Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)
10(1):14-26, janeiro-abril 2018
Unisinos - doi: 10.4013/rechtd.2018.101.02

The capital markets union in the scope of the European financial system

A união financeira e o sistema europeu de supervisão financeira

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Abstract

This essay analyses the main steps to build the Capital Market Union by reference to the Green Paper about building a Capital Markets Union and the Action Plan on Building a Capital Markets Union, undertaken by the European Commission. Moreover, this study takes into account Europe's priorities of economic growth and creation of jobs, examining key issues such as the access to financing of small and medium-sized enterprises, long-term investing, securitization, and Competition Law. We also examine the essential role of the European Financial Supervision System in the integration and stability of the European capital markets, considering this ambitious project as prominent to the recovery of the economy and the welfare of the entire population in Europe.

Keywords: capital markets union, capital market, financial supervision.

Resumo

Este ensaio analisa as principais etapas para a construção da União do Mercado de Capitais com referência ao Livro Verde sobre a construção de um Mercado de Capitais e o Plano de Ação para a Construção de um Mercado de Capitais, implementada pela Comissão Europeia. Além disso, este estudo leva em consideração as prioridades da Europa para o crescimento econômico e a criação de empregos, examinando questões-chave, como o acesso ao financiamento de pequenas e médias empresas, investimentos de longo prazo, securitização e direito da concorrência. Examinamos também o papel essencial do Sistema Europeu de Supervisão Financeira na integra-

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ção e estabilidade dos mercados de capitais europeus, considerando este ambicioso projeto tão proeminente para a recuperação da economia e o bem-estar de toda a população na Europa.

Palavras-chave: união financeira, mercado de capitais, supervisão financeira.

Introduction

We continue to feel the effects of the economic crisis and it is undeniable that we live in pernicious times. The high levels of inequality, the poverty, the precariousness, the debt of families, the unsustainable debts and social security, the speculative excesses of the financial system. Meanwhile, more and more people have no jobs, the states have greater difficulties in paying more pensions, health care and bursaries. Fewer salaries, less purchasing power, less consumption, less tax incomes, all this explains the recessive spiral which we find ourselves in. The economic growth no longer means employment creation. In fact, it implies the opposite.

Therefore, it is important to have a more efficient regulation for our financial system and a new European Union's policy, in these times when investors, that only care about cash inflows and shot-terms profits, proliferate (Câmara, 2007, p. 175). Europe is in a period of reflection and reshaping, requiring a duty for us to follow the progress closely, in order to solve the stated recessive spiral and to ensure that the economic growth may result in employment creation and welfare to the entire population.

This said, we have chosen to focus, in this investigation, in one of the main points of the European integration and the heart of the current crisis, the increasing internationalization of the capital markets and the globalization of the financial instruments transactions[3]. We also consider relevant, in the approach of this topic, the 5 Presidents Report (Juncker, 2014), of July 2014, in which, Jean-Claude Juncker, President of the European Commission, refers that the Capital Markets Union is one of core priorities of his mandate.

In this respect, the European Commission published, on 18 February 2015, the Green paper "Building a Capital Markets Union" (European Commission, 2015b), aiming, as main priorities, jobs and growth. The central idea is, basically, to build strong capital markets that can handle the shocks of the financial crises and can complement banks as a source of financing, attracting more investment to European Small and Medium-sized Enterprises (SMEs)[4], making the financial system more stable and opening up a wider range of funding sources.

Subsequently, issuing the recent "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions" about the "Action Plan on Building a Capital Markets Union", of September 30th, 2015 (European Commission, 2015a), we finally find a an uniquely defined ambitious path to build a Capital Markets Union in the European Union.

After the creation of the Banking Union, on November 4th, 2014, the Capital Markets Union appears as the next major stage to the European integration and a crucial goal for the Economic and Monetary Union, which goes in the direction of the liberalization of capital movements, fourth fundamental freedom of common market (Gorjão-Henriques, 2017, p. 585)[5] (article 26, n. 2, of the Treaty on the Functioning of the European Union).

Thereby, we will analyse a set of measures – the most pertinent, in our understanding –, which will contribute to the building of the Capital Markets Union, with reference to the Green paper "Building a Capital Markets Union" and the "Action Plan on Building a Capital Markets Union", starting with brief historical analysis to understand the current state of the European capital markets, comparing them with capital markets of the United States of America, due to their great development.

Next, the present essay will analyse the steps to mobilise more capital to European SMEs, the way to unlock more investment to long-term projects and the securitization markets, and explore the importance of competition in this ambitious project to build the Capital Markets Union.

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[3] Matters already covered in the study of law in the past years, for example, Palma e Oliveira (1998, p. 7-16).

[4] In the Commission Recommendation 2003/361/CE, of May 6th, the European Commission define qualification of SME as making up "of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million".

[5] The principle of free movement of capital was formalised, since 1958, in the Treaty that established the European Economic Community. Being capital, as labour, a production factor, it was believed that its liberalisation in the internal market would make its use more useful and efficient and the subsequent increase of welfare (Fontaine, 2016, p. 379).

Lastly, we will parse the key role of the European Financial Supervision System for the stability of the Capital Markets Union, considering the special case of the European Securities and Markets Authority (ESMA).

Capital markets in Europe

Brief historical analysis

In Europe, the markets, as an economic activity[6], developed very early, and, had been largely regulated, because they were an institution legacy of the Middle Ages, in order to protect the consumers and small producers and to rationalise resources. This led to a promotion of cartels from the European Governments, in contrast to the American Government that have banned them (Casson and Lee, 2011, p. 11).

At a later stage, financial innovations like credit and debt securities emerge in France and in the Banks of Bruges[7] and Antwerp, and triggered, afterwards, the great exchange of financial instruments in Amsterdam and London markets. Thereby, the United Kingdom attempted to stand out, at the beginning of the Industrial Revolution, in the globalization of the markets, taking advantage of the ideals of liberalism and *laissez-faire*, in a period of major expansion of that markets (Bordo *et al.*, 2005, p. 121-127).

In the early 20th century, the issuance of American Government bonds informed the general public of the securities market's existence, motivating numerous companies to look for this kind of funding, to the detriment of the traditional bank loans. This change of course, with a direct impact in the revenues, prompted the credit institutions to enter in the booming securities sector (Cordeiro, 2014, p. 567). Thereupon the american Great Depression of the 1930's, raised the *New Deal*, an extensive program of intervention in the economy (Domingues, 2010, p. 489), being one of the measures the introduction of federal legislation to control the capital markets and the banking system (Securities Act and Glass-Steagell Act, 1933) and to protect the investors (Securities Exchange Act, 1934). This federal laws, still in force, have been essential to an effective regulation of the financial system, allowing the strengthening of the capital markets, and their consequent substantial growth (Domingues, 2010, p. 489-492), and imposed the separation between the commercial and the investment banking, which union was one of the key elements of the american capital markets (Cordeiro, 2014, p. 567). In Europe, on the other hand, there never has been barriers between commercial and investment banking, and all European Governments have adopted the universal banking system.

In philosophical and political terms, in contrast to what has happened in Continental Europe, the history of the United States of America and the United Kingdom was inspired by the ideas of free market[8], which had a major influence in the further development of their capital markets.

> In the post-World War II, Europe seek its reconstruction in the conclusion of the Treaties on the European Communities – the Paris Treaty of 18 April 1951, establishing the European Coal and Steel Community and the Treaties of Rome of 25 March 1957, founding the European Atomic Energy Community and the European Economic Community (Silva, 2013b, p. 10).

Moreover, with the Bretton Woods[9] era terminated (1945-1971), there has been an exponential growth after it was sought to restore the economies that were affected by World Wars I and II[10], mainly in the United States of America, which had put its faith in the financial innovations, through Regulation Q, that had introduced maximum limits in bank deposit rates, leading to a greater demand for financial instruments from the capital markets (Anderson *et al.*, 2015, p. 8). At a subsequent time, in 1999, the same nation repealed barrier between the commercial and investment banking, with the Gramm-Leach-Bliley Act. The recent technological progress of the financial engineering enable companies to maximise the use of assets, on both liability and asset side (Quelhas, 2013, p. 83), with a new holistic dynamics of the market operators and a diversification of funding sources, along with economic globalization.

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[6] The market, as an economic activity, is a meeting point of buyers and sellers (Sá Fernandes, 1997, p. 191).

[7] The origin of the term Bourse is not clarified, although is traditionally associated with the emergence of the city of Bruges, where a lord of the noble family ordered construct a local destined to receive meeting of traders, which had a frontispiece with a shield and his weapons in three bursaries (Sá Fernandes, 1997, p. 187).

[8] Ideas that introduced the believe that any individual could start his business and access the stock markets, allowing a great competition with already establish companies, with the Federal Government protecting their right to entry (Casson and Lee, 2011, p. 11).

[9] The Bretton Woods agreement established a set of trade, productive, technological and financial relations, which attempted to force an international landmark of stability and regulation. Under the mantle of this hegemony the economies of Europe and Japan were reconstructed and were created conditions the progress of industrialisation in the periphery of capitalism (Belluzzo, 2016, p. 14).

[10] One of the great landmark of the capital markets was the opening other first secondary electronic market, in New York, on 5 February 1971, the NASDAQ (Mandaloniz, 2003, p. 380).

In sum, we may say that there had been two major models of capital markets: the Anglo-Saxon model, characterized by robust capital markets, minimal state intervention in the economy and strong incentives to the investors; and the continental European model, with a great state intervention in the economy and a huge influence from banks to the funding of companies. That being said, we consider that the Capital Markets Union, by involving, naturally, the 28 nations from the European Union, including the United Kingdom (the largest financial market is located in London), need structural reforms to approximate the European capital markets to the Anglo-Saxon model, because, among other reasons, that model was less affected by the financial crisis, as we will see *infra*.

The present time

After the global financial crisis, that began in August 2007, it was found that the national autonomy of financial policies did not followed the financial globalization and the reality of integration, interconnection or independence of the European capital markets, with the frequently felt lack of coordination/cooperation or the integration of the supervision not hindering the instability of the system or surely not competing for a stable system (Silva, 2013b, p. 85), with the banking sector being the most affected by the crisis, generating great difficulties in the granting of credit[11]. There was also a decline in liquidity and a notorious fragmentation of capital markets of the European Union, deteriorating the access to that markets (Panait, 2015, p. 40).

Thereby, the European Commission promoted an integrated supervisory structure of the European Union, creating in 2010 the European Financial Supervision System, and from 2012, implemented the Banking, in a clear procedure of integration of the European project. In this respect, the 5 Presidents Report (Juncker *et al.*, 2015) aims to the conclusion of the Banking Union process and the engaging of the Capital Markets Union, in order to guarantee the Euro stability, share risks with the private sector, strengthen the economic growth and support the job creation, by channeling savings to productive investment, and, mainly, in SME, which form most part of the European business fabric.

This ambitious plan of European integration can only be possible once the Member States avoid the fragmentation of capital markets, an arduous task in this times of economic instability in Europe (Demary *et al.*, 2015, p. 33). In any case, the creation of the Capital Markets Union, as long as it is able to reduce that fragmentation and complement the banking funding with more developed and more liquid capital markets, it could probably provide to the reduction of the financing cost, promoting the job creation (Gouveia and Martins, 2015, p. 4). Clearly, the path shall not be an imposition of other financial system, but to improve an alternative way of funding (Schammo, 2015).

SME's access to funding

The prospectus

The access to the capital markets from SME is considered one of the priorities of the Capital Markets Union project, and, for this purpose, is mandatory to have stronger capital markets and less bureaucracy, to channel savings to long-term investments.

As such, the SMEs have been the basic cell of the economic structure of the distinct Member States, because of their contribution to regional investment and production, and because of their dynamics and ability to adapt and innovate (Mandaloniz, 2003, p. 69), being natural that one of main targets of the Capital Markets Union is the reduction of obstacles that restrict the SMEs' capacity to obtain funding, by equity or debt. Indeed, it is seen as a priority the help of startups to grow, by removing the legal barriers. For that reason, the European Commission is planning to present a proposal of revising the "Prospectus" Directive.

Prospectus are considerable demanding documents in terms of financial information, particularly about risks and financing models, enforced by the law to companies, in order to suitably inform the investors. To this extent, it is preponderant to simplify this documents, while bearing in mind the quality and accuracy of the financial information.

In this regard, the European Commission has been harmonizing the prospectus requirements, to allow a fair comparison of investments in the Community zone. Topics like protection of investors, the reduction of administrative burdens, unnecessary costs, incentives to transboundary investments, requirements and exceptions to the prospectus regime, and a system more suitable to SMEs were addressed by the European Com-

[11] The financial crisis of 2007 cause less harm to countries with more developed capital markets, allowing to conclude that the capital markets are a vital instrument to financial stabilisation (Schoenmaker, 2015, p. 5-8).

mission. In this way, it is intended to facilitate the use of prospectus by the SME, enabling their access to the capital markets.

However, the initiative of simplification and harmonization of prospectus have to be viewed in the supply-side, also, thus contributing to an easier risk assessment (Virtuoso *et al.*, 2015, p. 9). The reduction of information must not carry a reduction of protection for the investors, requiring the European Commission to adopt the needed means to this safeguard, namely, the creation of a European platform of investment advice.

Standard information

In the financial world, better information means almost always better access to funding (Raize, 2015). None the less, various European SMEs report financial information solely on the basis of national accounting standards, that can be inadequate to meet the needs of the international investors, due to lack of comparability. This information shortfall makes it impossible to the investor to identify and analyse companies that could interest them, and hinders companies from getting to know financial sources more in line with their features.

There are various problems in this matter: the disparity between national legal systems and supervisory practices; and the fact that the production of information have higher costs but it is inexpensive to reproduce it, resulting in relevant failures in the capital markets.

Community intervention is urgent, and the European Commission has taken measures, recently, in this matter with the Transparency Directive (2013/50/EU) and the Accounting Directive (2013/34/EU). The efforts go towards a standardization of accounting and auditing rules in the European Union, facilitating the exchange of the best practices.

The more information gathered in the capital markets, the less risky will be the investments (Cordeiro, 2015, p. 275). For that reason, the credit risk assessment, that enables the access to the data on SME's solvency, is considered of utmost priority (Virtuoso *et al.*, 2015, p. 9). Moreover, the information about credit risk can attract institutional investors, producing beneficial results to the integration and standardization of the capital markets (Kaya, 2015, p. 18; Véron and Wolff, 2015, p. 12).

Therefore, the European Commission intends to increase the exchange of best practices, in order to create reliable sources of information to support SMEs' funding. This means establishing an information system that guarantees the connection, all over the European Union, between potential financial services providers and SMEs. The European Commission also considers the creation of a transboundary connection to involve the different national systems, gathering all investors and SMEs in Europe. The key will be comparability of the relevant data, favouring the potential investors to have exact, reliable and actual information of SMEs in the European Union.

It is equally important to ensure that banks substantiate the rejections of financial requests by the SMEs, protecting these enterprises, due to their limited negotiating power (Mandaloniz, 2003, p. 77). That information might be vital to a company benchmark its capacity of access to funding. A better information provided to small investors can ensure the transparency that the capital markets require and we consider that the steps of the international community are being made with flair, namely, with the promulgation of the International Financial Reporting Stantard 9.

Alternative financing

Private equity, venture capital and Business Angels

One of the main problems of the economies hit by strong crises, such as the one that the Eurozone crossed in recent years, is the drastic reduction of available financing, largely due to the excessive dependency of the companies in the recourse of banking lending (Virtuoso *et al.*, 2015, p. 7). Therefore, seems obvious the effort in alternative financing, enabling the diversification of funding sources for SMEs and the increasing options for the savers, in order to make the economy more resistant, promote the European integration and to enhance competitiveness, allowing families to have more suitable financial solutions.

Nevertheless, the new forms of credit are poorly developed in Europe – while the European SME depend on banks in more than 70% of their funding, in the United States of America, the SME only depend in 30% of their funding (Stefanova and Stoev, 2015, p. 15) – for the historical reason described above, thus offering the prospect of long and hard way to promote alternative financing.

Even so, the Member States should drive forward their common efforts to increase use of alternative financing, aiming the promotion of financial literacy to investors and to SMEs, because alternative financing is a focal point in the evolution of the Capital Markets Union.

One of the main activities of alternative financing for the SME is the private equity investment, especially for high-tech enterprises, withstanding their dynamics, efficiency and fast-growing qualities (Rusek, 2015, p. 5). The SME can ensure, through private equity, the necessary instruments for technological solutions and efficiency strategies (of production, distribution and marketing), fomenting the business valuation, and, ultimately, the sustained economic growth and the job creation (Comissão do Mercado de Valores Mobiliários, 2014, p. 6).

Thus, we intend to start by examining the private equity and the venture capital, which have been a focus of attention from the Community legislator, in particular in the Directive 2011/61/EU, of June 8th, 2011, and Directive 2013/14/EU, of May 21st, 2013, and in the Regulations (EU) 345/2013 and 346/2013, of April 17th.

The investment in private equity and venture capital is defined, for example, in the Portuguese legal regime as the acquisition, for a limited period of time, of equity instruments in companies with strong development potential as a way to benefit from the increase of value[12]. In this regard, we can have private equity and venture capital funds or companies. This entities assume an option in the capital provision of a company, from which they can exit in a later time by a public or private offering. Thereby, the major feature of the private equity and venture capital is the limited investment time and the returns added value of asset in the disinvestment (Vasconcelos, 2012, p. 158).

This model of financing is purely and simply a subscription or acquisition of shares from companies in the establishment phase (venture capital) or in a restructuring process (private equity), funding the company (by the shares purchase), and aiming its valorization for the subsequent alienation of the shares with profit (Oliveira, 2015, p. 71).

In most of the European Union, the private equity and venture capital funds and companies face problems to reach the necessary scale and extend its portfolio of assets and risk spreading. The absence of equity participation culture, the information gap, the fragmentation of the markets and the elevated costs are the main reasons for that problems.

For this reason, the European Union created the European Venture Capital Funds (EuVECA) and the European Social Entrepreneurship Funds (EuSEF), which aims to allow this funds to raise and commercialize capital in the internal market (Oliveira, 2015). The Regulation of EuVECA and the Regulation of EuSEF define the conditions in which the funds can be negotiated with institutional investors and high-net worth investors in the European Union. The venture capitalists can market their funds to investors across the EU through a voluntary EU-wide passport (so-called "European Venture Capital Fund" label) without having to meet all of the demands of the AIFM Directive.

However, the EuVECA and EuSEF passports may only be obtained by small fund managers, whose financial assets does not exceed EUR 500 million. The European Commission plans to reduce the investment threshold of EuVECA and EuSEF funds, aiming to attract more investors and expedit the transboundary investment (European Commission, 2015b, p. 19). In our point of view, we should take the opportunity of the building of the Capital Markets Union to increase the scope of this passports, that until now had an uplifting outcome, but there is a great progress margin.

Business Angels[13] can be defined as entrepreneurs of confirmed experience that invest, predominantly, in venture capital companies. They realize an enduring rapid expansion in Anglo-Saxon countries, where the capital markets are highly developed, allowing Business Angels to place SMEs in that markets (Mandaloniz, 2003, p. 342). In the building of the Capital Markets Union, it will be of paramount importance the presence of angel investor's support to venture capital investment, fostering economic growth and enabling the possibility for the entrepreneurs to mobilise funding in the European Union (European Commission, 2015a, p. 13).

The number of private equity and venture capital funds and companies, as well as Business Angels, is still very small, but the most important path to the Capital Markets Union is the support of this financial models, because of their promotion of high-tech investments, that enables the creation of wealth and attracts third countries capital, in the new global economy.

Crowdfunding

SMEs have few opportunities to find a suitable funding, simply choosing the least costly and complicated

[12] The venture capital investment is surprisingly ancient. It comes from the old commendatory abbot, the contract which the merchant obtain funders that provide capital to enterprises and share the profits in the end. From the commendatory abbot, it had been evolved, in a long historical process, the joint ventures and the limited partnerships (Vasconcelos, 2012, p. 159). In our days, the venture capital is closely associated with investment in startups, with great opportunities for growth and dynamic projects. The high-risk investments from venture capital is compensated with a high level of return (Mandaloniz, 2003, p. 307). Venture Capital can be defined as a form of business investment, with the objective of finance companies, supporting their growth and development, with strong reflections in the management (Caldeira, 2014, p. 13); Private Equity is a type of financial granted to institutions that invest predominantly in companies not listed in Stock Exchange, in order to leverage their development (Silva, 2013a, p. 242). Today, in the global market, the funds that invest with more efficiency and malleability is, probably, Private Equity (Vasconcelos, 2012, p. 157).
[13] The investment market of Business Angels in European Union, in 2013, was approximately EUR 5 billion (Décarre and Wetterhag, 2015, p. 21).

option. In this context, and taking advantage of the bank credit crises, emerges a new funding source: crowdfunding.

Crowdfunding can be defined as "a form of funding for projects and activities, typically using the internet, through an invitation to investment by the public (crowd)" (Santos, 2015, p. 7).

One of the main advantages of Crowdfunding is its ability to reduce risks of a particular project, because it can be used as a benchmark instrument – online marketing (Lucas, 2016, p. 48; Mollick, 2014, p. 2) – for further use of a more advanced funding source. "So, by allowing anyone to pitch their ideas easier and at low risk, there are more ideas to be tested, in which some of them will prevail, in a space where there is no center neither periphery, everything is in between, and there is opportunity for serendipity to meet with sagacity within heterogeneous networks" (Leite, 2012, p. 24). It is presented too as a unique opportunity to simplify the access to capital markets by small investors (Paolantonio, 2014, p. 7-8)[14].

For this last reason, the European Commission incorporated in its priorities to build the Capital Markets Union the fostering of this new financing scheme, despite it had not been regulated yet. However, some Member States already regulated crowdfunding, such as Italy, United Kingdom, France, Germany, Spain and, more recently, Portugal.

While it can be considered that the regulation of crowdfunding can limit the economic progress of this financing scheme, we have the diametrically opposed position, believing that only with regulation we can have an effective protection for investors, inspiring the needed confidence for the growth of crowdfunding. Therefore, we appeal to the urgent action of the European Commission in this matter, promoting the Crowdfunding transactions between Member States.

Even though crowdfunding being subject to the regulation of its underlying contract, this meaning that a crowdfunding campaign can be interpreted as just a contract (a purchase contract, a service agreement, an issuance of securities or a loan agreement) – being regulated by the legal regime correspondent to each kind of contract –, Crowdfunding have specific problems due to its *leitmotiv*, and, thereby, it is automated from the underlying contract, needing its own regulation, to solve concerns like investment limits and the increased risk of investing in startups.

Moreover, online financing models like Peer to peer lending[15] or Invoice trading[16] should not be overlooked, because of their open growth and lack of regulation, and we should follow the example of United Kingdom, that have that markets strongly developed[17].

The European Commission did not forget to approach this figures, including in the Green paper "Building a Capital Markets Union" the following: "At the same time, new technologies and business models are emerging, such as peer-to-peer lending or other types of non-bank direct lending, which seek to offer funding to SMEs and start-ups. The Commission welcomes views on whether there are significant barriers to entry to providing and growing these services alongside bank lending" (European Commission, 2015b, p. 20).

Long-term financing and securitization markets

The excessive short-time focus generated a poor allocation of companies' assets and a harmful volatility of capital markets, causing instability because of the unbridled pursuit for profits (Santos, 2014, p. 474). The narrow view of administrators was, definitely, one of the causes of the economic crisis of 2007. It is understandable that the European Commission wants to encourage sustainable investments that can guarantee the economic growth in a long-term perspective, more in accordance with an effective union of capital markets, that must emphasis the financial sustainability and the long-term growth of enterprises.

Thus, it appears as evident the adoption by the European Commission of the Regulation on European long-term investment funds, in April 2015, emerging a new vehicle to transboundary funding for long-term projects (such as energy, transportation and others infrastructures). It is known the great need of the European Union to have a high amount of new sustainable and long-term investments to increase the competition and to ensure a transition to more ethical and effective economy in the allocation of resources. That was not overlooked by the "Action Plan on Building a Capital Markets Union", which states the intention of the Com-

[14] "It can also be used to a small local business acquire means of production to better serve the local community" (Rosa, 2013, p. 15). In a study from United Kingdom, 62% of 290 Equity Crowdfunding investors had no experience in investments (Baeck *et al.*, 2014, p. 53).

[15] The so-called peer to peer (P2P) lending correspond, essentially, to a loan realised directly by non-professional lenders. It is a form of disintermediation in the granting of credit" (see http://www.vda.pt, accessed on January 25, 2018).

[16] Invoice trading is, basically, a form of trading invoices in online platforms (www.marketinvoice.com).

[17] About autonomisation, see Ringe (2015, p. 2-10).

mission to support investors to make long-term investments with the knowledge of all risks involved.

In the same vein, it will be essential to promote the issuance of securities with longer maturities (Herring, 1993, p. 8), being necessary an action in the securities marker. Due to the fact that the capital markets in United States of America are more developed, as described above, there was, in the economic crisis of 2007, a wrong assessment of risks in the granting of credit. None the less, the path of Europe can be different if we assure a simpler, more transparent and more regulated securitization (Brühl *et al.*, 2015, p. 12).

The securitization of credits is a financial operation based on credit aggregation, for a subsequent sale by the originator (original credit holder) or transferor to other acquiring entity or transferee (usually a Special Purpose Vehicle – SPV), which will issue debt securities collaterised by the credits acquired, generally placed with institutional investors (allowing the financing by credits purchase. Securitization enables the raising of funds in a particular way: the sale of assets (Oliveira, 2015, p. 176), or, in other words, the sale of cash flows.

The significant benefits of securitization are the solvability ratio's improvement of banks and the possibility of deliver assets with the European Central Bank as a security, for monetary policy of the EuroSystem, in order ensure financial liquidity to banks. We can also say that securitization is a driver of revitalization and diversification for the capital markets (Da Silva, 2013, p. 16).

Securitization can be the main funding model in European Union, helping the banking credit and the release of financial capacity of banks, in order to increase their borrowing capacity and their long-term investor's base. This said, it will be necessary to produce a framework of the banking system within the Capital Markets Union, which can be done with a more harmonized and suitable securitization regime.

In the European context, the promoting of the securitization market can only be possible with standardization of securities for capital markets, and mainly for the bond market (Brender *et al.*, 2015, p. 2), with this market, in Europe, being half of the size of the same market in the United States of America (Kaya, 2015, p. 2), and for that it will be a strong condition the active presence of institutional investors. Notwithstanding, standardization can lead to a poor quality of information, demanding an effective and supervisory action by the European Commission (Gurdgiev, 2015, p. 9-10).

We are pleased to see that the European Commission considered this matter noticeable, including in the Green paper "Building a Capital Markets Union" the following: "For investors, an EU-wide initiative would need to ensure high standards, legal certainty and comparability across securitization instruments. This framework should increase the transparency, consistency and availability of key information, particularly in the area of SME loans, and promote the growth of secondary markets to facilitate both issuance and investments" (European Commission, 2015b, p. 12).

The importance of competition

One of the foundations of the EU Law is Competition Law. The defense of undistorted competition in the European market was considered, since the early years, a necessity and one of the main objectives of the European Community. Like the generality of the industrialised countries, the European Union believes that the market economies based in the principles of free competition are essential for the promotion of economic and political freedoms, and are the best process to assure the welfare of the population (Pais, 2011, p. 61-62).

The competition is a consequence of the economic freedoms, an actual driver of the European market economy, however, it is also a fragile mechanism that hardly withstands on its own (Santos *et al.*, 2010, p. 100). Thereby, it should be fulfilled a competition policy with the comparison of this two archetypes: the perfect competition and the monopoly. Therefrom, despite the irreversible end of the utopia of the perfect competition, the market monopolization have, from the point of view of the society in general, several potential drawbacks, whilst on the other hand, from the point of view of the sellers, the monopolization is a source of potential benefits, wherefore it is expected that they pledged to promote it. For this reason, the role of Competition Law is to avoid that the sellers adopt anti-competitive practices in detriment of society (Rodrigues, 2007, p. 157-167). Additionally, the objective of Competition Law must be the pursuit of more concrete financial goals, like economic growth, financial stability and full employment (Santos *et al.*, 2010, p. 322).

Reproducing the content of the Green paper "Building a Capital Markets Union": "Competition plays a key role in ensuring that consumers get the best products and services at adequate prices, and that investment flows are channeled towards the most productive uses. Entry barriers for competitors should be removed where possible and access to financial market infrastructure needs to be assured. To support more efficient and well-functioning capital markets, the Commission has pursued several cases in recent years using its competition powers. The Commission will continue to ensure that competition law is rigorously applied to avoid restrictions or distortions of competition affecting the emergence of integrated and well-functioning capital markets" (European Commission, 2015b, p. 24).

Howbeit, there is the opinion that the defense of competition and the removal of barriers of capital movement in European Union are over-ambitious objectives, that should not be included in the "Action Plan on Building a Capital Markets Union", where it can be blended with short-time objectives, resulting in a loss (with the same opinion, Valiante, 2015). We do not share this view, for the simple reason that we consider crucial to the integration and harmonization of the capital markets the elimination of obstacles to the free competition (Virtuoso *et al.*, 2015, p. 8), and, even more important, assure that competition is not distorted (Gorjão-Henriques, 2017, p. 638-643). The way forward has to be the way to compete in the globalized world, in accordance to the lessons of experience, with the removal of the market failures and the creation of indispensable external economies, including in the "Action Plan on Building a Capital Markets Union" this important tasks (Porto, 2009, p. 573).

Therefore, Competition Law will have, undoubtedly, the key role in the building of the Capital Markets Union, also on the grounds that many financial schemes do not have specific regulation, demanding to find their tutelage in the functioning of the market and in Competition legislation (European Commission, 2015b, p. 6). Furthermore, it will be essential to the integration of capital markets, more competition and less costs for investors, as well as, more efficient risk sharing and management (European Commission, 2015b, p. 10).

European Financial Supervision System

European Systemic Risk Board and the European Supervisory Authorities

The European Financial Supervision System was created by four Regulations of the European Parliament and of the Council, on November 4th, 2010: The Regulation (EU) 1092/2010, that established the European Systemic Risk Board; the Regulation (EU) 1093/2010, that established the European Banking Authority; the Regulation (EU) 1094/2010, that established the European Insurance and Occupational Pensions Authority; and the Regulation (EU) 1095/2010, that established the European Securities and Markets Authority.

This initiative seems to be a strong response by the European Commission to the financial crisis. It is conspicuous that the relaxation of prudential regulation and supervision, in response to the decrease of the subjective probability of a disaster[18], may contribute to the growing vulnerability of the financial system (Guttentag and Herring, 1984, p. 1378).

Established on the basis of three essential principles (decentralization, cooperation and segmentation) (Morais, 2015, p. 118), the European Financial Supervision System is composed, according to the article 1, n. 3, of the Regulation (EU) 1092/2010, and the article 2, n. 2 of the Regulations (EU) 1093/2010, 1094/2010 and 1095/210, by the European Systemic Risk Board[19], by the three European Supervisory Authorities, the Joint Committee of the European Supervisory Authorities and the competent or supervisory authorities in the Member States, in a centralization and vertical cooperation paradigm (Silva, 2013b, p. 77).

This model of autonomous financial regulation was inspired in the north-american system and newly introduced in the European Union, on account of extensive privatization and liberalization programmes in economic sectors where public monopolies and golden shares predominate (Morais, 2015, p. 103).

As an important novelty, the European Systemic Risk Board is the responsible body for the macroprudential supervision, conceived to deal with various financial sectors, and does not have legal. In spite of its recommendations and warnings are non-binding, this body is regarded as having reputational nature. The European Systemic Risk Board's capacity to influence and to act lies in its credibility, Independence and technical quality, being able to make its recommendations and warnings public (Terrinha, 2012, p. 14).

[18] The prudential supervision covers the activities and the connection of financial intermediaries with clients to ensure financial stability and consistency of the intermediary in front of his clients (Pereira, 1997, 56 e ss.). "From an Anglo-Saxon origin, the expression became popular. It involves the monitoring of compliance of the obligations imposed to institutions by prudential rules, that aim to assure that an institution is well managed, in particular concerning the financial liquidity and solvency (Athayde *et al.*, 2009, p. 294). Therefore, at its very core, regulation and supervision of financial institutions involves a prudential dimension driven to the permanent control and assessment of a special set of financial balance indicators and a dimension of control and scrutiny of the market conduct of financial institutions (Morais, 2015, p. 116).

[19] The definition of systemic risk is in Article 2, point (c), of the Regulation (EU) 1092/2010: "systemic risk means a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree".

There were also created three European supervisory authorities, with Community agencies status[20], accountable to the European Parliament and to the Council, and each one enjoying legal personality, in opposite of the European Systemic Risk Board. In the securities sector operates the European Securities and Markets Authority (ESMA), alongside the European Banking Authority (EBA), to the banking sector, and the European Insurance and Occupational Pensions Authority (EIOPA), to the insurance pension funds sector.

In this new paradigm, it is essential to have a great coordination of the authorities, due to the blurring boundaries between the sectors of the financial system, *maxime*, the emergence of financial conglomerates. And, being aware of the building of the building the Capital Markets Union, it will be vital to converge this authorities on this ambitious project.

> The ESAs have an important role to play in continuing to foster greater supervisory convergence, increasing the focus on and use of peer review and appropriate follow-up. Furthermore, use of dispute settlement where it is needed and investigatory powers in relation to alleged breaches of EU law could facilitate consistent implementation and application of EU law across the single market (European Commission, 2015b, p. 24).

The importance of supervision will be its capacity to avoid over-regulation, which brings unnecessary costs in the intermediation and access to the capital markets (Panait, 2015, p. 3-4). Never the less, one of the priorities should the control of risks like shadow banking, the sharp increase of financial linkages, asymmetric of regulations and excessive pro-cyclicity of capital markets (Virtuoso *et al.*, 2015, p. 11).

This requires a great coordination between supervisory authorities, because with a fragmented financial supervision, it will be impossible to have the European capital markets integrated and to have an actual alternative to bank financing (Buttigieg, 2015, p. 35-36).

The key role of ESMA

With a leading role in the building of the Capital Markets Union, we have the European Securities and Markets Authority (ESMA), due to its specificities of capital markets supervisor. The difficult task of this authority comes from the fact that empirically and economically the capital markets are unstable, therefore requiring suitable external stabilisers, such as the financial supervision, that can protect the consumers, create solid institutions and guarantee the balance in the system, ensuring trust in all parties (Patrício, 2004, p. 42-44).

However, ESMA will not have an exclusive role, like the European Banking Authority in the Banking Union (Lannoo, 2015, p. 6), on account of the great need for cooperation between the three European supervisory authorities to control the evolution of the Capital Markets Union. Moreover, it is required a constant coordination between ESMA and the supervisory authorities of the Member States, in order to ensure that market players cannot avoid sanctions only because of simple alteration of activity to another jurisdiction, so-called *forum* shopping (Véron and Wolff, 2015, p. 11-12), and to retain technological innovation, the celerity of operation and the competence of the sector, only limiting the private autonomy on the strict condition of legal certainty of the market players and of the financial transactions (Zunzunegui and Barios Asensio, 2012).

Given this difficult tasks, ESMA is endowed with powers concerning the supervisory process – being able to produce opinions, orientations, recommendations and projects of technical standards. In case of violation of EU Law by any of supervisory authorities of the Member States, ESMA have powers to investigate, to formulate recommendations of sanctions for the illicit acts, and to send information of the incidents to the Commission (Câmara, 2007, p. 8).

The integration of capital markets and the removal of national barriers can create several risks, which implies one main supervisory authority for the Capital Markets Union, which provides the control and share of risks (Juncker *et al.*, 2015, p. 12). To this end, it is imperative to reinforce the powers of ESMA, to ESMA gain an importance comparable to the Securities and Exchange Commission (SEC), of the United States of America.

It must be evident to agree with Cordeiro, when he refers that the increasing integration of securities in the European Union will cause, inevitably, an enlargement and extension of powers of ESMA, because with-

[20] There a lot of criticisms to this community agencies, namely, due to their lack of democratic legitimacy. In the accordance to Shapiro (1996, p. 104), the fact that this agencies defend themselves in the basis of their technical legitimacy shows that is denied the transparency to the people. If the language used by technicians cannot be understood by others, but it is, at the same time, the basis of the claimed legitimacy, then the message that can be given to the population is that someone is telling me that I am not supposed to understand and I cannot really understand what the Government is doing, Ferreira da Cunha (2015, p. 158), explains eloquently and succinctly that the emergence of this independent regulatory authorities were cause by the increasing complexity of the social reality and the increasing quantity of legal rules, demanding the need of specialised organizations to monitor the compliance of this complex norms.

out a centralised supervisory authority, the desired single financial market will be just a mirage (Cordeiro, 2015, p. 121).

Conclusion

We analysed in this study one of most recent projects of European integration, the Capital Markets Union, starting by a brief historical analysis, with a counterpoint to the capital markets from United States of America, because of their development. We face, with this analysis, with two great models, the Anglo-Saxon model and continental European model, inferring that the process to build the Capital Markets Union will have to bring the European capital markets closer to the Anglo-Saxon model.

Also, we observe the reasons, in the present time, for the decision to proceed with this ambitious project, and then we analyse the most important measures, in our point of view, to an effective adoption of the Capital Markets Union.

We started with SME's access to funding, investigating the simplification of prospectus, the standardization of financial information, the promotion of alternative financing like Private Equity, Venture Capital, Business Angels and Crowdfunding. The capital markets need the SMEs, which make up the majority of the European business fabric, to have great dynamics, being the European Commission responsible for the balance between the simplification of SME's access to funding and the more required protection for the investors.

Furthermore, we peered the need to encourage long-term investments in Europe, in order to achieve a more sustainable and ethical economy, with a great support from institutional investors. To that extent, we observed the importance of standardization and harmonization of securities to attract institutional investors to guarantee greater solvency for the banking system.

In the next chapter, we investigated the importance of competition in conciliation of the single financial markets, searching for the important benefits of competition, like less costs for the investors, a more efficient distribution of risks and a better share of risks.

Finally, we explored the establishment of the European Systemic Risk Board and the European Supervisory Authorities, concluding that the primordial role of financial supervision has to be based in the integration and harmonization of the capital markets, requiring an enormous coordination between the supervisory authorities, with an emphasis on ESMA, which, in our view, has to have its powers reinforced in order to prevent the relevant risks that might arise in the long and difficult task of building the Capital Markets Union.

In a globalised economy, where there is a great economic Independence in the majority of the Member States, it is peremptory to coordinate the European Supervisory Authorities to ensure a more sustainable economy to Europeans and enables the access to all European companies.

Thereupon, we consider essential that all Europeans know and take part in this project to build the Capital Markets Union, demanding an adoption by the European Commission of a democratic process in this respect, ensuring the understanding of all population of the main benefits of the harmonization of capital markets, the channeling of savings to better investments and a greater stability of the whole economy.

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Submetido: 01/02/2018
Aceito: 10/04/2018