assonime
Associazione fra le società
italiane per azioni

The Director General

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ASSONIME's answer to ESMA's Call for evidence on potential further steps towards harmonizing rules on prospectus liability pertaining to securities under the Prospectus Regulation

Introduction

The Prospectus Regulation is an essential element of the Capital Markets Union (CMU). Important measures of the Listing Act, such as the Market Abuse Regulation and the Prospectus Regulation, are designed to strengthen the EU capital market, since several studies related to Prospectus Regulation examined the varying approaches of National Competent Authorities (NCAs) identifying differences among Member States (MSs) on the length of the prospectuses, the number of approved prospectuses and on approval procedures. The Listing Act has reached significant milestones in this regard, including: (i) exempting secondary issuances from the requirement to publish a prospectus; (ii) expanding certain exemptions; (iii) raising the threshold for mandatory prospectus publication from €5 million to €12 million; and (iv) establishing a maximum page limit for each type of prospectus.

While the Prospectus Regulation ensures maximum harmonization in terms of form, content, disclosure obligations, and public enforcement, civil liability regimes remain under the jurisdiction of individual Member States. We are confronted with a wide range of heterogeneous regimes, which hinders the development of a single market, creating not only inefficiencies but also disparate treatments that are difficult to justify, especially in light of the largely uniform substantive regulations and practices concerning the content, preparation, and approval of the prospectus. This patchwork of approaches makes cross-border transactions complicated and burdensome, while legal risks are either magnified or difficult to predict. Inevitably, this situation also raises concerns regarding the enforcement of judgments: despite a shared set of rules on judgment enforcement within the EU, the actual enforcement of decisions made under different regimes could become complex at various levels.

In this regard, we believe that a stronger and clearer harmonization could represent a significant step toward a true CMU, potentially contributing to the development of a

00187 **Rome** Piazza Venezia 11 20122 **Milan** Via Michele Barozzi 6
tel. +39 06695291 tel.+39 0286997450 / fax +39 0286997009
fax +39 066790487 / +39 066781254 assonime.milano@assonime.it
e-mail: assonime@ssonime.it
tax code 80053570588 1040 **Brussels** Rue de la Science 23
tel.32 2 2307254 / fax +32 2 2305362
assonime.bruxelles@assonime.it

more integrated European market and facilitating cross-border transactions on a continental scale. While we support the establishment of a fully harmonized regime immediately applicable across the EU, in this particular area, an optional regime—similar to what is sometimes referred to as the "28th System Approach"—could be tested. This issue raises the question, which needs to be investigated and deepened, of the need for a system of European courts which could validly support an empowered ESMA in its function of direct supervisor of companies opting for the 28th regime.[1]

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?

Yes. The minimum harmonization approach pursued by Article 11 PR has not substantially reduced the number and extent of differences among Member States, which remain significant and profound. National approaches differ significantly, ranging from the existence (or absence) of specific statutory provisions addressing the issue to the legal qualification of the liability regime (whether as a tort or a form of pre-contractual liability); from the allocation of the burden of proof to the definition of a "reasonable investor" and how reliance on disclosed information is demonstrated; from

[1] An example could be the Unified Patent Court.
According to the TFUE, art. 81, EU is allowed to adopt measures to improve judicial cooperation in civil matters having cross-border implications and according to art. 257, the EU may establish specialised courts attached to the general court within the ECJ to hear and determine at first instance certain classes of action or proceedings brought in specific areas; this issue has been tackled by a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the European Parliament's Committee on Legal Affairs (JURI Committee) to the Directorate General for Internal Policies of the Union to shed light on cross-border commercial contracts and their operation in theory and practice; the study recommended, among others, the institution of specialized courts or chambers for cross-border commercial cases and an European Commercial Court which does not replace national courts but offers an alternative solution for cross-border disputes (see European Parliament, *Building Competence in Commercial Law in the Member States*, September 2018).

identifying responsible entities and individuals to determining who can bring a cause of action; from standards of diligence to the appropriate measure of damages, including the treatment of forward-looking statements.

Given the different legal regimes across Member States and their relevance for cross-border transactions, we believe harmonization is necessary regarding key elements of prospectus liability, including:

(i) the legal standing to bring a liability action;
(ii) the fault and fraud regime;
(iii) the burden of proof on the plaintiff;
(iv) the regime of presumptions related to the above elements; and
(v) the limitation period for the action (see Q3 to Q6).

A more precise definition of the information whose omission, falsity, or inaccuracy triggers liability under Article 11 RP, as well as clearer rules on the quantification of damages (see Q7), would enhance the certainty and predictability of the rules within the context of the Capital Markets Union (CMU).

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)?

Yes. At least one leading case has been established by the Supreme Court of Cassazione's judgment No. 14056 of 11 June 2010, followed by other rulings offering the same conclusion (Cass. Civ., Order No. 8034 of 8 April 2011 and Cass. Civ. Order No. 15707 of 14 June 2018). These decisions have also influenced a number of judgments by the first-instance Courts, including the Court of Milan's decisions of 18 May 2017 and 15 February 2021, where issuers were held liable for providing incorrect information in the prospectus.

In all these cases, the courts have established the liability of issuers for tort in relation to the purchase of shares.

Standard parameters for liability

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

Yes. We believe that Article 11 of the Prospectus Regulation (PR) should specify who is entitled to claim compensation in order to enhance legal certainty and predictability of legal risks.

Under the Italian legal system, case law holds that only investors who purchased shares based on the prospectus are entitled to claim damages. This conclusion is based on two main reasons: first, the performance of securities after their purchase may not result in damage; and second, the right to compensation is an independent right from ownership and does not transfer with the sale of the security. Compensation for the falsity or inaccuracy of the prospectus applies to all purchases/subscriptions made on the basis of the information contained in the prospectus itself. In contrast, other forms of protection apply when incorrect information is disseminated to the market during the subsequent circulation of the security. The prospectus is an informational document designed to encourage an investment and is not intended to disseminate structural information that may change over time. Since the prospectus is tied to a specific solicitation, understood as an invitation to invest, only the subscribers/purchasers should be considered damaged and entitled to bring an action. For the same reasons, compensation is not due to those who are already shareholders at the time of the prospectus' publication and who, based on that prospectus, sell their shares on the market.

We believe that these principles provide a solid solution at the European level, where only investors who purchased shares based on the prospectus—rather than subsequent purchasers—should have the right to claim damages.

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?

Yes. The issue of negligence or, from another perspective, exculpatory due diligence should be clearly addressed. In fact, any uncertainties surrounding this element significantly undermine both investor protection and legal clarity for issuers and intermediaries. Liability should cover infringements committed intentionally or with gross negligence, as already provided for by the Credit Rating Agencies Regulation (Article 35a) and as also suggested by the German paper on prospectus liability dated March 2023.

We strongly believe that any form of no-fault liability ("strict liability") should be firmly avoided.

Regarding forward-looking information (see Q10), however, we consider it appropriate to introduce a limitation of liability only in cases in which fraud occurs.

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?

Yes. Once again, the legislation should offer clear indications on this crucial issue. It is, however, a multi-faceted problem, because it is necessary to distinguish the different elements of the cause of action. Each cause of action is basically based on three elements, that the parties must either prove or disprove: (a) the breach of a rule or standard; (b) the fact that this breach caused damage (causal link); and (c) the amount of damages.

In our legal system, these three elements must always be proven by the claimant. The first element is demonstrated by proving that the prospectus contained false or incomplete information on relevant matters (those that could influence investment decisions, see Q7). The second element is demonstrated by proving that the falsity or incompleteness influenced the investment decisions and, consequently, damaged the investor's trust (causal link). Regarding the proof of this second element, a presumption applies: when the falsity or incompleteness of the prospectus is established, it is presumed that the prospectus influenced the investment choices. However, the defendant is given the opportunity to rebut this presumption by providing evidence that the investors would have made the same investment even if they had been aware of the true state of affairs.

This approach is also reflected in the legislation of other Member States. We believe that these conclusions should be incorporated into Article 11 RP e that the claimant must prove (a) the breach of a rule or standard; (b) the fact that this breach caused damage (causal link); and (c) the amount of damages. A clarification regarding the quantification of compensable damages, even based on presumptions, appears also needed, as this is a crucial aspect of PR civil liability regime (see Q7).

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

Yes. This is another element that cannot be regulated differently across jurisdictions if a level playing field is to be established. The key issues that must be addressed are as follows: 1. the duration of the statute of limitations; 2. the point from which the limitation period begins (is it from the offer, the purchase of the securities, or the discovery of the information defect?); 3. suspension and expiration (are there any supervening circumstances that could shorten the duration of the limitation period?).

In our legal system, an action for damages may be brought within five years of the publication of the prospectus, since the damaging event occurs at that time. If this first time limit has expired, it is still possible to bring the action within two years from the discovery of the fraud or falsity of the prospectus, since the investor's right of defense must be ensured from the moment the investor has actual knowledge of the damage.

Once it is clarified that the right to bring the action is reserved solely for the investor who purchased securities based on the prospectus, this regime should be harmonized at the European level by establishing that the duration limit for the legal action is five years from the publication of the prospectus, unless the breach of information is discovered at a later time. In such a case, the action could be brought within a shorter period of two years from the date of discovery.

Liability's impact on cross-border offerings

Q7 Is further harmonization 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 harmonization could help to increase the number of cross border offers.

Yes. As noted above, further harmonization of the rules on civil liability for the information provided in a prospectus within the Union is necessary to significantly advance the path toward a Capital Market Union. In this regard, it would be essential to clarify the concept of relevant information, the omission, falsity, or inaccuracy of which generates liability, as well as to establish certain criteria for quantifying compensable damages.

Regarding the concept of relevant information, Italian case law requires that the information be material in relation to the investment decision or the determination of the security's price, excluding compensation only when the information is deemed "marginal."

Regarding the definition of compensable damages, in our jurisdiction they are determined as the difference between the total amount actually paid for the purchase of the security and the true value that the security would have had if the omitted or false information had been disclosed. In the event of reselling, the differential value must be reduced by the additional amount the investor could have obtained by liquidating the investment promptly. In fact, the so-called diligence of the informed investor must also be considered, i.e. the amount of the loss that the investor could have avoided through ordinary diligence, particularly in the case of a professional investor, as well as the natural decline in the security's price due to market factors. However, it is often not possible to determine exactly the value the security would have had if the omitted or false information had been known, nor to quantify the depreciation caused by the investor's lack of diligence or market fluctuations. As a result, case law relies on equitable criteria to quantify damages and does not require actual proof of the amount of damage suffered.

We believe that principles and criteria for defining what constitutes material information should be clarified to prevent significant differences in interpretation at the European level. Furthermore, information external to the company, even if included in the prospectus, should never be regarded as a source of liability.

A harmonized and clear regime regarding the principles and criteria for quantifying damages, along with clarifications on aspects related to the burden of proof, could serve as an incentive to increase the number of cross-border offerings.

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

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.

No. The level of harmonization we consider necessary for the prospectus liability regime under Article 11 PR should encompass broader elements than those covered by Article 15 of the MICAR.

In addition to specifying the persons entitled to bring an action for damages and properly allocating the burden of proof, Article 11 PR should outline the criteria for fraud

and gross negligence, the time limits for initiating a liability action, and the criteria for quantifying damages.

Safe Harbor Provision

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 harbor provisions would help to address this situation.

Yes. The absence of a safe harbor for forward-looking information may lead to significant reluctance among issuers and intermediaries to provide details about potential or future events or developments, which can hinder both the quantity and quality of information available to investors. The inclusion of such information can also provide clarity on the current information disclosed by the issuers and the specific context in which it is presented.
We strongly believe that a reasonable safe harbor, contingent upon the use of appropriate language and warnings, should exempt parties from liability or, at the very least, limit it exclusively to cases of fraud.

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

Yes. Please refer to the answer to Q10 above. Furthermore, the introduction of a safe harbor at the Union level, similar to the frameworks in the USA or UK, should encourage companies acting in good faith and could be beneficial in promoting a more open approach.