Deutsches Aktieninstitut
Kapital. Markt. Kompetenz.

Harmonise Prospectus Liability to move forward in the Capital Markets Union

Reducing barriers to achieve a true single market

Position on Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation, 18 December 2024.

Table of Contents

Introduction 3

1 Summary 4

2 General questions 6

3 Standard parameters for liability 7

4 Liability's impact on cross border offerings 9

5 Comparison with liability regime under the Markets in Crypto-Assets Regulation 10

6 Safe Harbour Provision 11

Contact 12

Introduction

Deutsches Aktieninstitut advocates for the interests of the capital market in Germany. Since 1953, we have represented the interests of listed companies and other key market participants. With over 200 members, we represent more than 90 percent of the market capitalization of German companies. Additionally, we provide the secretariat for the Commission of the German Corporate Governance Code ("Regierungskommission Deutscher Corporate Governance Kodex").

Deutsches Aktieninstitut welcomes the harmonisation of civil liability rules for securities prospectuses as this is a necessary step towards progressing the Capital Markets Union. A harmonisation of liability will facilitate market access for issuers and enhance transparency for investors. Strengthening Europe's capital markets is increasingly important in the face of new challenges.

1 Summary

Many issues only take place nationally and not across borders. Anyone wishing to issue cross-border in the EU is faced with an unmanageable number of different liability regimes. As can be seen from the ESMA report "Comparison of liability regimes in the Member States with regard to the Prospectus Directive" of May 30, 2013, the liability regimes of the Member States differ considerably.

While the risk can be better calculated through private placements, a harmonisation of liability would be a further step towards a Capital Markets Union. Greater EU-wide harmonisation of prospectus requirements is therefore desirable, provided it does not lead to further undue burden on access to the capital market.

Please find our harmonisation proposals below[1]:

1. Applicable law

A high degree of harmonisation could be achieved by determining the applicable law. The country of origin, as is done with approval of prospectuses, or the seat of the issuer could be considered here. This would be very attractive, as European regulations are also applied differently in some cases. This also appears to have advantages for investor confidence. If a prospectus error occurs, investors in many member states are affected. A definition would therefore lead to equal treatment of shareholders, and this would strengthen shareholder confidence in the long term. Confusion does not create trust.

If this path is not contested and only European prospectus liability applies, then this should apply exclusively. This means that, in addition to European liability, no other national civil law liability provisions should apply.

2. Liable party

In many jurisdictions, such as Germany, personal external liability of the issuer's administrative, management or supervisory bodies does not apply, or only applies in exceptional cases, such as when this person has a particular personal economic interest in the respective issue. This approach is appropriate. Changing this would have the opposite effect, making cross-border issues less attractive. The objectives of the Capital Markets Union are to lower barriers to accessing capital markets. See more details below in the response to question 9.

[1] In our response to the call for evidence, these are listed under question 1.

Overall, determining the liable party in prospectus law is likely to be challenging, as different individuals are responsible for drafting prospectuses in various Member States.

3. Entitled party

Under German prospectus law, only investors who acquired the securities at least six months ago can assert claims for damages. For further details, please refer to the response to question 3.

4. Expiry of claims

Claims should be asserted within three years. The period should begin no later than the expiry of the preceding 6-month period. For further details, please refer to the response to question 6.

5. Framework of national investor protection

Investor protection is regulated very differently across the member states. The level of knowledge expected of an investor should at least be harmonised. For further details, please refer to the response to question 3.

6. Fault

It would be appropriate to account for gross negligence, defined as the failure to observe the required diligence in a particularly severe manner. For further details, please refer to the response to question 4.

7. Burden of proof

If a harmonisation to gross negligence occurs, it seems justified to shift the burden of proof of fault from the investor to the liable party. For further details, please refer to the response to question 5.

8. Healing of an error in the prospectus

The possibility to cure prospectus errors would be useful. For example, an ad hoc announcement could cure a prospectus error. Anyone who reads a prospectus is likely to also read an ad hoc announcement. This approach would safeguard investor protection and reduce liability risks.

9. Amount of damages

The amount of loss should be limited to the price difference.

2 General questions

Question 1: *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?*

Article 11 of the Prospectus Regulation (EU 2017/1129) delegates the provisions for prospectus liability to the EU Member States. This results in a variety of non-transparent prospectus liability regimes across the EU, as highlighted in the ESMA report "Comparison of liability regimes in the Member States with regard to the Prospectus Directive" of May 30, 2013.[2] These regimes often include general liability rules that completely disregard the specific nuances of prospectus law, leading to significant differences.

For instance, there is no EU-wide harmonisation of fault. In some Member States, they even impose strict liability. Additionally, in some Member States, the administrative, management or supervisory bodies of the issuer may even face personal external liability, even if they were not involved in preparing the prospectus. These differences should also be considered when planning a cross-border issue. In such cases, private placements can be a viable alternative.

Therefore, greater EU-wide harmonisation of the prospectus requirements is desirable, provided it does not impose a further unreasonable burden on access to the capital markets.

Question 2: *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 comment.

[2] ESMA/2013/619, Annex II available at https://www.esma.europa.eu/document/comparison-liability-regimes-in-member-states-in-relation-prospectus-directive

3 Standard parameters for liability

Question 3: *Should Article 11 PR specify who is entitled to claim damages? If so, what specification(s) would you suggest?*

Yes, we are in favor of specifying the individuals entitled to compensation.

A prospectus can only serve as a basis for investment decisions for a limited period. Markets, issuers, and the economic environment in which the issuer operates are constantly changing and these developments are not reflected in a prospectus after the period requiring a supplement has expired. Adequate information is ensured through ongoing financial reporting in accordance with the Transparency Directive and the ad hoc publication of inside information in accordance with Art. 17 MAR.

Under German prospectus law, only those investors who acquired the securities within six months can assert claims for damages. This applies to purchases made as part of an offer based on the relevant prospectus. For a listing prospectus, only investors who acquire securities within six months of the introduction of the securities admitted to trading on the basis of the prospectus may claim damages on the basis of this prospectus. This principle was originally developed by the courts, as it was assumed that after six months, a prospectus no longer had an impact on "market sentiment". This was later confirmed by legislation.

It follows that it is neither necessary nor appropriate to allow liability claims to be based on a prospectus for losses incurred after a significant amount of time has passed and new disclosures have been made superseding the initial prospectus. Therefore, this concept should be part of new harmonized prospectus liability rules.

Question 4: *Should Article 11 (or another provision in the PR) determine a degree of fault or culpability? If so, what specification(s) would you suggest?*

Yes, a maximum limit of fault should be established in the Prospectus Regulation. According to the ESMA report, some individual member states even consider no-fault liability, which is completely disproportionate and concerning.

As in Germany, it would be appropriate to account for gross negligence, defined as failure to observe the required diligence in a particularly severe manner. This approach will prevent the misuse of prospectus liability to recover losses from market developments or general life risks when any misbehavior is questionable.

If harmonisation to gross negligence take place, it seems justified to shift the burden of proof from the investor to the liable party. This would significantly

improve investor protection, as it is generally difficult for investors to prove even simple negligence. The increased burden on the potentially liable party is justified by the higher degree of fault.

Question 5: *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?*

In our view, the question of who bears the burden of proof is linked to the question of the degree of fault.

As detailed in the response to question 4, it seems reasonable to shift the burden of proof from the investor to the liable party if gross negligence (i.e. a particularly serious disregard of the required care) is established. This would significantly improve investor protection, as it is usually difficult for investors to prove even simple negligence. The increased burden on the potentially liable party is justified by the higher degree of fault.

Question 6: *Should rules on the expiry of claims be harmonised? Please explain your answer.*

Yes, harmonising the expiry period makes sense. Currently, different periods apply in different member states, which, when they relate to the same inaccuracy or incompleteness in the prospectus, lead to unequal treatment of investors and legal uncertainty for the issuer, without there being any objective reason for this. Investors should be able to assert their claims within three years from the date on which they became aware of the alleged misstatement or omission. The period should begin no later than the expiry of the preceding 6-month period. You can find more details on the 6-month period in the response to question 3.

4 Liability's impact on cross border offerings

Question 7: *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.*

Harmonising civil liability is a necessary step towards a uniform European capital market. Currently, offering across borders requires considering the liability regimes of all member states as the applicable law depends on the investors. However, issuers have no control over who buys their securities on the secondary market.

Therefore, it should be considered that the applicable law and jurisdiction be based on the issuers' registered office. This approach ensures equal treatment of investors. Otherwise, in the event of a prospectus error, affected investors from different countries could potentially face different court decisions.

To increase cross-border offers, the personal liability of board members should be excluded unless they have a special personal economic interest in the issue. This is appropriate since they are often not directly involved in preparing the prospectus. Personal liability does not make sense in prospectus law and poses a clear obstacle for cross-border issues from countries like Germany, which rightly do not provide for personal liability.

Additionally, there should be further harmonisation regarding the expected knowledge of investors. This is relevant for liability and for the length of the prospectus. In Germany, courts assume that an average investor can be expected to read a balance sheet but not understand every technical term.[3] The regulation should express this basic understanding on the part of the investor.

Question 8: *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.*

Harmonising liability would primarily impact cross-border emissions within the EU and likely have less effect outside the EU.

[3] Bundesgerichtshof (BGH) [Federal Court of Justice] 12 July 1982 - II ZR 175/81, WM 1982, page 862f.

5 Comparison with liability regime under the Markets in Crypto-Assets Regulation

Question 9: *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.*

It is understandable to consider the existing Article 15 MiCAR, as the objectives of liability are similar. However, the situation differs as it concerns companies which are very different in their business activities and capital resources. To give an example, while the liability of the management of a company that has issued a white paper on crypto securities can be explained by the fact that issuers of crypto securities are often young companies with little capital, this situation cannot be compared to a large, financially sound group that carries out a business activity in the real economy and whose management has a completely different focus than financial market transactions and is therefore often not directly involved in the preparation of the prospectus. Therefore, while the starting point of the liability regimes may appear to be comparable at first glance, it is in fact not. .

As mentioned above, it is essential to harmonise the entitled persons (six-month period, see response to question 3) and the statute of limitations (see response to question 4). Ideally, this would also include fault and limitation of amount of damages. Additionally, harmonisation would require the existence of other national liability provisions alongside prospectus law.

In many jurisdictions, such as Germany, personal external liability of the issuer's administrative, management or supervisory bodies does not apply, or only applies in exceptional cases, such as when an individual has a particular personal economic interest in the respective issue. This approach is appropriate. Changing this would have the opposite effect, making cross-border issues less attractive. The objectives of the Capital Markets Union are to lower barriers to accessing capital markets. Such a barrier would include personal external liability for crypto traders but not for normal companies. Furthermore, there may be a prospectus requirement for a mere secondary placement by existing shareholders without any benefit to the issuer.

Overall, determining the liable party in prospectus law is likely to be challenging, as different individuals are responsible for drafting prospectuses in various Member States.

As mentioned above, it is essential to harmonise the entitled persons (six-month period), the expiry of claims and the fault. Additionally, harmonisation would require the existence of other national liability provisions alongside to prospectus law.

Further harmonisation proposals can be found in the response to question 1.

6 Safe Harbour Provision

Question 10: *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.*

Yes, liability risks are certainly the reason for the reluctance to disclose forward-looking information. Making statements about the future and becoming liable for them is challenging. Therefore, a clear regime and relief would be welcomed. However, it seems difficult requiring knowledge or a burden of proof for shareholders. It is also necessary to prevent courts in Member States from attempting to assist shareholders by allowing overly extensive investigations into companies. Such investigations are highly susceptible to abuse and can be very damaging for companies. This should be prevented at all costs.

In our view, liability for forward-looking statements could be limited to intent, with the burden of proof falling on the issuer.

Question 11: *Should a safe harbour provision be introduced at Union level? If so, please explain what the scope and requirements should be.*

A clear regime and easing of liability for forward-looking statements would be welcome. However, it seems difficult requiring knowledge or a burden of proof for shareholders. It is also necessary to prevent courts in Member States from attempting to assist shareholders by allowing overly extensive investigations into companies. Such investigations are very susceptible to abuse and can be very damaging for companies. This should be prevented at all costs.

In our view, liability for forward-looking statements could be limited to intent, with the burden of proof falling on the issuer.