The EU Legal Framework for Prospectuses in the wake of the Amended Prospectus Directive and a Comparison of the Relevant Liability Regimes in Greece and the UK

By

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Dedication

To my family

Declaration

This is to certify that this dissertation is the result of an original investigation. The material has not been used in the submission for any other qualification. Full acknowledgement has been given to all sources used.

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Abstract

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This dissertation aims to provide an updated overview of the legislative framework for the prospectuses accompanying the offer of securities to the public or their admission to a regulated market in the European Economic Area. The recent developments of the Prospectus Directive and the Regulation implementing the Directive brought significant changes for the issuers of securities and financial markets participants. The increasing integration of the European financial markets and the sophisticated nature of such provisions render the monitoring of these arrangements a necessity for the stakeholders seeking for clarity and comprehensive understanding of the different regimes in place. In this respect, this study presents the basic requirements for the issuing of prospectuses and a summary of the administrative, civil and criminal liability regimes prevailing in both a civil and a common law jurisdiction, namely in Greece and the United Kingdom. It is in general concluded that the Prospectus Directive is transposed into the national legal orders in a similar but not uniform manner. The sanctions prescribed take the form of both fines and imprisonment, however the fine amounts and the duration of custody differ significantly across jurisdictions.

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Contents

Table of Abbreviations:

BoG: Bank of Greece

CESR: Committee of European Securities Regulators

ECB: European Central Bank

EEA: European Economic Area

ESMA: European Securities and Markets Authority

EU: European Union

FCA: Financial Conduct Authority

FSA: Financial Services Authority

FSAP: Financial Services Action Plan

FSMA: Financial Services and Markets Act

HCMC: Hellenic Capital Markets Commission

IPO: Initial Public Offering

LSE: London Stock Exchange

OFR: Official Financial Report

PD: Prospectus Directive

UK: United Kingdom

Introduction

The securities markets are a vital part of the financial system, which is in turn deemed as the oil in the engine of the economy. The legislators of the EU were well aware that in order to achieve a smoothly functioning single market had to pursue a structural reform of the financial markets' regulatory framework. The legal system had to be capable of ensuring a stable and safe environment for those issuing and trading securities by maintaining the perceived requirements of efficient financial markets.

Efficient financial markets are characterized by minimum fragmentation and transparency. Freed from legal and economic barriers, they allow market participants to access liquid capital by issuing securities and trade them in regulated markets which ensure investor safety. Therefore, the harmonisation of securities law in the EU level was a primary objective serving the fundamental aim of financial integration. EU law aims to harmonise securities a law in a way that does not affect the idiosyncratic contract, tort and fiduciary laws of the member states, which become relevant and affect the securities markets. The main idea was to passport issues of securities, rather than require the unification of all securities regulations across the EU. By passport of an issue, it is meant that an issue of securities which has been authorised for admission to listing in one Member State can automatically be admitted to listing in any other Member State. This has become the key means by which a single market for securities is to be effected, by permitting a security authorised in one jurisdiction to be effectively authorised in another jurisdiction.

Bearing in mind the immaterial nature of securities in connection with the requirement for transparency in financial markets, the significance of information is effortlessly understood. Potential investors must have access to true and reliable information on investment products, so as to be able to form accurate investment decisions. The Prospectus Directive[1], as part of the legal acts implementing the Financial Services Action Plan, serves to fulfil the requirement for undisturbed flow of information with the ultimate goal to create an integrated EU-wide securities market. It plays a major role in the development of the single financial market, as is evident by the continuous reforms in accordance with the factual circumstances of capital markets, and is, thus, worthy to be examined.

In addition, given the technical nature of those provisions, the majority of the literature is limited to descriptive references of the established legal framework rather than insights to their practical implementation. However, in the context of an integrated EU-wide financial market in the aftermath of a global financial crisis, those topics have become of greater importance for an increasing number of professionals and market participants seeking for some clarity about the prevailing liability regimes across the Union[2].

The aim of this dissertation is to provide an overview of the European legislation for prospectuses, focusing on the most important provisions, discuss its application in practice by the member states and provide a comparison of the liability regimes into force in Greece and the UK. In this respect, Section I explains the legislative process behind the Prospectus Directive and the basic principles on which it has developed, Section II summarizes the regulatory framework after the entry into force of the Amended Prospectus Directive, Section III describes how the Prospectus Directive was transposed into the national legal order of Greece and the United Kingdom and in Section IV the liability regimes followed by these two member states are compared.

[1] The term refers to the Directive 2003/71/EC Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, as amended by the Directive 2010/73/EU.

[2] This necessity is reflected in the recent release of the first of its kind report "on the Comparison of liability regimes in Member States in relation to the Prospectus Directive" by the European Securities and Markets Authority (ESMA) in June 2013. The report provides an overview of administrative, criminal, civil and governmental liability based on factual information on the national liability regimes, though it does not examine how they are implemented.

I. The Sources of the Prospectus Directive

Historical Background:

The regulatory reform of the single market with the aim to facilitate and improve the provision of financial services among member states was part of the European Council's agenda since 1973, as memorized in the most important step in this process, the Commission's Financial Services Action Plan (FSAP), which was published on 11 May 1999[3].

The FSAP, composed under the light of the common currency, set the main objectives with regard to the creation of an integrated EU infrastructure for financial transactions of higher quality and less costs to replace the then existed mosaic of national or domestic retail markets, subject to national laws and regulations. The strategic objectives set out in the FSAP were further orientated by subsequent acts; The Lisbon European Council of March 2000 set a detailed timetable for the actual implementation of the Financial Services Action Plan by 2005[4] and the "Committee of the Wise Men", under Alexander Lamfalussy and instructed by the EU's Economic and Finance Ministers produced a report ("the Lamfalussy Report") including practical recommendations, such as the need for a single issuers' prospectus, the modernization of the listing regime and the generalization of the mutual recognition principle, in February 2001.

In November 2002, London Economics, in conjunction with PricewaterhouseCoopers and Oxford Economic Forecasting, produced a report based on real data, stating the anticipated impact of the new regulatory framework on the economy. The report indicated that a fully integrated financial market could significantly (around 40 basis points) eliminate the cost of equity capital, increase liquidity and render financing easier, fostering business investment and economic growth in the long term.

[3] COM (1999) 232 (http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf).

[4] http://ec.europa.eu/internal_market/finances/docs/actionplan/index/progress2_en.pdf

The FSAP managed to reveal some of the shortcomings of the previous regimes that hindered the development of an integrated capital market across the EEA. For instance, cross-border initial public offerings (IPOs) were difficult because of the different disclosure requirements that had to be met in each member state. The same applied to the financial reporting systems across the EEA, which could not be effectively compared by the investors.

The FSAP was implemented through the entry into force of six Directives, the most important of which are the Market Abuse, the Prospectus and the Transparency Directive. The last two contain in their Recitals the most important indications of the guiding principles behind the FSAP Directives.

The Lamfalussy Four-Stage Legislative Process:

The European legislative process is based on mainly two legislative tools -the Directive and the Regulation- and is deemed to be slow. The Directives impose instructions to the member states so as to enact national legislation that implements the provisions set out in them within a certain time period, whereas Regulations take direct effect in the law of all member states without the need for any action by the national legislative authorities. Bearing in mind the diverse legal orders of so far 27 member states, this is a process that takes time and effort.

Back in 2001, the Alexandre Lamfalussy's Committee of Wise Men was asked to propose a more efficient way for the transposition of the Union's legislation into the national legal orders. Following this request, the Lamfalussy report introduced a four-stage process; Level 1 consists of a Directive that sets out the general framework for the proposal, a form of an outline. Level 2 consists of either another Directive or a Regulation, which provides for more detail. Level 3 serves to interpret the legislative acts put into force in the first two stages, through guidance given, in the context of the Prospectus Directive, by the Committee of European Securities Regulators (CESR). Finally, level 4 involves the Commission enforcing compliance of the whole regime across the EU.

The Guiding Principles:

When implementing the FSAP Directives, the Commission is bound by a bunch of principles originally stated in the recitals of the Prospectus and the Transparency Directives and also serve as interpretative tools for the consistent application of the EU legislation in the national legal orders. Therefore, for the successful completion of the FSAP project, the Commission must be instructed by:

-the need to ensure confidence in financial markets among small investors and small and medium-sized enterprises (SMEs) by promoting high standards of transparency in financial markets,

-the need to provide investors with a wide range of competing investment opportunities and a level of disclosure and protection tailored to their circumstances,

-the need to ensure that independent regulatory authorities enforce the rules consistently, especially as regards the fight against white-collar crime,

-the need for a high level of transparency and consultation with all market participants and with the European Parliament and the Council,

-the need to encourage innovation in financial markets if they are to be dynamic and efficient,

-the need to ensure systemic stability of the financial system be close and reactive monitoring of financial innovation,

-the importance of reducing the cost of, and increasing access to, capital,

-the need to balance, on long-term basis, the costs and benefits to market participants of any implementing measures,

-the need to foster the international competitiveness of the Community's financial markets without prejudice to a much-needed extension of international cooperation,

-the need to achieve a level playing field for all market participants by establishing Community legislation whenever it is appropriate,

-the need to respect differences in national financial markets where these do not unduly impinge on the coherence of the single market,

-the need to ensure coherence with other Community legislation in this area, as imbalances in information and a lack of transparency may jeopardize the operation of the markets and above all harm consumers and small investors[5].

Bearing these fundamental principles in mind, the EU legislative authorities implemented and continue to develop the regulatory framework of the single financial market faithful to the goals set by the FSAP.

The Disclosure Requirement:

Trading in financial markets is an activity based on information; investors gather, estimate and combine together information available in the market so as to form their decisions, which in turn affect the values of securities. It is easily understood that any interference in this process distorts the balance between supply and demand and leads to otherwise unattainable results, which have a destructive effect for capital markets. Dissemination of false or misleading information, concealing of facts that should have been published, creation of artificial prices, dealing by insiders etc. may have a catastrophic impact on the smooth operation of financial markets and are prohibited as market abuse practices. These practices create false impressions as regards the worth of financial instruments or of their issuers and lead to distorted valuations, know as “artificial” prices. Market abuse causes instability in the financial system, and since the latter serves as the oil in the engine of the economy, its protection from harmful activities is of vital importance and best executed through legislation.

Efficient markets are characterized by the circulation of true and sufficient information, available to every investor in a fair and equivalent way. Markets where investors feel confident that they are treated fairly and have access to reliable information attract sufficient supplies of sellers and buyers and function efficiently.

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5 Prospectus Directive Recital 41.

When it comes to securities markets, all relevant information can be found in the documentation accompanying the newly issued or already traded securities. Each time an issuer offers securities to the market or obtains admission for its securities, so that they can be traded, a disclosure document is required. This must contain a description of the terms of the security and adequate information on the business and prospects of the issuer and the risks involved in investing on this security.

It is important to bear in mind that the ideal scenario of a well-informed and accurately priced market prerequisites a cost and administrative burden for those requested to provide the information. The legislators need to achieve a balance between the amount of information that is deemed sufficient and the time and costs required by the businesses involved so as to meet this obligation. The same degree of proportionality has to be considered when it comes to liability issues. A strict liability regime for errors or omissions from the mandated disclosure could impede the process, rendering those responsible conservative and over-cautious.

II. The Prospectus Directive[6]

The Prospectus Directive sets the legal requirements of the documentation (prospectus) to be published before securities are offered to the public or admitted to a regulated market. The prospectus must be prepared by the issuer or offeror and approved by a regulator. It must contain information about the issuer, its business, its financial position and its prospects, together with all information about the securities to which it relates, that is sufficient to enable investors to make an informed investment decision, taking into account the offer or market price.

There were three objectives of the Prospectus Directive. First, to achieve a single passport for securities issued in one jurisdiction in all other member states in the EU. Secondly, to harmonize the regulation of securities markets in the member states of the EU by means of the single passport regime to which reference has just been made. Thirdly, to achieve an increased level of investor protection by means of the provision of sufficient, suitable information for investors to make informed decisions about their investments.

The detailed requirements are specified in the commonly referred as the Regulation under the Prospectus Directive, in line with the four level law-making procedure of the Lamfalussy Report.

The Legal Acts:

The regulatory framework for prospectuses in the European Union was set in place with the Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities, which proposed a single prospectus valid EU-wide. The initial text was amended by the Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, which is commonly referred to as the Prospectus Directive (PD). In 2009, a consultation process aiming to the revision of the Prospectus Directive began and concluded with the Directive 2010/73/EU, which

[6] Directive 2003/71/EC

came into force on 31 December 2010 and brought significant changes to the until then existing obligations for issuers, especially those of retail debt and equity securities.

Subject to the Lamfalussy law-making process, the legal framework imposed by the Directives was practically implemented through more detailed Regulations, starting with the Commision's Regulation 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements. The known as Regulation for Prospectuses was subsequently amended by the Regulation 211/2007 as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial, and more recently by three Regulations following the implementation of the amended PD by the member states, namely (a) Regulation 486/2012 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements, (b) Regulation 862/2012 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors and (c) Regulation 759/2012 as regards the disclosure requirements for convertible and exchangeable debt securities.

Apart from the binding enactments, the competent regulatory authorities have produced a wide range of instructive and consultative documents so as to provide technical advice, control and facilitate the smooth transition of the EU law across all member states.

Scope:

The Prospectus Directive excludes from its application a wide range of non-transferable securities and certain short-term money market instruments. Article 1(2) contains a long list of issuers and types of issue, which fall entirely outside the scope of the Directive. The most important exemptions are the following:

-open-ended collective investment undertakings,

-non-equity securities issued by a public international body, such as the World Bank or the European Bank for Reconstruction and Development, provided its membership includes an EU state,

-the European Central Bank (ECB) or national central banks of the member states,

-securities that are unconditionally guaranteed by an EU member state or one of its regional or local authorities, and

-certain securitized deposits issued by European credit institutions

are excluded. They are accordingly regulated by other legal instruments, while Article 1(3) permits sovereign issuers, and their regional and local authorities, to submit themselves voluntarily to the Prospectus Directive.

When is a Prospectus needed?

A prospectus has to be produced following two events; either the public offer of a transferable security or the admission of a transferable security to an EEA regulated market.

Public Offer:

The first triggering event, the making of an offer to the public, is defined in the Prospectus Directive as *"a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities*[7]*."* This definition shall also be applicable to the placing of securities through financial intermediaries.

The public offer definition, given its importance, is considered to be obscure, however it serves to include multiple and diverse cases of contractual or non-

[7] Prospectus Directive Article 2(1)(d)

contractual offerings that might occur under each member state's market peculiarities.

Article 3(2) of the Directive, as amended, provides for numerous occasions of public offers where a prospectus is not necessary, the most crucial of which are the offers addressed solely to qualified investors[8], those addressed to less that 150 natural or legal persons per member state and those exempted based on the nominal amount of the investment.

Admission to a regulated market:

The admission of securities to an EEA regulated market is the second event that triggers the production of a prospectus. In the same vein, there are reasonable exemptions, such as the issuing of shares to substitute already admitted shares of the same class, shares offered free of charge to existing shareholders, shares offered to directors or employees or those resulting from conversion of other securities, under certain circumstances.

Content and Format of a Prospectus:

The Prospectus Directive establishes a generic disclosure standard, stating that a prospectus "*shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.*"

The basic content requirement stated in Article 5(1) of the Directive is supplemented with the detailed content requirements found in the Prospectus Regulation. These are presented in the form of lists and are broadly divided into three categories. The first set of disclosure requirements are those connected with the type of issue, the

[8] The amended Prospectus Directive introduces an updated definition of "qualified investors" in its Article 1(2)(a)(i).

second disclosure list is dependent on the type of the issuer and the third provides additional disclosure standards to be used where appropriate.

What is noteworthy is that the disclosure lists included in the Prospectus Regulation are not exhaustive and shall not be used as fill-in forms. Since the Regulation is by nature subordinate to the Directive, the potential issuers need to comply with the generic requirement stated in the latter's Article 5 and, thus, provide all information that is essential for the formation of an accurate investment decision, even if they are not included in the relevant annexes of the Regulations. The same logic applies when new types of securities are issued; the national competent authorities, in consultation with the issuer, have to examine what information concerning the securities shall be included in the prospectus and notify the Commission on the conclusions.

Prospectus Summary:

Article 5 of the Prospectus Directive stipulates the formats a prospectus may take and provides for separate documents combined a prospectus, namely the registration document, the securities note and the summary[9]. The summary is important bearing in mind that it is the only document that need to be translated in some jurisdictions.

The summary should not exceed the longer of 7 per cent of the length of the prospectus or 15 pages (formerly 2500 words); it should convey concisely, in non-technical language and in an appropriate structure, the key information relevant to the securities which are the subject of the prospectus and, when read with the rest of the prospectus, must be an aid to investors considering whether to invest in the securities. Key information is defined as "*the information which is essential to enable investors to understand the transferable securities to which the prospectus relates and to decide whether to consider the offer further… [and] must include (a) the essential characteristics of, and risks associated with, the issuer and any guarantor, including their assets, liabilities and financial positions; (b) the essential*

[9] Article 5(2) of the Prospectus Directive read in conjunction with the PD Recital 21.

characteristics of, and risks associated with, investment in the transferable securities, including any rights attaching to the securities; (c) the general terms of the offer including an estimate of the expenses charged to an investor by the issuer and the person offering the securities to the public, if not the issuer; (d) details of the admission to trading and (e) the reasons for the offer and proposed use of the proceeds".

The summary must contain no cross references to other parts of the prospectus The order of the information in the Tables and of the specified information within each Table is mandatory, although there is no requirement to repeat the requirements set out in the Tables or their numbering/lettering. Clear language must be used and the key information is to be presented in an easily accessible and understandable way and descriptions required by each element should be brief.

Main Regulatory Reforms[10]:

The Prospectus Directive and its implementing Prospectus Regulation contain a vast of sophisticated provisions, which set out the technical details with regard to the drawing up, publication and circulation of prospectuses. For the purposes of this dissertation, the apposition of detailed provisions is not considered relevant since they are repeatedly included in the existing literature and their strict wording rarely raises interpretative issues. Consequently, this section will present the main amendments brought to the regulatory framework for prospectuses after the entry into force of the Amending Prospectus Directive and the recently introduced Prospectus Regulations[11].

To begin with, the thresholds outlining the exemptions from the prospectus requirements have been increased as follows; (i) in case offers where the total consideration for securities offered in the EEA over a 12-month period is less than €2.5m, the maximum has raised to €5m; (ii) offers made to or directed at fewer than 100 persons per EEA state, other than Qualified Investors, now require less than 150

[10] As amended by the Directive 2010/73/EU, valid from July 1st, 2012

[11] See "Legal Acts" above, Section II

persons; and (3) in case of offers with a minimum consideration per investor or minimum denomination of at least €50,000, the minimum has raised to €100,000.

The exemption from requiring a prospectus for an offer to Qualified Investors has changed in that the definition of "Qualified Investors", which was formerly defined in the Prospectus Directive[12], has changed so that Qualified Investors are now defined in Article 2.1(e) by cross-reference to categories of persons who are, or who may elect to become, professional clients or eligible counterparties (as defined in the Markets in Financial Instruments Directive[13] (MiFID). MiFID allows professionals to request non-professional treatment and vice versa and the ESMA amendments specify how this is to be applied in the context of an offer to the public[14].

With regard to ongoing sales, where there has already been an offer to the public, further offers to the public of the same securities, sold or placed through a financial intermediary, are exempt from any further prospectus requirement, subject to the satisfaction of certain conditions. In particular, written consent is now required from the issuer or from any person who was responsible for drawing up the prospectus for the original offer to the public. There are requirements to include certain information relating to such a consent which are set out in Annex XXX of the Prospectus Regulation as amended. In the case of equity issues, this is only likely to be relevant in the rare cases of IPOs where the bank or broker buys the shares as principal and on sells them to the public[15].

To continue, the new provisions introduce a significant relaxation[16] for the content of prospectuses (i) for offers by SMEs and (ii) for rights issues. SMEs are defined as companies which according to their latest annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less that 250, a total balance sheet not exceeding €43m and an

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[12] Article 2.1(e)(i)–(v)
[13] Directive 2004/39/EC
[14] As stated in Ashurst's London Briefing on "Changes to the Prospectus Directive and impact on UK ECM practice" of July 2012
[15] usually the offer is either directly by the issuer or through the bank or broker as agent).
[16] known as the "Proportionate Regime"

annual net turnover not exceeding €50m. The term "rights issue" is defined and includes compensatory open offers and any other open offer which is in compliance with statutory pre-emption rights. This is likely to lead to non-compensatory open offers being made in compliance with statutory preemption rights where the issuer wishes to take advantage of the relaxed regime. The key relaxations for these pre-emptive issues are that no Official Financial Report (OFR) is required and audited accounts are only required for one year but risk factors are still required. In practice, some sponsors may still require an OFR and three years audited accounts to be produced.

A minor change in relation to warning for the non-publication of prospectuses for any offers or applications for admission to a regulated market where no prospectus is required because an exemption applies, such as on a placing to Qualified Investors, is that any advertisement must include a warning to the effect that no prospectus is required in accordance with the Directive 2003/71/EC.

Furthermore, subject to the amendments, the requirement for listed companies to file an annual information update after publication of annual accounts has been abolished. In addition, various changes have been made to the withdrawal rights rules but their practical implementation will reveal their actual impact for the market participants.

Last, where a profit estimate is included in a prospectus, the new rules also set out certain conditions which, if satisfied, would obviate the need for an accountants' report, including a condition that independent accountants or auditors have agreed that this information is substantially consistent with the final figures to be published in the next annual audited financial statements.

III. The Prospectus Liability across the EU

The EU Liability Regime:

The Prospectus Directive together with the implementing Regulations do not aim at complete harmonization of the liability regimes across the EEA but leave their specification to the national legislators. However, some aspects of the administrative and civil liability for prospectuses are regulated in the EEA level, as analyzed below.

Administrative Liability:

Starting with the administrative liability, the basic principles for the establishment of the respective sanctions system by the member states are outlined in the Article 25 of the Directive, which promotes the effectiveness, proportionality and dissuasiveness of the appropriate measures, together with an obligation for disclosure. The right of appeal is also mandated by the Directive in its Article 26 and the persons responsible are identified in its Article 6(1).

Civil Liability:

Member states are obliged to ensure that “their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus[17]”. It is further stipulated that no liability shall derive from the summary lone.

In cases where the issuer or the person responsible for drawing up the initial prospectus has given his consent to the use of the prospectus by a financial intermediary, the first remains liable for the information stated therein. This is important for the investor who can seek relief for errors or omissions for as long as the prospectus is used with the issuer’s consent.

[17] Article 6(2) of the Prospectus Directive

Country summaries:

The Application of the Prospectus Directive in the Greek Legal Order:
As summarized in Wood (2007), Greece is categorized as a Napoleonic jurisdiction. As far as concerns the regulation and supervision of financial institutions, there are two main regulators, the Bank of Greece in respect of credit institutions and the Hellenic Capital Markets Commission (HCMC), which regulates brokers and investment portfolio companies. The HCMC is the authority primarily responsible for the administration and enforcement of Greek securities laws and therefore approves the prospectuses, monitors compliance, imposes administrative sanctions and supervises the organized markets operating in Greece. The Athens Exchange was established back in 1876 and is both stock and derivatives exchange, constituted by a central counterparty for the settlement of exchange dealings and a central securities depository.

In general, the foreign institutions based in the EEA are passported in Greece but when it comes to credit institutions and investment firms based in non-EU countries, the Bank of Greece has to grant a license on the basis of reciprocity. The sale of shares in collective investment schemes based in EEA countries is as well passported into Greece but a sale of shares in mutual funds not covered by the EU passport regime must be approved by the HCMC. The approval process involves, apart from constitutional and other documents, the publication of a prospectus and the appointment of a representative, save for the exemptions of statutory private placements and sophisticated investors.

The Code of Conduct for Mutual Funds and Investment Portfolio Companies states seven basic principles, with which foreign funds must comply. These are (i) the honest and fair conduct and preservation of confidentiality, (ii) the preservation of the autonomy of the firm, (iii) the exercise of the rights in the best interests of the clients, (iv) the avoidance of inaccurate or misleading advertising and respect for the principles of fair competition in promotional campaigns, (v) the effective internal control and administrative assistance, (vi) the equal treatment of clients and sufficient information to clients and (vii) the organization and administration of share disposal in the way that guarantees the best interests of the clients.

The Greek Prospectus Law:

The Prospectus Directive was implemented in Greece with the Law 3401/2005, which was adopted by the Hellenic Parliament on September 28, 2005 and came into force on October 17, 2005, that is quite a long after the initial implementation deadline[18]. The new law repealed the pre-existing legal framework and, since the Prospectus Directive is a maximum harmonization directive, it closely resembled the wording of its provisions.

A major amendment brought by the introduction of the Prospectus Directive into the Greek legal order was the EU Passport regime. Based on the principle of mutual recognition and supervision by the competent authorities of the home member state, the prospectuses that have been approved subject to the laws of any other member state, are valid in Greece once the competent authority has notified the HCMC accordingly and no further approval is required.

According to the Law, a prospectus can be drawn up either as a single document or as by way of three separate documents, that is a registration document, a securities note and a summary note. I can be drawn in a language of those deemed customary in international finance but the HCMC can request the translation of the summary into Greek under certain circumstances.

For a public offering of securities, the offeror and the issuer must file a petition to the HCMC for approval of the prospectus and the public offer. The contents of the prospectus are determined by law 3401/2005, implementing the Prospectus Directive and EC Regulation 809/2004. Following its approval, the prospectus is made available to the public along with the financial and legal due diligence that the advisors of the underwriter, if any, have performed upon the issuer.

[18] July 1 was set as the implementation deadline by the Prospectus Directive.

If the public offering is to be combined with an initial listing, before filing the prospectus with the HCMC, the offeror and the issuer must have obtained a listing pre-approval by the Athens Exchange. This pre-approval is always conditional upon the approval of the prospectus by the HCMC.

The current practice is that the HCMC scrutinizes the prospectus and may revert with extensive comments on the disclosures contained therein. Furthermore, HCMC has sometimes adopted the approach that full and accurate disclosure may not be sufficient to protect potential investors and that HCMC's approval entails a qualitative judgment on whether the securities to be offered are a 'good' investment opportunity. Therefore, during the prospectus review, the HCMC may comment not only upon disclosure but also present informal suggestions on how to reorganize the issuer's business – suggestions that need to be followed if approval is to be granted.

Under Law 3401/2005, HCMC must provide comments on the prospectus disclosure within 10 to 20 days. It is estimated that a well-coordinated process for an initial public offering, starting from the Athens Exchange pre-approval application and ending on the listing of the new shares, could last approximately three to four months.

As far as concerns the advertisement of a public offering, Law 3401/2005 provides that all advertisements relating either to public offerings or admissions to trading must be submitted to the HCMC two working days before their publication.

Furthermore, the Underwriter's Code of Conduct (UCC)[19] provides that the sponsor or underwriter must take all necessary measures to ensure that all advertisements and public announcements aiming at promoting the offering or the listing of securities on a regulated market (i) are compliant with the relevant national legislation, (ii) are not directly transmitted to potential investors without their consent, and (iii) do not contain any judgment or forecast on the success of the offering or listing.

[19] Law 2396/1996

The UCC further provides that during the period that starts three days before the commencement of the offering or listing and ends either at the end of the offering or the listing, only announcements that provide information necessary for the conduct of the offering or listing and the disclosure of the terms and the procedure regarding the participation of the investors are allowed and that no actual advertising of the securities takes place.

Primary and Secondary offerings:

In case of an initial listing, the Athens Exchange rulebook prohibits shareholders holding more than 5 per cent of the issuer's shares from disposing of more than 25 per cent of their holding during the first year after the listing. Further, in the case of a share capital increase of a listed company, shareholders holding more than 5 per cent and participating in the management of the issuer, must disclose whether or not they intend to participate in the contemplated increase and whether they intend to dispose of any of their holding for the period ending six months after the completion of the increase.

In the case of a secondary offering requiring the publication of a prospectus, the relevant rules of law 3401/2005 shall apply, including the civil liability provisions, that will be analysed below.

Private placing:

The Law 3401/2005 has implemented fully the Prospectus Directive as regards the types of offer that do not require the publication of a prospectus (and may thus be considered as non-public offers) and the types of securities that are exempt from the scope of this law. At the same time, the law grants the authority to the minister of finance to regulate the requirements for the offering of such exempt securities.

Further to the above, an HCMC decision regulates private placements made concurrently with an initial public offer and listing. In such cases, the private placement can be effected only to the issuer's (or its affiliates') employees and members of the board and to the issuer's associates (in the latter case, up to 100 persons).

If an offer qualifies as a private placement, that means it is exempt from the obligation to publish a prospectus according to the Prospectus Directive, there is no mandatory obligation on the offeror to make available any kind of relevant disclosure to potential investors.

However, in accordance with article 15 of Law 3401/2005 and the Prospectus Directive, if no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, shall be disclosed to all qualified investors or special categories of investor to whom the offer is exclusively addressed. Where a prospectus is required to be published, such information shall be included in the prospectus or in a supplement to the prospectus.

Underwriter's liability:

Law 3401/2005 expanded quite substantially the underwriters' civil liability for prospectus disclosure. In certain initial public offerings that have taken place under the new framework, the lead underwriters were obliged by the remaining underwriters to provide an additional (to the one offered by the issuer or the seller) indemnity. So far this indemnity has not had an impact on the syndicate size or underwriting fees.

The Greek Liability Regime:

The civil liability for errors or omissions in the content and the information provided in a prospectus has been expanded[20] by Law 3401/2005. Subject to its Article 25, the responsibility lies with the issuer, the seller or the person applying for the listing, as

[20] The rules found in Law 3401/2005 amend a prior civil liability rule by extending liability to all persons responsible for issuing a prospectus, including as possible intermediaries all investors that acquired securities in the subsequent period of 12 months (rather than only those buying in the offer) and prolonging the statute of limitations to 3 years (instead of 1 stipulated previously).

the case may be, the members of their board of directors, the underwriter or adviser, and any other persons identified as 'responsible persons' in the prospectus. These are held jointly and severally liable for the completeness and accuracy of the information contained in the prospectus and are liable (a) to any person that acquired securities within 12 months following the prospectus publication and (b) for any actual loss that was caused by the negligence of the responsible persons. Further to the above, an investor has the right to base a civil liability prospectus claim on any other applicable provision of Greek law.

The investors must prove the loss and the causation between the negligence and the loss. The persons responsible for the prospectus bear the burden of proving that they have acted in a diligent manner. Apart from civil liability, and as mentioned in question 17, the responsible persons may be fined by the HCMC if the prospectus is found to contain inaccurate or misleading information, or if they breach any other securities regulation provisions.

The Application of the Prospectus Directive in the UK Legal Order

The UK regulatory framework for financial markets affirms the legendary strictness of UK laws, rendering the Primary Listing on the London Stock Exchange (LSE) a badge of quality for the companies that manage to comply with the stringent eligibility criteria and exacting standards in place. The UK's competent authority for the purposes of the Prospectus Directive is the Financial Services Authority (FSA), which undertook responsibilities from the LSE, that served as the UK's financial regulator until 2000. Today it focuses on the admission of securities to trading, running two principal markets, the Main Market and the Alternative Investment Market, and the Professional Securities Market for specialist issuers.

The Prospectus Directive was implemented in the United Kingdom through the Financial Services and Markets Act 2000 (FSMA), which remains the principal piece of legislation setting the legal requirements for prospectuses. The Prospectus Rules included in Part VI, sections 72 to 103 of FSMA closely resemble the rules adopted across the EU with regard to prospectuses and empower the FSA to make additional rules so as to implement the PD. The main provisions are found in (a) sections 84 to 87R of FSMA, which contain rules on the general standard of disclosure required in prospectuses, define the key terms, stipulate the nature of liability for prospectuses, designate when a supplemental prospectus is required and establish the right to withdrawal; and (b) the Prospectus Rules, which set out the detailed requirements in relation to the content and publication of prospectuses as prescribed by the Prospectus Regulation.

The Prospectus Rules:

Since the main provisions of the Prospectus Rules derive from the EU Directives and Regulations and have been analysed above[21], this section will highlight the most important special provisions found in the English Law as regards the requirements for prospectuses. For instance, the English law in its section 102B(5) clarifies that a public offer does not include a communication in connection with trading on a regulated market or other specified trading facility, aiming to avoid the interpretation that prices quoted on stock exchanges are in effect public offers.

The UK Liability Regime:

Offers of securities are offers to enter into a contract. That contract may be entered into between the issuer of securities and a subscriber for those securities, or it may be entered into between an owner of securities and a purchaser in the after market.

Typically, in relation to both kinds of securities, it will be issuer of the securities which will have made a number of representations as to the quality and nature of those securities in any prospectus that was published in advance of their issue. If the issuer is a party to the contract, then liability may lie in contract or in tort for fraudulent or negligent misrepresentation. If the issuer is not a party to the contract, then liability may lie in tort for misrepresentation. The people who are liable for the preparation of the prospectus and for other statements about the securities extend beyond the issuer itself into a range of other agents, advisors and experts.

[21] Under Section II for the EU legislation and Section III for the Greek Prospectus Law

The publication in the UK of offering documents exposes those responsible for their preparation and publication to potential liability for misrepresentation or negligent misstatement.

As summarized in Hudson (2008), the Prospectus Rules prescribe the categories of person who are held to be responsible for the contents of a prospectus in relation to equity shares, derivatives or other transferable securities. In line with para 5.5.3R of the Prospectus Rules, those could be apart from the issuer, the directors and those authorising themselves to be named as responsible for the prospectus. In relation to an offer, each person who is a director of a body corporate making an offer of securities; in relation to applications for admission to trading, each person who is a director of a body corporate making an offer of securities and those persons who have authorised the contents of the prospectus. It is possible for individuals, advisors or companies to limit their liabilities by refusing to accept responsibility for part or all of the particulars.

There is a right to recover damages under Section 150 of FSMA in the following circumstances: "[a] contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention".

Subject to section 90 of FSMA, any person responsible for a prospectus is liable to pay compensation to a person who has acquired securities to which the prospectus applies and who suffered loss in respect of them as a result of any untrue or misleading statement in the prospectus or as a result of the omission from the prospectus which should have been included under the duty of disclosure. A number of defences are then provided in Section 10 of FSMA relating to the defendant's belief in the truth of the statement, or relying on a statement by an expert or a statement in an official publication, or relating to an attempt to publish a correction.

Liability for misrepresentations may derive from general law provisions with regard to negligence. Liability exists at common law for the tort of deceit, for the tort of negligence under *Hedley Byrne v Heller*[22] or negligent misstatements, for fraudulent misrepresentation under contract, and for negligent misstatement under contract. These heads of liability are considered in detail below, including analyses of the particular cases relating to offers of securities. The old cases took the view that people preparing a prospectus are "are bound to state everything with strict and scrupulous accuracy", and so liability for damages or for rescission at common law was predicated on this principle: a principle which, it is suggested, can be found in similar (if milder) form in the prospectus rules. Thus half-truths and ambiguous statements will attract liability at common law as much as outright lies (albeit that the former may be negligent while the latter will be fraudulent).

IV. A Comparison of the Greek and UK Liability Regimes[23]:

Civil Liability:

To begin with, both countries have entered specific prospectus liability regimes into force, which apply concurrently with the general civil law tort and contractual liability rules, and prescribe the persons who can be held liable for damages for information contained in a prospectus and the type of liability, which can be both joint and several. In the UK, it is possible to establish civil liability for misleading or false information and omission of material information, even when a prospectus has not been duly approved.

The degree of fault required for civil liability is at least negligence, however in the UK there is a possibility of greater liability when intend can be established. The persons entitled to sue for damages are in both countries limited to the investors, either those who purchased the securities during the public offer or those who acquired them later on the secondary market. In the UK, as in most EU jurisdictions, the plaintiffs have to prove the causal link between the breach of the PD framework and

[22] Hedley Byrne v. Heller [1964] AC 465

[23] See the European Securities and Markets Authority Report of 30 May 2013 on the "Comparison of liability regimes in Member States in relation to the Prospectus Directive", ESMA/2013/619

the damage they suffered, though in Greece the fault of the defendant is presumed. An investor in Greece can be compensated only for material damages based on the specific civil liability regime for prospectuses, but compensation for lost profit can still be sought based on general civil law provisions.

As far as concerns procedural issues, the time limit within which the relevant civil claims can be filed is limited to five years in Greece whereas it is longer (up to ten years) in the UK, and the prescription begins from the knowledge/occurrence of the damages. Class action suits are explicitly permitted in the UK, that is not the case in Greece, where, nonetheless, associations or groups of investors may exercise their rights jointly in line with the Greek civil law provisions.

Administrative Liability:
Similarly to the regulation of civil liability and subject to the Article 6 of the Prospectus Directive, the Greek and UK law specify the parties, which can be either natural or legal persons, that can be held responsible for the information contained in a prospectus. It is noteworthy that the UK law does not provide for several party liability for different parts of a prospectus. Both countries apply the strict liability scheme for administrative liability, which can refer to a wide range of infringements, such as the inclusion of untrue information, the omission of material information, the selling of securities to the public without a PD compliant prospectus, the inaccurate or misleading advertising and other advertisement inconsistencies.

The imposition of administrative sanctions has been assigned to the competent authorities for the obligations deriving from the Prospectus Directive, that is the Hellenic Capital Markets Commission in Greece and the Financial Conduct Authority (FCA) in the UK. The sanctions can take several forms, from fines to various supervisory measures, such as the issuance of orders requiring the remedy of the infringement, trading halts, prohibition of public offers, suspension of licenses or activities, prohibition or suspension of advertisements and publication of the sanctions imposed and the identity of the responsible person(s). The maximum size of the threatened fines ranges from EUR 500,000 to EUR 5,000,000 in Greece and is unlimited in the UK.

Considering time limits, administrative proceedings may be initiated up to three years after the moment the misconduct is discovered in UK Courts, whereas in Greece the law does not provide for a time limit. Another difference is the option to proceed with a settlement procedure, which is available only in the UK. Last, the punished parties have the right to appeal before an independent tribunal constituted in the corps of the administrative body prior appealing to a court.

Criminal Liability:
As it is the case for the majority of the EEA jurisdictions, the criminal laws of both Greece and the UK include specific provisions for criminal offences related to prospectuses, along with the general criminal provisions on fraud that also apply. The Greek criminal law provides for specific persons that can be held criminally liable, contrary to the UK law where no indication occurs. In addition, Greece has imposed specific penalties for both the lack of an approved prospectus and false or misleading information in it; the latter is punished according to the general criminal provisions on fraud in the UK legal system. As for the level of fault, the Greek legislator requires intention while the UK law covers cases of negligence. The penalties imposed depend on the severity of the offence and differ accordingly.

Governmental Liability:
In cases when the government or the competent authority responsible for the approval of the prospectus has not performed its duties in accordance with the PD framework, investors have the right to obtain restitution for any losses they suffered, in line with the general rules on governmental or civil liability since no specific rules exist neither in Greek nor in the UK jurisdiction. Additionally, UK law provides for a complaint scheme that could lead to compensation for the investor.

In the abovementioned cases, any person who claims to have suffered damaged is entitled to sue for damages, within a time span of 5 years starting from the knowledge/occurrence of the damage, irrespectively of whether they have purchased securities during the public offer or on the secondary market. The plaintiff has to prove the following circumstances: (i) the existence of an action or omission of the competent authority, (ii) that was unlawful, (iii) triggered by gross negligence or intend, (iv) caused damage to the investor and (v) the existence of a casual link between the damage and the action or omission. The court shall recover the material damages and, in Greece, may take into account the loss of opportunity and adjust the compensation appropriately.

Conclusions:

It can be generally commented that the Prospectus Directive has been transposed into the national legal orders of the member states in a non-uniform way, The particular characteristics of each jurisdiction have significantly affected and are evident in the national legislation implementing the requirements set out in the EU Prospectus Directive. However, since the Prospectus Directive is a maximum harmonisation directive and the Regulations implementing its provision are immediately incorporated into the national legal orders of the member states, the legal framework for prospectuses does not differ significantly across the European Union.

The recent developments serve to facilitate the smooth functioning of the continuously developed financial markets and to increase the confident of investors by enhancing their protection, especially after the turbulence experienced during the global financial crisis after 2008. The economic growth is highly dependant on the operation of capital markets since the latter increase liquidity and funding opportunities for businesses. In this respect, the EU legislators and competent authorities work on the development of financial regulation so as to meet the needs of the market, trying to maintain the balance between effectively regulated but efficient markets, with no excessive administrative burdens for businesses.

The Prospectus Directive guarantees the provision of accurate and reliable information to the investors, allowing them to make informed investment choices, and promotes the fulfilment of the objectives set by the FSAP. The national competent authorities work in this progress, securing high-level financial services open to investors EU-wide.

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