AFME response

ESMA Call for Evidence on potential further steps towards harmonising rules on Civil Liability

31 December 2024

(I) General Questions

Q1: Have you identified issues in respect of civil liability for information provided in securities prospectuses (e.g., divergent national liability regimes, cross-border enforcement of judicial decisions, amount of damages); can you provide examples?

AFME response: AFME members believe that the lack of a uniform prospectus liability regime across the European Union may create uncertainty on where responsibility, liability and risks lie in equity transactions and therefore generally support the aim of increased certainty and efficiency in this area. However, we also realise that full harmonisation of civil liability regimes across Europe would be a daunting, and perhaps even insurmountable task, and would require significant changes to national laws and practices as well as a reassessment of risks and potential liability. The complexity and difficulties inherent in this process would, we believe, make it unlikely that sufficient consistency and harmonisation across the EU could be achieved within a reasonable timeframe to merit embarking on the hugely time-consuming and burdensome processes and workstreams required for such a project.

If ESMA decides that it will pursue harmonisation of civil liability regimes across Europe, the approach should be measured and reasonable and should take into account the interests of all participants in the market, as well as the effect on different markets and transactions. The process should consider what might be reasonably achievable in a time frame that should not become so extended as to render the exercise fruitless. Incremental, targeted harmonisations. For example, EU level defences to liability claims and/or a harmonised safe harbour for forward-looking information – may be less complex to achieve in a shorter period. Such targeted harmonisations could deliver meaningful reform while full harmonisation is progressed over the longer term.

In this case, we have set out below some of the areas of difference among civil liability regimes and some of the issues raised by such differences:

- In some Member States certain persons (such as the issuer) are liable for the entire prospectus, while in other Member States persons are liable only for the part(s) of the prospectus for which they are specifically deemed or stated to be responsible i.e., a concept of "split responsibility" (see ESMA Report Comparison of liability regimes in Member States in relation to the Prospectus Directive of 30 May 2013 | ESMA/2013/619, Annex II). Furthermore, in some Member States it is unclear which persons may be found liable in hindsight for all or parts of a prospectus.

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- Different prospectus responsibility and liability standards across the EU may result in different, potentially better or worse, outcomes for investors, issuers, directors, shareholders, expert report providers, underwriters and financial advisers in relation to the same security, based on where investors have standing for a claim.

If ESMA decides to harmonise civil liability regimes across Europe, we believe that it should consider the following potential areas concerning EU prospectus liability regime, which we have discussed further under the specific questions below:

- The persons responsible and liable for a prospectus and ways in which any such responsibility and liability would be triggered and acknowledged
- The liability standard for prospectus content
- Defences to liability claims
- Burden of proof
- Effectiveness of disclaimers
- Circumstances in which an investor is able to bring a claim against the persons responsible for a prospectus
- Limitation period during which claims may be brought

The same points also apply to shorter non-prospectus documents, for which it will be important to establish a clear responsibility and liability regime given that these will include less disclosure than a full prospectus, meaning that the risks of potential liability, especially in respect of omissions, may be heightened.

Given the complexity of these topics, we encourage ESMA, at an appropriate time, to consider related topics that fall outside the scope of this consultation, including the (extent) of the damages that can be claimed and which state(s) would have jurisdiction to hear a claim.

Q2: Are you aware of any leading judicial decisions in your jurisdiction effectively holding an issuer liable for incorrect information in the prospectus? If so, how many are there, and which type of securities did they apply to (equity securities and/or non-equity securities)?

No response.

Q3: Should Article 11 PR specify who is entitled to claim damages? If so, what specification(s) would you suggest?

AFME response: Yes. It should be made clear that the only persons entitled to claim for damages are investors in the offering who have actually purchased securities on the basis of the material misstatement or material omission in the prospectus.

Q4: Should Article 11 (or another provision of the PR) determine the degree of fault or culpability? If so, what specification(s) would you suggest?

AFME response:

Materiality –Damages for Material Misstatements and Material Omissions

Inclusion of a "materiality" standard

The civil liability regime should include a materiality standard to reduce the risk and incidence of vexatious claims. The persons responsible for a prospectus should only be liable for material damages from:

- material misstatements; and
- material omissions (if it was necessary to render another statement not misleading, or if the defendant had a duty to disclose),

'material' in this context meaning material for the purposes of the Article 6(1) necessary information test. For shorter non-prospectus documents, the term 'material' should also take into account the restrictions on the length of the document i.e. such documents should not be held to the same standard as a full prospectus given that they have necessarily been drafted in a shorter format, meaning that more information will have been be omitted and the information that is included less comprehensive, in each case compared to a full prospectus.

Defences

Potential Liability Defences:

The PR should also provide for the defences available to parties who could potentially be found liable against a claim that a prospectus (or shorter non-prospectus document) contains a material misstatement or material omission, for example, that:

- the persons responsible reasonably believed the statement to be true or that the omission was not material, the so-called 'due diligence defence';
- that the statement was correct before the claimant acquired its securities;
- that the claimant knew that the statements in question were untrue or misleading or knew about the relevant omissions;
- that the information could not be considered by a reasonable investor as important when making an investment decision;
- that the deficiency in the prospectus was not material and therefore did not influence the price of the security;
- that liability is disclaimed by a party not responsible for the contents of a prospectus (or shorter non-prospectus documents). For example, where such a party is named in the prospectus due to their role on the transaction/ in assisting with the preparation of the information contained in a prospectus. Parties should be able to limit liability contractually.

Alternatively and preferably from an efficiency and clarity perspective the PR, or ESMA guidance should confirm that, other than in the case of the issuer and selling shareholder, unless a person involved in the sellside process consents to and is named in the prospectus, specifically, as being responsible and liable for a part or all of the prospectus then such party is not and should not be found responsible or liable in the absence of proven fraudulent behaviour;

- disclaimers used reasonably concerning the reliability and/or adequacy of certain types of information disclosed in a prospectus (or shorter non-prospectus document) (e.g., estimated data, forward-looking statements) should be confirmed in regulation to be effective in mitigating liability.

This will ensure that the civil liability regime is consistent with those of other leading jurisdictions, including the relevant Member States, the United States and the United Kingdom. To ensure harmonisation, this specific liability regime should exclude claims on other grounds (e.g,, tort).

Q5: Should Article 11 (or another provision in the PR) make any determinations as to the burden of proof? If so, what specification(s) would you suggest?

AFME response: The burden of proof should be the same as for any other civil claim, namely the claimant should be required to prove that:

- in the prospectus, the defendant made a material misstatement or material omission of any matter required to be included by the Prospectus Regulation or which renders a material fact misleading;
- the investor purchased securities on the basis of that material misstatement or material omission;
- the misstatement or omission was made with the required degree of fault or culpability (scienter or recklessness);
- the investor suffered a loss as a result;
- there is a causal connection between the material misrepresentation or omission and the investor's loss.

Having a unified burden of proof would also make it easier for issuers to comply with the regulation. We strongly discourage attempting to impose a different burden of proof given that this could result in uncertainty over potential liability for prospectuses and compare unfavourably with other jurisdictions.

Q6: Should rules on the expiry of claims be harmonised? Please explain your answer.

AFME response: The relevance of a prospectus as a basis for an investment decision is limited in time given that a prospectus is used for a specific purpose and both the market and the issuer are permanently the subject of new developments. These developments do not have to be reflected in a prospectus when the offering has ended and therefore a supplement is no longer required. Accordingly, it is not appropriate to allow liability claims to be based on a prospectus for losses

occurring after the offering to which the prospectus relates has ended, for example in a subsequent disclosure under MAR. Put simply: only investors buying the offered or listed securities in the offering may assert liability claims based on the prospectus.

Separately, ESMA could consider introducing a general statute of limitation. It is very important that there is certainty around the endpoint of the statute of limitations. Having the period start when the investor obtains knowledge of an infraction would mean the parties will never be certain of when the period will begin or end. For a statute of limitation to achieve the goal of certainty over when legal liability will expire, it is important for the period to be based on an objective time frame Therefore, our view is that investors should be required to enforce their claims within a defined period, with such period starting at the publication of the prospectus or, at the latest, the settlement / trade date. A limitation period of three years is appropriate given the nature of the equity capital markets, however, we recognise that a limitation period of five years is currently more common in the EU.

See also our response to Q3.

In the context of a "direct listing" transaction (i.e. an admission to trading of securities with no Prospectus Regulation governed offering of them), the "material time" for triggering liability in this context should be the date on which an agreement to sell and purchase the securities is concluded (the "trade day"). If the prospectus which is valid on or around the trade date contains a mis-statement or omits a material information, but the investor takes no action within 3-5 years following the trade day, the investor's claim should become time-barred.

Q7: Is further harmonisation of the rules on civil liability for the information given in a prospectus in the Union needed in your view? Please explain your answer and indicate whether you think such harmonisation could help to increase the number of cross border offerings.

AFME response:

Please see our response to Question 1 above for our views on the efficacy of harmonisation of civil liability rules across the EU. We note, however, that another reason for the present fragmentation may be a retail banking market that is still focused on the individual Member State, with many of these markets being largely dominated by national institutions. In addition, different requirements in terms of investor protection under national legal regimes, different historically driven investment cultures and different pension systems all have an impact. In order for harmonisation to be effective, if a claim is available under the PR, then other claims must be excluded. Also, the PR liability regime should also apply to any acts implementing the PR, such as the German Securities Prospectus Act.

Q8: In your opinion, can any amendments to Article 11 PR help to reduce issuers' and offerors' liability concerns considering the impact of third countries' liability laws? If so, please explain where such amendments could be effective.

AFME response:

A Prospectus (or shorter non-prospectus document) must be capable of complying with the legal and regulatory requirements as well as market practices of third countries

It should be appreciated that where an offering (or listing) is being made both within the EU and into third countries, it may be necessary to include additional disclaimers and/ or disclosures in a prospectus (or shorter non-prospectus document) in order to satisfy the laws, regulations or practices of those third countries. This should be expressly permitted, and it is important that this is not limited to legal requirements but also permits additional disclosures which reflect market practices in third countries, since these may go to underlying legal or risk issues, or may be necessary for commercial reasons.

- Making additional disclosures should not constitute material omissions if it does not render another statement not misleading, or if the defendant does not have a duty to disclose: In order to make additional disclosures as a result of the legal and regulatory requirements as well as market practices of third countries, or to offer (or list) securities in a third country, it may be necessary for an issuer to issue a different form of prospectus or, where the PR requires a shorter non-prospectus document, to publish a separate more fulsome prospectus-like document for use in that third country, for legal, risk or commercial reasons (including, for example, additional historical financial information). This may result in investors in that third country receiving more information than investors in the EU. It will be important to ensure that this does not give rise to additional liability risk in respect of the EU offering, in terms of EU investors being able to claim that the additional information provided to investors in that third country is a material omission from the prospectus or shorter non-prospectus document. This is an issue that could be especially acute with respect to shorter non-prospectus documents given their length.

- Additional disclosures to institutional investors. On a related point, while the PR may legislate for a shorter non-prospectus document for a particular offering/ listing, it may be necessary, for commercial reasons, to additionally prepare a more detailed prospectus-like document for the purposes of offering those securities to institutional investors within the EU. Where this is required, the participants in the offering should be protected from potential claims from investors investing on the basis of the shorter non-prospectus document, that such document contained a material omission in respect of information contained in the more detailed prospectus-like document available to institutional investors, provided that such more fulsome document is publicly available to be viewed by EU non-institutional investors (but not as part of the formal non-prospectus document to which civil liability under the Prospectus Regulation would attach).

Q9: Should Article 11 PR be amended to replicate the liability regime under Article 15 of the Markets in Crypto-Assets Regulation more generally? Can you name specific aspects? Please explain your answer.

AFME response: While there are a few similarities in this context, we do not believe that the European liability regime applicable to parties offering crypto-assets to the public should be replicated for the liability regime that is generally applicable to parties offering equity and debt securities to the public. Any such replication would be inappropriate as crypto assets do not represent an interest in an operating business or assets (other than in some cases other crypto assets), and the main purpose of a prospectus is to provide information to investors on that operating business or assets, so there is no look-across between equity / debt securities and crypto assets in terms of the relevant offering materials that should be used to market or list them.

Specific examples of why the replication of Article 15 of MiCAR would be inappropriate in this context for other reasons, including some outlined below:

- The lack of an Issuer. Firstly, an "issuer" is not mentioned (other than in the earliest draft of MiCAR) – as there is the presumption that crypto-assets do not necessarily have an issuer. The specific liability provisions impose liability on an issuer of tokens as well as on members of its administrative, management and supervisory bodies for information in a white paper – which, in the context of equity securities is not fair, clear and complete, or which is misleading. Therefore, the persons responsible for a white paper are defined both widely and inconsistently.
- Persons responsible. If the liability provisions in Art. 15 and 26 MiCAR were taken as a model for a harmonised prospectus liability, the group of persons liable for a prospectus should be critically reviewed and amended. It should be noted in particular that Art. 11 PR does not require that all persons listed in that provision have to be liable under applicable law, but at least one of them, i.e. the issuer.
- Level of fault or culpability. Art. 15 MiCAR does not provide for a requirement of a certain level of fault or culpability on the part of the person(s) responsible for a prospectus. As discussed above, this would be a necessary element of any harmonised prospectus civil liability regime.

Q10: Are liability risks driving non-disclosure of forward-looking information? Please explain your answer, indicate which sorts of forward-looking information and whether and how you believe that safe harbour provisions would help to address this situation.

AFME Response: Yes, we believe that such risks are, to a certain extent, driving the decision whether or not to include forward-looking information. The absence of a safe harbour under the Prospectus Regulation also compares unfavourably with the position in the United Kingdom and, to some degree, the United States. We believe that addressing the concerns and suggestions that

we provide in our response to Question 11 below would encourage issuers to include more forward-looking information, when appropriate and helpful for investors, in connection with offerings and listings of securities.

Q11: **Should a safe harbour provision be introduced at Union level? If so, please explain what the scope and requirements should be.**

AFME response: We support the introduction of a safe harbour provision at the EU level. We encourage any such safe harbour to be as broad as possible, to ensure that it covers all types of forward-looking disclosures typically included in a prospectus. It should cover (i) projections (e.g., forecasts, estimates, expectations), aspirations (e.g. targets, aims) and guidance type statements; (ii) quantitative and qualitative statements; (iii) financial and non-financial information (e.g. operating data); (iv) specific and non-specific periods (e.g. medium term guidance); and (v) forward looking statements wherever included in a prospectus (e.g. it should not be limited to specific, or exclude specific, sections or statements. The safe harbour should apply to all persons responsible for a prospectus, or parts of it, and to both prospectuses, shorter non-prospectus documents (i.e. Annex IX documents) and advertisements.

We do not believe that a prescriptive regime (e.g. an exhaustive list of the types of statement to which the safe harbour would apply) would be appropriate or helpful. A prescriptive approach would take time to develop and agree, be inflexible, and would likely not capture all circumstances in which it would be desirable to protect forward-looking statements in order to encourage the publication of such statements. In addition, the needs and requirements of investors change over time, meaning that a prescriptive regime may rapidly become outdated and, so, less useful.

We believe that it should be possible for forward-looking sustainability-related information to merit protection of any safe harbour.

For example, we believe that (a) projections of the financial effects of risks and opportunities, (b scenario analysis and targeting (quantitative and qualitative) and (c) climate transition plans would all benefit from inclusion in the safe harbour**.**

We also believe that the EU should preserve flexibility as to the method through which issuers seek to present or label information that is subject to the safe harbour in a prospectus.

We also agree that, depending on the nature of the information that is subject to the safe harbour, it may be appropriate to include key assumptions and inputs. Indeed, such disclosure may be necessary to ensure accurate and not misleading disclosures of such information and to help ensure that the relevant information is prepared to an appropriate standard.

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