AMF ITALIA
ASSOCIAZIONE INTERMEDIARI
MERCATI FINANZIARI

Milan, 27 December 2024

ESMA
201-203 rue de Bercy
CS 80910
75589 Paris Cedex 12
France

Via ESMA website

Prot. n. 71/24

Re: AMF Italia contribution to ESMA "*Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation*"

AMF Italia[1] welcomes the opportunity to provide comments on the ESMA Consultation Paper in subject as better detailed here below.

******

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?

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. There is no need here to recap the different approaches and specific solutions, being sufficient to mention that they range from the very existence of ad hoc statutory provisions addressing the issue, to the very legal qualification of the liability regime (whether it is a tort or a form of pre-contractual liability); from the distribution of the burden of the proof to the notion of reasonable investor and, therefore, how to demonstrate reliance on the information disclosed; from potential responsible entities and people to the issue of who enjoins a cause of action; from the standard of diligence to the proper measure of damages, or the treatment of forward-looking statements.

[1] AMF Italia – *Associazione Intermediari Mercati Finanziari* is the Italian Association of Financial Markets Intermediaries, which represents the majority of financial intermediaries acting in the Italian markets.

In short, we are faced with a true panoply of heterogeneous regimes, something that hinders the development of a single market, creating not only inefficiencies, but also different treatments that can hardly be justified, especially vis-à-vis a rather homogeneous substantive regulation and practice on the contents of the prospectus and its preparation and approval. This patchwork of approaches renders cross-border complicated and burdensome, and legal risks are magnified or, more precisely, hard to forecast. Inevitably, this situation also raises – at a minimum – possible issues with respect to the enforcement of judgements: notwithstanding a shared set of rules on the enforcement of judgements within the EU, as a matter of fact it is obvious, and well-known in legal circles, that the actual enforcement of decisions rendered under different rules might become complex and impractical at several levels.

In this perspective, we believe that a stronger and clear harmonization – if well-crafted and balanced – could represent a meaningful step toward a true CMU, potentially contributing to the development of a more integrated European market and facilitating cross-border transactions with a continental dimension.

While we support the establishment of a truly harmonized regime immediately applicable throughout the EU, in this specific area, precisely because it concerns a fundamental but discrete set of rules, an optional regime, along the lines of what is sometimes colloquially called "28th System Approach", could be experimented.

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)?

While there have been several decisions, including of the Italian Supreme Court, on several aspects of prospectus liability and, in some cases, liability has been established and damages awarded, it is highly questionable whether it would be correct to identify any true "leading case". This is obviously not only for the general rule that precedents are technically not binding in a civil law system (even if not binding, they can have a significant persuasive authority), but because the cases do not seem to have established yet an entirely coherent and systematic doctrine on the major questions raised by the internal rules implementing Article 11 PR. In addition, some differences still exist between judicial positions and legal scholars that contribute to a certain degree of uncertainty.

In any case, as regards our jurisdiction, most of the cases dealt with by the Italian courts so far have involved genuine fraud, and very few have involved gross negligence.

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

Yes, clarifying the criteria to identify who is entitled to a cause of action is fundamental to enhance legal certainty and mitigate – or at least predict – legal risks. In this perspective, we hold the view that claims should be limited to those investors who are supposed to have based their investment decisions on information on the prospectus and to whom the prospectus was

addressed. Accordingly, only investors who have subscribed or purchased securities in the actual offering should be entitled to a cause of action. At most, the possibility of including investors who have purchased the securities in a subsequent resale or final placement might be considered, to the extent that the offer amounts to a public offer within the meaning of the PR and the issuer or the person responsible for drawing up the prospectus has consented to the use of the prospectus by means of a written agreement under Article 5 PR. In these specific circumstances, investors are presumed to have based their investment decision on the prospectus addressed to them in the context of a public offer conducted by parties (authorized offerors) other than the material/original authors of the prospectus. In line with our answer to question 7, we hold the view that the material/original authors of the prospectus should remain solely responsible for any fault arising from the information contained in the prospectus, whereas the authorized offerors would only bear responsibility arising from their conduct and the information they provided in the context of the resale.

Furthermore, we strongly believe that investors should have a claim only if they own the securities at the time of the litigation; still, they might be awarded a claim as well in the event they have in the meantime sold their securities only if the sale was carried out in order to limit the 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 – to consider it from a different perspective – exculpatory due diligence should be clearly addressed and, in fact, uncertainties concerning this element significantly undermine both investors' protection and legal clarity for issuers and intermediaries.

We strongly believe that liability should cover infringements committed intentionally or with gross negligence, as already provided for by the Credit Rating Agencies Regulation. Accordingly, any form of no-fault liability ("*responsabilità oggettiva*") must be rigorously avoided and, at the same time, the issuer/offeror must be allowed to avoid any form of liability through a due-diligence exception.

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 Regulation 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. Taking a step back, each cause of action is basically based on four elements, that litigants must either prove or disprove: (a) the breach of a rule or standard; (b) the fault; (c) the fact that this breach caused damage (causal link); and (d) the amount of damages. In the case of false or misleading information in a prospectus, in line with the general principles applying to tort liability each one of the above four elements have to be proven by the plaintiff. However, if the Regulation resolves to presume any of the above four elements, the defendant should be allowed to rebut this presumption by proving, for instance, that the

investors would have made the same investment even if they had been aware of the true situation, or that the investor was negligent, or that the relevant information was not material.

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

Absolutely, this is yet another element that cannot be regulated differently in different jurisdictions if a leveled playing field wants to be established. There are at least two issues that must be addressed, which are the following:

- duration of the statute of limitations: our proposal is to set it at 5 years, as is the case in the vast majority of member states;
- starting point the time limit should start running from the final day of the offer/ subscription/purchase of the securities. Still, individual plaintiff should also be allowed to file a claim within two years from the actual discovery of the information defect or from when it was "discoverable" (with the usual diligence).

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 offerings.

In order to increase the number of cross-border offers, further harmonization would also be necessary with regard to the persons subject to civil liability for false or misleading information in a prospectus, which in our view should not go beyond the persons expressly mentioned in Article 11 PR. To this end, it should be made clear that responsibility for the information contained in the prospectus rests solely with the issuer/offeror. Accordingly, Article 11(1) PR should be amended to make it an exhaustive list, thus removing the current possibility for Member States to extend the scope of persons subject to civil liability. In principle, any person other than the issuer/offeror involved in the drafting of the prospectus should be liable only for the specific part of the prospectus for which they are in charge.

It may be worth mentioning that the Italian legislator, which in the past had made use of the current optional regime in Article 11, has recently backtracked. In order to facilitate companies' access to the capital market, it has excluded from the list of persons liable for the information contained in the prospectus any person not expressly covered by Article 11. More specifically, since March of this year, the above list no longer includes the organizer of the placement, i.e. the person who organizes and sets up the syndicate, the placement coordinator or the sole placement agent. Indeed, policymakers eventually recognized that this duplication of responsibilities on the organizer of the placement, which were already the responsibility of the issuer/offeror, significantly increased the cost of prospectuses, which is one of the most significant barriers to IPOs and public offerings in general.

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.

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.

We strongly believe that the provisions in Article 15 MICAR should not serve as a reference point in the context of Article 11 (or other articles) of the PR. Any new statutory legal EU regime governing prospectus liability should be based on the duty of care allowing a due-diligence defence, rather than strict or absolute liability. Additionally, once replicated within the different context of prospectus liability Article 15 provisions would be too broad in their objective and subjective scope.

Moreover, it's important to note that Article 15 is untested, meaning that there is no clear benefit in replicating its provisions within the context of the prospectus liability, on which across Europe there are judicial decisions, statutory regimes, and several scholar discussions by referring to the approach taken under Article 15 and its new/untested provisions. In sum, a referral to the provisions in Article 15 would not allow us to rely on a unitary, mature, consistent application, or interpretation since they have not been applied yet and are already subject to criticism and different readings.

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.

The absence of a safe harbor regarding forward-looking standards practically determines a significant reluctance of issuers and intermediaries to offer a discussion about possible future events or developments, something that in fact hinders the quantity and quality of information available to investors. We strongly believe that a reasonable safe harbor, conditional upon the use of proper language and warnings, should exonerate from liability or, at a very minimum, truly confine it to cases of intentional fraud.

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

Consistent with our answer to question 10, we believe that a safe harbor should be introduced for forward-looking statements to the extent that the issuer or offeror has, to the best of its knowledge, based such information on reasonable assumptions supported by objective data and the prospectus explicitly cautions investors that such projections are not a reliable indicator of future results.

****

We remain available for any further information or clarification.