ABI reply to ESMA Call for Evidence on potential further steps towards harmonizing rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation

27 December 2024

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?

In the transposition of the Prospectus Directive (2003/71) into the Italian Financial Law (Testo Unico della Finanza, TUF), Art 94, par 7, has extended the prospectus liability regime set at European level to the lead manager of the placement syndicate for false information or omissions likely to influence the decisions of the investor, and have also provided for a presumption of liability for itself.

This responsibility was not reflected in the Prospectus Regulation which does not provide for any liability (or a presumption of itself) against a financial intermediary for false information or omissions. Such wider liability regime has also contributed in the past to make the prospectuses longer, in order to provided as much as information possible to prevent any source of liability.

Thus, the above provision has burdened since 2003 the intermediaries operating in Italy with a liability not foreseen by the European legislation, neither by the most EU member States, determining a situation of "unlevel playing field" between intermediaries operating in Italy and abroad. The provision, therefore, has been recently deleted (see Law for the capital markets competitiveness, n. 21/2024).

From an European regulatory perspective, the current liability and sanctions regimes under art 11 PR (including in relation to the summary) doesn't raise concerns. Perhaps, more importantly, there are some areas where clarification could be helpful (see Q10 and Q11 below).

Indeed, it cannot be overlooked that the variety of regimes in this crucial area can determine unlevelled playing field and regulatory arbitrage.

For this reason, we overall are in favor of initiatives aimed at increasing the degree of legal certainty in this topical area and improving the level of consistency.

That said, we are well aware of the fact that pursuing the goal of a complete harmonization of the civil liability regimes across EU would be not straightforward. Actually, the landscape of the national regimes governing civil liability is scattered and heterogenous.

Should ESMA decides to harmonize civil liability regimes across Europe, we believe that it should consider a step-by-step, gradual approach, identifying a first set of areas where to start.

In particular, we would encourage ESMA to consider the following potential areas concerning EU prospectus liability regime:

- safe harbors for forward-looking statements;
- the liability standard for prospectus content;
- defences to liability claims;
- burden of proof;
- effectiveness of disclaimers;
- circumstances in which an investor is able to bring a claim against the persons responsible for a prospectus;
- limitation period during which claims may be brought.

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)?

We are aware that in the past years some judicial decisions have been taken, holding financial intermediaries (lead managers in the placement syndicate) liable for incorrect information in the prospectus for IPO transactions.

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

We consider that the only persons entitled to claim for damages are the investors in the offering who have actually purchased securities on the basis of the material misstatement or omission in the 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?

We consider that the persons responsible for a prospectus should only be liable for material misstatements and material omissions, where "material" in this context meaning material for the purposes of the Article 6(1) necessary information test.

An omission should only give rise to liability if it was necessary to render another statement not misleading, or if the defendant had a duty to disclose. Applying a materiality standard will hopefully reduce the risk and incidence of vexatious claims.

For shorter non-prospectus documents, the term "material" should also take into account the restrictions on the length of the document. Such documents should not be held to the same standard as a full prospectus given that they have necessarily been drafted in a shorter format, meaning that more information will have been omitted and the information that is included less comprehensive, in each case compared to a full prospectus.

Moreover, we deem it would be important if it were specified that a responsibility in relation to the content of a prospectus may be claimed only

if the above-mentioned material misstatements or material omissions were the result of a grossly negligent behavior.

Finally, providing "safe harbors provisions" in relation to specific matters, as is the case for forward looking statements in the U.S. could be very useful (see answers to the questions #10 and #11).

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?

The burden of proof should be the same as for any other civil claim, namely the claimant should be required to prove that:

- in the prospectus, the defendant made a material misstatement or material omission of any matter required to be included by the Prospectus Regulation or which renders a material fact misleading;
- the investor purchased securities on the basis of that material misstatement or material omission;
- the misstatement or omission was made with the required degree of fault or culpability;
- the investor suffered a loss as a result;
- there is a causal connection between the material misrepresentation or omission and the investor's loss.

A unified burden of proof would make it more straightforward for the issuers to comply with the regulation.

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

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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

We are aware of the growing interest in cross-border offerings and the role that civil liability plays in these transactions. However in our view the EU's existing mechanisms, such as the European passport for prospectuses, already serve as a sufficient tool to facilitate cross-border offerings.

However, harmonizing civil liability may be helpful to working towards a single European capital market, but we have also to consider that this is not the panacea for achieving this goal.

Indeed, there are several reasons for fragmentations, including, by mere way of an example, i) different requirements in terms of investor protection under national laws (partly driven by national case law), ii) different historically driven investment cultures, iii) different pension systems etc.

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 don't consider that amendments to Art 11 PR may help to reduce issuers and offerors liability concerns with regard to the impact of third countries liability laws.

Conditions should be created so as that a prospectus as well as other, shorter non-prospectus documents, might be in the position to comply with the non-EU jurisdictions' legal and regulatory requirements and market practices. For example, the inclusion of specific, ad hoc disclaimers in the prospectus should be permitted in the case of offering or listing which take place both in the EU and in non-EU jurisdictions.

It should also be avoided that not disclosing additional information does not represent material omission as long as, for example, the defendant is not under an obligation to disclose.

In those cases where, due to the different requirements prescribed by the regulatory framework of EU and of non-EU jurisdictions, investors in a non-EU jurisdiction are provided with more information than investors in the EU, it will be of critical importance to avoid that this asymmetry does not raise the liability risk in relation to the EU offering, based on the allegation that the additional and/or the more detailed information provided to investors in a non-EU jurisdiction represents a material omission from the EU prospectuses or other, shorter non-prospectus documents.

The remarks above are particularly relevant in the context of equity offerings.

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.

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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 address this situation.

Yes. As stated in the answer to Q2 and Q 4 we are aware that in the past years a few judges have ruled against lead managers in IPO transactions holding them responsible for the information disclosed within the prospectus.

Within the listing process, forward looking statements - when disclosed - are of huge help both to NCAs during the prospectus approval process to better understand the issuer's expectations and growth plan and to investors to have a better idea of what the investment could entail.

The current liability risk to be borne on uncertain and potentially inaccurate estimates underlying the forecast paired with all the regulatory requirements (statements to be provided for and principles to be complied with) which result in additional costs, makes it very unlikely for such information to be embedded within a prospectus.

To encourage companies to list their securities and reverse the current situation, we would suggest providing a safe harbour provision which restricts liability for forward-looking statements to an exhaustive list of situations.

By mere way of an example, it should cover i) forecasts, estimates, expectations as well as targets, ii) quantitative and qualitative statements iii) financial and non-financial information and v) forward looking statements included in the prospectus taken as a whole.

In addition to this, the issuer could be expressly authorized to ask for a comfort letter on the statements concerning the preparation of the profit forecast or estimate to be included in the relevant building block, thus having such statements backed by an external and independent expert. Such comfort letter was already provided for under Regulation 809/2004 Annex 1 §13.2.

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

Yes, we believe that a safe harbour provision should be introduced at Union level (at least) for equity prospectuses to ensure a level playing field between markets, taking into consideration it already exists in the US and will be introduced in the UK shortly too, reducing the regulatory framework gap vis-à-vis US and UK.

As per the scope of such safe harbour provision please also see answer under Q10. We think it should be applicable to equity prospectuses with certain requirements (see below) and that the burden of proof should be borne by the investor.

For the liability regarding forward-looking statements in a prospectus to apply, the person responsible for the prospectus should:
- know that the statement included was untrue or misleading; or

- omit knowingly a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.