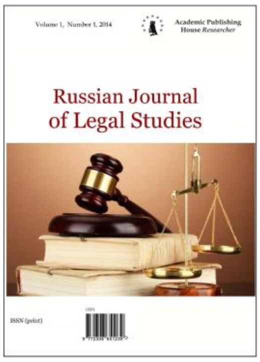
Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2020, 7(2): 77-87

DOI: 10.13187/rjls.2020.2.77
www.ejournal25.com



The Exempt Offerings in the EU and the US-Comparative Perspective

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Abstract

The prospectus – exempted offering framework plays a crucial role in the process of creating a more issuers-friendly capital markets by minimizing the "barriers to entry" (such as burdensome prospectus obligations and ongoing disclosure thereafter). Thanks to certain prospectus exemptions, SMEs have better opportunities to access critical funds in order to grow and scale. In recognition of the above, the prospectus law in the European Union and the United States has lately been subject to dynamic reforms, aimed at expanding the exempt offerings frameworks. In the EU, a landmark reform, followed by multiple changes on a national level, has been introduced by the Prospectus Regulation (EU) 2017/1129 (hereinafter – PR). In the US, for many years now, we have been observing major exempt offerings reforms, such as the "JOBS Act", the "FAST Act" and the "Economic Growth Act", followed by the SEC rules. The main objective of this article is to analyze and evaluate, from a comparative perspective, the EU and the US legal frameworks for offers exempted from prospectus obligations – especially in light of the latest reforms. The article is based mostly on scrutinizing sources of law, academic literature, reports and data published by market authorities.

Keywords: EU prospectus law, US prospectus law, prospectus exemption, EU Regulation 2017/1129, private primary markets.

1. Introduction

One of the main challenges faced worldwide by prospectus regulations, is to create a more issuers-friendly environment by minimizing the "barriers to entry", such as compliance costs. In doing so, a model prospectus law should carefully strike a balance so it can best address the sometimes opposing (albeit equally justified) needs of various actors – not only the issuers' need for cheap funding without excessive burdens, but also the investors' need for appropriate disclosure and market oversight, and finally – the general need to increase the competitiveness and attractiveness of the capital markets vis-a-vis banking system.

The exempt offering framework plays a crucial role in this process. It allows certain small capital raisings to skip the burdensome prospectus obligations and ongoing disclosure thereafter. Thanks to certain prospectus exemptions, multiple small companies (from early-stage start-ups seeking seed capital to companies that are on a clear way to go public) have opportunity to access critical funds in order to grow and scale (Office of the Advocate, 2019). The exempt offerings can also satisfy the capital needs of some SMEs that are unlikely to become public companies due to their size or business nature (Office of the Advocate, 2019). In other words, the dynamics of the

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capital markets is depends highly on a robust pipeline of new companies-supported by the exempt offering framework—that can eventually enter the public markets "in full grace".

In pursuit of these goals, prospectus law in the European Union and the United States has lately been subject to dynamic reforms.

In the EU, a landmark prospectus law reform, followed by multiple changes on a national level, has lately been introduced by the Prospectus Regulation (EU) 2017/1129 and other secondary laws (such as the Commission Delegated Regulations 2019/980 and 2019/979, ESMA Guidelines), with the intent to enhance the market's efficiency and attractiveness against the US counterpart. In addition, further amendments are being discussed and proposed by the experts and political leaders.

In the US, for many years now, we have been observing major **exempt offerings** reforms, such as the "JOBS Act" (2012), the "FAST Act" (2015) and the "Economic Growth Act" (2018), followed by multiple rules established by the Securities and Exchange Commission (SEC). In addition, even more laws have lately been proposed, including the "JOBS Act 3.0" and "Facilitating Capital Formation" SEC Proposal (2020).

Changes on both sides of the Atlantic represent a clear, ongoing trend of liberalization towards prospectus obligations to increase the competitiveness and attractiveness of local capital markets vis-a-vis other jurisdiction (this process is often called "regulator shopping").

Since the European solutions on exempt offerings differ significantly from the American ones, these divergencies may hold the key to understanding the lower efficacy and competitiveness of the European markets. Hence, to draw from the US experience, it is particularly important for European legal scholars to better understand the rationale behind US changes. Meanwhile, for their American peers, it might be equally valuable to grasp some insights into the EU Prospectus Regulation perspective (especially in the face of their own impending reforms). Therefore, the aim of this article is to comparatively analyze and evaluate the exempt offering frameworks in the EU and the US in light of the latest changes.

2. Materials and methods

Detailed differences in shaping the prospectus law in the EU and the US are not widely known even to specialists in capital markets law. This is despite the fact that numerous materials and data on this subject are readily available on the Internet, the vast majority of them in English. Nevertheless, prospectus law in the EU and the US is subject to constant and dynamic changes. As a result, most publications on them quickly expire. This study takes into account all recent changes to the exemptions from the obligation to publish a prospectus, both in the EU and the US. The article is based mostly on scrutinizing sources of law, academic literature, reports and data published by competent market authorities in the US and the EU. Legal scientific research methods applied by the author include: the historical method, comparative legal research, critical and systematic analysis, formal-dogmatic method, critical-legal methods, and to some extent- law and economics.

3. Discussion

3.1. The exempt offerings in the EU

Prospectus law in the European Union is governed by the PR 2017/1129, which provides for a single regime throughout the whole Union and European Economic Area (EEA). It lays down the requirements for the drawing up, approval, and distribution of prospectus to be published when securities are offered to the public or admitted to trading on a regulated market within a Member State. This new prospectus law, which replaced the previous Prospectus Directive 2003/71/EC, entered into force on 20 July 2017 and apply fully from 21 July 2019. As contrary to the Directive, the Prospectus Regulation is directly binding and fully applicable in all EU Member States without any further implementation. The new law is a realization of the European Capital Markets Union Plan (CMU, 2015). The regulation is also part of the European Commission's (hereinafter referred to as "EC") more general commitment to simplifying EU laws and making them more efficient (REFIT). The flagship EU project which reflects a long-term ambition to expand and diversify sources of funding alternative to bank lending, and to help EU companies to better finance their expansion in order to create jobs and growth (Recital (1) of the PR). One of the major aims of the Regulation is to enhance the internal EU market for capital (Recital (7) of the PR). In order to achieve this goal, it introduced a number of sweeping changes, including, in particular, a significant increase in the exemption thresholds from the prospectus obligation (the "lower threshold" from EUR 100.000 to 1 million EUR and the "upper threshold" from EUR 5 million to EUR 8 million EUR).

In general, under PR (Art. 3(1)) securities shall only be offered to the public in the EU after the prior publication of an EU- compliant prospectus (unless there is an exemption available). Before a prospectus can be published, it has to be submitted and approved by the relevant national competent authority (Art. 20(1)). Subsequently, the competent national authority notifies the issuer and the Exchange and Securities Market Authority ("ESMA") of the approval. Once approved, the prospectus has to be made public by the issuer at the latest at the beginning of the offer (Art. 21). Importantly, under the Prospectus Regulation, once a *prospectus* has been approved in one *EU* country, it is valid throughout the whole *EU* (the passporting procedure – Art. 24, 25 of the PR).

In order to promote capital formation by SMEs, the Prospectus Regulation sets forth a number of exemptions from prospectus obligations, of which the two most relevant are described below. Unlike in the US, the EU exempted offers are not subject to any restrictions with respect to advertisement and solicitation. However, making use of exemptions comes at a price. Such offers cannot be subject to the notification procedure (article 25 of the PR 2017/1129), and consequently, cannot benefit from the passporting regime under the Regulation (Recital (13) of the PR 2017/1129). Thus, despite the fact that the exemption framework on the EU level is relatively straightforward, it can still be subject to various disclosure requirements imposed within the states' discretion and autonomy, which creates confusion – especially for smaller issuers with no adequate research resources.

3.2. Offers exempted due to the limited value

Pursuant to Article 1(3) of the Prospectus Regulation, the obligation to publish a prospectus does not apply to an offer of securities to the public with a total consideration in the EU of less than EUR 1 million over 12 months. According to Article 1(3) subparagraph 2, Member States shall not extend the obligation to draw up a prospectus below EUR 1 million (lower threshold). 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 PR, Member States may decide to exempt offers from the obligation to publish a prospectus provided that the total consideration of each such offer in the Union does not exceed EUR 8 million over 12 months. Also below that threshold, Member States are free to require other disclosure requirements at the national level so long as such requirements do not constitute a disproportionate or unnecessary burden in relation to such exempted offers of securities. As mentioned before, such offers cannot benefit from the passporting regime under the Recital (12) of the PR 2017/1129. Moreover, the exemption thresholds are not applicable to the admission to trading on regulated markets. These limitations are often heavily criticized by experts (Casale et al., 2017).

Upholding the MS discretion in setting out a threshold between EUR 1 and 8 million (as well their discretion to impose additional national disclosure rules below this threshold), according to their perception of the appropriate level of domestic investor protection, was motivated by the varying sizes of financial markets across the EU (Recital (13) of the PR). Member States are required to notify the European Commission and ESMA of whether and how they decide to use the exemption in Article 3(2), as well as of any subsequent changes to that policy.

The increase in the upper exemption threshold from EUR 5 million to EUR 8 million was almost immediately reflected in the subsequent legislative tendency of the Member States (Table 1). The numbers speak for themselves – since 2016, at least 17 states have used the opportunity to raise their thresholds (Chyla, 2019) – of which 14 raised the threshold to the maximum EUR 8 million, and another 3 are now in the process of implementing higher thresholds (Bulgaria, Greece, Iceland).

Table 1. Threshold above which members of the EEA 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, Czechia, Hungary, Slovakia	Poland, Sweden	**Slovenia**	**Austria**, Croatia, **Cyprus**, Greece, Iceland, Malta, **The Netherlands**, Portugal, **Romania**, Spain	**Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Norway, United Kingdom**

Expressed as the total consideration of the offer in the EU over 12 months. The countries that raised the exemption thresholds since 2016 are mentioned in bold font.

In consequence, as of 2020, in Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Norway, and the United Kingdom, the exemption threshold is EUR 8 million. In Austria, Croatia, Cyprus, Greece, Iceland, Malta, the Netherlands, Portugal, Romania, Spain the threshold is EUR 5 million. In Romania, there is a EUR 5 million threshold for offers made exclusively in the Member States other than Romania (Article 5, paragraph 2, Romanian Regulation № 5/2018 on issuers of financial instruments and market operations), and EUR 1 million threshold for offers made within Romania (Article 5, paragraph 1(h) Romanian Law № 24/2017 on issuers of financial instruments and market operations). In Slovenia, the threshold is EUR 3 million, while in Poland and Sweden- EUR 2.5 million. The lowest exemption thresholds of EUR 1 million (the admissible minimum) are in Bulgaria, Czechia, Hungary, Latvia, and Slovakia.

As a consequence, the EU exemption framework seems to be visibly inconsistent. As shown above, full discretion and flexibility in setting the upper exemption threshold result in high diversity among the Member States. The thresholds differ significantly, ranging randomly from EUR 1 to 8 million, often regardless of the economic development of the particular markets. In consequence, issuers from states with a lower threshold have a natural incentive to conduct an offering under a more favorable regime. This, in turn, creates severe cross-border concerns of *forum shopping* (Härkönen, 2017: 130). Moreover, the disclosure requirements faced by the issuers of exempted offerings are extremely diverse across the EU, which might cause even further fragmentation and uncertainty in the markets. Firstly, there are at least 10 states that do not require any particular disclosure for such offers neither to the public nor to the competent national authorities (Bulgaria, Cyprus, Czech, Denmark, Malta, Portugal, Romania, Slovakia, Spain, and Sweden). Secondly, there is a large group of countries that impose very little information obligations- either in the form of short information notes, short documents, or even press releases (Belgium, Finland, France, Lithuania, Netherlands, Latvia, United Kingdom) - majority of which do not require any prior approval by the competent authority (Except for Germany, where the short (up to 3 A4 pages) information document (WIB) needs to be approved by BaFin). In some countries, bare notification of the use of the exemption suffice (Croatia, Slovenia). Thirdly, some countries have more strict disclosure requirements, which require submission of lengthy information documents or special national prospectuses, the majority of which have to be approved by competent authority prior to publication (Estonia, Norway, Greece, Iceland, Poland, Hungary).

As a result, in numerous states, issuers offering securities to the public with a total consideration of EUR 8 million will face significantly fewer obstacles (or even no disclosure requirements at all) than conducting public offering with a total consideration of EUR 1 million in other states (such as Poland or Hungary). This concerns not only more developed economies, such as Belgium, France, UK, Italy, or Germany, but also countries with modest depth and development levels of the capital markets opportunities – such as Lithuania or Latvia.

Finally, the lack of passporting procedure in case of exempted offerings might deepen the financial fragmentation of the EU markets in the long run. Issuers in member states with higher exemption threshold or with no particular disclosure requirements can only offer their securities to domestic investors. In practice, with the international nature of crowdfunding and the easy Internet access available for potential investors in other states, SMEs using a crowdfunding platform need to be wary of potential liability risk cross-border investors (Härkönen, 2017: 128).

All this lack of coherence and harmonization might have a negative effect on the EU capital markets, hindering the achievements of the PR towards the CMU.

3.3. Offers to qualified and a limited number of non-qualified investors

Pursuant to Article 1(4) of the PR 2017/1129, which fully retained the Prospectus Directive solutions in this matter, the obligation to publish a prospectus shall not apply to offers of securities addressed solely to qualified investors or to fewer than 150 non-qualified investors (often referred to as "private placement" exemption). Since under Regulation, various exemptions are not exclusive and can be used jointly with other ones, the issuance of shares to a limited number of 149 non-qualified investors in each of a number of Member States can be further broadened by exemption covering issues of up to EUR 8 million or exemption covering issues to an unlimited number of qualified investors.

The original objective of the exemption was to serve as a kind of *'de minimis'* clause allowing issuers in a private placement to include a restricted circle of non-qualified investors in their offers (Capital Markets Union, 2015: 21). However, as a consequence of the enlargement of the EU, issuers can now offer to sell its securities to more than 4.000 non-qualified investors, without triggering any prospectus requirements whatsoever (Härkönen, 2017: 128; Staff Working Document: 19). This might be problematic at least as it runs counter the objective of investor protection. Surprisingly, the European Commission even considered raising this limit to 300 or even 500 persons in order to further benefit the development of crowdfunding across the EU. It was reported that in the UK, where crowdfunding is most developed, the average number of investors range from 50 to 400 persons (Staff Working Document: 20). However, this idea was abandoned since the vast majority of crowdfunding offers, despite reaching more than 150 non-qualified investors can still enjoy the 8 mln. EU exemption threshold. According to ESMA's report "Investment-based crowdfunding: insights from regulators in the EU" 2015, the average amount raised via the UK crowdfunding platforms between 2011 and the first quarter of 2014 was the equivalent of 270.000 EUR. Nevertheless, the biggest threat to the smooth development of the equity crowdfunding across the EU lies in the Member States' discretion to extend the prospectus disclosure requirements below that threshold because. As shown above, the diversity of domestic regulations is a substantial entry barrier for the issuers.

3.4. The exempt offerings in the US

Securities law in the United States involves dual regulation and is facilitated by both federal laws and the laws of the particular state in which securities are offered (the so-called *blue state laws*). The term originated after one of the state lawmakers declared that "if securities legislation was not passed, financial pirates would sell citizens everything in his state but the blue sky"', referring to a once widespread problem of financial piracy in the United States. "These financial pirates were engaged in the widespread sale of "pieces of paper" representing ownership in various corporate enterprises, many of which were valueless or nonexistent" (Warren, 1984: 1). The focus of this analysis is on the federal laws only since most federal exempt offerings create securities classified as *covered securities,* which preempt state registration (and other state disclosure requirements) and thus are subject only to federal regulations. Traditionally, blue sky laws were not preempted by Securities Act of 1933 and the Securities Exchange Act of 1934. Although many state laws are based on the Uniform Securities Act (USA) of 1956, designed as a template, most of them adopted variations that added to their complexity and diversity across states- not to mention the variation in judicial interpretations. In recent years, there have been continuous efforts to harmonize securities legal framework in order to reduce unnecessary obstacles to capital formation. To achieve uniformity and reduce the burden on issuers, the National Securities Markets Improvement Act (NSMIA) of 1996 has been passed. It classifies certain types of securities as covered securities, which are exempt from state registration and requirements and thus subject only to federal law.

The Section 5 of the Securities Act of 1933 (15 U.S.C. § 77a) requires that every offer (15 U.S.C. 77b(a)(3)) and sale of securities be registered with the Securities and Exchange Commission, unless an exemption from registration is available (Facilitating Capital Formation, 2020: 6). The Securities Act requires a company to file a registration statement with the SEC before it may offer its securities for sale. Issuers are not supposed to sell securities covered by the registration statement until the SEC staff declares the registration statement as "effective". Registration statement contains two essential parts. Part I is the prospectus, in which an issuer must clearly describe important information about its business operations, financial condition, results of operations, risk factors, and management. The prospectus must also include audited financial statements. The prospectus has to be delivered to every offeree (prospective investors). Part II contains additional information and exhibits which must be filed with the SEC but there is no obligation to deliver them to offerees (prospective investors).

An issuer who has filed a registration statement with the SEC becomes subject to regular disclosure obligations under the Securities Exchange Act of 1934. However, taking into account that registration is not always the most effective solution, the Securities Act sets forth a number of exemptions from its registration requirement as well as some additional exemptions the SEC is authorized to adopt. Section 3 of the Securities Act identifies types of securities that are exempt from the registration requirements, whereas section 4 of the Securities Act identify transactions that are exempt from the registration requirements. For instance, section 28 of the Securities Act, authorizes the Commission to exempt other persons, securities, or transactions to the extent "necessary or appropriate in the public interest and consistent with the protection of investors. Section 28 was added by the National Securities Markets Improvement Act of 1996.

Without a doubt, the US exempt offering framework is substantially more complex and diversified than the EU one. It has evolved and significantly expanded over time through SEC rules and major legislative changes, such as Jumpstart Our Business Startups Act of 2012 ("JOBS Act"), Fixing America's Surface Transportation Act of 2015 (the "FAST Act") and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (the "Economic Growth Act"). Over the past years, there has been a noticeable trend of increasing liberalization of the US prospectus law by raising the prospectus exemption thresholds and facilitating the use of these thresholds for smaller companies. At the same time, exemptions are still carefully balanced so as to where non-accredited investors are permitted to participate in the offering they usually include more investor protection (Facilitating Capital Formation: 13). It is worth noting, that the exempt offerings market in the US is highly successful. The SEC estimates that in 2019, exempt offerings accounted for USD 2.7 trillion (69.2 percent) of new capital compared to USD 1.2 trillion (30.8 percent) raised through registered offerings. Based on analyses by staff in the Commission's Division of Economic Risk and Analysis ("DERA") of data collected from SEC filings (Concept, 2019), at Section II.

Despite the fact that there are many types of exemptions, the focus of this analysis is put only on the following federal regulations: Regulation D, Regulation A and Regulation Crowdfunding. For the reasons specified below, the exemptions excluded from the analysis are: Section 4(a)(2) offerings, Rule 144A offerings, Regulation S offerings, Rule 147 and Rule 147A Intrastate offerings. Section 4(a)(2) of the Securities Act offerings are barely used since its criteria are vague and there is a convenient safe harbor available under Rule 506(b) of SEC Regulation D. Rule 144A is a safe harbor exemption from the registration requirements of Section 5. It applies to resales of securities to qualified institutional buyers only and can be used only by persons other than the issuer of the securities. Regulation S offerings allow for issuers to raise capital only outside the U.S. Rule 147 and Rule 147A provide for the intrastate offerings. Because this type of offering includes no more than one state, it is exempted from the federal law and jurisdiction of the SEC. It does, however, fall under the jurisdiction of particular state authorities. Rule 147 is a "safe harbor" under Section 3(a)(11) of the Securities Act and provides objective standards that an issuer can rely on to meet the requirements of that exemption. Rule 147A is an intrastate offering exemption adopted by the Commission in 2016. According to SEC, it seeks to accommodate modern business practices and communications technology and allows to raise capital locally, for instance by intrastate crowdfunding offerings.

3.5. Regulation D

The SEC Regulation D (17 C.F.R. §230.501 et seq.) establishes the most significant exempt offerings regime, by setting forth three separate exemptions from the registration requirements of the Securities Act. The SEC estimates, that in 2019, issuers in the Regulation D market raised approximately USD 1.56 trillion of which the vast majority (USD 1.5 trillion) was raised under **Rule 506(b)** – (Facilitating Capital Formation: 15). The offerings under **Rule 506(c)** raised approximately USD 66 billion, while offerings under **Rule 504** raised only around USD 228 million (Facilitating Capital Formation: 16).

The first one, and by far the most popular one, **Rule 506(b) of Regulation D** (referred to as "private placement"), is considered a "safe harbor" under Section 4(a)(2) of the Securities Act. Section 4(a)(2) only vaguely exempts from registration transactions by an issuer not involving any public offering. The so-called "private placement" exemption under Section 4(a)(2) of the Securities Act requires, that the purchasers of the securities: a) either have enough knowledge and experience in finance and business matters to be "sophisticated investors" (able to evaluate the risks and merits of the investment), or be able to bear the investment's economic risk, b) have access to the type of information normally provided in a prospectus for a registered securities offering and c) agree not to resell or distribute the securities to the public. If the issuer offers securities to even one person who does not meet these conditions, the entire offering may be in violation of the Securities Act. Hence, the more purchasers are involved in the offering, the higher the risk of not complying with Section 4(a)(2) requirements. To mitigate this risk, the Rule 506(b) provides objective standards that a company can rely on to meet the requirements of Section 4(a)(2) exemption. According to **Rule 506(b)** exemption, an issuer may offer and sell an unlimited amount of securities, provided that offers are made without the use of general solicitation or general advertising (Rule 502 (c)) and sales are made only to accredited investors and maximally 35 non-accredited, yet sophisticated investors. Sophisticated investors shall meet an investment sophistication standard pursuant to Rule 506(b)(2)(ii) (stating that each purchaser who is not an accredited investor either alone or with a purchaser representative has such knowledge and experience in financial and business matters that such purchaser is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within that description).

The second most popular exemption, **Rule 506(c) of Regulation D**, sets forth an exemption without any limitation on offering amount pursuant to which offers may be made with the use of general solicitation or general advertising. However, the eligible purchasers in the **Rule 506(c)** offering are only limited to accredited investors and the issuer is obliged to take reasonable steps to verify their accredited investor status (because of that, this exemption is often referred to as "accredited investor crowdfunding").

Both rule **506(b) and 506(c)** provide a federal preemption from state registration and qualification. However, the states still retain the authority to require notice filings and collect state fees (Section 18 of the Securities Act). Purchasers in offerings under both rules receive "restricted securities.", with limitations on resale. According to rule 502 d, except as provided in §230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(a)(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom.

A third exemption, and the least popular one, **Rule 504 of Regulation D**, exempts from registration the offer and sale of up to USD 5 million of securities in a 12-month period. It was adopted by the SEC, due to its authority under Section 3(b)(1) of the Securities Act. Section 3(b)(1) of the Securities Act establishes the SEC's exemptive authority for offerings of up to USD 5 million. Unlike other exempt offerings, rule 504 requires a company to comply with securities laws of states in which securities are offered or sold. In general, like under Rule 506(b) offers are to be made without the use of general solicitation or general advertising, and similarly to Rule 506(b) and 506(c) purchasers receive only "restricted securities" However, these limitations are inapplicable if the issuer complies with certain state registration requirements (Rule 504(b)(1)). Rule 504 is the only Regulation D exemption in which non-accredited investors can freely participate. In order to enhance the attractiveness of the Rule 504, the SEC has recently proposed to raise the exemption threshold to USD 10 million.

All Regulation D offerings are subject to "bad actor" disqualification provisions, which provides extra protection for investors against criminal and fraudulent activity by eliminating certain issuers from exempt offerings. Pursuant to Rule 506(d) bad actor disqualification, an offering is disqualified from relying on exemptions of Regulation D if the issuer or any other person covered by Rule 506(d) has a relevant criminal conviction, regulatory or court order or other disqualifying event.

On the surface, the Regulation D seems to be quite similar to the EU exemption framework. For instance, Rules 506(b) and 506(c) can be compared to Prospectus Regulation articles 1(4)(a) and 1(4)(b) - "private placement" exceptions for qualified and 149 non-qualified investors. In turn, Rule 504 can be confronted with the EU exemption from article 1(3) – first, because of the value of the threshold (EUR 8 million vs USD 5/10 million), and second, because both exemptions do not preempt the laws of particular states. However, there are many differences. Unlike Rules 506(b) and 506(c), the EU exemptions are not preempted from the national laws of the Member States. Second, the EU exemptions can be freely advertised and solicited, unlike Rules 506(b) and Rule 504. Most notably, the EU law lacks certain investor protection safeguards, such as provisions on resales of restricted securities or bad actor disqualification.

3.6. Regulation A/A+

The SEC Regulation A (which is often referred to as Regulation A+ after latest reforms) in its current shape was adopted by the SEC in 2015, due to its authority under Section 3(b)(2) of the Securities Act. Section 3(b)(2) directs the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to USD 50 million of securities within a 12-month period. Regulation A provides an exemption from registration for public offerings and has two offering tiers: tier 1, for offerings of up to USD 20 million and tier 2, for offerings of up to USD 50 million- both in a 12-month period. For offerings of up to USD 20 million, companies can choose to proceed under the requirements for Tier 2.

Some basic requirements are applicable to both tiers, such as company eligibility (Rule 251(b)), bad actor disqualification provisions (Rule 262), and disclosure obligations, including an offering statement. The offering statement consists of the contents required by Form 1-A filed with the Commission, including two years of financial statements and any other material information necessary to make the required statements, in light of the circumstances under which they are made, not misleading (Rule 252). Additional requirements that apply solely to Tier 2 offerings include requirements for audited financial statements and filing of ongoing reports – such as annual, semi-annual and current reports (Rule 257). Furthermore, there are investment limits on the amount of money a non-accredited investor may invest in a Tier 2 offering. The so-called Main Street investors (as opposed to Wall Street investors) cannot invest greater than 10 % of their annual income or 10 % of their net worth (Rule (d)(2)(i)(C)). However, unlike under the Tier 1 regime, issuances in Tier 2 offerings enjoy preemption of state registration and qualification.

Regulation A carries important benefits. First of all, securities are available not only to accredited but also to non- accredited investors, which on the one hand gives retail investors investment opportunities, and on the other hand, enables issuers to seek more diversified sources of funding. In addition, issuers utilizing Regulation A+ are permitted to "test the waters" with the potential purchaser and use solicitation materials both before and after filing the special offering statement (Rule 255). Moreover, securities purchased in offerings under Regulation A are not restricted on resale.

According to research, Regulation A is particularly favored by mature and later-stage companies, which treat its exemption as a stop on the way to regular initial public offering (Regulation A offerings are often referred to as "Mini IPOs") – (Office of the Advocate: 12). The SEC estimates, that from June 2015 till December 2019, issuers under Regulation A reported raising approximately USD 2.4 billion in 382 qualified offerings, the majority of which was raised under Tier 2 (USD 2.2 billion- 90.6 percent) (Facilitating Capital Formation: 18). Despite the fact that the value and volume of Regulation A offerings remain relatively modest (especially comparing to registered offerings or Rule 506(b) offerings), the financing levels after the 2015 amendments become incomparably higher than before. Moreover, there has been reported a steady increase in the aggregate amount raised annually under Regulation A for the past 3 years (84 % in 2018 and 42 % in 2019).

Considering the Regulation's young age, as well as its growing popularity, it is hard to deny its success. It is worth – noting that the Regulation A original solutions have no equivalent within the EU, not to mention its generous exemptions (USD 20 and 50 million vs. only EUR 8 million). Moreover, the SEC has recently proposed to increase the maximum offering amount under Tier 2 of Regulation A from USD 50 million to USD 75 million. Such move is believed by the US authorities to further facilitate capital formation by attracting the number of larger issuers, qualified and institutional investors as well as intermediaries to the Regulation A environment (Facilitating Capital Formation: 120-121). Since this measure will make Regulation even more competitive from a comparative perspective, it will definitely widen the gap between the US and the EU prospectus exemption framework. Taking this into account, the EU lawmakers should consider establishing an exemption threshold that would be in nature similar to Regulation A – with a considerably higher threshold and some form of alleviated disclosure requirements.

3.7. Regulation Crowdfunding

Regulation Crowdfunding (hereinafter referred to as "Reg. C."), effective from 2016, was adopted by the SEC, due to its authority under Title III of the JOBS Act which added Securities Act section 4(a)(6). Reg. C. provides an exemption from registration for crowdfunding transactions under certain conditions. "*Crowdfunding generally refers to a method of capital raising in which an entity or individual raises funds via the internet from a large number of people typically making small individual contributions*" (Facilitating Capital Formation : 19). It permits the offer and sale of up to USD 1,070,000 million of securities in a 12-month period (Rule 100(a)(1) of Regulation Crowdfunding) and introduces investment limits for individual investors. Pursuant to Rule 100 (a)(2), The aggregate amount of securities sold to any investor across all issuers in reliance on section 4(a)(6) of the Securities Act during the 12-month period shall not exceed: (i) The greater of $2,200 or 5 percent of the lesser of the investor's annual income or net worth if either the investor's annual income or net worth is less than $107,000; or (ii) 10 percent of the lesser of the investor's annual income or net worth, not to exceed an amount sold of $107,000, if both the investor's annual income and net worth are equal to or more than $107,000. General solicitation and advertising are permitted with certain limitations. Pursuant to Rule 203 of Regulation C. Reg. C. requires all transactions to take place online through an SEC-registered intermediary - a broker-dealer or a funding portal (section 4A(a) of the Securities Act (15 U.S.C. 77d-1(a)). Moreover, it requires that issuers and intermediaries provide certain specified information to investors and the SEC. Purchasers receive restricted securities which cannot be freely resold for a period of 12 months unless they are sold to certain persons i.e. the issuer of the securities, an accredited investor. See: Rule 501 of Regulation C. Importantly, crowdfunding offerings enjoy preemption of state registration and qualification. Similarly to other exempt offerings, Reg. C. offerings are also subject to "bad actor" disqualification provisions (Rule 503 of Regulation C).

The SEC estimates that from May 2016 till Dec. 2019, issuers in the Reg. C. raised approximately USD 170 million in 795 completed offerings (Facilitating Capital Formation : 20). Despite the market's stable growth over time, these numbers should be considered modest (Regulation Crowdfunding, 2019 : 4) - especially in comparison to main competitors, such as the European Union, United Kingdom or China. For example, in the UK, only in 2017, crowdfunding issuers raised the equivalence of approximately USD 450 million (3rd Report, 2017). There are many reasons for such a transatlantic gap. First, the UK crowdfunding market is significantly older (operates since 2011) and more developed. Second, alongside other EU states, it offers higher offering thresholds regimes than the US (EUR 8 million compared to USD 1 million) and favorable tax treatments of crowdfunding investments (Regulation Crowdfunding, 2019 : 15-17).

It is worth noting, that in the field of Crowdfunding the EU holds an undeniable advantage over the US. Although the EU lacks the coherent legal framework regarding crowdfunding and this matter is still under member states' exclusive discretion, multiple national laws allow crowdfunding offerings of up to EUR 8 million (which is the upper exemption threshold of Prospectus Regulation).

However, to significantly strengthen the US capital formation under Reg. C., the SEC lately proposed (Facilitating Capital Formation : 126) to raise the issuer offering limits to USD 5 million and increase the investment limits for investors (By no longer applying those limits to accredited investors and allowing investors to rely on the greater of their income or net worth in calculating their investment limit). These changes, if adopted, may fill the gap between the US and the EU crowdfunding and mitigate the European advantage.

4. Results

So, there are several findings that can be drawn from the above analysis.

Firstly, the US exempt offerings framework is more developed, complex and diversified than the EU one. In addition to Regulation D, which more or less mirrors the EU exemption system, the US system contains specific laws governing pre-IPO offerings (Regulation A) and crowdfunding (Regulation Crowdfunding) which find no equivalent in the EU. It can be argued, that this original set of rules is more mature and tailored to the specific needs of certain SMEs, rather than the European "one size fits all approach".

Secondly, when it comes to offers involving retail investors (non-accredited/non-qualified investors), the US issuers can raise much larger funds without triggering the obligation to produce a full-blown prospectus. Although, as of 2020, the upper exemption threshold in the EU (EUR 8 million) is higher than under Rule 504 (USD 5 million), the latter will soon likely be increased to USD 10 million. Also, many of the EU Member States (13 out of 27) set up their thresholds at way below EUR 8 million (even EUR 1 million). Moreover, under Regulation A, the issuers in the US can raise up to USD 50 million (USD 75 million due to latest proposal). With this regard, the US regulations give issuers much larger funding opportunities at a lower marginal cost, even though they are connected with some additional disclosure requirements.

Thirdly, again from the issuers' perspective, the US exempted offerings rules are generally more stringent and burdensome than the European ones. This is, among other things, mostly due to several solutions generally no existent in the EU system, such as the restrictions on advertising and general solicitation (Rule 506(b), Rule 504), restrictions on resales (Regulation D, Regulation Crowdfunding), investment limits for non-accredited investors (Regulation A, Regulation Crowdfunding), additional disclosure rules (Regulation D, Regulation A, Regulation Crowdfunding) and ongoing reporting requirements after the offer (Regulation A, Regulation Crowdfunding). **However**, this is partly mitigated by two factors. First, unlike most of the US exemptions, the EU exemptions do not preempt the requirements of the particular Member States, which in many cases are almost as costly and burdensome. Secondly, with the EU exemptions comes a great deal of uncertainty when it comes not only to national rules and competent authorities procedures but also differing civil liability regimes. The above impacts the small issuers' decision- making process as to conducting the offer. Undoubtedly, the presence of various exemption thresholds and different requirements in each jurisdiction increase transaction costs for small and medium enterprises and may lead to severe fragmentation of the EU capital markets.

Fourthly, from the perspective of market oversight and investor protection, the EU prospectus law provides for much more lax rules than its US counterpart (Härkönen, 2017: 140). The Prospectus Regulation completely lacks important investor protection safeguards, such as proportional (yet carefully scaled) disclosure, investment limits for non-qualified investors, provisions on resales of restricted securities, disqualification rules for bad actors or gatekeeper regulations (such as under US Regulation Crowdfunding). Even a limited disclosure regime would probably eliminate many fraudulent issuances and increase investor protection. This would translate into increased public confidence in smaller issuers, who naturally are more prone to investment risk. In turn, the investment limits can prevent retail investors from losing all his money after investing in a risky offering, while the bad actors' disqualification can eliminate fraudulent persons, who are willing to take advantage of the exemptions under EU law (Härkönen, 2017: 146). When it comes to investor protection in exempted offerings, it seems that the US prospectus law has it right.

5. Conclusion

The comparative analysis indicates, that the US solutions hold certain advantage over their European counterparts. First, they provide issuers with much larger funding opportunities at a lower marginal cost. Secondly, they provide more investment opportunities for retail investors. Last but not least, they provide important investor protection safeguards, which are absent under European law.

6. Acknowledgements

The article was written as part of the Polish National Center for Science scientific grant "Preludium" № 2018/29/N/HS5/02977.

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