

## Taking Stock of Securities and Fund-raising in the EU and UK

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### Introduction

The Prospectus Regulation 2017 and the FCA's reforms to the prospectus regime in the UK in the same year signal policy-makers' efforts to deliver on two aims. One is to make it attractive for companies to 'come to market' and become publicly traded entities, and the second is to continue to make the markets for publicly traded companies attractive to investors, especially retail investors. As the Kay Review states,<sup>1</sup> the importance of equity markets is that '[they] are a means of financial intermediation between savers and companies. Financial intermediation enables savers to achieve diversification and liquidity.' Savers participate in the economic wealth creation of the private sector in return for the goal of creating private value for long-term savings needs. Hence, the twin aims of facilitating companies to become publicly traded, realising their own financing needs and creating accessible and long-term means of investment for the democratic participation of savers, are essential to modern financialisation in the EU and UK.

However, the initial public offer has become a milestone with high barriers to entry for companies,<sup>2</sup> and savers in the EU and UK seldom participate directly in equity markets.<sup>3</sup> Even with constraints on bank-based finance for the needs of corporate finance, companies could be disincentivised from coming to market due to the high cost of the initial public offer<sup>4</sup> and the continuing regulatory burdens in terms of corporate transparency<sup>5</sup> and exposure to liability.<sup>6</sup> Companies can turn to private investment such as by private equity and venture capital funds.<sup>7</sup> The eclipse of the public corporation<sup>8</sup> can however have serious ramifications. The public trading of companies' securities is crucial to accessibility to liquid investment by institutions, who have become the major intermediaries transforming savers' long-term financial needs into investment into the corporate sector.

This article examines the extent to which the Prospectus Regulation 2017 and the FCA's 2017 reforms resonate with the supply and demand sides in the public securities market, in order to facilitate companies to come to market as well as retail investor participation. On the supply side, this article argues that 'coming to market' remains a high hurdle for companies even if reform has been introduced to relax some aspects of regulation. This is because policy-makers are too tethered to high standards of mandatory disclosure as the gold standard for fund-raising. Such an ideological

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<sup>1</sup> BIS, *The Kay Review of UK Equity Markets and Long-Term Decision Making* (July 2012) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf) at ch 2.1.

<sup>2</sup> above at ch2.

<sup>3</sup> S. M. Solaiman, 'Revisiting Securities Regulation in the Aftermath of the Global Financial Crisis: Disclosure - Panacea or Pandora's Box' (2013) 14 J. World Investment & Trade 646.

<sup>4</sup> See below.

<sup>5</sup> EU Transparency Directive 2014, Arts 4, 5 and Art 17, Market Abuse Regulation 2015 on a continuing disclosure regime of 'inside' information without undue delay to the markets. Difficulties for corporate compliance can be seen in debates raised in cases such as *Geltl v Daimler AG* [2012] EUECJ C-19/11 (28 June 2012).

<sup>6</sup> Continuing disclosure obligations can result in exposure to liability, such as the Tesco Plc earnings misstatement in 2014, 'Tesco fined £129m for overstating profits' (BBCNews, 29 March 2017) at <https://www.bbc.co.uk/news/business-39415681>.

<sup>7</sup> Indeed in Europe the investment by private equity is significant, at about 80bn euros at the end of 2018, see Invest Europe, *European Private Equity Activity Report and Data 2018* (2018) at summary report, p30, at <https://www.investeurope.eu/research/data-and-insight/>.

<sup>8</sup> Michael C Jensen, 'Eclipse of the Public Corporation' (Harvard Business Review, 1989) at <https://hbr.org/1989/09/eclipse-of-the-public-corporation>.

tether even affects policy design for novel and alternative means of corporate fund-raising. On the demand side, we also argue that the desire to expand opportunities for investors at the retail level is unlikely to be fulfilled. Retail investors suffer from structural disadvantages that are not addressed in the FCA's reforms, and policy design should indeed cater for their appetite for a wide range of investments.

Section A discusses the policy aim in bringing more of the supply side within the scope of prospectus regulation while calibrating for their needs. Section B discusses the policy aim, encompassed in the FCA's 2017 reforms, to make the initial public offer of securities an attractive and accessible investment for the retail investor. The article argues that the flaws in both approaches can be better addressed by focusing the initial public offer of securities as a premium investment product both for the supply and demand sides. Policy-makers should recognise that the prospectus regime cannot meet all corporate fund-raising needs, and would only appeal to and be productive for certain groups of retail investors. This limited expectation for the prospectus regime supporting the initial public offer market would assist policy-makers in facilitating the more effective working of this market, and to recognise and support diversity in other forms of corporate fund-raising and retail investment.

### **A. Policy for the Supply Side of the Initial Public Offer Market**

*Theoretically*, the initial public offer market should be looked at as the *default means of and gold standard for* corporate fund-raising. A company that wishes to raise funds to grow and expand,<sup>9</sup> pay down debt, invest in research and development,<sup>10</sup> or engage in asset or corporate acquisition<sup>11</sup> can offer public participation in its wealth creation, and in the process bind itself to the regime of public securities regulation in order to meet the social expectations of investor trust and confidence. The twin ideals of the *default means of fund-raising* and the *gold standard for doing so* underlie the prospectus passport,<sup>12</sup> which facilitates market integration in the Single capital market. Issuers of securities, by complying with the regulatory regime of extensive mandatory disclosure and producing a prospectus that is approved<sup>13</sup> by a national regulator, can request that such prospectus be passported to another member state as an offer document to that member state's market. The passporting regime allows issuers of securities to potentially be able to access the demand sides in any or all parts of the European Single Market and this boosts the issuer's fund-raising prospects.

The familiar story however, is that the gold standard for corporate fund-raising has largely become the reason for the initial public offer market not becoming the default means of fund-raising as theoretically hoped for. The demands of public securities regulation, which is extensive mandatory disclosure in the form of a lengthy and highly comprehensive prospectus, has led to highly expensive compliance expenditure on the part of issuers.<sup>14</sup> Further, issuers of publicly traded

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<sup>9</sup> H-Y Chiu, "Can UK Small Businesses Obtain Growth Capital in the Public Equity Markets? – An Overview of the Shortcomings in UK and European Securities Regulation and Considerations for Reform" (Spring 2004) 28 Delaware Journal of Corporate Law 933 at 937-946.

<sup>10</sup> Woojin Kim and Michael S Weisbach, "Motivations for Public Equity Offers: An International Perspective" [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=843608](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=843608). (accessed 15 March 2010).

<sup>11</sup> Ibid, and see James C Brau and Stanley E Fawcett, "Initial Public Offerings: An Analysis of Theory and Practice" (2006) 61 Journal of Finance 399 which suggests that acquisitions is the main reason why companies need increased capital and choose to go public.

<sup>12</sup> Art 24, Prospectus Regulation 2017.

<sup>13</sup> Approval is made pursuant to the criteria of completeness, consistency and comprehensibility, see Art 20, Prospectus Regulation 2017, and arts 36-38, Commission Delegated Regulation (EU) 2019/980 of 14 March 2019. See critique of this approval regime, Pierre Schammo, 'The Prospectus Approval System' (2006) 7 European Business Organisations and Law Review 501.

<sup>14</sup> Elizabeth Howell, 'An Analysis of the Prospectus Regime: The EU Reforms and the

securities must comply with continuing transparency obligations<sup>15</sup> in order to keep the trading markets fed with efficient levels of information to support continuing price formation and investor discipline.<sup>16</sup>

It is opined that the cost of preparing a prospectus for an initial public offer (IPO) is likely in the region of £1.3 million thereabouts,<sup>17</sup> and unless a company can afford this and is asking to raise way in excess of such cost, the public offer is not likely a viable or appealing fund-raising route for a company. In the PwC survey of IPOs in Europe in 2019,<sup>18</sup> the largest IPOs in the UK, Germany, Italy, France and Sweden raised over thousands of millions in euros.<sup>19</sup> These are companies that have already attained a certain level of maturity and are using the funds for next levels of growth. The IPO market is thus not the default means of fund-raising for most companies, especially for younger or start-up companies, simply because they may not be able to afford the regulatory compliance, and may not have the requisite trading records demanded by established stock exchanges.<sup>20</sup> This is despite the likelihood that younger or start-up companies are likely to be most in need of funds.

The Prospectus Regulation 2017 has responded to the supply side constraint in the following ways that will be critically discussed:

- (a) Certain exemptions from preparing a prospectus; and
- (b) A special 'growth' prospectus for small and medium sized enterprises.

#### **(a) Certain Exemptions from Preparing a Prospectus**

First, the Prospectus Regulation 2017 has increased the scope for exemptions from the requirement to prepare a prospectus from the previous 2003 version of the Prospectus Directive. This is in recognition for the needs of fund-raising which would become counterproductive if the full suite of prospectus regulation were applied. However, the ideological stickiness of the 'gold standard' of full mandatory disclosure still shadows these exemptions.

Small offers such as offers of securities under 1 million euros over 12 months would be exempt,<sup>21</sup> but member states have the discretion to exempt offers made up to 8 million euros over 12 months.<sup>22</sup> Small offers would also be offers made to 150 natural persons or less, as long as the amount of funds raised meet the ceilings referred to above.<sup>23</sup> Another category of exemptions relate to the large-denominated offer, in 100,000 euros or above per security. These are offered usually to sophisticated investors such as institutions. These thresholds have largely increased significantly from the thresholds in the 2003 Prospectus Directive which exempted large denominated offers of 50,000 euros or above for example, and defined small offers as made to 100 natural persons.

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'Brexit' Factor' (2018) European Company and Financial Law Review 69.

<sup>15</sup> See n5 and 6.

<sup>16</sup> The efficient capital markets hypothesis.

<sup>17</sup> See n14.

<sup>18</sup> PwC, *IPO Watch Europe 2019* at <https://www.pwc.co.uk/audit-assurance/assets/pdf/ipo-watch-q4-2019-annual-review.pdf>.

<sup>19</sup> Nexi Spa in Italy raised over 2,065million euros on the Borsa Italiana, Teamviewer AG raised over 1,969million euros on Deutsche Börse and Network International Holdings plc raised over 1,414million euros on the London Stock Exchange.

<sup>20</sup> Such as five years of trading records and audited financial statements for admission to the London Stock Exchange.

<sup>21</sup> Art 1(4), Prospectus Regulation 2017.

<sup>22</sup> Art 3(2)(b), *ibid*.

<sup>23</sup> Art 1(4), *ibid*.

Of these the large denominated offer and the 1-8 million euros ceiling have been the most significant exemptions. The large-denominated offer in particular would be made in private markets dominated by institutions who arguably can deal at arms length with the issuer. However, the Prospectus Regulation offers the nudge that a voluntary prospectus based on the gold standard can still be drawn up.<sup>24</sup> Indeed the gold standard continues to loom in the background as a recent survey shows that debt securities issuers who make issues of large-denominated offers draw up prospectuses, particularly for passporting purposes.<sup>25</sup>

Where the exempt small offer under 8 million euros is concerned, this has paved for the way for novel fund-raising by usually young or small companies, such as on online equity crowdfunding platforms. The unshackling from the prospectus regime allows such companies to raise far smaller amounts, sometimes up to 500,000 euros in more flexible ways engaging with investors, especially retail investors. This has been facilitated by platform technologies, and increasingly blockchain technology that facilitates direct fund-raising in a peer-to-peer manner from retail investors. However, as retail investors have increasingly participated in this space, EU regulatory policy has intervened into online equity crowdfunding<sup>26</sup> in order to provide a standardised approach to investor protection and a European passport to the Single Market. There is a conscious effort to ensure that this regulatory regime is proportionate but the ideological gold standard inevitably looms. In contrast, the UK's approach to regulating online equity crowdfunding<sup>27</sup> departs from the gold standard and can arguably better meet the needs of the market, to be discussed shortly. There is no development yet of EU regulation into blockchain-facilitated fund-raising, known as initial coin offerings,<sup>28</sup> but early policy soundings reflect path dependence upon the ideological tether to established tenets.<sup>29</sup> This may be counterproductive for fund-raising phenomena which ought to be 'exempt' from the prospectus gold standard. The universal application of this gold standard has been put to doubt in market developments and distinct regulatory thinking is not unwarranted for new issuer products.

The rise of platform technologies has changed structures of economic activity and markets, looking at the growth of eBay and Amazon for example, and how commercial relations are reshaped in relation to goods and services traditionally in the stranglehold of well-established sectors, such as hospitality, transport and finance. In hospitality for example, the old world was dominated by hotel and hospitality empires that erected barriers to access to this industry unless competitors were resourced in real estate assets, service provider networks and regulatory expertise. AirBnB

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<sup>24</sup> Art 4, *ibid*.

<sup>25</sup> ESMA, *EEA Prospectus Activity 2017* (Oct 2018) at [https://www.esma.europa.eu/sites/default/files/library/esma31-62-1114\\_eea\\_prospectus\\_activity\\_in\\_2017.pdf](https://www.esma.europa.eu/sites/default/files/library/esma31-62-1114_eea_prospectus_activity_in_2017.pdf) at sections 3.2, 4.

<sup>26</sup> 'Europe becomes reality for crowdfunding' (7 Jan 2020) at <https://october.eu/europe-becomes-reality-for-crowdfunding/>.

<sup>27</sup> FCA, *Loan-based ('peer-to-peer') and investment-based crowdfunding platforms: Feedback to CP18/20 and final rules* (July 2019) at <https://www.fca.org.uk/publication/policy/ps19-14.pdf>.

<sup>28</sup> Philip Hacker and Chris Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' (2018) *European Company and Financial Law Review* 645 on distinguishing ICOs from IPOs, but see Philipp Maume and Mathias Fromberger, 'Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws' (2019) *Chicago Journal of International Law* 548; Alex Collomb, Primavera de Fillippi and Klara Sok, 'Blockchain Technology and Financial Regulation: A Risk-Based Approach to the Regulation of ICOs' (2019) *10 European Journal of Risk Regulation* 263; Dmitri Boreiko, Guido Ferrarini & Paolo Giudici, 'Blockchain Startups and Prospectus Regulation' (2019) *20 European Business Organisations and Law Review* 665.

<sup>29</sup> *Final report of the Expert Group on Regulatory Obstacles to Financial Innovation: 30 recommendations on regulation, innovation and finance* (Dec 2019) at [https://ec.europa.eu/info/publications/191113-report-expert-group-regulatory-obstacles-financial-innovation\\_en](https://ec.europa.eu/info/publications/191113-report-expert-group-regulatory-obstacles-financial-innovation_en).

fundamentally changed this when it introduced a business model of bringing together people with spare rooms in residential flats onto a common platform to offer as holiday accommodation for visitors to their cities.<sup>30</sup> Similarly in finance, young, small or private companies looking to raise funds could be confined to business angels and private equity funds, and sharp deals are often cut with these so that funds can be raised upon trading off control and governance.<sup>31</sup> Platform technologies work to bring the needs of young or small companies to a common platform in order to appeal to members of the public for modest amounts of investment, which collectively could meet these companies' needs. Online equity crowdfunding could be the lifeline for a start-up restaurant,<sup>32</sup> or Vegan supermarket<sup>33</sup> and has increasingly become popular in EU member states where there is sufficient 'crowd' interest to support small companies.<sup>34</sup>

Although initially unregulated in the UK, the UK's Financial Conduct Authority has introduced regulation for platforms since 2015 and have recently enhanced the regulatory regime for platforms. The regulatory regime is still relatively light-touch as no mandatory disclosure document is required and platforms have the freedom to improve on their best practices to elicit from issuers and make available to investors relevant information.<sup>35</sup> However platforms must ensure that retail customers are advised, and to that end need to comply with the suitability requirements for giving investment advice.<sup>36</sup> This investor protection approach crucially relies on the legal standard of suitability of advice and the potential civil consequences of unsuitable advice to incentivise advisors to serve their customers' interests. This is in place of trusting that mandatory disclosure in standardised forms by issuers would be sufficient. Arguably the mandatory advice approach can deliver stronger investor protection as investors' motivations on platforms can be better understood in a relational paradigm. Empirical research has found that social and personal motivations underlie crowdfunding decisions as investors could be following friends on social media,<sup>37</sup> or feel obliged to fund a family member or friend.<sup>38</sup> These behavioural issues can be better picked up in an advisory context. A mandatory disclosure approach of offering standardised disclosure would only leave investors to make sense of the information for themselves, and investors' bounded rationality is well-discussed.<sup>39</sup>

In the face of local growth in online equity crowdfunding and local demand, a number of EU member states have introduced their own platform regulations,<sup>40</sup> but commentators<sup>41</sup> increasingly called for a European approach, so that online crowdfunding platforms can also obtain a passport to access

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<sup>30</sup> Arun Sundarajan, *The Sharing Economy* (Mass: MIT Press: 2016) on how platform technologies facilitate the commercialisation of large assets so that their 'spare capacities' can be commoditised.

<sup>31</sup> Jesse M Fried and Mira Ganor, 'Agency Costs of Venture Capitalist Control in Start-ups' (2006) 81 *New York University Law Review* 967.

<sup>32</sup> Gary Usher's restaurants for example, see 'How to crowdfund a restaurant empire' (The Guardian, 16 July 2017) at <https://www.theguardian.com/lifeandstyle/2017/jul/16/how-to-crowdfund-a-restaurant-empire>.

<sup>33</sup> The VeganKind, crowdfunding on Seedrs.com, at <https://www.seedrs.com/thevegankind>.

<sup>34</sup> Dirk A Zetsche and Christina Preiner, 'Cross-Border Crowdfunding: Towards a Single Crowdlending and Crowdfunding Market for Europe' (2018) 19 *European Business Organisations and Law Review* 217.

<sup>35</sup> See n27.

<sup>36</sup> FCA Handbook COBS 9.3.5, and also generally 9.2, 9.4.

<sup>37</sup> Zetsche and Preiner (2018).

<sup>38</sup> This study is done in the context of online p2p lending but nevertheless is instructive on the dynamics in crowdfunding platforms, see Mingfeng Lin, Nagpurnanand R. Prabhala, Siva Viswanathan, 'Judging Borrowers by the Company They Keep: Friendship Networks and Information Asymmetry in Online Peer-to-Peer Lending' (2013) 59 *Management Science* 17.

<sup>39</sup> See S. M. Solaiman, 'Revisiting Securities Regulation in the Aftermath of the Global Financial Crisis: Disclosure - Panacea or Pandora's Box' (2013) 14 *J. World Investment & Trade* 646 and citations within.

<sup>40</sup> Zetsche and Preiner (2018).

<sup>41</sup> *Ibid* and Guido Ferranini, 'Regulating FinTech: Crowdfunding and Beyond' (2017) *European Economy* 121.

other member states' markets, and a minimum standard of investor protection can be evenly secured. This has now been achieved at the EU level. This regime is different from the UK's and is ideologically more tethered to the gold standard of prospectus regulation. First, the EU regulation requires a mandatory disclosure document of 'Key Investment Information' to be produced.<sup>42</sup> As argued above, this article does not think a standardised disclosure document prepared on the basis of a rational investor is necessarily an optimal approach to securing investor protection.<sup>43</sup> Next, the EU crowdfunding regulation would only apply to issuers of offers up to 5million euros. It is queried why the cap at 5 million euros if member states are able to exempt offers of less than 8million euros from the prospectus requirement? Further the limits for retail investors are lower than in the UK,<sup>44</sup> and it is uncertain if a mandatory test for investors to determine their retail status or otherwise would be cumbersome.<sup>45</sup> It is queried if the ideological tether to the gold standard in prospectus regulation inhibited more liberalised thinking for the crowdfunding regulatory regime, and for rather low amounts that could be raised, the compliance requirements and demand side limitations may be relatively demanding.

### **(b) The Growth Prospectus**

Next, the Prospectus Regulation 2017 provides for a pared down version of the full prospectus, in the form of the Growth Prospectus, so that small and medium sized companies may be able to take advantage of a European passport for fund-raising on the basis of complying with the growth prospectus.<sup>46</sup>

Small and medium sized companies are defined as 'companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding 43million euros and an annual net turnover not exceeding 50 million euros'.<sup>47</sup> This is closer to the UK's Companies act definition of medium sized companies,<sup>48</sup> which calibrate the company's compliance under the Act proportionately. Indeed small companies under the Act are defined to have assets under £2m and turnover not exceeding £3.26m, with less than 50 employees.<sup>49</sup> In this regard there is a significant sector of companies that would be unable to utilise the growth prospectus.

The growth prospectus is subject to a highly prescribed template for disclosure, which contains not unseemingly onerous items such as an operating and financial review including financial and non-financial performance, 2 years' worth of audited historical financial statements, profit forecasts and estimates, corporate governance information including remuneration policy information etc.<sup>50</sup> Further, the disclosure of 'material risk factors' unique to the company is mandatory, whether for the gold standard prospectus or the growth prospectus.<sup>51</sup> It can be argued that compared to the process for admission to a second tier growth market that is local to particular jurisdiction, such as the Alternative Investment Market (AIM) in London, or the Euronext Growth which spans Belgium, the Netherlands and France, the EU's pan-European growth prospectus can seem more onerous to

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<sup>42</sup> See n23.

<sup>43</sup> Eg Solaiman (2013); Steven L Schwarcz, 'Disclosure's Failure in the Subprime Mortgage Crisis' (2008) Utah Law Review 1109.

<sup>44</sup> See n27.

<sup>45</sup> Ibid.

<sup>46</sup> Art 15, Prospectus Regulation 2017.

<sup>47</sup> Art 2(f), *ibid*.

<sup>48</sup> Section 465.

<sup>49</sup> Section 382.

<sup>50</sup> Annex 24, Commission Delegated Regulation (EU) 2019/980.

<sup>51</sup> Art 16, Prospectus Regulation 2017.

comply with. For example, although the AIM requires 3 years' worth of audited financial statements from would-be issuers, the mandatory disclosure prescriptions are less detailed, revolving around business description and principal risks but would not be as demanding as an operating and financial review, and including forecasts and estimates.<sup>52</sup> Further, the AIM moderates its relatively less onerous mandatory disclosure requirement by requiring companies to appoint an independent director to prepare for its admission to trading and compliance and to work with a Nominated adviser to oversee shareholder protection throughout the admission process.<sup>53</sup>

In addition, Howell<sup>54</sup> also argues that the growth prospectus may not be that useful as smaller companies are likely to tap their local markets for funds rather than access pan-European markets. Their smaller profiles may mean that only local markets may be more familiar with them and would respond to such fund-raising.

## **B. Policy for the Demand Side of the Initial Public Offer Market**

The gold standard of mandatory prospectus disclosure is based on the lowest common denominator of the retail investor, hence the high levels of comprehensive transparency. Although commentators<sup>55</sup> laud the theoretical optimality of disclosure in relation to comparability and comprehensiveness, the retail investor would invariably find the prospectus too lengthy and technical to understand. The EU has since 2003 introduced a mandatory summary to accompany the prospectus and the summary has over time become a regulated disclosure document with prescribed key information, though intended to be non-jargonistic and technical.<sup>56</sup>

It may be said that the summary's availability may crucially appeal to the retail investor, who has become a rare participant in initial public offers. However, a retail investor cannot rely only on the summary to make an investment decision as any mis-disclosure can only be actionable against the issuer if the prospectus is read in full with the summary.<sup>57</sup> Further, Howell opines that many summaries are 'cut-and-paste' versions of the prospectus and little effort is made to make the summary a dedicated document for laymen.<sup>58</sup> Moreover, retail investors are not motivated to participate in the IPO environment as it is highly unfavourable to them. Underwriters for IPOs bookbuild by liaising with institutional investors first and offer them usually discounted securities.<sup>59</sup> Hence, retail investors would not be able to access the best price.

Further, although a minimum investment of £1,000 is the usual minimum investment requirement in an IPO, households in the UK on average have a median yearly income of £29,000<sup>60</sup> and would likely

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<sup>52</sup> London Stock Exchange, *A Guide to the AIM* (version 2015) at <https://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/a-guide-to-aim.pdf>.

<sup>53</sup> *ibid.*

<sup>54</sup> Howell (2018).

<sup>55</sup> John C Coffee, "Market Failure and the Economic Case for a Mandatory Disclosure System" (1984) 70 *Virginia Law Rev* 717; Merritt B Fox, "Rethinking Disclosure Liability in the Modern Era" (1997) *Washington U Law Quarterly* 903.

<sup>56</sup> Art 7, Prospectus Regulation 2017 and Commission Delegated Regulation (EU) 2019/980.

<sup>57</sup> Art 11, Prospectus Regulation 2019.

<sup>58</sup> Howell (2018).

<sup>59</sup> Solaiman (2016); Iris H-Y Chiu, 'IPOs- Perspectives from the Supply and Demand Side' in D Prentice and A Reisberg eds, *Corporate Finance Law: UK and EU Perspectives* (Oxford: Oxford University Press 2010) at article 6.

<sup>60</sup> Available from the Office of National Statistics as of 2019, at <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyearsending2019provisional>.

find that it is luxury to have spare £1,000s to invest in IPOs. Further retail investors are able to invest in other financial products that offer diversification, a *prima facie* way of risk management. Retail investors would be able to spread a £1,000 investment over many peer-to-peer loans offering attractive interest rates on Zopa.co.uk<sup>61</sup> for example, or invest tax free in lower minimum sums in ISA products.<sup>62</sup> Many collective investment scheme products require lower minimum investments<sup>63</sup> and so do alternative investment products such as online equity crowdfunding.<sup>64</sup>

In this context, the FCA has introduced reforms in 2017 to revive retail investor interest in IPOs so that IPOs are still available and offered to all. The FCA found<sup>65</sup> that companies only publish their prospectuses at the very last minute ahead of admission to trading, after firming up the bookbuilding and pricing of the securities with institutional investors. Institutional investors hardly need the information in the prospectus as they would have been privy to information during the bookbuilding process and connected analyst research leading up to the public offer. The prospectus has become a mere formality for compliance and retail investors do not feature as issuers' target market at all.

The FCA now requires prospectuses to be published much earlier so that retail investors can benefit from information in the public domain. Issuers are required to brief both unconnected and connected research analysts. Further, connected research cannot be published until at least one day after unconnected research is published or at least 7 days after the prospectus is filed. This forces issuers to publish at least a base prospectus even without the final pricing information ahead of the bookbuilding process.<sup>66</sup> Unconnected analyst research is also facilitated to enrich the information environment for retail investors. However as discussed above, the deterring factors for the retail investor may be the capability to assess the investment opportunity and the lack of access to prices earmarked for institutional investors.<sup>67</sup>

### **C. The Initial Public Offer as a Targeted and Premium Product, and Concluding Remarks**

The gold standard for corporate fund-raising, which is comprehensive and often maximum mandatory disclosure, can arguably be perceived to have attained not just internationally convergent but also ideological status. This is in no small part attributable to its status as a New Deal reform in the US, forming a fundamental tenet of the social contract between economy and society in relation to public-facing fund-raising. The EU's tethered stance to this ideological tenet prevails in its financial regulation in general, from securities regulation to crowdfunding, investment fund<sup>68</sup> and packaged product regulation.<sup>69</sup> The retail financial investor or consumer is regarded as best served by mandatory disclosure.

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<sup>61</sup> <https://www.zopa.com>.

<sup>62</sup> Such as £500.

<sup>63</sup> Such as £100 for some tax-free ISA investments, see offering by Nutmeg for example at <https://support.nutmeg.com/hc/en-us/articles/115000356932-Minimum-investment>.

<sup>64</sup> Minimum of £10 on Seedrs.com, an online equity crowdfunding platform.

<sup>65</sup> FCA, *Reforming the Availability of Information in the UK Equity IPO process* (2017) at <https://www.fca.org.uk/publications/policy-statements/reforming-availability-information-uk-equity-ipo-process>.

<sup>66</sup> FCA Handbook COBS11A.

<sup>67</sup> for example parity of price access is suggested by Luca Enriques, 'EU Prospectus Regulation: Some Out-of-the-Box Thinking' (10 May 2016) at <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/eu-prospectus-regulation-some-out-box-thinking>.

<sup>68</sup> UCITs Directive 2009 also provides for mandatory pre-sale prospectuses.

<sup>69</sup> The 'Key Information' document as the gold standard for investor protection, Art 13, PRIIPS Regulation 2014.



Although information-rich markets are crucial for analysis, retail investors are no longer utilising the information supplied optimally or directly. Infomediaries' work such as research and analysis and credit ratings for debt issues provide shortcuts to investors' assessment of investment-related information. Even institutional investors rely heavily on such shortcuts.<sup>70</sup> Compliance with the prospectus is now more of a defensive compliance-based requirement to protect against ex post liability, especially if US securities investors, who may be able to galvanise class securities litigation, are involved.<sup>71</sup> It is questioned if there should be such faithful proliferation of mandatory disclosure tenets as the gold standard for investor protection, and whether alternative forms of fund-raising that have arisen precisely to avoid the cost of prospectus-based fund-raising, should still be tethered to disclosure-based framework. Besides, a disclosure-based framework results in investors fending for themselves and behavioural findings of investors' bounded rationality suggest that assumptions of rationality that support the outworking of mandatory disclosure are misplaced.<sup>72</sup> In comparison, the mandatory advice regime for retail investors under the UK's regulation of crowdfunding platforms seems a different but pertinent measure as investors obtain help at pre-sale stage, which is crucially important for making an optimal investment decision.

It is unlikely that underwriters would be incentivised to attract retail investors by offering an advisory service as they would have to meet a suitability standard that can increase compliance cost and litigation risk. Hence, it may be timely to consider the public offer of mature companies' securities as a premium product which ideally only institutional investors would consider and purchase. In that light, policy-makers should consider the utility of the extensive mandatory disclosure requirement and the summary for institutional investors,<sup>73</sup> and whether scaling back ex ante prescriptions and facilitating ex post liability as a form of market discipline may be more desirable.

Institutional investors are well-placed to exercise market discipline in ex post liability regimes as they are well-resourced and can organise representative litigation against issuers for mis-disclosures. It is arguably time to consider if the EU and UK would facilitate civil liability regimes in greater detail than the current skeletal state.<sup>74</sup> For example, if mandatory disclosure is pared down, issuers can be held to the same standard of civil liability for any pre-sale representations made outside of the prospectus to institutions during the bookbuilding process. Further it should be considered if contingency fees should be allowed for securities litigation. It may be argued that contingency fees can be misused and this encourages a floodgate of litigation against issuers. However such contingency fee agreements can be sanctioned with the approval of court in preliminary proceedings that aim to establish a viable case on the merits, like under the preliminary proceedings in derivative litigation.<sup>75</sup>

There is scope for rethinking the 'default' modus of the securities regulation regime as based on comprehensive mandatory disclosure pitched at the lowest common denominator, the retail

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<sup>70</sup> Richard E Mendales, "Collateralized Explosive Devices: Why Securities Regulation Failed to Prevent The CDO Meltdown, And How To Fix It" (2009) University of Illinois Law Review 1359.

<sup>71</sup> Discussed for example in Marc Moore, 'Redressing Risk Oversight Failure in UK and US Listed Companies: Lessons from the RBS and Citigroup Litigation' (2017) 18 European Business Organisations and Law Review 733.

<sup>72</sup> Niamh Moloney, *How to Protect Investors: Lessons from the EC and the UK* (Cambridge: Cambridge University Press 2010).

<sup>73</sup> Abolition of the summary is also advocated in Enriques (2016).

<sup>74</sup> Art 11, Prospectus Regulation 2017.

<sup>75</sup> S262(1), Companies Act 2006. This has been sometimes criticised as being rather onerous but courts are clear that they are not deciding merits but are looking for 'real prospects' of arguability, see *Mission Capital plc v Sinclair* [2008] All ER (D) 225.

investor standard. Such rethinking can allow us to reform regulatory regimes with diverse standards so that retail investors' needs can be met where they are truly participating in those markets. Further, a more efficient initial public offer market that is realistically targeted at institutional investors can evolve, perhaps with no less market discipline.