German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation ESMA32-117195963-1257

German Lobby Register No R001459
EU Transparency Register No 52646912360-95

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Berlin, December 18, 2024

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks.

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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?

a) Art. 11 PR only provides for a generic framework for prospectus liability. Within that framework the adoption of prospectus liability provisions is deferred to the EU member states and their respective national laws. This results in a quite divergent prospectus liability regime across the EU (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).

While a general standard for information to be provided for in a prospectus is defined in Art. 6 PR (and modified in PR for certain special forms of prospectuses), it is – for example - not harmonized across the EU which persons in particular are liable for any misstatement or omissions in a prospectus. Some member state laws provide for certain persons (e.g. the issuer) to be liable for the entire prospectus, whereas other persons can only be held liable for a part of the prospectus they are specifically responsible for (e.g. experts such as auditors). Conversely, the laws of other member states do not provide for such a concept of "split responsibility". Therefore, in certain cases a higher level of harmonisation of prospectus liability across the EU appears desirable, provided that it does not conceptually provide yet another inappropriate burden to access capital markets.

However, the current liability regime has proven in practice. This reflects member states' legal traditions and market characteristics, offering tailored solutions that align with their unique frameworks. Germany's liability rules, for instance, provide legal clarity without fostering excessive litigation. Taking into account the subsidiarity principle, civil law claim ruled continue to be regulated at national level. Therefore, setting out a civil law basis for a claim in an EU Regulation should be carefully calibrated as it would give rise to a large number of subsequent civil law questions at the level of the substantive claim, which typically can be meaningfully answered by national law.

If there is broad consensus among Member States and market participants on the further harmonisation of the prospectus liability regime, then the following considerations should be taken into account to avoid legal uncertainly for issuers and investors.

b) Furthermore, we believe that the existing cross-border enforcement mechanisms (such as Brussels-Ia-Regulation) adequately address the challenges associated with intra-EU enforcement of judicial decisions. It is questionable whether there is a need for any special regulation in the PR for the enforcement of civil law judgments.

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)?

Germany has a robust framework for prospectus liability, with several judicial decisions holding issuers liable for incorrect or incomplete information. Such cases predominantly involve equity securities and are not overly frequent, demonstrating a balanced approach to investor protection and issuer accountability.

Non-equity securities, typically targeted at institutional investors, rarely see liability disputes due to the sophistication of the investor base.

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

We believe that such matters are deeply rooted in national civil law traditions and EU-level specifications could disrupt established systems and result in more confusion than alleviation for investors. From a national perspective we see currently no merit in prescribing who the rightful claimant is.

However, it should be taken into consideration that a prospectus can reasonably only serve as a basis for an investment decision for a fairly limited timespan. Markets, companies issuing securities and the economic environment they are operating are subject to continuous change and new developments. After the period has expired during which a supplement to the prospectus is required these developments are not reflected in a prospectus. Moreover, adequate information of the capital markets is ensured by ongoing financial disclosure under the Transparency Directive as well as so-called "ad-hoc" disclosure of inside information under Art. 17 MAR.

Under German law only those investors can therefore assert damage claims on the basis of a prospectus if they acquired the securities covered by that prospectus in an offer conducted on the basis of that prospectus or within the six months thereafter. In the case of a mere listing prospectus only investors acquiring securities within six months after the introduction to trading of the securities admitted on the basis of the prospectus are entitled to claim damages based on that prospectus. This principle was initially developed by the courts on the theory that after six months it can no longer be assumed that a prospectus has an impact on the "market sentiment" and thereafter adopted in a legislative act amending prospectus liability provisions.

It follows the idea that it neither appears necessary nor appropriate to allow liability claims to be based on a prospectus for losses occurred after a significant amount of time has passed and such new disclosure has been made superseding the initial prospectus.

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

Fault standards differ more or less across member states, reflecting – as stated above - their legal traditions and principles. For example, the German fault-based system (e.g., gross negligence or intent) aligns with broader legal principles and already provides sufficient clarity and fairness. Harmonizing fault requirements could risk imposing artificial standards that may not suit all jurisdictions, undermining subsidiarity.

At present most of the EEA member states require at least negligence (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, answers to question 5). It would appear disproportionate and would expose persons liable for a prospectus an inappropriate liability risk if they were held strictly liable irrespective of any fault.

In Germany claims based on the statutory prospectus liability regime, require "gross" negligence, i.e. a failure to observe the required diligence in a particularly severe manner. This well-balanced approach strongly motivates issuers to act carefully and diligently when drawing up a prospectus by exposing the persons responsible for the prospectus to potential prospectus liability, while at the same time preventing the prospectus liability risk from having overly discouraging effects on capital market funding on the one hand and avoiding a misuse of prospectus liability to recover losses resulting from market developments or general life risk where any misbehaviour on the part of the persons

responsible for a prospectus is questionable on the other hand. The circumstances under which "gross" negligence is to be assumed are determined by national German law.

It can hardly be avoided that a possibly harmonized definition of the degree of fault contradicts the nationally defined degrees of culpability. However, this could lead to massive legal uncertainty for the courts, which have to assess this, and for issuers and investors.

It should also be taken into account that culpability is excluded, e.g. in the case of contributory negligence on the part of the issuer who was aware of the incorrectness or incompleteness of the prospectus. National law typically takes these particularities into account. A harmonized regulation might not be able to adequately take such situations into account.

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?

Member states have developed differing evidentiary standards tailored to their legal systems. Germany's civil law tradition balances evidentiary burdens effectively, ensuring fairness without unnecessary complexity. Introducing a uniform burden of proof could probably lead to increased litigation risks and compliance costs for issuers.

Furthermore, the question of the burden of proof is at least not a question of substantive law, but rather a question of civil procedure, which is currently carefully regulated at national level in order to avoid inconsistencies in civil proceedings. Otherwise, further details would also have to be clearly regulated, such as the question of proof of "negative facts" (i.e. an event did not occur or a circumstance did not exist), in order to avoid different assessments by national courts. The implementation of such a regulation in the PR could interfere with the applicable principle of subsidiarity.

Apart from that, evidence relating to any potential wrongdoing or sloppiness in the prospectus preparation regularly requires a deep insight into the processes conducted by a person responsible for a prospectus. Therefore, it is common to a number of member states to reverse the burden of proof in a sense that the defendant (i.e. the person responsible for a prospectus) shall have to provide evidence that any misstatement or omission for the prospectus was not caused by its own fault.

From a German understanding this would correlate with the aforementioned high standard of culpability (gross negligence) against which the diligence of a person responsible for a prospectus is measured.

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

Limitation periods reflect national legal traditions and are interconnected with broader civil law rules and customs. Germany's statute of limitations for prospectus liability is well-established and fits within the broader framework of German civil law.

At most, it would be conceivable to require Member States to adopt a corresponding provision at national level, stipulating that any liability claims can no longer be asserted after the expiry of a certain reasonable period from the date on which the inaccuracy in the prospectus became public (e.g. 1 year). However, claims should not be time-barred only upon knowledge, but at the latest upon expiry of a reasonable period from a certain date (e.g. 5 years from the publication of the prospectus). This could increase legal certainty for issuers and investors.

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.

There are currently no cross-border offerings in the retail banking market to any significant extent, and this is unlikely to change with further harmonisation of liability rules for prospectuses. The reluctance to engage in cross border offerings stems from other factors unrelated to prospectus liability harmonisation, such as: A retail banking market that is still focused on the individual member state. Different requirements in terms of investor protection under national law (partly also driven by national case law) and language requirements, different historically driven investment cultures and different pension systems have an impact.

Any alternative assumption that liability rules represent a significant obstacle to cross-border offerings should be substantiated by a thorough analysis demonstrating the extent to which this is the case. Without such evidence, introducing harmonized liability standards risks imposing unnecessary changes without addressing the actual barriers to market integration.

Therefore, it is doubtful that further harmonisation of liability regulations will lead to an increase in cross-border offers. Cross-border offerings are already facilitated through mechanisms like the European passport for prospectuses. In addition to liability for the accuracy of the prospectus in the narrower sense (resulting from claims arising from the regulation in Art. 11 PR) further national claims may be considered to which the issuer's organisational representative or issuing agent may be exposed (e.g. in Germany, for having breached the personally claimed confidence). Claims in tort under national protection laws (e.g. in Germany under the German Criminal Code) may also be considered.

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.

Cross-border liability is a rather complex issue extending far beyond the scope of the PR. Therefore, we doubt that any amendments to Article 11 PR are unlikely to significantly alleviate liability concerns related to third-country laws. We do not see why EU law could have an impact on third countries' liability regimes, in particular be suitable to reduce liability concerns with respect to those third country regimes.

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.

Article 11 PR is tailored to a different regulatory context and should not replicate the liability regime under Article 15 of MiCAR. The two frameworks serve fundamentally different purposes. MiCAR whitepapers focus on crypto assets' technological risks and mechanics, offering more flexible disclosure tailored to the emerging crypto market. In contrast, the PR prospectus provides comprehensive and standardized financial disclosures for securities, reflecting its role in established markets where investor protection is paramount. That explains another major difference, the requirement for regulatory approval: unlike MiCAR whitepapers, prospectuses under the PR must be reviewed and approved by national competent authorities (NCAs) before issuance, ensuring a high level of scrutiny and compliance with investor protection standards.

The nature and risks associated with crypto assets differ substantially from those of traditional securities, requiring distinct liability regimes risks. Aligning these liability regimes would undermine the PR's higher disclosure standards and create inconsistencies.

However, the liability regime under MiCAR contains a number of deficiencies making it unsuitable to work as a template for a harmonised pan-European prospectus liability framework. The following aspects should be considered:

a) Persons responsible

The group of persons liable for a white paper is not complete, fair or clear; rather it appears misleading with the persons responsible being defined as

- the offeror,
- the person seeking admission to trading or
- the operator of a trading platform and the members of its administrative, management or supervisory body.

An "issuer" is not mentioned (other than that was the case in the draft of MiCAR) – as it appears on the presumption that crypto-assets do not necessarily have an issuer.

The more specific liability provision for crypto-asset white papers relating to asset-referenced tokens does provides for a liability of the issuer of that token plus the liability of the members of its administrative, management or supervisory body.

Therefore, the persons responsible for a white paper are defined both widely and inconsistently. As a result, the group of persons liable for a white paper/prospectus should be critically reviewed. 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.

In our view the following distinction should be made:

- The issuer:

  The issuer is typically the beneficiary of a securities offering or listing that has triggered the requirement to publish a prospectus. It fully or partially receives the proceeds from an offering; a listing provides access to a regulated market and facilitates future capital raisings. However, if the requirement to publish a prospectus arises from a mere secondary placement by existing shareholders without the issuer generating any economic benefit therefrom, the issuer's liability should be reconsidered.

  However, sometimes the issuer's involvement is only of a technical nature without being the economic beneficiary. This applies, for example, in the case of depository receipts over shares. In this case the issuer in a technical sense is the depository, who in fact just acts as a service provider for the issuer of the underlying shares. In this case the issuer of the underlying shares should be liable for the prospectus instead of the depository.

- The members of the issuer's administrative, management or supervisory bodies

  At least in some jurisdictions (such as Germany) a personal liability of the Issuer's administrative, management or supervisory bodies only applies on an exceptional basis, i.e. when such person has a personal economic interest in the respective issuance. This appears appropriate. Further it should be considered that one of the objectives of the Capital Markets Union is to lower the barriers to access capital markets. On that background personal liability of members

of the issuer's body does not appear helpful. Hence it is proposed not to provide for a personal liability of members of the issuer's body in general.

- The offeror

  The offeror has been named as a person that could be liable for a prospectus in Art. 11 PR and in Art. 15 MiCAR. However, its responsibility for the accuracy and completeness of a prospectus should be combined with appropriate defences and an appropriate minimum level of fault or culpability (see response to Q4).

- The person seeking admission to trading

  The person seeking admission to trading has been named as a person that could be liable for a prospectus in Art. 11 PR and (similarly) in Art. 15 MiCAR. However, its responsibility for the accuracy and completeness of a prospectus should be combined with appropriate defences and an appropriate minimum level of fault or culpability (see response to Q4).

  Or

- The guarantor

  The guarantor has been named as a person that could be liable for a prospectus in Art. 11 PR. This, however, should only be the case where the guarantor is the beneficiary of an offering, i.e. generates a significant economic advantage therefrom beyond a consideration for the delivery of the guarantee and a compensation for its risk arising from the guarantee.

b) 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. It is argued in legal literature that this is an unintended omission and that a minimum degree of fault or culpability of the person(s) responsible for a crypto asset white paper should be required, e.g. by applying prospectus liability provisions. Indeed, current national prospectus liability regimes typically require some kind of negligence to hold a person liable. As aforesaid, it appears appropriate to require gross negligence as aforesaid (response to Q4).

c) Due Diligence Defence

Apart from a certain minimum level of fault or culpability, it is an established principle in international capital markets that persons other than the issuer should not be liable for misstatements or omissions in a prospectus if they had exercised due diligence when preparing or reviewing the prospectus.

For example, Section 11 of the U.S. Securities Act of 1933 provides that no person, other than the issuer, shall be liable if he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading. In determining what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property. In a number of member states a similar concept exists, be it implemented in national law, (e.g. in France, Italy or Spain – 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 responses to questions 2, 5 and 8) be it by interpretation of the relevant fault or culpability (e.g. in Germany).

d) Expert liability

In certain jurisdictions experts (such as auditors or property appraiser delivering an evaluation of real estate assets) are being held liable for statements they make, on the basis of their expertise, in prospectus. Conversely, other persons responsible for a prospectus are relieved from liability for an expert statement in a prospectus if such an expert statement was included in a prospectus based on the expert's consent, provided that the other person had no reasonable ground to believe and did not believe that the expert statement was untrue or incomplete for it to not to be misleading, or that the expert statement was not fairly represented or not a fair copy or extract of the original expert. Section 11 of the U.S. Securities Act of 1933 provides Section 11 of the U.S. Securities Act of 1933 provides for a treatment of expert statement in registration statements along those lines.

e) Time limitation

Art. 15 MiCAR does not provide for liability claims being time-barred. This also appears as an unintended omission by the legislator as seems to be the common view in legal literature. Introducing never-ending liability claims does not appear appropriate and with a view to the objective of the Capital Markets Union to facilitate access to capital markets counter-productive. Conversely, an appropriate time limitation for prospectus liability claims should be provided for (see response to Q6).

f) Persons entitled to assert claims

Whilst the information contained in a MiCAR whitepaper remains relevant for the entire life of the crypto-asset, the information provided in a prospectus inevitably gets outdated sooner or later once the period during which it needs to be supplemented in case of a significant new factor, material mistake or material inaccuracy has expired. Therefore, it is appropriate to allow claims in view of an incomplete, wrong or misleading prospectus only to persons who acquired the securities during a period in which it was reasonable to take the information contained in the prospectus into account when making the investment decision. In that regard, reference is made to our response to question 3.

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.

Forward-looking information, by nature, involves projections and assumptions that cannot be guaranteed. Given that a certain level of uncertainty (and, thus, by definition also liability risks) is unavoidable and inherent to such disclosures, we believe that existing frameworks, particularly in Germany, adequately address this issue by requiring forward-looking information to be grounded in reasonable evidence.

Reluctance to provide forward-looking information in a prospectus seems to primarily result from the uncertainty as to how forward-looking information in a prospectus is assessed and whether it may result in liability risks, especially if it turns out in hindsight that the expected development underlying or described in the forward-looking information turn out to be different.

Q11: **Should a safe harbour provision be introduced at Union level? If so, please explain what the scope and requirements should be. However, rather than applying criteria, we recommended that the FCA introduce guidance regarding the types of statements that would or could be considered PFLS and the conditions to be applied to PFLS. This would enable greater flexibility and agility, allowing the guidance to be updated as market practice evolves.**

A safe harbour provision should not be introduced at the EU level. Such provisions could undermine investor protection by potentially shielding issuers from accountability for misleading or inaccurate forward-looking statements. National liability regimes already provide sufficient safeguards for issuers while ensuring that investors have access to reliable information.