Introduction

Prospectus regulation is one of the core pillars of European securities regulation. The seeds of the prospectus regime, as we know it today, were sown by the Financial Services Action Plan and the Risk Capital Action Plan which foresaw many other measures that are nowadays pillars of the EU securities and financial markets framework.[1] In 2003, the call to modernise the 'Directives on prospectuses'[2] led to the adoption of a single directive, the Prospectus Directive ('PD'). As a Lamfalussy directive, it was given flesh by implementing legislation and, in time, by soft-law measures. Together, these measures put in place a more comprehensive regime of rules and disclosure requirements that apply to persons who wish to make a public offer or seek admission of securities to trading on a regulated market in the EU.

This book examines the prospectus disclosure regime and the institutional choices that underpin it. The PD was designed to succeed where earlier directives had failed. A new, improved, mutual recognition system – the so-called 'single passport' system – was fashioned to facilitate cross-border capital raising. A more aggressive form of 'maximum harmonisation' was supposed to bring about uniformity and, thereby, greater consolidation of rule-making competence at EU level. Since 2003, the regime and the institutional framework that governs it have developed. The directive was only recently amended in order to make it more effective and to ensure that the new European Securities and Markets Authority ('ESMA') has all the necessary powers to act in the prospectus field. The Lamfalussy framework, which deals with rulemaking, supervision and enforcement, has seen noteworthy changes as well. The Lisbon Treaty

[1] European Commission, 'Financial services: implementing the framework for financial markets: action plan' (COM(1999) 232, 11 May 1999) (the 'FSAP'), http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf; European Commission, 'Risk capital: a key to job creation in the European Union' (April 1998) (the 'RCAP'), http://ec.europa.eu/internal_market/securities/docs/risk_capital/sec98_552_en.pdf.

[2] 'FSAP' 22. See also 'RCAP' 23.

replaced the old comitology system, which, *inter alia*, governed decision-making at Lamfalussy Level 2, by new rules on delegated and implementing acts. What is more, the worldwide financial crisis gave, after some initial hesitations, the necessary impetus to a new round of reforms which ultimately led to important institutional changes, including the establishment of a new European System of Financial Supervision ('ESFS'). ESMA replaced the Committee of European Securities Regulators ('CESR') in January 2011. In short, the EU has firmly established itself as the main actor shaping prospectus disclosure regulation while collective securities actors such as ESMA are the main force for bringing about consistency in the application of EU securities legislation.

It is against this background that the book pursues two lines of enquiry, tied together by a common interest in European decision-making in the securities field.[3] It first examines the substantive law on prospectus disclosure, including the framework that governs its creation, implementation and enforcement. Often presented as a 'maximum harmonisation' directive, the reality is more complex: first, the scope and boundaries of the maximum harmonisation regime are not necessarily obvious; second, maximum harmonisation is only one facet of a regime which uses a mixture of regulatory techniques, including a form of equivalence-based regulation; third, the lack of an autonomous enforcement apparatus[4] forces the EU to rely on the enforcement efforts of national actors and on collective securities actors such as ESMA to keep order among competent authorities. Thus, although the EU legislature is the main force shaping the regulatory regime,[5] Member State competence persists in important areas. One such area is the approval of prospectuses. One of the main messages of this book concerns this approval system. It fulfils, for better or worse, an enforcement function, but curiously, it currently also allows safeguarding decision-making powers elsewhere; for example, in the field of equivalence-based regulation.

The second theme of this book concerns regulatory competition. As a subject of study, its interest has been in sharp decline. Calls in favour of

[3] I have gained much insight on EU decision-making from Fritz Scharpf's work on policy-making (e.g., F. Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford University Press, 1999); F. Scharpf, *Games Real Actors Play – Actor-Centered Institutionalism in Policy Research* (Westview Press, Boulder CO, 1997)).

[4] By 'enforcement', I mean mostly enforcement of EU rules and regulations against issuers and other market actors.

[5] For a more detailed analysis of the changes to the regulatory landscape in financial markets, see N. Moloney, *EC Securities Regulation* (Oxford University Press, 2008).

regulatory competition as an institutional arrangement in the securities markets field have mostly been silenced. The mainstream literature on securities regulation has mostly moved on, turning for inspiration and insights to new fields of interest such as law and finance, a scholarship that is more empirically grounded, but still controversial in its claims and conclusions.[6] And yet, the interest in regulatory competition is not exhausted. Indeed, the thesis of this book is that regulatory competition remains a subject of interest in the securities field. But there is a need to conceptualise it differently by engaging in a more meaningful manner with decision-making at European level. In the law and economics literature, which has dominated the study of regulatory competition and securities regulation, decision-making at EU level has mostly been outside the scope of enquiry. It has been treated as a 'black-box' and little time and effort has been invested in describing and examining 'what happens in the box, who acts and how'.[7] Deterministic assumptions about the behaviour of policy actors at EU level, with no further enquiry into the empirical reality of decision-making at this level, have left the securities literature with little useful insight. Likewise, harmonisation has been treated as an outcome or worse, a *fait accompli*, instead of being seen as a process involving actors with interests and ideas who are meant to find common agreement over sets of rules and arrangements. Law and finance scholarship has also been mostly unconcerned about the mechanics of European decision-making. Wide-scale empirical studies have admittedly shed new light on distinct legal systems and enforcement mechanisms, but here too decision-making at EU level has generally been sidestepped.[8]

Hence, there is a need for a more grounded approach which integrates European decision-making more closely into regulatory competition studies and pays due attention to the behaviour and decision-making of collective securities markets actors.[9] In short, the question is not whether regulatory competition is 'efficient', but how it affects EU decision-making

[6] See especially the work by La Porta, Lopez-de-Silanes, Shleifer and Vishny which I will discuss in Chapters 5 and 7.

[7] I borrow the phrase from C. Radaelli, 'The puzzle of regulatory competition' (2004) 24 *Journal of Public Policy* 1, 19.

[8] See Chapter 5 for details.

[9] In developing this perspective, I have, *inter alia*, benefited from Nicolaïdis's work on 'managed mutual recognition'. See e.g., K. Nicolaïdis, 'Regulatory cooperation and managed mutual recognition: elements of a strategic model' in G. Bermann, M. Herdegen and P. Lindseth (eds.), *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects* (Oxford University Press, 2000) 571.

and EU regulatory output in the prospectus field. The book attempts to work towards answers, sometimes in a descriptive manner, sometimes in a more analytical fashion, but at all times with the aim of gaining useful insights for the literature on securities regulation. In this process, old themes will be revisited (e.g., Hirschman's 'threat of exit' hypothesis)[10] and new themes will emerge, such as the discursive dimension of regulatory competition at EU level. The process of implementation of European rules, which in many respects represents the ultimate test of the effectiveness of EU law, will not be ignored either.

The various themes that the book pursues are developed in five parts and the next eleven chapters. Chapter 1 begins by introducing the different actors that participate in the creation, implementation and enforcement of EU prospectus law, and the formal institutional setting in which they act and interact. It sets the scene for the following parts that deal, in turn, with prospectus disclosure regulation, prospectus disclosure enforcement and regulatory competition. Chapter 2 is an introductory chapter on prospectus disclosure regulation. It discusses the main questions that prospectus disclosure has raised in the literature. Chapters 3 and 4 examine the two main disclosure models under the EU regime: first, an ordinary disclosure model based on 'maximum harmonisation' disclosure items; and second, a more illusive regime based on equivalence provisions. Chapter 5 is the first chapter that deals with enforcement. Its aim is to review the debate on enforcement and to present the issues that require attention. Chapter 6 continues the examination of enforcement by considering the EU's approach to prospectus disclosure enforcement and the arrangements that the EU legislature has adopted. Chapter 7 looks at the application and implementation of these arrangements at national level and, for that purpose, turns to prospectus disclosure enforcement in France and the UK. Chapter 8 introduces the part of the book on regulatory competition. It examines the debate on regulatory competition and its underpinnings. Chapter 9 defines the perspective on regulatory competition which this book seeks to explore. Chapter 10 is the empirical part of this study. In an effort to examine the propositions and suggestions of the previous chapter, it turns to the negotiations of the PD. The book ends with a conclusion in Chapter 11 which summarises earlier findings and makes a set of proposals for the future.

[10] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations, and States* (Harvard University Press, Cambridge MA, 1970).

PART I

Prospectus disclosure in a wider institutional context

1

Actors and institutions

I Introduction

This chapter introduces the different actors that participate in the creation, implementation and enforcement of EU prospectus law and the formal institutional setting in which they act and interact. Actors include policy- and rule-making actors such as the European Commission, the European Parliament ('EP') and the Council, but also committees such as the European Securities Committee ('ESC'); collective actors such as the former Committee of European Securities Regulators ('CESR') and its successor, the European Securities and Markets Authority ('ESMA'); and national actors – competent authorities, in EU jargon – such as the UK Financial Services Authority ('FSA') or the French *Autorité des marchés financiers* ('AMF').

The institutional framework is, meanwhile, made of rules, requirements and procedures that actors must observe when choosing between different regulatory, supervisory and enforcement arrangements. They mostly spring from the EU's founding Treaties, which were reshaped in 2009 as a result of the entry into force of the Lisbon Treaty, and from the European Court's interpretation of EU primary law – think of cases such as *Meroni* or *Romano*.[1] In the securities sector, it is common to identify the institutional framework with the Lamfalussy process[2] whose four-level approach not only addresses rule-making, but also deals with the implementation, application and enforcement of EU legislation. The Lamfalussy process did not require Treaty changes and its arrangements merely reflect what is, as a matter of law, permissible within the constitutional boundaries set

[1] Case 9/56 *Meroni v High Authority* [1958] ECR 133; Case 98/80 *Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241.

[2] The Lamfalussy approach was the brainchild of the Lamfalussy Committee, a group of experts set up at the request of Ecofin Ministers in July 2000. See 'Final Report of the Committee of Wise Men on the Regulation of European Securities Markets' (Brussels 15 February 2001), http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wise-men/final-report-wise-men_en.pdf (hereinafter, the 'Lamfalussy Report').

by the Treaties. As a result, the Treaties shape the Lamfalussy process; it changes and evolves in sync with them. It is also affected by institutional and regulatory reforms that take place within the EU's constitutional framework, such as, for instance, the recent reforms that established a European System of Financial Supervision ('ESFS') and new collective actors such as ESMA. As we will see later, the ESFS refashioned, *inter alia*, Lamfalussy Level 3, blurring, by the same token, the distinction between hitherto different levels of decision-making. What is more, as a procedural approach that has no constitutional status, the Lamfalussy approach is not a source of substantive power for actors. The competence and powers of competent authorities, for instance, the main actors involved in enforcing EU prospectus law, are defined by national legislation.

This chapter proceeds as follows. Section II begins with policy and rule-making actors and examines the arrangements governing their decision-making. Section III deals with collective securities markets actors, i.e., the (former) CESR and ESMA. Section IV, turns to national financial markets authorities – competent authorities – and especially to two of the most prominent authorities, the AMF and FSA. Section V concludes by drawing lessons with respect to the pattern of institutional change in the securities field.

II Policy- and rule-making actors

As mentioned in the introductory section, in examining which actors are involved in prospectus regulation and how policies and rules are made in the securities sector, the Lamfalussy four-level approach provides a starting point. Under the Lamfalussy process, as originally agreed, each of the four levels corresponds to a specific level of competence. Framework principles – that is 'core political principles, the essential elements of each [legislative] proposal'[3] – are adopted at Level 1 in the form of directives or regulations through a legislative procedure. At Level 2, these Level 1 principles are given flesh by detailed implementing measures. Level 3 seeks to ensure consistency in the implementation and application of EU rules. Level 4 focuses on the enforcement of EU rules against non-compliant Member States. The ESFS introduced noticeable changes to the Lamfalussy four-level approach. Thus, although policy- and rule-making continue being within the purview of levels 1 and 2, following the adoption of the ESFS, the point is somewhat in need of a reassessment.

[3] 'Lamfalussy Report' 22.

As we will see in section III, ESMA participates more vigorously in the creation of binding standards which are endorsed by the Commission as delegated or implementing acts.[4] But for now I will skip over ESMA's role and concentrate on the role of EU institutions at Lamfalussy Level 1 and Level 2. These levels are governed by distinct decision-making procedures and, as mentioned, involve different actors.

A Level 1 decision-making

At Level 1, rule-making is governed by the ordinary legislative procedure,[5] the former co-decision procedure under the EC Treaty. It is the standard legislative procedure for the adoption of internal market legislation under the Treaties and involves the European Commission, the Council (in one of its different configurations) and the EP. Under the ordinary legislative procedure, the decision-making process is effectively divided into different 'readings' and requires the Council and the EP to agree on a common text following a proposal by the European Commission.[6] This process can involve up to two readings and might be followed by conciliation and a third reading if the Council and the EP cannot reach agreement after the second reading.[7] Conciliation marks the final attempt to find agreement between the institutions. The conciliation committee will consist of Council members (or their representatives) and representatives of the EP.[8] The European Commission is meant to facilitate agreement. If the

[4] I will examine the role of ESMA separately hereinafter. But already worth noting is that ESMA cannot adopt these standards autonomously. To make them legally binding, the Commission must endorse them. These standards are conceptually different from 'ordinary' delegated and implementing acts that are adopted at Level 2, although they have, in fact, the same constitutional bases (TFEU Arts 290 and 291).

[5] TFEU Art 294.

[6] TFEU Art 289(1). Note that the Lisbon Treaty allows, in some specified cases, the ordinary legislative procedure to be launched following an initiative of a group of Member States or the EP, or following a recommendation from the European Central Bank, or following a request by the Court of Justice or the European Investment Bank (TFEU 289(4)).

[7] According to TFEU Art 294, conciliation is averted at second reading if the EP agrees with the Council's position (known as a 'common position'), or if the EP fails to take a decision, or finally if it rejects it outright. In the latter case, however, the outcome is different, as the proposal is deemed to be rejected. If the EP adopts amendments to the common position, the Council needs to approve them (in which case, the proposal is passed). If the Council does not approve them, conciliation ensues. Legislative proposals can, of course, already be adopted at first reading, but it presupposes that the Council agrees with the EP's position on the Commission's proposal (or agrees outright with the Commission's text in the case where the EP has left the Commission's proposal unchanged).

[8] TFEU Art 294(10).

committee is successful in hammering out an agreement, the agreed text will still require adoption by the Council and the EP. If conciliation fails, or if the Council or the EP does not adopt the agreed text, the legislation fails.

Like the co-decision procedure, the ordinary legislative procedure can be time-intensive, complex and cumbersome. It not only requires agreement between institutions, but also between Member States within the Council which may involve lengthy and intricate negotiations.[9] National interests play naturally an important part in this process. In order to facilitate decision-making, the Council relies on committees which operate beneath it and help it to deal with its work and decision-making load.[10] These committees include the Committee of Permanent Representatives or *Comité des représentants permanents* (Coreper) in which Member States are represented by senior Member State officials and which prepares the work of the Council.[11] They also include a whole network of working groups attended by Member State officials and experts (e.g., national regulators) who work on legislative proposals.[12] One of the advantages of this system is that, in practice, most matters can be resolved in advance of Council meetings. Resolved matters are known as 'A' points on the Council agenda, as opposed to 'B' points on which Council members will need to find agreement.[13]

The functioning of the EP depends similarly on delegation and work in committees. Committees consider legislative proposals, propose amendments by drafting reports and resolutions which are submitted to

[9] The voting rules are somewhat complex. Within the Council, Member States must vote by qualified majority (TEU Art 16(3)). But Council members must act unanimously at first reading where amendments to the Commission's text are tabled which the Commission decides not to endorse (TFEU Art 293(1)). Likewise, Council members must act unanimously at second reading where they vote on EP amendments that the Commission does not endorse (TFEU Art 294(9)). The EP meanwhile votes by simple majority at first reading. At second reading, the EP's plenary can only reject the Council's position (the common position) or adopt amendments to it, by a majority of its component members (Art 294(7)).

[10] T. Christiansen, 'The Council of Ministers: facilitating interaction and developing actorness in the EU' in J. Richardson (ed.), *European Union – Power and policy-making* (Routledge, Abingdon, 2006) 147, 161–2. See also F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (Palgrave Macmillan, Basingstoke, 2006) 68–100; A. Arnull *et al.*, *European Union Law* (Sweet & Maxwell, London, 2006) 34ff.

[11] TEU Art 16(7).

[12] Christiansen, 'The Council of Ministers: facilitating interaction and developing actorness in the EU' 161.

[13] *Ibid.*, 162.

the plenary session of the European Parliament in 'more or less a "take it or leave it" form'.[14] Within the committee itself, most of the work is entrusted to the designated *rapporteur* who, if politically and technically skilled, can be a powerful individual in the Parliament and during inter-institutional negotiations.[15] The latter often take place in 'trilogues',[16] i.e., informal contacts between designated representatives of the Council, the EP and the Commission that allow them to sound out the space for bargaining well in advance of reaching the conciliation stage.[17] Trilogues have proven to be an essential and effective means for the institutions to expedite decision-making and reach agreement. Indeed, the recent deal on the European System of Financial Supervision illustrates the point perfectly, as the institutions were able to reach agreement at first reading – a remarkable outcome given the size of the reforms – after having hammered out an inter-institutional agreement over the package of measures in a series of trilogues in September 2010.

Hence, delegation, i.e., work in committees and, especially, trilogues, contribute significantly to facilitating agreement within or among EU institutions, especially when there is political will and momentum to adopt reforms. But for reasons that will be discussed in more detail in Chapter 9, the capacity of EU decision-making processes to produce *effective* solutions cannot be taken as a given. The Lamfalussy Committee sought to address problems with decision-making under the co-decision procedure by calling for yet more delegation of decision-making. In other words, it recommended delegating decision-making to a subordinate level which it branded 'Level 2' of the Lamfalussy process.

[14] S. Hix, *The Political System of the European Union* (Palgrave Macmillan, Basingstoke, 2005) 93 noting further that '[a]mendments to the proposed committee resolutions can be made in the full plenary, but without the backing of a committee and the EP party support that goes along with this, amendments are less likely to be adopted by the parliament'.

[15] See on this G. Benedetto, 'Rapporteurs as legislative entrepreneurs: the dynamics of the codecision procedure in Europe's Parliament' (2005) 12 *Journal of European Public Policy* 67.

[16] See for details European Parliament, Council and Commission 'Joint Declaration on Practical Arrangements for the Codecision Procedure (Article 251 of the EC Treaty)' [2007] OJ C145/5.

[17] See J. Peterson and E. Bomberg, *Decision-making in the European Union* (Macmillan Press, Basingstoke, 1999) 35 ('[t]he difficulty of negotiating in formal conciliation committees puts a premium on such forums which facilitate informal bargaining').