

DANNY BUSCH

***THE FUTURE OF THE CAPITAL MARKETS UNION  
AFTER BREXIT***

2

---

2018

**ISSN 2282 - 667X**

**Direttore responsabile:** *Francesco Denozza*

**Editorial Board/Direzione scientifica:** *Pierre-Henri Conac, Jorge Manuel Coutinho de Abreu, Francesco Denozza, Stefan Grundmann, Carlo Ibba, Jonathan Macey, Marco Maugeri, Vincenzo Meli, Massimo Miola, Andrea Perrone, Serenella Rossi, Giuliana Scognamiglio, Ruggero Vigo*

**Editorial Staff/Redazione scientifica:** *Alessio Bartolacelli, Elisabetta Codazzi, Chiara Garilli, Carmen Herrero Suarez, Corrado Malberti, Alessio Scano, Alessandra Zanardo*

**Referees/Revisione scientifica:** *Niccolò Abriani, Elisabetta Bertacchini, Vincenzo Calandra Buonauro, Lucia Calvosa, Stefano Cerrato, Antonio Cetra, Nicoletta Ciocca, Monica Cossu, Concetto Costa, Renzo Costi, Emanuele Cusa, Vincenzo Di Cataldo, Philipp Fabbio, Marilena Filippelli, Carlo Felice Giampaolino, Gianvito Giannelli, Paolo Giudici, Andrea Guaccero, Gianluca Guerrieri, Giuseppe Guizzi, Aldo Laudonio, Mario Libertini, Elisabetta Loffredo, Giorgio Marasà, Marisaria Maugeri, Aurelio Mirone, Paolo Montalenti, Mario Notari, Michele Perrino, Paolo Piscitello, Giuseppe B. Portale, Gaetano Presti, Roberto Sacchi, Luigi Salamone, Davide Sarti, Laura Schiuma, Maurizio Sciuto, Renato Santagata, Antonio Serra, Marco S. Spolidoro, Lorenzo Stanghellini, Mario Stella Richter, Andrea Tina, Alberto Toffoletto, Umberto Tombari, Paolo Valensise, Francesco Vella, Andrea Vicari, Roberto Weigmann*

## THE FUTURE OF THE CAPITAL MARKETS UNION AFTER BREXIT

DANNY BUSCH\*

TABLE OF CONTENTS: 1. Introduction. – 2. CMU objectives. – 3. EBU–CMU relationship. – 4. Regulatory burden. – 5. Better Regulation and Call for Evidence. – 6. Towards supervisory convergence in Europe. – 7. Sustainable finance. – 8. Prospectus. – 9. Better access of SMEs through capital markets. – 10. Investment funds. – 11. Securitisations. – 12. FinTech and Crowdfunding. – 13. Clearing and settlement of securities transactions. – 14. Macro-prudential policy framework. – 15. Concluding remarks.

1. *Introduction**Capital Markets Union Action Plan*

When the European Commission under President Juncker published the original Capital Markets Union (CMU) Action Plan, the tone was still self-assured:

‘The Commission’s top priority is to strengthen Europe’s economy and stimulate investment to create jobs. The EUR 315 billion investment plan, up and running less than a year after the Commission took office, will help to kick-start that process. To strengthen investment for the long term, we need stronger capital markets. These would provide new sources of funding for business, help increase options for savers and make the economy more resilient. That is why President Juncker set out as one of his key priorities, the need to build a true single market for capital – a Capital Markets Union for all 28 Member States.’<sup>1</sup>

*Brexit*

After the United Kingdom signalled its intention to leave the European Union in the Brexit referendum of 23 June 2018, little of this self-assurance remained. The news came as a bombshell worldwide. The referendum result was particularly sobering for the European Commission. British Commissioner for Financial Services Jonathan Hill<sup>2</sup>, who had been

---

\* Prof. Dr. Danny Busch, M.Jur. (Oxon.) is Chair of Financial Law and Director of the Institute for Financial Law (IFL), University of Nijmegen, the Netherlands. He is also Visiting Professor at Università Cattolica del Sacro Cuore di Milano, Università degli studi di Genova, and Université de Nice Côte d’Azur, Member of the Dutch Banking Disciplinary Committee (Tuchtcommissie Banken), and Member of the Appeal Committee of the Dutch Complaint Institute Financial Services (Klachteninstituut Financiële Dienstverlening, KiFiD). E-mail: [d.busch@jur.ru.nl](mailto:d.busch@jur.ru.nl). This paper was completed on 18 July 2018. No account could be taken of developments since that date. It is based in part on the author’s article *A Capital Markets Union for a Divided Europe*, *Journal of Financial Regulation* (2017), 262–279. The ideas and analysis contained in this paper will be further expanded in a more comprehensive work forthcoming in FEDERICO FABBRINI & MARCO VENTORUZZO (eds), *Research Handbook of EU Economic Law*, Edward Elgar Publisher 2019.

<sup>1</sup> European Commission, Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30.09.2015, 3. See for an early assessment of the CMU Action Plan for example WOLF-GEORG RINGE, *Capital Markets Union for Europe – A Political Message to the UK*, *Law and Financial Markets Review* 9 (2015), 5.

<sup>2</sup> Full title: Commissioner for Financial Stability, Financial Services and Capital Markets Union.

the driving force behind the CMU, immediately tendered his resignation and was succeeded by Valdis Dombrovskis from Lithuania. In the light of this development the obvious question is whether the CMU Action Plan is still realistic if London, Europe's financial heart, no longer participates. The Commission clearly considers that it is. This was already apparent from its communication of 14 September 2016 entitled 'Capital Markets Union – Accelerating Reform'.<sup>3</sup>

### *Trump*

More bad news resulted from the US presidential election. Donald Trump has become the 45<sup>th</sup> President of the United States. For the time being, anti-European and anti-globalist sentiment have triumphed in the UK and the US. Brexit and Trump's 'America First' administration are bad news for European integration and for the plans for a European Capital Markets Union. For the time being, President Putin is the laughing third party in geopolitical terms.

### *Italy*

The wave of populism and anti-Europe has also reached the European Continent. The most recent example is Italy, where the anti-European populists won the parliamentary elections of 4 March 2018. After confusing and lengthy negotiations, the League (led by Matteo Salvini) and the Five Star Movement (led by Luigi Di Maio) formed a populist and Eurosceptical coalition, with Giuseppe Conte as Prime Minister (previously a law professor at the university of Florence).

### *Poland, Hungary, the Netherlands*

Other examples are Poland and Hungary. In many other countries on the Continent, including the Netherlands, developments are moving in the wrong direction as well. In the Dutch elections on 15 March 2017, the anti-Europe and anti-Muslim party of Geert Wilders (PVV) did not manage to become the largest party in the Dutch Lower House (*Tweede Kamer*), but it was a close call.

### *Revival of the French-German tandem*

The recent revival of the French-German tandem may perhaps give us some hope. In France the independent pro-European and socio-liberal presidential candidate Emmanuel Macron beat the populist and anti-European candidate Marie Le Pen with 65% against 35% on 7 May 2017. Legislative elections were held on 11 and 18 June 2017 (with different dates for voters overseas) to elect the 577 members of the 15th National Assembly of

---

<sup>3</sup> European Commission, Capital Markets Union – Accelerating Reform, COM(2016) 601 final, 14.9.2016, 7. See on Brexit and the financial sector, for example, KERN ALEXANDER, CATHERINE BARNARD, EILIS FERRAN, ANDREW LANG & NIAMH MOLONEY, *Brexit and Financial Services – Law and Policy*, Hart/Bloomsbury 2018; EDDY WYMEERSCH, *Some Aspects of the Impact of Brexit in the Field of Financial Services*, in DANNY BUSCH, EMILIOS AVGOULEAS & GUIDO FERRARINI (eds), *Capital Markets Union in Europe*, OUP 2018, 81-96; NIAMH MOLONEY, *Capital Markets Union, Third Countries, and Equivalence*, in DANNY BUSCH, EMILIOS AVGOULEAS & GUIDO FERRARINI (eds), *Capital Markets Union in Europe*, OUP 2018, 97-139.

the French Fifth Republic. The En Marche! party Macron founded in 2016 presented candidates under the banner of La République En Marche! (REM) in alliance with the centrist Democratic Movement (MoDem), together securing 350 seats – a substantial majority – in the National Assembly at the expense of the Socialist Party (PS), reduced to 30 seats, and the Republicans (LR), reduced to 112 seats. In short, Macron took control of the French National Assembly and assumed the lead role on reform of the European Union.

Federal elections were held in Germany on 24 September 2017 to elect the members of the 19th Bundestag. After difficult and lengthy negotiations, the CDU/CSU reached a coalition agreement with the SPD to form a Grand Coalition, the fourth in post-war German history. The new government took office on 14 March 2018. The agreement came after a failed attempt by the CDU/CSU to enter into a 'Jamaica coalition' with the Greens and the Free Democrats, which the latter pulled out of citing irreconcilable differences between the parties on migration and energy policy.

At the same time, from a German point of view, the French plans for more Europe are radical, especially in budgetary terms. In addition, Merkel's position has recently been put under a lot of pressure due to a conflict with her Bavarian CSU Interior Minister Seehofer on the ever-sensitive topic of immigration. The future of the French-German tandem is far from certain.

It is clear that the populists should not be ruled out and be taken seriously. So, whether the recent political developments will pose an existential threat to the EU or will instead spark a new wave of European integration within the EU27 remains to be seen. The Commission in any event takes the latter stance: due to Brexit and Trump there is all the more reason to accelerate the CMU Action Plan.

Populists will undoubtedly see this as a surrealistic move which underlines the bankruptcy of Europe's institutions. The populist's interpretation will be that an 'out-of-touch political and intellectual elite' is pressing ahead with more integration, contrary to the stated wish of the 'people' to have less integration.

On the other hand: the EU27 should move forward to create integrated capital markets now that it is losing its only truly European capital market based in the UK. Let us now turn to considering some key aspects of the CMU Action Plan. After all, one thing is clear: the European legislative machinery is still turning over at full speed, regardless of whether or not this is realistic in the present political climate.

## *2. CMU objectives*

CMU must make it easier for providers and receivers of funds to come into contact with one another within Europe, especially across borders. This is regardless of whether it is arranged through the intermediary of a bank, through the capital markets or through alternative channels such as crowdfunding. In addition, more non-bank funding will help

to lessen dependence on the traditional banking industry and enhance the ability to cope with economic shocks.<sup>4</sup>

This overarching objective is broken down by the Commission into seven more specific objectives:

- (i) financing for innovation, start-ups and non-listed companies;
- (ii) making it easier for companies to enter and raise capital on public markets;
- (iii) investing for longer-term, infrastructure and sustainable investment;
- (iv) fostering retail investment;
- (v) strengthening banking capacity to support the wider economy;
- (vi) facilitating cross-border investment;
- (vii) strengthening the capacity of EU capital markets.<sup>5</sup>

### 3. EBU–CMU relationship

Another European project – the European Banking Union (EBU) – was clearly born under a more favourable constellation. Although the EBU is not yet complete, managing to establish a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) within the eurozone in such a short space of time is a tremendous achievement. The SSM has been operational since 4 November 2014 and provides for the European Central Bank (ECB) in Frankfurt to carry out prudential supervision directly over the main banks within the eurozone. Moreover, since 1 January 2016 the Single Resolution Board (SRB) in Brussels has been in charge of the orderly resolution of failing banks in the eurozone.<sup>6</sup>

How do these two European mega projects relate to one another? And, above all, what are the differences? First, the CMU focuses not on the financial services industry but on the European economy as a whole. Second, financial stability is not the primary driver (unlike in the case of the EBU), but is simply a precondition for the development of the CMU.<sup>7</sup> Third, institutional issues do not form the essence of the CMU, although institutional reforms may be necessary in order to achieve its objectives.<sup>8</sup> Fourth, the geographical scope of the CMU is not confined to the eurozone but extends to the EU as a whole. Although Brexit means that the difference will be smaller, it will still exist. Fifth, the CMU is not triggered by crisis management challenges, but is part of a broader long-term agenda for structural change in Europe. This was markedly different in the case of the EBU. The main motive for establishing the EBU was the eurozone crisis. But sixth, the banks play an essential role in the capital markets, even in systems such as the US where

---

<sup>4</sup> See European Commission, *Capital Markets Union – Accelerating Reform*, COM(2016) 601 final (14 September 2016), 2.

<sup>5</sup> See [https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan\\_en](https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en) (heading ‘Overview of progress achieved and next steps’) (accessed on 18 July 2018). Initially, the CMU objectives were phrased in a slightly different manner, see DANNY BUSCH, *A Capital Markets Union for a Divided Europe*, *Journal of Financial Regulation* (2017), 262–279, at 265.

<sup>6</sup> See, for example, DANNY BUSCH & GUIDO FERRARINI (eds), *European Banking Union*, OUP 2015.

<sup>7</sup> See § 14 below.

<sup>8</sup> See § 6 below.

the capital markets are more highly developed. The correct initiatives for banks and capital markets can in this way be mutually reinforcing.<sup>9</sup>

#### 4. *Regulatory burden*

But what are the ‘correct initiatives’? In short, how does the Commission envisage achieving the CMU? The CMU cannot in any event be achieved by a single measure. Examination of the CMU Action Plan quickly reveals that the Commission believes the solution lies mainly in adjusting the legislation. In the following sections I will briefly review the Commission’s main CMU initiatives. Before doing so, however, I should first like to make some general observations about the regulation of the financial services industry.

To start with, properly regulating the financial services industry is no easy matter. Regulation should be neither unduly strict nor unduly lenient. Nor should it be unduly vague (since this is at the expense of legal certainty) or excessively detailed (since this is at the expense of flexibility).

Nonetheless, the regulatory (compliance) burden is starting to become a problem for the financial services industry. In response to the financial crisis, the Commission quickly erected a complex regulatory structure comprising as many as forty new directives and regulations. And this structure is not yet complete. A notorious example is the Capital Requirements Regulation (CRR), which takes up no fewer than 337 closely printed pages.<sup>10</sup> And this is just one regulation. Moreover, the rules sometimes contain mutually contradictory or overlapping provisions or even gaps. The complex interaction of all these new rules can also have undesirable economic consequences.

And, for the people who have to cope with this flood of legislation, are the rules still readily identifiable and comprehensible? This applies not only to staff of the financial services industry itself but also to the financial supervisors who have to monitor compliance with the rules. Hardly surprisingly, therefore, the supervisory authorities have seen a huge increase in their staff complement in recent years and hence also in the costs of supervision.

#### 5. *Better Regulation and Call for Evidence*

Fortunately, the Commission has recently become more aware of the problem of the regulatory burden. This is apparent from the Better Regulation Programme, which aims to cut down on the number of new rules and evaluate existing rules more critically.<sup>11</sup> In April

---

<sup>9</sup> See NICOLAS VÉRON & GUNTRAM WOLFF, *Capital Markets Union: A Vision for the Long Term*, *Journal of Financial Regulation* (2016), 130-153, at 132.

<sup>10</sup> Regulation (EU) No. 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, OJ EU L 176, 27 June 2013, 1-337.

<sup>11</sup>As regards Better Regulation, see, for example, European Commission, Better Regulation: Delivering better results for a stronger Union, COM(2016) 615 final, 14.09.2016.



2016 the Commission concluded an Interinstitutional Agreement on Better Law-Making<sup>12</sup> with the Council and the European Parliament.

‘The Commission sees this agreement as a joint commitment to focus on the big and urgent things, whilst striving for simple, evidence-based, predictable and proportionate laws which deliver maximum benefits for citizens and businesses.’<sup>13</sup>

It is also to be welcomed that on 30 September 2015, in its call for evidence in the context of the CMU, the Commission asked the market what rules are inconsistent and give rise to undesirable economic consequences.<sup>14</sup>

Out of the feedback received, one of the key points of criticism is that strict regulation is limiting the quantity of bank financing available in the economy. But other responses emphasise that the higher capital requirements (CRD IV and CRR<sup>15</sup>) are actually having a positive impact on investor confidence and will in due course benefit the economy. According to these respondents, the volume of lending has declined because demand for loans has fallen.<sup>16</sup> The Commission concludes that the strict capital requirements are necessary to ensure financial stability, but that the requirements can be relaxed in some areas. These changes have been taken into account in the current review of the European banking rules (so-called ‘CCR2 package’). The Commission published the CCR2 package and its response to the call on 23 November 2016.<sup>17</sup>

---

<sup>12</sup> Interinstitutional Agreement of 13 April 2016 on Better Law-Making, OJ EU 2016, L 123, 12 May 2016, 1-14.

<sup>13</sup> See European Commission, Commission Work Programme 2017 – Delivering a Europe that protects, empowers and defends, COM(2016) 710 final (25 October 2016), 16.

<sup>14</sup> European Commission, Call for Evidence – EU regulatory framework for financial services (downloadable at [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf)) (accessed on 18 July 2018).

<sup>15</sup> The full title of CRD IV (Capital Requirements Directive IV) is as follows: Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ EU L 176, 27 June 2013, 338-436. As regards the CRR (Capital Requirements Regulation), see note 10 above.

<sup>16</sup> See European Commission, Summary of Contributions to the Call for Evidence (available at [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses_en.pdf)), 8-9 (accessed on 18 July 2018).

<sup>17</sup> See European Commission, Call for Evidence – EU regulatory framework for financial services, COM(2016) 855 final, 23.11.2016, 4-7 (many more policy actions are listed here). The CCR2 package refers to the combination of risk reduction measures in the following proposals: Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 575/2013 and Regulation (EU) No 648/2012, COM(2016) 850 final, 23.11.2016; Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU, COM(2016) 854 final, 23.11.2016; Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU, COM(2016) 853 final, 23.11.2016; Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 806/2014, COM(2016) 851 final, 23.11.2016.



Another key point of criticism is that the legislation is not always proportionate, for example for small banks.<sup>18</sup> Here too, the respondents' concerns have struck a chord with the Commission. For example, the CRR2 package also provides for a less onerous disclosure regime and simpler remuneration rules for small, non-complex banks.<sup>19</sup>

There are also complaints about excessive compliance costs, especially for smaller institutions. These costs are due to the complexity and sheer number of rules and duplication of reporting requirements in various regulatory schemes. In addition, the quantity of information requested is not always proportionate to the targeted risk.<sup>20</sup> The Commission is also sympathetic to this oft-heard complaint. For example, the CRR2 package provides for a reduction of the reporting frequency for small, non-complex banks. In addition, the Commission has announced a more comprehensive study of reporting obligations in the financial services industry.<sup>21</sup>

But are the measures that have been announced sufficient? The Commission faces a difficult task. Determining the correct level of regulation for the financial services industry has always been hard. And the degree of complexity has now been increased by Brexit and the advent of Trump. Partly in anticipation of the call, the Commission launched a number of legislative initiatives as part of the CMU Action Plan. Below is a concise overview of some important legislative initiatives and supporting measures.

#### 6. *Towards supervisory convergence in Europe*

Having a harmonised set of rules is a necessary precondition for achieving an integrated European capital market, but is not sufficient in itself. To achieve actual integration, supervisory convergence within Europe is of the utmost importance.<sup>22</sup> Currently, ESMA only has direct supervisory powers with respect to credit rating agencies (CRAs) and trade repositories (TRs), as well as some product intervention powers (e.g. MiFID II).<sup>23</sup>

---

<sup>18</sup> See European Commission, Summary of Contributions to the Call for Evidence (available at [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses_en.pdf)), (accessed on 18 July 2018), 8-9, 12-13.

<sup>19</sup> European Commission, Call for Evidence – EU regulatory framework for financial services COM(2016) 855 (23 November 2016) 7-9.

<sup>20</sup> See European Commission, Summary of Contributions to the Call for Evidence (available at [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses_en.pdf)), 13-16 (accessed on 18 July 2018).

<sup>21</sup> See European Commission, Call for Evidence – EU regulatory framework for financial services, COM(2016) 855 final, 23.11.2016, 9-11.

<sup>22</sup> See also DANNY BUSCH, *A Stronger Role for the European Supervisory Authorities in the EU27*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 28-54; EMILIOS AVGOULEAS & GUIDO FERRARINI, *A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 55-78.

<sup>23</sup> See on direct supervision of credit rating agencies and trade repositories, and on direct product intervention powers, NIAMH MOLONEY, *EU Securities and Financial Markets Regulation* (3<sup>rd</sup> ed), OUP 2014, 670-676 (credit rating agencies), 614-615 (trade repositories), 825-832 (product intervention), 983-985 (credit rating agencies, trade repositories and product intervention). See on direct product intervention powers specifically under MiFID II/MiFIR, DANNY BUSCH, *Product Governance and Product Intervention Under MiFID II/MiFIR*, in DANNY BUSCH & GUIDO FERRARINI (eds), *Regulation of the EU Financial Markets: MiFID II and*

*CCPs, data reporting services providers, funds, benchmarks*

However, in its proposals of 13 June and 20 September 2017, the Commission proposes to grant ESMA additional direct supervisory powers with respect to: (i) Central Counterparties (CCPs), (ii) data reporting services providers; (iii) approval of certain prospectuses; (iv) certain harmonised collective investment funds (EuVECA, EuSEF and ELTIF); and (v) benchmarks.<sup>24</sup>

*PEPP providers*

In addition, in its proposal of 29 June 2017, the Commission proposes to introduce a pan-European Personal Pension Product (PEPP). PEPP providers will be supervised by the NCAs, but a PEPP may only be manufactured and distributed in the Union where it has been authorised by EIOPA.<sup>25</sup>

*Crowdfunding Service Providers*

See, finally, the 8 March 2018 Commission Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business. To complement the new regulation on crowdfunding, the Commission has also adopted a proposal for a directive amending MiFID II.<sup>26</sup> The proposal seeks to establish uniform rules on crowdfunding at EU level. It does not replace national rules on crowdfunding where they exist. A crowdfunding service provider can choose to (i) either provide or continue providing services on a domestic basis under applicable national law (including where a Member State chooses to apply MiFID II

---

*MiFIR*, OUP 2017, 123-146, at 143-146. 'MiFID II' stands for 'Markets in Financial Instruments Directive II'; 'MiFIR' stands for 'Markets in Financial Instruments Regulation'.

<sup>24</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095 and amending Regulation (EU) No 648/2012, COM (2017) 331 final (13 June 2017) (CCPs); Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, COM(2017) 536 final (20 September 2017).

<sup>25</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP), COM (2017) 343 final (29 June 2017) ('PEPP Proposal'). The idea of a legislative proposal was coined in European Commission, Capital Markets Union – Accelerating Reform, COM(2016) 601 final (14 September 2016), 4. See for an explicit announcement of a legislative proposal: European Commission, Mid-Term Review of the Capital Markets Union Action Plan, COM(2017) 292 final (8 June 2017), 6. See also on the topic (but written prior to the publication of the Commission proposal): MARK HEEMSKERK, RENÉ MAATMAN & BAS WERKER, *A Policy Framework for European Personal Pensions?*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 372-394.

<sup>26</sup> Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business, COM(2018) 113 final (8 March 2018); Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments, COM(2018) 99 final (8 March 2018).

to crowdfunding activities); or (ii) seek authorisation to provide crowdfunding services under the proposed regulation.

In the latter case, (i) authorisation allows crowdfunding service providers to provide crowdfunding services under a passport across all Member States; (ii) a legal person that intends to provide crowdfunding services shall apply to ESMA for authorisation as a crowdfunding service provider (Art. 10); and (iii) crowdfunding service providers shall provide their services under the supervision of ESMA (Art. 12). Please note that the regulation does not apply to crowdfunding services that are provided by project owners that are consumers (Art. 2(2)(a)). But the persons at the other end, i.e. those who grant loans or acquire transferable securities through a crowdfunding platform (investors) are also captured by the regulation if they are consumers (Art. 3(1)(g)).<sup>27</sup>

### 7. *Sustainable finance*

The Commission points out that we are increasingly faced with the catastrophic and unpredictable consequences of climate change and resource depletion. Current levels of investment are not sufficient to support an environmentally-sustainable economic system that fights climate change and resource depletion. According to the calculations of the Commission, more private capital flows need to be oriented towards sustainable investments to close the €180-billion gap of additional investments needed to meet the EU's 2030 targets of the Paris Agreement. The Commission concludes that the financial system has a key role to play here.<sup>28</sup>

#### *EU High-Level Expert Group on Sustainable Finance*

At the end of 2016, the Commission appointed a High-Level Expert Group on Sustainable Finance. On 31 January 2018, the expert group published its final report, offering a comprehensive vision on how to build a sustainable finance strategy for the EU. The Report argues that sustainable finance is about two urgent imperatives: (1) improving the contribution of finance to sustainable and inclusive growth by funding society's long-term needs; (2) strengthening financial stability by incorporating environmental, social and governance (ESG) factors into investment decision-making. The Report proposes eight key recommendations, several cross-cutting recommendations and actions targeted at specific sectors of the financial system.<sup>29</sup>

#### *Commission Action Plan on Sustainable Finance*

---

<sup>27</sup> See on crowdfunding (albeit written prior to the publication of the proposal) for example: GUIDO FERRARINI & EUGENIA MACCHIAVELLO, *FinTech and Alternative Finance in the CMU: The Regulation of Marketplace Investing*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 208-233.

<sup>28</sup> See European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final (8 March 2018), 1 ff.

<sup>29</sup> EU High-Level Expert Group on Sustainable Finance, *Financing a Sustainable European Economy* ([https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf)) (accessed on 18 July 2018).

On 8 March 2018 the Commission launched its Action Plan on Sustainable Finance. The Action Plan builds upon the group's recommendations to set out an EU strategy for sustainable finance. This Action Plan on sustainable finance is part of broader efforts to connect finance with the specific needs of the European and global economy for the benefit of the planet and our society.

Specifically, this Action Plan aims to: (i) reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth; (ii) manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and (iii) foster transparency and long-termism in financial and economic activity.

In the Action Plan these aims are translated into 10 concrete actions: (1) establishing an EU classification system for sustainable activities; (2) creating standards and labels for green financial products; (3) fostering investment in sustainable projects; (4) incorporating sustainability when providing financial advice; (5) developing sustainability benchmarks; (6) better integrating sustainability in ratings and market research; (7) clarifying institutional investors' and asset managers' duties; (8) incorporating sustainability in prudential requirements; (9) strengthening sustainability disclosure and accounting rule-making; (10) fostering sustainable corporate governance and attenuating short-termism in capital markets.<sup>30</sup>

#### *A unified EU classification system (taxonomy)*

On 24 May 2018 the Commission partially delivers on its Action Plan. First, a proposal for a unified EU classification system ('taxonomy'). It sets harmonised criteria for determining whether an economic activity is environmentally-sustainable. Step by step, the Commission will identify activities which qualify as 'sustainable', taking into account existing market practices and initiatives and drawing on the advice of a technical expert group that is currently being set up. This should provide economic actors and investors with clarity on which activities are considered sustainable so they take more informed decisions. It may serve as the basis for the future establishment of standards and labels for sustainable financial products, as announced in the Commission Action Plan on Sustainable Finance.<sup>31</sup>

#### *Investor's duties and disclosure*

Second, a proposal for investors' duties and disclosures. The proposed Regulation will introduce consistency and clarity on how institutional investors, such as asset managers, insurance companies, pension funds, or investment advisors should integrate environmental, social and governance (ESG) factors in their investment decision-making process. Exact requirements will be further specified through Delegated Acts, which will be adopted by the Commission at a later stage. In addition, those asset managers and

---

<sup>30</sup> European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final (8 March 2018).

<sup>31</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, COM(2018) 353 final (24 May 2018).

institutional investors would have to demonstrate how their investments are aligned with ESG objectives and disclose how they comply with these duties.<sup>32</sup>

#### *Low-carbon benchmarks*

Third, a proposal regarding low-carbon benchmarks. The proposed rules will create a new category of benchmarks, comprising the low-carbon benchmark or ‘decarbonised’ version of standard indices and the positive carbon impact benchmarks. This new market standard should reflect companies’ carbon footprint and give investors greater information on an investment portfolio’s carbon footprint. While the low-carbon benchmark would be based on a standard ‘decarbonising’ benchmark, the positive-carbon impact benchmark would allow an investment portfolio to be better aligned with the Paris agreement objective of limiting global warming to below 2° C.<sup>33</sup>

#### *Advice to clients on sustainability*

Fourth, the Commission aims for better advice to clients on sustainability. The Commission has launched a consultation to assess how best to include ESG considerations into the advice that investment firms and insurance distributors offer to individual clients. The aim is to amend Delegated Acts under the Markets in Financial Instruments Directive (MiFID II) and the Insurance Distribution Directive (IDD). When assessing if an investment product meets their clients’ needs, firms should also consider the sustainability preferences of each client, according to the proposed rules. This should help a broader range of investors access sustainable investments.<sup>34</sup>

### 8. *Prospectus*

The prospectus forms an essential part of the CMU. It provides companies with access to the European capital markets. As part of the CMU, the Commission proposed to replace the Prospectus Directive by a Prospectus Regulation. The proposal has already been adopted. The new rules will be binding per July 2019.<sup>35</sup>

The Prospectus Regulation has three main aims: (i) to reduce the administrative burden of drawing up of a prospectus for all issuers, in particular for SMEs, frequent issuers of securities and secondary issuances; (ii) to make the prospectus a more relevant disclosure

---

<sup>32</sup> Proposal for a Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341, COM(2018) 354 final (24 May 2018).

<sup>33</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks, COM(2018) 355 final (24 May 2018).

<sup>34</sup> See [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2681500\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2681500_en) (MiFID II) and [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2681527\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2681527_en) (IDD) (both accessed on 18 July 2018).

<sup>35</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, *PbEU* 2017, L 168/12. See on the new Prospectus Regulation BAS DE JONG & TOMAS ARONS, *Modernizing the Prospectus Directive*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 237-252.



tool for potential investors, especially in SMEs; and (iii) to achieve more convergence between the EU prospectus and other EU disclosure rules (such as the Transparency Directive and PRIIPs<sup>36</sup>).

To achieve objective (i), the Prospectus Regulation provides for an optional ‘light regime’ geared to the needs of the SMEs and their investors so that they can draw up a relatively concise and therefore cheaper prospectus. This option in fact exists only if the SME does not have a stock exchange listing. This light regime is intended for a listing on a so-called SME growth market (this is not a regulated market but a multilateral trading facility or MTF) (Art. 15).<sup>37</sup> Companies which already have a listing on a regulated market or an SME growth market and wish to issue additional shares or bonds will in due course be able to issue a new, simplified prospectus (Art. 7 and 14). This should give more flexibility and less paperwork for repeat players. At present, 70% of the approved prospectuses are follow-up issues by companies that already have a listing.

To achieve objective (ii), it is desired to make the prospectus more concise and a better source of information. At present, even the summary is often very long and couched in complicated legalese not readily intelligible to most investors. The prospectus published on the occasion of ABN AMRO’s initial public offering on 10 November 2015 consisted of no fewer than 729 closely printed pages.<sup>38</sup> This creates additional costs for issuing institutions, without providing clear benefits for investors. The Commission now wishes to ensure that prospectuses are shorter and more accessible by indicating what information is necessary. The prospectus summary should be modelled as much as possible after the consumer-tested key information document (KID) required under the PRIIPs Regulation. This can then also help to achieve objective (iii). Whatever the case, summaries which can presently quite easily take up 15 pages or more (34 closely printed pages in the case of ABN AMRO) will in due course be limited to a maximum of 7 pages, ‘using characters of readable size’ (Art. 7(3)).

Furthermore, prospectuses presently contain such a veritable flood of ‘risk factors’ that identifying those that are really pertinent becomes very difficult. In the case of ABN AMRO, the risk factors took up 55 closely printed pages. This market practice is intended to protect issuing institutions and their advisers from civil liability, but is prejudicial to investor protection. Under the new rules, only risk factors that are material and specific to the issuing institution and the securities may be included in the prospectus. The issuing institution is required to allocate risk factors across a limited number of categories by reference to their relative materiality, based on its assessment of the probability of their

---

<sup>36</sup> The full title of the Transparency Directive is: Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ EC L 390 of 31.12.2004, 38 ff.). The full title of the PRIIPs Regulation is: Regulation (EU) no. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ EU L 352 of 9.12.2014, 1 ff.).

<sup>37</sup> Art. 15.

<sup>38</sup> For the prospectus, see: [https://www.abnamro.com/nl/images/do\\_not\\_index/IPO/Prospectus.pdf](https://www.abnamro.com/nl/images/do_not_index/IPO/Prospectus.pdf) (accessed on 18 July 2018).

occurrence and the expected magnitude of their negative impact. ESMA can develop guidelines for this purpose. This should enable investors to gain a better understanding of the potential risks of their investment decisions. In addition, only the most important risk factors may be mentioned in the summary (Art. 16). However, the possibility of incorporation by reference is expanded (Art. 19).

Whether all of this will make prospectuses a more useful information document in the future (through being more readable and, hopefully, more concise) remains to be seen. The information paradigm continues to be the deciding factor. The key to investor protection therefore remains ensuring that investors are properly informed and can thus make well-considered investment decisions. And this is despite the fact that many people doubt whether all the different information available to the investor really helps in making an informed and considered decision.<sup>39</sup>

Finally, the fact that the prospectus rules will shortly all be set out in an EU regulation that is directly applicable will undoubtedly result in a higher degree of harmonisation. Nonetheless, a supervisory authority in one Member State may be more flexible and grant approval more easily than its counterpart in another Member State. Such a situation could be countered by working on a harmonised approach to supervision which, as noted previously, is high on the agenda of both ESMA and the Commission. In its Proposal of 20 September 2017 the Commission proposes to give ESMA the power to approve at least certain prospectuses.<sup>40</sup>

#### 9. *Better access of SMEs through capital markets*

On 24 May 2018 the Commission tabled proposals to amend the Markets Abuse Regulation (MAR), MiFID II and the newly adopted Prospectus Regulation. Facilitating SMEs' access to finance at each stage of their development is central to the Commission's CMU project. Much has already been achieved in facilitating SME's access to finance, notably simplified prospectus rules. Requirements for SME growth markets which enable smaller companies to get equity capital and debt finance (bonds) also entered into force in January 2018 (MiFID II).<sup>41</sup>

But, as the Commission points out, more still needs to be done: the number of SME initial public offerings today has halved compared to 2006-2007. Companies listed on an SME Growth Market are required to comply with several EU rules, such as the MAR, the Prospectus Regulation or MiFID II. However, in many respects, EU laws do not differentiate between larger and smaller companies. For example, MAR applies to all share issuers irrespective of size. With the 24 May 2018 proposals, the Commission wants to

---

<sup>39</sup> See, for example, NIAMH MOLONEY, *How to Protect Investors – Lessons from the EC and the UK*, Cambridge, CUP 2010, 288 ff; LUCA ENRIQUES & SERGIO GILOTTA, *Disclosure & financial markets regulation*, in Niamh Moloney, Eilis Ferran & Jennifer Payne, *The Oxford Handbook of Financial Regulation*, Oxford, OUP 2015, 511-536; VEERLE COLAERT, *Investor Protection in the Capital Markets Union*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 341-371.

<sup>40</sup> See § 6 above.

<sup>41</sup> See on SME Growth Markets: ANDREA PERRONE, *Small and Medium Enterprises Growth Markets*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 253-267; RÜDIGER VEIL & CARMINE DI NOIA, *SME Growth Markets*, in BUSCH & FERRARINI (eds), *supra* note 23, 345-362.



establish a more proportionate regulatory environment to support SME listing while safeguarding investor protection and market integrity.<sup>42</sup>

The main proposed changes to SME listings rules are as follows. First, adaptation of the current obligations to keep registers of persons that have access to price-sensitive information so as to avoid excessive administrative burden for SMEs, while ensuring that competent authorities can still investigate cases of insider dealing.

Second, allowing issuers with at least three years of listing on SME Growth Markets to produce a lighter prospectus when transferring to a regulated market. The proposal goes even further than the already overhauled and simplified prospectus rules in terms of making it easier for firms to tap Europe's capital markets.

Third, making it easier for trading venues specialised in bond issuance to register as SME Growth Markets. This will be done by setting a new definition of debt-only issuers. Those would be companies that issue less than EUR 50 million of bonds over a 12-months period.

Fourth, create a common set of rules on liquidity contracts for SME Growth Markets in all Member States, in parallel to national rules. This refers to agreements between issuers and financial intermediaries (a bank or an investment firm) for buying and selling shares of and on behalf of the issuer. By so doing, the financial intermediary enhances the liquidity of the shares.

#### 10. *Investment funds*

Investment funds play an important intermediate role in matching supply with demand for capital.<sup>43</sup> The CMU Action Plan therefore contains a good number of initiatives relating to investment funds.

##### *Venture capital*

First of all, there are various initiatives intended to strengthen the venture capital market.<sup>44</sup> On 1 March 2018, new rules on venture capital investment (EuVECA) and social entrepreneurship funds (EuSEF) entered into application, making it easier for fund managers of all sizes to run these funds and allowing a greater range of companies to benefit from their investments. The new rules will also make the cross-border marketing of EuVECA and EuSEF funds less costly and will simplify registration processes.<sup>45</sup>

---

<sup>42</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, COM(2018) 331 final (24 May 2018) (adjustments to MAR and the Prospectus Regulation). The proposal for adjusting the MiFID II framework is downloadable at file:///C:/Users/u148150/Downloads/PART-2018-241887V3%20(1).pdf (accessed on 18 July 2018).

<sup>43</sup> I use the term 'investment funds' here in a generic sense, namely to cover all collective investment schemes.

<sup>44</sup> For a critical stance see ERIK VERMEULEN, *Capital Markets Union: Why 'Venture Capital' is not the Answer to Europe's Innovation Challenge*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 193-207.

<sup>45</sup> See [https://ec.europa.eu/info/business-economy-euro/growth-and-investment/investment-funds\\_en](https://ec.europa.eu/info/business-economy-euro/growth-and-investment/investment-funds_en) (accessed on 18 July 2018).

In addition, in November 2017, the Commission published a ‘Call for expression of interest’ to assess whether asset managers are prepared to manage venture capital funds-of-funds with EU support in order to induce large institutional investors to invest in this investment category and thus boost the European venture capital industry. It received 17 applications by the 31 January 2017 deadline. As a first step, the Commission assessed all investment proposals and conducted the pre-selection based on their policy fit with the programme. Soon after, the European Investment Fund (EIF) conducted its standard due diligence process of the pre-selected candidates, six of which were selected for funding and invited to enter into negotiations with the EIF late in 2017. The first two signatures took place on 10 April 2018 in Brussels between IsomerCapital and EIF, and Axon Partners Group and the EIF. The remaining four – Aberdeen Standard Investments, LGT, Lombard Odier Asset Management and Schroder AdvEq – are expected to be finalised in the course of 2018.<sup>46</sup>

The Commission services have reviewed national tax incentives for venture capital and business angels. Building on this and on the initiatives envisaged under the 2016 Start-up and Scale-up Initiative, a study setting out good practices has been published on 8 June 2017.<sup>47</sup> It will support Member States’ policy design and implementation, including through the European semester, to improve the effectiveness of such tax incentives and foster the development of local capital markets.

#### *Cross-border distribution*

In addition, there are concerns about the regulatory and administrative barriers to cross-border distribution of investment funds. On 2 July 2016 the Commission published a consultation document to find out from stakeholders, including fund managers, investors and consumer representatives, what barriers currently exist to the cross-border distribution of funds in Europe. The Commission is mainly seeking specific examples such as the impact of marketing rules, administrative arrangements imposed by host countries, regulatory fees and notification procedures and also the most pertinent features of the tax environment.<sup>48</sup>

Investment funds in the EU are still small and less cost-efficient than in some other jurisdictions, while the distribution of funds remains geographically limited. The evidence collected during the public consultation shows that a significant reason for this is the lack

---

<sup>46</sup> See European Commission, Press release – VentureEU: eur 2.1 billion to boost venture capital investment in Europe’s innovative start-ups ([http://europa.eu/rapid/press-release\\_IP-18-2763\\_en.htm](http://europa.eu/rapid/press-release_IP-18-2763_en.htm)) (accessed on 18 July 2018).

<sup>47</sup> Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups ([https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_paper\\_69\\_vc-ba.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_paper_69_vc-ba.pdf)) (accessed on 18 July 2018).

<sup>48</sup> Consultation document CMU action on cross-border distribution of funds (UCITS, AIF, ELTIF, EUVECA and EUSEF) across the EU (<http://ec.europa.eu/finance/consultations/2016/cross-borders-investment-funds/>) (accessed on 18 July 2018). See on the cross-border distribution of funds (but written prior to the 12 March 2018 proposals): MATTEO GARGANTINI, CARMINE DI NOIA & GEORGIOS DIMITROPOULOS, *Cross-Border Distribution of Collective Investment Products in the EU*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 413-441.

of regulatory and supervisory convergence, including divergent national requirements on the use of the marketing passport under the UCITS and AIFM Directives.<sup>49</sup>

Greater cross-border distribution and in particular digital cross-border distribution would allow funds to grow, allocate capital more efficiently across the EU, and compete within national markets to deliver better value and greater innovation. Barriers to the cross-border distribution of investment funds were also mapped by the Commission and an expert group of Member States' representatives. The result was a roadmap of measures endorsed by Member States in May 2017 to tackle the first set of barriers identified and to identify and dismantle other potential barriers in CMU-relevant areas.<sup>50</sup>

On 12 March 2018 the Commission published two legislative proposals: (i) a directive to amend the UCITS directive and the AIFM directive; (ii) a regulation on facilitating cross-border distribution of collective investment funds and amending the Regulation on European venture capital funds and the Regulation on European social entrepreneurship funds.<sup>51</sup> The main goal is to streamline / harmonize marketing communications across the EU in a fairly high-level manner. AIFMs and UCITS management companies must inter alia ensure that (i) all marketing communications are identifiable as such, (ii) risks and rewards of purchasing units or shares of an AIF or UCITS are presented in an equally prominent manner; (iii) all information included in marketing communications is fair, clear and not misleading.

National competent supervisors must publish and maintain on their websites central databases containing all applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and the summaries thereof, in at least a language customary in the sphere of international finance. Fees or charges levied by competent authorities shall be proportionate to the expenditure relating to the authorisation or registration and the performance of the supervisory and investigatory powers.

ESMA must publish and maintain on its website a central database containing the national laws, regulations and administrative provisions concerning marketing requirements, and the summaries thereof, and the hyperlinks to the websites of competent authorities.

#### *Business growth funds*

To support equity financing for small, high-growth firms, Business Growth Funds in some Member States can provide a way for banks to provide equity funding instead of a loan. The Commission has consulted the Member States to gather information on similar

---

<sup>49</sup> See the Explanatory Memoranda of the proposals mentioned below.

<sup>50</sup> See the Explanatory Memoranda of the proposals mentioned below.

<sup>51</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds, COM(2018) 92 final (12 March 2018); Proposal for a Regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013, COM(2018) 110 final (12 March 2018).

initiatives across the EU. Based on replies received and other input, the Commission Services will explore ways to develop this source of equity funding with the Member States and public/promotional banks.<sup>52</sup>

#### *Loan-originating funds*

Finally, it is worth noting that ESMA issued an opinion on loan-originating funds in April 2016. The opinion identifies elements that should be part of a possible European framework on loan origination, if one is deemed necessary. The Commission will work with Member States and the European Supervisory Authorities (ESAs) to assess the need for a coordinated approach to loan origination by funds and the case for a future EU framework.<sup>53</sup>

#### 11. *Securitisations*

The underlying theory is simple. If the European market for securitisations is revived, this would free up capacity on banks' balance sheets by removing lending portfolios and transforming them into bonds through off-balance-sheet special purpose vehicles. In this way, scope could be provided for new loans and a strong boost given to both bank lending and capital market funding. But securitisations were in fact one of the root causes of the financial crisis, partly because loans were granted in the US to households that were totally incapable of keeping up the repayments on them (NINJA loans).<sup>54</sup> The credit rating agencies turned a blind eye because they were paid for their services by the bank originators of the securitisations.<sup>55</sup> Now the rules have been tightened up. This also applies to the rules for the rating agencies (Credit Ratings Regulation).<sup>56</sup>

In practice, the trick will be to revive the European securitisations market in such a way as to minimise the chances of things going badly wrong. The Commission has taken three initiatives for this purpose: (i) a proposal for Simple, Transparent and Standardised (STS) securitisations (STS Regulation)<sup>57</sup>; (ii) reduction of the capital requirements for banks that invest in STS securitisation products<sup>58</sup>; and (3) as soon as political agreement has been reached on the STS Regulation, the Commission wishes to propose a reduction in the capital requirements for insurers that invest in STS securitisations.<sup>59</sup> The first two initiatives

<sup>52</sup> European Commission, Capital Markets Union: First Status Report, SWD(2016) 147 final (25 April 2016), 5 (no. 4).

<sup>53</sup> European Commission, Capital Markets Union: First Status Report, SWD(2016) 147 final (25 April 2016), 5 (no. 5).

<sup>54</sup> NINJA stands for 'no income, no job, no assets'.

<sup>55</sup> For a clear description of events, see, for example, *Inside Job* (2010 film), director Charles Furgeson; Michael Lewis, *The Big Short*, 2nd ed., Penguin Books, London/NY 2011.

<sup>56</sup> For an overview of the relevant legal instruments, see: [http://ec.europa.eu/finance/rating-agencies/index\\_en.htm](http://ec.europa.eu/finance/rating-agencies/index_en.htm) (accessed on 18 July 2018).

<sup>57</sup> Proposal for a Regulation laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation, COM(2015) 472 final, 30.09.2015.

<sup>58</sup> Proposal for a regulation amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms, COM(2015) 473 final, 30.09.2015

<sup>59</sup> See European Commission, Capital Markets Union: First Status Report, SWD(2016) 147 final (25 April 2016), 2-3 (no. 1).

have been adopted in December 2017.<sup>60</sup> It will be necessary to wait and see whether these measures will be sufficient to revive the European securitisations market safely, particularly in view of the paralysing effect of Brexit and the efforts of the Trump administration to deregulate the financial sector.

#### 12. *FinTech and Crowdfunding*

On 8 March 2018 the Commission published its FinTech Action Plan. The aim is ambitious. It envisages to enable the financial sector to make use of the rapid advances in new technologies, such as blockchain, artificial intelligence and cloud services. At the same time, it seeks to make markets safer and easier to access for new players. This will benefit consumers, investors, banks and new market players alike, says the Commission.<sup>61</sup> However, it is no easy task to strike the right balance between easier market access for new players on the one hand, and investor protection and financial stability on the other. Be that as it may, as a first major deliverable, the Commission proposed new rules that should help crowdfunding platforms to grow across the EU's single market.<sup>62</sup>

#### 13. *Clearing and settlement of securities transactions*

The Commission notes that recent EU legislation has removed important barriers to the cross-border clearing and settlement of securities. Particular examples are EMIR and CSDR.<sup>63</sup>

---

<sup>60</sup> Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, *PbEU* 2018, L 347/35; Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms, *PbEU*, L 347/1. See further GERARD KASTELEIN, *Securitization in the Capital Markets Union: One Step Forward, Two Steps Back*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 464-483; STEVEN SCHWARCZ, *A Global Perspective on Securitised Debt*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 484-503.

<sup>61</sup> European Commission, FinTech Action plan: For a more competitive and innovative European financial sector, COM(2018) 109 final (8 March 2018). See on FinTech and the CMU (albeit written prior to the publication of the FinTech Action Plan): EMILIOS AVGOULEAS, *The Role of Financial Innovation in EU Market Integration and the Capital Markets Union*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 171-192.

<sup>62</sup> Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business, COM(2018) 113 final (8 March 2018); Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments, COM(2018) 99 final (8 March 2018).

<sup>63</sup> See European Commission, Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30.09.2015, 23. The full title of EMIR is: the European Markets Infrastructure Regulation (Regulation (EU) no. 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ EU 2012, L 201, 27 June 2012, 1-59. The full title of CSDR is: Central Securities Depositories Regulation (Regulation (EU) no. 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, OJ EU, L 257, 28 August 2014, 1-72. See further BAS ZEBREGS & VICTOR DE SERIÈRE, *Efforts to Strengthen the Clearing and Settlement Framework of the Capital Markets Union*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 526-555.

*Giovannini barriers*

Despite the progress that has been made, much remains to be done. Over ten years ago the main barriers were identified by the working group under the direction of Alberto Giovannini.<sup>64</sup> Many barriers have their origins in divergent national property and insolvency laws, as well as national laws regarding securities holdings. These differences can give rise to uncertainty in international relations, for example regarding the enforceability of collateral, and can threaten the resilience of cross-border settlement and collateral flows.<sup>65</sup>

*Conflict of laws rules for third party effects of transactions in securities and claims*

Against this backdrop, in April 2017 the Commission launched a public consultation (consultation on conflict of laws rules for third party effects of transactions in securities and claims) and established an Expert group on conflict of laws regarding securities and claims.<sup>66</sup> The group assisted the Commission by providing specialist advice from experts on private international law and financial markets as a sound basis for policymaking.

In March 2018 the Commission proposed the adoption of common conflict-of-laws rules on the third-party effects of assignments of claims.<sup>67</sup> The proposal complements the Rome I Regulation. It provides that, as a rule, the law of the country where the assignor has its habitual residence will govern the third-party effects of the assignment of claims. By introducing legal certainty, the new measures seek to contribute to promote cross-border investment, enhance access to credit and contribute to market integration.

The Commission's proposal is accompanied by a communication clarifying conflict-of-law rules for securities.<sup>68</sup> In this area, different EU directives (the settlement finality, the winding-up and the financial collateral directives) lay out specific provisions on which national law is applicable to the proprietary effects of cross-border transactions in securities. While broadly similar, these provisions sometimes differ when it comes to details. The communication seeks to clarify the Commission's views on these specific provisions.

*Derivatives clearing, CCPs & Brexit*

EMIR is a centrepiece of the legislation introduced in the wake of the financial crisis to make financial markets safer and more transparent. A key pillar of EMIR is the requirement for standardised OTC derivatives contracts to be cleared through a Central

---

<sup>64</sup> Giovannini Group, Second Report on EU Clearing and Settlement Arrangements, Brussels, April 2003 ([http://ec.europa.eu/internal\\_market/financial-markets/docs/clearing/second\\_giovannini\\_report\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/clearing/second_giovannini_report_en.pdf)) (accessed on 18 July 2018).

<sup>65</sup> See European Commission, Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30.09.2015, 24.

<sup>66</sup> See [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/securities-and-claims-ownership\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/securities-and-claims-ownership_en) (accessed 18 July 2018).

<sup>67</sup> Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM(2018) 96 final (12 March 2018).

<sup>68</sup> European Commission, Communication on the applicable law to the proprietary effects of transactions in securities, COM(2018) 89 final (12 March 2018).



Counterparty (CCP).<sup>69</sup> A CCP is a market infrastructure that reduces systemic risk and enhances financial stability by standing between the two counterparties to a derivatives contract (i.e. acting as buyer to the seller of risk and seller to the buyer of risk) and thereby reducing the risk for both.<sup>70</sup> EMIR also introduced strict prudential, organisational and business conduct requirements for CCPs and established arrangements for their prudential supervision to minimise any risk to users of a CCP and to underpin systemic stability.<sup>71</sup>

While the scale and scope of centrally-cleared transactions has expanded, the number of CCPs has remained relatively limited. There are currently 17 CCPs established in the EU, all of which are authorised under EMIR to offer their services within the Union - although not all CCPs are authorised to clear all asset classes (e.g. only 2 CCPs clear credit derivatives, only 2 CCPs clear inflation derivatives). An additional 28 third-country CCPs have been recognised under EMIR's equivalence provisions, allowing them to offer their services in the EU.<sup>72</sup> Accordingly, clearing markets are integrated across the EU and are highly concentrated in certain asset classes. They are also highly interconnected.<sup>73</sup>

While increased clearing via properly regulated and supervised CCPs reinforces systemic stability overall, the concentration of risk makes the failure of a CCP a low-probability but potentially extremely high-impact event. Given the centrality of CCPs to the financial system, the increasing systemic importance of CCPs gives rise to concerns. CCPs have themselves become a source of macro-prudential risk, as their failure could cause significant disruption to the financial system and would have systemic effects. For instance, large scale, uncontrolled termination and close-out of contracts cleared by CCPs could lead to liquidity and collateral strains across the market, causing instability in the underlying asset market and the wider financial system. As is the case with other financial intermediaries, CCPs are also potentially susceptible to 'runs' due to clearing members losing confidence in the solvency of a CCP. This could create a liquidity shock for the CCP as it attempts to meet its obligations to return the principal collateral (i.e. initial margin). The impact of a CCP failure due to increased concentration of risk would be amplified by a

---

<sup>69</sup> See for the clearing obligation Art. 4 in conjunction with Art. 5 EMIR. See generally on EMIR Ch. 24 of this volume.

<sup>70</sup> See for the definition of 'CCP' Art. 2(1) EMIR.

<sup>71</sup> See Art. 16 and Art. 40-50 (prudential requirements), Art. 26-39 (organisational and business conduct requirements). See European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095 and amending Regulation (EU) No 648/2012, COM (2017) 331 final (13 June 2017) ('EMIR Commission Proposal 13 June 2017'), recital (1) and see Explanatory Memorandum to Commission Proposal 13 June 2017 ('Explanatory Memorandum EMIR Commission Proposal 13 June 2017'), 2.

<sup>72</sup> In accordance with EMIR, ESMA provides a list of the third-country CCPs that have been recognised to offer services and activities in the Union. The third-country CCPs are established in 15 countries covered by CCP equivalence decisions adopted by the Commission, including Australia, Hong Kong, Singapore, Japan, Canada, Switzerland, South Korea, Mexico, South Africa and the US CFTC, Brazil, UAE, Dubai International Financial Centre (DIFC), India and New Zealand. See Explanatory Memorandum EMIR Commission Proposal 13 June 2017, 4, footnote 15.

<sup>73</sup> See Explanatory Memorandum EMIR Commission Proposal 13 June 2017, 3-4 (with further references).



growing interconnectedness between CCPs both directly and indirectly via their members (usually large global banks) and clients.<sup>74</sup>

In response, and in line with the G20 consensus, the Commission adopted a proposal for a Regulation on CCP Recovery and Resolution in November 2016.<sup>75</sup> The objective of the proposal is to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs. The CCP Recovery and Resolution proposal refocused attention on the supervisory arrangements for EU and third-country CCPs included in EMIR and the extent to which these arrangements can be made more effective five years after adoption of EMIR.<sup>76</sup>

In line with this, and in addition to the CCP Recovery and Resolution proposal, on 13 June 2017, the Commission proposed amendments to EMIR and the ESMA Regulation, with a view to regulating and supervising the systemic risk posed by CCPs and strengthening the role of ESMA. In order to avoid risks of regulatory and supervisory arbitrage the ‘CCP executive session’—established within ESMA—will be responsible for a more coherent and consistent supervision of CCPs. To this effect, ESMA may determine a third-country CCP to be systemically important, thereby subjecting it to stricter requirements. Acting on a recommendation from ESMA, the Commission may also determine a third-country CCP to be substantially systemically important. Subsequent to such a determination, the Commission may declare that the CCP may provide services in the Union only if it is authorised in the EU.<sup>77</sup>

Of course, the 13 June proposal is a direct response to Brexit. This may be gleaned from recital (24) of the proposal:

‘A significant amount of financial instruments denominated in the currencies of the Member States are cleared by recognised third-country CCPs.

This will increase substantially when the United Kingdom withdraws from the Union and the CCPs established there will no longer be governed by the requirements of this Regulation.

Cooperation arrangements agreed in the supervisory colleges will no longer be subject to the safeguards and procedures of this Regulation, including the Court of Justice of the European Union.

This implies significant challenges for Union and Member State authorities in safeguarding financial stability.’

---

<sup>74</sup> See Explanatory Memorandum EMIR Commission Proposal 13 June 2017, 4 (with further references).

<sup>75</sup> Proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, COM(2016) 856 final (28 November 2016). See on the proposal ZEBREGS & DE SERIÈRE, *supra* note 63, at 535-542.

<sup>76</sup> See Explanatory Memorandum EMIR Commission Proposal 13 June 2017, 4 (with further references).

<sup>77</sup> See for a more detailed discussion of the proposal: BUSCH, *supra* note 22, at 35-54. See also GUIDO FERRARINI & DAVIDE TRASCIATTI, *OTC Derivatives Clearing, Brexit, and the CMU*, in BUSCH, AVGOULEAS & FERRARINI (eds), *supra* note 3, 140-167.

#### 14. *Macro-prudential policy framework*

This brings us neatly to the theme of financial stability. As noted previously, financial stability is not the primary driver, unlike in the case of the EBU. It is merely a precondition for the development of the CMU,<sup>78</sup> albeit an important one. The Commission rightly requests that this receive explicit attention.<sup>79</sup>

Further to this request, the Commission published its consultation document on the EU macro-prudential framework on 1 August 2016. The consultation is about much more than financial stability in the context of the CMU, but is also intended in any event to determine the impact of more market-based finance on financial stability, to take action to enhance the monitoring of such risks and to examine whether the macro-prudential toolkit should be expanded. By promoting more diverse funding channels, the CMU will help to increase the resilience of the EU financial system. At the same time, there is a need to be alert to and enhance the monitoring of financial stability risks that may be linked to the growth of market-based financial flows.<sup>80</sup>

In September 2017, following its consultation in 2016, the Commission proposed amendments to the ESRB Regulation to ensure that the European Systemic Risk Board (ESRB) has the capacity to monitor potential risks to financial stability arising from market-based finance.<sup>81</sup>

#### 15. *Concluding remarks*

It is clear from what has been said above that there is no lack of well-intentioned initiatives. But is the CMU Action Plan sufficient to achieve an integrated European capital market? Numerous other measures are in any event conceivable.<sup>82</sup> And is the CMU Action Plan still realistic if London – Europe's financial heart – no longer takes part? And how will the Trump administration affect the CMU project? These are questions which cannot be answered with any certainty at present. The future is a black box. This has naturally always been the case, but Brexit and Trump are now forcing us to face facts. We are on the threshold of a period of great uncertainty. The European Union is facing some major tests. The time has come for a radical modernisation of the EU, including the governance of the European institutions and the European supervisory authorities such as ESMA. But this will require the European leaders to work together effectively. Let's hope for the best.

---

<sup>78</sup> See § 3 above.

<sup>79</sup> See European Commission, Capital Markets Union: First Status Report, SWD(2016) 147 final (25 April 2016), 9 (no. 9).

<sup>80</sup> European Commission, Consultation Document – review of the EU Macro-Prudential Policy Framework, 1 August 2016 ([http://ec.europa.eu/finance/consultations/2016/macprudential-framework/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2016/macprudential-framework/docs/consultation-document_en.pdf)).

<sup>81</sup> Proposal for a regulation of the European Parliament and of the Council on amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, COM(2017) 538 final (20 September 2017).

<sup>82</sup> See for example: DIEGO VALIANTE, *Europe's Untapped Capital Market – Rethinking financial integration after the crisis*, downloadable at <https://www.ceps.eu/publications/europe%E2%80%99s-untapped-capital-market-rethinking-integration-after-great-financial-crisis> (285 pp.); VÉRON & WOLFF, *supra* note 9, 130-153.