Svensk Värdepappersmarknad
Swedish Securities Markets Association

Stockholm, 19 December 2024

The Swedish Securities Markets Association (SSMA)[1]

Response to

ESMA´s call for evidence

on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation (the CfE)[2]

1. General comments

SSMA welcomes the opportunity to respond to the CfE.

Generally, we do not support a development of harmonisation of rules on civil liability pertaining to securities prospectuses in the Union.

In Sweden, there may only on rare occasions be discussions on implications for foreign representatives acting on the board of directors of a Swedish company. Further, we do not think that a low number of cross border offerings is caused by lack of harmonised rules on civil liability in the Union but rather depend on other things, such as differences in culture, credit appetite and appetite for FX-exposure[3].

Developing a harmonised liability regime in the Union would also be extremely complex given (among other things) the level of detail that would be required on various issues to achieve a workable regime with consistency and clarity for investors as well as offerors.

2. Questions

2.1 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?

No, we have not identified issues in respect of civil liability for information provided in securities prospectuses.

Only on rare occasions there may be discussions on implications for foreign representatives acting on the board of directors of a Swedish company.

[1] The SSMA is a trade association representing the interests of investment firms active on the Swedish securities market, hereinafter referred to as "SSMA" or "we".

[2] ESMA32-117195963-1257. The definitions, if any, used in this response have the same meaning as in the CfE.

[3] FX-exposure is the risk that a business faces due to fluctuations in foreign exchange rates.

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)?

No, not any leading judicial decisions.

We are aware of three judicial decisions where Swedish courts have handled issues arising from liability of shareholders (or third parties) according to 29:1–2 in the Swedish Companies Act (the only provisions handling prospectus liability in Swedish law). These decisions are (i) the BDO judgement (NJA 2014 p. 272), which mainly concerned the auditor's liability for damages against someone other than the company (i.e. shareholders or third parties), due to deficiencies in the audit of an annual report, (ii) the Countermine judgement (HovR 1845-12), where the issue of board members' liability for allegedly misleading information in the listed company Countermine Technologies AB was dealt with and (iii) The Hudya judgement (TR 10146-20) where the issue of prospectus liability of the board members of the company Hudya AB was dealt with.

However, the above decisions, and case law in general, do not deal with all the criteria required for liability according to 29:1–2 in the Swedish Companies Act. In the BDO judgement, the Supreme Court (Swe: *Högsta domstolen/HD*) did e.g. not address the issue of damage calculation. In the Countermine judgement, the Court of Appeal (Swe: *Hovrätten/HovR*) never examined questions of negligence and adequacy and in the Hudya judgement the District Court (Swe: *Tingsrätten/TR*) did not explicitly address the question of whether the injured party was eligible for compensation. Having said that, in our opinion there are no leading judicial decisions holding an issuer liable for incorrect information in the prospectus.

2.2 Standard parameters for liability

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

No.

From a Swedish law perspective, it may be unclear who that would benefit and it might contravene local Swedish law, which is an argument for letting local Swedish legislation as well as legal principles and case law handle this.

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?

No, see Q3.

Also, it may be hard to establish thresholds acceptable to all Member States.

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?

No, see Q3.

However, please see Q9 below.

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

No, see Q3.

2.3 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**.

No, in our view, further harmonisation in the Union is not needed.

We are unfamiliar with the argument that lack of harmonised rules on civil liability in the Union are reducing the number of cross border offerings.

Our view is that cross border offerings – at least regarding equity securities - are already very common in terms of offers of securities whose denomination per unit exceeds EUR 100,000 (i.e. where a prospectus is not necessary) and the common procedure is to allow investors from all Member States to participate. Also, in terms of offerings to investors applying for securities of less than EUR 100,000 (retail), the administrative costs of managing a retail tranche in an additional Member State (especially outside the Nordics), including passportation and any translation necessary, compared to the relatively low need for additional demand and/or interest from retail investors outside of the Nordics, in a vast majority of cases means that no offering to retail will be made to such Member States (unless special circumstances apply, e.g. a large ownership base in a rights issue).

The more evident reasons for a low number of cross border offerings, in our Swedish perspective, are (among other things):

- cultural differences (investors-issuer),
- cultural differences (arranger-issuer),
- differences regarding appetite for FX-exposure (typical EUR investors are reluctant to take a local currency exposure like SEK and likewise SEK investors avoid NOK, DKK and similar), and
- differences regarding credit appetite.

Hence, we do not see that harmonised rules on civil liability in the Union is a relevant factor for cross border offerings, and given the changes made in PR, other administrative hurdles will be reduced (while commercial and cultural factors will remain).

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.

No.

We are unfamiliar with this as an issue.

2.4 Comparison with liability regime under the Markets in Crypto-Assets Regulation

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.

No, not in general.

From a Swedish law perspective, we think one can fall back on general Swedish legal principles. Possibly, at a Union level, there is a point of clarifying as to the burden of proof (in line with the Markets in Crypto-Assets Regulation) under Article 11 PR. However, there would be no intrinsic value of such clarification unless each Member State´s rules regarding burden of proof differ to the same extent – which we do not have any knowledge about.

2.5 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.

No.

In Sweden, forward-looking information in securities prospectuses is generally kept to a minimum and preferably avoided. If such information is included, it could, depending on the type of business in question, address e.g. order inflow or regulatory approval of medicines.

However - although the leeway for liability issues when it comes to forward-looking information could possibly contribute to greater caution in publishing forward-looking information – we are not of the opinion that liability risks are driving non-disclosure of forward-looking information.

With that said, a safe harbour provision could perhaps contribute to companies becoming less cautious about including forward-looking information in securities prospectuses. It should however be noted that in a Swedish law context, compensation for damages in liability cases are generally low compared to a US/UK law context, which may also influence how Swedish companies view a safe harbour provision.

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

We are cautiously positive to have a safe harbour provision introduced at Union level.

On the one hand, forward-looking information is relevant in an investor perspective, and a safe harbour provision might lead to an increased number of such information (see Q10).

On the other hand, forward-looking could increase the uncertainty of the information in the prospectus to a level that may not be beneficial for investors. Also, a safe harbour provision may allow issuers to present a more favourable business case than the reality which "should" affect the interest among investors for the relevant security and affect the pricing of the security. It is therefore of great importance that forward-looking information is well substantiated and – if a safe harbour provision is introduced at a Union level – this should be reflected in scope as well as requirements of such provision.

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