The Implementation of a Single Civil Liability Regime for Breaches of the Prospectus Regulation in the Framework of the Capital Markets Union Plan

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Introduction

'Let's finally complete the Capital Markets Union'[1].

Although the Juncker Commission had a concrete grasp of the plan to establish the Capital Markets Union (hereafter also referred to as 'CMU') in 2014, the genesis of it would actually date back to 1957[2]. The free movement of capital is indeed enshrined as one of the four fundamental freedoms which the Community has sought to achieve since the Treaty of Rome.

Several more or less notable attempts and occasional advances to achieve this objective have marked the following decades.

First, as early as 1988 there was talk of preventing any restriction on free capital flow within the Community[3]. Then, in 1999, the European Commission adopted the Financial Services Action Plan ('FSAP')[4]. According to some scholars, it was an unprecedented initiative and a milestone in the history of financial integration in Europe[5].

Another important step forward in 2011 was the establishment of the European Securities and Markets Authority (hereafter 'ESMA'). ESMA is one of the three authorities set up to form the European System of Financial Supervision[6]. While its role within the European Union is becoming increasingly important, the boundaries imposed by this study do not allow us to engage in a detailed discussion of this authority. Consequently, we refer the reader to some enlightening contributions on this topic[7].

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[1] Ursula von der Leyen, Opening Statement in the European Parliament Plenary Session, 16 July 2019, Strasbourg, 2.
[2] Mireille Berthelot and Philippe Arraou, 'Vers une union des marchés des capitaux en Europe' [2015] Revue Française de Comptabilité 54.
[3] Jean-Pierre Bâché, 'La libération des mouvements de capitaux : bilan et échéances' (1989) 8 Revue d'économie financière 104.
[4] Commission of the European Communities. Communication from the Commission 'Implementing the framework for financial markets : Action Plan' COM (1999) 232 final.
[5] David Wright, 'Objectifs et résultats du Plan d'action pour les services financiers' [2007] Revue d'économie financière 13.
[6] The European System of Financial Supervision includes the European Systemic Risk Board, the three European supervisory authorities, i.e. EBA, ESMA and EIOPA and national supervisors.
[7] See Niamh Moloney, *The Age of ESMA : Governing EU Financial Markets* (Hart Publishing 2018). Mads Andenas and Iris HY Chiu, *The Foundations and Future of Financial Regulation* (Routledge 2014).

Despite the efforts made, these attempts never really achieved the Commission's original ambition.

In 2014, the newly elected President Juncker affirmed his willingness to pursue European financial integration by establishing the Capital Markets Union and the Banking Union[8].

The importance of the establishment of the Capital Markets Union is based on the fact that the European economy remains to a large extent dependent on the banking system[9]. This orientation, therefore, creates an increased dependence on the stability of these institutions. History has shown us, particularly through the example of the financial crisis of 2008 - 2009, that the use of financing through the banking system is not without risk.

While reliance on banking institutions still largely stems from the culture and financial education within the Union, this path is not inevitable[10]. Indeed, it must be noted that this orientation differs from what can be found outside Europe in terms of financing, with the American example remaining to some extent the most striking.

In pursuing the objective of establishing the CMU, the Commission aimed, on the one hand, to promote the use of capital markets, particularly for SMEs which are to a large extent impacted by the consecutive Action Plans[11]. On a more global scale, the creation of the CMU also aims at changing the behaviour of economic actors generating a general lack of financial profitability within the Union[12].

The establishment of CMU is part of a broad policy. The framework of this study does not allow us to examine all its aspects. Therefore, as outlined below, the focus will be on one particular aspect that fits into the broader framework of the CMU: the establishment of a single civil liability regime for breaches of the rules laid down in the Prospectus Regulation.

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[8] Jean-Claude Juncker, 'A new start for Europe : opening statement in the European Parliament Plenary Session', 15 July 2014, Strasbourg, 19.
[9] Ibid., 7.
[10] European Court of Auditors, 'Capital Markets Union – Slow Start towards an Ambitious Goal' (2020) 25/2020 <https://www.eca.europa.eu/Lists/ECADocuments/SR20_25/SR_CMU_EN.pdf> accessed 1 April 2021.
[11] See n 14.
[12] Benoît Cœuré, 'Capital Markets Union in Europe: An Ambitious but Essential Objective' (The European Capital Markets Union, a viable concept and a real goal?), Frankfurt, 18 March 2015.

The Prospectus Regulation, which was reviewed in 2017, is indeed part of the general framework for the establishment of the CMU. However, we will put forward the hypothesis that the system established by the Regulation is flawed and should be uniformised on certain points. As we will develop in the dedicated section, a single European system would be necessary in order to avoid the fragmentation of national regimes and indirectly strengthen the possible realisation of the CMU.

It is first necessary to delimit precisely the scope of this study.

In the first part, we will briefly review the history of the CMU as initiated in 2015. On this occasion, emphasis will be placed on the reasons and objectives of this project, but also on the weaknesses that have hindered the concrete implementation of the CMU. This introduction will be closed with expectations based on the future and the actions of the von der Leyen Commission.

In the second part, particular emphasis will be placed on the development of the Prospectus Regulation. We have chosen this topic because of its importance, which we consider to be significant in the context of the CMU. On the other hand, it is one of the issues that has undergone relevant changes in recent years. Indeed, the Commission has been working to give a concrete expression to its desire to simplify the documentation to be published by companies before raising funds on the capital markets. Its aim was to make it easier for companies to access finance through these markets.

This second part will be divided into several sections. An overall state of play will be established as an introduction. This will be followed by a brief review of the changes brought about by the transition from a directive to a regulation. We will then take a critical look at some of the missed opportunities during this transition.

In a fourth section, we will address the core of our topic: the lack of a single civil liability system within the Prospectus Regulation. It will be argued that the fragmentation of the national regimes is leading to an unfortunate decrease in the efficiency of the European regime impacting the establishment of the CMU. The above-mentioned fragmentation of regimes will be illustrated by a comparison of different national systems. We will also look at the American system, which is considered by some scholars to be more effective and to be a source of inspiration.

The third part of this study will be aimed at proposing a possible new orientation for the civil liability regime linked to the Prospectus Regulation.

Finally, we will conclude this study in a fourth part. We will then return briefly to the general state of the CMU plan, its future and the changes that may be suggested to ensure its effectiveness.

I. The Capital Markets Union in a perspective

1. Introduction

As already explained above, the establishment of the Capital Markets Union is linked to the long history of European construction[13].

While the idea is not new, it was a question as of 2014 of taking an unprecedented initiative that went beyond previous more or less ambitious and successful *ad hoc* interventions. Below, we will first briefly review the legislative history of the CMU project. This first point will also make it possible to address the objectives pursued by the European Union through this project.

Then, a second, more critical, point will be made about the shortcomings and weaknesses of the initial CMU Action Plan and of the subsequent revisions. This perspective will allow us to look back at the plan published by the European Commission on 24 September 2020 and to briefly consider the future of the construction of the Capital Markets Union.

2. Legal background and objectives of the CMU

The initial scope of the CMU project is significant. As summarised by the European Court of Auditors in its special report of November 2020, the CMU is primarily intended to create a single market for capital, not only to improve access to non-bank finance for businesses – especially SMEs – but also to deepen and integrate local capital markets[14]. This ambitious objective was therefore aimed at making the financial system more stable, thus responding to the need to stimulate growth, create jobs and increase Europe's attractiveness to foreign investors[15].

The legislative process of the CMU as redesigned by the Juncker Commission started in 2015.

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[13] See Introduction.
[14] European Court of Auditors, 'Capital Markets Union – Slow Start towards an Ambitious Goal' (2020) 25/2020 <https://www.eca.europa.eu/Lists/ECADocuments/SR20_25/SR_CMU_EN.pdf> accessed 1 April 2021. On this aspect, see also Jonathan Hill, Opening speech given by Commissioner Jonathan Hill on the overhaul of prospectus rules for the Capital Markets Union, 30 November 2015 and European Commission. What is the capital markets union ? – General information on the objectives of the capital markets union.
[15] Ibid.

In September 2015, the European Commission published the first Action Plan to build the Capital Markets Union[16]. This plan was undoubtedly ambitious but not without flaws. We will elaborate on these below.

In 2017, the Commission published a Mid-Term Review[17]. This review was intended to take stock of the progress made since 2015.

During the Mid-Term Review, the Commission also identified nine new priority actions which were subsequently translated into new legislative measures. While some authors have seen these measures as the beginning of the completion and concretisation of the CMU[18], we shall see that this position needs to be qualified and that optimism must be tempered.

Despite the delay in the implementation of the CMU project over the years, the European Union has constantly reaffirmed the above-mentioned objectives[19].

The change of leadership at the presidency of the European Commission was an opportunity to breathe new life into the CMU. In her mission statement to Valdis Dombrovskis, Ursula von der Leyen reaffirmed her will and ambition to implement this plan[20]. After the establishment of a High-Level Forum[21] and the publication of its report in June 2020, the Commission published a new plan of sixteen actions to achieve three specific objectives. We will come back to these.

[16] European Commission. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan on Building a Capital Markets Union. COM (2015) 468 final.
[17] European Commission. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan. COM (2017) 292 final.
[18] Olivier Guersent, 'L'union des marchés de capitaux : état des lieux (trois ans après la publication du plan d'action)'(2018) Droit du Financement de l'Économie 9.
[19] European Commission. Communication from the Commission on capital market union: Progress on building a single market for capital for a strong economic and monetary union. 15 March 2019.
[20] Ursula von der Leyen. Political Guidelines for the next European Commission 2019 - 2024, A Union that strives for more - My agenda for Europe, 27 November 2019 8.
[21] The High-Level Forum is an expert group of highly experienced business leaders and leading international experts and academics tasked with working on the directions to be taken under the CMU. According to the European Commission's website, the group was asked to propose targeted policy recommendations for future CMU actions to ensure that citizens and businesses can access capital markets across the EU on equal terms and irrespective of their geographical location.

3. Gaps and weaknesses: a look back at the early days of the CMU

While the ambition and motivation behind the CMU are remarkable, it should be recognised, as mentioned above, that the initial plan was far from flawless.

Many authors point out that the main guiding objectives of the project were not accompanied by adequate measures to implement them[22].

The review of the first Action Plan from 2015 is not the heart of this paper. However, the shortcomings of this first Plan contribute to understanding the current state of the CMU.

Below, we will briefly mention three flaws that were initially present. These three examples are only a very brief overview of the various problems that have accompanied the CMU since its inception. The special report of the European Court of Auditors, already mentioned, completes the perspective on many points that we were not able to address in this paper. We therefore refer the reader to this report for a more detailed discussion[23].

A first weakness of the CMU plan is inevitably linked to the political nature of this project. As a result, the proposals made are mainly of a compromising nature and the initial major objectives were dislocated through measures that are sometimes insignificant and sometimes even much broader than the scope of the initial objective[24].

As Georges Ugeux pointed out in 2016, 'by adding numerous other EU projects in the CMU documents, the risk of dilution of the efforts beyond its core purpose is such that it might derail the creation of a capital market and misses its key target. It also complicates the debate concerning the further development of the CMU and the shape thereof '[25].

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[22] See for instance Thomas Flament, 'L'état de l'Union des marchés des capitaux en Europe. Le point sur la situation et retour sur quelques développements récents' [2020] Forum Financier / Droit Bancaire et financier 127. Apostolos Thomadakis 'How Close Are We to a Capital Markets Union?' (*CEPS*, 17 March 2017) <https://www.ceps.eu/ceps-publications/how-close-are-we-capital-markets-union/> accessed 4 February 2021.
[23] European Court of Auditors, 'Capital Markets Union – Slow Start towards an Ambitious Goal' (2020) 25/2020 <https://www.eca.europa.eu/Lists/ECADocuments/SR20_25/SR_CMU_EN.pdf> accessed 1 April 2021.
[24] Flament (n 22). The author refers in particular to measures focusing on venture capital or business angels.
[25] Georges Ugeux, 'Building a European Capital Markets Union: The Need for Liquidity and Focus' (2016) 31 Journal of International Banking Law and Regulation 314.

This observation is correct as demonstrated by the evolution of the first Action Plan. Indeed, to date it can be argued that, with the exception of a few modifications, the CMU has generally failed to deliver on its promises.

A second flaw in the original plan was the lack of detail on a concept central to the Capital Markets Union: the liquidity. As Thomas Flament points out, 'liquidity is an essential characteristic of these markets in that it allows investors to buy or sell securities quickly without these purchases or sales substantially affecting the price of the securities'[26]. The author notes that this concept is completely absent from the plan. To go further and anticipate somewhat the rest of our presentation, the Mid-Term Review did not remedy this shortcoming. This aspect is surprising. The Commission's Green Paper of 18 February 2015 laying the foundations of the CMU had indeed already questioned this problem[27].

A third weakness of the initial plan concerns SMEs. The European legislator has not given equal attention to their importance to these entities[28]. Furthermore, the European Commission's work has not taken care to apply a consistent definition of SMEs, nor to adapt to economic realities. The above-mentioned author rightly points out that not all SMEs have the vocation or the necessary maturity to access the capital markets[29]. Consequently, clarification would have been welcome.

The long road of the Capital Markets Union has therefore not started under the best of omens. It would be bold to say that the Mid-Term Review has completely changed the picture. While a first reading of the review suggests progress[30], it must be stressed that the new measures proposed have not remedied the shortcomings mentioned above.

The nine new priority actions proposed by the Commission have in fact amplified the problem of the excessive diversification of measures and have not in any way remedied the issue of liquidity, nor clarified the issue of SMEs.

[26] Loose translation. Flament (n 22).
[27] European Commission. 'Green Paper on Building a Capital Markets Union' COM (2015) 63 final 29. The author mentioned in n 22 also points out that the regulatory framework in this area is characterized by significant contradictions, in particular regarding the role of financial institutions in relation to the liquidity issue.
[28] Flament (n 22).
[29] Ibid.
[30] The Securitisation Regulation and the Prospectus Regulation which will be discussed below can be mentioned.

The year 2020 has, therefore, begun with a mixed record. It was a year that shook the world and particularly weakened European financial stability.

4. Current findings and prospects for the future

The establishment of the CMU has gained urgency due to the Brexit and the COVID 19 pandemic. These upheavals have made the realisation of the Capital Markets Union project more important than ever.

During a press conference on 23 September 2020, Valdis Dombrovkis reaffirmed the need to make the unification of European capital markets a reality[31]. The European Commission's work, based on earlier findings and the High-Level Forum report of 10 June 2020, resulted in the publication of a new Action Plan on 24 September 2020.

Sixteen measures propose to address the following three objectives[32]:

- Support a green, digital, inclusive and resilient economic recovery by making financing more accessible to European companies
- Make the EU an even safer place for individuals to save and invest long-term
- Integrate national capital markets into a genuine single market

The orientation of this new plan is largely driven by the necessary objective of stability. It is hoped that this new initiative will be successful. However, a first look at the sixteen proposed actions leaves an impression of *déjà vu*. This impression does not lie in the prescription of the measures enacted but, in our view, in the generality and multitude of issues addressed. It seems that one of the problems initially noted in 2016 is in fact recurrent: the excessive diversification of measures.

At the time of writing, it seems too early to attempt to analyse the concrete effects of this new plan. It will therefore be necessary to pay close attention to future developments in this area.

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[31] European Commission. Press release. Capital Markets Union: Commission to boost Europe's capital markets. 24 September 2020.

[32] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Capital Markets Union for people and businesses-new action plan. COM (2020) 590 final.

II. The Evolution of the Prospectus Regulation in the context of the development of the Capital Markets Union

1. Initial state at the beginning of the first Action Plan

The idea of issuing a prospectus to be published in the event of a public offer or admission to trading of securities is older than one might think and did not emerge with the ambition of bringing about the Capital Markets Union.

The foundations of the matter were laid as early as 1989, when the European Community adopted Directive 89/298/EEC 'coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered to the public'[33]. This directive was intended to apply to the offers to the public of securities not admitted to trading[34].

Directive 89/298/EEC therefore defined the requirements for the drawing up of the prospectus in the case of a public offer of securities. The requirement of Article 11 of the Directive was that investors 'should be able to make an informed judgement of the assets and liabilities, financial position, profits and losses, and prospects of the issuer, as well as of the rights attaching to such securities'[35].

The final objective of these rules was to allow mutual recognition of prospectuses approved in the Community Member States[36].

The lack of clarity and the extent of discretion left to Member States in the implementation of the Directive undermined its effectiveness[37] and led to its redrafting in the early 2000s.

[33] Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public.
[34] Anastasia Sotiropoulou, 'Section II. - La Consécration de l'harmonisation Des Règles d'information', *Les obligations d'information des sociétés cotées en droit de l'Union européenne* (Larcier, 2012). The prospectuses to be published for the admission of securities to official listing on a stock exchange in the European Union were governed by Directive 80/390/EEC.
[35] Art. 11 of the Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public.
[36] Sotiropoulou (n 34).
[37] For further details on this point, see A. Sotiropoulou (n 34).

Directive 2003/71/EC succeeded the 1989 Directive in the European landscape[38]. The 2003 Prospectus Directive was part of the 1999 Financial Services Action Plan[39].

The purpose of the directive was to establish a single European regime for the prospectus requirement, its characteristics and the formalities for its implementation[40].

Moreover, the underlying objective of establishing a true single passport for issuers of securities was to enable the efficient solicitation of investors throughout Europe on the basis of a prospectus issued and approved by a single Member State[41]. In doing so, it was also intended to remove obstacles to the integration of European financial markets while ensuring uniform investor protection through certain standards[42].

This project and its implementation, although laudable and innovative in some respects, was unsuccessful in some others[43].

For example, the European Commission's Green Paper of 18 February 2015 on building a Capital Markets Union revealed that the administrative burden and costs involved were an obstacle to raising capital, particularly for small and medium-sized enterprises[44].

A broad public consultation initiated by the European Commission took place in the first half of 2015. It concluded that the Prospectus Directive should be reformed in the context of the establishment of the Capital Markets Union[45].

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[38] 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 [2003] OJL 345.
[39] See Introduction.
[40] Thomson Reuters,'Prospectus Directive' <https://uk.practicallaw.thomsonreuters.com/8-200-9274?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 25 February 2021.
[41] Matthieu Duplat and Thomas Flament, 'Le nouveau Règlement Prospectus et ses conséquences sur la loi du 16 juin 2006' [2017] TRV - RPS 805.
[42] Ibid.
[43] Ibid.
[44] European Commission. 'Green Paper on Building a Capital Markets Union' COM (2015) 63 final. The European Commission's Green Paper also reported that, in addition to the administrative overload, the editing of certain information proved to be problematic for certain types of investors (ex. Retail investors).
[45] Consultation on the Review of the Prospectus Directive : 18 February 2015 – 13 May 2015, Feedback statement on the public online consultation, available on the website of the European Commission.

Thus, following the publication of the first Action Plan for the implementation of the Capital Markets Union in September 2015, the Commission published a proposal for a regulation revising the Prospectus Directive[46]. This revision, which was considered necessary for the construction of the Capital Markets Union, was intended to establish, by means of harmonised rules, a real ‘gateway’ to the European capital markets for issuers seeking financing[47].

By implementing a Prospectus Regulation, the aim was therefore to remove unnecessary barriers to the raising of capital[48] and, in short, ‘to provide all types of issuers with disclosure rules which are tailored to their specific needs while making the prospectus a more relevant tool of informing potential investors’[49].

2. Transition from directive to regulation: key changes

Three key areas reflect the measures considered by the Commission. To cite the latter, the proposed measures were initially aimed at :

(i) reduce the administrative burden of drawing up of prospectus for all issuers, in particular for SMEs, frequent issuers of securities and secondary issuances;
(ii) make the prospectus a more relevant disclosure tool for potential investors, especially in SMEs; and
(iii) achieve more convergence between the EU prospectus and other EU disclosure rules[50].

[46] European Commission. ‘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) 583 final.
[47] European Commission. ‘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) 583 final.
[48] European Commission. ‘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) 583 final.
[49] European Commission. ‘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) 583 final, 3. For this reason, the proposal puts special emphasis on four groups of issuers: (1) issuers already listed on a regulated market or an SME growth market, which want to raise additional capital by means of a secondary issuance, (2) SMEs, (3) frequent issuers of all types of securities and (4) issuers of non-equity securities.
[50] European Commission. ‘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) 583 final, 3.

The objective pursued through the first strand was to reduce the administrative requirements for drawing up a prospectus. This rationalisation not only meets the aforementioned objective of removing certain obstacles to access to European financial markets. It also responds to the observation made in recent years related to a significant reduction in the number of prospectuses approved in the European Union[51].

The second area is to enhance investor protection through the relevance of the information received in the prospectus, which will enable investors to make informed decisions[52].

Finally, the European legislator's aim in implementing the third objective was to avoid the proliferation of identical information, both in the prospectus and elsewhere, as a result of other legal transparency obligations[53]. Consequently, some regimes contain reduced disclosure requirements, resulting from a combination of the Prospectus Regulation and other instruments such as EU Regulation 596/2014 on Market Abuse or the Transparency Directive 2004/109[54] .

A first reading of this proposal for a regulation gives the impression of a certain ambition. Moreover, the choice to establish this type of instrument, directly applicable in each Member State, promised a truly uniform and coherent regime. The regulatory form was also intended to ensure the integration of national capital markets and to reduce the fragmentation of the rules applying to transactions carried out within the European Union[55].

Recital 5 of the Prospectus Regulation further justifies the use of a regulation in these terms:

> It is appropriate and necessary for the rules on disclosure when securities are offered to the public or admitted to trading on a regulated market to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on persons involved in offers of securities to the public and in admissions of securities to trading on a regulated market are applied in a uniform manner throughout the Union. Since a

[51] Duplat and Flament (n 41). ESMA, 'EEA Prospectus Activity in 2016' (2017) 31-62–746 <https://www.esma.europa.eu/sites/default/files/library/esma31-62-746_eea_prospectus_activity_in_2016.pdf> accessed 25 February 2021.
[52] European Commission. '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) 583 final, 8-9.
[53] Duplat and Flament (n 41).
[54] Ibid.
[55] Ibid.

legal framework for the provisions on prospectuses necessarily involves measures specifying precise requirements for all different aspects inherent to prospectuses, even small divergences on the approach taken regarding one of those aspects could result in significant impediments to cross-border offers of securities, to multiple listings on regulated markets and to Union consumer protection rules. Therefore, the use of a regulation, which is directly applicable without requiring national law, should reduce the possibility of divergent measures being taken at national level, and should ensure a consistent approach, greater legal certainty and prevent such significant impediments. The use of a regulation will also strengthen confidence in the transparency of markets across the Union, and reduce regulatory complexity as well as search and compliance costs for companies[56].

It cannot be denied that the revision of the Prospectus Directive has been beneficial.

In line with the above objectives, the European legislator has made major changes. Among these, listed non-exhaustively below, are a reinforcement of the summary requirements[57] and the presence of a new Universal Registration Document. This URD allows issuers listed on a regulated market or a multilateral trading facility to prepare and file this document each financial year for approval by the regulatory authority of their Member State[58]. Also, noteworthy is the introduction of the EU Growth Prospectus concept, a regime for certain issuers allowing for adaptation to their specific needs[59].

The above examples seem to point to a positive future for the Prospectus Regulation. However, the optimism of the European Commission and some authors must be tempered. Indeed, as we will demonstrate in the rest of this study, the Prospectus Regulation as entered into force on 21

[56] Recital 5 of the 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.
[57] Art. 7 of the 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.
[58] Art. 9 of the 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.
[59] Simmons & Simmons, 'The new Prospectus Regulation: Key changes to the prospectus regime for equity issuers' (18 July 2019) < https://www.simmons-simmons.com/en/publications/ck0bka1zd7m700b940moc5rhz/180919-the-new-prospectus-regulation-key-changes-to-the-prospectus-regime-for-equity-issuers> accessed 23 February 2021.

July 2019 still leaves Member States a significant margin of discretion on some important aspects.

This initiative, while strengthening the regime of the Prospectus Directive through certain improvements, is nevertheless far from having brought about an expected and necessary revolution in the framework of the Capital Markets Union.

3. The missed opportunity to harmonise the regime: brief focus on chosen aspects of the Prospectus Regulation

As discussed above, the Prospectus Regulation is not a revolution in itself. In the following, we will return to two selected aspects of the regulation which are largely left to the discretion of national legislators. The focus on these first elements will allow us to look at the Prospectus Regulation in its entirety and to take a critical look at it. It will also allow us to put into perspective the rest of our study, which is intended to demonstrate the importance of the implementation of a single civil liability regime for prospectuses.

3.1. Application of monetary thresholds

A first aspect highlighted is the treatment by the Prospectus Regulation of the thresholds below which the exemption from publishing a prospectus relating to an offer of securities applies.

This is a first element of significant importance left to the discretion of Member States.

Recital 13 of the Regulation states in these terms:

> Furthermore, in view of the varying sizes of financial markets across the Union, it is appropriate to give Member States the option of exempting offers of securities to the public not exceeding EUR 8 000 000 from the obligation to publish a prospectus as provided for in this Regulation. In particular, Member States should be free to set out in their national law a threshold between EUR 1 000 000 and EUR 8 000 000, expressed as the total consideration of the offer in the Union over a period of 12 months, below which the exemption should apply taking into account the level of domestic investor protection they deem to be appropriate. However, such exempted offers of securities to

the public should not benefit from the passporting regime under this Regulation. Below that threshold, Member States should be able to require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden in relation to such exempted offers of securities. Nothing in this Regulation should prevent those Member States from introducing rules at national level which allow the operators of multilateral trading facilities (MTFs) to determine the content of the admission document which an issuer is required to produce upon initial admission to trading of its securities or the modalities of its review[60].

Articles 1.3. and 3.2. of the Regulation complete this recital[61].

The motivations of the European legislator in leaving a margin of discretion to the Member States are understandable. This margin allows them to adapt to their economic reality. Nevertheless, it appears that this aspect constitutes a loophole in the overall objective of harmonising the rules.

Similarly, it quickly becomes apparent that the discretion left to Member States in this area leads irremediably to a first undesirable fragmentation within the Union and an obstacle to cross-border access to capital markets for issuers and investors. In practice, this fragmentation

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[60] Recital 13 of the 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.

[61] Art. 1.3.Without prejudice to the second subparagraph of this paragraph and to Article 4, this Regulation shall not apply to an offer of securities to the public with a total consideration in the Union of less than EUR 1 000 000, which shall be calculated over a period of 12 months.

Member States shall not extend the obligation to draw up a prospectus in accordance with this Regulation to offers of securities to the public referred to in the first subparagraph of this paragraph. However, in those cases, Member States may require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden.

Art. 3.2. Without prejudice to Article 4, a Member State may decide to exempt offers of securities to the public from the obligation to publish a prospectus set out in paragraph 1 provided that:

(a) such offers are not subject to notification in accordance with Article 25; and

(b) the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8 000 000.

Member States shall notify the Commission and ESMA whether and how they decide to apply the exemption pursuant to the first subparagraph, including the monetary amount below which the exemption for offers in that Member State applies. They shall also notify the Commission and ESMA of any subsequent changes to that monetary amount.

was observed when this part of the regulation was implemented in the Member States of the Union.

For the sake of brevity, we can summarise the situation as follows: starting from the prescription of the above articles, four thresholds below which a prospectus is not required are retained by Member States: EUR 1 million, EUR 2.5 million, EUR 5 million and EUR 8 million. It should be noted that some countries include several thresholds in their national legislation, depending on the market on which the securities are admitted or on the quality of the issuers concerned[62].

While an initial disparity is already well established with regard to the various thresholds used, the fragmentation is reinforced by the lack of uniformity regarding the rules applicable to offers below the thresholds provided for by each Member State[63]. The result is a most discordant situation between the rules with no rules at all and the systems aimed at extreme perfection.

3.2. Sanction Regime

The second illustrative aspect chosen, highlighting the consequences of the choices made when drafting the regulation, is that of the sanctions regime for breaches of the Prospectus Regulation.

Recitals 74, 75 and 76 of the Regulation, as supplemented by Article 38 of the Prospectus Regulation, aim at entrusting Member States with the task of taking administrative sanctions and other appropriate measures to ensure compliance with the prospectus requirements[64].

Once again, it can be seen that this choice results in the fragmentation of the unity that is supposed to result from the regulation in an aspect of considerable importance.

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[62] This includes, for example, requirements under Belgian or German law. It should be noted that German law is even more nuanced in this respect. For more information, see ESMA, 'National Thresholds below Which the Obligation to Publish a Prospectus Does Not Apply' (ESMA 2020) <https://www.esma.europa.eu/sites/default/files/library/esma31-62-1193_prospectus_thresholds.pdf> accessed 24 February 2021.

[63] ESMA, 'National Thresholds below Which the Obligation to Publish a Prospectus Does Not Apply' (ESMA 2020) <https://www.esma.europa.eu/sites/default/files/library/esma31-62-1193_prospectus_thresholds.pdf> accessed 24 February 2021.

[64] Recitals 74, 75 and 76 of the 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. Article 38 of the 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.

While some national regimes have truly incorporated the text of Article 38 into their national law, others have opted for a range of severe sanctions that can be applied more or less broadly[65].

If this aspect breaks again the dynamics that could be expected from a regulation, it also calls into question the model of supervision thought out of and leads to reflection on a possible overhaul of the system in favour of a true European supervision.

3.3. A Regulation with Directive Tones

As stated above, the choices made by the legislator for reasons of flexibility – and no doubt also motivated by dominant political reasons – are understandable. However, it cannot be denied that the regulation resulting from these choices is in many respects similar to a form of directive.

In an interview done at the end of 2017, Steven Maijoor, the first chair of ESMA, expressed the hope that European directives would be replaced by regulations in the near future[66]. While this optimism is commendable, this replacement seems questionable if it turns out that, in reality, regulations become new versions of directives.

While this study is not intended to focus on all the aspects of the Prospectus Regulation left to the discretion of Member States, our research choice focused on one of these aspects in particular.

The European legislator has so far avoided addressing concretely the issue of prospectus civil liability. We will argue below that the unification of the liability regime is a necessary condition for the realisation of the Capital Markets Union project.

[65] See for the first nuance, Article 30 of the Belgian Act - Loi du 11 juillet 2018 relative aux offres au public d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés. The second nuance refers to the German system. See in this respect Cleary Gottlieb, ‘The EU Prospectus Regulation and German “Implementing” Legislation – More Flexibility for Issuers, Tougher Sanctions and a More Powerful Regulator’ (8 March 2019) <https://www.clearygottlieb.com/-/media/files/alert-memos-2019/2019_03_08-the-eu-prospectus-regulation-and-german-implementing-legislation-pdf.pdf> accessed 7 February 2021.

[66] Nicolas Véron and Steven Maijoor ‘The Future of Capital Markets Union’ <https://www.bruegel.org/2017/11/the-future-of-capital-markets-union/> accessed 3 February 2021.

4. The single responsibility system, a blatant absence fragmenting the European markets

4.1. Current state of the regulatory framework

The liability regime relating to the prospectus is now set out in Article 11 of the Prospectus Regulation.

The Prospectus Regulation provides:

> 1. Member States shall ensure that responsibility for the information given in a prospectus, and any supplement thereto, attaches to at least the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible for the prospectus, and any supplement thereto, shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.
>
> 2. Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof, unless:
>
> (a) it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus; or
>
> (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.

> 3. The responsibility for the information given in a registration document or in a universal registration document shall attach to the persons referred to in paragraph 1 only in cases where the registration document or the universal registration document is in use as a constituent part of an approved prospectus. The first subparagraph shall apply without prejudice to Articles 4 and 5 of Directive 2004/109/EC where the information under those Articles is included in a universal registration document. The first subparagraph shall apply without prejudice to Articles 4 and 5 of Directive 2004/109/EC where the information under those Articles is included in a universal registration document[67] .

While this Article is somewhat more elaborate than the analogous article in the Prospectus Directive[68], it does result in minimum harmonisation, leaving the actual substance of the article to the discretion of Member States.

It should also be noted that some authors point out that the text of Article 11 itself is subject to analysis. They underline the ambiguity of certain terms chosen by the European legislator within the text[69]. For an initial analysis of this text, we refer to a relevant contribution on the topic[70].

As will be discussed below, the approach taken by Member States to civil liability under the Prospectus Regulation is far from uniform.

While some Member States have specific rules on liability for breaches of the Prospectus Regulation[71], others do provide for the application of general civil liability rules[72]. Between these two positions, some Member States have chosen to adopt what we call a hybrid system.

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[67] Art. 11 of the 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.

[68] Art. 6 of the 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 [2003] OJL 345.

[69] Danny Busch, 'The Influence of the EU Prospectus Rules on Private Law', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020).

[70] Ibid.

[71] These Member States include Italy, Germany and Spain. The case of Italy will be examined below.

[72] France applies such an approach. It will be detailed below as well.

This system, therefore, provides for both general and specific rules on civil liability for breaches of the Prospectus Regulation[73].

In addition to this lack of homogeneity, an analysis of the various national case law reveals that the courts and tribunals of the Union have radically different approaches when dealing with prospectus liability cases[74].

In line with the beginning of our study, it should be acknowledged and stressed that the chosen topic is extremely broad. The considerations already set out and demonstrating this are reinforced in several respects.

The chosen field of study is all the more complex because the issue of liability is often part of a cross-border context. Such a context is generally conducive to the occurrence of conflicts of law and conflicts of jurisdiction[75]. We will not examine this aspect in this thesis.

To sum up, it is therefore clear that there is a strong diversity between state civil liability regimes, even between countries within the same legal tradition. For this reason, an approach that differs from the more traditional comparative approach, which puts the civil law and common law regimes into perspective, should be adopted below.

First, we shall return to three national systems of civil law tradition in order to illustrate the approaches presented above. In this way, the French, Dutch and Italian systems will be reviewed.

Secondly, we will focus on the Irish system derived from the common law. This will enable us to see whether or not this system is similar to one or more civil law approaches.

Thirdly, we will focus on the public offer system applicable in the American market. Some people consider this system to be a model. This third part will allow us to affirm or invalidate this in the case of liability and to find or not a source of inspiration for our fourth part.

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[73] These countries include Luxembourg and the Netherlands. The Dutch system will be examined subsequently.
[74] See Busch (n 69).
[75] For more details on this topic, see Matteo Gargantini, 'Competent Courts of Jurisdiction and Applicable Law', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020).

4.2. Discrepancies between European civil law countries

4.2.1. Emphasis on the French responsibility system

4.2.1.1. Sources of French civil liability for breach of the Prospectus Regulation

The French system does not generally have specific provisions relating to breaches of the rules set out in the Prospectus Regulation[76]. The only existing provision relating to the infringement as regards the summary of the prospectus is found in Article L 412-1 of the Monetary and Financial Code[77].

In the absence of more specific provisions, the civil liability regime for breaches of the Prospectus Regulation is linked to the general civil liability regime under French law. It is therefore necessary for the claimant to demonstrate a fault, a damage and a causal link[78]. We will return to this necessary triad below.

This triptych should also be supplemented by other useful elements that can be found in sometimes scattered sources. For example, the general regulations of the French *Autorité des Marchés Financiers* (AMF), which provide for three articles for which certain participants are responsible, should be taken into account[79].

4.2.1.2. Persons liable in case of breach of the rules of the prospectus under French law

The question of determining the person responsible in the event of infringement of the prospectus in French law requires taking various situations into account. Offerors or issuers whose securities are listed on the regulated market are civilly liable for misleading information

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[76] Thierry Bonneau, 'France', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020).
[77] The second paragraph of the article specifies that ' No action for civil damages may be brought solely on the basis of the summary, including its translation, unless its content is misleading, inaccurate or in contradiction with the information contained in the other parts of the document referred to in the first paragraph or unless it does not provide, read in combination with the other parts of the document referred to in the first paragraph, the vital information helping investors when they consider to invest in financial securities'(Loose translation).
[78] Bonneau (n 76).
[79] Articles 212 - 14, 212 - 15 and 212 - 6 of the AMF General Regulation should be read together. These articles have been drawn up in accordance with the Prospectus Directive and the subsequent Prospectus Regulation. This study takes into account the AMF General Regulation as in force on 1 January 2021.

contained in prospectuses[80]. Where such entities are legal entities, certain provisions of company law should also be considered. Article L 225-251, §1 of the French Commercial Code, supplemented by the findings of the Supreme Court's Chamber of Commerce examine this aspect. This court considers that the directors of the entity may be held liable in the event of serious misconduct committed intentionally and incompatible with the exercise of their duties[81].

Depending on the circumstances of the offence, directors may be held jointly and severally liable[82]. Also, in the event of a breach of its legal duties, the issuer's auditor may be held liable[83].

4.2.1.3.Persons entitled to bring a civil liability action under French law

French law does not distinguish between the different categories of investors who may seek to hold the above-mentioned entities liable[84]. Consequently, there is uniformity between the treatment of so-called private or consumer investors and that of professional investors. Also, no distinction is made between these same categories when assessing the specific failure of the information contained in the prospectus[85].

4.2.1.4.Elements of liability

We have recalled above that in the absence of a specific provision on liability, it should be based on a particular triad: fault, damage and causal link. The fault taken into account is not subject to specific conditions, so any type of fault can be considered[86]. Damage, on the other hand, often refers to the loss of opportunity for investors to buy, to sell and to keep or not their securities. More specifically, the damage lies in the loss of the opportunity to make a decision

[80] Bonneau (n 76).
[81] Article L225-251, §1 of the French Commercial Code. See an example of case law in *Sati* [2003] Cass Com n° 99-17.092, Bull Joly Sociétés. para. 167, 786, note H. Le Nabasque and Cass. Com. (8 November 2017), Review Sociétés (June 2018) 357, note J. Porok.
[82] Bonneau (n 76).
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.

in full knowledge of the facts[87]. The plaintiff claiming to have suffered damage will have to prove the fault and the causal link in question[88].

4.2.1.5. Disclaimer

French law does not allow any disclaimer from liability in respect of prospectuses[89].

4.2.1.6. Time limit for claims under French law

The statutes of limitations under French law in this area are very limited. Indeed, only one article can be requested. Article L. 225-254 of the French Commercial Code provides that liability actions against directors or general managers, both corporate and individual, are time-barred after three years, starting from the harmful event or, if it was concealed, from its disclosure[90]. This article also adds that when the act is qualified as a crime, the action is prescribed by ten years.

4.2.2. Emphasis on the Dutch responsibility system

The Netherlands is one of the systems that we have described as a hybrid[91].

4.2.2.1. Sources of Dutch civil liability for breach of the Prospectus Regulation

The first rules on prospectus liability date back to 1928 and more specifically to the codification of Dutch company law[92]. Indeed, as Jan Paul Franx relates, the Dutch legislator quickly

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[87] *Flammarion* [2003] CA Paris 2001/21885, 1 Bull Joly Bourse 43. A second, albeit more abstract, approach to damage can also be presented. Some consider that damage results in the restriction of freedom of choice. It should be noted that this conception gives rise to two particular presumptions relating to the causal link and the harm caused.
[88] Bonneau (n 76).
[89] Ibid. The author also points out that such a disclaimer would have very little effect because of other rules that would have to be set in parallel.
[90] Loose translation of Article 225 – 254 of the French Commercial Code.
[91] See *supra* n 73.
[92] Jan Paul Franx, 'The Netherlands', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020).

considered the prospectus as a corporate document[93]. It was therefore necessary to provide for a rule of liability in the event of a breach of the prospectus together with the Companies Act[94].

In practice, the Dutch Civil Code included a rule in a specific category and provided that ‘managing and supervisory directors of the issuer would be jointly and severally liable with the issuer itself for misleading statements in the prospectus’[95].

In 1984, a further step forward in Dutch law was taken with the entry into force of Directive 84/450 on misleading advertising[96]. While the mention of this instrument may at first sight, seem surprising in the context under consideration, Dutch commentators acknowledge that this is one of the most peculiar aspects of the Dutch approach to prospectus liability[97]. However, this analysis is justified by the considerations that the prospectus is in fact a form of advertising[98].

As a result of the implementation of the above-mentioned directive, the Dutch legislator repealed the 1928 provisions, which were considered superfluous[99].

Consequently, since the 1980s, the Dutch Civil Code has included civil liability rules for prospectuses as part of the rules protecting consumers against misleading advertising[100].

Since the implementation of the Unfair Commercial Practices Directive 2005/29[101], there is a dual regime for prospectus liability: investors considered as consumers[102] can act on the basis of Articles 6:193a and seq. of the Dutch Civil Code implementing the above-mentioned Directive 2005/29, whereas investors who we will refer to as "professionals" will have to act

93 Ibid.
94 Ibid.
95 Ibid. The effect of this provision was to make the Dutch scheme favourable to investors and thus to investments.
96 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.
97 Franx (n 92).
98 Ibid.
99 Ibid.
100 As a result, the clarifications of the European Court of Justice in the field of consumer law are from time to time relevant in the Dutch prospectus liability regime.
101 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).
102 A consumer is defined as a natural person not acting in the exercise of a profession or business.

on the basis of Articles 6:194 et seq. of the same Code implementing the above-mentioned Directive 84/450. A general provision is, furthermore, available in Article 6:162 of the Code. However, claimants generally tend to resort to the specific regime of Articles 6:193 and 6:194 allowing them to reverse the burden of proof as to the misleading character of the prospectus information and the liability of the defendant[103].

4.2.2.2. Persons liable in case of breach of the rules of the prospectus under Dutch law

As a result of the practice and the space left by Article 11 of the Prospectus Regulation, the issuer is generally designated as the entity responsible for the information included in the prospectus in the various national laws. Dutch law has not escaped this, and it appears in practice that directors, co-directors and other potentially responsible entities are usually not explicitly listed as such[104]. Some authors argue that this practice would have the effect of rendering the law meaningless because the issuer is usually always the "first line" liable[105].

Specifically, the following may be held liable for misleading information in the prospectus under Dutch law: the issuer acting in the exercise of its profession, the lead manager, the co-managers and the auditors of the issuer. These different responsibilities that may be involved depending on the specific case may or may not be joint[106].

4.2.2.3. Persons entitled to bring a civil liability action under Dutch law

As mentioned above, Dutch law distinguishes between investors considered as consumers and professional investors. This distinction affects the burden of proof when the prospectus rules are infringed[107].

[103] Franx (n 92). See n 111 for further information.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] See pt 4.2.2.1.

4.2.2.4.Elements of liability

The liability of these different parties will be engaged in the event of a fault on the part of the entity in question. While the issuer is generally not able to benefit from an exemption from liability, other parties, such as the lead manager for example, may benefit from it provided that they can demonstrate that they have acted in accordance with due diligence[108].

The question of defective information in the prospectus remains at the discretion of the Dutch courts and subject to the case law of the European Court of Justice[109].

As in French law, the claimant will have to establish the link between the fault and the damage in order to obtain compensation[110]. The burden of proof will be borne by the claimant, although in practice this burden will be lighter as a result of the case law. In the 2009 *World Online* judgment, the Dutch Supreme Court established that a causal link is presumed if the initial information is misleading[111]. This presumption can be reversed by the issuer and/or the lead manager by providing sufficient evidence to the contrary.

4.2.2.5.Disclaimer

Despite the possibility to include a disclaimer in the prospectus, the doctrine states that this is not a common practice in the Netherlands[112].

4.2.2.6.Time limit for claims under Dutch law

A time limit for claims is provided for in Article 3:310 (1) of the Dutch Civil Code. This states that an action for compensation for damage or payment of a stipulated fine is time-barred after five years. This period starts from the beginning of the day following the day on which the injured party became aware of both the damage or the liability for the fine and the person

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108 Franx (n 92).
109 It should be noted that the Dutch Supreme Court generally applies the criterion of a reasonably well-informed, observant, and circumspect average investor in order to evaluate the quality of the information.
110 Franx (n 92).
111 *World Online* [2009] Hoge Raad der Nederlanden 07/11104, 44/45 Ned Juristenblad 2251. See also *CoopAG* [1994] Hoge Raad der Nederlanden 15488, Ned Juristenblad 246.
112 Franx (n 92). Furthermore, the compliance of such a disclaimer with the provisions of the Prospectus Regulation is questionable.

responsible for it. In any event, the action is time-barred after twenty years from the event which caused the damage or made the fine payable[113].

4.2.3. Emphasis on the Italian responsibility system

Italy joins the Member States with a civil law tradition in a third category, i.e. those countries that have adopted a specific approach to the liability for the prospectus.

4.2.3.1. Sources of Italian civil liability for breach of the Prospectus Regulation

The adoption of a specific liability regime dates back to 2007[114]. In that year, the *Testo Unico della Finanza* (TUF)[115] introduced a system of liability specific to the prospectus when implementing the Prospectus Directive[116]. The text of the TUF, although revised since its entry into force, is still relevant.

4.2.3.2. Persons liable in case of breach of the rules of the prospectus under Italian law

Article 94, section 8 of the TUF states that:

> The issuer, the offeror, the guarantor, and any person that contributes to the information contained in the prospectus is liable for the information provided towards any investor who reasonably relied on this information, unless it can be proved that sufficient due diligence was performed in order to ascertain that the information was true and there were no significant omissions[117].

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[113] Loose translation of Art. 3:310 (1) of the Dutch civil Code (Burgelijk Wetboek – Boek 3).
[114] Paolo Giudici, 'Italy', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020). Prior to this date, two approaches to liability were adopted. The first was based on the principles of pre-contractual liability and on Article 2339, Section 1, No. 3 of the Italian Civil Code with respect to misrepresentations in the distribution of securities accompanied by a prospectus drawn up by the issuer and the underwriters. The second approach was considered on the basis of Article 2043 of the same Civil Code and based on general tort law. For further developments concerning the period prior to 2007 and the consequences of both approaches, we refer the reader to the above-mentioned contribution.
[115] Testo Unico della Finanza (translated as Consolidated Financial Services Act) – Decreto legislativo del 24 febbraio 1998, n.58. The version of the text used in this study is the version as of 15 September 2020.
[116] It should be noted that the concept of prospectus in Italian law covers a broader scope than that set out in Article 2 of the Prospectus Regulation. The Italian prospectus requirements apply to any offer, irrespective of the type of financial product linked to it.
[117] Art. 94, section 8 TUF as translated by Paolo Giudici, see Giudici (n 114).

On this article, Paolo Giudici specifies that each party mentioned in it is responsible only for the part of the information for which it is competent[118].

Article 94, section 9 completes the previous one by allowing the lead manager to be held liable [*responsabile del collocamento*] unless the latter demonstrates the exercise of due diligence[119]. The latter, unlike the other persons mentioned above, is responsible for the entire prospectus[120].

4.2.3.3.Persons entitled to bring a civil liability action under Italian law

Like other European systems, the Italian system does not distinguish between retail and professional investors. Therefore, both categories are subject to the same rules on prospectus liability.

4.2.3.4.Elements of liability

The deficiency gauge of the information provided in the prospectus focuses mainly on the state of the market and not on the expectations of the investor[121].

4.2.3.5.Disclaimer

The only exception to liability is found in Article 94, section 8 of the TUF reproduced above, according to which the persons responsible for the information contained in the prospectus are each liable for the part of the prospectus for which they are competent. No other limitation of liability is possible[122].

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118 Giudici (n 114).
119 Art. 94, section 9 TUF.
120 Giudici (n 114). As the author points out, however, Italian law does not include rules on the liability of other financial intermediaries. The author states, however, that various scholars consider that the liability of intermediaries taking de facto a role equivalent to that of the *responsabile del collocamento* can be engaged, see Dmitri Boreiko and Stefano Lombardo, 'Prospectus Liability and the Role of Gatekeepers as Informational Intermediaries: An Empirical Analysis of the Impact of the Statutory Provisions on Italian IPOs' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3003825 <https://papers.ssrn.com/abstract=3003825> accessed 21 February 2021.
121 Giudici (n 114).
122 ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013). Also, it is not possible to benefit from a disclaimer due to the fact that case law considers that the liability regime does not have a voluntary basis.

4.2.3.6. Time limit for claims under Italian law

Prospectus liability claims are subject to a time limit under Italian law. Thus, the action of the applicant will be prescribed at the end of the five-year period from the publication of the prospectus, except in the situation in which the applicant demonstrates that he discovered the fraudulent information or omission in the two years preceding the initiation of the legal action[123].

4.3. Emphasis on the Irish responsibility system

4.3.1. Introduction

While the traditional distinction between common law and civil law systems is, as seen above, not the most relevant one when it comes to looking at the different prospectus liability regimes, it should be recognised that this study would be incomplete if common law systems were completely ignored.

These systems are few and far between in the European Union[124]. This situation was further reinforced on 1 January 2021, when the United Kingdom definitively left the Union.

Our choice of study, therefore, focused on the Irish law system. Despite the proximity of this system to the UK system on many respects, it is clear that the Irish system does not have the same degree of complexity as its neighbour in terms of prospectus[125].

4.3.2. Irish civil liability regime

4.3.2.1. Sources of Irish civil liability for breach of the Prospectus Regulation

The Irish prospectus civil liability system is the result of a patchwork of documents and instruments of various kinds. Thus, in addition to the direct application of the Prospectus

[123] Giudici (n 114).
[124] Apart from the United Kingdom before Brexit, only Ireland and Malta are common law systems in Europe.
[125] For an overview of the UK system before Brexit, see Gerard McMeel, 'United Kingdom', *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020).

Regulation, the Irish Central Bank has issued various regulations[126] and Investment market rules of conduct[127]. Also, the Companies Act 2014 provides in its sections 1349 and seq. for a civil, criminal and administrative liability regime relating to public offers of securities[128]. This legislative landscape is complemented by *ad hoc* publications of communications from the Central Bank such as the information note on civil liability in relation to prospectuses published in 2011[129].

The Irish Central Bank has recently reiterated that the rules on civil liability under the Prospectus Regulation remain identical to those dating from the period of the Directive[130]. It will therefore be possible to refer to some of the pre-Prospectus Regulation documents in the context of this study.

4.3.2.2.Persons liable in case of breach of the rules of the prospectus under Irish law

Prior to the implementation of the Prospectus Directive[131], Irish practice permitted for a system of shared liability[132]. This configuration allowed the issuer to limit its potential liability to a part of the prospectus.

Since the advent of Irish Regulation 324/2005 implementing the Prospectus Directive, there is a requirement for a nominee to take responsibility for the whole prospectus[133].

Thus, although the Directive provides for the – a minima – liability of the issuer, it was possible as early as 2005 for third parties to take responsibility for certain sections of the prospectus, although they could never substitute for the primary liability referred to above[134].

[126] Central Bank Regulation No. 380/2019 on the prospectus and Regulation 324/2005 implementing the Prospectus Directive are relevant in this respect.
[127] Central Bank (Investment Market Conduct) Rules (S.I. No. 366 of 2019).
[128] Companies Act, 2014 (Sections 1349 and seq.).
[129] Central Bank of Ireland. Responsibility for Information within a Prospectus for Debt Securities. 16 September 2011.
[130] Central Bank of Ireland ‘Regulatory Requirements & Guidance | Central Bank of Ireland’ <https://www.centralbank.ie/regulation/industry-market-sectors/securities-markets/prospectus-regulation/Regulatory-Requirements-Guidance> accessed 25 March 2021.
[131] See *supra* n 38.
[132] Central Bank of Ireland. Responsibility for Information within a Prospectus for Debt Securities. 16 September 2011.
[133] Article 6 of the Prospectus Directive as implemented by Regulation 31 and Schedule 1 of the Central Bank Regulation 324/2005.
[134] Regulation 31 and Schedule 1, section 3.2. of the Central Bank Regulation 324/2005.

Civil liability for breaches of the prospectus is therefore potentially far-reaching. This is further amplified because Irish law specifies that it is also possible to hold liable any expert engaged in the drawing up of the prospectus by his statements and who has consented to their inclusion in the prospectus[135].

As in other regimes already observed, a breach of the Prospectus Regulation entails joint and several liability of the parties mentioned above[136].

4.3.2.3.Elements of liability

Irish law considers that civil liability arises from '(a) an untrue statement; or (b) an omission of information required by EU Prospectus Law'[137].

In a 2013 report, ESMA listed the Irish system under the so-called strict liability category[138]. The intention behind the action does not have to be proved in order to hold a person liable.

However, it is necessary to specify that there is an exemption from liability according to the following terms:

> [T]he prospectus was issued without [the promoter's] knowledge or consent, and that on becoming aware of its issue he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent[139].

The promoter will therefore be able to demonstrate, under certain conditions, the absence of liability on his part[140].

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[135] Section 1350, par.4 of the Companies Act.
[136] ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).
[137] Ibid. The terms EU Prospectus Law have a defined meaning in Irish legislation (as outlined in section 38 of the 2005 Act), and relate to any measures directly applicable in the State in consequence of the Prospectus Directive or Regulation.
[138] ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).
[139] Section 43.3.b. of the Central Bank Regulation 324/2005.
[140] It should be noted that Irish law frequently uses the term 'promoter' when referring to the persons responsible for the prospectus.

4.3.2.4.Persons entitled to bring a civil liability action under Irish law

The right to sue is reserved for any investor who has acquired securities on the basis of a misleading prospectus and has suffered loss or damage as a result of it[141]. There is no distinction according to the nature of the investor, or the nature of the securities concerned. In the event of liability, Irish law and common law principles allow for compensation to the claimant[142]. This depends essentially on the circumstances of the case.

4.3.2.5.Disclaimer

Apart from the clarifications already made regarding the potential avoidance of liability, there is no other possible disclaimer in this regard. The Irish Central Bank points out in this respect that the courts and tribunals have not established any case law[143]. It also underlines that Irish law specifies the limits to liability in other statutory torts and that because of the Oireachtas[144]' codification of the entirety of these circumstances, it follows that it is not possible to find any further limitations of liability[145].

4.3.2.6.Time limit for claims under Irish law

As in other systems, a limited period of time is established in the context of the liability action.

This is two years from the event giving rise to the action or from the discovery of the information underlying the action in accordance with Irish liability law[146].

As stated above, Irish law does not distinguish between claimants according to their profile. However, a practical aspect should be mentioned. While the traditional way is to bring an action before the state courts and tribunals, complainants considered to be consumers are allowed to

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141 Cormac Kissane and others, 'Debt Capital Markets in Ireland: Regulatory Overview' (*Practical Law*) <http://uk.practicallaw.thomsonreuters.com/5-525-3240?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 25 March 2021.
142 ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).
143 Ibid.
144 The term Oireachtas refers to the Irish national parliament.
145 ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive'(2013).
146 Eoin Quill, *Torts in Ireland* (3. ed, Gill & Macmillan 2009).

lodge their complaint before a Financial Services Ombudsman established by the Central Bank Act 1942[147]. The latter has investigative powers and may draw conclusions on the conduct of a regulated financial service provider[148]. Moreover, the Financial Services Ombudsman's decision can be appealed before the courts[149].

In addition to civil liability for breaches of the prospectus, Ireland allows for criminal and administrative liability[150].

4.4. Brief comparison : a focus on the American Framework

4.4.1. Introduction to the US Capital Market

'There is no better place to start than the world's largest and most successful "Capital Market Union", the capital market of the US'[151].

The introduction to this study outlined the link often made with the American system, considered by some authors as an example in terms of access to capital[152].

The American capital market is a product of national history and its beginnings date back to the 19th century. Scholars Gordon and Judge report that access to capital was essential to the US economy from that period onwards[153]. This need was a consequence of both the growing demand for funds from large, risky companies and the limited capacity of banking institutions to provide such financing[154].

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147 ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive'(2013).
148 Ibid.
149 Ibid.
150 Kissane and others (n 141).
151 Jeffrey N Gordon and Kathryn Judge, 'The Origins of a Capital Market Union in the United States' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3154676 <https://papers.ssrn.com/abstract=3154676> accessed 19 February 2021.
152 See Introduction.
153 Gordon and Judge (n 151).
154 Ibid.

As a result, the paralysis of the banking system has encouraged the growth of bond markets, which have access to national and international capital markets, and the growth of the equity market[155].

This expansion has also benefited from the support of the legislator[156]. The enactment of the Securities Act of 1933 is particularly noteworthy in this respect[157]. Among other things, this legislative initiative strengthened the disclosure and liability regime for public issues of debt and equity securities[158]. We will come back to this act hereafter.

The disclosure regime presented above has contributed to the reduction of the banks' advantageous position in the valuation and supervision of credits[159]. It has also increased the depth and liquidity of equity markets[160].

While the Securities Act was the cornerstone of the expansion of the US capital market, some subsequent initiatives have also weakened the position of banking institutions in the US, such as the Trust Indenture Act of 1939 and the Investment Company Act[161].

It follows from this situation that while the European and American economies are more or less of the same size, the European capital markets are much less important than their American counterparts[162]. If the dependence of companies on the banking sector is so considerable, it is because of the size of European markets. According to the data included in the Communication of the European Commission of 30 September 2015, European equity markets are less than half of their US counterpart while European debt markets represent only one-third[163].

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155 Ibid.
156 Ibid.
157 This act is incorporated into Title 15 of the United States Code. However, for the sake of clarity, we will refer to the act itself in this study.
158 Gordon and Judge (n 151).
159 Ibid.
160 Ibid. Gordon and Judge also point to the establishment of a single federal securities regulator – the Securities Exchange Commission - that has removed potentially inconsistent state regimes and thereby strengthened the US capital market.
161 For detailed clarification of these acts, we refer the reader to the above-mentioned contribution. The authors point out that in addition to these various legislative interventions, the importance of legal developments outside the financial sector should be recognised. These provide a complete landscape for the reasons for the success of the US capital markets.
162 European Commission. Communication from the Commission on capital market union: Progress on building a single market for capital for a strong economic and monetary union. 15 March 2019 3.
163 European Commission. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan on Building a Capital Markets Union. COM (2015) 468 final.

The full study of the US system would prove to be tedious and irrelevant in the context of this research. Therefore, the following section will focus on the review of the civil liability rules applicable in the event of a breach of the disclosure rules for public offerings.

4.4.2. US liability regimes

The reasons for establishing disclosure rules are identical to those which can be found at the origin of the Prospectus Directive and Regulation in the European Union. The disclosure rules aim to remedy the asymmetries of information on the financial markets[164]. These asymmetries lead to potential market failures, thus preventing the successful trading of valid offers[165].

Despite the existence of some market-based solutions that are real antidotes and allow investors to regain confidence in the market, Merritt Fox points out that these remedies alone are not sufficient[166]. Therefore, there must be appropriate responses to incomplete or misleading disclosures of information[167]. The above-mentioned author states that 'the US experience is that the deterrent value of civil liability is important as well in deterring dishonesty and assuring an optimal level of care with respect to determining the facts'[168].

From a global perspective, the US legislator proposes three different liability regimes: absolutely strict, strict with a due-diligence defence or the so-called scienter-based liability.

In the following, we will outline the three liability regimes with their respective *ratio legis* and the stakeholders to whom they apply. Due to the multiple natures of the system, the structure of the presentation will differ from that used in the sections dedicated to the different European systems.

As a preliminary point, it should be clarified that regardless of the regime concerned, there must be a breach of a disclosure rule by the issuer. This condition requires the material element that

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[164] Merritt B Fox, 'Initial Public Offerings in the CMU - A US Perspective', *Capital Markets Union in Europe* (Oxford University Press 2018).
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Ibid.

information that was required to be given was not given or that the statement made as a result of the disclosure regime was false or misleading[169].

It is generally considered that the information required to be disclosed is so important, in particular for the investor to be able to make an informed decision, that it should be known to the issuer's top officials in the day-to-day conduct of business[170]. In some situations, these officials are at least responsible for the content of the disclosure relating to the offer issued[171].

4.4.2.1.Absolute strict liability

The strict liability regime is that imposed on the issuer under Section 11(a) of the Securities Act[172]. The issuer's strict liability shall apply for breaches of the disclosure rules for offers subject to registration under Section 5 of the Act.

Thus, any person acquiring such a security may bring an action for the omission or false disclosure in the registration statement of such security[173].

[169] Ibid.
[170] Ibid.
[171] Ibid. The author points out that under certain provisions, these officials are required to sign a declaration regarding this information and are potentially liable.
[172] Sec. 11(a) of the Securities Act of 1933 provides that ‘In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue— (1) every person who signed the registration statement; (2) every person who was a director of (or person per forming similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted; (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions or partner; (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him; (5) every underwriter with respect to such security. If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such per son acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person’. This provision is qualified subsequently.
[173] Sec. 11(a) of the Securities Act of 1933.

This type of liability is, in a sense, the purest of all. The US legislator established it to encourage compliance with the prescribed rules[174]. The aforementioned author M.B. Fox argues that this is to ensure a higher standard of disclosure than that which would exist between the parties if this point was left to the discretion of their contractual relationship and the usual tort law remedies[175].

This author goes on to argue that this uncompromising liability regime is a means of ensuring that the offer price reflects the information available to investors[176]. In its absence, there may be concerns that some information considered negative may not be disclosed or that false positive statements may be made[177].

The spectre of liability and the absence of a due diligence defence reduce the occurrence of these events. If liability is incurred, the issuer should return to the complaining investors the amount constituting the surplus resulting from the breach of the disclosure rules[178].

The practical consequence of the situation described is that in most cases investors can obtain compensation for damage suffered as a result of a violation.

However, this situation does not guarantee the absence of risk for the plaintiff. Indeed, certain events have the consequence of rendering the issuer impervious to the effect of liability judgements[179].

For this reason, the Securities Act provides for the possible involvement of other parties in the liability process: underwriters and top officials of the issuer.

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174 Fox (n 164).
175 Ibid.
176 Ibid.
177 Ibid.
178 Ibid.
179 Ibid. In the following section, we will outline some of these events.

4.4.2.2.Absolute liability subject to due diligence defence

This second liability regime applies to underwriters[180] and top officials of the issuer because of the combination of Sections 11(a) and (b) of the Securities Act[181].

Initially, the introduction of this regime was intended to encourage each party other than the issuer to carry out a personal investigation of the offering and to actively participate in the offering process[182].

It is also suggested that, in line with the concerns leading to the establishment of issuer liability, holding these parties liable would further limit the number of 'defective' offers in the market[183].

The doctrine argues that upstream of the offering, underwriters and top officials of the issuer are able to reverse the trend and encourage the issuer to comply with disclosure rules[184]. Moreover, these stakeholders are in a better position than most investors to discover the potential violation of the rules mentioned above[185].

In his contribution to the book 'Capital Markets Union in Europe', M.B. Fox summarises the potential motivations of underwriters with the following example:

> Consider a piece of information that either is required to be disclosed, or that renders a statement made by the issuer false or misleading. Suppose that the underwriter knows of the information but the issuer wished not to disclose it. The prospect that the underwriter will face liability for investor losses if it acquiesces to the wishes of the issuer will likely lead the underwriter to seek to force its disclosure. If the issuer does

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[180] As indicated in section 2. (a) (11), the term underwriter means "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term ''issuer'' shall include, in addition to an issuer, any person directly or indirectly control ling or controlled by the issuer, or any person under direct or indirect common control with the issuer". The term underwriter will often refers to investment banks.

[181] Sec. 11(a) and (b) of the Securities Act of 1933. Indeed, while Section 11(a) imposes an absolutely strict liability on these actors, Section 11(b) releases them under conditions.

[182] Merritt B Fox, 'Civil Liability and Mandatory Disclosure' (2009) 109 Columbia Law Review 237.

[183] Fox (n 164).

[184] Ibid.

[185] Ibid.

> not comply, the underwriter is likely to refuse to proceed with the offering. The expected cost of participating in the offering without the disclosure is just too high.[186]

The author goes on to discuss various cases in which the issuer and the underwriters may have conflicting interests. In particular, the author discusses the case where the issuer does not disclose information because the lack of availability of this information would allow it to avoid bankruptcy[187]. The author also mentions situations where the issuer's officials do not perceive the importance of a piece of information and do not disclose it[188]. In these situations, underwriters, aware of their potential liability, will not hesitate to act to encourage disclosure, as they have nothing to lose.

The regime set out in the Securities Act is a strict liability regime with a possible due diligence defence[189]. The remainder of this paper will set out this defence for underwriters. However, an analogy can be made with the situation of the issuer's top officials.

In order to avoid liability, it will be necessary for the underwriter to show that it engaged in a sufficient investigation of the offer and that, as a result of that investigation, it had a reasonable belief that there was no breach of the disclosure rules[190].

A standard of reasonableness is included in this demonstration and is set out in Section 11(c) of the Securities Act. This section states that 'in determining (…) what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property'[191]. Also, the *In re Software Toolworks* case law specifies that this implies a cost-benefit analysis:

> A prudent man would not, at the margin, spend more on investigation than the expected value of the poor returns that would be avoided by not purchasing assets the inferiority of which would only be revealed by more intense investigation[192].

[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Sec. 11(b) and (c) of the Securities Act of 1933.
[190] Sec. 11(b) of the Securities Act of 1933. Fox (n 164).
[191] Sec. 11(c) of the Securities Act of 1933.
[192] *In Re Software Toolworks* [1992] US District Court for the Northern District of California 789 F Supp 1489, 1496 – 1500. Fox (n 164).

If it is shown that the standard of reasonableness is not met, the underwriter will be held liable and will therefore bear the costs associated with its liability. The damages awarded will be equal to the amount by which the non-disclosure of the undetected problem inflated the price of the offer[193].

While this basis of assessment seems a priori to be a cause of complications in liability litigation, practice shows that knowledge of a disclosure violation is easily determined by the courts[194].

Some authors point out that the possibility of asserting the due diligence defence is a strong incentive for underwriters to engage in offering transactions[195].

4.4.2.3.Scienter-based liability

The third possible liability regime is the scienter-based liability regime[196].

This regime is reflected in Section 10(b) and Rule 10(b-5) of the Securities Exchange Act[197]. These are the only grounds on which plaintiffs may bring an action for damages against an issuer of securities where the securities are not registered under the Securities Act or made in accordance with Regulation A+[198].

In this context, the issuer shall be liable if some of its top officials had knowledge of the undisclosed information as required by Section 10(b) of the Securities Exchange Act[199].

This approach is rather debated and is not the most applied in practice for reasons explained by the doctrine.

As Donelson, Prentice and Fox report, a first disadvantage of this regime is that it creates an incentive to falsify the functioning of the issuer's internal communication channels in order to

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[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] The US Supreme Court has defined the term 'scienter' as mental state that encompasses an actual intent to manipulate, defraud or deceive in Ernst & Ernst v. Hochfelder [1976], 425 U.S. 185, 193 n.12.
[197] Securities Exchange Act of 1934.
[198] According to the US Securities and Exchange Commission website, Regulation A+ refers to an exemption that allows small companies to sell their shares to the general public, making it possible for almost anyone to invest in a business through crowdfunding.
[199] Fox (n 164).

keep its top officials in the dark about certain important information[200]. The authors explain that by keeping these officials in the dark, the issuer can violate the disclosure obligations imposed on it without risking being easily sanctioned[201]. Indeed, in these circumstances, the decisive factor that could engage the issuer's liability – namely the knowledge of the information by its top officials – is absent.

A second disadvantage is a consequence of the first one. The information resulting from incomplete disclosure leads to suboptimal marketing of the offer, impacting the overall economy in case of large-scale multiplication[202].

Fox also points out that access to evidence to establish the issuer's liability is potentially complicated[203]. In order to establish liability, it must be possible to prove 'who knew what'[204]. This factor considerably increases the burden of proof for the plaintiff, while drastically reducing any chance of success to receive compensation.

This system of liability, therefore, has greater disadvantages than the first regimes described.

4.5. Mid-term conclusion: Deciphering of the risks linked to the fragmentation of responsibility regimes

We have sketched out in this part that the regime chosen by the European legislator for liability for breaches of the Prospectus Regulation is far from ideal. This choice results in a breakdown of state systems. It is clear that, although many share certain characteristics, none of them are alike.

The result of the current situation is profound legal uncertainties leading to the fragmentation of the European markets as well as to a geographical concentration of securities issues[205].

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[200] Dain C Donelson and Robert A Prentice, 'Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications' (2012) 63 Case Western Reserve Law Review 441.
[201] Ibid.
[202] Fox (n 164).
[203] Ibid.
[204] Ibid.
[205] Flament (n 22).

The implementation of civil liability is all the more complex because of the nature of the area concerned. Indeed, the financial sector is by its very nature internationalised. Consequently, the civil liability of the actors concerned is almost inevitably likely to raise the issue of conflicts of law.

It is therefore easy to understand the impact of this problem on the construction of the Capital Markets Union. In the following chapter, we will argue that it is essential to establish a single system of civil liability if the Capital Markets Union is to become a reality.

III. Proposal for a better harmonisation in the field of responsibility at the European Level

1. The need for a unique responsibility regime in the framework of the CMU Plan

The conclusion of the previous section stated that the choices made by the European legislator with regard to the prospectus liability have resulted in a fragmented Europe. We then discussed the consequences and problems raised by this situation.

The first section of this third part aims to complete the landscape outlined above.

As already mentioned, the revision of the Prospectus Directive was envisaged in the context of the establishment of the Capital Markets Union. In our view, the implementation of this project requires the establishment of a single civil liability system.

Alongside the remediation of European fragmentation envisaged in the mid-term conclusion, the establishment of a single liability regime is in many ways consistent with the ambitions of the CMU. Such a regime would significantly strengthen the shield of investor protection, thus contributing to the stimulation of cross-border investments and the attractiveness of European markets. It can also be stressed that such a system would make it possible to respond to the fragmentation of case law in this area, which cannot be ignored because of its divergent orientations[206].

Unification of legislation and case law under the European umbrella is now a necessity, if not an urgency.

[206] Busch (n 69).

2. Proposal for a new orientation of the responsibility regime in the Prospectus Regulation

2.1. Introduction

While the rules on civil liability for prospectuses are subject to fragmentation in Europe, neither the analysis in Part II nor our overall observation of the various European systems[207] suggests that these systems are irreconcilable at first sight.

We consider that a strong and strict liability system should be put in place at the European level to allow for true efficiency, stability and resilience in this area.

With this in mind, the following section is intended to outline the features of a single civil liability system for prospectuses. While this is a perilous attempt, it will seek to sketch out in a coherent, relevant and realistic way a potential liability regime to apply to the various participants in the prospectus preparation process.

The following proposal is not intended to be aligned with Article 11 of the Prospectus Regulation. However, some parts will take up elements formulated by this regulation and will therefore be integrated in the proposal.

This research does not claim to be exhaustive, but as complete as possible given the limits imposed to this study. This section will conclude with a discussion of the proposed system and a more general statement on the likelihood of success of a single liability system in the near future.

For the sake of clarity, the remainder of the paper will be divided into several sub-sections. Occasionally, some of the elements presented will be briefly recalled in several sections in order to link the proposed responses.

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[207] ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).

2.2. Proposal

2.2.1. A strict civil liability system in two variations for stakeholders in the establishment of the prospectus

As stated in the introductory part of this proposal, we believe that a system of strict civil liability for prospectuses should be established.

However, we propose to qualify this first step. We suggest that a distinction should be made between two categories of parties involved in the preparation of the prospectus: the so-called main stakeholders and the so-called secondary stakeholders.

In contrast to main stakeholders, we believe that secondary stakeholders should be able to raise a due diligence defence in the event that their liability is incurred.

We will begin by examining the first form of liability – namely, the strict civil liability of main stakeholders without any specific defence – and more specifically, its *ratio legis*, its addressees and its main characteristics.

Subsequently, we will return to the stakeholders subject to a strict liability regime but benefiting from a due diligence defence, as well as to the conception of this notion in the context of the topic studied.

2.2.1.1. A strict civil liability regime involving the main stakeholders

a) The concept of main stakeholder

In our view, this first category should be addressed to the parties referred to in Article 11.1. of the current Prospectus Regulation, i.e.:

- The issuer or its management, administrative or supervisory bodies
- The offeror
- The person asking for the admission to trading on a regulated market
- The guarantor, as the case may be

It appears that the European legislator presents in this article what we will call the main stakeholders[208].

We propose that these key players should be covered by the strict civil liability regime precisely because of their position. We consider that they should have an additional duty of care upstream of any transaction for the entire prospectus for at least one party. In practice, some of the first three entities mentioned above may be combined in a single entity[209]. The guarantor could be liable to the extent of its intervention.

This liability is justified in our view, as stated above, because of the more advantageous position of these parties in the transaction. We also believe that the lack of strict liability on the part of these parties would not only diminish the duty of care that can be expected from these parties, but could potentially lead them to circumvent the disclosure rules of the prospectus.

Clearly, a strict liability regime, in our view, encourages the search for real transparency in the market and reinforces the good faith that parties must show.

By calling for caution on the part of stakeholders, it also strengthens the chances of success for plaintiff investors when bringing an action. Consequently, it seems clear to us that the implementation of a European regime of strict liability for market participants would increase cross-border trade and investment in terms of the trust that such a regime could instill in the market.

b) The implications of a strict liability regime

The strict civil liability regime would imply that the degree of fault on the part of the participants could result from simple negligence.

[208] We also argue that this strict liability of the entities concerned does not automatically extend to the natural persons involved. They can be held liable for their own actions and facts in this context.
[209] Busch (n 69).

Consequently, the liability of the participants could be engaged notwithstanding the absence of any intention and without the need for the court to assess the care taken in drawing up the prospectus.

For the defect in the information given by the prospectus triggering the fault, we refer to the section dedicated to it below[210].

We consider that if such a liability regime were to be implemented, the requirement for the identification, declaration and signature of the parties involved provided for in Article 11.1 of the Prospectus Regulation should be retained. In our view, this would confirm the awareness and caution required of key players when drafting the prospectus.

The majority of European national regimes provide that the parties covered by the Prospectus Regulation in this first category should ideally be held jointly and severally liable where circumstances permit[211]. We consider that this aspect should be maintained in a regime such as the one presented. This is because it prevents the impact of a possible insolvency of the parties involved and allows the plaintiff to successfully pursue its liability claim.

c) Summary of the proposed liability regime

We therefore envisage that under a single liability regime, strict liability should be able to hold the main stakeholders jointly and severally liable depending on the circumstances[212].

Civil liability would therefore be incurred on the basis of a fault, which could be as simple as negligence and without any particular defence being possible. This liability

[210] See pt 2.2.3.
[211] ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).
[212] i.e. whether or not all parties are involved in the process. Furthermore, while the category of guarantors - acting intermittently - could potentially have been placed among the secondary stakeholders, we do not consider this appropriate. Indeed, we believe that they should not be able to benefit from the due diligence defence.

would be reinforced, as in the current Prospectus Regulation, by the identification, declaration of compliance and signature of the stakeholders[213].

2.2.1.2. A strict civil liability system with due diligence defence for potential secondary stakeholders

a) The concept of secondary stakeholder

As stated in the introduction to this section, we propose a second civil liability regime for what we call secondary stakeholders in the preparation of the prospectus.

These stakeholders are seen as occasional stakeholders in contrast to the first category considered. The secondary aspect of these stakeholders is not intended to diminish their importance but to emphasise the intermittent nature of their presence.

The following are considered as secondary parties in the context of this drafting process: potential financial intermediaries, such as underwriters, and certain ancillary agents involved from time to time in the drafting of the prospectus, such as experts, accountants, counsels or CFO. In order to be potentially liable, these ancillary agents would have to have consented to have their statements incorporated into the content of the prospectus.

Under the approach proposed in this section, secondary parties would be liable for the limited part of the prospectus, i.e. the part specific to their intervention. For some of them, this liability would be incurred to the extent of their consent to the incorporation of their statements into the prospectus as specified above.

We believe that it is important to provide for a uniform system of liability for these parties, mainly in order to support the objective of prudence and transparency that we

[213] As a reminder, the second part of Article 11.1 of the Prospectus Regulation states: The persons responsible for the prospectus, and any supplement thereto, shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

mentioned in relation to the main stakeholders and to make the secondary parties aware of the performance of their duties.

Although the objective is common to both categories presented, secondary stakeholders should not, in our view, be considered in the same way as the first category we referred to above. They could not be held strictly liable on a general basis for a number of reasons that seem relevant to us.

In contrast to the main stakeholders, we first point out that secondary stakeholders may have less information and knowledge about the overall context of the prospectus. Secondly, it would be difficult to hold them responsible for the information and omissions of the main stakeholders.

For these reasons, as mentioned above, we also consider that it would be appropriate to allow an *ex post* defence for these parties. Also, this configuration maintains the attractiveness of these parties in the prospectus drafting process.

b) The concept of due diligence in the context of the strict liability regime for secondary stakeholders

The concept of due diligence is one of those concepts that are dislocated between several definitions. If such a concept were to be embodied in European legislation in the context of a single liability regime, it would be desirable for it to be harmonised in the long term, leading to a specific, Europe-wide concept that would be binding on the national courts of the Union.

However, for the time being, we propose to establish a criterion based on a common understanding of the concept.

In the event that plaintiffs bring a civil liability claim against secondary actors, the latter would have to demonstrate individually that they exercised the care, prudence, firmness and action that a similarly qualified person in the same circumstances would have taken.

Although this section aims to establish a single European liability system, it must be recognised that such a system faces certain limitations at this stage of the reasoning.

Above, we referred to the need for European intervention at the level of case law for the purpose of harmonisation. Here again, if the situation were to become a reality, it would probably be necessary – unless another European initiative emerges in this area – to refer to the state systems for the purpose of determining the admissible evidence regarding due diligence.

c) Summary of the proposed liability regime with a due diligence defense

We therefore propose a system of strict civil liability with a possible due diligence defence applying to secondary actors involved in the preparation of the prospectus. In this framework, we believe that their liability limited to their contribution subject to the consent of the parties concerned leads these actors to be prudent in their mission without having to be liable for the principal actors. The defence of due diligence consists of an individual demonstration of having exercised the care, prudence, firmness and action that a similarly qualified person in the same circumstances would have adopted.

2.2.2. Persons entitled to bring a civil liability action

The European state regimes are extremely fragmented as to who can bring a civil liability claim in relation to a prospectus.

We believe that any investor who has acquired securities in good faith on the basis of a prospectus and has suffered loss or damage as a result of misrepresentations or omissions in that prospectus has standing and an interest in bringing a liability claim.

A first aspect of this proposal relates to the requirement of good faith of the investor concerned. This point is hardly required in the various national systems. It would appear that it is only found in Article 38.3 of the Securities Market Act and Article 36 of Royal Decree 1310/2005 from the Spanish system[214]. However, we believe that the inclusion of this requirement is relevant insofar as it would at least rule out the – hypothetical – cases in which investors close to the issuer would be aware of omissions or misleading information in the prospectus.

A second aspect that complements the proposal is the distinction between primary and secondary market investors. We argue that it would be appropriate in this single regime to open up the potential action concerning secondary market investors during the 12-month period of validity of the prospectus as defined by Article 12 of the Prospectus Regulation as it stands[215].

Such a time-limited regime for the secondary market would avoid an exponential increase in complaints over several years.

Although we have established what we believe to be a relevant system in this respect, we feel it is important to consider and briefly review the implications of certain state systems on the question of who is entitled to bring a liability action. Indeed, certain systems such as the Belgian, Luxembourg or French systems cited as examples present a triad of fault-damage-causation in their general civil liability regime. Thus, in the context studied and in systems such as those mentioned above, although the situation is hypothetical, any person relying on the triad set out other than an investor could bring an action for prospectus liability.

The case law of some of these systems has shown that the presence of this triad in countries with a civil law tradition is not without consequences in financial matters. By way of example, Belgian case law, although not very abundant, has demonstrated a striking difficulty of harmonisation in this field[216].

Thus, for example, the analysis of the causal link is most complicated because of the divergent orientations adopted by the courts with regard to the elements considered in its application.

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[214] Art. 38.3 Ley 24/1988, de 28 de julio, del Mercado de Valores. Art. 36 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.

[215] Art. 12.1 of the Prospectus Regulation states that: A prospectus, whether a single document or consisting of separate documents, shall be valid for 12 months after its approval for offers to the public or admissions to trading on a regulated market, provided that it is completed by any supplement required pursuant to Article 23.

[216] For a detailed analysis of Belgian case law on prospectus liability see Elke Vandendriessche, 'Fraud-on-the-Market: Een Causaliteitstheorie Inzake Beleggersverliezen' (2011) 2 Tijdschrift voor Privaat Recht 277.

To illustrate this divergence, it can be underlined that some judges have tended to determine the decisive influence of the deficient information on the investor's decision when assessing the causal link[217]. On the other hand, these same judges have not assessed the impact of the information on the stock exchange price, which seems to be criticised by some Belgian scholars[218].

On 3 October 2006, the Brussels Court of Appeal departed somewhat from the general trend in its *Barrack Mines* judgment. In addition to the first criterion of decisive influence mentioned above, the Court had introduced the presumption of adequate information taken by the investor before he made his decision. Finally, still in the assessment of the causal link, the Court introduced a chronological criterion by considering that the causal link was only established with regard to the securities acquired before the correction of the deficient information[219]. This last point seems logical to us.

Since then, the courts have not clarified the fragmented case law. The last time that case law had to rule on the matter was on 21 June 2016[220]. The causal link was only briefly examined on that occasion, so that no certainty is present in the Belgian landscape.

These uncertainties are reinforced by the doctrine, which is equally hesitant in the matter. In this regard, in their contribution published in March 2021, N. Résimont and M. Baba mention different doctrinal currents in this matter without any clarity being established once and for all[221].

This example of difficulty justifies, in our view, the establishment of a system such as the one we defined at the beginning of this section for complaining investors.

However, it would be pointless to try to erase this triad, which is present in many European systems, so that a perfect symbiosis results from the single system that was the subject of our proposal.

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[217] Ibid.
[218] See Nicolas Résimont and Malik Baba, ‘Point Sur Le Lien Causal et Son Application En Matière de Préjudice Boursier’, *Liber Amicorum Paul Alain Foriers. Entre tradition et pragmatisme* (Larcier, 2021).
[219] *Barrack Mines* [2006] Hof van Beroep te Brussel 2004/AR/369, 2 DAOR.
[220] *SPRL LC et M RA c SA DEXIA et M PM* [2016] Tribunal de première instance francophone de Bruxelles (73[e] ch) 14/782/A, 3 DAOR 93.
[221] Résimont and Baba (n 218) .

Therefore, we argue that if a person – who we could call an outsider, i.e. not an investor – decided to use the presented triad to engage the civil liability of a stakeholder, the state civil liability regime should apply. This situation would preclude the application of the liability regimes presented in Section 2.2.1.

In contrast to the Dutch law system, we do not believe that it is appropriate to categorise consumers and professional investors. We believe that the implications of such categories do not lend themselves well to the field of civil liability in the financial sector.

2.2.3. Defectiveness of the Prospectus Information

This section aims to determine which defects in the prospectus may lead to liability.

Liability could arise if a misrepresentation is present in the prospectus. The same would apply in case of an omission of material information affecting the scope of the prospectus.

With regard to the latter aspect, we propose to consider as material information that would have influenced the investor's decision and that would have enabled him to make an informed assessment of the financial situation, plans, losses and prospects of the parties involved and the rights attached to the securities.

2.2.4. Degree of fault required

As a reminder, we had proposed above two regimes of strict civil liability of the participants, qualified by the possibility of defence for the second category of participants.

As mentioned, in view of the strict nature of this liability, we argued that the slightest negligence was sufficient to trigger possible liability. More specifically, we consider that the damage suffered by the investor is presumed to result from the absence or misleading or inaccurate nature of the information contained in the prospectus and any supplements thereto, where such absence or misleading or inaccurate nature was likely to create a positive feeling in the market or to positively influence the acquisition price of the investment instruments[222].

2.2.5. Disclaimer

In line with the current regime in many Member States and for obvious reasons of full and effective investor protection, we propose that it should not be possible to insert a disclaimer benefiting the parties drawing up the prospectus.

2.2.6. Burden of proof

This section is established as a consequence of the enforcement regimes chosen above. As a reminder, the *bona fide* plaintiff must make his or her claim by demonstrating that he or she relied on a valid prospectus containing omitted or misleading information.

At this stage, the first category of investor will be liable unless the evidence to the contrary is proved in accordance with the means accepted by the applicable law.

The second category of stakeholder will be able to defend itself and demonstrate that it acted in accordance with the test embedded in the concept of due diligence.

2.2.7. Time limit for lodging a complaint

This is one of the issues that is subject to fragmentation between European state systems.

A first aspect was addressed in Section 2.2.2. and related to the proposed limit for liability actions relating to the secondary market. As a reminder, our proposal was therefore aimed at avoiding a significant multiplication of claims and a potential chaotic situation.

As regards primary market actions, we believe that the following time limit should be proposed: the liability action should be open for a period of three years from the moment the injured party

[222] This idea of presumption is also present in Art. 26 of the Belgian Act - Loi du 11 juillet 2018 relative aux offres au public d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés.

becomes aware of the damage and the identity of the person responsible for it. The time limit as supplemented by its computation modalities may not exceed a period of twenty years after the occurrence of the damage.

In our opinion, such a time limit, together with these procedures, makes it possible to meet the needs of the matter, tempering the room for unforeseen events without, however, leaving the possibility of *ad vitam aeternam* action and allowing adaptation to the perpetual changes in the sector.

The question of the suspension of limitation periods also seems to us to be subject to debate and leads to a necessary harmonisation in this area.

As a reminder, although it is not the topic of this study, the issue of limitation periods also includes a criminal law component in the event of an offence.

2.2.8. Compensation for the plaintiffs damage

It seems reasonable to us that the damage caused should be remedied for by means of compensation for the loss caused.

The notion of loss needs to be defined more precisely. We believe that in the context studied, a loss could consist of both a loss of income and a loss of profit or opportunity. The latter criterion would certainly appear to some to be harsh on the person liable. However, because of the sector involved, we do not consider this system to be unusual[223] nor unjustified.

Furthermore, we consider that moral damage should not be taken into account in the quantification of compensation.

It seems to us premature and complex to define in detail the rules for quantifying compensation, although we are aware of the scope and importance of this point in the context of the choice of the forum before which to bring a complaint. We hope that future papers will allow us to expand

[223] The concept of loss of opportunity is used in French and Polish law, for example, to determine damages. For more details, see ESMA, 'Annex II - Comparative Table of Responses from EEA States : Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive' (2013).

on this aspect as well as on many elements that are more incidental – albeit important – to the main body of this study.

2.2.9. Liability for the Prospectus Summary

In the context of a strictly defined regime, we believe that the wording of the rules on the liability for the summary of the prospectus as set out in the Prospectus Regulation are adequate.

As a reminder, Article 11.2 of the regulation states:

> […] Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof, unless:
>
> (a) it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus; or
>
> (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.

As mentioned we believe that such a provision could be part of a strict liability regime provided that it is read in conjunction with the clarifications made above. It should also be noted that this part of the liability regime as specified by the Prospectus Regulation has not, so far, given rise to any major disputes[224].

[224] Busch (n 69).

3. Conclusion on the proposal for a single civil liability regime

The drafting of the outline proposal presented did not fail to meet our expectations. It has indeed proved to be a challenging exercise.

For the time being, we remain convinced that the national systems of civil liability for prospectuses are not irreconcilable. However, we believe that the astonishing but extraordinary complexity of the subject matter makes any progress inconceivable at the time of writing.

A definite obstacle in our writing is the degree of detail required by the topic. If the establishment of a single civil liability system seems so complex, it is certainly because of the recurrent need to comply with national law in respect of details which seem to be incidental but which have a definite impact on the main structure of the system.

Moreover, civil liability is an area that shows an increasing dependence on the case law of courts and tribunals. It would be appropriate – at least as far as our field of study is concerned – for this case law to resonate in unison between the various state courts. However, the European lethargy cannot be remedied without the contribution of the Member States in this respect.

The position of the Member States of the Union, which seem to be reluctant to any form of harmonisation in the area of civil liability, has resulted in global inertia on the part of the European institutions. While we find this regrettable, it must be said that the lack of support from the Member States makes it impossible for the European Union to assume its much-needed role as a 'harmonizer'.

In conclusion, while we maintain that a single liability system for prospectuses is indispensable in the context of the establishment of the Capital Markets Union, it is clear that this unification is not on the agenda and will probably remain a dead letter in the years to come.

IV. Conclusion – The Prospectus Regulation in the framework of the CMU plan: Where are we and where are we going?

'We should recognize that the CMU is still unfinished business.'[225]

If Steven Maijoor summed up the situation very well in his speech to the European Parliament and the Committee on Economic and Monetary Affairs on 4 November 2019, we cannot say whether he was predicting at that time that the situation would have hardly changed by the end of his term as ESMA Chair.

The history of the CMU is long. The project has evolved in recent years trying to adapt to new realities. Attempts since the first Action Plan in 2015 have been less successful than hoped. We have pointed out that the necessary measures did not accompany the objectives, sometimes as ambitious as unrealistic, to enable them to be achieved.

It would now be wise to redefine clearly the priorities in the context of the newly reformed European Union. The road to the completion of the single European financial market will still be long because the CMU, as envisaged and rethought over the years, is in the end a real Pandora's box.

In addition to setting clear objectives and priorities, we also believe that European Union should not pursue illusory reforms.

The reform of the prospectus as carried out is not entirely in vain. However, it must be recognised that the political concerns of each Member State are indeed real obstacles.

We have tried to reflect the importance of establishing a single civil liability regime in the event of a breach of the Prospectus Regulation and to propose potential solutions. We believe that it is necessary to establish a strong, robust and resilient system to integrate and reinforce the Capital Markets Union project.

[225] Steven Maijoor, Opening Statement before European Parliament and Economic and Monetary Affairs Committee, 4 November 2019, 2.

As a basis for such a system, we have proposed a strict liability regime in two variations for those involved in the preparation of prospectuses. In our view, such a regime is the only way to harmonise the different systems of the Member States through a levelling up. Indeed, we have noticed that, although some systems have interesting provisions in this area, too few national systems have real liability rules. The result is the fragmentation of the European markets and a geographical concentration of securities issues that is inconsistent with the CMU project.

Despite the importance for us of establishing such a harmonised system, it is with full awareness that we acknowledge that this goal will probably never be achieved.

As mentioned above, the obstacle posed by the EU Member States is real. Furthermore, we recognise that the area of civil liability is a complex subject, which in addition to requiring the support of the Member States at an internal level, would need strong support from the European institutions. However, due to the cyclical nature of this issue, this support cannot be achieved without the contribution of the Member States.

The conclusion of this study is not only pessimistic with regard to the future of civil liability for prospectuses but is more generally perplexed as regards the achievement of the Capital Markets Union. It will be necessary to pay close attention to the future, a black box which is more uncertain than ever.

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