospectus Regulation (*Gesetz zur weiteren Ausführung der EU- Prospektverordnung und zur Änderung von Finanzmarktgesetzen,* 214/19), entered into force on 21 July 2019 (https://www.bundesrat.de) and in line with previous law (Art. 19, Prospectus Law, https://www.gesetze-im-internet.de/wppg).

[27] See Article 23.1, Real Decreto 1310/2005, de 4 de noviembre, por el que se desarrolla parcialmente la Ley 24/1988, de 28 de julio, del Mercado de Valores, en materia de admisión a negociación de valores en mercados secundarios oficiales, de ofertas públicas de venta o suscripción y del folleto exigible a tales efectos. This is confirmed by the Frequently Asked Questions on the CNMV's website, https://cnmv.es/Portal/GPage.aspx?id=MP_FAQ3 and https://cnmv.es/Portal/GPage.aspx?id=MP_FAQ1 (both confirming the possibility of drafting prospectuses in English).

[28] The use of English is stated in Article 5:19, Financial Market Supervision law (*Wet op het financieel toezicht*), https://www.afm.nl.

[29] Article 25, Prospectus Directive had only two paragraphs stating that (i) without prejudice to the right of Member States to impose criminal sanctions and without prejudice to their civil liability regime, Member States should ensure, in conformity with their national law, that the appropriate administrative measures (to be effective, proportionate and dissuasive) could be taken or administrative sanctions be imposed against the persons responsible in case of noncompliance, and that (ii) Member States should provide that the NCAs could disclose to the public every measure or sanction they imposed, unless disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved.

This implies that Member States and NCAs should carefully check and possibly review their sanctioning regime and due process when adapting their legal systems to the new Regulation.

1. Criminal and Administrative Sanctions

16.67 The Prospectus Regulation stresses the importance of enforcement through appropriate administrative sanctions and other administrative measures, in line with the Communication of the Commission of 8 December 2010 on Reinforcing sanctioning regimes in the financial services sector.

16.68 As equally stated in many other Regulations and Directives, sanctions and measures for violation of the prospectus regime should be effective, proportionate, and dissuasive. On the one hand, the Prospectus Regulation auspices a common approach in Member States and a deterrent effect; on the other hand, it is—when it comes to sanctions—a minimum harmonization regulation, as it does not limit Member States in their ability to provide for higher levels of administrative sanctions (Recital (74)). At the same time, the Regulation does not deal with criminal sanctions, as opposed to the Market Abuse Directive II (Directive 2014/57/EU).

16.69 Under the Prospectus Regulation, Member States are able to impose administrative and criminal sanctions for the same infringements, but are not obliged to impose administrative sanctions for infringements which are subject to criminal sanctions in their national law. The Regulation does not take position on the *ne bis in idem* issue: but in case of a criminal sanction which is not decided by an administrative authority, it recommends that Member States and NCAs, where possible, have in place cooperation systems that enable the exchange of information (Recital (76), Prospectus Regulation).

16.70 The minimum harmonization requirements set forth in Article 38, Prospectus Regulation deal with the violation of the main provisions of the Regulation[30] or the failure to cooperate in an investigation or with an inspection or request covered by Article 32.

16.71 In case Member States do not impose administrative sanctions because violations are already subject to criminal sanctions as explained in paragraph 16.69 above, they must notify in detail, to the Commission and to ESMA, the relevant parts of their criminal law. In any case, Member States must also notify the Commission and ESMA of their sanctioning regimes and of any subsequent amendment thereto.

[30] Articles 3, 5, 6, 7(1)–(11), 8, 9, 10, 11(1)–(3), 14(1) and (2), 15(1), 16(1), (2), and (3), 17, 18, 19(1)–(3), 20(1), 21(1)–(4) and (7)–(11), 22(2)–(5), 23(1), (2), (3), and (5), and 27.

2. The Menu of Sanctions and the Due Process

16.72 The menu of administrative sanctions that can be imposed by NCAs (according to the powers Member States are required to confer upon them) includes public statements indicating the natural person or the legal entity responsible and the nature of the infringement , cease and desist orders,[31] and administrative pecuniary sanctions (Art. 38, Prospectus Regulation). In this case, the rules do not mandate a minimum sanction, but rather set a minimum level of maximum sanctions. The Regulation provides for a general 'minimum of the maximum', which is defined for disgorgement of profits,[32] and for two other similar thresholds, one for natural[33] and the other for legal persons.[34] At the same time, Member States 'may provide for additional sanctions or measures and for higher levels of administrative pecuniary sanctions than those provided in this Regulation' (Art. 38(3)), thus going beyond the minimum requirements of the Regulation.

16.73 In order for the sanctions and measures to be effective, proportionate, and dissuasive (and ensure a common approach in Member States and a deterrent effect), the NCAs, when determining the type and level of administrative sanctions and other administrative measures, must take into account all the relevant circumstances including, where appropriate: (i) the gravity and the duration of the infringement; (ii) the degree of responsibility of the person responsible for the infringement; (iii) the financial strength of the person responsible for the infringement (as indicated by the total turnover of the responsible legal person or the annual income and net assets of the responsible natural person); (iv) the impact of the infringement on retail investors' interests; (v) the importance of the profits gained or the losses avoided by the person responsible for the infringement; (vi) the importance of the losses for third parties derived from the infringement, in so far as they can be determined; (vii) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person; (viii) previous infringements by the person responsible for the infringement; (ix) measures taken after the infringement by the person responsible for the infringement to prevent its repetition.

16.74 Given the explicit mention of these principles in the Prospectus Regulation (which was not the case in the Prospectus Directive), it is now binding for NCAs to take into account and motivate all the above points when deciding an administrative sanction

[31] An order requiring the natural person or legal entity responsible to cease the conduct constituting the infringement.

[32] At least twice the amount of the profits gained or losses avoided because of the infringement, where those can be determined.

[33] In the case of a natural person, maximum administrative pecuniary sanctions shall be of at least EUR 700,000.

[34] In the case of a legal person, maximum administrative pecuniary sanctions shall be of at least EUR 5,000,000, or 3 per cent of the total annual turnover of the individual or, where existing, consolidated accounts.

and its level. At the same time, NCAs must cooperate closely to ensure that the exercise of their supervisory and investigative powers and the administrative sanctions and other administrative measures that they impose are effective and appropriate, and to avoid duplication and overlaps when exercising their powers in cross-border cases (Art. 39(3)).

16.75 Finally, Member States must ensure that NCAs' decisions taken under the Regulation are properly reasoned and always subject to a right of appeal before a tribunal. This should also apply in case of non-decisions or negative decisions in the approval process of a prospectus (including when no feedback is given, within the time limits, through a request for changes or supplementary information on the basis of Art. 20(2), (3), and (6)).

3. Publication of Decisions

16.76 NCAs' decisions imposing administrative sanctions or other administrative measures must have a deterrent effect on the public at large. For this reason, publication is the default rule, with three exceptions when NCAs deem it inappropriate: publication on an anonymous basis; delayed publication; or non-publication (Art. 42, Prospectus Regulation).

16.77 In principle, a decision imposing an administrative sanction or an administrative measure for infringement of Prospectus Regulation must be published by competent authorities on their official websites. This should happen not immediately after the final decision taken by NCA, but only after the person subject to that decision has been informed of it. In order to act as a deterrent, the publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible. This does not apply to decisions imposing measures that are of an investigatory nature.

16.78 Exceptions to publication are carefully drafted in the Regulation, both in form and in substance. Where the publication of the identity of the legal entities, or identity or personal data of natural persons, is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where such publication would jeopardize the stability of financial markets or an ongoing investigation, Member States shall ensure that the NCAs adopt one of the following remedies: (i) deferral of the publication of the decision until the moment where the reasons for non-publication cease to exist; (ii) publication of the decision on an anonymous basis in a manner which is in conformity with national law, where such anonymous publication ensures an effective protection of the personal data concerned; (iii) abstention from publication in the event that the other options are considered to be insufficient to ensure the stability of financial markets or the proportionality of the publication (which is the case for offenses of a minor nature).

16.79 In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be deferred for a reasonable period where it is foreseen that, within that period, the reasons for anonymous publication shall cease to exist.

16.80 The Regulation does not impose to wait until expiration of the right to appeal (or even until *res judicata*) for publication, but it requires that NCAs also publish immediately, on their official website, that a decision was challenged and any subsequent information on the outcome of the appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.

16.81 NCAs should keep the decisions on their official website for a period of at least five years after its initial publication, but personal data contained in the publication shall be kept on the website only for the period which is necessary in accordance with the applicable data protection rules.

16.82 NCAs must provide ESMA, on an annual basis, with aggregate information regarding all administrative sanctions and other administrative measures imposed in accordance with Article 38. The European Securities and Markets Authority shall publish that information in an annual report.

16.83 Where Member States have chosen, in accordance with Article 38(1), to lay down criminal sanctions for the infringements of the provisions referred to in that paragraph, their competent authorities shall provide ESMA annually with anonymized and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish data on criminal sanctions imposed in an annual report.

16.84 Where the NCA has disclosed administrative sanctions, other administrative measures, or criminal sanctions to the public, it shall simultaneously report them to ESMA. National competent authorities must also inform ESMA of all administrative sanctions or other administrative measures imposed but not published, including any appeal in relation thereto and the outcome thereof. Member States shall ensure that NCAs receive information and the final judgment in relation to any criminal sanction imposed, and submit it to ESMA. The European Securities and Markets Authority shall, on its turn, maintain a central database of sanctions communicated to it solely for the purposes of exchanging information between NCAs. That database shall be accessible only to competent authorities, and it shall be updated on the basis of the information provided by the NCAs.

VI. Remaining Spaces for Arbitrage in the Prospectus Regime

16.85 The previous analysis has demonstrated that determining the home Member State for an offer or an admission to trading may have remarkable implications. Identifying the home NCA also means identifying the administrative law applicable to the scrutiny

and the subsequent approval of the prospectus, which also drives the application of national choices in matters where Member States retain national discretion under the Prospectus Regulation. Furthermore, not all the NCAs have the same supervisory style, and this can influence the way the prospectus approval procedure is actually run, as the previous sections show.

16.86 As for the hard law determinants, the law of the NCAs regulates key matters such as the linguistic regime and the supervisory fees, as well as the procedural and substantive rules on sanctions, which are subject to limited harmonization (sections IV 'Linguistic Regime', para. 16.54, and V 'Sanctioning Regime', para. 16.66). The sanctioning regime for both criminal and administrative violations follows, in fact, the home country principle, as NCAs and criminal judges always administer their national laws, and never apply foreign provisions.

16.87 Even in the absence of express optional regimes or national discretion, the supervisory style of national competent authorities may diverge, in particular on the interpretation of the role of NCAs in the scrutiny. This can lead to divergent outcomes for issuers and other applicants as regards the prospectus approval procedure and the interpretation of general rules such as those triggering the duty to publish a supplement (section II.4 'Timing and Procedure of Prospectus Approval', para. 16.39). The variable length of the approval procedure as a consequence of the reiteration of requests for supplementary information under Article 20(4), Prospectus Regulation (section II.4) is a case in point.

16.88 These remaining divergences in areas where the EU prospectus regime does not allow for any national discretion may depend on a number of factors. Beside the unavoidable path dependence of different traditions on the vetting procedure, mention should be made at least of national courts. The role of the case law on prospectus liability can hardly be overestimated, as it influences NCAs in many respects. First, when a court adjudicates on prospectus liability disputes, it often determines whether the items in the document(s) contained all the material information an investor would need to know when making an informed assessment of the issuer and its securities (Art. 6, Prospectus Regulation). In spite of their non-negligible impact,[35] EU soft-law tools may not always play a decisive role in judicial decisions,[36] but national case law will in any event inevitably affect subsequent NCAs' approval procedures. Second, when NCAs and their employees fear they may be easily held liable under the national law (Art. 20(9), Prospectus Regulation),[37] they are likely to react in a defensive manner by

[35] ECJ, C-410/13, *Baltlanta*, 3 September 2014, para. 64; C-322/88, *Grimaldi*, 13 December 1989, para. 18; C-207/01, *Altair Chimica*, 11 September 2003, para. 41.

[36] See e.g. Carmine di Noia and Matteo Gargantini, 'Issuers at Midstream. Disclosure of Multistage Events in the Current and in the Proposed EU Market Abuse Regime', *European Company and Financial Law Review* (2012) 9, 484, 488–9.

[37] An interesting case recently occurred in Italy which may shed light on the powerful incentive case law may exert on NCAs and their employees. In July 1983, the Italian Financial Conduct Authority (Consob) approved a prospectus for a public offering of shares that, as subsequently emerged, contained some false information. After complex procedural developments that lasted for years, the Court of Cassation paved the way to supervisory liability in case of gross negligence (Court of Cassation, 3 March 2001, 3132). On the basis of this interpretation, the

making their scrutiny particularly strict and by relying on a more bureaucratic and formalistic approach to supervision. After all, bureaucrats, like any other individual, may be sensitive to risks. Issuers are not very likely to sue a supervisor that has rejected prospectuses that they consider complete, consistent, and comprehensible (Art. 40(2), Prospectus Regulation). To the contrary, the risk that a supervisor be sued for approving a prospectus that turns out to contain false information is incomparably higher.

16.89 For the time being, ESMA peer reviews have not proven particularly effective in reducing the distance between NCAs,[38] but it remains to be seen whether the new ESMA guidelines to be issued under the Prospectus Regulation—such as those on the specificity and materiality of risk factors under Article 16[39]—will curb these inconsistencies and make the NCAs' approach more homogeneous. As long as the existing divergences remain and are not negligible, market participants will have an incentive to select one or the other NCA, depending on their interests. The driver of such choice will typically consist in a combination of different factors, like the intention to show a credible commitment to higher standards and the desire to save on regulatory costs. The following sections analyse the default regime for the identification of the NCA (section VII 'Identifying the National Competent Authority', para. 16.90) and the margin for issuer choice (section VIII 'A Focus on Equity Securities', para. 16.97).

VII. Identifying the National Competent Authority

16.90 With a view to identifying the home Member State—and hence the NCA[40]—the Prospectus Regulation sets different connecting factors, depending on the securities involved. The default rule, which applies unless the other rules determine otherwise, connects the home Member State with the issuer's registered office (Art. 2(m)(i)). This rule—which we label as '(i)' for the sake of exposition—has two exceptions.

16.91 The first exception—which we label as '(ii)'—concerns the public offers and the requests for admission to trading of non-equity securities whose denomination per unit amounts to at least EUR 1,000 (Art. 2(m)(ii), Prospectus Regulation).[41] For those

Court of Appeal of Milan deemed the late chairman of Consob and two civil servants to be personally liable for damages towards the investors on the basis of gross negligence (Milan Court of Appeal, 21 October 2003, 127 Il Foro Italiano 583 (2004)). In May 2016, the decision was upheld by the Court of Cassation and became res judicata against the heir of the chairman and the two civil servants (Court of Cassation, Section I Civ., 23418, 18 May 2016). See also Paolo Giudici, Chapter 22 'Italy', this volume, section V 'Persons Liable for Misleading Prospectus Information' (para. 22. 16).

[38] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council', COM(2017) 536 final, Brussels, 20 September 2017, 7–8 (**European Union, Proposal for Regulation of European Parliament**) (ESMA peer review efforts highlighted divergent practices among Member States in prospectus approval).

[39] For an analysis, see Robert ten Have, Chapter 12 'The Summary and Risk Factors', this volume.

[40] See n. 4 above and accompanying text.

[41] For currencies other than the euro, a criterion of equivalence applies.

securities, the issuer or the offeror, or the person asking for admission to trading, as the case may be, has an option to determine the home Member State for the prospectus approval. This power is confined to three alternative anchors, however: once again, the Member State where the issuer has its registered office; the Member State where the securities were or are to be admitted to trading on a regulated market; or the Member State where the securities are offered to the public.

16.92 Rule (ii) is silent on the optional connecting factors in case of requests for multiple listings or of public offers that take place in more than one Member State simultaneously. A reasonable interpretation is that, in those circumstances, the issuer, the offeror, or the person asking for admission to trading can freely choose its home country among those involved. Furthermore, the choice of the home Member State is not done once and for all, as each offer or admission to trading is a separate transaction with its own home Member State. As a consequence, choices made by an applicant under rule (ii) bind neither other future applicants nor the same applicant in its future choices, so that all of them retain their freedom to select a different NCA when Article 2(m)(ii) allows it.[42] For instance, a prospectus concerning a public offer in country A of non-equity securities above EUR 1,000 that are already listed on a regulated market in country B by an issuer having its registered office in country C can be approved by the NCA of either country A, B, or C, regardless of the national competent authority that previously approved the listing prospectus.

16.93 The optional regime established by rule (ii) also includes hybrid or derivative non-equity securities,[43] whether physically or cash-settled. This only applies in so far as the underlying securities are not issued by the same issuer of those non-equity securities, or by any member of the issuer's group. This last limitation to rule (ii) is meant to curb elusive practices, as issuing call options having own securities as underlying securities would amount, from a purely financial perspective, to issuing those underlying securities directly (see also Art. 2(b), Prospectus Regulation).

16.94 As a consequence of the scope of application of the alternative regime (ii), non-equity securities whose face value per unit is below the EUR 1,000 threshold fall into the default rule (i), and so do equity derivative securities (whichever their denomination per unit). Therefore, for all these securities the Prospectus Regulation establishes the NCA on the basis of the issuer's registered office (with no alternative anchors).

16.95 The other exception—'(iii)'—to the general default rule (i) concerns third-country issuers (Art. 2(m)(iii), Prospectus Regulation). This regime determines the European country that plays the role of the home Member State on the basis of the

[42] Dirk van Gerven, 'The General Provisions of Community Law relating to the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading', in: Dirk van Gerven, (ed.), *Prospectus for the Public Offering of Securities in Europe* (Cambridge: CUP, 2008), 27–8 ff.

[43] Only some plain vanilla derivatives fall into the scope of application of the Prospectus Regulation. These are securities giving the right to acquire or sell bonds and shares or determining a cash settlement based on transferable securities, currencies, interest rates or yields, commodities, or other indices or measures (Art. 4(1)(44), Directive 2014/65/EU (**MiFID II**).

place of first landing. This is where the securities will be offered to the public for the first time, or where the first application for admission to trading on a regulated market is made by any of the applicants. As opposed to the default regime (i), the special regime (iii) cannot, of course, rely on the registered office as a connecting factor. This has two implications, which the Prospectus Regulation tackles with ad hoc rules. First, when issuers are not the applicants in the prospectus approval procedure, rule (iii) would deprive them of any control over their home Member State. This would not be coherent with the default regime (i) for the same class of securities.[44] To fix this misalignment, the special regime (iii) allows issuers to define their home Members States at a later stage, when they are not the original applicants. The second implication would emerge if, whichever the initial applicant, issuers lost their home Member States by changing the place of listing. This consequence is solved by moving the home Member State to the new country where the relevant securities are listed, and by giving issuers the option to select such Member State in case of multiple listing.[45]

16.96 This special regime for third-country issuers (iii) applies to public offers and requests for admission to trading of equity securities and non-equity securities that cannot take advantage of the optional regime set forth in Article 2(m)(ii). For securities falling under the scope of Article 2(m)(ii), therefore, the regime is identical, irrespective of the issuers' registered office, whether in Europe or abroad, with the obvious—but unexpressed—limitation that the issuer registered office cannot anchor NCAs' competence for third-country issuers. This is in line with the fact that, under regime (ii), issuers do not have full control of choice of their home Member State.

VIII. A Focus on Equity Securities

16.97 Because the issuer choice regime of the Prospectus Regulation is particularly strict, issuers have no easy way to select an NCA other than that of the country where they have their registered office. An alternative choice is available only for issuers of non-equity securities whose face value per unit exceeds EUR 1,000, provided that such securities are to be (or were already) admitted to trading on a regulated market or are offered to the public in the selected country. No connecting factor other than the registered office applies, instead, to equity securities, or to non-equity securities of lower face value. Firms issuing these latter two categories of securities are therefore bound, in principle, to the NCA of the country where they have their registered office, with no way out in the event that the approval procedure is slow.

[44] No such principle underlies the regime for non-equity securities above the EUR 1,000 threshold (ii). For this reason, this regime applies to both European and non-European issuers, with no distinction (see immediately below, in the text).

[45] This regime is defined by reference to Article 2(1)(i)(iii), Directive 2004/109/EC (**Transparency Directive**).

1. Tying Prospectus Regime to Company Law

16.98 The regulatory policy underlying this approach determines an infrangible link between prospectus regime and company law, and makes forum shopping more expensive. To some extent, tying prospectus regime and company law may facilitate the vetting procedure by the relevant NCA, which is typically more acquainted with local rules and best practices on corporate governance to be disclosed in prospectuses. For instance, the applicants have to disclose, in the registration document, their board practices, their corporate governance regime, and the rules applicable to related party transactions (sections 14 and 17, Annex 1, Prospectus Regulation), as well as the shareholder rights attached to shares (section 4, Annex 11, Prospectus Regulation).[46]

16.99 However, this policy also has some drawbacks. First, some matters to disclose in the prospectus may depend on the host country regime. For instance, the best practices of the UK Corporate Governance Code also apply to non-UK (overseas) companies with a premium listing in the UK.[47] Scrutinizing this information may be uneasy for non-UK NCAs, and in any event the UK Listing Authority will be involved in the process for the admission to listing, which requires separate assessment of the eligibility requirements of the issuer even in the presence of a passported prospectuses approved by the home NCA.[48]

16.100 Furthermore, scholars have stressed that the current conflict-of-law policy for the identification of NCAs may deliver suboptimal outcomes in a context where the legal techniques to break the connection between company law and prospectus regime are expensive—as is the case nowadays (see section VII 'Identifying the National Competent Authority', para. 16.90).[49] This holds true in the first place for issuers and investors themselves, as they might be unable to easily opt into supervisory regimes that better fit their respective needs. But it also relaxes the incentives on NCAs to improve the quality of their supervision, because they do not face the risk that the number of entities they supervise might shrink (together with the supervisory fees).

[46] Similarly, the conflict-of-law regime of the Transparency Directive links the NCA and the applicable substantive law for equity securities to the issuer's registered office (Art. 2(1)(i)). Governance practices are disclosed in the annual financial report under Article 4, Transparency Directive and Article 20, Directive 2013/34/EU on annual financial statements (also applicable to listed companies: European Commission, 'Comments concerning Certain Articles of the Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards and the Fourth Council Directive 78/660/EEC of 25 July 1978 and the Seventh Council Directive 83/349/EEC of 13 June 1983 on Accounting', Brussels, November 2003, 10.

[47] Information on compliance with the main principles of the Code and a statement of compliance or an explanation for non-compliance of other principles is included in the annual financial report (UK Listing Rules 9.8.7R and 9.8.6R(5) and (6)).

[48] London Stock Exchange, *A Guide to Listing on the London Stock Exchange* (London: London Stock Exchange, 2010), 16.

[49] See Luca Enriques and Tobias Tröger, 'Issuer Choice in Europe', *Cambridge Law Journal* (2008) 67, 521, 536–40.

16.101 What are the options left to issuers against this drawback? We now summarize some legal techniques equity issuers may resort to when trying to have a prospectus approved by an NCA other than their own natural one.

2. Regulatory Arbitrage Techniques in Equity Markets

16.102 Issuers of equity securities may resort to various techniques to escape their home Member State and become subject to another NCA. In this subsection, we consider three of them: the transfer of the registered office through a reincorporation abroad; the incorporation of a holding company in another Member State; and the issuance of depository receipts.

16.103 The first technique issuers may adopt to select another NCA is their reincorporation in another Member State. Absent, for the time being, an EU legal framework for the direct cross-border transfer of registered offices, issuers can rely on the European Court of Justice (ECJ) case law. Particularly relevant in this respect is the *Vale* decision, which prevents Member States of destination from discriminating against foreign companies wishing to reincorporate there.[50] However, reincorporation may more easily take place through a cross-border merger (as per Directive 2005/56/EC).[51]

16.104 However, cross-border reincorporation has some limits in its ability to allow the selection of NCAs. First, this solution may not be available when the country of destination has adopted conflict-of-law rules inspired by the real seat doctrine, unless, of course, the relevant issuer is ready to move its head office as well. In this case, as recognized by the ECJ case law, the country of destination may refuse recognition of the issuer as a legal entity governed by its law.[52] Second, even when the country of destination recognizes companies with only their legal seat in its own territory and their administrative seat abroad, reincorporating might not be a cheap solution. This reorganization may require expensive legal advice and costly adjustments in the corporate structure and internal procedures as a result of the adoption of a new company law. For this reason, relocating the registered office may not be an optimal choice for issuers that wish to maintain, for whatever reason, the rules concerning their internal organization and their relationships with third parties.

16.105 With a view to retaining their original company law, issuers may also incorporate a holding company abroad and list this in their country of choice, while conveying

[50] ECJ, C-378/10, *Vale*, 12 July 2012.

[51] An oft-mentioned example was the (now liquidated) Germany-based airline Air Belrin, which reincorporated in the UK as a plc through a reverse merger and was later on listed on the Frankfurt stock exchange (see e.g. Simon Deakin, 'Reflexive Governance and European Company Law', *European Law Journal* (2009) 15, 224, 240; Holger Fleischer, 'A Guide to German Company Law for International Lawyers—Distinctive Features, Particularities, Idiosyncrasies', in: Holger Fleischer et al. (eds), *German and Nordic Perspectives on Company Law and Capital Markets Law* (Tübingen: Mohr Siebeck, 2015), 11.

[52] This can be inferred in particular from ECJ, C-210/06, *Cartesio*, paras 99–124 (confirming that Member States whose law applies to a company may determine the connecting factors needed to recognize that company).

the initial public offering's (IPO's) proceedings to the operating subsidiary. This is the typical form adopted when issuing Eurobonds, but it has also been tested for shares.[53] The costs of this solution may be prohibitive for SMEs, however, not to mention the complexity deriving from the addition of a new layer to the corporate group structure.

16.106 Under the repealed Prospectus Directive, another system issuers could use to select their NCA was depositary receipts issued by a bank, having as underlying securities the shares of the same issuers.[54] Depositary receipts qualified as non-equity securities under the Prospectus Directive (Recital (12)) and they were regarded as securities issued by the depositary bank (as ESMA confirmed in its Q&A on Prospectus Directive).[55] Therefore, depositary receipts might be issued by a bank in the country of choice, so as to make the offering or the listing subject to local rules and supervisory competence. Whether this option is still feasible under the new Prospectus Regulation remains unclear, however. Not only is the Regulation less clear on the nature of depositary receipts,[56] but the new ESMA Q&A Prospectus no longer addresses the question on the identification of their issuer.

16.107 However, even in the previous regime, recourse to depositary receipts was a difficult strategy to pursue. First, depositary receipts could help select the competent authority only for prospectus approval, but the home Member States would remain the same under the Transparency Directive (Art. 2(1)(d)).[57] Second, depositary receipts would have made the governance structure more complex for the issuer of the underlying shares, as they would have added an extra layer to the holding chain of securities. As the custodian banks involved would have likely qualified as the legal shareholder or bondholder, managing corporate actions would have become more complex. For instance, the involvement of the depositary banks would have been necessary for the collection of votes by the holders of the underlying shares.

16.108 Although some uncertainties remain, the current legal framework therefore offers issuers some flexibility in selecting the NCA, but the available options are, overall, expensive and come with a number of side effects. To be sure, these drawbacks are not absolute obstacles, as the practice shows some examples where issuers have taken advantage of the full set of options the existing regime offers. For instance, in 2014 the Italian carmaker Fiat SpA merged into the Dutch company Fiat Investments NV, a member of the same corporate group, to create Fiat Chrysler Automobiles NV, which

[53] An example is aptly mentioned by Enriques and Tröger (n. 49), 536 (referring to the listing on the Milan stock exchange of the Luxembourg-based D'Amico International Shipping SA, a newly incorporated parent company holding a controlling stake in the Italian operating subsidiary).

[54] Once again, this mechanism is mentioned by Enriques and Tröger (n. 49), 538.

[55] ESMA, 'Q&A on Prospectus Directive', ESMA31-62-780, 8 April 2019, No. 39 (Qb) (**ESMA Q&A Prospectus**).

[56] Recital (10) Prospectus Regulation is silent on the qualification of depositary receipts as equity or non-equity securities. Article 2(1)(44), MiFID II groups depositary receipts of shares with shares, and depositary receipts of bonds with bonds.

[57] Enriques and Tröger (n. 49), 539.

had the AFM as its NCA.[58] The new company had its shares admitted to the Milan stock exchange,[59] just like Fiat SpA previously did, and established its principal office in London. Incidentally, Fiat Chrysler Automobiles NV issues bonds, also through a subsidiary established in Luxembourg, which are listed on the Irish Stock Exchange.[60] Furthermore, Exor NV, the controlling entity of Fiat Chrysler Automobiles, opted for the Dutch legal and supervisory regime on prospectus approval when listing its subsidiary Ferrari NV (equally having its registered office in the Netherlands) on the Milan stock exchange.[61]

16.109 The Fiat Chrysler example may suggest that companies have quite some room for selecting their home Member State and their NCA. However, the question remains whether the costs companies face to do so are excessive. While some companies will have the resources to undergo complex corporate restructurings, costs may be excessive for other issuers. At the margin, this may curb a material amount of efficient selections of NCAs other than those of the country where issuers have their registered office. We now analyse some alternative regimes on the determination of NCAs that have either been in force in the past or have been unsuccessfully proposed to reform the old Prospectus Directive, and will consider their pros and cons.

3. Alternative Connecting Factors

16.110 The definition of the home Member State for prospectus approval has not always been the same. The Public Offers Directive (Directive 89/298/EEC) and the Listing Directive (Directive 2001/34/EC) determined the NCA on the basis of the registered office only if the offer was made or listing was sought in that country, either exclusively or in conjunction[62] with joint offers or admissions to listing in other Member States. When the transaction did not involve the country where the issuing company was incorporated, the registered office ceased to be a connecting factor, and the competence to approve the prospectus lay with the NCA of the country where the offer

[58] Fiat SpA, 'Information Document Prepared in Accordance with Article 57, Paragraph 1, Letter (d) of Consob Regulation No. 11971 of 14 May 14, 1999, as subsequently amended relating to the Cross-Border Merger of Fiat SpA with and into Fiat Investments NV (to be Renamed "Fiat Chrysler Automobiles N.V.")', 11 October 2014, 97–109 (on applicability of Dutch law and supervision to matters including company law, periodic financial reporting, major shareholding disclosure, and takeover bids).

[59] The IPO of Fiat Chrysler Automobiles NV relied on the exemption based on the availability of a merger document containing information recognized as equivalent to that of a prospectus by the NCA (former Art. 4(1)(c) and (2)(d), Prospectus Directive): ibid. (equivalence assessed by Consob). In the Prospectus Regulation, merger documents are no longer subject to *ex ante* equivalence scrutiny by NCAs (Art. 1(4)(g) and (5)(f), Prospectus Regulation). Fiat Chrysler Automobiles NV is also listed on the New York Stock Exchange (NYSE).

[60] Fiat Chrysler Automobiles NV and Fiat Chrysler Finance Europe SA, EUR 20,000,000,000 Euro Medium Term Note Programme Base Prospectus, 14 March 2018 (approved by the Central Bank of Ireland as NCA).

[61] Ferrari NV, Prospectus for the Admission to Listing and Trading on the Mercato Telematico Azionario Organized and Managed by Borsa Italiana SpA of Common Shares, 3 January 2016 (approved by the Dutch AFM as NCA). Just like Fiat Chrysler Automobiles NV, Ferrari NV is also listed on the New York Stock Exchange (NYSE).

[62] 'Simultaneously or within a short interval', to avoid circumventions of the rule (Art. 37, Listing Directive).

was made or the listing was sought (Art. 20, Public Offers Directive; Arts 20 and 37, Listing Directive).[63]

16.111 The logic behind this framework seems to be that local authorities were regarded as better suited to protecting local investors, if only for their incentives and their accountability regimes. A passport was also available for subsequent offers or admissions to listing in other countries, but to avoid any abuse, Member States where issuers had their registered office were not bound by mutual recognition (Art. 21(4), Public Offers Directive; Art. 38(5), Listing Directive). This regime for requests to 'passport back' in the country of incorporation entailed the risk that issuers be prone to conflicting rules, and punished the decision to raise capitals abroad with an increased cost of subsequent decisions to do the same in one's own country—quite a paradox from a market integration perspective.

16.112 The Prospectus Directive repealed these rules and introduced the regime subsequently reproduced in the Prospectus Regulation, but the EU lawmakers have repeatedly tried to adopt different regimes in recent years, without success. For instance, the European Commission proposed to foster issuers' freedom to select their NCA by expanding the rule currently applicable to non-equity securities whose face value per unit exceeds EUR 1,000[64] in its reform proposal, which subsequently led to Directive 2010/73/EU.[65] In previous years, that rule had supported the development of the Eurobond market and had strengthened the role of pan-European financial infrastructures such as the two international central securities depositaries (ICSDs) Euroclear and Clearstream. The European Parliament removed the Commission's amendment to protect retail investors from the risk of arbitrage.[66]

16.113 In a surprising exchange of roles, the Commission's proposal for a new Prospectus Regulation, adopted in the context of the CMU initiative, left the Prospectus Directive regime on the identification of NCAs unchanged. While this proposal made its way through the preparatory work, the European Parliament's ECON Report unsuccessfully recommended granting issuers the possibility of selecting their NCA for both equity and non-equity securities, regardless of their face value.[67]

[63] For an overview of the implications, see also Enriques and Tröger (n. 49), 529–30; Marcello Bianchi et al, 'The EU Securities Law Framework for SMEs: Can Firms and Investors Meet?', in: Colin Mayer et al. (eds), *Finance and Investment: The European Case* (Oxford: OUP, 2018), 264–6.

[64] This is the rule we labelled as '(ii)' in section VII.

[65] More information on the preparatory work before and after the adoption of the Prospectus Directive in Schammo (n. 3), 328–41.

[66] Committee on Economic and Monetary Affairs (Rapporteur: Wolf Klinz), 'Report on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market', COM(2009)0491—C7-0170/2009—2009/0132(COD)) (A7-0102/2010, 26 March 2010, 7.

[67] Committee on Economic and Monetary Affairs (Rapporteur: Phillipe de Backer), 'Draft Report on the proposal for a regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading', COM(2015)0583—C8-0375/2015—2015/0268(COD), 16 March 2016, 9, 31.

16.114 An even more flexible regime would be one where operators of regulated markets had the power to approve prospectuses (for admission to listing and admission to trading), as the ESMA Securities and Markets Stakeholder Group suggested in 2012.[68] This connecting factor would disentangle company law and securities regulation and supervision, possibly without the drawbacks of the rules in force before the Prospectus Directive was introduced.

IX. Competition versus Centralization: A Trade-Off?

16.115 It remains, of course, uncertain whether facilitating competition among NCAs in the realm of equity securities—and of small debt securities—would determine a race to the top or a race to the bottom. In this chapter, we cannot analyse all the arguments in favour or against broader issuer choice.[69] Suffice it to say, however, that in a context like the CMU, the risks of suboptimal outcomes in a more competitive context are greatly reduced by ESMA's powers of intervention, at least in the case of blatant violations of the rules on prospectus approval.[70] If, to the contrary, some believe that these powers, alone or in combination with investor ability to discount low-quality prospectuses in higher prices, do not suffice to curb moral hazard and adverse selection as a consequence of the opportunity to select more lenient NCAs, then the whole CMU would need a deep overhaul, based as it is on mutual recognition. If that was the case, indeed, the idea of ensuring a level playing field among issuers in different countries would already be a chimera.

16.116 Rather, what is worth stressing here is that both the Prospectus Directive and Regulation regime and the alternative measures we considered rely on the presence of multiple NCAs, the only difference between them being the scope of issuer freedom to choose their authority. A radically different system would be one where some or all offering and listing prospectuses would be subject to approval by a centralized competent authority. In this regard, some scholars have submitted that completion of a true CMU would require the creation of a fully fledged European Listing Authority for the entire EU. This central authority would, to some extent, replicate the functioning of the Single Supervisory Mechanism (SSM) which serves as the backbone of the European Banking Union.[71] In line with this term of comparison, also the European Listing Authority would be competent for larger issuers, while the approval of prospectuses concerning smaller companies would remain in the NCAs' remit.[72] In this

[68] ESMA, 'Securities and Markets Stakeholder Group, Helping Small and Medium Sized Companies Access Funding', ESMA/2012/SMSG/59, 12 October 2012, 17.

[69] See again Enriques and Tröger (n. 49) for a convincing analysis.

[70] See Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation (Case C-270/12)', *European Business Organization Law Review* (2014) 15, 1.

[71] A reasoned and detailed proposal in this sense can be found in Emilios Avgouleas and Guido Ferrarini, 'A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA. Costs, Benefits, and Legal Impediments', in: Danny Busch et al. (eds), *Capital Markets Union in Europe* (Oxford: OUP, 2018), 55.

[72] ibid., 58–9 and 68.

manner, the European capital markets would retain some form of forum shopping and supervisory competition. For larger issuers, this proposal would also eliminate the bureaucratic costs of prospectus notification, which is today required to take advantage of the European passport (Arts 25 and 26, Prospectus Regulation), and would deliver higher economies of scale, thus potentially reducing the direct and indirect costs of supervision.

16.117 The European Commission took a step towards the centralization of prospectus approval in its proposal for a reform of the three European supervisory authorities (ESAs).[73] This initiative devised the conferral upon ESMA of the power to approve certain prospectuses for which centralization was justified, in the Commission's opinion, by a cross-border dimension within the Union, by a particular level of technical complexity, or by the potential risks of regulatory arbitrage. These were prospectuses for the admission to trading of wholesale non-equity securities on a regulated market accessible only to qualified investors, prospectuses relating to specific types of complex securities, such as asset-backed securities, or to specific types of issuers, such as property companies, mineral companies, scientific research-based companies, shipping companies and, remarkably, third-country issuers.

16.118 As one can see, the Commission proposed to centralize prospectus approval both in areas where issuer choice is today broader (such as wholesale non-equity securities, by definition above the EUR 1,000 threshold) and in areas where the only connecting factor is the issuer's registered office. Due to lack of political agreement, these proposals did not remain in the reform package that was subsequently approved.[74]

16.119 The unsuccessful attempt of the Commission shows that the time might not be yet ripe for a complete centralization of prospectus approval, whether this concerns only some specific matters or it encompasses all issuers above a certain threshold. Another approach that might deserve consideration—either as such or as an intermediate step towards further supervisory centralization—is also the conferral on ESMA of the power to approve prospectuses, but with no exclusive competence on them. In other words, ESMA could qualify as an additional twenty-ninth (or twenty-eighth, considering Brexit) NCA, to which issuers and other applicants could refer to regardless of the place of the public offer, of the admission to trading, or of the issuer's registered office.[75]

[73] European Commission (n. 38) (see Art. 9(10)).

[74] See the European Parliament, Legislative Resolution, COM(2018)0646—C8-0409/2018—2017/0230(COD), 16 April 2019, http://www.europarl.europa.eu/doceo/document/TA-8-2019-0374_EN.html. The Parliament vote was preceded by a provisional agreement between the Council presidency and the Parliament: see European Parliament, Confirmation of the final compromise text with a view to agreement on the Amended proposal for a Regulation of the European Parliament and of the Council (2017/2030(COD)), 7940/19 ADD 1, COM(2018)0646—C8-0409/2018—2017/0230(COD), Brussels, 29 March 2019, http://data.consilium.europa.eu/doc/document/ST-7940-2019-ADD-1/en/pdf.

[75] The proposal to create an additional European regime that provides a further option for market participants, without replacing the existing national system, is not unprecedented. In the field of crowdfunding, see the European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ESSP) for Business, Brussels, COM(2018) 113 final, 8 March 2018 (**European Commission Proposal on Crowdfunding**).

16.120 This approach would be a halfway step between the Prospectus Regulation regime and the centralization of competence, its intermediate nature being both content- and (possibly) time-related. While a similar attempt might, of course, face some resistance,[76] it should be politically more palatable than the immediate creation of a European Securities and Exchange Commission.

16.121 Furthermore, we believe that adding ESMA to the existing NCAs would be beneficial in many respects. First, it would offer issuers and investors an additional option without dispersing the expertise that local NCAs have developed over the years. To some extent, European capital markets are already enjoying a high level of centralization, whenever the connecting factors enable a sufficient freedom to choose the preferred NCA. A look at the data ESMA collected on the number of prospectuses that are approved and passported, combined with the type of securities these prospectuses concern, demonstrates the point.[77] In particular, the NCAs of Luxembourg, Ireland, and Germany seem to have a consolidated role as European hubs for the approval of prospectuses on, respectively, debt securities, asset-backed securities, and derivatives, sometimes sharing the role among them.[78] Unsurprisingly, no such centralization seems to exist for equity securities, due to the current regime for the identification of NCAs.[79]

16.122 In a system where centralization is already a fact, the immediate establishment of a single competent authority would prevent issuers and investors from continuing to rely on those NCAs that have demonstrated to be better able to meet their needs. To the contrary, adding ESMA as an additional central authority would avoid the risk of petrification that may accompany the creation of a competent authority with a monopolistic power, and would allow the big step towards a European single authority to be made—if this is deemed appropriate—only after testing its success among issuers and investors alike. This form of competition would also avoid the risk of a race to the bottom, as ESMA would surely not allow any competition to attract equity issuers at the expense of prospectus quality.

16.123 The role of ESMA as an additional competent authority would make restrictions to issuer choice in the realm of equity capital a less compelling problem. However, it might be advisable that policymakers keep this option on their table even in this context. Fostering competition among NCAs would in fact still facilitate the spontaneous

[76] To be sure, the European Commission Proposal on Crowdfunding had no better fortune than that on centralization of prospectus approval within ESMA's reform (n. 38), when it comes to the role of ESMA (see European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business, COM(2018)0113—C8-0103/2018—2018/0048(COD), Brussels, 27 March 2019.

[77] See ESMA, Report—EEA Prospectus Activity in 2017, ESMA31-62-111, 15 October 2018, 9–13.

[78] Our analysis is inevitably approximate, based as it is on the numbers of prospectuses rather than on the total value of the securities they accompany.

[79] On the determinants for the creation of competitive financial centres, see in general Thomas Gehrig, 'Location of and Competition between Financial Centers', in: Xavier Freixas et al. (eds), *Handbook of European Financial Markets and Institutions* (Oxford: OUP, 2008), 619.

creation of European hubs, in case these proved more efficient than ESMA. Once again, this might be an intermediate step towards top-down centralization.

X. Conclusion

16.124 This chapter has analysed the regulatory framework for prospectus approval by NCAs. As under the previous Prospectus Directive, NCAs approve prospectuses after verifying that they are complete, consistent, and comprehensible. The delegated acts supplementing the Prospectus Regulation specify the contents of the supervisory activity at a much greater level of detail than the previous regime. However, it remains to be seen whether this will suffice to ensure an actual level playing field across the EU. Indeed, NCAs might maintain different approaches during the approval process, even in the presence of ESMA's coordination efforts. Next to this, Member States retain discretion on some crucial regulatory options, and the liability regimes are often uneven across Member States.

16.125 All these remaining differences create space for arbitration, and make the rules on the identification of the relevant NCA all the more important. This chapter has analysed the legal regime for the allocation of the power to approve prospectuses from two different perspectives. The first perspective concerns the transfer of such power from one NCA to another. In this respect, the transfer of prospectus approval might enable a better allocation of supervisory powers whenever the predefined NCA is not the most suitable one for the task. Unfortunately, the transfer of prospectus approval has not been used very often to date. The second perspective relies on issuer choice, and therefore concerns the connecting factors the Prospectus Regulation sets forth to identify the relevant NCA. This regime is quite flexible for non-equity securities of higher face value, but it remains linked to issuers' registered office otherwise. While the intention to avoid a race to the bottom is understandable, the chapter submits that broader margins for issuer choice would be beneficial. With a view to further centralize supervisory tasks, the chapter also considers the policy option of charging ESMA with a more direct role in prospectus approval, without displacing—at least as a preliminary step—NCAs and their expertise.