



**University of  
Zurich** <sup>UZH</sup>

**Institute of Law**

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# **Prospectus Regulation, Insider Dealing, Market Abuse and Fraud**

Gesellschaftsrecht (Master) – Lecture 7

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- L1 Introduction, Theory of the Firm, Common Principles of Corporate Law across Jurisdictions, Role of Shareholders (KA)**
- L2 Management & Agency Problems, Role of Board of Directors (KA)**
- L3 Corporate Personality, Formation, Separate Legal Entity Principle, Limited Liability (KA)**
- L4 Corporate Finance, Capital Raising and Maintenance (KA)**
- L5 EU Capital Market Structure and Free Movement (KA)**
- L6 Investor Protection, Shareholder Control Issues, and Minority Shareholders Rights (DR)**
- L7 Prospectus Regulation, Insider Dealing, Market Abuse and Fraud (KA)**
- L8 Data Law (DR)**
- L9 Compensation and Bonuses (DR)**
- L10 Corporate Governance, Stakeholders and Corporate Social Responsibility (MdE)**
- L11 Takeovers and Mergers (DR)**
- L12 Role of Gatekeepers – Accountants, Auditors and Rating Agencies - a 'True and Fair View' (MdE)**
- L13 Multinational Corporate Groups, Ethics, and Corruption (MdE)**
- L14 Selected Topics and Exam Review (KA)**



## EU – Investor Protection through Disclosure Requirements

- Prospectus Directive
  - Prior approval of the prospectus by the issuer's home Member State
- Transparency Directive
  - Ongoing disclosure
  - Regulated information filed in the issuer's home Member State
- Market Abuse Directive
  - Ad hoc disclosure



## Prospectus

- Primary market offerings
- **US:**
  - Formal requirements and catch-all prospectus definition (“*any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security*”)
- **EU:**
  - Prospectus **Directive** applies to offerings and listings of securities (old regime). New Prospectus **Regulation** entered into force in 2017, rules will apply in 2019 (some exceptions)
  - Securities offered to the public or admitted to trading on a regulated market situated or operating within a Member State
- **CH:**
  - Issue prospectus: Art. 35 FIDLEG/FinSA (exceptions: Art 47 FIDLEG/FinSA)
  - Listing prospectus: SIX Swiss Exchange listing rules



## Regulating prospectuses in the EU

- Prospectus regulation in the EU
  - Directive 2003/71/EC (“Prospectus Directive” or “PD”)
  - Directive 2010/73/EC amending Directive 2003/71/EC
  - Regulation (EU) 2017/1129 (“Prospectus Regulation” or “PR”) repealing Directive 2003/71/EC
- Prospectus Regulation
  - In force since July 2017, rules apply in July 2019 (Art. 49 PG)
  - Exemptions apply (application already as of July 2017/ 2018) (see Art 46 & 49 PG)
  - ESMA and the European Commission will create / created technical standards. (For instance: ESMA see Art 7; Commission: See Art. 44)
- Compared to the PD, the PR introduces changes for both equity and debt markets: Prospectus exemptions, content and format of the prospectus, fast track approval for frequent issuer.



## PR: Introduction

- Recital (1) “This Regulation constitutes an essential step towards the completion of the Capital Markets Union as set out in the Communication of the Commission of 30 September 2015, entitled ‘Action Plan on Building a Capital Markets Union’”.
- Recital (3) “Disclosure of information in cases of offers of securities to the public or admission of securities to trading on a regulated market is vital to protect investors by removing asymmetries of information between them and issuers. Harmonising such disclosure allows for the establishment of a cross-border passport mechanism which facilitates the effective functioning of the internal market in a wide variety of securities”.
- Recital (6) “The assessment of Directive 2010/73/EU of the European Parliament and of the Council has revealed that certain changes introduced by that Directive have not met their original objectives and that further amendments to the prospectus regime in the Union are necessary to simplify and improve its application, increase its efficiency and enhance the international competitiveness of the Union, thereby contributing to the reduction of administrative burdens”.
- Recital (7) “The aim of this Regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital.”



## PR: Definitions (Art. 2) (1/2)

- Art.2 (b) 'securities' means transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months
  - Point (44) of Article 4(1): Defines *inter alia* shares and bonds
- Art.2 (b) 'equity securities' means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer;
- Art.2 (c) 'non-equity securities' means all securities that are not equity securities;
- Art.2 (d) 'offer of securities to the public' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries;



## PR: Definitions (Art. 2) (2/2)

- Art.2 (e) 'qualified investors' means persons or entities that are listed in points (1) to (4) of Section I of Annex II to Directive 2014/65/EU, and persons or entities who are, on request, treated as professional clients in accordance with Section II of that Annex, or recognised as eligible counterparties in accordance with Article 30 of Directive 2014/65/ EU unless they have entered into an agreement to be treated as non-professional clients in accordance with the fourth paragraph of Section I of that Annex. For the purposes of applying the first sentence of this point, investment firms and credit institutions shall, upon request from the issuer, communicate the classification of their clients to the issuer subject to compliance with the relevant laws on data protection;
  - Section I of Annex II of Directive 2014/65/EU
    - (1) Credit institutions, investment firms, etc; (2) Large undertakings (e.g. balance sheet EUR 20m) (3) national and regional governments (4) Other institutional investors
  - Section II: Elective Professional clients (detailed process to be followed)
  - Article 30: Eligible counterparties



## PR: Art. 1 - Subject matter, scope and exemptions

- Art. 1 (1) “This Regulation lays down requirements for the
  - drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.”
- Definition: “**Published**” (Art 21):
  - Art 21 (1) “Once approved, the prospectus shall be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market at a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or the admission to trading of the securities involved.”
  - Art 21 (2) This can be fulfilled e.g. in electronic form on the website of the regulated market. Further details apply, see Art 21 ff
- Definition: “**Securities offered to the public**” (Art. 2 (d)) means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. [...]



## PR: Art. 1 - Subject matter, scope and exemptions

- Definition: “**Admitted to trading on a regulated market**”
  - “regulated market” is defined in MiFID II Art. 4 (21). It “means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments [...].”
    - In practice this includes stock exchanges such as Euronext Paris, Frankfurter Wertpapierbörse, or the London Stock Exchange
  - “admission to trading” does not have a specific meaning in EU law.
- Art. 1 (2) mentions securities for which the PR shall not apply this *inter alia* includes:
  - (a) collective investment undertakings other than the closed-end type;
  - (b) non-equity securities issued by a Member State or by one of a Member State’s regional or local authorities [...];
  - (d) securities unconditionally and irrevocably guaranteed by a Member State [...]. (see also (c),(e),(f))
- Art. 1(3) states that the PR “shall not apply to an offer of securities to the public with a total consideration in the Union of less than EUR 1 000 000, which shall be calculated over a period of 12 months.” Although as noted, member states may require other disclosure requirements



## PR: Art. 1 - Subject matter, scope and exemptions

- Art. 1 (4) states that the obligation to publish a prospectus set out in Art. 3 (1) shall not apply to the following types of offers of securities to the public:
  - (a) an offer of securities addressed solely to qualified investors
  - (b) an offer of securities addressed to fewer than 150 natural or legal persons per MS, other than qualified investors
  - (c) an offer of securities whose denomination per unit amounts to at least EUR 100.000
  - See further exemptions in (d-j)
- Art. 1 (5) states that the obligation to publish a prospectus set out in Art. 3 (3) shall not apply to the admission to trading on a regulated market for
  - (a) new securities already admitted to trading on the same regulated market (over a period of 12 months, less than 20% of the number of securities already admitted on the same regulated market)
  - (b) shares resulting from conversion of another securities (e.g. convertible bonds) (same 12 months and 20% rule apply)
  - See further exemptions in (c-j)



## PR: Art. 6 – The prospectus

- Art. 6 (1) states the required information which a prospectus shall contain:
  - (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor;
  - (b) the rights attaching to the securities; and
  - (c) the reasons for the issuance and its impact on the issuer.
    - It further states that the above may vary *inter alia* depending on the nature of the issuer, the type of security
- As written in Art. 6 (2) the information “shall be written and presented in an easily analysable, concise and comprehensible form”
- Moreover, Art. 6 (3) states that “[t]he issuer, offeror or person asking for the admission to trading on a regulated market may draw up the prospectus as a single document or as separate documents.
  - It further states that: [...] a prospectus composed of separate documents shall divide the required information into a registration document, securities note and a summary. (Registration document = information on issuer; securities note = information on security)



## PR: Art. 7 – The prospectus summary

- Art. 7 (1) states that the prospectus shall include a summary, which provides the investor with the key information in relation to “the nature and the risks of the issuer, the guarantor and the securities” [...]. The summary has “to be read together with the other parts of the prospectus” [...].
- It also mentions exemptions where no summary has to be created. This is true for securities which are admitted „to trading on a regulated market of non-equity securities provided that”
  - (a) such securities are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities; or
  - (b) such securities have a denomination per unit of at least EUR 100 000.
- The „summary shall be accurate, fair and clear and shall not be misleading” (Art. 7 (2))
- Art. 7 (3 & 4) further outline the format (i.e. max 7 pages) and the four main sections in the summary (i.e. key information on issuer, securities) which are further explained in Art. 7 (5-8)



## PR: Art. 8 – The base prospectus

- „Base prospectuses are commonly used in the context of offering programmes in the international debt market. Under a programme, an issuer will be able to make several issues of debt securities over a period of time”\*
- It is not available for equity issues
- Base prospectuses give the issuer flexibility, e.g. as it
  - “allow them to tap markets quickly because most of the disclosure will be set out in the base prospectus and, consequently, the documentation burden for each issue under the programme will be reduced”\*.
- It is “[f]or non-equity securities, including warrants in any form” [...] (Art. 8 (1))
- The base prospectus is optional, e.g. it is ‘at the choice of the issuer’ [...] (Art. 8 (1))
- It shall include ‘a template, entitled ‘form of the final terms’ to be filled out for each individual issues’ [...] (Art. 8 (2a))

\*Pierre Schammo: EU Prospectus Law (Cambridge University Press, 2011)



## PR: Art. 9 – The universal registration document

- Art 9. (1) „Any issuer whose securities are admitted to trading on a regulated market or an MTF may draw up every financial year a registration document in the form of a universal registration document describing
  - the company’s organisation, business, financial position, earnings and prospects, governance and shareholding structure”.
- This brings advantages for frequent issuers:
  - Thus, issuers whose securities are admitted to trading on regulated markets or MTFs should have the option, but not the obligation, to draw up and publish every financial year a universal registration document containing the information mentioned above.
  - Drawing up a universal registration document should enable the issuer to keep the information up-to-date and to draw up a prospectus when market conditions become favourable for an offer of securities to the public or an admission to trading on a regulated market by adding a securities note and a summary.



## PR: Art. 14 – Simplified disclosure regime for secondary issuances

- Based on Art 14. (1), companies may choose to draw up a simplified prospectus under the simplified disclosure regime for secondary issuances, in the case of an offer of securities to the public or of an admission to trading of securities on a regulated market.
- This reason for this regime can be seen in the below statistical facts:
  - “Based on statistical data provided by 21 Member States, an average of 70% of all equity prospectuses approved in 2013 and 2014 corresponded to secondary issuances (public offers made by companies already admitted to trading on a regulated market or an MTF). Equity prospectuses represented a quarter of all prospectuses approved in the EU in 2014 (935 prospectuses).”\*
- The simplified prospectus shall consist of a summary in accordance with Article 7, a specific registration document which may be used by persons referred to in points (a), (b) and (c) of Art 14 (1) and a specific securities note which may be used by persons referred to in points (a) and (c) of Art 14 (1).

\*Source: <https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/SWD-2015-255-F1-EN-MAIN-PART-1.PDF> (P26)



## PR: Art. 15 – EU Growth prospectus

- Art. 15: “An EU Growth prospectus under the proportionate disclosure regime shall be a document of a standardised format, written in a simple language and which is easy for issuers to complete. It shall consist of a specific summary based on Article 7, a specific registration document and a specific securities note.”
  - This applies particularly to SMEs (small-medium enterprises) (Art. 15 (1a)) in order to make it easier for them to raise capital
- Art. 15 (2), “The Commission shall, by 21 January 2019, adopt delegated acts in accordance with Article 44 to supplement this Regulation by specifying the reduced content and the standardised format and sequence for the EU Growth prospectus, as well as the reduced content and the standardised format of the specific summary.”



## PR: Art. 16 – Risk factors

- Art 16 (1) states that ‘risk factors featured in a prospectus shall be limited to risk which are specific to the issuer and/ or to the securities and which are material for taking an informed investment decision [...]’
- It further states that, ‘the materiality of the risk factors based on the probability of their occurrence’ shall be assessed. Moreover, ‘the most material risk factor shall be mentioned first [...]’.



## PR: Home/ Host MS (competent authority), ESMA & Passporting

- Recital (11): To ensure the approval and passporting of the prospectus as well as the supervision of compliance with this Regulation, a competent authority needs to be identified for each prospectus. Thus, this Regulation should clearly determine the home Member State best placed to approve the prospectus.
- Recital (63): All prospectuses approved, or alternatively a list of those prospectuses with hyperlinks to the relevant dedicated website sections, should be published on the website of the competent authority of the issuer's home Member State, and each prospectus should be transmitted by the competent authority to ESMA along with the relevant data enabling its classification. ESMA should provide a centralised storage mechanism of prospectuses allowing access free of charge and appropriate search facilities for the public. [...]
- Recital (68): The competent authority of the host Member State should be entitled to receive a certificate from the competent authority of the home Member State which states that the prospectus has been drawn up in accordance with this Regulation. [...]



## PR: Home/ Host MS (competent authority), ESMA & Passporting

- Art. 24 (1): [...] where an offer of securities to the public or admission to trading on a regulated market occurs in one or more Member States, or in a Member State other than the home Member State, the prospectus approved by the home Member State and any supplements thereto shall be valid for the offer to the public or the admission to trading in any number of host Member States, provided that ESMA and the competent authority of each host Member State are notified in accordance with Article 25. [...]



## PR: Art. 27 – Use of language

- It is relevant where (in which MS) the prospectus is used:
  - Art. 27(1) “Where an offer of securities to the public is made or admission to trading on a regulated market is sought only in the home Member State, the prospectus shall be drawn up in a language accepted by the competent authority of the home Member State.”
  - Art. 27 (2) [...] sought in one or more Member States excluding the home Member State, the prospectus shall be drawn up either in a language accepted by the competent authorities of those Member States or in a language customary in the sphere of international finance [...]
    - Note: The competent authority of each host Member State shall require that the summary referred to in Article 7 be available in its official language, or at least one of its official languages, or in another language accepted by the competent authority of that Member State, but it shall not require the translation of any other part of the prospectus.
  - Art. 27 (3) [...] sought in more than one Member State including the home Member State, the prospectus shall be drawn up in a language accepted by the competent authority of the home Member State, and shall also be made available either in a language accepted by the competent authorities of each host Member State or in a language customary in the sphere of international finance [...]



## PR: Art. 11 Responsibility attaching to the prospectus & Art 38 Administrative sanctions

- Art. 11 (2): „Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.”
  - Art 11 (1): The person responsible for the information in the prospectus may be: the issuer, the person asking for the admission to trading, or a guarantor. Moreover, the person responsible has to be clearly identified in the prospectus.
- Art. 38: Without prejudice to the supervisory and investigatory powers of competent authorities under Article 32, and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions and take appropriate other administrative measures which shall be effective, proportionate and dissuasive. Those administrative sanctions and other administrative measures shall apply at least to
  - e.g. infringements of Article 3, Article 5, Article 6, Article 7(1) to (11), Article 8, Article 9, Article 10, Article 11(1) and (3) [...].



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This document comprises a prospectus ("prospectus") relating to Adriatic Metals Plc (the "Company" or "Adriatic") prepared in accordance with the prospectus regulation rules of the UK Financial Conduct Authority (the "FCA") made under section 73A of FSMA (the "Prospectus Regulation Rules"). This prospectus has been filed with the FCA and made available to the public in accordance with Rule 3.2 of the Prospectus Regulation Rules by being made available, free of charge, at www.adriaticmetals.com and at the Company's registered office at Stamford House,

Regent Street, Cheltenham, Gloucestershire, England, GL50 1HN. This prospectus has been approved by the FCA, as competent authority under Regulation (EU) 2017/1129. The FCA only approves this prospectus as meeting the standards of completeness, comprehensibility and consistency imposed by Regulation (EU) 2017/1129. Such approval should not be considered as an endorsement of the issuer or of the quality of the securities that are the subject of this prospectus.

Applications will be made to the FCA for all of the ordinary shares of nominal value 1.3355 pence each in the capital of the Company (the "Ordinary Shares") which are issued (the "Issued Share Capital") to be admitted to the Official List of the FCA (the "Official List") by way of a standard listing ("Standard Listing") under Chapter 14 of the listing rules of the FCA made under section 73A of FSMA (the "Listing Rules") and to London Stock Exchange plc (the "London Stock Exchange") for such Ordinary Shares to be admitted to trading on the main market for listed securities ("Main Market") of the London Stock Exchange (together, "Admission"). It is expected that Admission will become effective, and that unconditional dealings in the Ordinary Shares will commence, at 8:00 a.m. on 12 December 2019. All dealings in Ordinary Shares on the London Stock Exchange prior to the commencement of unconditional dealings will be on a "when issued" basis and will be of no effect if Admission does not take place and such dealings will be at the sole risk of the parties concerned.

The Ordinary Shares are currently listed on the Australian Securities Exchange, where the Company will continue to be listed. The Company is seeking a secondary listing for the Ordinary Shares on the standard segment of the Official List and to trading on the London Stock Exchange.

The whole of the text of this prospectus should be read by prospective investors. Your attention is specifically drawn to the discussion of certain risks and other factors that should be considered in connection with an investment in the Ordinary Shares, as set out in Part II – Risk Factors beginning on page 10 of this prospectus. Investors should make their own assessment as to the suitability of investing in the Ordinary Shares.

The Company and the Directors, accept responsibility for the information contained in this prospectus. To the best of the knowledge of the Company and the Directors, the information contained in this prospectus is in accordance with the facts, and the prospectus makes no omission likely to affect its import.

## ADRIATIC METALS PLC

(Incorporated in England and Wales with registered number 10599833)

Admission to the Official List of 177,715,987 Ordinary Shares of nominal value 1.3355 pence each (by way of a Standard Listing under Chapter 14 of the Listing Rules) and to trading on the Main Market of the London Stock Exchange

Financial Adviser

TAMESIS PARTNERS LLP



This prospectus does not constitute an offer to sell or an invitation to purchase or subscribe for, or the solicitation of an offer or invitation to purchase or subscribe for, Ordinary Shares in any jurisdiction where such an offer or solicitation is unlawful or would impose any unfulfilled registration, publication or approval requirements on the Company.

A Standard Listing will afford investors in the Company a lower level of regulatory protection than that afforded to investors in companies with premium listings on the Official List ("Premium Listing"), which are subject to additional obligations under the Listing Rules.

The Ordinary Shares have not been and will not be registered under the US Securities Act of 1933 (the "US Securities Act"), or the securities laws of any state or other jurisdiction of the United States or under applicable securities laws of Canada, Japan or the Republic of South Africa. Subject to certain exceptions, the Ordinary Shares may not be, offered, sold, resold, transferred or distributed, directly or indirectly, within, into or in the United States or to or for the account or benefit of persons in the United States, Canada, Japan, the Republic of South Africa or any other jurisdiction where such offer or sale would violate the relevant securities laws or regulations of such jurisdiction (each, a "Restricted Jurisdiction").



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<p><b>Currency, denomination, par value, number of securities issues and the term of the securities</b></p>	<p>The Ordinary Shares are denominated in UK Pounds Sterling with a nominal value of 1.3355 pence each.</p> <p>As at the date of this prospectus, there are 177,715,987 Ordinary Shares in issue, all of which have been fully paid up. The term of the securities is perpetual.</p>
<p><b>Rights attached to the securities</b></p>	<p>Shareholders will have the right to receive notice of and to attend and vote at any meetings of Shareholders. Each Shareholder entitled to attend and being present in person or by proxy at a meeting will, upon a show of hands, have one vote and upon a poll each such Shareholder present in person or by proxy will have one vote for each Ordinary Share held by such Shareholder.</p> <p>In the case of joint holders of an Ordinary Share, if two or more persons hold an Ordinary Share jointly, the vote of the senior shareholder, shall be accepted to the exclusion of the other joint holders and for this purpose, seniority is determined by the order in which the names stand in the register of members in respect of the joint holding.</p> <p>Pre-emption rights have been disapplied (in respect of future share issues whether for cash or otherwise) pursuant to a special resolution passed on 8 November 2019.</p> <p>On a winding up, the liquidator may, with the sanction of a special resolution of the Company and any other sanction required by law, divide among the members the whole or any part of the assets of the Company and may, for that purpose, value any assets and determine how the division shall be carried out as between the members or different classes of members. Any such division may be other than in accordance with the existing rights of the members but if any division is resolved otherwise than in accordance with such rights the members shall have the same right of dissent and consequential rights as if such resolution were a special resolution passed pursuant to section 111 of the Insolvency Act 1986.</p>
<p><b>Relative seniority of the securities in the issuer's capital structure in the event of insolvency</b></p>	<p>Not applicable. The Company does not have any other securities in issue or liens over its assets and so the Ordinary Shares are not subordinated in the Company's capital structure as at the date of this prospectus, and will not be immediately following Admission.</p>
<p><b>Restrictions on the free transferability of the securities</b></p>	<p>Not applicable. The Ordinary Shares are freely transferable and tradable and there are no restrictions on transfer.</p> <p>Each Shareholder may transfer all or any of their Ordinary Shares which are in certificated form by means of an instrument of transfer in any usual form or in any other form which the Directors may approve. The Directors may refuse to register a transfer of Ordinary Shares which are certificated if (a) the share if not fully paid; (b) the transfer is not lodged at the company's registered office or such other place as the Directors have appointed (c) the transfer is not accompanied by the share certificate or such other evidence as the Directors may require to show the transferor's right (d) the transfer is in favour of more than four transferees.</p> <p>Each Shareholder may transfer all or any of their Ordinary Shares which are in uncertificated form through CREST. Shareholders wishing to trade their Ordinary Shares on the ASX may transfer their Ordinary Shares in uncertificated form using CHESS Depository Interests.</p> <p>The Directors may, in circumstances permitted or required by the Companies Act and the ASX Listing Rules, refuse to register the transfer of Ordinary Shares which are in uncertificated form, provided that exercise of such powers does not disturb the market in the Ordinary Shares.</p> <p>In accordance with Chapter 9 of the ASX Listing Rules, certain of the Company's securities are subject to mandatory escrow restrictions imposed by the ASX.</p>
<p><b>Dividend or pay-out policy</b></p>	<p>The Company has yet to develop its dividend policy and the funding requirements and expected time for the further development, construction and commissioning of the Vareš Project may restrict the Company in relation to when it will be in a position to pay dividends. Any decision to declare and pay dividends will be made at the discretion of the Board and will depend on, among other things, the Group's results of operations, financial condition and solvency and distributable reserves tests imposed by law and such other factors that the Board may consider relevant.</p>
<p><b>Where will the securities be traded?</b></p>	
<p><b>Application for admission to trading</b></p>	<p>Application will be made for the Ordinary Shares to be admitted to trading on the Main Market of the London Stock Exchange.</p>
<p><b>Other markets where the securities are or are to be traded</b></p>	<p>The Ordinary Shares are currently listed on the ASX.</p>

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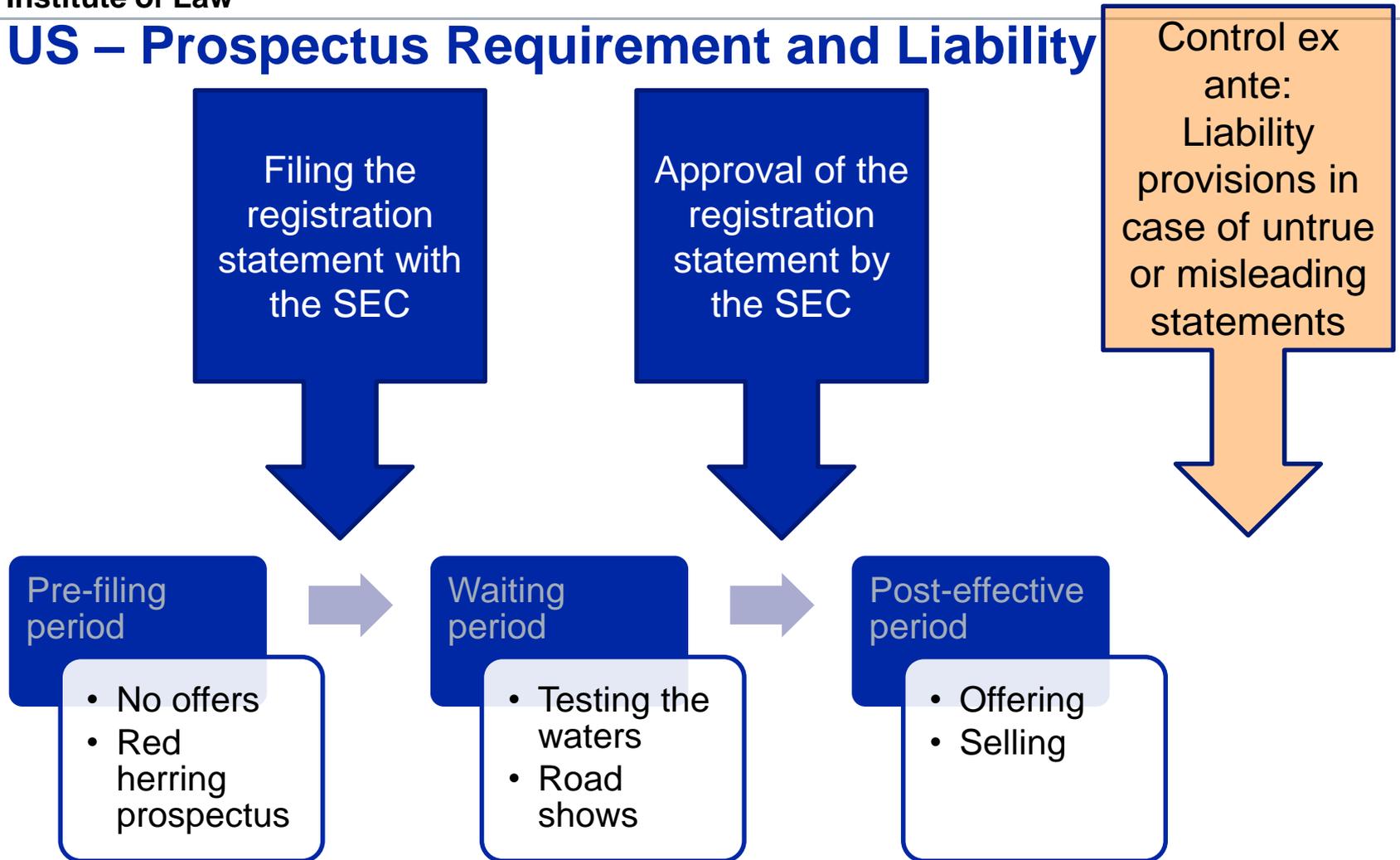
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# US – Prospectus Requirement and Liability





# Prospectus Liability (US) (1)

- Section 11 of the Securities Act of 1933
  - Defendant: every person who signed the registration statement, every underwriter (among others)
  - Any untrue or misleading statement, any omission to state a required material fact in the registration statement
  - Standards of care: strict liability of issuer, but other defendants (e.g. underwriter) can invoke the due diligence defence
    - Expertised portions: «had no reasonable ground to believe and did not believe that the statement therein contained a material misrepresentation or omission»
    - Non-expertised portions: idem «after reasonable investigation»
  - Causation: assumed
  - Remedies: value loss of the security



## Prospectus Liability (US) (2)

- Section 12(a) of the Securities Act of 1933
  - Defendant: any person who «offers or sells a security»
  - Requirement of privity between the defendant and the plaintiff
  - Types:
    - 12(a)(1): violations of Section 5 (period constraints, prospectus requirements)
    - 12(a)(2): Prospectus containing misleading statements, untrue statements, or omission of material facts
  - Standard of care:
    - 12(a)(1): strict liability
    - 12(a)(2): negligence, but defence of due care
  - Causation: assumed
  - Remedies: rescission or damages

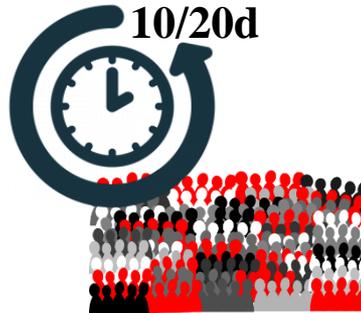


## Prospectus Liability (US) (3)

- Section 10(b) of the Securities Exchange Act of 1934
  - Anti-fraud provision
  - No requirement of privity between the defendant and the plaintiff
  - Fraudulent activities linked with securities transactions
  - Any misrepresentation or omission of a material fact
  - Standards of care: scienter (intent or recklessness)
  - Reliance
  - Causation
  - Remedies: Rescission or damage (value loss of the security = difference between the price paid and the price at which the securities would have traded with the accurate information)



# Switzerland – Prospectus Requirement and Liability



**Review body** appointed by FINMA  
 Currently (since 1 June 2020):

- **BX Swiss AG**
- **SIX Exchange Regulation**

- Relevant provisions:
- FIDLEG/FinSA Arts 35ff
  - Arts 109ff FinSO
  - SIX Exchange listing rules
  - Art 52 FIDLEG/FinSA
  - Art 69 FIDLEG/FinSA
- Applicable by 1 December 2020

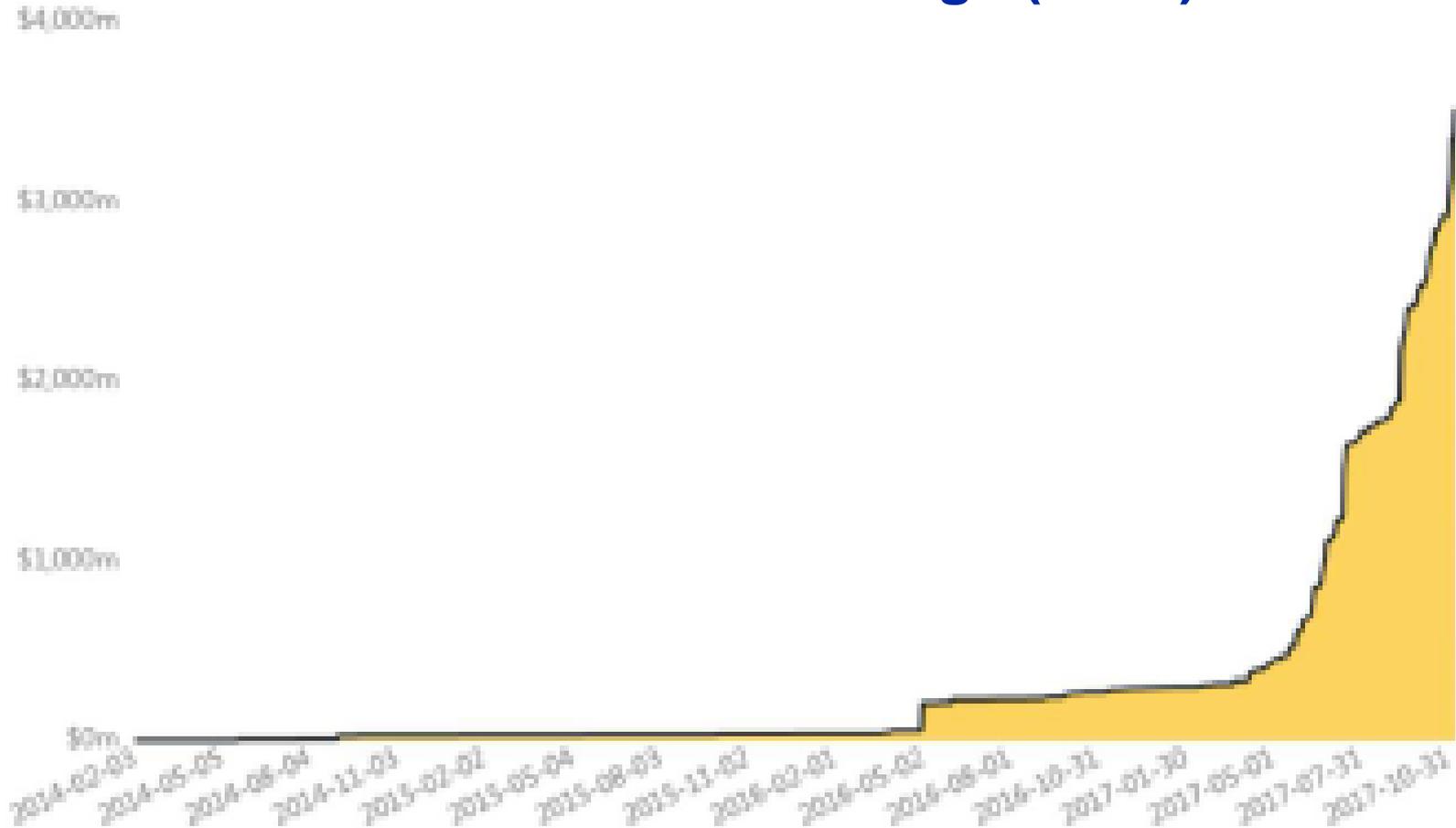


# Prospectus Liability (CH)

- Art. 69 FIDLEG/FinSA
  - Plaintiffs: primary and secondary market investors
  - Defendants: persons involved in the preparation and the dissemination of prospectus or related material
  - Untrue or misleading representations (+omissions) in a prospectus or a «similar statement»
  - Standard of care: negligence
  - Causation: Transaction causation may be established even if the investor did not read the prospectus («investment atmosphere»)
  - Remedies:
    - value loss of the securities
    - loss of profit



# All-time cumulative funding for International Coin Offerings (ICOs)



Source: CoinDesk ICO Tracker, November 2018



# International Coin Offerings (ICOs) Four Different Regulatory Approaches



Temporary ban on ICOs



Requirement of compliance with securities regulation



Requirement of compliance with securities regulation  
→ But clarifying position as to how to fall outside the scope of securities regulation



Current lack of clear regulatory treatment





# The Scope of Securities Regulation

## US

- Application of securities regulation if tokens are investment contracts: “Howey Test” (SEC v Howey)
  - Investment of money → assets
  - Expectation of profits
  - Common enterprise
  - Profit depending on the efforts of a promoter or third party

## Singapore

- Application of securities regulation if tokens are capital markets products
  - Securities
  - Futures contracts
  - Contracts or arrangements for purposes of leveraged foreign exchange trading

## Switzerland

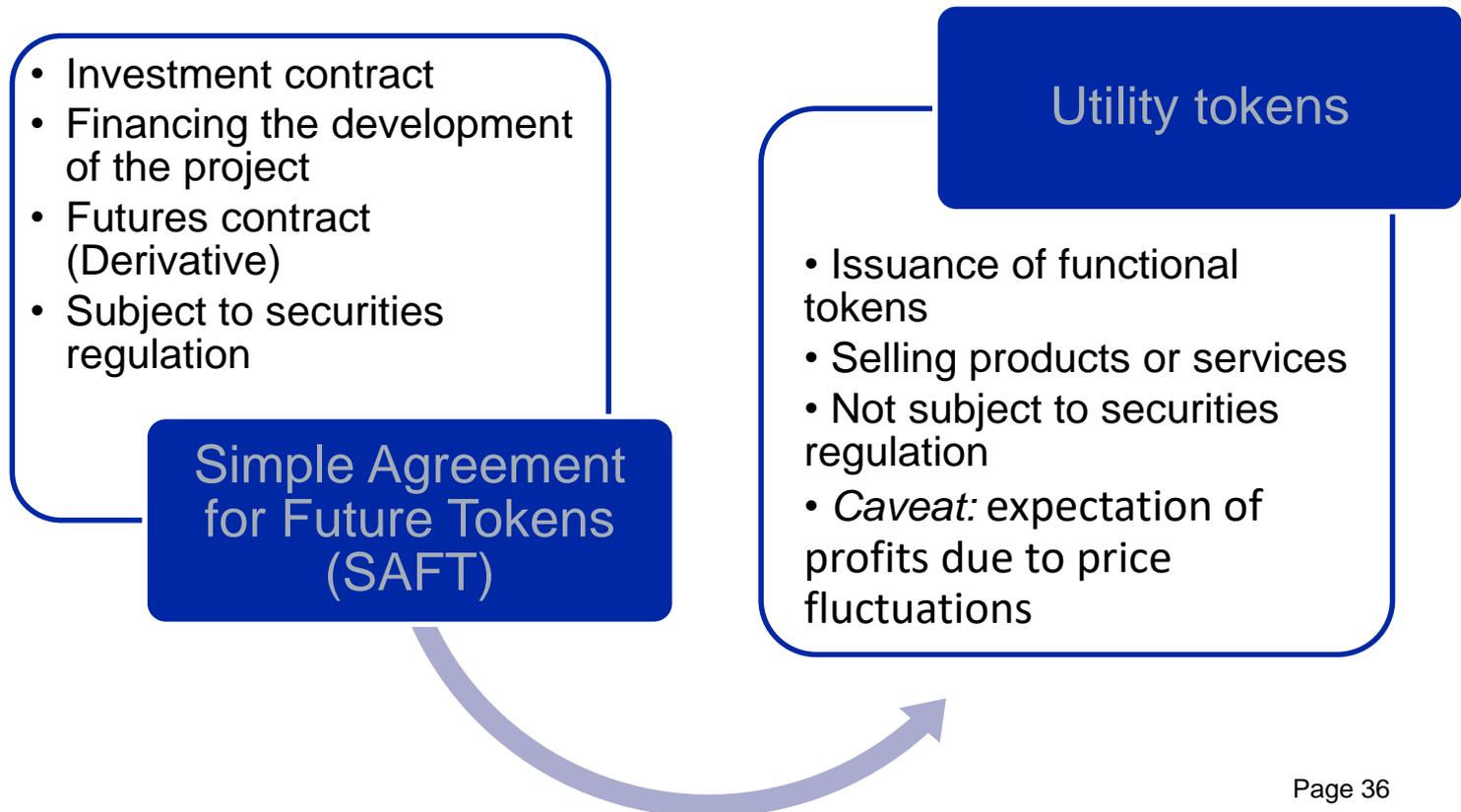
- Application of securities regulation if tokens fall within one of these 4 categories:
  - Certificated securities
  - Uncertificated securities
  - Derivatives
  - Intermediated securities (art. 2 let. b FMIA)

+ FinTech Regulatory Sandboxes



Security tokens: Issuers raise capital through an ICO in order to finance the development of a project

Emerging business model with a view to avoiding the qualification as security tokens:





## Summary

- Company may finance their investments and projects with debt or equity or retain earnings (equity)
- Debt finance may offers tax advantages. The optimal capital structure may result in a minimized WACC and a maximised company value
- CMU tries to solve the lack of market integration (e.g. cross border investments), the reliance on bank loans and improve the access to finance for SME
- Prospectus requirements: EU – PR (2019)(exemptions apply/proportionality for smaller issuers). Changes include: Prospectus exemptions, content and format of the prospectus, fast track approval for frequent issuer.
- US/EU/Swiss liability provisions – *ex ante* v *ex post* control provisions
- International Coin Offerings – regulatory challenge of financial technology
- Shareholder approval to change company structure



## Lecture 3 review: Separate Legal Entity

- Legal personality acquired on registration
- Legal personality distinct from the people who compose it
- Separate entity with perpetual existence
- Capacity of:
  - Entering into contracts and owning its own property
    - The question of pre-incorporation contracts
      - UK: founders are liable but company is not liable
      - CH: founders are jointly and severally liable and company may assume liability of the founders within three months of incorporation (Art. 645 I & II CO)
      - Germany: “Vorgesellschaft” = pre-incorporation company
    - Delegating authority to agents
    - Suing and being sued in its own name



## Piercing the Corporate Veil

- Exception to the separate legal entity principle
- Preventing those with fraudulent tendencies from hiding behind the corporate veil
- Disregarding the existence of the company
- Case law
  - *Macaura v. Northern Assurance Co.* [1925] – House of Lords refused to lift the veil
  - *Jones v. Lipman* [1962] – Court lifted the veil because company was a sham
  - *Trustor AB v. Smallbone* [2001] – Court lifted the veil because company was a façade used to misappropriate Trustee's funds



## Corporate Groups (1)

- Common law countries
  - UK: Statutory rules or court principles
    - *Adams v. Cape Industries* [1990] = strict application of the Salomon principle even though the group had been restructured so as to avoid liability
- Civil law countries
  - Germany: “*Konzernrecht*” = law of groups
- EU law
  - Draft EC Ninth Company Law Directive on the conduct of groups was withdrawn



## Corporate Groups (3/1)

- Switzerland
  - Principle: Parent company and subsidiary are separate legal entities – creditors of the subsidiary cannot get the parent company's assets
  - Exception: Possible to pierce the corporate veil if the parent company misuses the group structure in order to escape from liability – creditors can get the parent company's assets when the subsidiary is insolvent



## Corporate Groups (3/2)

### Liability for the Corporate Parent under Swiss law

- Principally the parent company as a mere share holder of the subsidiary has no duties going beyond the obligation to pay in full for its shares and is not liable for the debts of its subsidiary (Art. 620 II and Art. 680 I OR).
- However the parent company might be liable if she is found to be a «de facto corporate organ» of the subsidiary. The same applies for her employees or members of her corporate bodies who are «de facto» corporate organs of the subsidiary (UBS Case BGer 4A\_306/2009 from 8. February 2010).
- «De facto» corporate organs are «legal or natural persons who do in fact make decision reserved for management or occupy themselves with actual administration and thus determine the company's aims and direction in a decisive way» (BGE 107 II 349; 114 V 213).



# Liability for administration, business management and liquidation in Swiss Law

## Art. 754 OR

### A. Liability

#### III. Liability for administration, business management and liquidation

- The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

#### General Prerequisites of a Liability Claim (CH)

- Damage
- Unlawfulness
  - Breach of contract, or;
  - Breach of legally imposed duty
- Causality
- Fault → (Willfully or negligently)



## Corporate Groups (3/3)

### Liability for the Corporate Parent under Swiss law

- Liability for a Swiss corporate parent that has acted as a de facto corporate organ in case of violation of a duty (Art. 754 OR)
- Liabilities arising from other legal grounds:
  - Liability arising from trust in the group  
(*Swissair Decision*, BGE 120 II 331)
  - Liability arising from Swiss tort law in the event that a corporate organ of the parent company harms a subsidiary through an unlawful act in terms of Art. 41 et seq. OR
  - Liability arising from the impossibility to tell apart the parent company and the subsidiary  
(eg. the entities have similar names of their firms, same headquarters, same buildings, same persons with authorisation powers, same telephone lines etc., see the Givaudan-Case, BGE 137 III 550)



## Societas Europaea (SE)

- Agreement reached in 2001 with a Council Regulation providing for the European Company Statute
- Formation in one of 4 ways:
  - Merger of 2 or more existing public limited companies from at least 2 different EU Member States
  - Formation of a holding company promoted by public or private limited companies from at least 2 different Member States
  - Formation of a subsidiary of companies from at least 2 different Member States
  - Transformation of a public limited company which has, for at least 2 years, had a subsidiary in another Member State
- Minimum share capital of €120'000
- Registered office in the Member State where it has its head office
- Applicable law: in the Regulation and Directive / where no provision is made: law of the registered office