BSW BUNDESVERBAND FÜR STRUKTURIERTE WERTPAPIERE

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

13 December 2024

Overall, we are of the opinion that the liability regime pertaining to securities prospectuses seems to work in substance and we do not see any major flaws in need of correction. Further, we consider the questions of the Call for Evidence to be of such general nature that they do not lend themselves to be answered with specific suggestions.

Having said this, we would like to provide the following feedback on the 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?

We take the view that, despite national differences between national liability regimes, the prospectus liability regime works in substance. Market participants are aware of the minor flaws – whether they are embedded in their own national laws or stemming from differences to other national laws – but the liability regimes are well known, and market players have adapted to them. We therefore believe that no major changes are necessary, at most minor adjustments could be made.

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)?

BSW is not aware of any leading judicial decisions except for one well known leading case regarding prospectus liability in Germany relating to an equity prospectus. Non-equity securities rarely seem to face liability disputes.

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

As far as BSW is aware, national laws in the EU countries provide for sufficient investor protection and there is no need for comprehensive regulations specifying who is entitled to claim damages. The existing regimes and legal certainty could otherwise be undermined which would be counterproductive. Any changes may lead to inconsistencies in the application of national laws that are already well established.

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?

BSW strongly believes that an amendment determining a degree of fault or culpability is unnecessary under the current circumstances.

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?

BSW believes that an amendment determining the burden of proof is unnecessary under the current circumstances and should remain governed by national rules.

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

For the same reasons, we see no need for a harmonisation of the rules on the expiry of claims.

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.

In our view, it is difficult to provide empirical evidence for a positive effect of harmonised liability rules on the number of cross border offerings. In any event, we do not see the lack of a harmonised liability regime in the EU as an impediment for the cross border offering of securities. The possibility of passporting prospectuses in the EU facilitates cross border offerings sufficiently. We would like to point out that it could be a starting point to consider relevant provisions in private international law which can be harmonised more easily, if necessary at all.

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.

As stated previously, we believe that it would be easier to address any concerns by amending relevant rules applicable under private international law. Further, the recognition of specific judgments could address existing concerns regarding the impact of third countries' liability laws.

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.

While we welcome the introduction of a more detailed liability regime under Article 15 of the Markets in Crypto-Assets Regulation (MiCA), we do not believe that these provisions should be applied to the regime of prospectus liability. The two frameworks serve fundamentally different purposes. The specifics of the scope of application of MiCA and the provisions tailored to crypto assets are simply not suitable to be transferred to the PR due to the completely different legal nature of these assets.

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.

Liability risks and disclosures of forward-looking information are indeed a conundrum to be solved in every prospectus. However, a well-established practice exists such that only forward-looking information can be presented that do not pose a potential risk. We therefore are of the opinion that no safe harbour provisions are necessary to address this situation.

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

As pointed out above, we do not see the necessity for a safe harbour provision. Furthermore, if the introduction of such provisions were to be discussed, much of our assessment will depend on the specifics of these provisions.

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