20 December 2024

# ESMA Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation

*(ESMA32-117195963-1257)*

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# ICMA response

***EXECUTIVE SUMMARY***

*(A) There is significant risk for limited benefit in seeking to harmonise EU national civil liability regimes.*

*(B)* One should rather override existing conflicts of laws arrangements.

*(C) Liability risk limits disclosure of forward-looking information and a safe harbour consistent with existing international market practice (such as in the US) could encourage more and better disclosure also in a debt context (for example, with respect to disclosure of sustainability information).*

1. **Introduction** – ICMA welcomes the opportunity to respond, from the perspective of the international mainstream bond markets, on ESMA's Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation.

2. **Significant risk for limited benefit in harmonisation (override instead existing conflicts of laws arrangements)** – Trying to change EU national liability regimes that are finely balanced is particularly delicate and so involves significant risks that do not seem to be justified with seemingly limited potential for countervailing gains given limited concerns with the status quo. (And national liability regimes do not differ that much anyway.) One should rather consider introducing a provision that will override existing conflicts of laws arrangements. In this respect, ICMA stated[1] in 2015:

   *<< (i) At present, if a prospectus is alleged to be materially misleading, the issuer and possibly its advisers may face litigation in multiple jurisdictions and under different laws. This could deter some issuers from making cross-border offerings of securities, for fear of the cost of fighting multiple cases under different laws and the loss of management time in doing so. It also represents a potential threat to shareholders and other investors, who will suffer from the cost and diversion of management resources. And it may result in unfairness in the treatment of investors, some of whom may be able to recover compensation thanks to the operation of the courts or laws in the*

[1] ICMA 1 May 2015 response to the European Commission's consultation on the Prospectus Directive review (#26 on pp.57-58).

*place where they sue, while others cannot. Multiple jurisdictions and applicable laws therefore operate as a brake on the development of a true cross-border market.*

*(ii) The liability and sanctions regimes under the PD (including in relation to the summary) are generally well known and understood by issuers, investors and other market participants. Developing any harmonised, pan-European liability regime would be extremely complex: there are entire legal textbooks dedicated to the subject under English law alone. Furthermore, we query whether agreeing a harmonised EU compensation regime would be practical given the level of detail that would be required on various issues (including assessment of quantum of damages and proximity of loss) to achieve a workable regime with consistency and clarity for investors on available remedies. The attempt to find an alternative liability regime in the PRIIPs context illustrates this.*

*(iii) Perhaps more importantly, creating a consistent liability regime across Member States is not achievable by amendments to the PD, because differences in other grounds of liability in place in Member States (such as negligent misstatement under English law) would continue to result in investors in different Member States being treated differently.*

*(iv) Whilst developing any harmonised, pan-European liability regime or a harmonised EU compensation regime may not be practical, providing more clarity as to which laws apply, and giving issuer choice as to which law and jurisdiction to submit to, may be helpful. This might, for example, be by reference to the approving competent authority or the governing law of the securities. >>*

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?

3. **No civil liability issues identified** – No new concerns have been raised with ICMA in respect of civil liability issues impacting mainstream bond issuance. (See generally #2.)

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)?

4. **No awareness of concerning judicial decisions** – ICMA is not aware of any such judicial decisions. (See generally #2.)

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

5. **No** – Prospectus Regulation Article 11 works adequately in its existing form in conjunction with national civil liability regimes, and is well-understood in the market. One should not try to change Prospectus Regulation Article 11 to specify in a prescriptive manner who is entitled to claim damages. (See generally #2.)

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?

6. **No** – Prospectus Regulation Article 11 works adequately in its existing form in conjunction with national civil liability regimes, and is well-understood in the market. One should not try to change this (or other Prospectus Regulation provisions) to specify in a prescriptive manner how the degree of fault / culpability should be determined. (See generally #2.)

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?

7. **No** – Prospectus Regulation Article 11 works adequately in its existing form in conjunction with national civil liability regimes, and is well-understood in the market. One should not try to change this (or other Prospectus Regulation provisions) to specify in a prescriptive manner how the burden of proof should be determined. (See generally #2.)

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

8. **No** – One should not try to change the expiry of claims timeline (the status quo works adequately). (See generally #2.)

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.

9. **No further harmonisation needed** – There is no substantial case to answer in terms of harmonising civil liability. (See generally #2.)

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.

10. **No awareness of any issuer liability concerns** – ICMA is not aware of any issuer liability concerns. (Subject to #12 and see generally #2.)

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.

11. **No** – Prospectus Regulation Article 11 works adequately in its existing form in conjunction with national civil liability regimes, and is well-understood in the market. One should not try to change this to replicate the MICAR liability regime. There are concerns with the MICAR regime being too prescriptive, and not clear on its interaction with national laws on civil liability. Furthermore, the MICAR liability regime is unproved in practice as it is only just coming into force. For these reasons, it should not be held out as a model to be rolled out elsewhere.

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.

12. **Yes** – Liability risk considerations indeed drive limitation on disclosure of forward-looking information. Whilst acknowledging that disclosure of forward-looking information may be more relevant in an equity context, introducing a well-calibrated safe harbour consistent with existing international market practice (such as the US-style safe harbour) could encourage more and better disclosure, which could also be helpful in a debt context (for example, with respect to disclosure of sustainability information). See further #13.

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

13. **Yes / US-style** – ICMA is supportive of a US-style safe harbour. In this respect ICMA stated[2] in 2023:

*<< 46. The US forward-looking statement safe harbour under the US Private Securities Litigation Reform Act of 1995 (PSLRA) works well. A legend is included upfront in offer documentation identifying that certain words denote a forward-looking statement (e.g. expect, intend, plan, etc). A similar "Cautionary Language Regarding Forward-Looking Statements" legend is typically included in the front of Regulation S prospectuses (i.e. where securities are not being targeted at US investors), which is based on the US PSLRA wording. […] there are examples in the market of the legend being adapted to refer to relevant EU regulation.*

*47. ICMA strongly emphasises the benefits of the existing US regime and the advantages of following a well-trodden path and the benefit for issuers of a consistent approach across different markets. Given that the US regime has been in place for some time and is understood by the market, and the US is one of the most litigious jurisdictions in the world, what works there to encourage forward-looking disclosures whilst maintaining investor protection should be a good model […] to consider. >>*

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[2] ICMA September 2023 response to UK FCA Engagement Papers (#46-47 on pp.11-12). ICMA reiterated its position in its 18 October 2024 response to UK FCA CP24/12 on the UK's new Public Offers and Admission to Trading Regulations regime (Q44 on pp.19-20).