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INVESTORS' PROTECTION ON CROWDFUNDING SECONDARY
MARKETS: A PROPORTIONATE INFORMATION DISCLOSURE REGIME

Master's Thesis

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INTRODUCTION

The core idea behind crowdfunding is nothing new – it has been around centuries that people pool together their assets in order to fund a common goal or create a common value. The most frequently referred example is the pedestal of the Statute of Liberty which was funded by the citizens of New York in 1885 after Joseph Pulitzer has published an announcement in the magazine “World” asking for a financial contribution for the pedestal of the statute in return for publishing each contributors’ name in the newspaper. In five months, the campaign reached USD 102,000.¹

Nowadays crowdfunding has made a significant development and gained completely different extent and importance as it was when Lady Liberty was sculptured. Today, under the term “crowdfunding” is specifically meant an activity of pooling money through internet-based platform in small individual contributions from group of people, who are typically not professional investors², in order to support other’s idea and to accomplish a specific goal.³ The reason why crowdfunding has gained so much popularity in recent years is mainly the Internet.⁴ The global digital revolution has made communication and cooperation between people easier than it has ever been before – people can share their ideas with the whole world, despite long distances or state borders, and the addressee is able to receive the information just in few seconds.

Crowdfunding may be conducted in different forms, depending on the object of funding and whether the individuals participating in the projects receive any profit or benefits. Crowdfunding is a very recent phenomenon and academic writing on crowdfunding is referred as being nascent or immature.⁵ The first academic discussions mentioning crowdfunding focused on the legal issues under U.S. law, as the United States was the first country where the crowdfunding platforms appeared and also the first country where a special regulation for crowdfunding was enacted in 2012.⁶ Just one year after enactment of the Jumpstart Our

¹ Franke, N., Dömötör, R., Rütgen-Dömötör, A. *The Power of the Crowd, Crowdinvesting für kapitalsuchende Unternehmen und Investoren*. Junge Wirtschaft Österreich, Vienna: 2014, p. 9.

² European Securities and Markets Authority. Opinion. Investment-based crowdfunding. 18 December 2014. ESMA/2014/1378, p. 3.

³ Danmayr, F. *Archetypes of Crowdfunding Platforms. A Multidimensional Comparison* With a foreword by Dr. Othmar Lehner. Springer Fachmedien Wiesbaden 2014, p. 1.

⁴ Brüntje, D., Gajda, O. (editors). *Crowdfunding in Europe. State of the Art in Theory and Practice*. In association with the European Crowdfunding Network. Springer International Publishing Switzerland 2016, p. 2.

⁵ Danmayr, F., p. 2.

⁶ The Jumpstart Our Business Startups Act was signed into law by President Barack Obama on April 5, 2012.

Business Startups Act (hereinafter the JOBS Act), the first crowdfunding regulation was enacted also in Europe, in Italy. German Retail Investor's Protection Act (*Kleinanlegerschutzgesetz*)⁷ came into force on 10 July 2015. As crowdfunding is not specifically regulated in Estonia and the academic discussion is almost absent, the analysis on this topic is mainly based on the opinions of EU and international economic and financial institutions (ESMA, European Commission, European Central Bank, OECD), as well as institutions and financial supervision authorities of other EU Member States and United States. As the United States, Italy and Germany were the first countries enacting specific crowdfunding regulations and by now in these countries the legal writings and debates on this topic are among the most developed, the thesis aims to see these countries as practical examples of different regulations for crowdfunding, together with the problems these states have faced so far and the opinions of both practitioners and academia. However, it should be noted that even in these countries crowdfunding secondary markets are still in process of being established and therefore discussions specifically on secondary markets are still immature.

The first crowdfunding platforms were launched in the United States already in 2005 and similar platforms started to appear in Europe in 2010.⁸ As in 2012 Europe's crowdfunding market was the second largest in the world after North-America, in 2014 Asia has overtaken Europe's position with a small margin.⁹ In 2012, USD 2.7 billion from about 1.1 million campaigns was raised in crowdfunding industry.¹⁰ Experts believe that the global crowdfunding volume will rise up to USD 35 billion in 2020.¹¹ Investment-based crowdfunding has become a promising instrument to overcome start-ups' early stage equity gap that reduces the new start-ups' success and prevents them from fully concentrating on their business activities.¹² Crowdfunding can be a possibility to support the early stage start-ups and strengthen the

⁷ Kleinanlegerschutzgesetz vom 3. Juli 2015. Bundesgesetzblatt Jahrgang 2015 Teil I Nr. 28, ausgegeben zu Bonn am 9 Juli 2015.

⁸ M. M. Gierczak, U. Bretschneider, P. Haas, I. Blohm, J. M. Leimeister. Crowdfunding: Outlining the New Era of Fundraising. – Crowdfunding in Europe. State of the Art in Theory and Practice. In association with the European Crowdfunding Network. Edited by Brüntje, D., Gajda, O. Springer International Publishing Switzerland 2016, p. 9.

⁹ In 2014, the growth of crowdfunding in Asia was 320 percent which jumped the volume of the total market to \$3.4 billion, comparing to Europe where the figure was \$3.26 billion. Hossain, M., Oparaocha, G., Crowdfunding: Motives, Definitions, Typology and Ethical Challenges. Published in Social Science Research Network, October 15, 2015, p. 6.

¹⁰ Danmayr, F., p. 2.

¹¹ Gebert, M. et al, Wenzlaff, K. *Crowdfunding 2020: Komplement oder Substitut für die Finanzindustrie*. BoD – Books on Demand, Norderstedt: 2015, p. 10.

¹² Hagedorn, A., Pinkward, A. The Financing Process of Investment-based Crowdfunding: An Empirical Analysis. – Crowdfunding in Europe. State of the Art in Theory and Practice. Brüntje, D., Gajda, O. (editors), in association with the European Crowdfunding Network. Springer International Publishing Switzerland 2016, p. 72.

employment and innovation and therefore it has a potential to offer financial growth in modern economics.¹³ It is estimated to become one of the most important ways of financing creative projects, start-ups and young companies in 2020.¹⁴

One of the biggest risk for crowdfunding investors investing in start-up companies is the lack of liquidity of these investments. It may take many years until the first liquidity events in a company. Moreover, dividend payments in young companies is very rare as normally most of the return of these companies will be invested in development of the company. The lack of liquidity is considered to be the major challenge for the whole crowdfunding financing as it may sabotage the whole concept because investors are not motivated to invest into illiquid securities.

As a reaction to the need of the market, recently several crowdfunding platforms have created special secondary trading platforms for crowdfunding investors. These so-called crowdfunding secondary markets give young companies a possibility to list their shares or share quotas on alternative trading venues. Secondary markets for crowdfunding securities would be a viable means for active, liquid and transparent trading of these shares or share quotas. However, until now, the topic has mainly been discussed among practitioners and there is still very few academic discussion about the potential investor protection risks.

The aim of this thesis is to find an answer to a question, whether the current company law and/or securities law provide for sufficient protection for crowdfunding investors on crowdfunding secondary markets and what the sufficient information disclosure on crowdfunding secondary market would be. First of all, it will be analysed whether the information disclosure requirements that are applicable to regulated markets, would also be applicable to crowdfunding secondary markets. Current EU information disclosure regime provides for comprehensive information disclosure framework for Member States' companies whose securities are admitted to regulated markets. The disclosure regime has mostly been enacted by maximum harmonisation directives and EU regulations that are directly applicable in all Member States. Therefore, the freedom of Member States deviate from EU requirements in issuer disclosure regime in listed companies is strictly limited. The information disclosure regime under EU law, currently in force in Member States, is mainly regulated in in Transparency Directive¹⁵,

¹³ Brüntje, D., Gajda, O., p. 2.

¹⁴ Gebert, M. *et al*, p. 10.

¹⁵ Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

Prospectus Directive¹⁶ and Prospectus Regulation¹⁷, Market Abuse Directive¹⁸. Also, MiFID I addresses investor protection problem, in particular, by prescribing organisational requirements for the marketplaces, by enacting transparency rules and thereby ensuring market integrity, and by providing for EU-wide conduct of business regime.¹⁹ The recently enacted Market Abuse Directive II²⁰ and Market Abuse Regulation²¹ will enter into force on 3th July 2016 and will replace the Market Abuse Regulation. Also, the new MiFID II²² and MiFIR²³ regime is supposed to enter into force on 3th January 2018. The author analyses whether similar information disclosure requirements would apply to crowdfunding secondary markets as it is currently applicable to companies whose securities are admitted to regulated markets. If the disclosure requirements that are applicable to regulated markets, are not applicable to crowdfunding secondary markets, the next question is, whether the company law provides for sufficient information disclosure regime for protecting the investors on crowdfunding secondary markets or would these investors need higher protection. Assuming that the disclosure requirements that apply to regulated markets, would also be applicable to crowdfunding secondary markets, it should be analysed whether these disclosure requirements would not be excessively burdensome to crowdfunded companies.

The author puts forward two hypotheses:

- 1) if the disclosure requirements that apply to regulated markets, are not applicable to crowdfunding secondary markets, the disclosure requirements under Estonian company law are not sufficient to provide adequate protection to crowdfunding investors;

¹⁶ Directive 2003/71/EC of the European Parliament and the Council of 4 November 2003 on the prospectus to be published when securities are offered to public or admitted to trading and amending Directive 2001/34/EC. In Estonia, the Prospectus Directive has been implemented into SMA in 2005.

¹⁷ Commission Regulation (EC) No 809/2004 of April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

¹⁸ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

¹⁹ Haar, B. Organizing Regional Systems: The EU Example – The Oxford Handbook of Financial Regulation. Moloney, N., Ferran, E., Payne, J. (editors). Oxford University Press, New York: 2015, p. 164.

²⁰ Directive 2014/57/EU of the European Parliament and the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

²¹ Regulation (EU) No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

²² Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II).

²³ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

2) if the similar disclosure requirements apply to regulated markets and crowdfunding secondary markets, these regulations would be excessively burdensome for crowdfunded companies.

Therefore, crowdfunding secondary markets would need a specific regulatory regime that would provide for higher information disclosure requirements than is provided under the company law, but would be less requiring than the regime for the companies admitted to regulated markets.

In order to test the abovementioned hypotheses, it should be first defined what the investment-based crowdfunding is, who are the participants of the funding rounds and what will be the legal status of crowdfunding investors in such companies. The protection of investors in secondary markets is highly dependent on the investor protection measures taken on primary market, therefore, the need for such specific regulations should be analysed. The EU law does not provide any specific harmonised legal framework for crowdfunding and the regulation is highly fragmented in different European countries. Some of the Member States have enacted comprehensive crowdfunding legal framework whereas in many other states crowdfunding remains fully unregulated. As Estonia belongs to the second group of the countries, the legal framework of crowdfunding in two other European countries – Italy and Germany – where a specific legal framework have been introduced, as well the birthplace of the crowdfunding regulations – the United States of America – are compared, and analysed whether Estonia would need to take an initiative to regulate investment-based crowdfunding in order to protect retail investors and/or facilitate the capital raising for young companies.

Second, in order to analyse whether crowdfunding secondary markets would be subject to similar information disclosure requirements as regulated markets, it should be first defined what crowdfunding secondary markets are, how these markets could be structured and what would be applicable regulations for such secondary market structures. In the first chapter, the author analyses the structures of the potential crowdfunding secondary markets as well as the admissibility of crowdfunding securities on different trading venues as well as trading over-the-counter and the possible regulatory and disclosure regime that would apply.

For testing the first hypothesis, the author analyses the core objectives of disclosure requirements on regulated markets in order to determine whether these objectives are similar in crowdfunding secondary markets. It will then be analysed whether the information disclosure requirements for non-listed companies under company law would be sufficient to achieve these

objectives in crowdfunding secondary markets or should the more stringent disclosure requirements, as applicable to regulated markets, apply.

The testing of the second hypothesis requires analysis of the proportionality of information disclosure requirements on crowdfunding secondary markets. The most important question concerning information disclosure on crowdfunding secondary markets is, whether the information disclosure requirements should be prescribed and guaranteed by a state or whether the information disclosure could be regulated by free market forces. If the information disclosure requirements are imposed by a state, the question is, what the limitations of the disclosure requirements under the principle of proportionality are. In other words, what the fundamental rights of a company that would be limited due to mandatory information disclosure are, and from the other side, what the justifications for these limitations on crowdfunding secondary markets would be.

From one side it is important that the potential advantages that crowdfunding would give to young companies would not be eliminated by excessively rigid administrative and information disclosure requirements imposed by a state. From the other side, despite all benefits that supporting financing young start-ups would give to our economy, the most important role of a state is to assure that investors participating in such fundings are adequately protected and that these markets are functioning honestly without fraudulent activities and exploitation of retail investors. With a speech at the SEC's and Rock Center's Silicon Valley Initiative, Chair Mary Jo White has expressed her concern of the problems regarding the risks of fraudulent activities in pre-IPO stock markets and how important it is that the regulators would take into account the technological changes and react quickly to the possible risks it may entail. Chair Mary Jo White referred to the problems of the technology-focused IPOs that enabled early staged employees to sell their stock to outside investors, in particular, unregistered broker-dealer activities, conflicts of interest and undisclosed compensation as well as fraudulent offers of pooled investment vehicles that purported to hold the pre-IPO stock. These issues were stemmed partly due to insufficient disclosure to the secondary market investors. These investors did not have an access to accurate information concerning the value of the companies where they were investing.²⁴As the success of primary crowdfunding market depends on the

²⁴ Chair Mary Jo White. Speech. Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative. 31.03.2016. Available at: https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html#_ftn16.

functioning of secondary markets, it may undermine the potential that crowdfunding would give for financing young start-ups and consequently to economy as a whole.

1. THE CONCEPT OF INVESTMENT-BASED CROWDFUNDING: PRIMARY AND SECONDARY MARKETS

1.1. Defining the concept of primary market of investment-based crowdfunding

Investment-based crowdfunding is a very new research area for academics and thus there is a widespread confusion and discordance in the use of terminology. Although in many languages, the borrowed English terms, such as crowdfunding, equity-based crowdfunding, investment-based crowdfunding or crowdsourcing are used more often than the corresponding terms in these languages, terms are not always uniformly used among practitioners. In German-speaking countries, the term crowdfunding is often used to distinguish crowdfunding based on the investments from other forms of crowdfunding.²⁵ Crowdfunding is considered to be a sub-category of crowdfunding²⁶. ESMA, however, has adopted the term investment-based crowdfunding.²⁷

Crowdfunding has been defined as “an open call, mostly through the Internet, for the provision of financial resources either in form of donation or in exchange for the future product or some form of reward to support initiatives for specific purposes.”²⁸ Crowdfunding is a form of financing that uses internal financing rather than traditional sources of external financing (e.g., bank loan, angel capital, venture capital).²⁹ Traditionally, banks have been acting as intermediaries between those who have and those who need money, but crowdfunding brings these people together directly, making it easier and cheaper for companies to collect capital

²⁵ Moritz, A., Block, J. H. Crowdfunding: A Literature Review and Research Directions – Crowdfunding in Europe. State of the Art in Theory and Practice. Brüntje, D., Gajda, O. (editors), in association with the European Crowdfunding Network. Springer International Publishing Switzerland 2016, p. 25.

²⁶ Klöhn, L., Hornuf, L. (2012). Investment-based Crowdfunding in Deutschland. *Zeitschrift für Bankrecht und Bankwirtschaft: ZBB*, 24(4), p. 239.

²⁷ E.g. see European Securities and Markets Authority. Opinion. Investment-based crowdfunding. 18 December 2014. ESMA/2014/1378. Available online: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1378_opinion_on_investment-based_crowdfunding.pdf; European Securities and Markets Authority. Investment-based crowdfunding. Insights from regulators in the EU. 13 May 2015, ESMA/2015/856 Ann 1.

Available online: https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-856_ann_1_esma_response_to_ec_green_paper_on_cmu_-_crowdfunding_survey.pdf. In this thesis, also the term investment-based crowdfunding (as a synonym of equity-based crowdfunding and crowdfunding) is used.

²⁸ Belleflamme, P., Lambert, T., Schwienbacher, A. Crowdfunding: Tapping the right crowd. *Journal of Business Venturing*. July 9, 2013, p. 8.

²⁹ *Ibid.*, p. 11.

through Internet based platforms and giving the customers a possibility to invest even small amounts of money directly in projects or companies. Crowdfunding is a collective effort by people networking and pooling their money together in order to invest in and support efforts initiated by other people or organisations.³⁰ Therefore, the main idea of crowdfunding is to make investing simple to big amount of customers, so that through collecting small contributions from each individual would be possible to create a common goal.

The term crowdfunding may mean several different types of money collecting activities, whereby the type of crowdfunding depends on the benefits that investors receive for their contribution. Mainly four different types of crowdfunding can be distinguished: donation-based, reward-based, lending-based and investment-based crowdfunding.³¹ Donation-based crowdfunding is based on the idea that a group of people finance a certain project with small contributions and without expecting to receive any benefits. The idea of donation-based crowdfunding has been extensively used by churches for many centuries who have collected small contributions from individuals. Reward-based crowdfunding is similar to donation-based crowdfunding, except for the small prize (e.g. concert tickets, pens, discounts, membership cards etc.) that the contributors will receive in case the project will be successful. The main motive of the individuals investing in these projects is usually not receiving profit but supporting the idea of the campaigner.

Crowdfunding can also be structured in a way that gives the investors possibility to receive some return from the money invested. Generally, there are two kinds of platforms that are based on a financial return of the investors: lending-based and investment-based crowdfunding platforms. Lending-based crowdfunding itself may also have several different business structures. For example, in Estonia there are currently so-called peer to peer lending platforms,³² which allow the individuals to give loans to individual borrowers, and real estate crowdfunding platforms³³ through which the individuals are giving loans for financing real estate projects. The research problems discussed in this thesis are, however, limited only to the financial return based crowdfunding business, i.e. investment-based crowdfunding.

³⁰ Ordanini, A., Miceli, L., Pizzetti, M. Crowd-funding: transforming customers into investors through innovative service platforms (2011). *Journal of Service Management*, Vol. 22 Iss 4, p. 444.

³¹ Klöhn, L., Hornuf, L., p. 239.

³² See for example Bondora, https://www.bondora.ee/newborrowerconversation/index2/?utm_expId=83917422-32.IUe_b4j9Rt2P0b7vpQBsNw.1&utm_referrer=https%3A%2F%2Fwww.bondora.ee%2Finvesteeri%2Finvesteermisjuhis.

³³ See for example EstateGuru, <https://estateguru.eu/>.

The main motive of the individuals to invest their money through investment-based crowdfunding platforms is to receive financial return. In case of investment-based crowdfunding, the contributors receive private equity in the financed companies if the project will be successful. Therefore, investment-based crowdfunding is a method of collecting small contributions from many individuals through internet based platform in order to finance or capitalise an enterprise.

Three different players in investment-based crowdfunding models can be identified: the project owner, the crowdfunding platform and the “crowd”. The project owner is a company (usually a start-up company)³⁴ launching a project and searching for financial contributions from interested supporters and issuing shares or share quotas, depending on the legal form of the company, that the contributors will receive for their investments. The project owner designs a campaign and calls for capital through special platform designed to advertise such projects (crowdfunding platform). The crowdfunding platform is an Internet based platform which is acting as an intermediary between the project owner and the crowd. The project owner designs and proposes it to be published on crowdfunding platform’s website. The crowdfunding platform publishes the information about the campaign and plays a matchmaking role between the issuer and the investors making small contributions for the proposed project. The platform usually does not provide any assistance concerning the investments in the companies and all the agreements with the companies are concluded on investors own risk. In case of successful campaign, the funds are transferred to the target company and the investors will become shareholders of the company. Should the campaign fail, the funds will be transferred back to the investors from the escrow account. The “crowd” is defined as a group of people (investors) who are giving financial contributions to support the idea of the project owner. In return to their investment, the contributors are promised to receive shares or share quotas in the established company. The contributors are generally consumers (retail investors) and the investments are rather small. For example, in Estonia, the minimum investment amounts on investment-based crowdfunding are EUR 100-200, although, under current legal framework there are no minimum or maximum investment limits for the individuals to invest in such projects;

³⁴ In Estonia, all types of companies can be funded through crowdfunding as there is no specific regulation restricting it but for example in Italy previously only „innovative start-ups“ were allowed to seek funding through investment-based crowdfunding.

1.2. The need for specific regulatory regime for primary markets of investment-based crowdfunding

Investment-based crowdfunding is not explicitly regulated in Estonia. Currently investment-based crowdfunding platforms are not required to hold any activity license and they are not supervised by Estonian Financial Supervision Authority. However, if a crowdfunding platform would provide any payment services that are provided under § 3 of it Payment Institutions and E-money Institutions Act (hereinafter PIEIA), it could qualify as payment institution³⁵ which could operate only as a public limited company (PIEIA § 5 (1)) and would need a payment services provider's licence from Estonian Financial Supervision Authority (PIEIA § 14). Moreover, if the platform would receive money from public for the purposes of depositing which would require banking activity licence. When a crowdfunding portal is solely intermediating funding the companies through online platform and holding the deposits on an account of a third party, license requirement does not apply.

The emergence of investment-based crowdfunding platforms in Estonia raises doubts whether the existing legal framework is sufficient to provide adequate protection to retail investors and transparency in such investment business and whether Estonian legislator should address the issue by bringing these platforms under the direct supervision of Estonian Financial Supervision Authority and/or taking additional consumer protection measures for crowdfunding investors. In fact, this problem has been addressed by many other countries (e.g. Italy, Germany and United States) where special regulations have been enacted in order to facilitate the capital raising through crowdfunding platforms and at the same time provide adequate protection to crowdfunding investors.

First country where crowdfunding was regulated was United States, where the JOBS Act was signed into law by President Barack Obama on April 5th 2012.³⁶ The aim of the act was to ease the regulatory burden of small companies when issuing securities.³⁷ Title III of the JOBS Act (the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012) regulates specifically the crowdfunding business. The JOBS Act allows individuals to invest in start-ups, emerging businesses, and small issuers online by purchasing equity securities in crowdfunded companies via SEC registered crowdfunding portals. The answer to the question

³⁵ The company would be qualified as payment institution if its *permanent* activity is providing payment services.

³⁶ See: <https://www.sec.gov/spotlight/jobs-act.shtml>.

³⁷ Newman, N. Let Sleeping Regs Lie: A Diatribe on Regulation A's Futility before and after the J.O.B.S. Act. U. of Pennsylvania Journal of Business Law. P. 65.

whether crowdfunding investments are securities subject to the Securities Act registration requirements, depends on the particular form of crowdfunding³⁸ and thus must be evaluated by case to case basis.

The JOBS Act legalised investment-based crowdfunding in the United States by creating a new registration exemption that allows certain issuers raise up to USD 1 million in twelve month period.³⁹ In addition, the contribution amount of each individual investor shall not exceed (i) the greater of USD 2,000 or 5 percent of the annual income or net worth of the investor, provided that either the annual income or net worth of the investor is less than USD 100,000; and (ii) 10 percent of the annual income or net worth of an investor, not to exceed a total amount sold of USD 100,000, if either the annual income or net worth is equal or more than USD 100,000.⁴⁰ Moreover, the transaction can be conducted only through a broker or funding portal that complies with the requirements of section in 4A(a) of the same act⁴¹ and the issuer has to comply with the requirements set forth in section 4A(b).⁴²

A person acting as an intermediary has to provide such disclosures, including disclosures related to risks and other investor education materials, as the Commission determines appropriate.⁴³ The intermediary has to ensure that the investor reviews or investor-education information positively affirms that the investor understands that the possible risk of losing the entire investment, and that the investor could bear such a loss. The investor has to answer certain questions demonstrating an understanding of the level of risk generally applicable to investments in start-ups, emerging businesses, and small issuers, an understanding of the risk of illiquidity and other matters as the Commission determines appropriate.⁴⁴ The intermediary has to take measures to reduce the risk of fraud with respect to such transactions, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by such person.⁴⁵

³⁸ Bradford, C. Steven. Crowdfunding and the Federal Securities Laws. Columbia Business Law Review. Vol 2012. P. 8.

³⁹ JOBS Act Sec. 302(a)(6)(A)

⁴⁰ JOBS Act Sec. 302(a)(6)(B)

⁴¹ JOBS Act Sec. 302(a)(6)(C).

⁴² JOBS Act Sec. 302(a)(6)(D).

⁴³ JOBS Act Sec. 4A (a)(3)

⁴⁴ JOBS Act Sec. 4A(a)(4)

⁴⁵ JOBS Act Sec. 4A(a)(5)

Not later than 21 days prior to the first day on which securities are sold to any investor, the intermediary has to make available to the Commission and to potential investors any information provided that the issuer is obliged to make available.⁴⁶ Section 4A(b) provides for a list of information that the issuer has to file with the Commission and to make available to potential investors. This information includes, *inter alia*, name, legal status, physical address, and website address of the issuer⁴⁷, a description of the business and the anticipated business plan⁴⁸, a description of the financial condition⁴⁹, a description of the stated purpose and intended use of the proceeds of the offering⁵⁰, the target offering amount, with the deadline to reach that amount⁵¹, the price to the public of the securities or the method for determining the price⁵², a description of the ownership and capital structure of the issuer⁵³.

The description of the ownership must include also the terms of the securities of the issuer being offered and each other class of security of the issuer, and a summary of the differences between such securities⁵⁴. The issuer has to make available a description of how the exercise of the rights held by the principal shareholders of the issuer could negatively impact the purchasers of the securities being offered, the name and ownership level of each existing shareholder who owns more than 20 percent of any class of the securities and how the securities being offered are being valued (with examples of methods for how such securities may be valued by the issuer in the future). The risks to purchasers of the securities relating to minority ownership in the issuer and the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties, must be described.⁵⁵

⁴⁶ JOBS Act Sec. 4A(a)(6)

⁴⁷ JOBS Act Sec. 4B(1)(A)

⁴⁸ JOBS Act Sec. 4B(1)(B)

⁴⁹ JOBS Act Sec. 4B(1)(C). According to the amounts of the offerings within the preceding 12-month period, the following documents shall be made available (i) \$ 100,000 or less, the income tax returns filed by the issuer for the most recently completed year (if any) and financial statements of the issuer, which shall be certified by the principal executive officer of the issuer; (ii) more than \$100,000, but not more than \$500,000, financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review or standards and procedures established by the Commission, and (iii) more than \$500,000, audited financial statements.

⁵⁰ JOBS Act Sec. 4B(1)(D)

⁵¹ JOBS Act Sec. 4B(1)(E)

⁵² JOBS Act Sec. 4B(1)(F). Before the final sale, each investor shall be provided in writing the final price and all required disclosures, with a reasonable opportunity to rescind the commitment to purchase the securities.

⁵³ JOBS Act Sec. 4B(1)(G).

⁵⁴ This must include an explanation how the rights of the securities being offered may be materially limited, diluted, or qualified by the rights of any other class of security of the issuer.

⁵⁵ JOBS Act Sec. 4B(1)(H)(i-v).

In Europe, the first country regulating crowdfunding was Italy, where the crowdfunding regulation has been adopted in 2013 with the CONSOB Regulation No. 18592/2013,⁵⁶ which implements sections 50-*quinquies* (“Management of portals for raising capital for innovative start-ups”) and 100-*ter* (“Offers through portals for raising capital”) of the legislative decree 58/1998 of Italian Consolidated Act of Finance, which has been introduced by law decree 179/2012. Banks and investment firms are allowed to manage crowdfunding portals in Italy, whereas crowdfunding portal managers must hold a specific license that is granted only when the portal manager fulfils all the following prerequisites: a) the portal manager is a private or public limited company or cooperative company; b) it is an Italian based company or an European Union company that has established a branch in Italy; c) the scope of the portal manager is managing of crowdfunding portals; d) the owners and the management of the company fulfils the special requirements provided by the regulation. Moreover, the company running crowdfunding portal is entered in a special registry which is managed by the CONSOB.

As regards investor protection, the crowdfunding regulation provides for a different protection regime for retail investors, which depends on the amount they wish to invest in the project in question. An exemption from MiFID I applies if a natural person invests less than EUR 500 in relation to each order or less than EUR 1.000 in relation to total amount of orders placed on a yearly basis. With regard to legal entities, the relevant thresholds are EUR 5.000 and EUR 10.000 respectively. Such measures are aimed to protect retail investors and to reduce the obligations of intermediaries.

Another unique requirement in Italy is that at least 5% of the financial instruments object of the offer must be subscribed by professional investors or banking foundations or incubators of innovative start-ups. It is, however, not a prerequisite for participating in crowdfunding, but a requisite for the completion thereof. In Italy, the prospectus requirement does not apply to the offering of securities with a value of less than EUR 5 million which is also the maximum limit under European law that the Member States may enact. According to that limit crowdfunding regulation allows to raise funds up to EUR 5 million per single offer in 12-month period. The threshold is considerably high comparing the USD 1 million in United States or even EUR 2.5 million in Germany.

⁵⁶ *Regolamento CONSOB n. 18592 sulla raccolta di capitali di rischio da parte di start-up innovative tramite portali on-line* [Regulation CONSOB no. 18592 on raising capital from innovative start-ups through online portals].

The first Italian crowdfunding regulation was criticized by practitioners because it established too strict limits for the enterprises who were allowed to raise money through crowdfunding. Namely, the regulation allowed only “innovative start-ups” to participate in crowdfunding financing rounds. The company must have been involved in the development, production or sale of innovative products or services having a high technological value and the company may not have been operational for more than 48 months. As a result, the crowdfunding regulation in Italy was subsequently amended by legislative decree 33/2015, whereas the new provisions refer to “offering subjects” (and not “issuers”), this way including in the definition also other companies, such as innovative SMEs, OICRs (investment funds).

Few years after the crowdfunding regulations were enacted in United States and in Italy, Germany adopted a special Retail Investors Protection Act (*Kleinanlegerschutzgesetz*),⁵⁷ which came into force on 10th July 2015. The legislator introduced so-called crowdfunding exception, which excludes crowdfunding from several requirements of the German Capital Investment Law (*Vermögensanlagengesetz*)⁵⁸, for example form prospectus requirement when the project does not exceed the threshold of EUR 2.5 million. The Retail Investors Protection Act applies only when offering profit participating loans, subordinated loans or commercially comparable investments. The total investment amount per each investor is limited to EUR 10,000. However, if the investment exceeds a threshold of EUR 1,000 investor must comply with further requirements, such as self-exploration on wealth or income. The maximum investment limit is not applicable to corporations. Any crowdfunding platform operating in Germany must hold a license under German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*)⁵⁹, under the German Banking Act (*Kreditwesengesetz*)⁶⁰ or the German Securities Trading Act (*Wertpapierhandelsgesetz*)⁶¹.

The objectives of the special crowdfunding regulations in all three countries have been two-sided. First, the crowdfunding regulations provide higher consumer protection by establishing certain wealth thresholds for investors, regulating the maximum investment amounts and

⁵⁷ Kleinanlegerschutzgesetz vom 3. Juli 2015. Bundesgesetzblatt Jahrgang 2015 Teil I Nr. 28, ausgegeben zu Bonn am 9 Juli 2015.

⁵⁸ Vermögensanlagengesetz vom 6. Dezember 2011 (BGBl. I S. 2481), das zuletzt durch Artikel 4 des Gesetzes vom 22. Dezember 2015 (BGBl. I S. 2565) geändert worden ist.

⁵⁹ Gewerbeordnung in der Fassung der Bekanntmachung vom 22. Februar 1999 (BGBl. I S. 202), die durch Artikel 10 des Gesetzes vom 11. März 2016 (BGBl. I S. 396) geändert worden ist.

⁶⁰ Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das durch Artikel 12 des Gesetzes vom 11. März 2016 (BGBl. I S. 396) geändert worden ist.

⁶¹ Wertpapierhandelsgesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2708), das durch Artikel 6 des Gesetzes vom 31. März 2016 (BGBl. I S. 518) geändert worden ist.

providing for very specific information disclosure requirements to issuers in order to be allowed to raise money from retail investors. From the other side, the regulations also facilitate money raising through crowdfunding online platforms. In United States the JOBS Act legalised crowdfunding business and made it possible for the retail investors to participate in such investment campaigns. Also in Europe, for example in Germany, the crowdfunding regulation made exemptions for the issuers from the prospectus requirement and in Italy crowdfunding business was legalised by giving the permission for banks and investment firms to manage such portals. In addition to investor protection and simplified regulations for crowdfunding portals to facilitate raising money, there is another important positive development that the special crowdfunding regulation has created – it is the legal clarity.

In Estonia, the current legal framework does not establish any significant obstacles for raising money through crowdfunding portals. In contrary, the investment-based crowdfunding is not under supervision of Estonian Financial Supervision Authority. The online platforms are not required to hold any licence and no special prerequisites are established for such portal operators. Moreover, there are no special protection measures, such as investment limits or wealth-based investment allowance or special risk warning requirements,⁶² established for retail investors and therefore the possibility for frauds and wrong assessment of risks by non-experienced investors are high. Besides, current legal uncertainty is a major obstacle for development of crowdfunding business and especially it is a barrier for foreign crowdfunding platforms providing cross-border services or establishing a branch in Estonia. As in above-described countries and many other countries in Europe and outside, Estonia needs to take the initiative to reassess the current legal framework in the light of the changed reality that crowdfunding has caused and find the reasonable compromise between the need for retail investor protection and the objective to encourage the growth of start-ups businesses through investment-based crowdfunding in Estonia.

1.3. Defining the concept of crowdfunding secondary market

Secondary market means a market where securities are traded after being initially offered to the public in the primary market. When in a primary market securities are offered for subscription

⁶² The risks include, *inter alia*, the risk of illiquidity, the absence of secondary market, restrictions of an investor to cancel the investment, the risk of not getting the expected performance, risk of not being able to influence the management of the issuer and risk of dilution. The Board of the International Organization of Securities Commissions. Crowdfunding 2015 Survey Responses Report. FR/2015, December 2015, p. 19.

for the purpose of raising capital, in the secondary market, these existing securities are traded among investors, and in principle, the secondary market operates independently from the issuer of the securities.⁶³ The distinction between primary and secondary markets is fundamental for companies. On the primary market “new” financial products are created and a company can obtain new financial resources. The secondary market is a market for “used” financial product, where the previously issued securities are simply changing hands, without any new securities created. The purpose of the secondary market is to ensure that the securities are properly priced and traded and thereby facilitating the purchase or sale of these securities, i.e. providing liquidity.⁶⁴ In investment-based crowdfunding business, the new issues market, i.e. the initial funding rounds where individuals are supporting an established start-up, is primary market, and the market where subsequent trading with these securities takes place, is secondary market.

Many states have already enacted primary market regulation for investment-based crowdfunding and the issues are actively debated among legal scholars and practitioners around the world. However, the most recent development in crowdfunding is the emergence of secondary market trading systems. Inherent lack of liquidity is considered to be one of the biggest risks when investing in start-ups and small businesses through crowdfunding. As the crowdfunding industry continues to grow, the need for effective secondary market becomes more important and many crowdfunding platforms are currently developing new technology and business structures to give their clients a possibility for secondary trading and thereby also help to develop the primary market.

The quality of primary market for securities depends greatly on the quality of secondary market.⁶⁵ There would be few incentive to buy a financial security on primary market, knowing that it would be impossible or even very difficult to sell it on secondary market. Moreover, the secondary market determines the price in which the company can issue its securities on primary market as investors would be deciding between the existing investments and new proposed investments.⁶⁶ The same applies to contributors in crowdfunding who invest their money into young companies in order to gain financial return. Without a secondary market these securities would be highly illiquid and would not provide any expected financial return to the investors.

⁶³ Vernimmen, P. *et al.* Corporate Finance. Theory and Practice. Forth Edition. John Wiley and Sons, Ltd, Great Britain: 2014, p. 538.

⁶⁴ Liquidity means the ability to convert an investment into cash quickly and without loss of value. An investment is liquid when an investor can buy and sell it in large quantities without causing a change in its price. See Vernimmen, P. *et al.* p. 538.

⁶⁵ *Ibid.*, p. 8.

⁶⁶ *Ibid.*.

1.4. Exchange trading venues for crowdfunded securities

Generally, there are two ways how to organise secondary markets: trading on an exchange venue or trading over-the-counter. Unlike over-the-counter trade, the exchanges have a “place”⁶⁷ and the institutional rules that govern the trading and they are usually more formal. The most important trading venue is regulated market, which is a market where the government controls the forces of supply and demand and the requirements to access to the market and the market prices. Regulated market is a multilateral system operated and/or managed by a market operator, which brings together or facilitates bringing together of multiple third-party buying and selling interests in financial instruments (in the system and in accordance with its non-discretionary rules) in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of MiFID II/MiFIR rules for regulated markets.⁶⁸ In Estonia, the only regulated secondary securities market is NASDAQ OMX Tallinn Stock Exchange.

Considering that the companies funded through investment-based crowdfunding platforms are usually young companies or start-ups, going public will not be near-future option for these enterprises, as they must meet specific quantitative admission requirements (e.g. free float, capitalisation, operating history, market cap)⁶⁹ and the costs of complying with regulatory requirements can be very high. Therefore, generally crowdfunded securities cannot be traded on regulated markets until the company has reached a certain size and development. As this is usually a process that takes many years and as only few of the crowdfunding companies are ever able to achieve such success, this may not provide enough liquidity for the crowdfunding investors who would like to exit the investments before. Because of that, the portals are developing new alternative trading options for crowdfunding investors.

⁶⁷ The “place” is not only physical location of the trade. Nowadays most of the trading exchanges are becoming electronic.

⁶⁸ Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II). Article 4(1)(21).

⁶⁹ For example, to be eligible for inclusion to the Main List of Tallinn Stock Exchange, a company must have three years of operating history an established financial position, market cap of not less than EUR 4 million, with reporting according to the International Financial Reporting Standards, and a free float of 25% or worth at least EUR 10 million. See <http://www.nasdaqbaltic.com/en/products-services/trading-2/market-structure/>.

Another possibility how to organise secondary market for young crowdfunding companies would be using alternative trading venues. MiFID I had great impact in market structure in Europe by abolishing the concentration rule and allowing other trading platforms to compete with the traditional stock exchanges (regulated markets). MiFID I created an additional trading venue, i.e. multilateral trading facility (hereinafter MTF),⁷⁰ and MiFID II/MiFIR adopted Organised Trading Facility (hereinafter OTF).⁷¹ However, the OTF cannot support trading in equity or equity-like securities.⁷² The main motivations not to use OTF in equity segment for equity was that OTF would have potentially prejudiced price formation because of the potentially poor quality of the transparency data such as OTF as a discretionary venue⁷³ could produce. By limiting the operation of OTF to non-equity instruments, many risks were avoided. As regulated markets and MTFs are non-discretionary, such problem was not seen to be existing there.

Several crowdfunding secondary markets that have established very recently, are using MTF platforms.⁷⁴ MTF is defined as a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments (in the system and in accordance with non-discretionary rules) in a way that results in a contract.⁷⁵ Under MiFID I, regulated markets are distinguished from other multilateral trading platforms by the distinct regime which applies to the admission of securities to trading on a regulated market and the extensive disclosure regime that is not applicable to any other trading venues. The MiFID I pre- and post-trade transparency regime applies to shares

⁷⁰ Alexander, K. Market Structures and Market Abuse. – Handbook of Safeguarding Global Financial Stability: Political, Social, Cultural, and Economic Theories and Models. Caprio, G, Jr. (editor-in-chef). Elsevier Inc., United States of America: 2013, p. 383.

⁷¹ OTF is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract. Examples of OTFs would include broker crossing systems and inter-dealer broker systems bringing together third-party interests and orders by way of voice and/or hybrid voice or electronic execution. European Commission. Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID), 08.12.2010, p 9; Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II).

⁷² Mills, A., Haines, P. Essential strategies for Financial Services Compliance. Second Edition. John Wiley & Sons Ltd, Great Britain: 2015, p. 352; 10. Moloney, N.. EU Securities and Financial Markets Regulation. 3rd Edition. Oxford University Press, Oxford: 2014, p. 464.

⁷³ Discretion in OTF operates in two levels: when deciding to place an order in OTF and to react the order and when not deciding to match a client order with other orders in the system at the time, as long as it compiles with best execution requirements (MiFID II Art. 20(6)). Moloney, N.. EU Securities and Financial Markets Regulation. 3rd Edition. Oxford University Press, Oxford: 2014, p. 465.

⁷⁴ E.g. see www.alternativa.fr; www.euronext.com.

⁷⁵ Directive 2014/65/EU, preamble (22).

admitted to trading on a regulated market and covers trading of such shares whether it takes place on a regulated market or on an MTF. However, the regime does not apply if an instrument is admitted only to trading on a MTF and has not been admitted to trading on regulated market.

European Commission has expressed its concern that the MiFID I transparency framework for the securities traded outside regulated market was not sufficient and more specific pre- and post-trade transparency rules should be applied when the securities are only traded on MTFs.⁷⁶ Moreover, it has been argued that MTFs have a competitive advantage comparing to regulated markets because the MTFs do not set prices or provide market-making facilities and are not required under EU law to maintain market abuse surveillance system and therefore the MTFs operate on the basis of lower operating and regulatory compliance costs.⁷⁷ Addressing this issue, MiFID II/MiFIR regime aims to align the regulatory standards for these two trading venues through pre- and post-trade transparency requirements.⁷⁸ Under MiFID II, the usual authorisation process (e.g. firm governance, qualifying investors, and initial capital) applies to an investment firm (or market operator) seeking to operate as an MTF.⁷⁹ Market operators and investment firms operating an MTF must make public current bid and offer prices, and the depth of trading interest at those prices that are advertised through these systems. As regards post-trade transparency, the price, volume and time of transactions executed must be made public.⁸⁰ Also, the national competent authority (in Estonia, Financial Supervision Authority) must be provided with a detailed description of the functioning of the MTF and every authorisation to an investment firm or market operator to operate an MTF must be also notified to ESMA, which must establish a list of MTFs in the EU. Therefore, under the new regime, regulated markets and MTFs will be subject to very similar disclosure rules.

The main reasons why the disclosure regime was extended to alternative trading venues were mainly to create more robust and efficient market structures, increase transparency and stronger investor protection similarly on all trading venues. From one side, the new regime provides for higher consumer protection and helps to avoid fraudulent activities on these financial markets, but from the other side, it may be argued that the new regime will indirectly introduce again the

⁷⁶ European Commission. Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID), 08.12.2010, p. 26.

⁷⁷ Alexander, K. Market Structures and Market Abuse. – Handbook of Safeguarding Global Financial Stability: Political, Social, Cultural, and Economic Theories and Models. Caprio, G, Jr. (editor-in-chief). Elsevier Inc., United States of America: 2013, p. 388.

⁷⁸ *Ibid.*

⁷⁹ Moloney, N. EU Securities and Financial Markets Regulation. 3rd Edition. Oxford University Press, Oxford: 2014, p. 475.

⁸⁰ Gullifer, L. Payne, J., p. 541.

concentration rule in EU capital markets as the trading even in alternative venues will be subject to similar requirements as on regulated markets. Under MiFID II/MiFIR equities subject to the trading obligation will no longer be able to trade on broker crossing networks but instead, all business will need to move to regulated markets (MiFID II Title III), MTFs or systematic internalisers (MiFID II Title II, the investment firm regime) or equivalent third country venues. This may be excessively costly and burdensome for crowdfunding secondary markets, which may make the crowdfunding platforms seek for different structures for organising the secondary market trading. Most importantly, these securities may be traded on over-the-counter markets.

1.5. Over-the-counter trading of crowdfunded securities

Over-the-counter trade would be another possible way how to organise crowdfunding secondary markets. MiFID II/MiFIR (as MiFID I) regime does not provide a comprehensive definition of over-the-counter trade.⁸¹ Over-the-counter trade relates to transactions that are *ad hoc* and irregular and are carried out with wholesale counterparties. Over-the-counter transactions are carried out outside regulated markets or other trading venues and it can take various shapes from bilateral trading to permanent structures, such as systematic internalisers. In an over-the-counter market, dealers act as market makers by quoting prices at which the securities will be sold or bought. The trade in over-the-counter market may be executed between two participants and the prices may not be disclosed to other parties. Therefore, over-the-counter trade is considered to be less transparent than exchanges.

When an investment firm deals on its own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system, it falls under the regulation of systematic internaliser⁸² which is defined under Article 4(1)(20) of MiFID II. When an investment firm is a systematic internaliser, it has to notify the national competent authorities of its systematic internaliser status and ESMA is maintaining a list of systematic internalisers in Europe (MiFIR Art. 15(1)). MiFIR changes the current regime regarding systematic internalisers by adding the pre-trade transparency requirements. Any order

⁸¹ The European Parliament proposed a definition of over-the-counter which was limited to bilateral trading carried out by an eligible counterparty on its own account, outside of a trading venue or an SI, on an occasional and irregular basis, with eligible counterparty, and always at large-in scale sizes, which was not adopted.

See European Parliament, proposal for regulation (COM(2011)0652 – C7-0359/2011 – 2011/0296(COD)). 14.5.2012; Moloney, N. (2014), p. 462.

⁸² Directive 2014/65/EU, Preamble (20).

transactions in financial instruments that are not concluded on multilateral systems or on systematic internalisers, must comply with the relevant MiFIR requirements for over-the-counter trading (MiFID II Article 1(7)). The main requirement for systematic internalisers is to make public firm quotes in liquid instruments on a regular and continuous basis during normal trading hours. Under MiFIR, systematic internaliser is able to decide sizes at which they quote, provided that they are at least 10 % of standard market size⁸³ and they are required to make available two way quotes – a bid price and an offer price.

Under MiFID II, an investment firm is considered to be acting as systematic internaliser when an activity of dealing on own account by executing clients' orders is frequent and systematic and substantial.

First, the frequent and systematic basis should be measured by the number of over-the-counter trades in the financial instrument carried out by the investment firm on own account when executing clients' order.⁸⁴ An investment firm is considered to be trading on a frequent and systematic basis when the number of over-the-counter transactions executed by this firm on own account in liquid instrument is, equal or larger than 0.4% of the total number of transactions in the relevant financial instrument in the European Union during the relevant period of time.⁸⁵ For illiquid instruments, the frequent and systematic criteria is deemed to be met when, during the relevant period of time, an investment firm has dealt on its own account over-the-counter in a financial instrument on average on a daily basis.⁸⁶

Second, the substantial basis is measured either by the size of the over-the-counter trading carried out by the investment firm in relation with the total trading volume in specific financial instrument or by the size of the over-the-counter trading carried in relation to the total trading in the European Union in a specific instrument.⁸⁷ According to ESMA, client internalisation for a specific financial instrument should be considered as substantial when its accounts either: a)

⁸³ Standard Market Size is a MiFID average order size threshold for firms conducting in-house business (internalisation). ESMA has considered in its Discussion Paper whether the classes of average value of transactions and standard market size are still appropriate to ensure that obligations for systematic internalisers remain reasonable and proportionate. ESMA has found that the smallest class of average value of transactions had risen from 35% to 95% between 2008 and 2013 and tried to find possible options how the financial instruments should be grouped into classes and how the standard market size is established. For maintaining and enhancing transparency, ESMA proposed to establish classes by average value of transactions for financial instruments with an average value of transactions larger than EUR 20 000. European Securities and Markets Authority. Discussion Paper. MiFID/MiFIR. ESMA/2014/548, 22.05.2014, p. 35.

⁸⁴ European Securities and Markets Authority. ESMA's Technical Advice to the Commission on MiFID II and MiFIR. ESMA/2014/1569, 19.12.2014, p. 220.

⁸⁵ *Ibid.*, p. 223.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 220.

for 15% or more of the firm's total turnover in that financial instrument, or b) for 0.4% of the total turnover for this financial instrument in the European Union.⁸⁸

Regardless of the abovementioned criteria, under MiFIR regulations, the investment firms can also voluntarily opt-in the systematic internaliser regime. The purpose of this option is in ESMA's view to seek to ensure that a sufficient number of systematic internalisers are available in the context of the trading obligation for shares under Article 23 of MiFIR.⁸⁹ Therefore, an investment firm which deals on its own account when executing clients' orders for crowdfunding securities outside of regulated markets or MTFs would be a systematic internaliser, provided that it fulfils certain thresholds regarding frequent, systematic and substantial activity.⁹⁰

Therefore, when crowdfunding secondary market is operated by an investment firm that is dealing on its own account by executing clients' orders in frequent, systematic and substantial basis, such investment firm would be classified as systematic internaliser and it is required to inform its national authority of such activity. Investment firm, acting as systematic internaliser, will be subject to special disclosure requirements.

⁸⁸ *Ibid.*, p. 224.

⁸⁹ An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading, unless their characteristics include that they: (a) are non-systematic, ad-hoc, irregular and infrequent; or (b) are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process. 6. European Securities and Markets Authority. Discussion Paper. MiFID/MiFIR. ESMA/2014/548, 22.05.2014. Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-548_discussion_paper_mifid-mifir.pdf.

⁹⁰ European Securities and Markets Authority. Discussion Paper. MiFID/MiFIR. ESMA/2014/548, 22.05.2014. Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-548_discussion_paper_mifid-mifir.pdf, p. 95.

2. THE OBJECTIVES OF INFORMATION DISCLOSURE ON CROWDFUNDING SECONDARY MARKETS

2.1. The subjects of information disclosure on crowdfunding secondary markets

Secondary market disclosures have for a long time been regarded as fundamentally shareholder-focused, as the aim of information disclosure was deemed to be exercising a corporate governance rule within the company rather than inform the investment decisions. In recent years the investor protection element in disclosure requirement has become more important and even some regulations that have previously been regarded as shareholder-focus, are now understood as having also investor protection purpose.⁹¹ Therefore, the subjects of information disclosure requirement on crowdfunding secondary markets would be both the potential investors who are evaluating the value of the company to make a reasonable investment decision, i.e. new crowdfunding investors on secondary market, as well as the existing shareholders in the company who have acquired stake in the company through initial crowdfunding rounds on primary markets and whose legitimate rights would otherwise easily be damaged by opportunistic behaviour of the managers and dominant shareholders.

As regards investor protection, information disclosure is important to ensure maximum transparency in capital markets. Transparency helps to prevent corruption and illegal transactions and it is an important means of investor protection. It is also crucial that the investors are adequately informed and they understand the risks associated with the investments. Better transparency is a necessary condition for better market discipline, which is essential for maintaining financial stability. From the issuers' point of view, information disclosure helps to create more efficient capital markets by reducing fraudulent activities in the market, thereby increasing investors' confidence. For crowdfunding investors, the information disclosed by the issuer is generally the only information available about the company. According to this information the investors must be able to evaluate the value of the stock in that company. When there would not be sufficient information available, the investors would be reluctant to take such high risks to invest in these companies. Consequently, the efficiency of crowdfunding secondary markets would decrease.

⁹¹ Gullifer, L. Payne, J. Corporate Finance Law. Principles and Policy. Second Edition. Hart Publishing Ltd, United Kingdom: 2015, p.542.

In addition to investor protection purpose, information disclosure is also important to ensure adequate protection for the existing shareholders in the company. Competent and committed shareholders who recognise and understand their roles in the company are considered to be an important prerequisite for the future growth and success of a company.⁹² Information disclosure is especially important for minority shareholders who have generally weaker position in the company and who may not otherwise have any overview over the companies' activities. Without adequate disclosure requirements there may be also a risk for crowdfunding shareholder to be expropriated by the controlling shareholders and managers (insiders) of the company. The company may use several strategies to divide the revenues among "insides" and avoid any dividend payments to minority shareholders.⁹³ Crowdfunding investors may face a risk that their investment will never materialise because it will be kept by the controlling shareholders or managers.

The control rights of the outside investors can be shaped with legal rules and effectiveness of their enforcement.⁹⁴ Mandatory disclosure requirements help to reduce opportunistic behaviour of the managers and controlling shareholders by limiting the option of silence or incomplete voluntary disclosures. Mandatory securities law disclosures demand the companies to provide specific information periodically and this requirement is ensured with legal enforcement, should the company fail to disclose required information or should the information be dishonest.⁹⁵ Information disclosure makes the companies accountable to the shareholders as well as to general public.⁹⁶ Such a detailed information disclosure makes it more difficult for the managers and controlling shareholders to protect their private benefits and control and expropriate value without incurring these legal penalties or reputational costs.⁹⁷

Moreover, mandatory disclosure requirements provide information that is necessary for the minority shareholders to protect themselves through other mechanisms, such as voting rights

⁹² OECD. Corporate Governance of Non-Listed Companies in Emerging Markets, p.12.

⁹³ Neville, M. A statutory buy-out right in SMEs – an important corporate governance mechanism and minority protection? Published in Company Law and SMEs, Mette Neuville & Karsen Ensig Sorenses (editors), Thomson Reuters, 2010, p. 286.

⁹⁴ Porta, R. La, Lopez-de-Silanes, F., Shleifer, A., Vishny, R. Investor Protection : Origins, Consequences, Reform. Financial Sector Discussion Paper No. 1. The World Bank, September 1999, p. 2.

⁹⁵ Closs, F. B., Prentice, R. A. Law and Corporate Finance. University of Texas at Austin, USA. Edward Elgar, Northampton: 2007.

⁹⁶ Rider, B. A. K., Tajima, Y., Macmillan, F. Commercial Law in Global Context. Some Perspectives in Anglo-Japanese Law. Kluwer Law International, London: 1998, p. 122.

⁹⁷ Renders, A., Gaeremynck, A. The Impact of Legal Voluntary Investor Protection on the Early Adaption of International Financial Reporting Standards (IFRS). De Economist 155, NO. 1 2007, p. 52.

or litigation.⁹⁸ Without mandatory information disclosure, the non-controlling crowdfunding shareholder would have no possibilities to determine whether or not the majority favours itself⁹⁹ and it would be even more difficult to prove such activities. Giving these shareholders full and timely access to information, in order to enhance good governance of the company, is equally important in listed companies, as well as on crowdfunding secondary markets.¹⁰⁰

It should also not be underestimated how information disclosure requirements encourage business participants (managers) to analyse the business.¹⁰¹ When managers are obliged to disclose information to shareholders and investors, they must first very deeply analyse the activity and the developments of the company and make sure that all the information published will be accurate and updated. In some sense it may even put pressure on the issuers to achieve better development of a company to avoid poor figures that would discourage investors to invest in that company.

In sum, crowdfunding markets could be subject to similar investor protection issues, as well as market manipulation and insider trading risks may be similar as on regulated markets. Thus, the general objectives of information disclosure should be similar in all capital markets, i.e. the similar objectives apply to crowdfunding secondary markets and regulated markets. Disclosure of corporate information is important tool in achieving the accountability of management to shareholders and the company to general public but most importantly it is an important source of information for potential investors. An additional value of information disclosure is that it requires the company to keep updated records of its financial information and analyse the activity and development of the company in ongoing basis.

2.2. Crowdfunding secondary markets' transparency

Adequate information disclosure is essential for achieving transparency in crowdfunding secondary markets. The key rationale of transparency is to ensure the effective integration of the equity markets, to promote the efficiency of the overall price formation process for equity instruments as well as to assist the effective operation of best execution obligations (Recital 44

⁹⁸ Kraakman, R. et al. *The Anatomy of Corporate Law. A Comparative and Functional Approach*. Second Edition. Oxford University Press: 2009, p. 99.

⁹⁹ Neville, M., p. 286.

¹⁰⁰ OECD. *Corporate Governance of Non-Listed Companies in Emerging Markets*, p. 11.

¹⁰¹ OECD. *Corporate Governance of Non-Listed Companies in Emerging Markets*. OECD: 2006, p. 11.

of MiFID). Achieving transparency in securities market requires transparency in the activity of market participants and access to information about the securities market. Transparency is an important condition for crowdfunding markets development since transparent activity on the market and access to information helps to reduce risks. Transparent market makes it possible for the participants to make informed investment decisions and at the same time it raises investors' confidence into the market.¹⁰²

Generally, two elements in transparency are distinguished: pre-trade transparency and post-trade transparency. In equity markets pre-trade transparency refers to the obligation to publish current orders relating to shares or share quotas, i.e. prices and amounts for selling and buying interest.¹⁰³ Post-trade transparency refers to the obligation to publish a trade report every time a transaction has been concluded. The aim of post-trade information disclosure is to give historical overview of the transactions excluded rather than information about trading opportunities.¹⁰⁴

Three core objectives of market transparency could be highlighted in the context of securities markets: financial stability, retail investor protection, and discouraging fraudulent and criminal activities.¹⁰⁵

Financial stability has been described as the ability of the financial system to maintain its basic functions without disruption that entail significant economic costs. The objective of financial stability is to ensure that the financial system can operate and can play the role that it needs to play in the economy as a whole.¹⁰⁶ Financial system comprises financial intermediaries, markets and market infrastructures. Financial instability can destroy wealth by disrupting investments, consumption and economic growth.¹⁰⁷ Financial stability is also described as stable equilibrium, in which small disturbance may lead to drastic changes. An unstable equilibrium can arise from financial imbalance (e.g. housing price bubble, over-exposure of banking system to specific sector or region) or investors' misassessment of risks. A shock to financial system may cause

¹⁰² Securities Markets in Eurasia. OECD: 2005, p. 84.

¹⁰³ European Commission. Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID), 08.12.2010, p. 22.

¹⁰⁴ European Commission. Public Consultation, Review of the Markets in Financial Instruments Directive, p. 24.

¹⁰⁵ Casey, J.-P., Lannoo, K. Europe's Hidden Capital Markets: Evolution, Architecture and Regulation of European Bond Market. Centre for European Policy Studies, Brussels: 2005, p. 112.

¹⁰⁶ House of Commons, Treasury Committee. Financial Stability and Transparency. Sixth Report of Session 2007-08, London: 2008, p. 5.

¹⁰⁷ Ferguson, R. W. Jr. *et al.* International Financial Stability. International Center for Monetary and Banking Studies (ICMB), Geneva: 2007, p. 5.

discontinuity or, in case of worse scenario, even crises.¹⁰⁸ The questions about risks created by the growing number of start-ups looking to disrupt traditional banking business and whether crowdfunding poses a systemic risk to the global financial sector have been addressed for example by the IOSCO. Although the IOSCO report concluded that the crowdfunding market does not present a direct systemic risk to the global financial sector at present, lack of transparency and disclosure risks are considered to be one of the key risks in crowdfunding business.¹⁰⁹ Information disclosure reduces information asymmetries in market and thereby reduces also the risk of financial instability.¹¹⁰

The second core objective of transparency of financial markets is investor protection.¹¹¹ In general terms, investor protection means the protection of investors against financial losses as a result of fraud and other illegal activities. Unsophisticated investors are the most vulnerable to market abuse, such as market manipulation or insider trading. Generally, the aim of investor protection measures is not to protect investors against a loss in the market value of security or inherit risks of investments.¹¹² However, unsophisticated customers may not understand and may not be able to evaluate new financial products.¹¹³ In order to reduce unanticipated risks to households, investor protection measures shall also ensure that customers, investing in financial products, are sufficiently informed and protected. Investor protection is considered to be as a matter of public interest and on a macro-economic basis it is considered to be essential for the proper functioning of the marketplace.¹¹⁴ Moreover, transparency of financial products is deemed to be essential to improve these households' welfare.¹¹⁵ Information disclosure helps customers to make informed investment decisions but it promotes also public understanding of the benefits, the risks and the embedded costs, associated with investing in different types of products. Regulative intervention helps to ensure that only most suitable products are offered

¹⁰⁸ *Ibid.*, p. 86.

¹⁰⁹ Kirby, E., Worner, S. Crow-funding: An Infant Industry Growing Fast. Staff Working Paper of the IOSCO Research Department, SWP3/2014.

¹¹⁰ Mullineux, A. W., Murinde, V. (editors). Handbook of International Banking. Edward Elgar Publishing Limited, Cheltenham: 2003, p. 638.

¹¹¹ Cetin N., Dr. Investor Protection as the Objective of Securities Regulation: Goal v Instruments. 2010.

¹¹² Collins, P. S. Regulation of Securities, Markets, and Transactions. A guide to the New Environment. Wiley, New Jersey: 2011.

¹¹³ Ferguson, R. W. *et al.*, p. 5.

¹¹⁴ Moloney, N. Investor protection and the Treaty: an uneasy relationship. – Capital Markets in the Age of Euro. Cross-Border Transactions, Listed Companies and Regulation. Ferrarini, G., Hopt, K. J., Wymeersch, E. (editors). Kluwer International, the Hague: 2002, p. 22.

¹¹⁵ Ferguson, R. W. Jr. *et al.*, p. 5.

to customers, taking into account customers' risk-bearing capability and financial sophistication.¹¹⁶

Adequate information disclosure regime also helps to reduce fraudulent and criminal activities on crowdfunding secondary markets. Disclosure gives private individuals insights into the operation of the corporation as well as it supplies information that can be used by regulators and surveillance bodies with enforcing certain standards of corporate behaviour in public interest.¹¹⁷ Information disclosure gives the crowdfunding investors better overview of the activities of the issuer and makes it more difficult for the issuer to manipulate with the information and give wrong insights to the potential investors.

However, it should be noted that although information disclosure is essential to create transparent capital markets, information disclosure alone may not always be sufficient to preserve financial stability, provide full protection to investors or eliminate all fraudulent activities in the market. Even in the most transparent financial markets it is not guaranteed that investors are able to do rational investment decisions. Investors may not be able to process information, especially when they are personally affected by the decision or when the information is too complex.¹¹⁸ For example, decisions of crowdfunding investors may be affected by advertisements of the platform or the company and the financial information provided by issuers may be complex and misleading for these investors.

Therefore, although transparency is an important means for protecting investors, reducing fraudulent and criminal activities in the market and helping to ensure financial stability, transparency cannot replace other kinds of regulation. Market transparency must always support other financial regulations and information disclosure requirements must be prescribed by government and also guaranteed by government.

2.3. The efficiency of crowdfunding secondary markets

Another core objective of information disclosure on crowdfunding secondary markets is promoting efficiency in these markets. In a perfectly efficient market, based on the theory of

¹¹⁶ *Ibid.*, p. 134.

¹¹⁷ Rider, B. A. K., Tajima, Y., Macmillan, F. Commercial Law in Global Context. Some Perspectives in Anglo-Japanese Law. Kluwer Law International, London: 1998, p. 122.

¹¹⁸ Etzioni, A. Is Transparency the Best Disinfectant? The Journal of Political Philosophy, Volume 18, Issue 4, pages 389–404, December 2010, p. 395.

Eugene F. Fama, there would be no information asymmetries between the investors and the issuers. Efficient capital market theory is based on the idea that in an efficient market the prices at any time “fully reflect” the available information about the company. Therefore, in an efficient market, prices are efficient in two ways: first, the prices immediately integrate new information provided to the market, and second, the prices predict the future value of the stock.¹¹⁹ In this perfectly efficient market, there would be no information asymmetries between the issuers and the investors that could lead to market manipulation or other fraudulent activities. However, due to market failures¹²⁰, the securities market can never be fully efficient.¹²¹

The way how information asymmetries can reduce confidence into markets often been explained by an illustrative example, so-called “lemons problem”¹²² in U.S. literature. According to this theory, in case of information asymmetry, buyers have no means to evaluate the quality of marketed goods. As a result, the seller has also no incentive to offer quality goods in the market as buyers are not able to tell any difference between better and inferior ones. The buyers value all goods at the average level and, at the end, the inferior goods are overvalued and quality goods undervalued. This will keep the quality products away from the market as the prices for their goods are too low. Consequently, only the inferior goods (“lemons”) will be left in the market which will reduce buyers’ confidence in the market and integrity of the market will be low.¹²³ When insiders know more about a firm’s securities, the securities can be “lemons”, so that new securities can be offered on discount. Therefore, if the company does not require the information that the investors require, the company will either not receive the credit or has to pay higher price for it.¹²⁴

One of the most important means for promoting investors’ confidence into the market is the requirement to disclose information¹²⁵ which would give the investors a possibility to assess potential risks and rewards of their investments and thereby help them to protect their own

¹¹⁹ Willemaers, G. S. The EU Issuer-Disclosure Regime. Objectives and Proposals for Reform, p 59.

¹²⁰ The market failures can be scenarios where individuals pursue their self interest leads to results that will not be efficient. The market failures could be for example adverse selections, moral hazards or information monopolies. Ledyard, J. O. The New Palgrave Dictionary of Economics, Second Edition, editors: Durlauf, S. N., Blume, L. E. 2008.

¹²¹ Willemaers, G. S., p. 60.

¹²² Akerlof, G. A. The Market for "Lemons": Quality Uncertainty and the Market Mechanism.

¹²³ Healy, P. M., Palepu, K. G. Information Asymmetry, Corporate Disclosure and the Capital Markets: A Review of the Empirical Disclosure Literature, p. 3.

¹²⁴ OECD. Corporate Governance of Non-Listed Companies in Emerging Markets, p. 23.

¹²⁵ According to the principle 16 of IOSCO 2010 report, “(t)here should be full, accurate and timely disclosure of financial results, risk and other information which is material to investors’ decisions.”

interests.¹²⁶ Moreover, the primary goal of the disclosure in secondary markets is to ensure that the prices are well informed.¹²⁷ Some commentators have found that the issuer-disclosure is the most important instrument for increasing investors' confidence.¹²⁸ For example, efficiency argument was also claimed to have played the main rule in enactment of the U.S. securities acts, as it was believed that disclosure regulation would enhance investors' confidence in capital markets.¹²⁹ The purpose of regulations should be to ensure that enough sufficient and accurate information will be provided to the investors. This generally involves certain sanctions or liability of the issuer or persons failing to exercise due diligence in gathering and provision of such information.¹³⁰

Disclosure regulation ensures the dissemination of financial information that otherwise would not be made available to the investors. Moreover, it allows public opinion (e.g. media) to promote discussion of the data and open discussions on issuer's performance. As a result, investors' confidence in the economy as a whole will be raised.¹³¹ Thus, disclosure improves the liquidity of market by reducing the information asymmetry, as reduced information asymmetry increases investors' confidence and increased investors' confidence leads to higher transaction volume and market efficiency.

However, information asymmetries may not be the only factor reducing investors' confidence and thereby making the markets less efficient. Market efficiency may also be undermined by fraudulent activities in the market, such as market manipulation or insider trading. Market manipulation may include dissemination of false or misleading information, bad faith transactions which are likely to give false or misleading signals to the market, fictitious or deceptive transactions and positioning of the price (SMA § 188¹⁵(1)). Market manipulation involves interference with the market's normal price-forming mechanism and thereby it undermines the efficiency, credibility and integrity of the market.¹³² As a result investors will lose their trust in such financial markets and will eventually give up investing or will invest in different sources.

¹²⁶ International Organization of Securities Commissions. *Objectives and Principles of Securities* (2003), p.5.

¹²⁷ Gullifer, L. Payne, p. 578.

¹²⁸ Willemaers, G. S., p. 44.

¹²⁹ Meier-Schats, C. J. *Objectives of Financial Disclosure Regulation*. *Journal of Comparative Business and Capital Market Law* 8 (1986) 219-248 219, p. 226. Available at: <http://scholarship.law.upenn.edu/jil/vol8/iss3/1/>.

¹³⁰ International Organization of Securities Commissions. *Objectives and Principles of Securities* (2003), p. 24.

¹³¹ Meier-Schats, C. J., p. 231.

¹³² Technical Committee of the International Organization of Securities Commissions. *Investigating and Prosecuting Market Manipulation*. May 2000.P. 7.

One of the difficulties with fighting against market manipulation is that not always the fraudulent misrepresentations are clear and straightforward. In most of the cases these are highly complex and not easily detectable trading practices, designed to increase or decrease a securities' trading volumes, distort the price or interfere with market forces of supply and demand.¹³³ Market manipulation practices are also continually evolving as new products are developed or new participants enter into the marketplace.¹³⁴ Low-priced securities, such as securities acquired through crowdfunding, may be more susceptible to fraud and market manipulation. Although crowdfunding, and especially secondary markets for crowdfunding, are a very new phenomenon in financial markets, it may give rise to undetected possibilities of abusive behaviour by the managers or the dominant shareholders. Misuse of information or misrepresentations and false statements can affect the confidence of crowdfunding investors.

Market manipulation and insider trading are closely related and in some situations it may be difficult to differentiate these concepts. However, the main difference is that manipulation consists of actions manipulating asset prices not necessarily based on privileged information as it is in case of insider trading.¹³⁵ Insider trading is considered to cause an adverse selection problem and therefore low liquidity, low prices, large bid ask spreads, high cost of capital and market breakdown under some conditions. Outside investors lose their confidence and invest less.¹³⁶

Insider trading is deemed to impair market efficiency because when we allow insider trading, it might cause insiders to delay information disclosure for the purposes of exploiting insider trading opportunities. This is because insiders would have strong incentives to withhold non-public price-sensitive information as they may be a possibility to profit on the basis of that information. Moreover, there may be a risk that the managers will withhold disclosure of information in order to reduce the risks that the market will not move as anticipated.¹³⁷ Because investors cannot easily distinguish shares in companies that present the risk of insider trading from the companies where it would not be, all of the investments will be discounted as reflecting

¹³³ Moloney, N. (2014), p. 703.

¹³⁴ *Ibid.*

¹³⁵ Barucci, E. Financial Markets Theory. Equilibrium, Efficiency and Information .Springer-Verlag London: 2003, p.383.

¹³⁶ Barucci, E., p. 384.

¹³⁷ Huang, H. International Securities Markets: Insider Trading Law in China.Kluwer Law International. Alphen aan den Rijn: 2006, p. 104.

the possible risk of insider trading. At the end, investors may refrain from investing altogether and thus the company might have difficulties with raising capital.¹³⁸

The harm to investors resulting from insider trading can be understood in two ways. First, the harm to each individual in specific insider trading cases from micro perspective which may bring private civil liability to insiders, and second, the harm which is caused to investors in general in macro perspective. It is argued that in markets with insiders the outside investors will always bear the cost of insider trading. Insiders will never buy unless the market price is too low and they will never sell unless the price is too high. Market makers would systematically lose. However, market makers tend to treat these possible losses to insiders as additional costs of maintaining the market and will tend to recover this cost from market participants. Therefore, all outside market participants will bear the costs of insider trading. Moreover, some commentators have pointed out the mathematical relationship between an insider trader's gain and the loss of investors (so-called Law of Conservation of Securities). It means that when someone trades on inside information, all other investors suffer loss which is equivalent to the insider trader's gain.¹³⁹ In crowdfunding markets, such loss would be covered most likely by crowdfunding investors who are standing far from the insiders circle. Without mandatory information disclosure, the issuer may avoid making available such information and crowdfunding investors would thus not even be aware of such insider dealings.

Market manipulation control systems are designed to avoid the misuse of material information by supplementing or including insider-dealing rules by avoiding the dissemination of misleading or false information that would distort the trading prices or trading volumes. In order to prevent market manipulation and maintain honesty in the market, the positive disclosure obligations to issuer may not be sufficient; the disclosure obligations must be supported by additional negative obligation, i.e. prohibition to disclose false or misleading information. In order to be effective, these obligations must be prescribed and guaranteed by the state.

¹³⁸ *Ibid.*, p. 106.

¹³⁹ *Ibid.*, p. 107.

2.4. Information disclosure requirements and objectives in private companies

In non-listed companies, the managers are required to disclose certain information to shareholders. After an investor has invested in a company, the investor attains a legal position in that company which gives the investor a justified interest in the property in which the investment was made. On the basis of this interest, the investor shall have a right to obtain information from the management about the activities of the company. Such information disclosure makes it possible for the shareholder to exercise also other rights in the company, such as voting rights or other minority shareholder rights.¹⁴⁰

The management board of a company is required to act in the most economically purposeful manner (§ 306(2) of the CC). According to § 138 of Estonian General Part of the Civil Code Act, rights shall be exercised and obligations shall be performed in good faith. Estonian Supreme court has found in 30th April 2003 and 2nd June 2003 cases that the responsibilities of the member of management board is to avoid the conflict of interests between the management and the company.¹⁴¹ However, the obligation to act in best possible way for the company and avoid conflict of interests would not be effective without information disclosure obligations as there would not be sufficient control mechanisms to discover such unlawful acts.

Under Estonian Commercial Code (hereinafter CC), different disclosure regime applies to private limited companies (*osaühing*) and public limited companies (*aktsiaselts*). Investor in a private limited company has higher information disclosure requirements than in public limited company because private limited company is generally considered to be smaller company in which the shareholders are more closely connected with the everyday activities of the company.¹⁴² As the competence of the investors in private limited companies is, in principle, unlimited and the shareholders could do decisions that are generally in the competence of the management (§ 168 (2) of CC), the investors in these companies need complete information to make informed and reasonable decisions. Therefore, they shall also have a right for access to the documents of the company.¹⁴³

¹⁴⁰ Saare, K., Volens, U., Vutt, A., Vutt, M. Ühinguõigus I. Kapitaliühingud. Kirjastus Juura, Tallinn: 2015, pp. 251, 425.

¹⁴¹ Judgements of the Civil Law Chamber of Estonian Supreme Court no. 3-2-1-41-03, para 10, and 3-2-1-67-03, para 23.

¹⁴² Saare, K., Volens, U. Vutt, A., Vutt, M., p. 251.

¹⁴³ *Ibid.*

The shareholders in public limited companies have less rights for information. They have a right to require information from the management only in the general meeting (§ 287 of the CC). Moreover, the investor in public limited company does not have a right of access to the documents of the company. Nevertheless, there are certain documents to which the shareholders shall always have an access. These documents include annual report (§ 332 of the CC), the draft of resolution (§ 293¹(5) of the CC) and the minutes of the general meeting (§ 304 (4) of the CC). In addition, Estonian Supreme Court has found that in addition to the minutes of the general meeting, the shareholders also have a right to access to its annexes.¹⁴⁴

The right for access to documents is also regulated in Estonian Law of Obligations Act (hereinafter LOA). According to § 1015 of LOA, a person who has a legitimate interest in examining a document which is in the possession of another person may demand that the possessor of the document allow the document to be examined if the document has been prepared in the interests of the person who wishes to examine the document or if the document sets out a legal relationship between such person and the possessor of the document or the preparation of a transaction between those persons. The provisions of CC as *ius specialis* prevails on the LOA and therefore solely the provisions of CC will apply investor is not obliged to prove his or her interest in the information but the right for the access to the documents results from the membership rights. Although the investors in public limited companies do not have the right for access to documents, they may still have such a right under § 1015 of LOA, provided that all the prerequisites are fulfilled.¹⁴⁵

The extent of information disclosure is closely connected with the loyalty obligation as well as with the obligation to act in good faith. These obligations are reciprocal; the aim of the information requirement by the investor shall not be malicious or in any way damaging the company and the information disclosed by the company must be right and accurate. The right to require information disclosure must, however, comply with the principle of reasonableness. For example, it would be considered generally unreasonable if a shareholder requires information disclosure at night or during national holidays.¹⁴⁶

The management board may refuse to give information or to present documents if there is a basis to presume that this may cause significant damage to the interests of the private limited company (§ 166 (2) of CC). This information disclosure limitation aims to set the interests of

¹⁴⁴ Judgement of the Civil Law Chamber of Estonian Supreme Court no. 3-2-1-6-15, para 18.

¹⁴⁵ *Ibid.*, pp. 251-252.

¹⁴⁶ *Ibid.*, p. 252.

the company above the interests of the shareholder in situations where the interests of the company would be damaged due to information disclosed. The damage shall not be understood solely in the meaning of § 128(2) of the LOA but it may include also damaging general interests of the company. The risk of damaging company's interests must not necessarily be directly connected with the disclosed information itself but the risk that some interests of the company may be damaged due to information disclosure, must be sufficiently important.¹⁴⁷

In practice, information disclosure has been denied when the investor is a competitor of the company or a person who is closely connected with the competitor. However, the fact that an investor is a competitor of the company does not automatically mean that the company may deny to disclose any information. The interests of the investor and the company must be evaluated in case by case basis.¹⁴⁸ For example, Estonian Supreme Court has found in 17th September 2013 case that despite the fact that the shareholders in public limited company are closely connected with a competitor of the company, the shareholders have a right to receive information about remunerations paid to the management board, the agreements concluded with the members of the management board and their close family members and the benefits received under these agreements.¹⁴⁹ The same principle applies to shareholders in private limited companies.¹⁵⁰

In addition to shareholders' right to require information disclosure, the minority shareholders in private limited companies have an additional protection measure against the opportunistic behaviour of the managers. Shareholders whose shares represent at least one-tenth of the share capital may demand a resolution on conduct of a special audit on matters regarding the management or financial situation of the private limited company, and the appointment of an auditor for the special audit by a resolution of the shareholders (§ 191 (1) of the CC). The aim of special audit is also to disclose certain information to shareholders but in this case it is more burdensome for the company as the abovementioned grounds for denial of information disclosure will not apply.¹⁵¹

The disclosure requirements in non-listed companies are aimed to protect the interests of the existing shareholders and promote corporate governance. This information disclosure is not protecting the potential investors from market abuse or contributing to formation of fair price

¹⁴⁷ *Ibid.*, p. 253.

¹⁴⁸ *Ibid.*, p. 254.

¹⁴⁹ Judgement of the Civil Law Chamber of Estonian Supreme Court no. 3-2-1-86-13, paras. 15, 17

¹⁵⁰ Saare, K., Volens, U., Vutt, A., Vutt. M., p. 254.

¹⁵¹ *Ibid.*, p. 255.

or helping crowdfunding investors to make informed investment decisions. The information is directed to the shareholders not to general public or third persons. Moreover, individuals who do not have a shareholder's legal status are not granted with a right to require any information disclosure. Therefore, these information disclosure requirements would not be sufficient to provide transparent crowdfunding secondary markets or promote efficiency in these markets.

2.5. Information disclosure requirements and objectives on regulated markets

The information disclosure regime is vastly more extensive when securities are traded on regulated markets. The issuers are subject to prospectus requirement as well as stringent ongoing and periodic information disclosure requirements under Transparency Directive. Moreover, in order to eliminate market abuses, regulated markets are subject to specific disclosure requirements under the market abuse regime.

Prospectus is a legally required document presenting information about a company which helps investors to decide whether to invest in variety of securities issued by the company.¹⁵² Before enactment of the SMA, Estonian Supreme Court has held that the purpose of prospectus is to provide overview of the economic situation of the issuer, describe the conditions of the securities issued and give other information needed for making an informed investment decision.¹⁵³ The court has referred to the earlier securities market act,¹⁵⁴ which gave more general definition of the prospectus than the SMA. Although the current § 14 of SMA, which has been transposed from the Prospectus Directive, provides for more detailed and comprehensive definition and purpose of the prospectus requirement, the core objectives of the document have remained the same.

One of the purposes of the EU Prospectus Directive was to make it easier and cheaper for companies to raise capital throughout the EU on the basis of a single approval from the regulatory authority in one Member State.¹⁵⁵ In other words, it is enough that a company publishes prospectus, which meets certain requirements arising from the Prospectus Directive,

¹⁵² *Ibid.*, p. 2.

¹⁵³ Judgement of the Civil Law Chamber of Estonian Supreme Court no. 3-2-1-24-96.

¹⁵⁴ Väärtpaberituruseadus [Securities Market Act] – RT I 1993, 35, 543.

¹⁵⁵ European Commission. Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, p. 4.

in one member state, in order to issue securities also in other member states on the basis of the same document. Moreover, the Prospectus Directive is a maximum harmonisation directive¹⁵⁶ which means that Member States cannot impose higher standards to the information disclosure as it is prescribed in the directive. This avoids the Member States to impose higher information disclosure requirements to issuers that would prevent capital raising.¹⁵⁷ However, between certain thresholds, the directive leaves Member States with considerable freedom in its implementation and application. This has caused a situation in which in different Member States the applicability of prospectus requirements is considerably different.¹⁵⁸ Fragmentation of prospectus disclosure requirements in Member States may be an issue also in crowdfunding markets as it causes uncertainties of the applicable requirements in other states and thereby may cause several expenses to issuers (e.g. hiring local councils, bring the documents into line with other states' requirements). On 30.11.2015 European Commission made a legislative proposal for a new Prospectus Regulation which was a result of the review of Prospectus Directive. The biggest change in the review proposal is that European Commission proposes to change the original directive to regulation, which in practice means that the regulation will be directly applicable in all Member States and thereby would harmonise the current regulation in EU. According to European Commission, uniformity in these rules is needed in order to abolish obstacles hindering a smooth functioning of the internal market.¹⁵⁹

Article 5(1) of Prospectus Directive sets out the core principle of disclosure of the information to investors, stating that the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading

¹⁵⁶ Ferran, E. Building an EU Securities Market. Cambridge University Press, New York: 2004, p. 145.

¹⁵⁷ Considering the minimum value of the offer of securities per all the Member States, European Commission has made a proposal on 30.11.2015 to extend the threshold from EUR 100, 000 to EUR 500,000 in all Member States. One of the reasons for the proposed amendment has been the impact to securities-based crowdfunding in those nine member states (including Estonia) where it is currently required a prospectus for offers below EUR 500 000. As now, the crowdfunding platforms and companies, wishing to raise money via crowdfunding, need to carry out county-to-county analyses in each Member States in order conduct cross-border business activities. Raising the threshold to EUR 500 000 is considered to provide a safe harbour for the development of the vast majority of crowdfunding activities. See European Commission. Commission Staff Working Document Impact Assessment. Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, p. 20.

¹⁵⁸ Under the SMA, an offer of securities is not deemed to be public in the following cases: 1) an offer of securities addressed solely to qualified investors, or 2) an offer of securities addressed to fewer than 150 persons per Contracting State, other than qualified investors, or 3) an offer of securities addressed to investors who acquire securities for a total consideration of at least 100,000 Euros per investor, for each separate offer, or 4) an offer of securities with the nominal value or book value of at least 100,000 Euros per security, or 5) an offer of securities with a total consideration of less than 100,000 Euros per all the Member States in total calculated in a one-year period of the offer of the securities.

¹⁵⁹ European Commission. Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading., p. 5.

on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer of any guarantor, and of the rights attaching to such securities. Therefore, the main purpose of prospectus is to protect investors in capital markets. The information in prospectus should help the investors to make informed investment decisions, evaluate possible risks and possible gains and losses that an investment may bring. Moreover, the prospectus is aimed to protect also retail investors. The orientation towards retail investors' protection is reflected by the fact that the issuer has to provide a prospectus summary, which must inform the investors about the basic risks and give the essential information about the issuer, guarantor and securities in short and non-technical form.¹⁶⁰

The provision of full information concerning securities and issuers of those securities promotes protection of investors as well as it provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. Publishing a prospectus is considered to be the most appropriate way to make this information available.¹⁶¹ The same information disclosure objectives that prospectus is aimed to achieve on regulated markets should be achieved also on crowdfunding secondary markets. However, the Prospectus Directive requires that prospectus must be published when securities are offered to public or are admitted to trading on regulated market. Provided that the offer of securities does not constitute a 'public offer', MTF falls outside of the scope of Prospectus Directive and the prospectus requirements also do not apply when the securities are traded over-the-counter. Therefore, prospectus requirement would generally not apply when the securities would be admitted to trading on crowdfunding secondary markets. Although, it must be admitted that prospectus would also be a valuable source of information for crowdfunding investors, the question here arises whether it would be proportionate to require young companies that are searching for funding through crowdfunding, comply with the same rigid disclosure rules as the big companies on regulated markets.

The Transparency Directive¹⁶² establishes rules on periodic financial reports – annual and half-yearly financial reports – and disclosure of major shareholders for issuers whose securities are

¹⁶⁰ Haar, B. Organizing Regional Systems: The EU Example – The Oxford Handbook of Financial Regulation. Moloney, N., Ferran, E., Payne, J. (editors). Oxford University Press, New York: 2015, p. 167.

¹⁶¹ Directive 2003/71/EC, recital 18.

¹⁶² The Transparency Directive was issued in 2004 and implemented in Estonian SMA in 2007 whereas the amendments of the directive entered into force on 26 November 2013 and were implemented into SMA in 2015. Seletuskiri väärtpaberiturust seaduse ja sellega seonduvate seaduste muutmise seaduse eelnõu juurde, 108 SE, [Explanatory memorandum to the amendment of Securities Market Act and the other laws in connection, Draft

admitted on a regulated market. The directive introduces minimum information requirements that the companies whose securities are traded on a regulated market must provide.¹⁶³ The transparency requirements are considered to be rather investors' protection than shareholder's protection measure, although shareholders benefit from the disclosure as well.¹⁶⁴ The objectives of the directive is to attract investors to the European market place and to improve the efficiency, openness and integrity of capital markets.

The minimum information requirements consist of audited financial statements, such as management report and statements by those who are responsible for information disclosure in the company¹⁶⁵ and imposes more detailed half-yearly reports, consisting of the condensed set of financial statements, interim management report and statements of reliability.¹⁶⁶ The management report provides a strategic overview of the company's position and summary of material events and risks of the company, whereby complementing the financial disclosure and giving more holistic picture of the company's performance.¹⁶⁷ These information disclosure requirements make sure that the investors will receive full and updated information about the company's activities in order to give investors adequate information for making investment decisions and thereby raising market efficiency. Moreover, the information disclosure requirements increase market transparency and avoid fraudulent activities and opportunistic behaviour of the managers of the company. As the issuer is obliged to disclose certain information, the market participants are waiting to receive such information. Any missing or controversial information would give rise to doubts of possible illegal activities by the managers of the company.

law No 108], adopted 24.10.2007. Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC Text with EEA relevance; Seletuskiri väärtpaberituru seaduse muutmise seaduse eelnõu juurde, 67 SE.

¹⁶³ Ernoult, J., Hemetsberger, W., Schoppmann, H., Wengler, C. European Banking and Financial Services Law. Third edition. European Association of Public Banks and Funding Agencies AISBL. Groupe De Boeck S.A., Brussels: 2008, p. 61

¹⁶⁴ Gullifer, L. Payne, J., p. 548.

¹⁶⁵ According to Article 4, the issuer shall make public its annual financial report at the latest four months after the end of each financial year and shall ensure that it remains publicly available for at least five years.

¹⁶⁶ Ernoult, J., Hemetsberger, W., Schoppmann, H., Wengler, C., p. 61.

¹⁶⁷ Chiu, I. H.-Y., p.23.

The Transparency Directive also sets forth the requirement to the issuers to provide information to holders of shares so as to facilitate participation in general meeting.¹⁶⁸ The directive contains provisions to the notification obligations in respect of the acquisition or disposal of major shareholdings. This requirement is implemented to § 185 of the SMA, establishing the obligation to notify of number of votes in issuer if the number of votes in an issuer of shares belonging to a person constitutes 5, 10, 15, 20, 25 or 50 per cent, or 1/3 or 2/3 of all the votes represented by the shares. This disclosure requirement informs also the other shareholders whether some of the shareholders would acquire significant shareholding or control over the company.

Similarly as the prospectus requirement, the information disclosure requirements under Transparency Directive apply only to securities which are listed on regulated markets, i.e. it is not applicable to the MTF markets.¹⁶⁹ Admission to trading on regulated markets has been strongly differentiated from admission to trading on other trading venues as extending this concept has been considered to lead significant confusion as to the content and quality of the information. Users of alternative trading venues are considered to be of a different category from those of the regulated markets and therefore also the need for specific obligation of publication, storage and filing is deemed to be different.¹⁷⁰ Therefore, the issuers who list the securities exclusively on an MTF or trade the securities over-the-counter, would not have to comply with the existing disclosure requirements. However, the author of this thesis notes that such interpretation may leave the investors on crowdfunding secondary markets without sufficient information and may cause serious shortage in investor protection on crowdfunding secondary markets.

In order to curb possible market manipulation and insider trading on capital markets, certain disclosure requirements have been introduced under the market abuse regime. Market Abuse Directive I implemented measures for fighting against insider trading and market manipulation, requiring directors and other persons discharging managerial responsibilities in a company and persons connected to them to report transactions in the issuer's securities.

¹⁶⁸ Ernoult, J., Hemetsberger, W., Schoppmann, H., Wengler, C., p. 62.

¹⁶⁹ Boskovic, T., Cerruti, C., Noel, M. Comparing European and U.S. Securities Regulations MiFID versus Corresponding U.S. Regulations. World Bank working paper no. 184. The International Bank for Reconstruction and Development/ The World Bank. Washington, D.C., 2009, p.

¹⁷⁰ CSSF's comments to the European Commission's background and consultation document on the review of Directive 2003/6/EC. MAF.09/1551-MRI/MRI. Luxembourg, 09.05.2009, p. 2. Available at: https://circabc.europa.eu/webdav/CircaBC/FISMA/markt_consultations/Library/financial_services/securities_directive/public_authorities/CSSF_en.pdf (14.04.2006).

The aim of the EU market abuse regime is to protect market integrity and eliminate unlawful behaviour in the financial markets. Information disclosure is one of the most important elements for achieving such objectives. The Market Abuse Regulation requires to disclose inside information and to maintain insider lists as well as requires disclosure in relation to conducting transactions on own account by PDMR¹⁷¹ or their closely associated persons. Market Abuse Regulation introduced also the ‘close period’ for the managers of the companies.¹⁷² It means that the person discharging managerial responsibilities within an issuer shall not conduct any transactions on its own account or for the account of a third party relating to the shares during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report. The aim of this requirement is to avoid conducting transactions in high risk period of insider dealing.¹⁷³ Such disclosures help to curb insider trading and market manipulation¹⁷⁴ and providing information to shareholders about the director’s interests in the company makes the financial incentives the director available to the shareholders.¹⁷⁵

When Market Abuse Directive I affects only firms and individuals participating in regulated market¹⁷⁶, Market Abuse Directive II and Market Abuse Regulation widen the scope also to financial instruments traded on MTFs, OTFs and over-the-counter.¹⁷⁷ Therefore, inside information disclosure rules will be also applicable to securities traded on markets operating as MTFs as well as over-the-counter, such as systematic internalisers. The author of this thesis is in opinion that when crowdfunding secondary markets would not be subject to any information disclosure requirements under the market abuse regime, it would pose high risks of abusive activities in these markets as due to lower knowledge and experience in investments, crowdfunding investors are highly vulnerable and would have no protection against fraudulent activities. The investors very often do not notice the abusive activities in the market and if they do, it is difficult to find any remedies. As the investments are generally rather small, the costs for court proceedings would be disproportionately high and therefore the investors would not even seek for judicial aid.

¹⁷¹ A PDMR is defined in Market Abuse Regulation as a person within an issuer who is (i) a member of the administrative, management or supervisory body of that entity; or (ii) a senior executive who is not a member of any of these bodies who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity.

¹⁷² Gullifer, L. Payne, J., p.552.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ See Art. 9(1) of Market Abuse Directive.

¹⁷⁷ See. Art. 1(2) of Market Abuse Directive II.

3. PROPORTIONALITY OF MANDATORY INFORMATION DISCLOSURE REQUIREMENTS ON CROWDFUNDING SECONDARY MARKETS

3.1. Mandatory versus voluntarily information disclosure

The most important question concerning information disclosure on crowdfunding secondary markets is, whether these information disclosure needs state intervention, i.e. whether the information disclosure requirements should be prescribed and guaranteed by a state or whether the information disclosure could be regulated by the free market forces.

Unlike most of the goods circulating in economy, securities do not have intrinsic value. That is why information about securities in capital markets may be very precious. The real value of a security is considered to be the discounted income that the owner of the security will receive in the future. This income, however, depends on the cash flows of the issuer in the future. As the future events are always uncertain and depend on different risks and the investors can only predict these events according to the information they have been provided with. Therefore, any information about the issuer's past events and future plans, about the competence of its managers and similar information may be very precious for investors.¹⁷⁸

Securities market has also been seen as information market, where investors are willing to pay more for reliable information. In free market conditions, limited resources are divided in society without regulatory intervention on the basis of the willingness of the members of the society to pay. Therefore, if we assume the rationality of the members of securities market, the supply and the demand of information in unregulated market conditions should achieve a balance in effective use of the resources, i.e. an equilibrium in which any additional unit of information would be more expensive than the benefit obtained with this information.¹⁷⁹

As the above-described information asymmetry problem („lemons problem“) showed, an investor who does not have adequate information, will evaluate all the securities with general value and will not be willing to pay more for higher quality securities. Therefore, all the securities would be sold with discounted price. An issuer who discloses more information may, however, sell the securities with higher price.

¹⁷⁸ Hint, M. Avalikustamiskohustuse vajalikkus väärtpaberitõiguses. Õiguse majandusteaduslik analüüs. *Juridica* I/2005, p. 63.

¹⁷⁹ *Ibid.*, p. 64.

The functioning of voluntarily information disclosure depends also on the existence of anti-fraud rules as the investors have limited possibilities to verify the accuracy and veracity of the information.¹⁸⁰ There are also several additional factors that the investors may rely on even without any information disclosure. For example, the reputation of the issuer, accounting and auditing measures, including the services of rating agencies, have been named as additional important factors for the investors to decide whether to invest in a certain company.¹⁸¹ However, in crowdfunding secondary markets, the companies are rather recently established, small and unknown and thus the reputation may not assist the investors in their decision-making. Also, due to small size of these companies, they may not be rated by the agencies. The weakness of accountants or auditors is, however, that they are designated and remunerated by the issuer itself and thus possible conflict of interest situation may arise.¹⁸²

The proponents of mandatory information disclosure argue that due to market failures the perfect equilibrium in the capital market is not possible. For example, market failures may arise information asymmetry between the issuers and the investors. As issuers are always likely to find that the cost of making disclosure to the extent demanded by investors is higher than the possible benefits, the issuers have no incentive to make disclosure to the same extent as demanded by the investors.¹⁸³ Furthermore, the issuers may decide to disclose information selectively in order to provide investors only with information that would raise the value of the company in investors' eyes. Therefore, if left market forces, some information would be voluntarily disclosed by issuers but this information would always be sub-optimal compared to the extent of the information that the investors actually demand.¹⁸⁴ Moreover, without disclosure requirements imposed by state, some information would never be disclosed because private corporations have no incentive to disclose voluntary information that would give other corporations certain competitive advantage (e.g. information about new products). Each corporation would be willing to disclose only if others were required to do likewise.¹⁸⁵

Moreover, the less is the stake of the managers in the share capital, the higher is the probability that these managers would try to acquire the resources of the company with additional rewards or non-monetary benefits. In this case, although the disclosure of information would be in the

¹⁸⁰ Hint, M., p. 64.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Chiu, I. H.-Y. Regulatory Convergence in EU Securities Regulation. Kluwer Law International, the Netherlands: 2008, p. 15.

¹⁸⁴ *Ibid.*, p. 14.

¹⁸⁵ Easterbrook, F. H. Mandatory Disclosure and the Protection of Investors. Mandatory Disclosure and the Protection of Investors, 70 Virginia Law Review 669 (1984), p.686.

interests of the company, the managers may decide not to disclose such information.¹⁸⁶ As crowdfunding investors are generally not closely connected with the everyday activities of the company and its managers, it may be very difficult to obtain such information if the managers decide not to disclose that. As a result, the investors are deprived from the returns that they would have otherwise been entitled to.

Therefore, issuers must be obliged to disclose the information about the company and the worth of the securities as for the investors on crowdfunding secondary markets this information would be very difficult to discover otherwise. Although, it would be possible that the investors pay for independent analyses and find out the information by themselves, it would make investing for them very expensive. Considering the general nature and small size of crowdfunding investments, it would be unreasonable to require crowdfunding investors to conduct independent financial analyses of these companies. When the investors are not sufficiently informed and they would need to collect the information by themselves, the investors would not be attracted by the crowdfunding securities markets and this would adversely affect issuers' capital raising process. Thus, the rule of the state should be to provide a framework of rules to facilitate adequate disclosure to help the crowdfunding investors to make informed choices and to avoid any false descriptions being disclosed.

3.2. The general limitations of mandatory disclosure requirement

Legislative measures for the mandatory information disclosure regime needs to be in compliance with relevant fundamental rights embodied in the EU Charter of Fundamental Rights (hereinafter: CFREU). Legislative measures for mandatory information disclosure obligation should be necessary and proportionate. From one side any disclosure obligation restricts the right for the protection of personal data (Article 8 of the CFREU) and freedom to conduct a business (Article 16 of the CFREU). From other side, sufficient disclosure is needed to ensure adequate customer protection (Article 38 of the CFREU). However, according to Article 52 of the CFREU, any limitation on the exercise of the rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely

¹⁸⁶ Hint, M., p. 68.

meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

The main objectives of information disclosure requirements, as discussed in more detail in second chapter of this thesis, are to ensure market transparency and enhance market efficiency. Transparency of financial markets helps to maintain financial stability, protects investors and discourages fraudulent and criminal activities in the market. In order to achieve effective financial markets, it is important to reduce information asymmetry between the companies and investors and eliminate abusive activities from the market.

Moreover, European Union polices shall ensure high level of consumer protection (Article 38 of CFREU). Information disclosure makes it possible for the investors to evaluate companies' activities, evaluate the fair price of the securities as well as it protects investors from insider trading or market manipulation. Once acquired share quotas or shares in a company, information disclosure protects investors from discriminative treatment and makes it possible to exercise their shareholders' rights, such as voting rights or rights for dividends. Without mandatory information disclosure the shareholders may easily be deprived of their rights due to opportunistic behaviour of the controlling shareholders and/or managers and would even have no evidence to claim the violation of their rights.

From the other side, everyone has the right to the protection for personal data. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Any information of the company would be qualified as "personal data" when it relates to an identifiable person. Identifiable means that even if the person is not directly known, one can speak about personal data if there are ways to identify the person.¹⁸⁷ Under Article 2(b) of Directive 95/46/EC,¹⁸⁸ processing constitutes any operation or set of operations which is performed upon personal data such as, *inter alia*, disclosure by transmission, dissemination or otherwise making available. Therefore, information disclosed by a company under mandatory provisions may qualify as personal data and the obligations for disclosing such data should be proportionate.

Besides, disclosure obligations increase administrative burden of the company and may restrict the fundamental right for a freedom to conduct business under Article 16 of the CFREU. Prior

¹⁸⁷ Peers, S. *et al.* Charter of Fundamental Rights. A Commentary. Hart Publishing Ltd., Oxford: 2014, p. 243.

¹⁸⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

to the coming into force of the CFREU, the ECJ had already confirmed that the principle of protection for freedom to conduct business would extend to protection for the established market position of an undertaking and the need to maintain a degree of certainty with regard to its economic planning.¹⁸⁹ Moreover, the court has several times ruled that the protection of business secrets is a general principle of European Law.¹⁹⁰ In the case *Interseroh* the ECJ added that the protection of commercial secrecy is another area of substantive protection covered by the right to protection of business.¹⁹¹ Restrictions may be imposed, provided that they do not constitute a disproportionate and intolerable interference impairing the very substance of the rights guaranteed.¹⁹²

Therefore, the legislative measures for mandatory disclosure requirements should be proportionate and not excessively restricting the companies right for freedom of business. The objectives of the directives and regulations regulating the extent of disclosure requirements for issuers is to balance the trade-off between investor protection and limiting administrative burden for issuers.

3.3. Rationales of different levels of mandatory disclosure requirements for listed and non-listed companies

Under current EU legal framework, mandatory information disclosure requirements are substantially different in private and public companies. Public companies are obliged to provide a prospectus to the potential investors¹⁹³ and must follow certain transparency rules as provided by the Transparency Directive. Under MiFID I, the transparency requirements are applicable only to regulated markets. Although, MiFID II and MiFIR will change the situation by applying the transparency rules also to other trading venues such as MTFs and investment firms operating

¹⁸⁹ Judgement of the Court of 19 September 1985, Joined cases 63 and 147/84 *Finsider v Commission of the European Communities*; Judgement of the Court of 5 October 1994, Case C-280/93, *Federal Republic of Germany v Council of the European Union*.

¹⁹⁰ Judgement of the Court of 14 February 2008, Case C-450/06 *Varec SA v État belge*., para. 49; Judgement of the Court of 19 May 1994, Case C-36/92 P, *Samenwerkende Elektriciteits-produktiebedrijven N V ('SEP') v Commission of the European Communities*. para. 36.

¹⁹¹ Judgement of the Court of 29 March 2012, Case C-1/11 *Interseroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)*, para. 43.

¹⁹² Craig, P. *EU Administrative Law*. Second Edition. Oxford University Press, New York: 2012, p. 608.

¹⁹³ Provided that the offer is over certain thresholds as provided in SMA § 12(2).

as systematic internalisers,¹⁹⁴ the other directives, such as Prospectus Directive and Transparency Directive, regulating the disclosure obligations for issuers in regulated markets remain non-applicable crowdfunding securities traded outside of regulated markets and the issuer-disclosure requirements are considerably lower than for listed companies.

The primary source of information for investors in publicly traded companies is the periodic publication of company's annual accounts and reports.¹⁹⁵ In addition to the requirement to publish periodic reports, the companies are also obliged to make disclosure of information for a different purpose if necessary. Four kind of *ad hoc* disclosure requirements are distinguished: inside information disclosure requirement, directors' shareholdings and major shareholdings and disclosure required by the listing rules.¹⁹⁶ According to OECD report, information disclosure in listed companies shall give a possibility to investors to keep track of them and the regulatory agencies to supervise them. Listed companies shall observe the following principles in disclosing information:

- 1) Principle of authenticity. The information disclosed must be objective, consistent and standardised and may not contain false records;
- 2) Principle of accuracy. The information disclosed must be accurate and shall not use any expressions that are misleading or cause confusion;
- 3) Principle of completeness. Listed companies must make public the relevant information in compliance with laws, as well as rules of securities regulatory institutions and stock exchanges;
- 4) Principle of timeliness. Information must be disclosed insofar as possible without delay;
- 5) Principle of fairness. Listed companies must treat their investors in the same manner and are not allowed to disclose information to some certain investors only.¹⁹⁷

¹⁹⁴ MiFID II is now due to apply from 3 January 2017 and member states must transpose its provisions in national legislation and regulations by 3 July 2016. However, European Commission has proposed to postpone the entry into force of the overall MiFID/MiFIR framework for one year, i.e. until 2 January 2018.

¹⁹⁵ OECD. Corporate Governance of Non-Listed Companies in Emerging Markets, p. 13.

¹⁹⁶ Gullifer, L. Payne, p.541.

¹⁹⁷ Organization for Economic Cooperation and Development. Corporate Governance of Listed Companies in China. Self-assessment by the China Securities Regulatory Commission. OECD: 2011, p.51.

Financial reports are supposed to give complete and understandable picture of a company's financial position, thereby minimizing market uncertainty.¹⁹⁸ All these principles have been proposed to companies whose shares are listed in regulated market and the non-listed companies have been left out from discussion. Although, it should not be at issue that market transparency and efficiency should be achieved in all markets, due to the costs of information and the obligations that are placed on the company, information disclosure cannot be unlimited. The extent of mandatory disclosure requirements should be proportionate, taking into account both the obligations and the restrictions of the rights of the company concerning the disclosure and the benefits that information disclosure gives to investors, i.e. how the mandatory obligation to disclose certain information helps to achieve transparency and efficiency objectives. OECD, giving its assessment about the benefits of introducing mandatory financial reporting in large private companies, it has been in view that the benefits of such disclosure obligation is unlikely to outweigh the costs. OECD found that the benefits are either likely to be contracted voluntarily or are likely to be minor.¹⁹⁹

The costs of mandatory disclosure requirements are generally considered to be higher compliance costs and administration costs. Publishing financial accounts incurs additional costs for administering and regulating the disclosure, as well as for filing and processing the information.²⁰⁰ Moreover, for many companies these direct costs may even not be that significant than the indirect costs, such as loss of personal privacy and loss of competitive position. Information is a private good of a company²⁰¹ and it should be carefully examined whether the benefits of the disclosure outweigh the enterprises' rights for privacy.

Higher disclosure requirements always entail loss in company's privacy and this may result in loss in competitive position. Privacy costs have been considered as one of the most important cost to the company.²⁰² When information on the financial position and performance is made public, the enterprises give up some of their personal privacy in certain extent. Loss in privacy may result in loss of competitive position for some companies.²⁰³ For example, disclosing accounting data the firm also informs its competitors and gives then an evidence of its success

¹⁹⁸ Eberhartinger, E., Lee, S. Transparency of Fair Value Accounting and Tax. – The Oxford Handbook of Economic and Institutional Transparency. Forssbaeck, J., Oxelheim, L. Oxford University Press, New York: 2015, p. 477.

¹⁹⁹ OECD. Corporate Governance of Non-Listed Companies in Emerging Markets, p.13

²⁰⁰ Arruñada, B. Mandatory Accounting Disclosure by Small Private Companies. European Journal of Law and Economics, December 2011, Volume 32, Issue 3, pp 377-413, p. 5.

²⁰¹ OECD. Corporate Governance of Non-Listed Companies in Emerging Markets. OECD: 2006., pp. 11.

²⁰² *Ibid.*, pp. 11,13.

²⁰³ Arruñada, B., p. 7.

or lack of success in the market.²⁰⁴ However, it can be argued that when all companies have the same obligations for information disclosure, they will be in the same position. Nevertheless, requiring private companies to disclose their financial information could result in loss of competitive position for these companies that combine through co-operative or franchise structure relative as individual member companies co-operative or franchise would be required to disclose publicly their accounts, while the other companies that are part of a single consolidated company, are required only to report publicly at the consolidated level.²⁰⁵ As a result, an attempt to achieve entity neutrality may result in undermining neutrality between separately owned and wholly owned companies.²⁰⁶

However, when a company goes public, it will be in a certain position in which they are required to provide adequate level of information to investors in order to achieve transparency and efficiency of the financial markets. The author of the current thesis is in opinion that the same principles should be applicable when the securities are traded on alternative trading venues as the investors' need for information is similar. The investor should receive the same information on securities traded on crowdfunding secondary markets and in case those securities are traded on a regulated market.²⁰⁷ Therefore, in the sense of information disclosure requirements, companies should be classified as public companies which includes also companies whose shares are traded on regulated markets, and private companies. Asking the same information disclosure from private companies as it is required for the companies whose shares are listed on regulated markets would be inappropriate as it is excessively restricting these companies' rights for privacy and freedom of business. When the securities are offered on crowdfunding secondary markets, the issuers should be similarly responsible to provide adequate information to the investors as it is on regulated markets. High level of consumer protection, as one of the most important policy in all capital markets in EU and it should be provided to customers regardless of the market structure or operator. Information disclosure is the most important means for the investors to understand the value of the company, fair price of the securities and the value of company's activities as well as it limits market manipulation and insider trading.

²⁰⁴ *Ibid.*

²⁰⁵ OECD. Corporate Governance of Non-Listed Companies in Emerging Markets. OECD: 2006, pp. 11, 13, 25.

²⁰⁶ *Ibid.*, p. 25.

²⁰⁷ European Securities and Markets Authority. Response to public consultation. ESMA response to the European Commission consultation on the review of the Prospectus Directive. 2015/ESMA/857, 13.05.2015, p. 6. Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-857_response_to_the_ec_public_consultation_on_the_review_of_the_pd.pdf (14.04.2015).

3.4. The need for specific disclosure regime for crowdfunding secondary markets

Information disclosure requirements are based on the principle that the disclosed information should be proportionate concerning the addressees' actual need for information. For example, in United States, a famous Supreme Court decision from 1953, concerning the interpretation of the concept of private placement, the court stated that the registration (and thus disclosure) exemption under federal law²⁰⁸ in favour of private offerings must rely on the offerees' actual need for protection²⁰⁹ thus, an offering should not be considered public, and therefore subject to more strict disclosure requirements, as long as the target offerees are able to “fend for themselves”. When we compare a crowdfunding investor with an investment agent with years of investment experience, the actual need for information for these two investors are vastly different.

The information disclosure regime in EU is also mostly been attributed by investors' protection.²¹⁰ As it is impossible to evaluate every investors' need for information separately, the legislator has introduced specific thresholds in order to determine whether an investor is a retail investor, thus needs more information, or a professional investor. Under MiFID I regime, qualified investors²¹¹ and eligible counterparties²¹² are distinguished from retail investors. Generally, for retail investors higher standards of protection measures have been introduced. For example, the prospectus directive is not applicable when the offer is made solely to professional clients as these clients are able to fend for themselves. Despite the general rule that distinguishes qualified and retail investors and requires certain disclosure only to retail investors, some exceptions have been introduced in order to not to burden issuers with too strict administrative rules and therefore disproportionately restrict the business activities. The aim of these rules is to find a right balance between investor protection and facilitation of access to

²⁰⁸ Section 4 (2) of Securities Act of 1933.

²⁰⁹ *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119 (1953).

²¹⁰ Willemakers, G. S., p. 29.

²¹¹ Qualified investors are, for example, a credit institutions, investment firms, management companies, investment funds, insurance undertakings and other financial institutions subject to financial supervision, as well as the Republic of Estonia or other states, a local or regional government, the central bank of Estonia or a foreign state, international institution (§ 6(2) SMA). Also a large enterprise is considered to be a professional investor under the SMA, if it meets at least the following conditions: 1) the balance sheet total thereof is equal to or exceeds EUR 20 million; 2) the net turnover thereof is equal to or exceeds EUR 40 million; 3) the equity thereof is equal to or exceeds EUR 2 million (§ 6(2)¹ SMA).

²¹² A person who is considered to be eligible counterparty may apply for being treated as retail client (§ 46¹(6) SMA) and in this case all the protection measures of retail investors will be applicable also to eligible counterparty.

capital markets. The disclosure regime should not be excessively burdensome to issuers but should be sufficient to protect investors according to their need for protection.

One of the purposes of regulating information disclosure in regulated markets is to improve the quality of information disclosed and thereby preserve investors' confidence in financial market. The same objectives should be achieved on crowdfunding secondary markets. Information asymmetries may be particularly high in young start-up companies due to the uncertainties and high risk with these investments.²¹³ Therefore, the risk of information asymmetries in crowdfunding secondary markets may be even higher than in the companies whose shares are traded on regulated markets. Moreover, companies with small capitalisations are deemed to present disproportionate risks for both business failure and fraud.²¹⁴ Adequate disclosure of information helps to protect investors and avoid market abuse, thereby increasing investors' confidence into these markets²¹⁵ and raising the crowdfunding secondary markets' liquidity.

The arguments against mandatory disclosure in small unlisted companies often concern the specific structure of smaller enterprises. From the existing shareholders' point of view, the information disclosure is deemed less likely to be needed in private companies as shareholders learn about the business because they are managers, employees, or close observers in the firms in which they invest.²¹⁶ This is, however, different in crowdfunded companies where the funding investors are strongly distinguished from the managers and controlling shareholders. Crowdfunding investors and shareholders generally are not close to the company managers and are not involved in company's everyday business. Mandatory disclosure obligation to the companies would ensure that these minority shareholders are sufficiently informed and would avoid opportunistic behaviour of the managers and controlling shareholders.

It is also argued that mandatory disclosure may increase economic growth of a company. It is an essential element in protecting company's investors and creditors which plays an important role in any financial markets. Although most of the studies, conducted in this question, concentrate on public companies trading in stock market, similar claims could be made also about companies whose shares are traded on alternative trading venues or over-the-counter. The volume of the credit in economy depends largely on the information available to the debtors.

²¹³ Osovsky, A. The Curious Case of the Secondary Market with Respect to Investors Protect. Heinonline, 82 Tenn. L. Rev. 83 2014-2015, p. 118.

²¹⁴ Fisch, J. E. Can Internet Offerings Bridge the Small Business Capital Barrier (1998). Faculty Scholarship. Paper 1343. http://scholarship.law.upenn.edu/faculty_scholarship/1343.

²¹⁵ Easterbrook, F., p. 673.

²¹⁶ Kraakman, R. *et al.*, p. 194.

Empirical evidences have shown that the volume of credit grows when banks share more information on debtors and when the quality of credit registers improves.²¹⁷ The publication of accounts allows improved assessment of credit risk for both individual transactions and bank and macroeconomic regulation.²¹⁸ Therefore, improved information disclosure may advance the crowdfunding companies by making it easier to collect credit from new investors.

Moreover, it is claimed that small companies may even benefit from mandatory disclosure systems than large or even medium size companies. This is mainly because the size of large firms makes them sensible for financial analysts and even press spend more for monitoring and analysing these companies' activities. Moreover, large companies deal often with many contractual parties and those act also as information networks. Small companies, as crowdfunded start-ups, are generally unknown outside of their small cycle.²¹⁹ This makes these companies higher risk investments²²⁰ than large companies and higher level of mandatory information disclosure would be an essential means for investors to evaluate these companies. Investors would be more confident to invest in these companies and the investment's volume would raise. Therefore, it can be concluded that the investors need for information in crowdfunding secondary markets is similar as in regulated markets. Crowdfunding investors may be vulnerable to exploitation by business managers and dominant shareholders and if let uncontrolled, crowdfunding may likely become a possible place for frauds and exploitation of retail investors. Moreover, crowdfunding investors need to have sufficient information available for making informed and reasonable investment decisions. For these reasons, crowdfunding secondary markets should be subject to market abuse regime as well as the mandatory information disclosure regime.

Under market abuse regime the issuers are required to disclose inside information and maintain insider lists, which would be an important means on crowdfunding markets to reduce insider trading and manipulation of the securities' prices. The core aim of market abuse regime is to protect market integrity and eliminate unlawful behaviour on financial markets. Such objectives should also be achieved on crowdfunding secondary markets.

²¹⁷ Arruñada, B., p. 4.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*, p. 11-12.

²²⁰ European Commission. Commission Staff Working Document Impact Assessment. Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading. SWD/2015/0255 final - 2015/0268 (COD), Brussels 30.11.2015, p. 20.

In addition, the issuers should be subject to the minimum disclosure regime under Transparency Directive. The disclosure regime consists of yearly and half-yearly information disclosure as well as on-going information on major holdings of voting rights. The yearly and half-yearly reports give the investors a comprehensive overview of the company's activity and provides the investors with adequate and updated information for making reasonable investment decisions. The information disclosure helps to achieve more transparent markets, thereby providing better investor protection and contributes to formation of fair price. However, if we apply on crowdfunding secondary markets similar disclosure requirements as on regulated markets, it may add extensive administrative burden and costs to the small companies that are typically financed by crowdfunding. Consequently, too rigid information disclosure requirements may eliminate the whole crowdfunding secondary markets and adversely affect the economy. When similar information disclosure requirements apply to all companies, it is clear that the same expenses that big companies could spend on information disclosure, would be substantially more burdensome for small companies. As a result, the small companies rather invest in restructuring the companies in order to avoid these requirements or even give up offering the securities to retail investors.

First, the full disclosure regime under Transparency Directive may be excessively burdensome to crowdfunded companies. The cost of information disclosure may be disproportionately high, considering the low cost of the crowdfunding securities and therefore lower risks that the investors take when investing through crowdfunding platforms. The author of the current thesis is in opinion that the format of current reporting requirements for companies on regulated markets is excessively stringent for crowdfunded companies. Although, crowdfunding secondary markets should be, in principle, subject to similar periodic information disclosure as regulated under the Transparency Directive, specific "lighter" version of the disclosure obligations should be introduced for crowdfunding secondary markets. This regime must, *inter alia*, include balance sheet, income statement, cash flow and changes in equity capital but these statements should be provided in shorter version.

Second, the shorter version of prospectus disclosure requirement should be introduced for crowdfunding. Commissioner for Financial Stability, Financial Services and Capital Markets Union Jonathan Hill has emphasized the need for prospectus regime that gives the investors the information they need but at the same time admitted the importance of a balanced regulation that would not pile up unnecessary costs and put companies off raising money on the public

markets.²²¹ The main concern of European Commission was that at the moment the prospectus requirement is acting as unnecessary barrier for SMEs to access public markets and raise capital.²²² In order to promote SME market, on European Commission has proposed special regulations for SMEs. A new “question and answer” format prospectus for SMEs will be introduced²²³ in order to lower administrative burden from those companies and facilitate capital raising.

This new regime would be specifically defined as a “SME market” regime in the framework directive and would set out requirements that are proportionate and tailored to take into account specific nature and needs of these markets. The criteria of “SME market” would set forth some specific thresholds and market capitalisation for such companies. With the new prospectus regime the Commission proposed to include into the existing framework directive, *inter alia*, detailed requirements applying to operator of the SME market, eligibility conditions for issuers to be traded on the SME market, the need for an admission document and audited annual report for SMEs on the market, pre- and post-trade transparency requirements and the specific requirements for monitoring trading on the market operator to ensure fair and orderly trading and to detect market abuse such as insider trading and market manipulation.²²⁴

The main objective of the amendment of the current prospectus regime is to make easier and cheaper for smaller companies to access capital markets and to provide simplified and flexible conditions for these companies on secondary markets. It is important to find the right balance between market transparency and protecting legitimate interests of the market participants. The current regime provides very rigid and “one-fits-all” type of disclosure requirements. This restricts small companies’ access to capital markets as the disclosure of information is disproportionately expensive and burdensome for these companies. In order to avoid these excessive expenses, the companies are searching for solutions how to structure the business in a way that exempts them from these disclosure requirements. As a result, none of the objectives of effective capital market would be fulfilled. First, companies are facing excessive expenses to avoid even higher disclosure costs and their access to markets is limited, and second, as the

²²¹ European Commission – Press Release. The Commission proposes to overhaul prospectus rules to improve access to finance for companies and simplify information for investors. Brussels, 30.11.2015. Available at: http://europa.eu/rapid/press-release_IP-15-6196_en.htm (13.04.2016).

²²² European Commission. Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading., p. 2.

²²³ *Ibid.*, p. 6.

²²⁴ European Commission. Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID), 08.12.2010, p. 20.

companies are avoiding being subject to disclosure requirements, the retail investors will not receive adequate information. This is especially problematic in crowdfunding business because the general level of investment knowledge of crowdfunding investors is low and these investors are particularly vulnerable to manipulation and exploitation. These investors should be provided with at least minimum information that is disclosed to them in simple and understandable way.

Therefore, the author is in opinion that special disclosure regime under Transparency Directive as well as the special light prospectus regime as proposed by European Commission, would be the best solutions for achieving more transparent and efficient crowdfunding markets while at the same time protecting crowdfunding investors in these markets. This specific disclosure regime for crowdfunding secondary markets would, however, first need a specific regulatory regime for crowdfunding primary markets in Estonia, as it is regulated in many other countries (e.g. the regulations in United States, Italy and Germany more specifically analysed in the first chapter). In particular, the concept of investment-based crowdfunding should be defined under law, registration requirement for investment-based crowdfunding platforms should be introduced and these crowdfunding platforms should be under the supervision of Estonian Financial Supervision Authority (*Finantsinspektsioon*). Otherwise, it would be difficult to distinguish investment-based crowdfunding platforms from other similar structures and the requirements of lower information disclosure may be misused. Moreover, regulating investment-based crowdfunding primary markets would lower the risks also on secondary markets and would reduce the risk of potential damages for investors (e.g. by imposing maximum investment limits per investor, imposing the investment limits that depend on the income of the investor or requiring that a certain percentage of investments must be made by professional investors).

CONCLUSION

Crowdfunding is an activity of pooling money in small individual contributions from group of people, who are typically not professional investors, in order to support someone's idea and to accomplish a specific goal. Investment-based crowdfunding allows business owners to source investments for their young companies by offering equity in the business. Crowdfunding would be an important means for start-ups and young companies to find funding for their ideas, thereby helping to create new jobs and stimulate the economy in general.

In Estonia, the investment-based crowdfunding is not under supervision of Financial Supervision Authority (*Finantsinspeksioon*) and the online platforms are currently not required to hold any licence and no other prerequisites are established for such portal operators. Moreover, there are no special protection measures, such as investment limits or wealth-based investment allowance, special risk warning requirements, established for retail investors. Therefore, the possibility for frauds and wrong assessment of risks by non-experienced crowdfunding investors is high. Besides, current legal uncertainty is a major obstacle for development of crowdfunding business and especially it is a barrier for foreign crowdfunding platforms providing cross-border services or establishing a branch in Estonia. Estonia needs to take the initiative to reassess the current legal framework in the light of the changed reality that crowdfunding has caused and find the reasonable compromise between adequate retail investor protection and the objective to encourage the growth of start-ups businesses through investment-based crowdfunding. These issues should be addressed in both primary and secondary markets.

One of the biggest risk for crowdfunding investors investing in start-up companies is the lack of liquidity of these investments. It may take many years until the first liquidity events in a company and when the investors would have any possibility to gain revenues from their investments. Addressing this problem, several crowdfunding platforms have recently created special secondary trading venues for crowdfunding investors. These so-called crowdfunding secondary markets give the young companies a possibility to list their shares or share quotas on alternative trading venues that do not require these companies to fulfil very high requirements as regulated markets do. This leads to a question, whether investors on such crowdfunding secondary markets are sufficiently protected, considering that the information disclosure requirements may not apply or be lower than on regulated markets.

With the current thesis, the author tried to find an answer to the question, what the sufficient information disclosure would be and whether the current company law and securities law provide for sufficient protection for investors in crowdfunding secondary markets.

Crowdfunding secondary markets could be structured on exchange trading venues (multilateral trading facilities) or over-the-counter. The information disclosure regime on regulated markets and on such crowdfunding secondary markets is vastly different. The companies, whose securities are admitted to regulated markets, are subject to disclosure requirements under Prospectus Directive, Transparency Directive and Market Abuse Directive. When securities are traded outside of regulated markets, such disclosure requirements are generally not applicable. However, under the Market Abuse Directive II and Market Abuse Regulation, which will enter into force on 3rd July 2016 will widen the scope also to financial instruments traded on MTFs or over-the-counter. Therefore, under the new market abuse regime, regulated markets and crowdfunding secondary markets will be subject to similar inside information disclosure.

Assuming that the disclosure requirements that are applicable to regulated markets, are not applicable to crowdfunding secondary markets, the sufficiency of the information disclosure requirements under Estonian company law, in order to protect investors on crowdfunding secondary markets, was analysed. The author found that the disclosure requirements in non-listed companies are aimed to protect the interests of the existing shareholders and promote corporate governance and this information disclosure is not protecting the potential investors from market abuse or contributing to formation of fair price or helping crowdfunding investors to make informed investment decisions. The information is directed to the shareholders not to general public or third persons. Moreover, individuals who do not have a shareholder's legal status are not granted with a right to require any information disclosure. Thus, if the disclosure requirements that are applicable to regulated markets, are not applicable to crowdfunding secondary markets, the disclosure requirements under Estonian company law are not sufficient to provide adequate protection to crowdfunding investors because these information disclosure requirements would not be sufficient to protect investors, provide transparent crowdfunding secondary markets and promote efficiency in these markets.

Assuming that the disclosure requirements applicable to regulated markets would be fully applicable to crowdfunding secondary markets, the author analysed whether these requirements would be proportionate on crowdfunding secondary markets. From one side, it is important that the potential advantages that crowdfunding would give to young companies, would not be excessively limited by rigid administrative and information disclosure regime imposed by state.

When the information disclosure requirements are too expensive and burdensome for the issuers, they would lose their motivations of listing the securities on the crowdfunding secondary markets. As the success of primary crowdfunding market depends highly on the functioning of secondary markets, it may undermine the potential that crowdfunding would give for financing young start-ups and consequently to economy as a whole. From the other side, despite all benefits that supporting financing young start-ups would give to our economy, the most important task of a state is to assure that investors participating in such funding are adequately protected and that these markets are functioning honestly without fraudulent activities and exploitation of retail investors. Crowdfunding investors are mainly unsophisticated retail investors without having any or having very few knowledge and experience in investing, and therefore, higher protection standards should be granted to these investors.

Information disclosure helps also to achieve more efficient crowdfunding secondary markets by increasing investors' confidence and trust into such markets. One of the most important means for promoting investors' confidence into the market is the requirement to disclose information which would give the investors a possibility to assess potential risks and rewards of their investments and thereby help them to protect their own interests. Disclosure regulation ensures the dissemination of financial information that otherwise would not be made available to the investors as well as it allows public opinion (e.g. media) to promote discussion of the data and open discussions on issuer's performance. This information could not be disclosed solely on voluntarily basis under free market forces as due to information asymmetries and possible market abuses, the efficiency of these markets would be very low. Considering the general nature and small size of crowdfunding investments, it would be unreasonable to require crowdfunding investors to conduct independent financial analyses of these companies. When the investors are not sufficiently informed and they would need to make additional expenses to collect the information by themselves, the investors would not be attracted by the crowdfunding securities as these markets would be too risky and expensive.

Crowdfunding secondary markets efficiency may be undermined by fraudulent activities in the market, such as market manipulation or insider trading. Market manipulation involves interference with the market's normal price-forming mechanism and thereby it undermines the efficiency, credibility and integrity of the market. As a result investors will lose their trust in such financial markets and will eventually give up investing or will invest in different sources. Insider trading is considered to cause an adverse selection problem and therefore low liquidity,

low prices, large bid ask spreads, high cost of capital and market breakdown under some conditions. Outside investors would lose their confidence and invest less.

According to Article 52 of the CFREU, any limitation on the exercise of the rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. Private companies are considered to have higher protection of private property and data. Requiring the same information disclosure from private companies as it is required for the companies whose shares are listed on regulated markets would be inappropriate as it would be excessively restricting these companies' rights for privacy and freedom of business. When a company goes public, it will be in a certain position in which they are required to provide adequate level of information to investors in order to achieve transparency and efficiency of the financial markets. The author of the current thesis is in opinion that the same principles should be applicable when the securities are traded on crowdfunding secondary markets as the company cannot be considered as private anymore and the investors' need for information is similar as on regulated markets. High level of consumer protection as one of the most important policy in all EU capital markets, and should be provided to customers regardless of the market structure or operator.

Information disclosure requirements should reflect the investors' actual need for information. The disclosure regime should not be excessively burdensome to issuers but should be sufficient to protect investors according to their need for protection. One of the purposes of regulating information disclosure in regulated markets is to improve the quality of information disclosed and thereby preserve investors' confidence in financial market. The same objectives should be achieved on crowdfunding secondary markets. Information asymmetries may be particularly high in young start-up companies due to the uncertainties and high risk with these investments. The risk of information asymmetries in crowdfunding secondary markets may be even higher than in the companies whose shares are traded on regulated markets. Crowdfunding investors need to have sufficient information available for making informed and reasonable investment decisions.

Under market abuse regime the issuers are required to disclose inside information and maintain insider lists, which would be an important means on crowdfunding markets to reduce insider trading and manipulation of the securities prices. The core aim of market abuse regime is to protect market integrity and eliminate unlawful behaviour on financial markets. Such objectives

should also be achieved on crowdfunding secondary markets. Therefore, the crowdfunding secondary markets should be subject to similar market abuse disclosure regime as regulated markets.

Regarding the periodic information disclosure under the Transparency Directive, the author is in opinion that the format of current reporting requirements for companies on regulated markets is excessively burdensome for crowdfunding secondary markets. Although, crowdfunding secondary markets should be, in principle, subject to similar periodic information disclosure as regulated markets, specific “lighter” version of the disclosure obligations should be introduced for crowdfunding secondary markets. The full disclosure regime under Transparency Directive may be excessively expensive to crowdfunded companies; the cost of information disclosure may be disproportionately high, considering the low cost of the crowdfunding securities and therefore lower risks that the investors take when investing through crowdfunding platforms.

Moreover, the author found in the current thesis that, in order to avoid imposing too burdensome and expensive disclosure requirements for issuers on crowdfunding markets, the SMEs should be subject to proportionate prospectus regime. A new “question and answer” format prospectus regime for SMEs, as it has been previously proposed by European Commission, would be necessary to reduce administrative burden and expenses for SMEs on crowdfunding secondary markets. This prospectus would provide the investors with necessary information in simple and understandable way, helping these investors to make informed investment decisions enabling the investors to understand the main risks arising from investments in crowdfunding securities. The author is in opinion that abolition of the prospectus requirement for crowdfunding would not be a right option for facilitating capital raising through crowdfunding as this would leave investors without adequate protection. The special SME market prospectus, however, would be one of the solution for achieving more transparent and efficient crowdfunding markets while at the same time it would provide sufficient information for crowdfunding investors, helping these investors to make informed investment decisions enabling the investors to understand the main risks arising from investments in crowdfunding securities.

This specific disclosure regime for crowdfunding secondary markets would, however, first need a specific regulatory regime for crowdfunding primary markets in Estonia. In particular, the concept of investment-based crowdfunding should be defined under law, registration requirement for investment-based crowdfunding platforms should be introduced and these crowdfunding platforms should be under the supervision of Estonian Financial Supervision Authority (*Finantsinspeksioon*). Otherwise it would be difficult to distinguish investment-

based crowdfunding platforms from other similar structures and the requirements of lower information disclosure may be misused. Moreover, regulating investment-based crowdfunding primary markets would lower the risks also on secondary markets and would reduce the risk of potential damages for investors (e.g. imposing maximum investment limits per investor).

INVESTORITE KAITSE ÜHISRAHASTAMISE JÄRELTURUL: PROPORTSIONAALNE INFORMATSIOONI AVALDAMISE KOHUSTUS

Resüme

Ühisrahastamine ehk *crowdfunding* tähendab (väikeste) investeeringute kogumist paljudelt üksikisikutelt, kes ei ole tavaliselt professionaalsed investorid, eesmärgiga toetada mingit ideed või saavutada teatud eesmärk. Investeeringutel põhinev ühisrahastamine tähendab ettevõtte rahastamist läbi spetsiaalse veebipõhise ühisrahastamise platvormi, mille käigus eraisikud saavad investeerida väikeseid summasid noortesse ettevõtetesse ja omandavad seeläbi osaluse vastavas ettevõttes.

Ühisrahastamine on maailmas üha enam populaarsust koguv noorte ettevõtete finantseerimisviis. Kõige enam ühisrahastamise platvorme tegutseb USA-s, kus esimesed loodi juba 2005. aastal. Euroopas hakkas ühisrahastamine populaarsust koguma esimeste platvormide ilmumisega 2010. aastal. Mitmed riigid (nt Saksamaa, Itaalia, Suurbritannia, Prantsusmaa, USA) on peamiselt investorite kaitse eesmärgiga loonud riigisisese ühisrahastamise regulatsiooni. Eestis ei ole seadusandja sellist initsiatiivi veel üles näidanud, olgugi et Eestisse on viimastel aastatel loodud mitu investeerimispõhist ühisrahastamise platvormi ja Eesti ettevõtjad on muutumas järjest teadlikumaks sellisest rahastamisviisist.

Investeeringupõhine ühisrahastamine on alternatiivne finantseerimisvahend ettevõtetele, kellel ei õnnestu finantseerida oma tegevust pankade ega riskikapitalifondide abiga. Samuti pakub ühisrahastamine ettevõttele aga vähem riskantsema ja lihtsama finantseerimise viisi võrreldes laenu võtmisega. Sellistes finantseerimistes osalevad inimesed ei ole tavaliselt professionaalsed investorid vaid üldjuhul väga väheste investeerimiskogemuse ja -teadmistega tarbijad. Ühisrahastamise teel omandavad investorid noortes arenguperspektiividega ettevõtetes osaluse, et ettevõtte hilisema arengu käigus kasumit teenida.

Üheks suurimaks riskiks ühisrahastamise teel väärtfabereid omandanud investoritele on vähene (või puuduv) likviidsus. Esiteks ei teeni investorid iduettevõtetes või noortes ettevõtetes osalust omandades dividende ja esimene tulu teenimise võimalus võiks olla osaluse müümine. Dividendide maksmine otsustatakse osanike või aktsionäride koosolekul ja selliste otsuste vastuvõtmiseks on vajalik osanike või aktsionäride häälteenamus. Häälteenamus võib aga kuuluda ettevõtte dominantsetele aktsionäridele või osanikele ja seega puudub ühisrahastamise teel oma aktsiad või osad omandanud investoritel reaalne otsustusvõimalus. Lisaks on noorte

ettevõtete puhul tavaline, et kogu kasum investeeritakse ettevõttesse, et kiirendada ettevõtte võimalikult kiiret kasvu. Võib võtta palju aastaid enne kui investor võiks dividendide näol tulu teenida ning samas ei pruugi seda kunagi juhtuda. Sellisel juhul oleks esimene võimalus investoritel oma investeeringust tulu teenimiseks oma väärtpaberid müüa.

Ühisrahastamise teel omandatud väärtpaberite vähese likviidsuse põhjuseks on eelkõige vastava spetsiaalse organiseeritud järelturu puudumine. Järelturu puudumine on samuti väga oluliseks takistuseks esmase turu arengule, sest investor, kes näeb, et tal puudub võimalus oma investeering temale sobival ajal välja võtta, või sellest reaalselt (lähi)tulevikus kasumit teenida, ei ole motiveeritud oma raha sellistesse projektidesse paigutama. Vastuseks turu vajadusele on Euroopas viimastel aastatel tekkinud mitmeid ühisrahastamise teel omandatud väärtpaberite järelturgu pakkuvaid platvorme, mis on organiseeritud väljaspool reguleeritud turgu. Seega saavad noored ettevõtted, kes on kapitali kogunud läbi ühisrahastamise platvormi, pakkuda oma investoritele võimalust väärtpaberitega kaubelda ilma, et need ettevõtted peaksid vastama rangetele reguleeritud turu nõuetele.

Sellised ühisrahastamise teel omandatud väärtpaberite järelturud (edaspidi ainsuses: ühisrahastamise järelturg) võiksid luua ideaalse võimaluse, kuidas muuta ühisrahastamise teel omandatud väärtpaberid likviidsemaks ja pakkuda investoritele võimalusi investeeringutest varem väljuda ning tulu teenida. Esimesed ühisrahastamise järelturud on aga tekkinud alles väga hiljuti ja siiani puudub selle kohta akadeemiline arutelu, kuidas sellised järelturu platvormid peaksid olema reguleeritud, millised potentsiaalsed ohud tekivad investoritele ühisrahastamise järelturu platvormidel kauplemisel ning milline peaks olema piisav informatsiooni avaldamise kohustus investoritele. Ühelt poolt on oluline, et likviidsus, mida ühisrahastamise järelturg pakub noortele ettevõtetele, ei oleks takistatud riigi poolt sätestatud liialt rangete administratiivsete ja informatsiooni avaldamise nõuetega. Teiselt poolt on peaks riik tagama, et investorid, kes investeerivad taolistel platvormidel, oleks piisavalt kaitstud ja et sellised turud toimiksid ausalt, ilma petturlike ja kuritaktlike tegevusteta.

Käesoleva magistritöö eesmärk on välja selgitada, millised peaksid olema eelkirjeldatud ühisrahastamise järelturul informatsiooni avaldamise nõuded, mis ühelt poolt ei takistaks liialt järelturgude arengut ühisrahastamise teel omandatud väärtpaberitele, kuid teiselt poolt pakuksid investoritele piisavalt kaitset ja aitaksid vältida turukuritarvitusi ja muid pettusi sellistel turgudel.

Autor püstitab kaks hüpoteesi:

- 1) kui informatsiooni avaldamise kohustused, mis kohalduvad reguleeritud turgudele, ei kohaldu ühisrahastamise järelturgudele, siis muud avaldamiskohustused, mis tulenevad äriseadustikust, ei paku piisavat kaitset investoritele ühisrahastamise järelturul;
- 2) kui informatsiooni avaldamise kohustused, mis kohalduvad reguleeritud turgudele, kohalduvad täielikult ka ühisrahastamise järelturule, siis sellised informatsiooni avaldamise kohustused on ülemäära koormavad ühisrahastamise järelturul.

Seega peaks ühisrahastamise järelturul kohalduma spetsiifiline informatsiooni avaldamise režiim, mis võtaks arvesse ühisrahastamise turgude eripära ja ei oleks sellistele ettevõtetele liialt koormavad, kuid samal ajal pakuksid piisavalt kaitset investoritele.

Kontrollimaks esitatud hüpoteese, selgitas autor kõigepealt investeerimispõhise ühisrahastamise ja selle järelturu üldist kontseptsiooni ning õiguslikku raamistikku. Ühisrahastamise teel omandatud väärtpaberite järelturgu mõjutab oluliselt esmase turu olemus ja regulatsioon. Hetkel puudub ühisrahastamise esmase turu harmoneeritud regulatsioon Euroopa Liidus, mistõttu on reeglistik Euroopa Liidu liikmesriikides väga killustunud. Mõned Euroopa riigid on võtnud vastu täpsed ühisrahastamise tegevust puudutavad regulatsioonid samas ajal kui mitmetes teistes riikides on kogu ühisrahastamise kontseptsioon jätkuvalt reguleerimata. Kuna Eesti kuulub teise nimetatud riikide gruppi, siis on töös võrdlusena uuritud kahe teise Euroopa Liidu liikmesriigi – Itaalia ja Saksamaa – ning ühisrahastamise ja vastavate regulatsioonide sünnikohariigi USA õiguslikku raamistikku ja analüüsitud, kas Eesti vajaks investeerimispõhise ühisrahastamise reguleerimist, et tagada tõhusam (jae)investorite kaitse ja/või lihtsustada ühisrahastamise teel noorte ettevõtete rahastamist. Leitud on, et Eesti vajaks vastavat õiguslikku raamistikku, mis reguleeriks investeerimispõhiste ühisrahastamise platvormide tegevust eelkõige tagamaks tõhusam kaitse investoritele.

Kontrollimaks, millised informatsiooni avaldamise kohustused oleksid kohalduvad ühisrahastamise järelturul, analüüsib autor esimeses peatükis erinevate kauplemissüsteemide sobivust ja börsivälise kauplemise regulatsiooni kohaldamist ühisrahastamise järelturule. Leitud on, et ühisrahastamise teel omandatud järelturg võiks olla praeguses õiguslikus raamistikus organiseeritud nii mitmepoolsetel kauplemissüsteemidel (*multilateral trading facilities*) kui ka börsiväliselt (*over-the-counter*). Börsivälise kauplemise puhul peaks aga investeerimisühing, mis tegutseb süsteemse täitjana (*systematic internaliser*), vastama

täiendavatele kauplemisselsetele läbipaistvusnõuetele, mis tavalise börsivälise kauplemise puhul ei kohaldu.

Teises peatükis selgitab autor välja, kas juhul kui ühisrahastamise järelturul ei kohalduks reguleeritud turgudel kohalduvad informatsiooni avaldamise nõuded, oleksid äriseadustikust tulenevad informatsiooni avaldamise nõuded piisavad, et tagada investorite piisav kaitse ühisrahastatud ettevõtetes. Autor analüüsib kõigepealt informatsiooni avaldamise eesmärgi ühisrahastamise järelturul, leides, et peamised eesmärgid on saavutada turu läbipaistvus ja efektiivsus. Turu läbipaistvus tagab muuhulgas investorite kaitse ja hoiab ära ebaseaduslikud tegevused turul. Turu efektiivsus on oluline piisava likviidsuse tagamiseks ja ühisrahastamise turu arengus, mis omakorda aitab elavdada majandust. Informatsiooni avaldamise peamine eesmärk ettevõtetes väljaspool reguleeritud turgu on aga pigem pakkuda äriühingu aktsionäridele või osanikele võimalus oma õiguste teostamiseks ettevõttes (nt hääleõigus, vähemusaktsionäride õigused). Seega on reguleeritud turgudel informatsiooni avaldamise eesmärgid laiemad. Informatsiooni avaldamise kohustuse subjektideks on nii olemasolevad aktsionärid või osanikud, aga ka potentsiaalsed investorid. Informatsiooni avaldamine aitab seega kaasa hea ühingujuhtimise tagamisele kui ka pakub investoritele võimalust hinnata väärtpaberite väärtust ettevõttes teha seega informeeritud investeerimisotsuseid. Kuna äriseadustik sätestab pigem aktsionäride ja osanike informeerimiskohustuse ja selline informatsiooni avaldamise kohustus ei ole suunatud investoritele investeerimisotsuste tegemiseks ega turu kuritarvitamise ärahoidmiseks, siis ei ole selline informatsiooni avaldamise kohustus piisav, et tagada turu läbipaistvus ja piisav turu efektiivsus. Seetõttu peaks ühisrahastamise järelturul kohalduma ulatuslikumad informatsiooni avaldamise kohustused.

Kolmandas peatükis analüüsib autor, kas juhul kui eeldada, et ühisrahastamise järelturul kohalduvad sarnased informatsiooni avaldamise kohustused nagu reguleeritud turgudel, oleksid sellised informatsiooni avaldamise kohustused proportsionaalsed, võttes arvesse ühisrahastamise turu võimalikke iseärasusi. Autori eesmärk on välja selgitada, milline peaks olema proportsionaalne informatsiooni avaldamise kohustuse nõue ühisrahastamise järelturul. Esiteks on analüüsitud, kas informatsiooni avaldamise kohustuse reguleerimine riigi poolt on ühisrahastamise järelturul vajalik või võiks selline informatsiooni avaldamine olla reguleeritud vaba turu tingimuses. Kui eeldada finantsturu osaliste ratsionaalset käitumist, siis peaks vaba turu tingimuses informatsiooni nõudlus ja pakkumine jõudma tasakaalupunktini, milles emitent avaldab täpselt niipalju informatsiooni, mida investor investeerimisotsuse tegemiseks vajab. Teiste sõnadega oleks tegemist sellise tasakaalupunktiga, milles iga järgnev ühik informatsiooni oleks kallim kui sellest saadav kasu. Võimalike turutõrgete tõttu ei ole aga

taoline tasakaal ühisrahastamise järelturgudel võimalik. Informatsiooni asümmeetria ja võimalike turukuritarvituste tõttu oleks sellise turu efektiivsus väga madal. Arvestades ühisrahastamise teel omandatud väärtpaberite väikest väärtust, siis oleks ebamõistlik eeldada ühisrahastamise investoritelt iseseisvat turuanalüüsi.

Siiski ei saa investori informatsiooni avaldamise kohustus olla piiranguteta. Ühelt poolt igasugune informatsiooni avaldamise kohustus piirab ettevõtte tegevusvabadust ja ärisaladusi. Teiselt poolt on piisav informatsiooni avaldamine vajalik, et tagada adekvaatne investorite kaitse. Vastavalt Euroopa Liidu Põhiõiguste Harta artiklile 52 peab hartaga tunnustatud õiguste ja vabaduste teostamist tohib piirata ainult seadusega ning arvestades nimetatud õiguste ja vabaduste olemust. Proportsionaalsuse põhimõtte kohaselt võib piiranguid seada üksnes juhul, kui need on vajalikud ning vastavad tegelikult liidu poolt tunnustatud üldist huvi pakkuvatele eesmärkidele või kui on vaja kaitsta teiste isikute õigusi ja vabadusi.

Üldiselt on ettevõtetel reguleeritud turgudel tagatud mõnevõrra madalam eraomandi ja ärisaladuste kaitse. Ebaproportsionaalne oleks nõuda eraettevõtetelt samasugust informatsiooni avaldamise kohustust kui noteeritud ettevõtetelt. Kui ettevõtte väärtpaberid noteeritakse, siis võtab ettevõtte teatud positsiooni, mis nõuab täiendavaid kohustusi investorite ees. Riik peab tagama, et reguleeritud turgudel oleksid investorid piisavalt informeeritud ning oskaksid hinnata investeerimisriske ning hoida ära kuritahtlikud ning petturlikud tegevused ja kindlustama turu aus toimimine. Käesoleva töö autor on seisukohal, et kuivõrd investorid ühisrahastamise järelturul on samasuguses positsioonis kui reguleeritud turu osalised ja nende investorite informatsioonivajadus on sarnane, siis tuleks neile investoritele ka tagada sarnane kaitse. Kõrgetasemeline investorite kaitse on üks kõige olulisemaid põhimõtteid kapitaliturgudel ja see peaks olema tagatud investoritele olenemata turu struktuurist või operaatorist.

Lisaks peaksid informatsiooni avaldamise nõuded peegeldama investorite tegelikku informatsioonivajadust. Ebakindluse ja kõrge riski tõttu võib informatsiooni asümmeetria olla noortes iduettevõtetes eriti kõrge. Samuti on investorid, kes investeerivad noortesse ettevõtetesse läbi ühisrahastamise platvormide üldiselt investeerimisteadmiste ja -kogemusteta tarbijad, kelle suhtes on eriti kõrge pettuste oht. Näiteks on oht, et investoritelt kaasatakse raha ettevõtete rahastamiseks, kuid samal ajal jäetakse nad ilma õigustest, mis üldiselt osanikele või aktsionäridele ettevõttes peaks kuuluma. Samas tuleks aga arvestada ka sellega, väikestes ja keskmise suurusega ettevõtetes võivad olla reguleeritud turgudega sarnased informatsiooni avaldamise kohustused liialt koormavad ja kulukad. Sellised kohustused võiksid pärssida

ettevõtete kapitali kaasamist ning järelturul likviidsuse pakkumist investoritele. Arvestades investeeringute üldiselt väga väikesi väärtusi ühisrahastamise järelturul, ei oleks proportsionaalne nõuda sellisel turgudel võrdset informatsiooni avaldamist kui reguleeritud turgudel. Seega on käesoleva töö autor seisukohal, et ühisrahastamise järelturul peaksid kohalduma spetsiifilised informatsiooni avaldamise kohustused, mis oleksid vähem koormavad kui reguleeritud turgudele kohalduvad avaldamisnõuded, kuid samas pakuksid investoritele ühisrahastamise järelturul piisavat kaitset.

Esiteks peaks ühisrahastamise teel omandatud väärtpaberite järelturul kohalduma turukuritarvitamise regulatsioonist tulenevad avaldamisnõuded. Kui informatsiooni avaldamine ühisrahastamise järelturul ei ole reguleeritud, siis võib tekkida kõrge oht turumanipulatsiooniks ja siseringi tehinguteks. Lisaks on risk, et ilma adekvaatse informatsiooni avaldamiseta jaeinvestorid ei suudaks hinnata investeerimisriske, mis tekivad ühisrahastamise järelturul.

Teiseks, seoses läbipaistvusdirektiivist tulenevate avaldamisnõuetega, on käesoleva töö autor seisukohal, et ühisrahastamise järelturul tuleks kehtestata spetsiifilised perioodilise finantsinformatsiooni avaldamise nõuded. Üldiselt peaksid läbipaistvusdirektiivist tulenevad avaldamisnõuded olema kohalduvad ka ühisrahastamise järelturul (nt bilansiaruanne, kasumiaruanne, rahavood ja muutused osakapitalis), kuid need nõuded peaksid olema madalamad ja informatsiooni esitamise vorm peaks olema lihtsustatum. Reguleeritud turgudele kohalduvad nõuded on käesoleva töö autori hinnangul liialt kulukad ja koormavad ühisrahastamise järelturul, arvestades ühisrahastatud ettevõtete suurust ja nende väärtpaberite väga väikest väärtust. Perioodilised finantsinformatsiooni avaldamise nõuete kohaldamine on aga oluline, kuivõrd need annavad investoritele adekvaatse ja uuendatud teave ettevõtte olukorrast ja pakuvad seega investoritele täieliku ülevaate ettevõtte tegevusest. Selline teave on oluline tegemaks mõistlikke investeerimisotsuseid ja hindamaks finantsriske. Informatsiooni avaldamine aitab luua läbipaistvamad kapitaliturud, luua efektiivsema investorite kaitse mehhanismi ja aidata kaasa õiglase hinna kujunemisele. Lisaks suurendab see investorite usaldust turgu ja aitab seega luua ka efektiivsema ühisrahastamise järelturu toimimise.

Lisaks leiab autor käesolevas töös, et ühisrahastamise väärtpabereid avalikkusele pakkuvatele väikestele ja keskmise suurusega ettevõtetele peaks kohalduma lihtsustatud prospektinõue. Praegusel hetkel kehtib ühesugune prospektinõue kõikidele ettevõtetele olenemata ettevõtte

suurusest.²²⁵ Prospekti koostamine võib aga olla ebaproportsionaalselt kulukas väikestele ettevõtetele ja pärssida nende ettevõtete kapitali kaasamist läbi ühisrahastamise. Uus „küsimusvastus“ vormis lihtsustatud prospekt, nagu eelnevalt välja pakutud Euroopa Komisjoni poolt, oleks vajalik, et vähendada väikeste ja keskmise suurusega ettevõtete administratiivset koormust ja kulutusi informatsiooni avaldamisele. Selline prospekt teeks investoritele vajaliku informatsiooni kättesaadavaks lihtsas ja arusaadavas vormis, aidates investoritel teha mõistlikke ja informeeritud investeerimisotsuseid ja aru saada riskidest, mis sellistesse väärtpaberitesse investeerimine endaga kaasa toob. Prospektinõude täielik kaotamine ühisrahastamise puhul poleks käesoleva töö autori hinnangul õigustatud kuna sellisel juhul ei oleks tagatud piisav investorite informeerimine, mis tagaks investorite adekvaatse kaitse.

Eelpoolkirjeldatud spetsiifiliste avaldamisnõuete režiimi kehtestamine ühisrahastamise järelturule nõuaks aga autori hinnangul kõigepealt ühisrahastamise esmase turu reguleerimist, s.t. eelkõige investeerimispõhise ühisrahastamise seaduses defineerimist, ühisrahastamise platvormi registreerimist ja Finantsinspektsiooni kontrolli alla viimist. Vastasel juhul oleks keeruline eristada investeerimispõhiseid ühisrahastamise platvorme muudest sarnastest struktuuridest ja madalamaid avaldamisnõudeid võidaks kuritarvitada muudel eesmärkidel. Lisaks vähendaks ühisrahastamise esmase turu reguleerimine riske ja vähendaks investoritele kahju tekkimise võimalust (nt läbi maksimaalsete investeerimispiirangute sätestamise).

²²⁵ Eeldusel, et väärtpabereid pakutakse reguleeritud turul või üle teatud piirmäära, mille puhul on tegemist avaliku pakkumisega (Väärtpaberituruseadus § 12 lg 2).

LIST OF ABBREVIATIONS

CONSOB	Public authority responsible for regulating the Italian financial markets (<i>Commissione Nazionale per le Società e la Borsa</i>)
CC	Estonian Commercial Code
ESMA	The European Securities and Markets Authority
IOSCO	The International Organization of Securities Commissions
IPO	Initial public offering
JOBS Act	Jumpstart Our Business Startups Act
MiFID I	Markets in Financial Instruments Directive I (Directive 2004/39/EC)
MiFID II	Markets in Financial Instruments Directive II (Directive 2014/65/EU)
MiFIR	Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014)
MTF	Multilateral Trading Facility
OECD	Organisation for Economic Co-operation and Development
OTF	Online Trading Facility
PIEIA	Estonian Payment Institutions and E-money Institutions Act
SEC	U.S. Securities and Exchange Commission
SMA	Estonian Securities Market Act

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