LISTING ACT

CIVIL LIABILITY AND SECURITIES PROSPECTUSES - ESMA'S CALL FOR EVIDENCE

AMAFI'S ANSWER

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

I. GENERAL QUESTIONS (SECTION 4.1)

Question 1 - 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?.

As a general comment, AMAFI finds that, although the idea of harmonization may seem attractive at first sight, namely from a theoretical or academic point of view, it seems to us that the disadvantages of harmonization and its practical implementations far outweigh those linked to the differences between legal systems.

Civil law or tort and contractual liability are in most, if not all, continental European jurisdictions laid down in a few simple, well-designed and well-drafted articles of civil or commercial codes. On those articles, long-standing and stable case law has arisen. The concepts that are part of the legal regimes are inherent to each Member State's civil laws. The functioning of the legal regimes among Member States might differ, but the outcome is generally similar, if not identical. Legal uncertainty resulting from those differences does not lead to unforeseeable cost or procedural impacts.

AMAFI and its members have not identified issues in respect of civil liability for information provided in securities prospectuses. We generally find that liability regimes for prospectuses information might differ materially among Member States, but that differences do not lead to legal uncertainty.

AMAFI does not see the lack of legal harmonization of the liability for prospectuses as a barrier to the capital markets union and does not consider this to be a market failure. AMAFI has not identified any issues in respect of civil liability for information provided in securities prospectuses.

To the contrary:

1. Trying to harmonize the liability regime is very likely to result in extra burden, i.e. that of a Level 1 European Regulation, Position papers by various regulators, Q&A's, Level 2 Legislation and all that replacing the 4 or 5 articles in current civil or commercial codes.
2. Materially, the objectives and the outcome of liability regimes do not differ much among Member States.
3. The Principle of subsidiarity is also an argument against harmonization. The EU does not have exclusive competence in this field and there are no objectives to be achieved that cannot be achieved by Member States.

Rather than a general overhaul of 27 well-functioning liability regimes, a conflict of law rule in article 11 of the Prospectus Regulation (governing liability for prospectus) could be more than sufficient, for example stating that the law applicable to the liability for a prospectus is the law applicable to the issued securities.

Question 2 - 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)?

A leading judicial decision comes from the Court of Justice of the European Union, Judgment of the Court (Fourth Chamber) of 3 June 2021 Bankia SA v Unión Mutua Asistencial de Seguros (UMAS).

In France, two judgements of the Cour de Cassation of 20 September 2017 decide that a Court of Justice is authorised to interpret a provision of the prospectus where the information provided was not accurate, precise or fair. French law follows the general regime of contractual liability.

II. STANDARD PARAMETERS FOR LIABILITY (SECTION 4.2)

Question 3 - Should Article 11 PR specify who is entitled to claim damages? If so, what specification(s) would you suggest?

We do not think that the person entitled to claim damages needs to be specified. In all jurisdictions, the person entitled to claim damages is the one who suffered damages as a result of misleading statements or omissions in the prospectus. We see no reason to extend this to any third party or to limit this to, for example, the investor at the moment the prospectus is published.

Question 5 - 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?

We are strongly opposed to any determinations as to the burden of proof.

A causal link should not be presumed between someone's actions and damages suffered or between a person's conduct and culpability, as ESMA proposes. We find this very worrying. This would mean that an investor would only need to demonstrate a loss resulting from an investment and an inaccuracy in the prospectus for the offeror or issuer and, where applicable, their advisor, to be liable; whereas at present, the investor must also demonstrate that the loss was caused by that inaccuracy in the prospectus. Otherwise, a loss could be caused by anything else (in whole or in part) and the investor would have a case against the issuer.

Question 6 - Should rules on the expiry of claims be harmonised? Please explain your answer.

We do not think that rules on the expiry of claims should be harmonized. They are part of the existing legal regimes governing liability in general and that of prospectuses in particular.

III. COMPARAISON WITH LIABILITY REGIME UNDER THE MARKETS IN CRYPTO-ASSETS REGULATION (SECTION 4.4)

Question 9 - 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 do not see any reason why the liability regime for prospectuses should be aligned with that in the Markets in Crypto-Assets Regulation. They are distinct markets and the legal regime of liability for prospectuses should not be harmonised, for the reasons given above (*question 1*).

IV. SAFE HARBOUR PROVISION (SECTION 4.5)

Question 10 - 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.

Forward-looking information is uncertain since it is related to future events. There is therefore an inherent likelihood that information or projections are inaccurate. However, in any case an issuer or offeror is liable for intentional misinformation in the prospectus. In that sense, it does not seem to us that a specific legal regime applies to forward looking information.