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Łukasz Chyla

# Is 2.5 million EUR prospectus exemption threshold enough?

Czy wystarczający jest próg wyłączenia prospektu emisyjnego na poziomie 2,5 mln EURO?

## 1. Introduction

Public Offerings are a vital part of any capital market. They enable companies to raise finance in exchange for shares in future profits from a wide range of investors. Collected funds allow them to conduct long-term investments, which in turn they can convert into jobs and growth. From the investors' point of view, public offers give them the possibility to put their accumulated capital to productive use as well as the chance for high profits in the case of successful investments made by the company. The strength and efficiency of capital markets, in particular in the field of public offerings, have a huge impact on the development of the entire global economy. Public offerings constitute not only the most effective way to raise capital, but also stimulate employment - statistically around 80-90% of the job growth in a company comes after initial public offer (IPO) and public listing<sup>1</sup>.

The economic analysis of law suggests that one of the main obstacles to the strengthening of European Capital Markets are, on the one hand, the entry barriers for capital companies seeking financial support, and on the other, lack of proper information protection for investors, which discourages them from placing money on the financial markets. The 2015 Impact Assessment Working Paper<sup>2</sup> evaluation has identified numerous issues which seem to hinder the

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<sup>1</sup> D. Höppner, *Europe's broken IPO market*, available at: <https://www.investeurope.eu/news-opinion/opinion/blog/2015/ipo/>.

<sup>2</sup> European Commission, *The Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the*

raising of capital in the EU. First, the costs of compliance with the Prospectus Directive are extremely high (on average at EUR 1 million, and up to 15% of the capital raised)<sup>3</sup>. Second, the investor protection is perceived as ineffective<sup>4</sup> because of the information overload provided by the prospectuses, being too long and drafted with the objective to address any potential legal liability rather than to inform investors in a suitable way. Thirdly, the regulatory framework under Prospectus Directive was neither flexible nor suitable for SMEs as well as some types of securities<sup>5</sup>. In the entire EU, the average for using equity as a source of funding for SMEs was at only 3%, even below the world's average.

Lately, numerous European experts have advocated that the removal of various legal barriers “to go public” in the form of appropriate simplification and flexibilization of the prospectus obligations for companies (including innovative companies and start-ups) would give them incentives to enter the capital market and derive significant benefits due to a broader access to cheap investor's capital and effective funding, which will have positive impact on the whole Europe's economic growth.

To address these issues and to improve the IPO environment, the completely new prospectus law was introduced by the Prospectus Regulation (EU) 2017/1129<sup>6</sup> which replaced the previous Prospectus Directive<sup>7</sup> and will be directly binding and fully applicable in all EU Member States from July 2019. The new legislation is also a realization of the European Capital Markets Union Plan (CMU)<sup>8</sup>, being the flagship EU projects which reflects a long-term ambition to expand and diversify alternative sources of funding to bank lending and to help EU companies to better finance their expansion and therefore to create jobs and growth. The regulation is also part of the Commission's more general commitment to simplifying EU laws and making them more effective and efficient (REFIT). It is no exaggeration to say that the reform and its legal framework

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*Council on the prospectus to be published when securities are offered to the public or admitted to trading*, Brussels, 30.11.2015.

<sup>3</sup> *Ibidem*, pp. 8-9.

<sup>4</sup> *Ibidem*, p. 9.

<sup>5</sup> *Ibidem*, p. 9.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> European Commission, *The Commission Staff Working Document Impact Assessment...*, Brussels, 30.11.2015, Annex 3, p.6.

will soon determine the future of capital markets, as well as the economy of the entire European Union. European actions became a part of a wider trend visible in many countries around the world, especially in the US- the EU's main competitor in the field of the capital markets.

One of the most important changes brought by the new law is raising the threshold, below which a prospectus is not required, from 100,000 EUR to 1 million EUR (unconditionally) and from 5 million EUR to 8 million EUR (subject to the autonomous decision of the Member States). The introduction of this landmark piece of legislation has implicated substantial legal reforms in all EU Members States, including Poland. In contrast to the international trends, the Polish legislator has not decided, however, to amend the threshold and left it at the current level of 2.5. million EUR. The aim of this article is to assess the correctness and effects of such decision from the comparative and economic perspective.

## 2. The EU legal framework

According to the previous Prospectus Directive 2003/71/EC, the obligation to publish a prospectus shall not apply to the offering of securities with a total consideration of less than EUR 100 000 (over a period of 12 months)<sup>9</sup>. Under the Prospectus Directive, there was also an exemption from prospectus obligation for securities included in an offer of less than EUR 2 500 000, calculated over a period of 12 months<sup>10</sup>. Later, the PD Directive was amended by Directive 2010/73/EU<sup>11</sup>, which established a higher threshold- 5 million EUR instead of 2.5 million EUR.

The latest landmark change was established under Prospectus Regulation 2017/1129.

According to the Motive 12th of the Regulation, for offers of less than 1 million EUR, the cost of producing a prospectus is likely to be disproportionate to the envisaged proceeds of the offer. It is therefore appropriate that the obligation to draw up a prospectus should not apply to offers of such small scale.

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<sup>9</sup> Article 3 par. 2 (e).

<sup>10</sup> Article 1 par. 2 (h).

<sup>11</sup> Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (Text with EEA relevance).

Article 1(3) of the Prospectus Regulation establishes that the Regulation—thus, the obligation to publish a prospectus—does not apply to an offer of securities to the public with a total consideration in the Union of less than 1 million EUR (over 12 months). According to article 1(3) subparagraph 2, Member States shall not extend the obligation to draw up a prospectus below 1 million EUR. However, in those cases, Member States may require other disclosure requirements at the national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden.

Additionally, pursuant to Article 3(2) of the Prospectus Regulation, Member States may decide to exempt offers of securities to the public from the obligation to publish a prospectus provided that the total consideration of each such offer in the Union shall not exceed 8 million EUR over 12 months. Such offers cannot be subject to notification procedure<sup>12</sup>. Importantly, below that threshold, Member States should be able to require other disclosure requirements at the national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden in relation to such exempted offers of securities<sup>13</sup>.

Member States are required to notify the European Commission and ESMA of whether and how they decide to apply the exemption in article 3(2), as well as of any subsequent changes to that policy. Articles 1(3) and 3(2) became applicable on 21 July 2018.

### 3. The Polish regulation

In Poland, the public offerings regime is regulated by the Act on Public Offering<sup>14</sup>.

According to the Act, for offers between 1 million EUR and 2.5 million EUR (over 12 months) the prospectus is not required as long as the information memorandum is submitted and published—after prior approval of the KNF (competent national authority). This threshold has not been changed since 2005, despite many other changes being introduced to the Act ever since. It is worth noting, that the Polish threshold was established discretionally, without reasonable support of any empirical data studies or legal economics analysis.

Under Polish law, there is a wide array of information memorandums, the most common being the one embodied in article 41. Although shorter than the

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<sup>12</sup> Article 25 of the Prospectus Regulation 2017/1129.

<sup>13</sup> Motive 12th of the Prospectus Regulation 2017/1129.

<sup>14</sup> Polish Act of 29 July 2005 on Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies.

regular prospectus, the memorandum still constitutes a significant burden for Polish issuers, often running into more than 100-150 pages.

According to the proposed amendments (due to the Prospectus Regulation), being still discussed in the Ministry of Finance, for offers between 100,000 and 1 million EUR, the issuer must publish a document containing essential information about the issuer, conditions and rules of the offer (securities, use of proceeds, risk factors, *etcetera.*) as well as the statement that the information is true, reliable and in accordance with the facts.

In Polish conditions, raising the threshold would significantly reduce the costs related to the preparation and approval of the prospectus, which would positively affect the access to capital for companies seeking fund through the issue of corporate bonds. It is worth mentioning, that the official total inflation of the euro between 2005- 2018 was about 25% (since the exemption threshold of 2.5 million EUR was established). Therefore, in order to just neutralize inflation, and to maintain the level of financing, the threshold should be valorized to 3- 3.5 million EUR.

Despite the excellent opportunity, the Polish lawmakers did not decide to liberalize the regulations on public offering. In the justification to the bill, the Ministry of Finance failed to mention any basis for introducing such a low threshold. Numerous demands to increase this threshold to 5 or even 8 million EUR, raised as a part of public consultations, have been rejected<sup>15</sup>. In response to the comments, the Ministry of Finance indicated laconically that “the predicted value of EUR 2.5 million is adjusted to the current development level of the Polish market”<sup>16</sup>.

It is worth noting that such important decisions, following international good practices, shall be made not without extensive consultations with experts preceded by a thorough economic analysis. For example, one can mention the long-term ESMA analysis preceding Prospectus Regulation (Working Assessment Paper 2015), research carried out by BaFin or the analysis of the US Securities and Exchange Commission and the US Department of Treasury regarding the - JOBS 3.0 Act, currently being discussed by the US Senate subcommittees. Meanwhile, in Poland, the initial project was introduced to the public just a few months before the deadline resulting from the Prospectus Regulation.

It is worth mentioning that the costs and practical problems related to the preparation of prospectuses and public offerings in Poland are enormous. Added to this is the drastically falling number of IPOs that are admitted to trading on the

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<sup>15</sup> A list of comments on the act amending the Polish Act on Public Offering (UC130), available: <https://legislacja.rcl.gov.pl/projekt/12318000>.

<sup>16</sup> *Ibidem.*

Warsaw Stock Exchange. In 2018, only 7 IPOs have been admitted (compared to 15 in 2017, 19 in 2016 or 30 in 2015). In other words, the Polish public offering market has become highly uncompetitive and more than just cosmetic changes is needed to reverse this trend. In fact, there are few places in the European Union, with an equally unfavorable ratio of potential profits to losses and risks in the area of Initial Public Offerings. Another problem seems to be the disproportionately deterrent function of administrative fines.

#### 4. The EU comparative perspective

Before drawing some hasty conclusions for the Polish lawmakers, a broader comparative context is needed regarding the EU countries' approach to the prospectus threshold. Despite the fact that the Polish threshold has not been changed since 2005, it can arguably be said that as for 2015, it did not stand out much negatively in comparison with the other EU Member States.

Although smaller economies such as Croatia, Estonia, and Lithuania were ahead of us, and the Polish information memorandum was relatively expensive and complicated compared to respective information documents in other countries, our solution was perceived as a reasonable compromise between the interests of various market players and investors.

However, since then, the international legal landscape has rapidly changed.

Table 1. Threshold above which Member States require an EU prospectus to be drawn up (2016)

Threshold (EUR)	100 000	250 000	1 000 000	1 500 000	2 500 000	5 000 000
Member States	Belgium, Bulgaria, Cyprus, France(1), Germany, Hungary, Latvia, Romania, Slovakia, Slovenia	Austria	Czech Republic, Denmark, Romania	Luxembourg	Finland, The Netherlands, Poland, Sweden	Croatia, Estonia, Greece, Ireland, Italy, Lithuania, Malta, Portugal, Spain, UK

Expressed as the total consideration of the offer in the EU over 12 months. (1) Only for offers representing more than 50% of the share capital of the issues.

Source: ESMA

Within the last 3 years, at least 12 countries have already used the opportunity to raise their thresholds. At least 7 countries have done so solely for the purpose

of exemptions provided by the Prospectus Regulation 2017/1129 and yet another 7 are considering such a solution.

Looking globally, in the last 3 years, the following substantial changes have taken place. Belgium, France, and Germany have raised their thresholds from 100 000 EUR to 8 million EUR. Denmark and Romania from 1 million to 8 million and 5 million, respectively. Finland and the Netherlands raised the thresholds from 2.5 million to respectively, 8 and 5 million. Italy and the UK, have decided to maintain the highest possible non-prospectus threshold, therefore raising the thresholds from 5 million to 8 million. Finally, Austria and Luxembourg have raised thresholds to 5 million, from in sequence, 250 000 EUR and 1.5 million EUR, while Slovenia has raised its threshold from 100 000 to 3 million EUR.

Interestingly, Poland is one of the 2 countries (next to the Czech Republic) where the exemption threshold was not raised – although in some countries such change was automatic due to the directly applicable provisions of the Prospectus Regulation. Moreover, Poland is one of the 2 countries (next to Hungary) who has already changed the law to adopt the threshold under the Prospectus Regulation and still refused to raise it.

Table 3: Threshold above which Member States require an EU prospectus to be drawn up (2019)

Threshold (EUR)	1 000 000	2 500 000	3 000 000	5 000 000	8 000 000
Member States	Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Slovakia	Poland, Sweden	<b>Slovenia</b>	<b>Austria</b> , Croatia, Estonia, Greece, Iceland, Ireland, Lithuania, <b>Luxembourg</b> Malta, <b>The Netherlands</b> , Norway, Portugal <b>Romania</b> , Spain	<b>Belgium, Denmark, Finland, France, Germany, Italy, UK</b>

Expressed as the total consideration of the offer in the EU over 12 months. Some members of the EEA are also included in this table. Bold are the countries that raised the exemption thresholds since 2016.

As of 2019, in Belgium, Denmark, Finland, France, Germany, Italy, and UK, the threshold is 8 million EUR. In Austria, Croatia, Estonia, Greece, Iceland, Ireland, Lithuania, Luxembourg, Malta, Netherland, Norway, Portugal, and Spain

the threshold is 5 million EUR. In Romania there is a 5 million EUR threshold for offers made exclusively in the other Member States than Romania<sup>17</sup>, and 1 million EUR threshold for offers made within Romania<sup>18</sup>. In Slovenia, the threshold is 3 million EUR. In Poland and Sweden, the threshold is 2.5 million EUR. In Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, and Slovakia, the threshold is 1 million EUR (the Prospectus Regulation minimum).

In Austria, for offers between 250,000 EUR and 2 million EUR, the issuer must publish an information document<sup>19</sup>, while for offers between 2 and 5 million EUR, the issuer must publish a simplified, national prospectus<sup>20</sup>.

In Belgium, beginning from 2018 reform<sup>21</sup> there are two general thresholds: 5 and 8 million EUR<sup>22</sup>. The 8 million EUR applies if the offered securities to be admitted to the MTF Alternext or the MTF Marché Libre. In that case, the issuer must publish an information note (short information document) and submit it to FSMA<sup>23</sup>, no later than when it is made available to the general public. Prior approval by FSMA is not required. The 5 million EUR threshold applies in case of public offers without admission on Designated MTF. The issuer is obliged to publish an information note (short information document) respectively. In case of offers not exceeding 500,000 EUR there are no information requirements, provided that the maximum subscription per investor is no larger than 5,000 EUR.

In Croatia, for offers below 5 million EUR, the issuer must notify Hanfa<sup>24</sup> that it is making use of the exemption immediately (but not later than three working days before the offer) after the issuer's company body issues a decision on the offer of securities<sup>25</sup>.

In Estonia, for offers between 2.5 and 5 million EUR, the issuer must publish a simplified prospectus<sup>26</sup>. Below that threshold, there is no disclosure obligation as such.

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<sup>17</sup> See Article 5, paragraph 2, Romanian Regulation no. 5/2018 on issuers of financial instruments and market operations.

<sup>18</sup> See Article 5, paragraph 1(h), Romanian Law no. 24/2017 on issuers of financial instruments and market operations.

<sup>19</sup> Austrian Alternative Financing Act.

<sup>20</sup> Austrian Capital Markets Act.

<sup>21</sup> *The New Belgian Prospectus Law (Loi du 11 juillet 2018 relative aux offres au public d'instruments de placement et admissions d'instruments de placement à la négociation sur des marchés réglementés)*.

<sup>22</sup> See Article 7, Belgian Royal Decree of 23 September 2018.

<sup>23</sup> Belgian Financial Services and Markets Authority.

<sup>24</sup> Croatian Financial Services Supervisory Agency.

<sup>25</sup> Croatian Capital Markets Act, art. 409, 412.

<sup>26</sup> Estonian Securities Market Act, Regulation by Minister of Finance.

In Finland, for offers between 1 and 8 million EUR, the issuer must file an information document with the FIN-FSA<sup>27</sup> prior to the planned offer (no approval required document) and publish it. The information document of maximum 6 pages contains the basic facts of the issuer and the offer<sup>28</sup>.

In France, below the 8 million EUR threshold there are several disclosure sub regimes<sup>29</sup>. For direct unlisted offerings of securities the issuer, prior to the offer, must file a summary information document<sup>30</sup> with the AMF<sup>31</sup> (without approval). For unlisted offers available on a crowdfunding website, prior to the offer, a short (about 8-10 pages), summary information document<sup>32</sup> must be published on the crowdfunding website. There are two types of regulated entities that can operate a crowdfunding website: Investment firms: Crowdfunding investment advisors. In case of Initial Public Offerings of securities that are to be admitted on an MTF (such as Euronext Growth, Euronext Access), operator's market rules may require an information document average size 100 pages<sup>33</sup>. Only in case of the first-time admission to trading on the Euronext, the prospectus, subject to prior AMF approval is required<sup>34</sup>. In case of secondary offerings under 8 million EUR, instead of an information document, a 3-10 page press release is recommended by the AMF<sup>35</sup>. It can be released even after the offering.

In Germany, one of the most coherent and well-thought systems has been introduced. By both raising the prospectus obligation threshold to EUR 8 million and minimalizing the scope of disclosure obligations, legislators have ensured considerable liberalization in order to promote Germany's capital market<sup>36</sup>. Under the amended German Securities Prospectus Act (WpPG)<sup>37</sup>, for offers between 100 000 EUR and 8 million EUR<sup>38</sup> the issuer shall produce a much

<sup>27</sup> Finnish Financial Supervisory Authority.

<sup>28</sup> Finnish Ministry of Finance Decree.

<sup>29</sup> [https://www.amf-france.org/en\\_US/Actualites/Communiqués-de-presse/AMF/annee-2018?docId=workspace%3A%2F%2FSpacesStore%2F3e1b1302-b11d-471b-9fde-of773295b760&langSwitch=true](https://www.amf-france.org/en_US/Actualites/Communiqués-de-presse/AMF/annee-2018?docId=workspace%3A%2F%2FSpacesStore%2F3e1b1302-b11d-471b-9fde-of773295b760&langSwitch=true).

<sup>30</sup> The specific content defined in the AMF Instruction 2018-07.

<sup>31</sup> French Autorité des Marchés Financiers.

<sup>32</sup> The specific content defined in the AMF Instruction 2014-12.

<sup>33</sup> ESMA 31-62-1193 Document (issued 08.02.2019).

<sup>34</sup> Book II of the General Regulation of the AMF, available: [https://www.amf-france.org/reglement/en\\_US/RG-en-vigueur](https://www.amf-france.org/reglement/en_US/RG-en-vigueur).

<sup>35</sup> The specific content defined in the AMF Position 2013-03.

<sup>36</sup> [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2018/fa\\_bj\\_1807\\_Wertpapierprospekte\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2018/fa_bj_1807_Wertpapierprospekte_en.html).

<sup>37</sup> German Securities Prospectus Act, Wertpapierprospektgesetz (WpPG), available: <http://www.gesetze-im-internet.de/wppg/index.html>.

<sup>38</sup> Section 3(2) sentence 1 no. 6 and section 3a of the WpPG.

shorter than prospectus, so-called securities information sheet- WIB<sup>39</sup>. The WIB may not be published until BaFin<sup>40</sup> has granted approval. For offers below 100 000 EUR, there is no need to produce prospectus or WIB<sup>41</sup>. The WIB comprises of max. 3 pages and must clearly state the key information on securities<sup>42</sup>, offerors, issuers and any guarantors in an easily comprehensible manner. The WIB must also contain a warning to the effect that acquisition of the security involves considerable risks and can result in the total loss of the capital invested. The WIB is to be kept up to date and/or corrected, if necessary, for the duration of the public offer. In order to ensure retail investors' protection, for offers between 1 and 8 million EUR the securities offered to non-qualified investors<sup>43</sup>, may be offered through investment advice or brokerage by investment services enterprises<sup>44</sup>. Moreover, the investment firm is obliged to verify that the securities that can be acquired by a non-qualified investor do not exceed 1000 EUR (or up to 10 000 EUR, depending on the financial situation). Finally, CRR credit institutions<sup>45</sup> and issuers whose shares have already been admitted for trading on an organized market are exempted from the WIB obligation if the offering is less than 5 million EUR<sup>46</sup>.

In Greece, for offers between 100,000 EUR and 5 million EUR, the issuer must publish an information document which, as a rule, has to be approved by the HCMC<sup>47</sup>.

In Hungary, for offers below 1 million EUR, the issuer must publish a simplified prospectus in accordance with the national rules<sup>48</sup>.

In Iceland, for offers between 2.5 and 5 million EUR, the issuer is obliged to publish a national prospectus<sup>49</sup>. The national prospectus contains information

<sup>39</sup> Wertpapier-Informationsblatt.

<sup>40</sup> German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht).

<sup>41</sup> Section 3 (2) sentence 1 no. 6 of the WpPG.

<sup>42</sup> Section 3a (3) sentence 2 of the WpPG, E.g. the functionality of and the rights attached to the security, identity of the issuer (including its business activity), the risks associated with the security and the issuer, the level of indebtedness calculated on the basis of the latest annual financial statements, the prospects of return under different market conditions, the planned use of anticipated net proceeds.

<sup>43</sup> See the definition: section 2 no. 6 of the WpPG.

<sup>44</sup> Section 3 (2) sentence 1 no. 6, section 3a and section 3c of the WpPG; Section 65a (1) of the WpHG.

<sup>45</sup> European Capital Requirements Regulation (CRR).

<sup>46</sup> Section 2 no. 8 of the WpPG.

<sup>47</sup> Hellenic Capital Market Commission; ESMA 31-62-1193 Document (issued 08.02.2019).

<sup>48</sup> Hungarian Capital Market Act (Article 21, paragraph 1a-1b, Annex 3).

<sup>49</sup> Icelandic Act No. 108/2007 on Securities Transactions See article 42 par 7. Article 54.

regarding the offer, the securities, the persons responsible, the issuer and its business, financial condition, administrative and management body<sup>50</sup>.

In Ireland, an offer below 5 million EUR may be subject to certain filing and disclosure requirements<sup>51</sup> whenever it meets the conditions of local offer outlined in the Companies Act 2014<sup>52</sup>.

In Italy, Issuers with shares admitted to trading on a regulated market below 8 million EUR shall publish press releases which include relevant details relating to the public offer, impact on the issuer, reasons for the offer, net proceeds, and their use, working capital statement, etcetera<sup>53</sup>. For offers of equity securities below 8 million EUR through crowdfunding portals, the portal manager must publish a document no longer than 5 pages of A4 format<sup>54</sup>.

In Latvia, for offers between 100,000 and 1 million EUR, the issuer is required to publish an information document<sup>55</sup> in accordance with national rules<sup>56</sup>.

In Lithuania, for offers between 100,000 and 5 million EUR, the issuer must publish an information document<sup>57</sup>, in accordance with national rules<sup>58</sup>. The Bank of Lithuania does not approve the information document.

In Luxembourg for offers between 1.5 and 5 million EUR<sup>59</sup>, the issuer must publish a simplified prospectus in accordance with national legislation<sup>60</sup>. No simplified prospectus shall be published until it has been approved<sup>61</sup> by the CSSF<sup>62</sup> (Article 31).

In Malta, for offers below 5 million EUR, there are no specific rules regarding information obligations unless an issuer seeks admission to trading on the Prospects MTF, operated by the Malta Stock Exchange. In this case, a special Admission Document needs to be for reviewed and approved by the Malta Stock Exchange prior to the offer<sup>63</sup>.

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<sup>50</sup> Icelandic Regulation No. 836/2013.

<sup>51</sup> Section 1361, Irish Companies Act 2014.

<sup>52</sup> Section 1348, Irish Companies Act 2014.

<sup>53</sup> According to Italian Consob Regulation 11971/1999.

<sup>54</sup> Article 100-ter, paragraph 1 of the Italian Consolidated Law (Italian Legislative Decree 58/98), Annex 3 of Italian Consob Regulation 18592/2013.

<sup>55</sup> Latvian Financial Instrument Market Law, see sec. 3, par. 7(8), sec. 16- 16 (1).

<sup>56</sup> Regulations of the Latvian Financial and Capital Markets Commission.

<sup>57</sup> Law on Securities of the Republic of Lithuania.

<sup>58</sup> Resolution No 03-45 of the Bank of Lithuania.

<sup>59</sup> Law on Prospectuses and Securities of Luxembourg, Article 30(2)(e).

<sup>60</sup> *Ibidem*, Articles 32- 39.

<sup>61</sup> *Ibidem*, Article 31.

<sup>62</sup> Financial Sector Supervisory Commission of Luxembourg.

<sup>63</sup> Malta Prospects MTF Rules, Chapter 4; ESMA 31-62-1193 Document (issued 08.02.2019).

In the Netherlands, for offers below 5 million EUR, the issuer is obliged to notify the AFM<sup>64</sup> and complete an information document, then submit it to AFM and publish it to make it available to investors<sup>65</sup>.

In Norway, for offers between 1 and 5 million EUR, issuers must file a national prospectus with The Register of Business Enterprises<sup>66</sup>

In Slovenia, for offers below 3 million EUR, the issuer must notify the ATPV<sup>67</sup> that it is making use of the exemption<sup>68</sup>.

In the UK, financial promotions are generally prohibited unless it is approved or communicated by an authorized person, or able to benefit from a statutory exemption<sup>69</sup>. The key requirement is for all promotions to be ‘fair, clear and not misleading’<sup>70</sup>. If the promotion is communicated to a retail client, the promotion needs to be accurate, sufficient for the recipient, give a fair and prominent indication of any relevant risks and not disguise, diminish or obscure important items, statements or warnings<sup>71</sup>.

Several countries (8), namely Bulgaria, Cyprus, Estonia, Greece, Iceland, Latvia, Lithuania, and Luxembourg are currently still in the process of adopting a specific threshold under Article 3(2) of the Prospectus Regulation<sup>72</sup>. Therefore, it is expected that some of them may increase the exemption thresholds even further- especially those who already had the maximum exemption under Prospectus Directive (Estonia, Greece, Iceland, Lithuania, Luxembourg).

In the following 9 countries, there are no national rules applicable to offers below the exemption threshold: Bulgaria, Cyprus, Czech Republic, Denmark, Portugal, Romania, Slovakia, Spain, and Sweden. In those countries, public offerings under the threshold do not require providing any additional information- neither to the public nor to the competent national authorities<sup>73</sup>.

Taking into account high exemption thresholds in Denmark (8 mln EUR), Portugal (5 mln EUR), Romania (5 mln EUR), or Spain (5 mln EUR), it can be

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<sup>64</sup> Dutch Authority for the Financial Markets.

<sup>65</sup> Dutch Financial Supervision Act, (Vrijstellingsregeling Wft), See: Article 53, paragraphs 2-8.

<sup>66</sup> Norwegian Act on Securities Trading, See chapter 7, particularly sections 7-1, 7-7.

<sup>67</sup> Slovenian Securities Market Agency.

<sup>68</sup> Slovenian Market in Financial Instruments Act (ZTFI-1 and ZTFI) see Articles 72/1/5 and 75).

<sup>69</sup> The UK Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018.

<sup>70</sup> FCA Handbook, Listing and Prospectus Rules.

<sup>71</sup> *Ibidem*.

<sup>72</sup> ESMA 31-62-1193 Document (issued 08.02.2019).

<sup>73</sup> *Ibidem*.

noted that from the issuers' perspective small capital raisings seem to be especially attractive in those countries.

At first glance, you can see that the Polish threshold belongs to one of the lowest, hence, the least competitive. However, to better assess the attractiveness of the Polish solution, a more thorough analysis is needed. First, although the Polish threshold is equal to the threshold in Sweden, the latter regime is considerably lighter, as there are no disclosure obligations for offers below 2.5 million EUR.

Second, the Polish threshold is higher than the exemption thresholds in Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Romania (public offerings within Romania), and Slovakia (1 million EUR). It still does not necessarily mean that we take the lead among those CEE countries.

In case of public offerings of a total consideration between 100 000 EUR and 1 million EUR in Bulgaria, Cyprus, Czech Republic, Romania and Slovakia, it is still easier for issuers to raise funds, because there are no national rules applicable to offers below the threshold. In Latvia, the established rules are comparable to Polish (publication of an information document without prior approval). In this range, only in Hungary, there is a more strict requirement to produce a simplified national prospectus which is subject to the prior approval by the national competent authority.

In the case of public offerings of a total consideration between 1 million EUR and 2.5 million EUR Polish regulation seems to be more liberal than the others above-mentioned. Notwithstanding, if you take into account that Bulgaria, Cyprus and Latvia are revising their regulation, our disclosure obligations in Poland are only lighter than in the Czech Republic, Romania (within Romania), Slovakia- with regards to offers between 1 million EUR and 2.5 million EUR, and lighter only than in Hungary- with regards to offers below 1 million EUR.

Particularly noteworthy are the liberal approaches of relatively smaller markets, such as Croatia, Estonia, Finland, Lithuania, Portugal, Romania (offerings outside Romania), which decided to set up a limit of 5 million EUR, and Slovenia with 3 million EUR.

Surprisingly, the Polish legislator did not take an example from the CEE countries with relatively less developed economies such as Croatia, Estonia, Lithuania, Romania and Slovenia.

In Croatia, offers up to 5 million EUR require nothing but notification, whereas in Poland any offer between 1 and 2.5 million EUR faces artificial barriers, in a form of long and costly information memorandum which has to be accepted by the KNF. There cannot be any reasonable explanation of such state of affairs,

especially as both countries are member states of EU, promoting its flagship project of Capital Markets Union.

In turn, in Croatia, Ireland, Lithuania, Malta, Netherland, Portugal, Spain issuers offering securities to the public with a total consideration of 4 999 999 EUR will face significantly fewer obstacles than conducting public offering with a total consideration of 1 000 001 EUR in Poland.

It is worth noting, that in numerous countries, such as Belgium, Denmark, Finland, Germany France, Italy, UK issuers offering securities to the public with a total consideration of 7 999 999 EUR will face significantly less obstacles than conducting public offering with a total consideration of 1 000 001 EUR in Poland.

As stated above, in Denmark there are no specific disclosure requirements at all. Short information documents (notes) in Belgium, Finland (6 pages), Germany (WIB- 3 pages), France (summary information document, 8-10 pages), Italy (press releases) are considerably shorter and easier to produce than the Polish memorandum (50-150 pages), not to mention that they do not require approval from competent national authorities. Some of them do not even require prior submission (Italy). Only in France, in case of IPO admitted on an MTF the information document (average size of 100 pages) is required.

In turn, in Croatia, Ireland, Lithuania, Malta, Netherland, Portugal, Spain issuers offering securities to the public with a total consideration of 4 999 999 EUR will face significantly less obstacles than conducting public offering with a total consideration of 1 000 001 EUR in Poland.

As in Denmark, in Portugal, and Spain there are no specific disclosure requirements at all. Short information documents in Ireland, Lithuania, Malta, Netherlands do not require prior approval, whereas in Croatia, mere notification of the exemption use, submitted to Hanfa is sufficient.

Apart from the fact, that their exemption thresholds are larger, some similarities can be seen between information documents in Austria, Estonia, Iceland, Luxembourg, Norway, Greece and under Polish memorandum regime. However, the Polish information memorandum seems to be more costly and complicated than the counterparts mentioned.

## 5. Conclusions

Initial Public Offerings are the true economic drivers- they create innovation, growth, jobs and facilitate proper allocation of the capital. Throughout the world, from the United States to Asia, the trend of liberalization of prospectus

obligations can be easily seen, in order to increase the competitiveness and attractiveness of local capital markets. This phenomenon can be noticed in relation not only to regular IPOs but also to Small and Medium Enterprises (SME's), crowdfunding or creative ways of raising capital, such as ICO (Initial Coin Offerings) or STO (Security Tokens Offerings). This phenomenon can be referred to as „Regulator Shopping”.

Economic and social benefits flowing from Initial Public Offerings have recently been noticed in the EU, which as a part of its flagship project, Capital Markets Union Plan, decided to conduct landmark reforms, replacing the previous Prospectus Directive with a liberal and more IPO- friendly, Prospectus Regulation 2017/1129.

Unfortunately, Poland has done nothing or little to follow this global trend. In fact, it established another additional obligation to publish an information sheet with regards to offerings up to 1 million EUR.

Considering the Polish GDP, the level of economic development as well as the aspirations of our capital markets (in 2018 Poland has joined to the group of developed countries, according to FTSE Russell), this approach seems to be incomprehensible, to say at least. If we add to this, the rather unfriendly regulatory environment for companies (e.g. in terms of taxation) - compared to, for example, the Czech Republic, Slovakia, or lately, Romania, we remain not only in the tail of Europe, but also the Central Eastern European countries. Unfortunately, the Polish regulatory approach can be seen as a textbook example of a national „gold-plating”<sup>74</sup>.

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<sup>74</sup> In operational terms, the European Commission defines gold-plating “an excess of norms, guidelines, and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such regulation”.

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### Summary

In order to improve the IPO environment in the European Union, the completely new prospectus law was introduced by the Prospectus Regulation (EU) 2017/1129, which replaced the previous Prospectus Directive and will be directly binding and fully applicable in all EU Member States from July 2019. One of the most important changes brought by the new law is raising the threshold, below which a prospectus is not required, from 5 million EUR to 8 million EUR- subject to the autonomous decision of the Member States. Numerous Member States have made use of such opportunity, introducing new exemptions in their national laws. Contrary to these trends, the Polish legislator has not decided, however, to amend the threshold and left it at the current level of 2.5 million EUR. The aim of this article is to assess the correctness and effects of such decision from the comparative and economic perspective

KEY WORDS: prospectus, prospectus exemption, Regulation 2017/1129.

## Streszczenie

W celu poprawy konkurencyjności rynku pierwotnego i atrakcyjności IPO w Europie, Unia Europejska wprowadziła nowe prawo prospektowe w postaci Rozporządzenia Prospektowego (UE) 2017/1129, które zastąpiło poprzednią Dyrektywę Prospektową. Będzie ono bezpośrednio wiążące oraz w pełni stosowane we wszystkich Państwach Członkowskich UE od lipca 2019 r. Jedną z najważniejszych zmian wprowadzonych przez nową ustawę jest podwyższenie progu, poniżej którego nie jest wymagany prospekt emisyjny, z 5 mln EUR do 8 mln EUR - z zastrzeżeniem autonomicznej decyzji państw członkowskich w tym zakresie. Wiele państw członkowskich skorzystało z takiej możliwości, wprowadzając nowe wyłączenia do prawa krajowego. Wbrew tym tendencjom, polski ustawodawca nie zdecydował się na takie rozwiązanie i pozostawił próg wyłączenia na obecnym poziomie 2,5 mln EUR. Celem tego artykułu jest ocena poprawności i potencjalnych skutków takiej decyzji z perspektywy prawnoporównawczej i ekonomicznej.

**SŁOWA KLUCZOWE:** prospekt emisyjny, wyłączenia prospektowe, Rozporządzenie Prospektowe 2017/1129

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