12 June 2025
ESMA32-117195963-1413

Final Report

Technical advice concerning civil prospectus liability

Table of Contents

1 Executive Summary

Reasons for publication

Under Article 48(2a) of the Prospectus Regulation (PR)[1], the European Commission is called upon to assess whether further harmonisation of the provisions on prospectus liability is warranted. If so, the Commission is to consider amendments to the liability provisions set out in Article 11 of the Prospectus Regulation. Under Article 48(2a) of said Regulation, the Commission is to deliver a report by 31 December 2025. According to recital 60 of the corresponding Amending Regulation[2], the background to this is to ensure that the CMU gathers momentum and reflects market realities as soon as possible.

On this basis, on 6 June 2024, the Commission mandated ESMA to provide technical advice on civil liability regarding the information given in prospectuses to include an assessment and recommendations on whether further harmonisation should be considered. The mandate further specifies that ESMA should take into account all relevant provisions of the Prospectus Regulation, in particular Articles 11 and 48(2a), all relevant recitals of the Amending Regulation and the report on prospectus liability regimes in Member States which it published in 2013. The Commission further asked ESMA to compare the civil liability provisions in Article 11 of the Prospectus Regulation with those set out in the Markets in Crypto Assets Regulation (MiCAR)[3] and to assess the need for possible alignment with or departure from those provisions.

This report represents ESMA's technical advice to the Commission.

Contents

Based on evidence collected from stakeholders and National Competent Authorities (NCAs), this report provides an overview of civil prospectus liability in the EU. ESMA launched a Call for Evidence (CfE) on 28 October 2024, which included 11 questions. Twenty stakeholders provided responses to the CfE within the two-month consultation period. ESMA also asked NCAs to update the Report on Comparison of liability regimes in Member States in relation to the Prospectus Directive of 30 May 2013 (Updated Civil Liability Report) as of 31 December 2024 and took the advice of its Securities and Markets Stakeholders Group (SMSG) into account.

In its Analysis section, this report looks at the overall perspective on reforming civil prospectus liability and compares Article 11 of the Prospectus Regulation with the civil

liability provisions in the Markets in Crypto Assets Regulation. It also goes into a number of specific aspects pertaining to civil prospectus liability.

This report **does not advise changes to the existing civil prospectus liability regime under Article 11 of the Prospectus Regulation**. While there are differences between Member States' rules on civil prospectus liability, many stakeholders do not see them as the primary obstacle to cross-border offerings and therefore not as a significant impediment to the Savings and Investments Union (SIU) at this juncture. Instead, other issues such as taxes, regulatory and administrative burden as well as the different investment cultures in Member States are seen as the more important obstacles. Many stakeholders consider that the current regime is well-balanced and argue that reform is unnecessary at this stage (or at least not the most pressing issue) and could create uncertainty by changing existing regulations.

Member States' liability laws are quite diverse, for instance when it comes to requests for signed statements in prospectuses, whether and under what circumstances board members can be held personally liable, standards of liability or the expiry of claims. These liability laws have very long-standing traditions within the Member States, so that harmonisation would require deep comparative analysis and could not be achieved in the short-term. Furthermore, overall harmonisation of civil prospectus liability rules should be comprehensive and cover all areas pertaining to this liability, as otherwise, courts might need to fill gaps within the regulation and resort to using unharmonised national law for this purpose.

ESMA has included two areas in the Advice section of this report, which may be worthy of further debate **in case the Commission should nonetheless still contemplate reform** in this area. This concerns safe harbour rules on immunity from liability for forward-looking statements with related safeguards and the rules of private international law, especially the Rome Regulations (Rome I[4] and Rome II[5]) that are used to determine which laws apply to a liability case.

[1] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC
[2] Regulation (EU) 2024/2809 of the European Parliament and of the Council of October 23, 2024 amending Regulations (EU) 2017/1129, (EU) no. 596/2014 and (EU) no 600/2014 to make public markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises
[3] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937
[4] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
[5] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

Next Steps

ESMA will submit the Final Report to the European Commission and continue to monitor developments in relation to prospectus civil liability.

2 References, definitions, acronyms

Amending Regulation	Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October, 2024 amending Regulations (EU) 2017/1129, (EU) No. 596/2014 and (EU) No 600/2014 to make public markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises
CfE	Call for Evidence on potential steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation of 28 October 2024: ESMA32-117195963-1257_Call_for_evidence_prospectus_liability (18).pdf
CDR	Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004
CSDDD	Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859
FLS	Forward Looking Statements
Listing Act	Legislative proposal to simplify the listing requirements to promote better access to public capital markets for EU companies, in particular SMEs, by reducing the administrative burden on companies that seek a listing or want to remain listed on a trading venue. The package comprised a regulation amending the PR, MAR, MiFIR and a directive amending MiFID II and repealing the Listing Directive. Furthermore, it introduced a new directive on multiple vote share structures.
MiCAR	Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937
NCAs	National Competent Authorities

PR	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC
Representative Actions Directive	Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
Rome Regulations	Rome I and Rome II
SMSG	ESMA's Securities and Markets Stakeholder Group
Updated Civil Liability Report	Annex V – Civil liability regimes in EEA Member States in relation to the Prospectus Regulation (Updated version of the civil prospectus liability sections in ESMA's Report on Comparison of liability regimes in Member States in relation to the Prospectus Directive of 30 May 2013: ESMA's report on liability regimes under the Prospectus Directive)

3 Introduction

3.1 Background

1. Civil prospectus liability is and always has been an important part of the rules and regulations pertaining to securities prospectuses. Article 6 of the Prospectus Directive[6] already reflected that by calling on Member States to ensure that they had a system for civil prospectus liability in place. When the Prospectus Regulation (PR) was introduced, the provision on civil prospectus liability was regulated in its Article 11 and the text complemented to address registration documents and universal registration documents.

2. In line with further changes introduced into the PR under the Amending Regulation as part of the Listing Act, the European Commission was called upon to assess whether further harmonisation of the provisions on prospectus liability is warranted and, if so, to consider amendments to those liability provisions. The Commission is to present a report on this to the European Parliament and the Council by 31 December 2025 (Article 48(2a) PR).

3.2 Mandate

3. On 6 June 2024, the European Commission asked ESMA for technical advice in the preparation of its report on civil liability for the information given in a prospectus, assessing whether further harmonisation of prospectus civil liability in the Union is warranted. The European Commission mandated ESMA to provide technical advice on civil liability regarding the information given in prospectuses [7] to include an assessment and recommendations on whether further harmonisation should be considered. The Commission further specified that ESMA should take into account the Updated Civil Liability Report and compare the civil liability provisions in Article 11 PR with those set out in the MiCAR.

4. The text of the mandate can be found in Annex I: Call for advice from the Commission (section 3.6 in the request to ESMA).

[6] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC – no longer in force, but replaced by the PR

[7] For the purposes of the mandate and of this report, as regards prospectuses, “civil liability” is to be understood as liability for the information given in a prospectus and any supplement thereto, attaching to the entity or entities responsible for giving the information. For clarity, this report does not intend to cover other forms of legal liability (for example, criminal or administrative/governmental liability).

3.3 Methodology

5. To collect input from stakeholders, ESMA launched the Call for Evidence (CfE) on 28 October 2024, which included 11 questions. ESMA received 20 responses, from various types of stakeholders (banking institutions, issuers, investment services associations, a regulated market and a law firm). A detailed categorisation of those respondents is presented in section 3.4.1. Moreover, ESMA sought the advice of its Securities and Markets Stakeholder Group (SMSG).

6. In addition, ESMA asked the National Competent Authorities (NCAs) to update the sections on civil prospectus liability in the Updated Civil Liability Report as at 31 December 2024. The updates provided a rich resource of information on EU/EEA Member States' liability laws and were taken into account in drafting this Final Report.

7. This Report is divided into two main sections, entitled "Analysis" and "Advice" respectively. The "Analysis" section elaborates on the input collected through the CfE, the advice provided by the SMSG and the NCAs' contributions to the Updated Civil Liability Report. It highlights key messages coming from stakeholders regarding a possible reform of Article 11 PR and analyses them. In the section "Advice", ESMA sets out its assessment to the European Commission (taking into consideration the input received, and the key areas identified).

8. The "Analysis" section builds upon the input gathered directly from the public consultation, the submissions by NCAs to the Updated Civil Liability Report and the SMSG advice which is reported and summarised in Evidence: Annex III: Input received via ESMA's Call for Evidence and ESMA's Updated Civil Liability Report. In the context of these summaries, ESMA would like to point out that both the CfE and the Updated Civil Liability Report worked with open-ended questions[8]. Respondents raised a variety of topics in their answers. The responses are often nuanced, layered or cover different points. To try to best reflect the feedback received, ESMA's goal with these summaries is to identify and aggregate the most important points and trends that arose and identify some of the issues that were raised by respondents.

9. Furthermore, several NCAs have pointed out that the submissions they provided to the Updated Civil Liability Report are purely for information purposes, are not exhaustive and

[8] Open-ended questions are free-form survey questions that allow and encourage respondents to answer in open-text format based on their complete knowledge, feelings, and understanding. Open-ended questions were necessary, as this report is about collecting concepts and ideas about whether harmonisation of the civil liability pertaining to prospectus would be warranted and, if so, what new legislation might look like going forward.

do not provide a description of all potentially applicable legal provisions. Accordingly, these updates should not be relied upon for specific cases.

3.4 Input received via the Call for Evidence

3.4.1 Categorisation of respondents

10. ESMA received 20 valid answers to the call for evidence. Half of all the responses were provided by stakeholders that did not consider themselves as part of a specific category of market participants. The remaining answers were sent by banking institutions (3), investment services associations (3), issuers (2), one regulated market and one law firm.

3.4.2 Main topics addressed

11. Civil prospectus liability is a multi-faceted topic. It can give rise to many issues which are typical for liability claims generally, but also to some that are quite specific to securities prospectuses. The main takeaways based on the comments provided by respondents to the CfE are as follows:

- Overall, respondents urge caution when it comes to introducing changes to civil prospectus liability. Many say that differences in civil prospectus liability rules are not the decisive obstacle to cross-border offerings in the EU/EEA. Instead, respondents refer to other impediments, such as taxation, the lack of a common investment culture, differences in risk appetite and home bias.

- Almost all respondents are sceptical with respect to using civil liability provisions in the MiCAR as a blueprint for Article 11 PR due to differences in the regulatory context between the MiCAR and the PR, concerns about direct liability of members of corporations' internal bodies and panels ("piercing the corporate veil")[9] in the MiCAR and the potentially disruptive effect of directly applicable civil liability provisions.

- A majority of respondents (all representatives of issuers and most from the banking and the investment services sectors fall into this category) are open to the idea of providing immunity from civil liability for forward-looking statements in the form of so-

[9] Broadly speaking, the corporate veil is a legal notion under which a natural person can act on behalf of a legal person and not be personally liable for it (with liability attaching to the legal person instead). "Piercing the corporate veil" is the idea that there are exceptions to this rule, so that, in some cases, a natural person will be held personally liable.

called safe-harbour rules, saying that this would induce more disclosure of forecasts and prognoses and align prospectus rules in the EU more with those in the UK and US.

3.5 Updated Civil Liability Report and SMSG input

12. The advice provided by the SMSG and the submissions to ESMA's Updated Civil Liability Report are summarised in Evidence: Annex III: Input received via ESMA's Call for Evidence and ESMA's Updated Civil Liability Report.

4 Analysis

13. This section of the report provides an analysis of the feedback in the responses to the CfE, the SMSG advice and the submissions to the Updated Civil Liability Report. It is divided into topical subsections which do not follow the order of the questions in the CfE due to the broad range of responses received. The topics have instead been put into an order that links them and allows for their best presentation (for further detail and summaries of the responses, please refer to Evidence: Annex III: Input received via ESMA's Call for Evidence and ESMA's Updated Civil Liability Report).

4.1 General view of changes to the regime of civil prospectus liability under the PR

14. Nineteen out of twenty respondents to the CfE provided a general view on the matter of possible reform of prospectus liability laws in response to Questions 1 and 7. These questions sought stakeholders' overall views on civil prospectus liability, what issues they identified (if any) and whether they think more harmonisation is needed. Respondents' views on reform pertaining to specific topics are set out in the subsequent sections.

15. Eight respondents (including the academic institutions and representatives of undertakings) generally support making changes to the rules currently set out in Article 11 PR. They think it is quite essential to help create a level playing field and build a uniform European capital market.

16. On the other hand, 11 respondents (including stakeholders with a background in investment services and banking) indicate that differences in civil prospectus liability regimes are not the pivotal obstacle to cross-border offerings. They cite other issues as more important impediments, namely taxes, regulatory and administrative burden, cultural differences (such as home bias) and a lack of investment culture more generally, such as in terms of appetite for currency exposure or for risk overall. Furthermore, a group of

four respondents holds that the existing system of civil prospectus liability is working well and that it would be a mistake to try to "fix something that is not broken"[10]. Without opposing reform outright, they urge that any harmonisation should be targeted and done on a step-by-step basis.

4.2 Case law on civil prospectus liability

17. In Question 2 of its CfE, ESMA asked if there were any leading decisions on civil prospectus liability in respondents' various jurisdictions. Fifteen out of twenty participants responded. Responses have shown that there is considerable case law in a number of jurisdictions (especially AT, DE, ES, IT and PL), demonstrating that civil prospectus liability is not a theoretical matter, but that there is ample evidence that these rules are applied by legal practitioners throughout Europe. As the decisions cover a wide spectrum of issues in terms of content, ranging from expectations on the average investor over rebuttable presumptions of causality to the availability of the so-called 'due diligence defence'[11], ESMA understands that the case law reflects the complexity of national civil prospectus liability regimes developed in multiple decisions across the various jurisdictions.

4.3 Comparison to regulation in the MiCAR

18. One of the requirements in the mandate ESMA received from the European Commission was to compare civil prospectus liability under Article 11 PR to the civil liability provisions in the MiCAR. ESMA included a question on this in the CfE (Question 9) asking respondents whether Article 11 PR should replicate Article 15 MiCAR[12] generally or in relation to specific aspects. Almost all respondents (17) oppose aligning Article 11 PR with the MiCAR.

19. In the comparison, the two issues that stood out the most in ESMA's view are the direct application of European law vs. its transposition by Member States and the legal notion known as "piercing the corporate veil".

[10] Even among those who are sceptical overall, some can imagine changes on specific points (especially when it comes to immunity from liability for so-called forward-looking statements) – this will be presented in the individual sections on the respective topics throughout the text.
[11] The notion that one can plead having applied due care or due diligence to defend oneself against civil prospectus liability claims.
[12] Articles 26 and 52 MiCAR also contain civil liability provisions, which apply to issuers of asset-referenced tokens and e-money tokens but otherwise are the same as Article 15 in many ways; ESMA thus focused on Article 15 (and already did so in the CfE).

4.3.1 Direct application of the provisions on civil liability

20. Both the PR and the MiCAR are Regulations, which means they are directly applicable. However, there is a difference between the two when it comes to civil liability claims. Article 11 PR is addressed to Member States for transposition into national law, whereas Article 15 MiCAR is directly applicable[13].

21. Article 11 PR reads (in part):

> *'Member States shall ensure that responsibility for the information given in a prospectus* […] *attaches to at least the issuer* […]*.'*

22. By contrast, Article 15 MiCAR reads:

> *'Where an offeror* […] *has infringed Article 6* […] *that offeror* […] *shall be liable to a holder of the crypto-asset for any loss incurred* […]*.'*

23. In the view of six respondents, the background for this difference between Article 11 PR and Article 15 MiCAR is that many Crypto-Asset White Papers do not undergo an approval process by a regulator (Art. 6(3) MiCAR) and that the MiCAR applies to riskier investments such as crypto-assets so that the liability regime in the MiCAR was made more prescriptive and directly applicable in an effort to use the disciplining effect of liability.

24. Most respondents to the CfE believe Article 11 PR requires a different approach. Seventeen respondents as well as the SMSG are of the view that Article 11 PR should not be aligned with Article 15 MiCAR. They consider that these Articles capture different lines of business.

25. Both directly and indirectly applicable legal provisions are used as tools of harmonisation in EU law. In the case of civil prospectus liability, ESMA considers that the indirect approach (chosen in Article 11 PR) may be preferable: Member States already have comprehensive civil/common law systems based on long-standing traditions. A directly applicable provision that overwrites national civil laws on prospectus liability would need to be equally comprehensive, as otherwise gaps would need to be filled; with no overall European liability-regime to draw from, courts would face the question if they should apply diverging national laws for this purpose, which would lead to fragmentation again.

[13] cf. Art. 149(4)(2) MiCAR: "*This Regulation shall be binding in its entirety and directly applicable in all Member States.*"

4.3.2 Piercing the corporate veil

26. The other point that stood out in the comparison between Article 15 MiCAR and Article 11 PR is the legal notion of piercing the corporate veil.

27. Article 15(1) MiCAR provides that liability can attach to members of companies' internal boards or bodies. It reads (in part):

> '[…] *that offeror, person seeking admission to trading or operator of a trading platform and the members of its administrative, management or supervisory body shall be liable* […]'

28. Not all respondents refer to piercing the corporate veil, but five specifically reject it in the context of civil prospectus liability. They maintain that Article 15 MiCAR introduced a major shift that changes long-standing legal traditions and should not be replicated in the PR. Respondents explain that this could have a chilling effect which would deter offerings for fear of personal liability and that piercing the corporate veil should only be applied in exceptional cases.

29. The legal notion known as "piercing the corporate[14] veil" is a long-standing part of many legal systems, with well-established rules. ESMA notes that this system of rule (protection by the corporate veil) and exceptions (piercing the corporate veil) has been balanced out over time and should be approached with great caution. It also holds that altering it by removing the corporate veil altogether would be perceived as a major shift. Given that evidence suggests this could be seen as a deterrent to cross-border offerings and therefore contrary to achieving the SIU, ESMA concludes that Article 15 MICAR may not be a good blueprint for changes to Article 11 PR.

4.4 Eligible claimants

30. A basic question underlying any claim for civil liability is who is entitled to make it. One might expect that a legal provision which serves as the (indirect) basis for claims should specify who is eligible. However, Article 11 PR does not do so. This should be seen in context with Member States' legal systems however, which do specify eligible claimants.

31. In Question 3 of its CfE, ESMA specifically asked whether Article 11 PR should specify who is entitled to claim damages under civil prospectus liability. Nine respondents (among them most of those coming from the investment services industry) show considerable

[14] This depends – in part – on the kind of corporation involved.

reluctance to amending the rules on who is eligible to claim damages, whereas seven (including the respondents from academia) indicate that they support harmonisation in this area as essential or at least desirable.

32. The opponents argue that there is no need to regulate this at the European level, that changes could disrupt a well-functioning system and that this issue should be left to Member States. The supporters think harmonisation would help private enforcement (i.e. the idea that civil litigation (not just administrative action) is a powerful tool for enforcing the rules), which would be enhanced if it were based on a harmonised liability regime.

33. The SMSG has expressed a concern that eligibility should not be extended to third parties or limited to those who were invested at the time when a prospectus was published.

34. The submissions to the Updated Civil Liability Report reflect wide differences between Member States' legal orders on a number of aspects to the question of who should be entitled to make claims (e.g. on whether and under what circumstances buyers in the secondary market should be eligible).

35. Comparing Article 11 PR to Article 15 (1) MiCAR, ESMA finds that the latter does specify who is eligible to claim damages in that it refers to the holder of the crypto-asset. It reads (in part):

> *'Where an offeror* […] *has infringed Article 6* […] *that offeror* […] *shall be liable to a holder of the crypto-asset* […]*.'*

36. For the purposes of Article 11 PR, limiting eligibility to make claims for compensation to holders of the security may be controversial, however. Responses to the CfE and the submissions to the Updated Civil Liability Report reflect that the holder of a security may not be seen as the only person to be affected by misstatements in a prospectus and to suffer recoverable damages. One would need to clarify if those who have sold a security (perhaps at a lower price) or who held securities before a prospectus was published, are eligible to claim compensation, too.

4.5 Degree of culpability

37. Another standard question in liability matters is what degree of culpability is required. ESMA addressed this in Question 4 of its CfE.

38. Among the respondents who have commented on this point, eight are open to the idea of specifying a degree of culpability in Article 11 PR, while seven argue that change is unnecessary in this regard, with no identifiable trend as to the backgrounds of respondents.

39. Almost all of the supporters (six) favour negligence as the standard, only one wants to introduce strict liability[15]. Those who favour the negligence standard support a wide range of different concepts, spanning from slight to gross negligence and different standards being applied vis-à-vis different defendants. These respondents believe that requiring some form of culpability will ensure there is no liability for simple and unimpactful oversights and guard against the misuse of prospectus liability to recover losses that are really not due to mistakes in the prospectus, but to general market developments. They argue against strict liability as they fear it may dissuade issuers from offering securities.

40. The SMSG considers that it may be difficult to establish a common norm acceptable to all Member States. In its view, liability should only be based on intent or negligence. Furthermore, it contends that liability should only apply to misstatements and omissions that are material within the meaning of Article 6 PR.

41. Among the Member States, most (25) report using the negligence standard in different variations, a minority (5) applies strict liability (with some overlap between the two groups)[16].

42. Negligence is a legal concept with a long-standing tradition in Member States' legal systems, that applies far beyond prospectus liability. Defining it at the European level (as one of the responses to the CfE has suggested) would impact a cornerstone of liability regulation in those systems. Hence, this is not a change that could be made easily or agreed upon quickly.

43. Strict liability (sometimes referred to as "no-fault-liability") is the exception from the norm. ESMA understands it is often associated with the idea that an activity is especially prone to causing damage, so that those who engage in it must accept liability irrespective of their subjective culpability (an example in some Member States is car accidents, as driving a car is seen as so prone to causing accidents that liability applies regardless of fault). This can be coupled with mandatory insurance for the risks in question. Strict liability may therefore not just be a concept to consider on its own merits but may have to be coupled with other rules, such as insurance coverage. Considering stakeholders' scepticism towards strict

[15] Basically, the idea that liability can apply irrespective of any fault in the form of intent or negligence (also sometimes referred to as "no-fault-liability").
[16] Negligence is the norm in most cases, but there are variations in terms of simple or gross negligence and for false or missing statements or where no prospectus has been published at all. For further detail, please refer to the corresponding section under 8.5.3

liability and the fact that only few Member States use it as the standard, it may not be a concept that would be easily embraced by all.

44. The text of Article 15 MiCAR does not specify any standard of culpability or strict liability. Given that there are very divergent expectations by stakeholders and major differences applied in Member States when it comes to civil prospectus liability, ESMA finds that any reform of Article 11 PR should not leave this open but state what the standard of culpability should be.

4.6 Calculation of damages

45. Another important topic is the calculation of damages. While ESMA has not asked a question about this in the CfE, three participants mentioned that the calculation of damages should be specified in some form. The topic is also covered in the Updated Civil Liability Report.

46. The responses to the CfE show that the calculation of damages is a complex subject. While there is some agreement that it needs to involve price comparisons, there are diverging views on which prices to use for that purpose. Some of the calculations proposed involve hypothetical scenarios based on whether investors would have bought securities had they known information that they were not aware of at the time they made the purchase. These calculations involve "ideal" and "fair" prices rather than mere market prices at different points in time. In practical litigation cases, this may necessitate the use of expert witnesses.

47. The submissions to the Updated Civil Liability Report present a wide range of different practices in Member States, when it comes to the calculation of damages, for instance as regards compensation of lost profits. In some Member States, the approach is that securities are bought back, and several Member States cap the calculation of damages, with different methods being used (e.g. the issuance price or the first market price or the criterion of foreseeability of damages).

48. Article 15(1) MiCAR does not specify the calculation of damages (except to say that it is to include "*any loss*" due to the infringement). It reads (in part):

> *'Where an offeror* […] *has infringed Article 6* […]*, that offeror* […] *shall be liable* […] *for any loss incurred due to that infringement.'*

49. It therefore does not provide much guidance and may not be detailed enough for the purposes of Article 11 PR to deal with some of the questions that arise when it comes to what items are included in calculations.

4.7 Burden of proof

50. A further issue under consideration is the burden of proof, which is of great practical importance and can often determine the outcome of litigation. ESMA asked stakeholders about the burden of proof in Question 5 of its CfE.

51. Among those who have responded, ten are in favour of reform in this area, whereas eight are opposed. The respondents from academia and the majority of respondents from the banking sector are among those who are open to the idea of reform, whereas the majority of respondents coming from the investment services industry are sceptical.

52. The supporters argue that having a harmonised rule is necessary to make a European liability regime effective. One points to Article 15(4) MiCAR as an example. Those, who go into further detail are in favour of putting the burden of proof on claimants when it comes to proving there is a misstatement in the prospectus, and a slight majority is in favour of requiring defendants to prove that damages were not caused by the misstatement. Those generally opposed to incorporating a rule on the burden of proof into Article 11 PR say that it is not necessary and may interfere with well-balanced national systems.

53. The SMSG is opposed to requiring defendants to prove that damages were not caused by a misstatement in a prospectus.

54. For NCAs, the burden of proof is on the claimant with respect to whether a misstatement has occurred (16 NCAs), whether such misstatement has caused damages (24 NCAs) and what those damages are (26 NCAs). Some NCAs point out there can also be presumptions to reverse the burden of proof in various contexts and under various circumstances.

55. Article 15(4) MiCAR provides a rule on the burden of proof. It reads:

> *'It shall be the responsibility of the holder of the crypto-asset to present evidence indicating that the offeror, person seeking admission to trading, or operator of the trading platform for crypto-assets other than asset-referenced tokens or e-money tokens has infringed Article 6 by providing information that is not complete, fair or clear, or that is misleading and that reliance on such information had an impact on the holder's decision to purchase, sell or exchange that crypto-asset.'*

56. This provision does not contain presumptions or exceptions that would allow for the reversal of the burden of proof in certain cases. Nor does it address the burden of proof regarding the extent of damages.

57. Responses to the CfE have not shown prevailing support for reform of the rules on the burden of proof and the SMSG has also expressed reservations. Member States' liability regimes display very granular sets of rules, which Article 15(4) MiCAR does not reflect. Furthermore, rules on the burden of proof are an integral part of Member States' legal systems, not just in terms of their substantive law, but also in terms of the rules of civil procedure. Therefore, one respondent has pointed out they do not see them as part of liability regulation, but as part of procedural law (even though the two are interlinked). Therefore, it may be difficult to introduce changes to these rules as part of reforming prospectus liability laws at the European level.

4.8 Safe Harbour rules for forward-looking statements

58. Safe harbour for Forward-looking Statements (FLS) is a concept under which certain FLS in prospectuses (predictions, prognoses, forecasts or expectations about future developments) are exempted from civil liability. As statements about the future are inherently uncertain, issuers can be reluctant to include them in prospectuses for fear of being held liable. Protecting them from civil liability is therefore meant to address this concern and induce issuers to disclose more forward-looking information. While immunity from civil liability can reduce investors' ability to make claims based on information in prospectuses, the idea is that it may ultimately benefit investors by providing more disclosures and thus keeping them better informed.

59. ESMA asked two questions (Questions 10 and 11) about safe harbour rules in the CfE to gather respondents' views on whether liability risks were driving non-disclosure of forward-looking information and if a safe harbour provision should therefore be introduced in the EU. The questions were included against the background of an ongoing discussion in the EU about regulation in this area in the UK[17] and the US[18], which is addressed in detail in section 4.8.2.

60. Out of the 18 participants that responded to the CfE, 14 are in favour of including safe harbour rules for FLS in European law (all representatives of issuers fall into this category). Respondents explain that under the current rules, issuers are reluctant to disclose positive information for fear of liability. They hope safe harbour rules will increase the availability of information and point out that this would align the EU with other jurisdictions. Four respondents remain sceptical and argue that reform is unnecessary as they do not see this

[17] CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime (POATRs) – point 7.2 on page 58; UK Listing Review of 3 March 2021, Chapter 4.1 (pages 40-42)
[18] Section 21E(c) Securities Exchange Act of 1934: COMPS-1885.pdf

as an issue in practice. They point out that the situation in the EU is different from the UK and the US, where liability risks are considered to be higher.

61. The SMSG provides that risk of liability can be a reason for reluctance to disclose FLS. In their view, if safe harbour rules were introduced, they should be broad enough to cover all types of forward-looking disclosures. The SMSG also underlines that FLS should only be protected as long as they are accurate and not misleading.

4.8.1 No guarantee for additional disclosures

62. ESMA understands that immunity from liability for statements that are inherently uncertain can make it easier for issuers to include them in prospectuses. It appears that the UK began looking into protecting FLS from liability in an effort to encourage disclosure of forward-looking information[19]. However, ESMA notes that there is no guarantee that such immunity will actually lead to more disclosures.

4.8.2 Regulation in the UK and the US

63. In the US, section 21E of the Securities Exchange Act of 1934[20] contains so-called 'safe harbour' provisions, which restrict liability for forward-looking statements in circumstances where their content is material and accompanied by cautionary statements identifying important factors that could cause the actual results to materially differ from those in the forward-looking statement. In such cases, for liability to apply, the plaintiff must prove that the statement was made knowing that it was false or misleading.

64. Specific 'exclusions' are provided for in section 21E, which prevent the application of the 'safe harbour' provisions in some situations. For example, they will not apply if the statement is made by someone who has violated anti-fraud provisions, if the issuer is a 'blank check'-company, the securities in question are 'penny stocks' or the forward-looking statement is made in relation to an IPO. These restrictions appear to be included for investor protection purposes, since they prevent the use of the 'safe harbour' provisions in high-risk situations.

65. The UK's policy is intended to encourage more growth companies to list their securities in the UK and appears to be inspired by the 'safe harbour' provisions in US law.

[19] CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime (POATRs) – point 7.2 on page 58; UK Listing Review of 3 March 2021, Chapter 4.1 (pages 40-42)
[20] Section 21E Securities Exchange Act of 1934: COMPS-1885.pdf

66. The main thrust of this proposal is to ensure that the person(s) responsible for a prospectus are only liable for certain protected forward-looking statements therein if:

    a. they knew the statement was untrue or misleading;

    b. they recklessly provided an untrue or misleading statement; or

    c. an omission dishonestly conceals a material fact.

67. ESMA emphasises that caution should be applied when looking to regulation in other countries, such as the UK and the US and notes that one needs to be aware of the context of exemptions in other jurisdictions and the differences between those jurisdictions and the EU. The US is generally seen as more litigious than EU Member States. As a result, there may be a higher need for exemptions from liability there. ESMA finds that what may be called for in the US in order to ease fears of liability may not have the same effect in the EU but may rather undermine reliability of prospectus disclosures in jurisdictions where the risk of liability is lower.

4.8.3 Defining requirements for immunity

68. Several respondents (seven) to the CfE have provided a number of criteria that can be used in identifying FLS that could benefit from safe harbour rules. While respondents sometimes have diverging views and different forms of words for similar ideas, ESMA observes that most of them believe there are a few basic requirements which such an FLS should adhere to.

69. If the European Commission were to proceed with introducing safe harbour rules for FLS into Article 11 PR, it might take into consideration that respondents agree on the following criteria for safe harbour for FLS:

    a) The statement is a forecast, projection or prognosis,

    - which relates to future events or circumstances and

    - whose materialisation is uncertain at the time the prospectus is published.

    b) FLS need to be factual, clear and specific and accompanied by risk disclosures.

70. This ties in with the notion used in the UK describing FLS as containing a projection, giving guidance, a statement of opinion as to future events or circumstances or a statement of intention[21].

71. By contrast, vague and unspecific statements, which do not fulfil the aforementioned criteria (e.g., because they are not sufficiently factual or specific), would not qualify as eligible FLS and thus not be covered by the safe-harbour rules.

72. The requirements for FLS would have to be easily applicable and not raise doubts with regards to their scope of application. Furthermore, any safe-harbour immunity related to FLS in prospectuses should not have an impact on existing well-functioning liability provisions in fields other than prospectuses (e.g., Art. 4 Transparency Directive[22]).

73. In line with the SMSG, ESMA holds that a definition would have to not be too prescriptive. Liability and immunity are abstract legal notions which involve a high degree of judgement. Tying them to many specific items in several legal acts would risk creating an extremely lengthy provision that could lose sight of the underlying principle. Changes to such legal acts would have to be followed up in the PR and if any was ever left out, it could give rise to a discussion about why that is the case, if it was deliberate and what it means for the interpretation of the provision as a whole. ESMA also considers it possible that there would be situations that were not foreseen by a prescriptive definition that should benefit from safe harbour rules based on their merits.

74. ESMA also notes that safe harbour rules for FLS, may need to distinguish between different kinds of issuers. Some issuers are well established and able to give a detailed account of their business activities and past record. It would normally be easier for investors to assess those businesses in terms of risks and opportunities. For newer companies such as start-ups, in the case of IPOs or for Special Purpose Acquisition Companies (SPACs)[23], this may be more difficult, as there is less of a past record and less material to underpin prognoses and projections as a result, including a track record of such prognoses and projections in terms of seriousness, integrity and controls in drawing them up. Therefore, caution may be warranted when granting immunity for FLS to start-ups or SPACs.

[21] CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime (POATRs) – PRM 8.1.2 on page 192

[22] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

[23] SPACs are shell companies that are admitted to trading on a trading venue with the intention to acquire a business and are often referred to as blank check companies – esma32-384-5209_esma_public_statement_spacs.pdf.

4.8.4 Accompanying statement setting out limitation of liability

75. FLS that are to be excluded from liability would have to be accompanied by a cautionary warning. This could come in the form of a statement explaining that forecasts and projections may not necessarily materialise and liability for such FLS is therefore limited. In this vein, a projection combined with a promise to deliver would not qualify as an FLS within the meaning of this report.

76. In this context, the question arises as to whether a cautionary warning would just have to be included once in a prospectus or repeated throughout the text. Attaching it to every eligible FLS may provide more clarity and certainty.

77. On the other hand, repeating the cautionary warnings throughout a prospectus could compromise readability. It may also create an incentive for issuers to mark all statements concerning future developments (including those that are not eligible FLS) in order to try to benefit from immunity.

4.8.5 Boundaries of immunity

78. In addition to the requirements set out for immunity to apply (cf. paragraph 4.8.3), respondents to the CfE who are in favour of introducing safe harbour rules argue that there needs to be exceptions to immunity. It is generally agreed that there should be no immunity where FLS are misleading, especially in cases of wilful or reckless misconduct and fraud. One respondent has proposed introducing a "good faith" requirement as a reference to a subjective state of mind in order to eliminate cases from the scope where a statement may be reasonable objectively but is still being used with malicious intent.

79. Contrary to sec. 21E(b)(2)(D) of the US Securities Exchange Act 1934 and in line with a comment from one respondent, ESMA does not consider that IPOs should generally be excluded from immunity for FLS, as there can be legitimate prognoses in this context, too, in spite of uncertainties concerning future developments. As such, it may be too formal to say that a statement cannot be recognized as a legitimate FLS (irrespective of what it actually says), only because the underlying transaction is an IPO.

4.8.6 Comparison to regulation in the MiCAR

80. Article 15 MiCAR does not address safe harbour rules for FLS.

4.9 Expiry of claims

81. Claims can no longer be enforced once they become time-barred, which is why the statute of limitations is an important part of any civil liability regime. In the CfE, ESMA asked a question on whether the rules on the expiry of claims should be harmonised (Question 6). Nine respondents are open to the idea of reform in this regard and another seven are opposed. Most of the investment services providers are among the sceptics and a majority of the representatives of undertakings among those open to harmonisation.

82. Two of the sceptical respondents indicate that changes to the statute of limitations would be ill-advised in their view, because the current national rules represent a functioning system that could be brought out of balance by changes at the European level. Among those who are more open to the idea of introducing a European rule, there are diverging views as to whether limitation periods should be triggered by subjective factors (e.g. knowledge of a violation and of the perpetrator) or objective ones (e.g. date of publication of a prospectus) or both. The same is true when it comes to the length of limitation periods, with suggestions ranging from 3 to 15 years (typically with a shorter limitation period triggered by subjective circumstances versus a longer one triggered by objective circumstances).

83. The SMSG has suggested taking inspiration from the approach in Article 29(3)(a) of the Corporate Sustainability Due Diligence Directive (CSDDD)[24], which requires Member States to adapt a minimum limitation period. However, the liability regime under the CSDDD is subject to review at the moment and a number of changes have been proposed[25]. It is therefore currently unclear what it will look like in the end.

84. NCAs' submissions to the Updated Civil Liability Report reflect a wide range of limitation periods, ranging from 6 months to 30 years. They include several different concepts on when limitation periods start to run and under what circumstances they can be halted. This indicates that finding a common position would be a considerable challenge and likely constitute an effort that cannot be achieved in the short-term.

85. Article 15 MiCAR does not address limitation periods for civil liability claims and thus does not impose any European regime in this regard.

[24] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859
[25] Corporate sustainability due diligence - European Commission

4.10 Determining the Applicable Law

86. Even though ESMA has not asked a specific question on the determination of the applicable law to claims for prospectus liability, this is another topic of interest raised by five respondents to the CfE and the SMSG. All of these respondents indicate that they would be open to harmonisation.

87. While ESMA observes that this is a relevant and important issue, there is already substantial European regulation in place, so that a harmonised regime on private international law exists, especially the Rome Regulations on the law applicable to contractual (Rome I) and non-contractual (Rome II) obligations, which respondents to the CfE refer to.

4.10.1 Harmonisation and applicable law

88. ESMA notes that the issue of determining the applicable law is neither part of the Commission's mandate, nor have specific questions about it been asked in the CfE. Furthermore, ESMA understands that potential improvements to the rules on determining the law applicable to civil prospectus liability claims may help to decide which national laws to use but considers that this will not in and of itself lead to greater harmonisation of those laws.

4.10.2 Relation between the Prospectus Regulation and the Rome Regulations

89. ESMA understands that changing the rules of private international law to facilitate determining the law applicable to civil prospectus liability claims may transcend the PR and have repercussions on other (European) legislation, Rome I and Rome II first and foremost.

90. Looking at the Rome Regulations more closely, both have their scope set out in their respective Article 1, which consists of general clauses in their Article 1(1) respectively, stating that they cover contractual (Rome I) as well as non-contractual (Rome II) obligations in civil and commercial matters. Those clauses are followed up by extensive lists in their respective Articles 1(2), which set out exclusions from the scope one by one. While some of those exclusions do not appear to touch upon prospectus liability (e.g., obligations arising out of matrimonial property regimes under Article 1(2)(c) Rome I), others are closer to the issue under consideration here, such as Article 1(2)(d) Rome I and Article 1(2)(c) Rome II which deal with negotiable instruments to the extent that obligations

arise '*out of their negotiable character*'. Furthermore, Articles 6(4)(e) and 4(1)(h) of Rome I contain a reference to the MiFID[26].

91. Providing a new set of rules on the applicable law in the PR might need to be reconciled with the scope of the Rome Regulations[27]. Given that Article 1(2) of both of these regulations sets out exceptions from their scope, a separate set of rules in the PR might have to be mentioned in those lists. Moreover, any changes to legislation covering private international law pertaining to civil prospectus liability will have to take into account that there is the aforementioned reference in Article 1(2)(d) Rome I and Article 1(2)(c) Rome II which deal with negotiable instruments and to the MiFID in Articles 6(4)(e) and 4(1)(h) Rome I. Alternatively, changes could be made to the Rome Regulations themselves, and the European Commission has recently published a report that mentions changes to Rome II as a possibility[28]. However, this would be beyond the scope of the mandate ESMA received from the Commission, which is about harmonisation through potential changes to Article 11 PR, not about the Rome Regulations.

92. Even if the PR contained a specialised rule on the applicable law[29] outside of the Rome Regulations which applied on the basis of '*lex specialis derogat legi generali*'[30], one would need to justify why the Rome Regulations are insufficient and why the new rules in the PR are necessary. Two respondents explain that Article 4 Rome II is difficult to apply, since its reference to the law applicable in the place where damage occurs leads to uncertainty as it points to the place of the aggrieved party's bank account or the place where the secondary market purchase occurred.

93. ESMA understands that determining the law applicable to civil prospectus liability claims outside of the Rome Regulations and extending the list of exclusions in their respective Articles 1(2) could in the long run undermine those Regulations and lead to the question whether other private international law rules pertaining to other types of claims should also be regulated outside of them. This could lead to a situation where rules on private international law are scattered across a multitude of legal acts, which is likely to produce contradictions over time. This is especially true in areas where cases can lead to an overlap

[26] Unfortunately, this reference is outdated as Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC is no longer in force.
[27] This may be called for in spite of Art. 23 Rome I and Art. 27 of Rome II, which recognise that there can be conflict of law rules in other European legal acts, because the basic approach remains that Rome I and II are meant to apply generally and specifically list those areas where they do not.
[28] Point 3.3 in the Report from the Commission the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), COM(2025) 20 final: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2025:20:FIN&qid=1738342646388
[29] In fact, there is a discussion among some legal scholars as to whether its para 2 already does.
[30] "The more specific rule supersedes the more general ones."

between claims based on civil prospectus liability on the one hand and other (more general) notions of civil/common liability law (such as tort, contract or quasi-contractual obligations) on the other.

4.10.3 Distinctions between different types of investors

94. Respondents supporting a change in Article 11 PR in the context of determining the law applicable to civil prospectus liability claims propose that distinctions be made based on the type of investor asserting a claim, because wholesale investors should be treated differently from retail investors in their view. The general idea behind this is that retail investors should be protected by having the laws of their home Member State applied to their case and that it should therefore be more difficult to opt out of those laws, whereas wholesale investors do not require the same level of protection[31].

95. Distinctions between different types of participants in trade and commerce are quite common (such as between professionals and consumers). They are reflected in Article 6 Rome I, which deals with consumer contracts and provides a bespoke set of rules for them. Creating a separate set of rules on the applicable law in the PR and introducing similar distinctions (in this case between wholesale and retail investors) there would replicate similar (and possibly overlapping) regulatory patterns in different legal acts, thus potentially undermining the central Rome Regulations. It could also create contradictions between the Rome Regulations and the PR if the similar distinctions in the requirements of the legal provisions therein are linked to diverging legal consequences under the different legal acts.

4.10.4 Comparison to regulation in the MiCAR

96. Article 15 MiCAR does not address private international law.

4.10.5 The 28th Regime

97. One of the notions associated with determining the law applicable to transactions is the idea of the so-called 28th Regime, i.e. the concept of providing an optional set of rules rather than harmonising legislation[32]. Application of such a regime would then be left to the market[33], and it could be agreed between parties to a contract. A few respondents to the CfE have mentioned this concept, saying that it might be considered, but also

[31] ESMA notes this approach can lead to different laws being applicable based on what kind of investor is involved.
[32] Point 1.1 in the Opinion of the European Economic and Social Committee on 'The 28th regime — an alternative allowing less lawmaking at Community level' (own-initiative opinion) 2011/C 21/05
[33] Point 3.5.2.1. in the Opinion of the European Economic and Social Committee on 'The 28th regime — an alternative allowing less lawmaking at Community level' (own-initiative opinion) 2011/C 21/05

questioned if it is viable for the purposes of civil prospectus liability. This report does not deal with this concept in detail but will confine itself to just a few remarks.

98. The mandate ESMA has received from the Commission is about harmonisation and potential amendments to Article 11 PR and contains a specific reference to the Updated Civil Liability Report. It does not mention the concept of a 28th Regime, nor do the Updated Civil Liability Report or the CfE. Instead, the mandate refers to liability provisions under the MiCAR, whose language points towards direct application[34] of European legislation (rather than transposition by Member States) in other words: towards strongly harmonising measures. A 28th Regime however would be quite the opposite as it could (at best) only achieve harmonisation of civil prospectus liability rules in a very limited fashion by introducing an optional layer rather than changing existing rules.

99. ESMA considers that the 28th Regime is a concept which lends itself to contract law particularly (albeit not exclusively) since the idea is for parties to choose it, which will typically imply some pre-existing relationship and agreement. This is already reflected in the Opinion of the European Economic and Social Committee on 'The 28th regime – an alternative allowing less lawmaking at Community level'[35]. As civil prospectus liability is seen by many Member States through the prism of tort law (rather than contract), it may not be a prime candidate for an approach based on the concept of the 28th Regime.

100. Moreover, ESMA understands there is no guarantee that market participants would choose a new European 28th Regime. Especially in finance (where there are many cross-border transactions), other standards have emerged over time (such as choosing the laws of England and Wales) and choice of law clauses point to legal orders which have often developed over centuries and possess the depth and comprehensiveness that comes with that. Another optional legal order to choose will only be able to rival those regimes if it provides a similar level of depth and comprehensiveness. This would be a demanding project, which could not be achieved in the short-term. Furthermore, it is not evident that adding another regime to the number of legal orders to choose from[36] would make prospectus liability law any clearer or easier to handle.

[34] Art. 15, 26, 52 MiCAR
[35] Point 4.3.1. Point 3.5.2.1. in the Opinion of the European Economic and Social Committee on 'The 28th regime — an alternative allowing less lawmaking at Community level' (own-initiative opinion) 2011/C 21/05 – the Opinion does not say that the 28th Regime can only apply to contractual contexts but does focus on it and recognise that this is the typical scenario.
[36] Depending on the circumstances in individual cases, parties can choose the laws of a jurisdiction (e.g., French law) or other sets of rules.

4.11 Impact of third countries' liability laws

101. Question 8 in the CfE was about whether changes to Article 11 PR could help reduce issuers and offerors' liability concerns considering the impact of third countries' liability laws. Twelve out of twenty participants responded to this question. However, the responses are quite diverse that they do not provide a clear direction.

102. Four respondents argue that no change to Article 11 PR could have an impact on liability laws in third countries. ESMA holds that European safe harbour rules for instance would not impact issuers' liability under third countries' laws (e.g., if IPOs were captured under a European safe harbour rule, but excluded in the U.S., issuers would still face liability risks there).

103. Two respondents to the CfE as well as the SMSG point out that diverging disclosure requirements in different jurisdictions could mean issuers have to disclose more information outside of the EU than within the EU. They express a concern that European investors might see the fact that investors outside of the EU receive more information as an indication that these issuers have not fulfilled their disclosure obligations under European law and may try to make claims against them on that basis. This concern may not be without foundation. However, in ESMA's view, this does not merit a change to Article 11 PR, as this has to be taken into account by courts when they apply national legislation based on Article 11 PR in any event. In ESMA's view, the question whether liability for lack of disclosures can be applied in cases where European rules do not require those disclosures is one that should be dealt with by courts in the way they construe the applicable legislation to individual cases.

4.12 Use of class action in civil litigation

104. Two respondents to the CfE point out that harmonised rules could help class action lawsuits, which they believe to be a more powerful tool for enforcing the rules than supervision by NCAs.

105. Most NCAs report that class action is available in their jurisdiction in one form or another (some cite details on whether this involves the use of a consumer association or assigning plaintiffs' claims to an SPV founded to specifically pursue the claims). Respondents also refer to the Representative Actions Directive.

106. ESMA notes that the PR is mentioned in Annex I(60) of the aforementioned Directive, but that this Directive only covers consumers. As such, making changes to Article 11 PR would have to involve this Directive and therefore have an impact that extends beyond the

PR itself. Furthermore, ESMA notes that class action has become known as being effective in pursuing claims of civil liability but could, in the context of prospectus liability, also impact issuers' willingness to seek financing on public markets.

4.13 Conclusions

107. Based on the analysis of responses to the CfE, the updates to the Updated Civil Liability Report and the advice provided by the SMSG as well as on the comparison of Article 11 PR with Article 15 MiCAR, ESMA understands that harmonisation of civil prospectus liability regulation would help create a level playing field between Member States and further integrate European capital markets. However, it also sees that many respondents do not consider differences in prospectus liability laws to be the decisive obstacle to cross-border offerings or to the integration of European capital markets or the SIU more generally at this juncture. Instead, they indicate that taxation, administrative burden and different investment cultures in Member States are more important to address.

108. NCAs' submissions to the Updated Civil Liability Report reflect that Member States' liability laws are intricate and have long-standing traditions of their own, some of which have developed over centuries and are not always enshrined in legislation but have been developed in case law. Against that background, ESMA considers that harmonisation of civil prospectus liability rules would require very deep comparative and thorough analysis of existing Member States' civil prospectus liability laws and would likely be controversial in several areas (in terms of who is eligible to claim, how to calculate damages, the burden of proof and the use of class action) and would therefore not be a short-term project.

109. In addition, an overall reform of Article 11 PR would have to be comprehensive enough to codify all aspects of prospectus liability from the degree of culpability over the calculation of damages to the statute of limitations etc. Otherwise, courts might fill gaps in the system with national law, which would reintroduce fragmentation.

110. Making changes to the rules on how to determine the applicable national law would not achieve much harmonisation and would impact other legal acts outside the PR (the Rome Regulations in particular).

111. Moreover, Article 15 MiCAR may not be the ideal model for Article 11 PR, as direct application might exacerbate the need for regulation to be comprehensive, since it would raise the question if national law can be used to complement gaps. Another reason is that piercing the corporate veil as a general rule might prove particularly controversial for the purposes of Article 11 PR, especially as it may be seen as a major shift. Furthermore, several respondents suggest it could have a chilling effect on securities offerings for fear of personal liability. When it comes to safe harbour rules for protecting FLS from liability,

ESMA notes that there is no guarantee that introducing this legal notion into Article 11 PR will actually lead to an increase in disclosure.

5 Advice

112. On the basis of the above considerations, ESMA presents its advice to the Commission below.

113. Based on the responses and updates ESMA has received, and as many NCAs are cautious when it comes to making any changes to the current prospectus liability regime, **ESMA is not recommending any changes to Article 11 PR**. Many respondents to the CfE are also cautious about amending what they see as a functioning system overall. Furthermore, based on the majority of respondents' views, ESMA understands that differences in prospectus liability regulation are not what primarily stands in the way of cross-border offerings at this juncture. Given the intricacies within a system of national civil liability laws, which have very long-standing traditions of their own, ESMA sees reform of civil prospectus liability as a project which would not be achieved in the short-term and that would need to be approached carefully and require a detailed analysis of national liability laws and regulations.

114. Although ESMA does not recommend any changes to Article 11 PR, should the European Commission still intend to contemplate reform, the following two issues may be worthy to further debate. The first one would be the topic of safe harbour rules for FLS and the second would concern changes to the rules for determining the applicable law. In both regards, great caution would most certainly be required. Introducing changes to liability regimes is complicated and would need to be based on very thorough analysis.

115. In the area of safe harbour protection for FLS, the Commission should only consider immunity for FLS with <u>at least</u> the following safeguards:

- Statements should only be categorised as FLS if their wording makes clear that they are a prediction, forecast, projection or prognosis, whose materialisation is uncertain.
- FLS should be required to be factual, clear, specific and set out their basis in fact.
- FLS should be accompanied by cautionary warnings, explaining that it cannot be guaranteed if the forecasts will materialise and that liability for FLS is limited.
- Immunity should not apply where they are misleading, especially where wilful or reckless conduct is at play.

116. Harmonisation of the rules on determining the applicable law in cases of civil prospectus liability may be worth looking into further. It could be a first step towards greater unity in relation to civil prospectus liability within the EU. However, ESMA considers that reform in this regard is not the main thrust of the mandate it has been given by the European Commission. Furthermore, making it easier to determine what national law applies will not harmonise those laws. ESMA notes that work on this topic could not be seen as a short-term project as it would have to take into account the impact of changes on other legislation, particularly the Rome Regulations. This would have to be an effort that involves other EU and Member States' institutions besides ESMA and its NCAs given that private international law is not part of their remit in some cases but falls into the responsibility of other institutions in some Member States. Therefore, ESMA holds that it cannot make a specific recommendation of its own at this stage.

6 Annex I: Call for advice from the Commission

Annex I only refers to the Civil Prospectus Liability component of the mandate. Namely item 3.6 of the mandate.

Pursuant to the amended Article 48(2a) of the PR, the Commission is required to submit a report by 31 December 2025[37] analysing the issue of civil liability for the information given in a prospectus, assessing whether further harmonisation of the prospectus civil liability in the Union could be warranted and, if relevant, proposing amendments to the liability provisions set out in Article 11 of PR.

In light of the above, the Commission invites ESMA to provide technical advice on the civil liability of the prospectus, which should include an assessment and recommendations on whether further harmonisation should be considered. ESMA should take into account all relevant provisions of the PR, in particular Articles 11 and 48(2a), all relevant recitals of the Amending Regulation, the report on civil liability of the prospectus that ESMA published in 2013 (ESMA/2013/619[38]). Finally, ESMA should compare the civil liability provisions set out in Article 11 of the PR with the civil liability set out in the Markets in Crypto-Assets Regulation[39] and the need for possible alignment with or departure from those provisions and provisions for prospectus civil liability.

[37] Recital 60 of the Amending Regulation clarifies that the requirement for the Commission to perform such assessment within the above-mentioned timeline is linked to the need of ensuring that the CMU gathers momentum and reflects market realities as soon as possible after they occur.
[38] https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-_619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf
[39] Regulation (EU) 2023/1114 of the European Parliament and of the Council.

7 Annex II: ESMA's Call for Evidence and summary of questions

Please find the link to ESMA's CfE here.

The questions are repeated 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?

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)?

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

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?

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?

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

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.

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.

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.

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

8 Evidence: Annex III: Input received via ESMA's Call for Evidence and ESMA's Updated Civil Liability Report

117. This section of the report summarises the responses ESMA has received to its CfE and the contributions to its Updated Civil Liability Report.

118. The beginning of each subsection states how many participants to the CfE (out of the total number of 20) have responded to the various questions. The submissions in response to the CfE and for the purposes of the Updated Civil Liability Report are quite diverse, nuanced and cover different points. To try to best reflect the feedback received, ESMA's goal is to identify and aggregate the main points and trends that arose, and to identify some of the diverse points that materialised. For the sake of brevity and as some of the feedback is quite complex and technical, the summaries will not always list every submission, but further detail is available in Annex IV: Responses to the Call for Evidence and Annex V: ESMA's Report on Civil Liability regimes in EEA Member States in relation to the Prospectus Regulation (ESMA's Updated Civil Liability Report).

8.1 General view of changes to the regime of civil prospectus liability under the PR

8.1.1 Responses to the CfE

119. The CfE contained several broad questions (Questions 1 and 7) on what issues respondents can identify when it comes to civil prospectus liability. Nineteen out of twenty participants have responded to these questions.

8.1.1.1 Status quo approach

120. Eleven respondents supported the status quo and were sceptical about changes to Article 11 PR overall, with one rejecting the idea outright. Another respondent contended that the current regime is well-balanced and argued (together with another three respondents) that one should not attempt to "fix something that is not broken". These respondents argued that, while the text of the rules may differ, the actual deviations between Member States' civil liability laws are not substantial in practice.

121. Eight of the above eleven respondents contended that it is not different civil prospectus liability regimes that impede cross-border offerings but other issues such as taxation or regulatory and administrative burden. One respondent pointed out that wholesale cross-border offerings are already quite common, but not in the retail-sector, due to numerous

administrative requirements and very little interest by retail investors. This respondent pointed to cultural differences between Member States as the much bigger impediment. Another respondent explained that passporting already provides a sufficient tool to facilitate cross-border offerings.

122. Two other sceptical respondents thought that harmonisation may be desirable or could be envisaged but felt it may take so long and be so difficult that it is not worth pursuing. These respondents saw targeted harmonisation on individual issues as more meaningful.

8.1.1.2 Reform-oriented approach

123. On the other hand, among the supporters of increased harmonisation (eight), six said that without reform of this part of the prospectus rules, there can be no level playing field for securities' offerings across the Union. Four argued that harmonising prospectus liability is a necessary step towards an integrated European capital market. A more cautious respondent believed that reform of the private international law rules on prospectus liability is particularly important.

8.1.2 SMSG input

124. The SMSG's advice addressed the overarching question of whether there should be any reform of civil prospectus liability rules. The SMSG pointed out that Europe lacks a uniform prospectus liability regime, which may lead to risks, inefficiencies and differences in processes and practices that could act as a barrier to the development of its capital market.

125. On the other hand, the SMSG stated that while there are differences to civil prospectus liability rules in Member States, those are normally reasonably well managed in practice. It explained that legal opinions and legends in offering documents are used to mitigate these risks.

126. The SMSG also questioned if differences in prospectus liability rules really pose a major obstacle to cross-border offerings. In this vein, it expressed a concern that work on liability rules could shift the focus away from addressing other topics such as the lack of a common investment culture, the appetite for currency exposure (Euro vs. non-Euro MS), risk appetite and home bias.

127. Furthermore, the SMSG referred to the subsidiarity principle and explained that the EU does not have exclusive competence in the area of civil liability. On that basis, it concluded that it is a political question if the objectives envisaged by a potential reform of prospectus liability rules need to be pursued at the European level.

128. The SMSG went on to state that reform of the prospectus liability rules would not just be confined to the PR, but that issuers are subject to different liability regimes under the Transparency Directive and the Market Abuse Regulation, which would also have to be taken into account. Therefore, the SMSG appreciated harmonising civil prospectus liability rules will not be easy and one must not underestimate the extent of political will required. It described harmonisation as desirable in theory but a long-term ambition.

8.2 Case law on civil prospectus liability

129. Question 2 in the CfE asked if there is leading case law pertaining to civil prospectus liability in respondents' jurisdictions. The background of that question was to get a measure of how much practical application there is to civil prospectus liability under Article 11 PR or if the topic was rather theoretical. Fifteen out of twenty participants in the CfE responded to this question.

130. Five respondents stated that they are not aware of any leading case law in their jurisdictions, another five pointed out there have been decisions, but do not mention any specifically.

131. One respondent pointed to one European decision rendered by the European Court of Justice and two French decisions. A German and an Austrian case were mentioned by another respondent, while yet another one cited four Danish cases. Three respondents pointed to cases both for equity and debt instruments in Italy, one of them cited nine specific examples. One further respondent named a number of cases in a variety of jurisdictions: six in Germany, five in Italy (mostly involving shares), seven in Spain, four in Poland, a landmark case in the Netherlands, five in Austria (on equity and non-equity instruments) and one in Ireland.

132. The decisions are very diverse in terms of their content, since they are based on national legislation and case law; as with any judicial decision, they are also very much tailored to the individual cases adjudicated. However, some topics keep recurring in several of the decisions that are mentioned. Some have ruled on directors' immediate liability for having violated their own duties. Others deal with whether the average investor can be expected to read a prospectus (which was confirmed in the particular case at hand). Furthermore, courts have dealt with presumptions of causality and ruled that those are rebuttable. With respect to the presumption of fault, judicial decisions have determined that the due diligence defence can be invoked.

8.3 Comparison to regulation in the MiCAR

8.3.1 Responses to the CfE

133. As the Commission's mandate to ESMA specifically refers to the liability regime in MiCAR, ESMA asked a question about MiCAR in the CfE (Question 9). Eighteen out of twenty participants responded to it.

134. Almost all respondents (17) were opposed to using the MiCAR as a blueprint for Article 11 PR. The remaining one indicated that they were sceptical, but open to aligning with Article 15(4) MiCAR, which puts the burden of proof on claimants.

135. The reasons are manifold. Five respondents considered that crypto-assets and securities are fundamentally different, with crypto-assets being seen as much riskier. Two of them and a third one argued that – contrary to prospectuses under the PR – Crypto-Asset White Papers do not get scrutinised.

136. Another view put forward by one respondent is that Article 15 MiCAR is not comprehensive and leaves many questions of civil law unanswered. Two respondents stated that the provision is untested. Another two argued that Article 15 MiCAR is not sufficiently detailed with another saying it does not determine any degree of culpability and one contending that Article 15(4) sets the wrong standard in terms of the burden of proof.

137. Moreover, the MiCAR has provisions that pierce the corporate veil, which is something five respondents specifically rejected. Two of them stated that introducing this into the PR would have a chilling effect on capital markets and make it harder to offer securities due to the personal risks involved. They added that piercing the corporate veil should be reserved for exceptional cases and not be the general rule.

138. There was one outlier who said they are open to the idea of taking inspiration from the MiCAR. They argued that it is comprehensive and does not delegate critical details (such as fault thresholds or evidentiary requirements) to Member States. Furthermore, they stated that this would prevent inconsistencies among the two liability regimes and that the regime for securities prospectuses should not be weaker than for crypto-assets.

8.3.2 SMSG input

139. The SMSG was of the opinion that the liability regimes under Article 11 PR and Article 15 MiCAR are not comparable and that regulation in the MiCAR should not be replicated in the PR.

8.3.3 ESMA's Updated Civil Liability Report

140. The Updated Civil Liability Report does not address the MiCAR. However, some NCAs have raised certain issues in connection with it, such as the notion of piercing the corporate veil or if and how directors of corporations can be held liable more generally.

141. One NCA (PL) said piercing the corporate veil is only possible in exceptional cases in their jurisdiction. Nine NCAs (DK, ES, FI, FR, HU, IS, LV, NL, SL) indicated that it is possible for members of companies' boards to be held liable. Four (CZ, FR, LV, SL) specified that companies can ask reimbursement from members of corporations' internal bodies when the corporation has had to bear liability vis-à-vis investors. Three NCAs (IE, PT, SI) generally listed members of corporations' internal bodies as civilly liable for prospectuses.

8.4 Eligible claimants

8.4.1 Responses to the CfE

142. In its CfE, ESMA asked a question about whether Article 11 PR should specify eligible claimants (Question 3). Eighteen out of twenty participants responded to this question (although not all of the responses are substantive). Nine respondents opposed harmonisation in this area, whereas seven supported it.

143. Among the nine respondents that were opposed, one explained that change is unnecessary in this area, while two others contended that it should be left to Member States to regulate instead of harmonising it at the European level. These respondents held that harmonisation could disrupt Member States' liability systems currently in place, which are seasoned and tested and could thus create more problems than it solves.

144. By contrast, seven respondents indicated that they consider harmonisation in this area to be essential or at least desirable (two do not position themselves clearly). One of the supporters explained harmonisation could enhance equality of access to legal remedies, bolster market confidence, and participate in providing consistent protections for cross-border retail investors who currently face varied liability regimes. Two more thought harmonisation would help private enforcement (i.e. the idea that civil litigation is a very powerful tool for enforcing rules), which would be enhanced if it were based on a harmonised liability regime.

145. When it comes to who should be eligible, one respondent argued that only individuals that have suffered damages should be allowed to claim compensation. Four said only the

investors who have actually purchased the securities based on the erroneous information in the prospectus should be allowed to sue. Two specified that those who already held shares when the prospectus was published should not be eligible, because the prospectus is published in connection with a specific offering and not designed to provide overall structural information that may change over time. By contrast, three thought that all impacted investors should be eligible, regardless of whether they purchased the securities directly during the initial offering or subsequently on the secondary market.

8.4.2 SMSG input

146. The SMSG was of the view that there is no need to specify eligible claimants in Article 11 PR. It explained the person allowed to sue should be the one who suffered damages because of mistakes in the prospectus and added that it does not see a reason for extending this to third parties or to limit it to those who were investors at the time a prospectus is published.

8.4.3 ESMA's Updated Civil Liability Report

147. Fourteen NCAs (BL, DK, FI, FR, IS, LI, LT, LU, NL, NO, PL, PT, RO, SE) reported that those persons can claim compensation who have actually suffered damages. Two (EE, LI) referred to the purchaser, one (SL) expressly to those who have received a prospectus, and six (CY, IE, IT, LT, LV, MT) to those who have purchased securities based on the information in the prospectus (including situations where information was missing from it). One NCA (HU) reported that the eligible claimant is the buyer in the primary market specifically, whereas fourteen (BE, CZ, DK, DE, ES, GR, IT, MT, NL, RO, PL, SE, SI, SL) said purchasers in the primary and the secondary market are eligible, with one (BE) specifying that the secondary market is only covered where the person responsible for the prospectus has consented to its use for a subsequent resale in accordance with Article 5 PR.

8.5 Degree of culpability

8.5.1 Responses to the CfE

148. In Question 4, ESMA asked if respondents had any views on whether the PR should specify the degree of fault or culpability to be used in civil prospectus liability. Fifteen out of twenty participants responded to this question. The positions were very much divided with about half of them arguing in favour and the other half opposed to changing Article 11 PR in this regard.

8.5.1.1 General views

149. Seven respondents argued that change is not necessary. One explained that the existing system is adequate and well understood in the market, and one should not try to fix something that is not broken. Another one feared changes could undermine well-functioning regulation tailored to local conditions and legal culture.

150. On the other hand, eight respondents were open to the idea of harmonisation, because they see it as important and a way to reduce uncertainty for issuers and retail investors (as it would lower their exposure to different liability rules), but also as an opportunity to align EU law with that of other jurisdictions, such as the US and the UK.

8.5.1.2 Negligence

151. Supporters of reform argued in favour of different standards of negligence (with the understanding being that intentional behaviour is covered in any case).

152. One respondent stated that the standard should be “reasonable prudence”, arguing that it could ensure that simple and unimpactful oversights are not treated as severely as reckless or wilful misconduct. Another one said that negligence should be the general standard and called for a European definition. Among the others, three respondents were in favour of using gross negligence as the standard (saying that this would prevent the misuse of prospectus liability to recover losses that are due to market developments), with one of them pointing to the Credit Rating Agency Regulation in this context.

153. Another respondent (one) wanted to apply intent or gross negligence to members of the administrative, management or supervisory bodies of the issuer. The negligence standard would then be applied to guarantors, lead managers, external accountants, parties meaningfully involved in drawing up the prospectus, selling shareholders, external lawyers, tax advisors, valuers and actuaries in their view.

8.5.1.3 Strict liability

154. Five respondents commented on whether issuers should be subject to strict liability. One of them stated that this should apply to issuers but conceded that even a fault-based system will often produce the same results. By contrast, four respondents advised against strict liability as they fear it may dissuade issuers from offering securities.

8.5.2 SMSG input

155. The SMSG considered that it may be difficult to establish a common norm acceptable to all Member States. It pointed out that there is no EU wide standard of fault. In its view, liability should only be based on intent or negligence.

156. Furthermore, the SMSG explained that liability should only apply to misstatements and omissions that are material within the meaning of Article 6 PR and added that a reference to Article 23(1) PR might be added.

8.5.3 ESMA's Updated Civil Liability Report

157. Twenty-three NCAs (AT, CY, CZ, DK, ES, FI, FR, GR, HR, IS, IT, LI, LU, LT, LV, MT, NL, NO, PL, PT, SE, SK, SL) reported their Member States use negligence as the standard (the understanding being that this means intentional behaviour is captured in any event). Two of those NCAs (AT, LI) contended especially that "slight" negligence is included.

158. Two NCAs (EE, LV) indicated their Member States distinguish and apply negligence in case of incorrect information in a prospectus but require intent where information is omitted. Another one (DE) stated that a standard of gross negligence (and intent) is applied where a claim is based on a prospectus having been incorrect or incomplete, whereas the standard is simple negligence (and intent) in cases where there has been a failure to publish a prospectus.

159. Five NCAs (IE, IS, HU, PT, SI) reported having strict liability applied in their member States[40]. One of them (IS) applies it only where there is a contractual relationship, while another (PT) applies it only vis-à-vis offerors and issuers under certain circumstances.

8.6 Calculation of damages

8.6.1 Responses to the CfE

160. ESMA did not specifically ask about the calculation of damages in the CfE, but the issue was raised by some participants in response to several questions. Three out of twenty respondents mentioned it.

161. One of those respondents argued that the amount of damages should be limited to the price difference. Another explained that it should be the difference between the purchase

[40] vide supra, para 39

and the sales price, or in case the investor has not sold the financial instrument, the price that forms after a misstatement in the prospectus is revealed. However, this respondent also stressed that when doing so, subsequent market movements and mitigating actions should be taken into account.

162. Another respondent proposed taking a slightly different approach. They argued that in cases where the claimant would have invested even without the misstatement, the calculation of damages should be based on comparing the price paid to the ideal fair price at the time of purchase. They explained that if one has to assume that the claimant would not have invested without the misstatement, they should be immune from overall market risk, and one should thus compare the purchase price to the new one that was arrived at after the misstatement became known. The respondent explained that this should be the price at which the resale occurred, provided that it happened within a reasonable amount of time after the purchase. The idea behind this concept is that the new price that is set after a misstatement is revealed will not only reflect the latter, but other market trends as well, as one cannot assume that price formation is monocausal. This respondent concedes that, in practice, it will not be easy for courts to disentangle the effects a misstatement had on the price of a security from that of other factors.

8.6.2 ESMA's Updated Civil Liability Report

8.6.2.1 General views

163. When it comes to the calculation of damages, the picture among Member States is very diverse (with different methods of calculation, damages including various positions and being capped in some jurisdictions). This summary identifies and aggregates the main points and trends that arise in the evidence and identifies some of the diverse points which materialise.

164. Four NCAs (AT, DE, FI, PT) reported that, in their Member States, the concept is that investors' recoverable damages should in principle put them in the position they would be in had the misstatement in the prospectus not occurred (DE, FI, PT) or not influenced their investment decision (AT). Twelve NCAs (CZ, ES, GR, HU, IS, IT, LT, LU, MT, NL, PL, SL) indicated the idea is that actual damages (for losses suffered) are compensated.

8.6.2.2 Methods of calculation

165. Two NCAs (HR, RO) reported that compensation of damages takes the form of the cancellation of the contract for the sale of securities (RO) or that the investor who still holds the securities has the right to demand (HR) that the defendant buy them back at the

price it paid for them. In two other jurisdictions (DE, EE), NCAs said this buyback is seen as a right the issuer can use to absolve itself from having to compensate other damages (EE) or an obligation of the investor vis-à-vis the defendant to return the securities in exchange for compensation (DE).

166. One NCA (IT) reported that the calculation of damages is based on comparing the purchase price not to the new price that forms immediately after a misrepresentation is revealed but to the intrinsic value calculated on the basis of the true and complete information that should have been in the prospectus.

167. Ten NCAs (CZ, DE, HU, IT, LT, LU, MT, NL, PL, SL) specified that damages include loss of profit in their respective Member States.

8.6.2.3 Compensation caps

168. Two NCAs (DE, HR) reported that, where a buy-back of securities occurs for the price paid by the investor, compensation can be capped at the amount for which that quantity of securities was originally issued (HR) (first issuance price – DE) or offered (first market price being considered the “first issuance price” in these cases – DE).

169. Two NCAs (LI, SL) referred to foreseeability standards as a way to cap damages (i.e. the notion that only those losses are recoverable that were foreseeable), with one (LI) pointing out that this applies to indirect damages.

8.7 Burden of proof

8.7.1 Responses to the CfE

170. In Question 5 of its CfE, ESMA asked if Article 11 PR should make determinations with respect to the burden of proof. Eighteen out of twenty participants responded to this question. The positions were divided with about half of them arguing in favour and the other half opposed to changing Article 11 PR in this regard.

8.7.1.1 General views

171. Eight respondents opposed changes to Article 11 PR when it comes to the burden of proof. Five considered that it is unnecessary to make any changes to the existing regime. Two argue that one should not interfere with a well-functioning civil liability system. Another one explained that the burden of proof is a matter of procedural and not of substantive law, by which they mean that it is not part of the body of law that determines if someone has

a claim for liability or not, but of the courts' procedural rules that deal with who has the burden of proof in civil litigation.

172. Ten were supporters of reforming the rules on the burden of proof. One of them contended that no liability regime can be effective without addressing this topic. Another explained that having a unified system would make it easier for issuers to comply with the PR in cross-border cases and another specified that they would like to see a rule similar to Article 15(4) MiCAR, which puts the burden of proof on the plaintiff.

8.7.1.2 Misstatement

173. When it comes to who needs to prove that information in a prospectus was false, four respondents stated that the burden of proof should be on claimants. One of them added that, otherwise, all claimants would need to do is just to allege and issuers would spend all their time trying to disprove the claims, even if they were baseless.

8.7.1.3 Causal link

174. One respondent stated that the burden of proof should be on the claimant when it comes to causality. By contrast, two others argued that the burden of proof should be on the defendant in the form of a presumption of causality, once a claimant has shown that there is a material misstatement in the prospectus.

8.7.1.4 Damages

175. In terms of proving the amount of damages, one respondent held that the burden should be on the claimant. Another one argued in favour of a system of presumptions so that the burden does not rest with the investor alone. They explained that the plaintiff should not have to prove that, without the misstatement in the prospectus, the transaction would have occurred at an accurate price.

8.7.1.5 Culpability/ Due diligence defence

176. Two respondents stated that the burden of proof should be on the claimant when it comes to culpability. A third one stated that if the standard of fault were gross negligence, the burden of proof should be shifted to the defendant, as it is usually difficult for investors to prove even simple negligence. Furthermore, a fourth respondent explained that in the case of a due diligence defence (i.e. defendants pleading that they exercised due diligence in drawing up the prospectus), the burden of proof should be on those invoking it.

8.7.2 SMSG input

177. The SMSG considered that it may be difficult to establish rules on the burden of proof at the European level, as that is a core part of national legal systems. It added that even the same text can be construed differently in different Member States.

178. In reference to a point of causality raised in para 14 of the CfE, the SMSG further considered that there should not be any presumption of causal links between someone's actions and damages suffered or between a person's conduct and culpability. It argued that such a presumption could put issuers in an untenable situation if all an investor needed to demonstrate was a mistake in a prospectus and that damages occurred, without having to prove a link between the two. The SMSG held that it would be difficult (if not impossible) to prove such a negative fact (i.e., the absence of such a causal link).

8.7.3 ESMA's Updated Civil Liability Report

8.7.3.1 Misstatement

179. Sixteen NCAs (BE, CZ, DE, EE, ES, HR, HU, IE, IS, IT, LV, MT, NL, PL, SE, SL) indicated that the investor bears the burden of proof on whether a misstatement has occurred in a prospectus in their jurisdictions. Two (CY, NL) reported reversing the burden of proof: One (CY) pointed out that the persons signing the prospectus bear the burden of proof for its accuracy, completeness and clarity and that necessary updates were made. The other (NL) stated that there can be a reversal of the burden of proof under special legislation, so that the defendant must prove that the prospectus is materially correct and complete[41].

8.7.3.2 Causal link

180. Twenty-four NCAs (AT, CY, CZ, EE, ES, FI, FR, GR, HU, IE, IS, IT, LI, LT, LU, LV, NL, NO, PL, PT, RO, SE, SI, SL) indicated that the investor has the burden of proof for the causal link between a misstatement in the prospectus and damages suffered.

181. By contrast, three NCAs (BE, DK, NL) referred to rules under which a causal link is presumed between negligence by those responsible for the prospectus on the one hand and losses incurred on the other provided other factors are proven by the investor, whereas a fourth (HR) referred that the defendant has to prove that the securities were not acquired based on the information in the prospectus. One NCA (BE) further stated that the investor

[41] (so long as the case is brought under legislation covering unfair commercial practices or misleading advertisement)

needs to demonstrate that, due to the misrepresentation, the market or the purchase price could be influenced positively.

182. Three NCAs (BG, CZ, IT) indicated the rules say that the defendant can prove the deficiency in the prospectus was not material and therefore did not influence the price of the security.

8.7.3.3 Damages

183. Twenty-six NCAs (AT, BE, CY, CZ, DK, EE, ES, FI, GR, HU, IE, IS, IT, LI, LU, LT, LV, MT, NL, NO, PT, PL, RO, SE, SI, SL) reported that in their Member States the investor bears the burden of proof with respect to the damages themselves. By contrast, one NCA (HR) explained that the defendant has to prove that the misrepresentation did not influence the market price of the securities.

8.7.3.4 Culpability/ Due diligence defence

184. In terms of culpability, seven NCAs (DK, HR, IS, LT, LU, RO, SE) reported that the investor must prove the defendant's wrongful/culpable conduct to receive damages.

185. However, eight NCAs (AT, EE, ES, GR, IT, LI, PT, SL) indicated the aforementioned burden of proof can be reversed in their Member State. Specifically, two (ES, GR) reported that the investor does not need to prove fault on behalf of the defendant. Six (EE, GR, IT, LI, PT, SL) explained that, where other factors such as misstatements in the prospectus are proven, there is a presumption of fault so that the defendant has to prove they were not at fault.

186. Seven NCAs (BG, CZ, DE, EE, GR, HR, MT) pointed out that a defendant can prove they were not aware of a misstatement and, due to that lack of awareness, were not culpable. Three others (ES, IT, SI) explained that the standard for a defendant to prove they were not at fault is to demonstrate that they exercised all reasonable care (IT, SI) or acted with due diligence (ES).

8.8 Safe Harbour rules for Forward-Looking statements

8.8.1 Responses to the CfE

187. In its CfE, ESMA asked about the protection of issuers from liability for FLS in the form of safe harbour rules (Questions 10 and 11). Eighteen out of twenty participants responded

to these questions. Fourteen respondents were in favour of including some form of safe harbour rule for FLS in the PR. Four respondents were more reluctant.

8.8.1.1 General views

188. One of the sceptics believed that no specific regulation is necessary, because only forward-looking statements that do not pose a potential risk get presented in prospectuses anyway. Two other respondents stated that they do not see liability for FLS as much of an issue in practice and that there is little need for change in the legislation. A fourth respondent stated that a more lenient approach towards prognoses could be factored into the existing standard of negligence or culpability generally. Even one of the supporters cautioned that the threat of liability in (at least parts of) the EU is low compared to the US and UK, which they see as more litigious. They explained that Europe may not need safe harbour rules to encourage issuers to disclose forward-looking information to the same extent as in other jurisdictions.

189. ESMA received 14 responses in favour of introducing safe harbour rules for FLS. Two of them believed that issuers are reluctant to disclose even positive forward-looking information for fear of liability and that immunity for such statements will increase their willingness to make such disclosures in prospectuses. Another six said they hope this immunity will increase quantity and quality of information in prospectuses and thereby help investors. Another respondent generally considered FLS to be helpful and thought they should be encouraged, while yet another pointed out that introducing safe harbour rules would align the EU with other countries such as the US and Switzerland. Two more respondents pointed out that the amount of FLS and the accompanying liability is expected to increase under the CSRD.

8.8.1.2 Requirements for immunity

190. When it comes to the requirements for immunity, four respondents considered that safe harbour rules may enhance transparency, but should only apply to factual, clear and specific statements accompanied by detailed risk disclosures. FLS should also be based on verifiable data and accompanied by cautionary warnings outlining risks, assumptions and uncertainties in their view. One of them stated that a requirement of good faith should be introduced as a reference to a subjective state of mind, because, while a statement may be reasonable objectively, it could still be used with malicious intent (for instance, where someone withholds inside knowledge not generally available). Another proposal was to use Art. 1(c), (d), Annex 1 section 11 CDR as a basis for a definition, which provide definitions of the terms “profit estimate” and “profit forecast” and set out requirements pertaining to these for the purposes of prospectus disclosures.

191. Further ideas about the scope of safe harbour rules for FLS were mentioned. Two respondents set this out in detail by saying they would like to include projections of the financial effects of risks and opportunities, scenario analyses and targeting (qualitative and quantitative) as well as climate transition plans or forecasts, estimates, expectations, quantitative and qualitative statements, financial and non-financial information and forward-looking statements generally. Another one considered that standardised disclosure templates would be useful. Yet another specified that in their view, liability for FLS should only apply in cases of intent, so there should be no protection from liability if a statement is deliberately false or misleading.

192. One respondent argued that high risk transactions, such as IPOs, pre-IPOs and SPACs and argued that those should be excluded because they are prone to promotional exaggeration in their view. They considered that promotional content within the prospectus, such as statements about a company's development and potential or strategic initiatives, should be flagged and fall outside the scope of the protections.

8.8.1.3 Boundaries of immunity

193. Three respondents addressed the boundaries of immunity in detail. One stated that immunity should be lifted if statements are misleading, omit material information or involve recklessness or wilful misconduct. Two others referenced knowingly false statements or fraud.

8.8.1.4 US and UK models

194. Six respondents argued that Europe should align itself with standards in the UK and/or US. One of them specified that they favour the UK model over the American one, as the latter won't apply to IPOs. By contrast, another respondent is more inclined to take inspiration from the US model, arguing that it works well and has been tested many times given that the US is seen as a relatively litigious jurisdiction. This respondent also explained that the US system makes clear that certain terms are used to mark FLS (e.g., "expect", "intend", "plan" etc.) and that the market has adapted to this standard.

8.8.2 SMSG input

195. The SMSG considered that liability risks can be a reason for reluctance to disclose FLS and that the absence of safe-harbour rules in the EU may be seen as a disadvantage compared to the US and UK.

196. It explained that, if a safe-harbour regime for FLS were introduced at EU level, it should be broad enough to cover all types of forward-looking disclosures, including on

sustainability, and that it should protect those normally responsible for the prospectus. The SMSG also underlined that FLS should only be protected as long as they are accurate and not misleading. The SMSG noted that an appropriate standard would have to be agreed.

8.9 Expiry of claims

8.9.1 Responses to the CfE

197. In the CfE, one of the questions (Question 6) was whether there is a need for a European statute of limitations applicable to claims for civil prospectus liability[42]. Such a harmonised set of rules would make it easier to determine how long liability risks associated with prospectuses persist.

198. Seventeen out of twenty respondents to the CfE commented on the matter of a European statute of limitations as part of a harmonised regime on civil prospectus liability. The number of supporters and sceptics almost splits down the middle with eight sceptics and nine open to the idea of introducing a change.

8.9.1.1 General views

199. Eight respondents were sceptical of introducing a European statute of limitations. Four of them argued that it is unnecessary, but did not generally go into much detail as to why. A fifth respondent pointed out that the current system is part of a functioning and well-balanced regime which should not be upset. One pointed to imbalances this could create within national legal systems and said that a limitation period which differs from that applicable to other claims under national civil law would induce plaintiffs to try to bring claims under different rules simply because there is a longer limitation period attached to them.

200. Nine respondents supported harmonising the rules on the statute of limitations. Five of them explained that a statute of limitations is essential and one of them adds that they believe the national differences that currently exist lead to significant legal uncertainty.

8.9.1.2 Start of limitation period

201. In terms of when a limitation period should start to run, two respondents argued that it should commence with the publication of the prospectus or the settlement or trade date at the latest, while another wants to use the end of the offer period. One of these respondents

[42] A statute of limitations basically provides when claims become time-barred and can no longer be enforced.

specified that the beginning of the limitation period should be linked to objective circumstances and not to subjective knowledge of an infraction, because the latter would result in legal uncertainty.

202. On the other hand, three respondents considered that there needs to be a subjective element, and that the expiration period should commence with the actual discovery of a misrepresentation (or when it could or should have been discovered). Two of these respondents specified that they want to combine the two concepts and introduce one (shorter) limitation period commencing when a claimant learns of a misrepresentation, and one (longer) period beginning with publication of the prospectus.

8.9.1.3 Length of the limitation period

203. There were a range of different opinions about the length of the limitation period with eight respondents addressing this.

204. Four respondents supported a limitation period of three years. However, one of them (together with three others) pointed out that five years is more common in the EU, and this was indeed the limitation period proposed by two of them. Another respondent argued that five to ten years was more appropriate.

205. Two respondents proposed a combination of several limitation periods and argued in favour of a three year-period that gets triggered based on subjective circumstances (discovery of the misstatement, or when it should have been discovered) combined with another period based on objective circumstances (publication of the prospectus) of five or ten years.

8.9.1.4 Halting limitation periods

206. One respondent indicated that the expiration period should pause if issuers actively conceal facts.

8.9.2 SMSG input

207. The SMSG stated that the harmonisation of limitation periods could add legal certainty to cross-border offerings but considered that it may be difficult to achieve full harmonisation in this area.

208. The SMSG referenced Article 29(3)(a) of the CSDDD as an example of regulating the expiry of claims for civil liability at the European level and points out that this provision sets a minimum limitation period.

8.9.3 ESMA's Updated Civil Liability Report

209. In the submissions to the Updated Civil Liability Report, the picture across the various jurisdictions is very diverse. A whole range of limitation periods exists amongst Member States, with many having combinations of various periods (often a shorter one that gets triggered by a subjective set of circumstances, such as knowledge of a violation of rights and a longer one that starts to run based on objective circumstances such as the publication of a prospectus).

210. For example, six NCAs (CY, IE, LI, MT, PT, RO) reported their Member States have relatively short limitation periods between six months (PT, RO) and one (LI[43], RO) or two (CY, IE, MT, PT) years. Combining a three year- with a ten year-period seemed to be among the most frequent combinations, with five NCAs (AT, CZ, DE, FI, PL) referring to this. Another six (BE, BU, EE, FR, IT, NL) refer to a limitation period of five years (two of them (BE, NL) combined with an overall limitation of twenty years), another two (LV, SE) to a limitation period of ten. The longest period is thirty years (LU).

211. Seventeen NCAs (AT, CZ, DE, DK, ES, IS, IT, LT, LU, LV, NL, NO, PL, PT, SE, SI, SL) referred to ways to halt limitation periods. Thirteen (AT, CZ, DE, DK, ES, IS, IT, LV, PL, PT, SE, SI, SL), specified that legal proceedings can stop or suspend the limitation period. Two NCAs (AT, DE) stated that negotiations over a claim can also stop or suspend its expiry. Six NCAs (DK, ES, IT[44], PL, SE, SI) said a recognition or acknowledgment of such claim or sending a notice to the obligor (three NCAs: IT[45], NL, SE) would also suspend the limitation period.

8.10 Determining the applicable law

8.10.1 Responses to the CfE

212. In the CfE, ESMA did not ask a specific question about applicable law. Nevertheless, five respondents raised this issue and indicated that they would be open to harmonisation. Two further respondents have touched upon the concept of the so-called 28th regime.

213. Given that this is an area of law on which there is regulation outside of the PR, two respondents pointed to weaknesses in some rules, such as Article 4 Rome II[46] and raised doubts as to whether it should be applied. They explained that this provision creates too

[43] Combined with a 10-year rule
[44] Vis-à-vis certain defendants
[45] Vis-à-vis certain defendants
[46] This provision essentially determines the applicable law by referring to the law of the place where damage occurs.

much uncertainty, with case law pointing to the rules of the place of the aggrieved party's bank account or the place where the secondary market purchase occurred or where the investment contract is signed. Attempts by the European Court of Justice to bring clarity to this were seen as insufficient.

214. Two other respondents considered that the applicable law should be linked to the country of origin or the seat of the issuer. One of them added that in the case of a non-EU-issuer, it could be the law of the place where the prospectus was approved. Another one wanted to use the law applicable to the securities. A third one explained that in case of no or of multiple listings, the law of the place where the security was acquired by the investor should be used.

215. Furthermore, two respondents argued that, for qualified investors, the jurisdiction and applicable law should be determined by the place of the market where the securities are admitted to trading. One of them pointed out that retail investors should not have to litigate abroad, and legal disputes should be concentrated at a specific court. They argued that these investors should be allowed to litigate in their home jurisdiction, if the issuer passported its prospectus there.

216. Finally, two respondents referred to the so-called 28th regime (i.e. the option of providing a set of rules that does not harmonise legislation but can be chosen or opted into by parties). They said this could be tested in relation to civil prospectus liability and raise the question if a system of European Courts should be set up to make sure the rules are not construed differently by courts in Member States.

8.10.2 SMSG input

217. The SMSG also weighed in on the question of determining the law applicable to civil prospectus liability claims.

218. It noted that harmonisation of civil prospectus liability is a long-term effort. Against that background, it considered if introducing a conflict-of-law rule into Article 11 PR might be a way forward in the short-term.

219. It suggested that one option would be to apply the laws of the issuer's home Member State and conceded that this would put a burden on investors and that it would allow for regulatory competition between Member States.

220. The SMSG also raised the question if the approach of a 28th regime might be explored but questions if that is a viable option given the costs and efforts involved and the fact that liability law is not seen as the biggest obstacle to cross-border offerings.

8.10.3 ESMA's Updated Civil Liability Report

221. The submissions that NCAs provided to the Updated Civil Liability Report presented a diverse overall picture.

222. Eighteen NCAs (CY, CZ, DE, DK, ES, FI, FR, GR, IE, IS, LI, LV, SI, CZ, MT, NO, RO, SE) reported that their Member State does not have a specific regime in place but referred to general standards of law or rules of private international law.

223. Nine NCAs (IT, LT, LU, NL, PL, PT, RO, SE, SL) indicated that the applicable law in their Member State is determined in accordance with the Rome Regulations. Five NCAs (IT, LU, NL, SE, SL) mentioned Rome II in particular. This approach is based on either a choice of law or the connecting factors normally used to determine the applicable law, starting with the place where damage occurred (in particular, the location of the investor's investment account), but also looking at other factors depending on the individual case. Three NCAs (BE, EE, IS) specifically pointed to the law applicable to the issuer (based on where it is situated or incorporated), the law of the state where the public issue took place (two NCAs (BE, HR)) or more generally the law of the place where an act of tort has occurred (four NCAs (EE, GR, SI, SL) mention this expressly). Two NCAs (HR, LT) explain that their Member States look at whether the offer or trading (LT) or the transaction happened in their jurisdiction or if investment services were provided there (HR).

8.11 Impact of third countries' liability laws

8.11.1 Responses to the CfE

224. In Question 8 of the CfE, ESMA asked if changes to Article 11 PR could reduce issuers' and offerors' liability concerns regarding the impact of third countries' liability laws. Twelve out of twenty participants responded to this question.

225. Three respondents contended that cross-border liability is an issue that extends beyond the scope of the PR. They (and a fourth respondent) doubted that changes to Article 11 PR could achieve much in this regard or that EU law could have an impact on third countries' liability regimes.

226. One respondent explained that where offers or listings take place both within and outside of the EU, it may be necessary to include additional disclaimers and/or disclosures in prospectuses to satisfy the requirements in third countries. They stated this should be permitted. Together with another respondent, they underlined that issuers should not be held liable for failure to disclose information where they are subject to different standards

in different jurisdictions and thus disclose information outside the EU, which they do not disclose within it (especially in cases, where the EU only requires a short document and the third country a full prospectus).

227. Three respondents suggested amending the rules on private international law in this context. One explained that to lessen the impact of third countries' laws, a special conflicts-of-laws rule is required. In their view, this rule should derogate from Rome II, whose Article 4(1) refers to the place where damage occurred. They added that efforts by the European Court of Justice to provide clarity on this have failed in their view and that the clearer European rules are, the more impact they will have in international dealings.

8.11.2 SMSG input

228. The SMSG considered that additional disclaimers and disclosures may be necessary where offerings or listings are made within the EU/EEA and outside of it.

229. It also noted that where disclosure requirements differ in third countries and investors there receive more information as a result, this should not be construed as a violation of duty vis-a-vis investors in the EU/EEA. In their view, investors in the EU/EEA should not be allowed to claim that additional information provided in a third country constitutes an omission from the prospectus in the EU/EEA. It pointed out that this could become particularly relevant with regard to shorter non-prospectus documents given their reduced length.

8.12 Use of class action in civil litigation

8.12.1 Responses to the CfE

230. One issue that was also raised by two respondents to the CfE (although it did not contain a specific question on this) is the use of class action. One of these respondents mentioned class action as a means of private enforcement of prospectus rules. They further pointed to the US and said that plaintiffs are seen as "private attorney generals" there and that this approach would be helpful in Europe as private claims are perceived as a more potent deterrent than administrative supervision. One of these respondents contended that there should be special legal provisions on class actions concerning primary market liability for misrepresentations.

8.12.2 ESMA's Updated Civil Liability Report

231. Nineteen NCAs (AT, BE, BG, DK, HR, HU, IE, IS, IT, LT, LV, MT, NL, NO, PL, PT, RO, SE, SL) reported that class action is available in their jurisdiction (even though it is not often being used in three (IE, LV, SE)). By contrast, seven NCAs (CY, CZ, EE, FI, FR, LU[47], SI) reported that no class action is available in relation to civil prospectus liability. At the same time, six NCAs indicated that the collective pursuit of litigation claims is possible using various legal mechanisms, such as investors' (FR) or consumers' -associations (DE, ES, GR) or other organisations (AT, LV).

[47] In LU, such legislation has been brought underway.

9 Annex IV: Responses to the Call for Evidence

Please find 19 responses to the CfE here (one participant has asked that their response remain private).

10 Annex V: ESMA's Report on Civil Liability regimes in EEA Member States in relation to the Prospectus Regulation (ESMA's Updated Civil Liability Report)

The updates to the Liability Report have been collated into a single document; please find the link here [we will include the link to this document the moment it is published; for the time being, we're supplying this text in a separate Word-document: ESMA32-1171959631414].

Please note that this is not an overall update of ESMA's Liability Report, since the Report dealt with different kinds of liability (incl. e.g., administrative liability), whereas the updates provided here only deal with civil liability.

11 Annex VI: (Advice of the Securities and Markets Stakeholder Group)

16 January 2025
ESMA24-229244789-5236

Securities and Markets Stakeholder Group

Advice to ESMA

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

Table of Contents

1. Executive Summary

In this response to ESMA's Call for Evidence the SMSG notes that Europe's non-uniform prospectus liability regime may lead to risks, inefficiencies, and differences in processes and practices that may act as a certain barrier to the development of our capital markets.

At the same time, while a more harmonised prospectus liability regime in Europe could bring advantages, the political will and efforts required to reach consensus on this matter should not be underestimated. However, we do hope that recent steps taken in the fields of taxation (FASTER) and insolvency procedures may have provided us with useful experiences as we look for a way forward.

The SMSG notes that although liability regimes presently differ among Member States, these differences are normally managed reasonably well in practice. From a practical perspective, the problem may not be considered as acute, and our work on this should not shift our focus

from addressing other obstacles such as our (lack of) investment culture, appetite for currency exposure (Euro vs non-Euro MS), risk appetite, and home bias.

Additionally, if material differences were to be found, and we hope to learn more about this through the Call for Evidence, it should be kept in mind that changes to existing regimes may have negative effects on the regimes in some Member States and positive effects on other Member States. Another important issue is the principle of subsidiarity. Considering these challenges, in our response we present possible alternative ways forward in relation to some of the questions raised.

We note that cross-borders offerings currently require the consideration of liability regimes of all Member States, as applicable law also depend on the investors. It should here be kept in mind that it would not be sufficient to harmonise liability rules in this area, as an issuer must observe liability rules e.g. in the Transparency Directive and the Market Abuse Regulation. In addition, we discuss the fact that even if rules were to be harmonised and worded in the same way they may still be interpreted in different ways in different Member States.

In our response, we further discuss the situation and consequences of making offerings or listings both within the EU and into third countries (outside of the EU/EEA) as – in such cases – it may then be necessary (and should be allowed) to include additional disclaimers and/or disclosures in the prospectus to comply with third-country rules or practices.

Finally, we discuss the potential benefits of introducing a harmonised safe harbour regime under the Prospectus Regulation. We note that such safe harbour provision would have to be balanced and require safeguards to ensure that any forward-looking disclosures are accurate and not misleading.

2. Introductory remarks

The SMSG notes that the fact that Europe today lacks a uniform prospectus liability regime may lead to risks, inefficiencies, and differences in processes and practices that may act as a barrier to the development of our capital market. This lack of harmonisation may place Europe at a disadvantage when compared to other jurisdictions with more harmonised liability systems.

As an example, there is a lack of harmonisation on which persons are liable for any misstatement or omissions in a prospectus. In some member states certain persons (such as the issuer) may be liable for the entire prospectus, in some member states they may only be liable for the part of the prospectus for which they are specifically responsible, and in some member states there is no concept of “split responsibility” for parts of the prospectus.

Different prospectus liability standards across the EU may consequently result in different, better, or potentially worse, outcomes for different investors in the same security, based on where they are domiciled where the securities are acquired, or in which way they are so acquired.

For example, a resident of one member state may be better protected if they have purchased securities based on a prospectus that contains material misstatements or omissions than a resident of another member state, even if they have both invested in the same security and on the same exchange. Such an outcome may not only be unfair but may also go against other benefits coming out of initiatives such as the Capital Markets Union and the Savings and Investments Union.

While we as the SMSG can see the advantages with having a more harmonised prospectus liability regime in Europe, we do not underestimate the amount of political will and efforts required to reach a consensus on this matter which poses subsidiarity questions and touches on rules relating also e.g. to company and insolvency law. Rules in the latter areas have in the past been difficult to change, but valuable experiences may recently have been made in the taxation (FASTER) and insolvency procedure fields.

3. General 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?

The SMSG notes that while liability regimes presently differ among Member States, these differences are normally managed reasonably well in practice. The problem may from that practical perspective not be considered as acute. However, if material differences were to be found (we hope to learn more about this through the Call for Evidence) any changes to the existing regimes may have negative effects on some and positive effects on others.

As an example, there seems to be no EU-wide harmonisation of the concept of “fault”. Some Member States may impose strict liability, while in other Member States administrative, management or supervisory bodies of the issuer may face personal external liability. This could then be the case even if they were not personally involved in preparing the prospectus. In many Member States external liability of an issuer's administrative, management or supervisory bodies does not apply, or applies only in exceptional cases, such as when such person has a particular personal economic interest in the respective issuer.

We consider that while harmonisation could be desirable in theory and serve as a long- term ambition, there are challenges that will have to be considered. An important issue is here the

principle of subsidiarity, as the EU does not have exclusive competence in this field. It is thus a political question if there are objectives to be achieved that cannot be achieved at Member State level.

Against this background, the SMSG has considered alternative ways forward. One way could in the short term be to introduce a conflict of law rule in art. 11 of the Prospectus Regulation, governing liability for prospectus, instead of overhauling existing liability regimes. Another way forward could be to introduce an optional 28th regime, applicable only to cross border offerings. However, as regards the latter option the question is if this would be a viable option considering the costs and efforts involved, and as cross border offerings are for other than legal reasons not that common in practice.

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)?

The SMSG leaves this question to other respondents to the Call for Evidence.

4. Standard parameters for liability

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

The SMSG finds it difficult to see who the beneficiary would be of such specification. In most if not all jurisdictions the person entitled to claim damages is the one who suffered damages because of misleading statements or omissions in a prospectus. We do not see any reason to extend this to third parties or to limit this to, for example, investors at the moment when a prospectus is published.

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?

The SMSG considers that it may be difficult to establish a threshold that would be acceptable to all Member States, and even if the rule itself were to be the same it may be interpreted in different ways in different Member States. If a rule is nevertheless considered, the threshold ought to be liability for material misstatements and material omissions, where material means material for the purposes of the Article 6(1) necessary information test. Reference may likely also be made to Article 23(1) [i.e. material omission triggering a requirement to supplement a prospectus]. Moreover, liability should only be based on intentional or negligent failures to comply with the disclosure requirements.

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 SMSG considers that it may be difficult to establish a rule regarding burden of proof, which is a core part of national legal systems, acceptable to all Member States. In addition, even if the rule itself were to be worded in the same way, it may still be interpreted in different ways in different Member States.

A question is in para. 14 asked, which we find concerning, whether a causal link should be presumed between someone's actions and damages suffered or between a person's conduct and culpability. Question is if this serves to indicate that an investor would merely need to demonstrate a loss linked to an investment and an inaccuracy in a prospectus for the offeror or issuer and, where applicable, their adviser, to be liable?

Presently an investor normally needs to demonstrate that a loss the investor suffered was caused by an inaccuracy in the prospectus. If this link is not maintained, a loss could be caused in whole or in part by anything else and the investor would have a case against the issuer. In practice and as a general principle of law, it is normally impossible to evidence a negative fact, i.e. impossible for the issuer to evidence that the suffered damage has no causality with a statement in the prospectus.

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

The SMSG considers what while a harmonisation of limitation periods could serve to add some legal certainty to cross-border offerings, it may be difficult to achieve full harmonisation in this area.

Reference could here be made to Article 29(3)(a) of the CS3D [(EU) 2024/1760] which only sets the minimum limitation period. However, in this case, a minimum harmonisation along these lines would likely not bring sufficient legal clarity.

5. Liability's impact on cross border offerings

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.

The SMSG would not rule out further harmonisation of the rules on civil liability could increase legal certainty which in turn could make our capital markets more attractive. This said, it is not clear if and if so to what extent such uncertainty serves as a deterrent to cross-border offerings.

From a practical perspective, uncertainty in this and other areas are in practice mitigated e.g. using legal opinions and legends in offering documents. There are also other actions that are more important to undertake and areas to tackle if we want to increase cross- border offerings, such as our (lack of) investment culture, appetite for currency exposure (Euro vs non-Euro MS), risk appetite, and home bias.

We note that further harmonisation of civil liability could potentially lead to the adoption of a 28th regime. This should however be weighed against the fact that currently cross- borders offerings require the consideration of liability regimes of all Member States, as applicable law also depend on the investors. We must here keep in mind that issuers normally do not have full control over who buys its securities on the secondary market.

Prospectus liability also has close links to liability provisions in other regulatory frameworks with which an issuer must comply, such as the Transparency Directive and the Market Abuse Regulation. This means that an omission of material information from a prospectus of a listed issuer may potentially also constitute an omission of material information from a periodic report or from an ad-hoc disclosure of inside information. Harmonisation in the area now contemplated may thus have as a consequence that the liability situation of issuers may become more, not less, complex.

Against this background, the SMSG is of the opinion that if an initiative were to be taken to harmonise prospectus liability, such liability should only cover intentional or negligent acts, there should be materiality test regarding the omitted information, a causal link should be required between the omission of material information and the damages suffered by the claimant, and compensation for damages should not lead to overcompensation.

An alternative way forward, at least in the short-term, could be to simplify the prospectus liability regime by adding a provision stating that the liability rules to be applied are the ones of the issuer's home Member State. While this would put a certain burden on investors, it would at the same time allow regulatory competition between Member States, so that we find a good balance in our liability rules.

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.

The SMSG considers that when an offering or listing is made both within the EU and into third countries (countries outside of the EU/EEA) it may be necessary and should be allowed to include additional disclaimers and/ or disclosures in the prospectus to satisfy rules or practices of those third countries.

When an offering or listing of securities takes place in a third country, issuers may also be required to issue a different form of prospectus or, where the Prospectus Regulation requires a shorter non-prospectus document, to publish a separate prospectus-like document with additional information for use in that third country, for legal or commercial reasons.

In case this results in investors in such third country receiving more information than investors in the EU, it is important to ensure that this does not give rise to additional liability risks to the issuer in respect of the EU offering. EU investors should thus not be able to claim that additional information provided to investors in a third country is in and of itself a material omission from the prospectus or shorter non-prospectus document. We would here also like to point to the fact that this is an issue that could be especially acute with respect to shorter non-prospectus documents, given their (limited) length.

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.

The SMSG considers that the regimes are not comparable, and it should thus not be replicated.

6. Safe Harbour Provision

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.

The SMSG considers that liability risks can be a reason for a reluctance to disclose forward-looking information. The absence of a safe harbour under the Prospectus Regulation may from this point of view compare unfavourably with the position in some other countries such as the UK and, to some degree, the US.

At the same time, as noted elsewhere in our response, we note that prospectus liability in general and prospectus liability for forward-looking statements more specifically cannot be fully separated from liability of other disclosures.

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

The SMSG considers that a safe harbour provision, if introduced at EU level, would have to be balanced. It should be broad enough to cover all types of forward-looking disclosures, including on sustainability, typically included in a prospectus, to persons normally responsible for

a prospectus, or parts of it, and to prospectuses as well as other similar documents and advertisements used in offerings.

Depending on the nature of the information that is subject to the safe harbour, it would also be appropriate to include and discuss key assumptions and inputs for such forward-looking statements. It will also be necessary to ensure that such disclosures are accurate and not misleading, meaning that an appropriate standard would need to be found and agreed.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 10 January 2025

[signed]	[signed]
Giovanni Petrella Chair Securities and Markets Stakeholder Group	Urban Funered Rapporteur