2024-12-20

Response by the Confederation of Swedish Enterprise to ESMA's Call for Evidence on Civil Liability for Prospectus Information

The Confederation of Swedish Enterprise appreciates the opportunity to provide feedback on ESMA's Call for Evidence regarding potential further steps towards harmonisation of rules on civil liability for securities prospectuses under the Prospectus Regulation (PR). The Confederation of Swedish Enterprise has 60,000 member companies organized in 48 business and/or employer associations.

Responses to Specific 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?

No, we have not identified any significant issues regarding the civil liability regime for prospectus information.

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, we are not aware of any significant judicial decisions in Sweden holding an issuer liable for incorrect or misleading prospectus information.

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

No. The current approach, which allows Member States to determine who is entitled to claim damages, works well. It reflects established national liability principles and respects the diversity of legal traditions across the Union. For example, in Sweden, under the Companies Act and general principles of civil liability, both shareholders and third parties can claim damages for harm caused

Svenskt Näringsliv Confederation of Swedish Enterprise
Postadress/Address: SE-114 82 Stockholm Besök/Visitors: Storgatan 19 Telefon/Phone: +46 (0)8 553 430 00
svensktnaringsliv.se Org. Nr: 802000-1858

by breaches of the Prospectus Regulation. Further specification at the EU level is unnecessary and risks disrupting well-functioning national legal frameworks.

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?

No. The determination of fault or culpability should remain within the remit of Member States, as it reflects established legal traditions and the specific characteristics of national liability frameworks. Harmonising this aspect at the EU level risks undermining well-functioning systems that are tailored to local conditions and legal cultures.

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?

No. The allocation of the burden of proof should remain within the competence of Member States, as it reflects well-established national civil liability principles. Harmonising this aspect at the EU level risks disrupting mature national legal systems without delivering clear benefits.

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

No. Prescription periods are closely tied to national legal traditions, and Member States should retain flexibility in this respect. While harmonisation in this area might not cause significant disruption, it remains unclear whether it would deliver sufficient value to justify such an approach.

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.

No, further harmonisation is not needed. Civil liability rules are closely tied to national legal systems, which have developed over long periods and reflect established legal traditions and natural differences. Imposing harmonisation risks disrupting these well-functioning systems without clear benefits. Instead, efforts should focus on reducing regulatory and administrative burdens as these are the real barriers to promoting cross-border capital-raising – not differences in civil liability regimes.

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.

We are uncertain about how amendments to Article 11 PR could effectively address concerns stemming from third-country liability regimes. The interaction between EU and third-country rules is complex, and further analysis may be required to understand the practical implications.

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. Not only do the differences appear largely semantic, but they also reflect natural differences between markets and regulatory approaches. MiCA addresses a new and largely unregulated market where white papers are not subject to prior review, whereas prospectuses under the Prospectus Regulation are scrutinized and approved by competent authorities. Introducing a MiCA-style liability regime would risk disrupting well-functioning national frameworks that have evolved over time, reflecting established legal traditions and practices.

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.

It is difficult to say with certainty. Liability risks may lead to caution in disclosing forward-looking information, but such prudence is often warranted to ensure that forward-looking statements are realistic and appropriately framed. When forward-looking statements are clearly accompanied by disclaimers about their inherent uncertainties, and national civil liability rules on negligence and causality are well-calibrated, this should provide a sufficient balance between transparency and protection for issuers and their representatives. From a Swedish perspective, we do not see this as a significant issue in practice.

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

While a safe harbour provision at Union level could be explored, we do not see a strong need for it. Forward-looking statements are typically managed through clear disclaimers and well-balanced national liability frameworks, which include reasonable requirements for negligence and causality. Introducing additional rules would risk adding unnecessary complexity without meaningfully

improving the current balance between transparency and protection for issuers and their representatives.

Final Remarks

The Confederation of Swedish Enterprise believes that the current liability framework under the Prospectus Regulation, together with well-calibrated national systems, provides a sufficient balance between investor protection and issuer responsibility. Further harmonisation of civil liability rules at the EU level appears unnecessary and risks undermining national systems that have evolved over time to reflect established legal traditions and practices. To facilitate cross-border capital-raising, efforts should instead focus on reducing administrative and regulatory burdens, as these are the real barriers to a more efficient and integrated European capital market.

Kind regards,

The Confederation of Swedish Enterprise
Business Policy and Law Division