ESMA Call for evidence (CfE)
Listing Act review | Civil Liability - Prospectus Regulation

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

—Date: 31 December 2024

—Ref: https://www.esma.europa.eu/press-news/consultations/call-evidence-potential-further-steps-towards-harmonising-rules-civil

Contact: policy@betterfinance.eu

Executive Summary

BETTER FINANCE welcomes ESMA's Call for Evidence on civil liability provisions under the Prospectus Regulation (PR). This consultation presents a critical opportunity to harmonise liability rules across Member States, addressing disparities that weaken investor protection and hinder the efficiency of EU capital markets. Divergences in fault standards, limitation periods, recoverable damages, and procedural rules create significant barriers to cross-border redress for retail investors and impose unnecessary compliance burdens on issuers.

BETTER FINANCE strongly supports harmonising liability standards to strengthen investor confidence, foster cross-border financial integration, and reduce regulatory fragmentation. Key recommendations include the establishment of a uniform 5 to 10-year statute of limitations for initiating claims, complemented by a 15-year limitation period to preserve underlying rights. This dual framework would provide retail investors with sufficient time to bring forward claims, particularly in complex prospectus cases where issues may surface years after issuance. Harmonising these rules would also simplify cross-border claims, instil investor confidence, and create a more consistent redress framework across Member States.

Moreover, BETTER FINANCE underscores the urgent need to address the disparity between the Markets in Crypto-Assets Regulation (MiCA) and traditional securities frameworks, such as the PR and the Market Abuse Regulation (MAR). MiCA provides clearer liability standards, which risks incentivising speculative digital investments at the expense of real economy financing. Aligning and strengthening liability provisions across these frameworks is essential to maintaining market trust, fostering fair competition, and ensuring that capital flows support productive investments.

Finally, BETTER FINANCE offers views on the potential introduction of an EU-wide safe harbour provision for forward-looking statements. While such a framework could enhance transparency, it must include stringent safeguards to protect investors. Safe harbour protections should apply only to factual, clear, and specific statements, accompanied by detailed risk disclosures. Protections must void automatically if

statements are misleading, omit material information, or involve recklessness or wilful misconduct. High-risk contexts, including IPOs, SPAC-related issuances, and certain ESG claims prone to greenwashing, should be excluded or clearly defined to preserve investor trust.

Harmonising liability rules under the PR should take precedence, providing a foundation for a unified and effective redress mechanism across the EU. A tailored safe harbour provision could complement this framework if it upholds transparency and accountability. Together, these measures would promote cross-border participation, strengthen the integrity of EU capital markets, and ensure investor protections remain robust. BETTER FINANCE reiterates that stronger investor protections – not diluted accountability – are key to fostering trust, competitiveness, and increased retail participation in both primary and secondary markets.

General Statement on Redress Mechanisms

BETTER FINANCE underscores the importance of harmonising civil liability rules under the Prospectus Regulation (PR) and aligning them with the Market Abuse Regulation (MAR) to ensure reliable and efficient redress mechanisms for EU investors. The PR governs pre-issuance documentation, while MAR addresses disclosures and market integrity throughout the lifecycle of securities. Together, these frameworks are vital for investor protection, yet significant gaps – particularly for cross-border claims – remain.

For MAR, the Representative Actions Directive introduces collective redress mechanisms; however, gaps persist for direct shareholders and bondholders, especially in cross-border claims. MAR remains largely outside the scope of European harmonisation, with the absence of procedural frameworks and qualified representation entities across Member States continuing to undermine investor redress.

The PR similarly suffers from insufficient cohesion in its civil liability framework, lacking the necessary cross-border uniformity to provide retail investors with consistent outcomes in different jurisdictions. This fragmentation makes it challenging for investors to pursue claims effectively and for issuers to navigate compliance obligations with certainty.

To address these challenges, BETTER FINANCE calls for reforms to streamline and clarify EU standards under the PR and MAR by promoting transparency, enhancing investor confidence, and, to urgently ensure a consistent, accessible redress framework across EU Member States for direct investors. These reforms are crucial for creating a robust, transparent, and investor-friendly capital market that meets the demands of modern financial systems.

- ⇨ *Please refer to our consultation response below*

Answers to ESMA's CfE Document | Questions

Civil Liability – Prospectus information

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?***

Whilst the Prospectus Regulation governs the pre-issuance stage by requiring accurate, detailed disclosures, whereas the Market Abuse Regulation (MAR) applies post-issuance, focusing on insider information and market conduct. Despite their distinct scopes, overlaps can arise: a misleading or incomplete prospectus summary can trigger liability under both PR (Articles 6 and 11) and MAR (Articles 12 and 17). Yet, the absence of uniform rules to determine fault, causation, or the scope of damages under the Prospectus Regulation leads to inconsistent outcomes and undermines investor protection across the EU. Several examples illustrate these discrepancies. Member States such as Germany require proof of negligence, while others like France impose strict liability, creating uncertainty for both investors and issuers. Statutes of limitation range from three years in Austria to even shorter windows in some countries (e.g. Belgium), causing many investors to lose the opportunity to seek redress if they discover misrepresentations too late. In the case of damage calculations, some jurisdictions (e.g. the Netherlands) allow broader, consequential losses, while others (e.g. Greece) focus on material damage only, thereby limiting investor compensation. High-profile proceedings like Austria's Immofinanz show how national courts can arrive at different interpretations of damage and liability requirements, and the Estonian Securities Market Act even confines redress to direct purchasers, excluding secondary market investors. These variations become more problematic in cross-border cases, as investors face complexities around which jurisdiction's courts have authority (Brussels I-bis) and which national laws apply (Rome II). The newly adopted Directive on Representative Actions does not fully resolve the conflict-of-laws gap, limiting the potential for large-scale, collective redress.

BETTER FINANCE maintains that uniform prospectus liability rules would help resolve these recurring conflict-of-laws challenges, ensuring investors in the same security receive comparable protection irrespective of their place of residence or the location of their bank account. We advocate for standardising liability standards, introducing a ten-year limitation period for initiating claims from the moment investors become aware of misleading information, while incorporating a 5 to 10-year statute of expiery/limitations to ensure procedural fairness and preserve rights in complex or concealed cases (while preserving extensions if issuers delay disclosures). Besides, there is a need to introduce a balanced burden of proof that presumes causation once false or incomplete disclosures are shown. BETTER FINANCE equally calls for broader damage eligibility – encompassing both direct and consequential losses – and the mutual recognition of judgments to streamline cross-border enforcement. Such harmonisation would reduce discrimination between investors in different Member States, create predictability for issuers, and generally fortify investor confidence in the EU's capital markets.

Liability of Issuers for incorrect Information

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)?***

Across Member States, there have been several notable instances where issuers were found liable for misleading or inaccurate information in a prospectus; most prominently the Austrian *Immofinanz* proceedings, involving equity securities, and Germany's *Wirecard* affair; underscored how differing legal standards affect causation and fault assessments. These cases highlight the uneven judicial landscape that retail investors often face, such as limitation periods, recoverable damages, and evidentiary burdens that can vary significantly from one jurisdiction to another. We view this as a patchwork that not only complicates legal strategies for aggrieved investors (when possible) but can also reduce transparency for issuers, who may face uncertainty to predict their exposure under divergent national rules – all those aspects can result in high legal fees and complex proceedings.

Such disparities underscore BETTER FINANCE call for uniform liability provisions under the Prospectus Regulation (see Q1). We note that where courts in one Member State may impose strict liability or accept broad definitions of recoverable damages, another may require proof of negligence or limit compensation to direct losses only. This lack of harmonisation raises fairness (and market clarity) concerns – an investor in one country could be left without redress, while an investor in another, dealing with the same misstatements, might be fully compensated. Harmonised liability standards, coupled with a uniform limitation period of at least 5 to 10 years for initiating claims and a 15-year statute of limitations to preserve rights in complex or delayed cases, would enhance both clarity and predictability for retail investors and issuers alike.

Further measures to consider would include clarifying rules on evidence and causation to ensure that investors in all Member States benefit from equivalent procedural safeguards. Moreover, we would agree that a centralised registry of leading judgments relating to prospectus liability should be established at the EU level so that court decisions are readily accessible across different jurisdictions. Taken together, these steps would streamline litigation strategies, promote consistency in judicial outcomes, and foster the market confidence essential for broader cross-border participation in EU capital markets.

Standard Parameters for Liability

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

To ensure consistency and protect retail investors' rights across all Member States, Article 11 of the Prospectus Regulation should explicitly define who is entitled to claim damages. Currently, the absence of clear eligibility criteria creates fragmented outcomes, as some jurisdictions limit claims to direct purchasers, while others allow indirect or secondary-market investors to seek redress. BETTER FINANCE, therefore, recommends a provision stipulating that all impacted investors – whether they purchased the securities directly during the initial offering or subsequently on secondary markets – be entitled to compensation if they suffer losses stemming from misleading, inaccurate, or incomplete prospectus information.
The term "impacted investor" should encompass not only refer those who hold securities on ones name (operating through nominee or omnibus accounts) – but specifically referr to the beneficial owner(s). This can ensure that the actual end investor (beneficiary), rather than merely the intermediary, retains the right to claim damages – and be economically compensated, while preventing legal or structural barriers from undermining investor protection. Clarifying such provisions in Article 11 would reduce legal uncertainty across the EU and prevent discrimination based on factors such as an investor's place of residence, account structure, or the channel through which the securities were acquired. Together, these clarifications would 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.

Degree of Fault / Culpability (Art. 11)

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?*

Establishing a unified standard of fault would certainly help reduce uncertainty retail investors, but also issuers currently face due to widely differing national liability regimes. BETTER FINANCE views the introduction of a uniform negligence standard for prospectus liability important. It shall require issuers to exercise a level of reasonable diligence consistent with best practice via established standards. Such a baseline of 'reasonable prudence' could ensure simple and unimpactful oversights are not treated as severely as reckless or wilful misconduct, which should remain subject to stricter sanctions or liability.

Beyond simplifying claims under Article 11, this approach would also dovetail with any safe harbour provisions for forward-looking statements by making clear that fraudulent or deliberately misleading behaviour is outside the scope of protected disclosures. Explicitly linking a harmonised negligence rule to the burden-of-proof framework (potentially through a presumption of causality in favour of investors once a misstatement is established) would certainly further help retail investors, who typically have limited resources to obtain evidence. Moreover, aligning fault standards across

Member States benefits cross-border offerings by fostering consistent expectations for disclosure obligations. Ultimately, a well-defined degree of culpability, paired with robust enforcement mechanisms, would enhance investor protection, encourage broader market participation, and bolster trust in the EU's capital markets.

Burden of Proof (Art. 11)

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?***

Yes, we think that introducing a clear EU rule on the burden of proof would significantly enhance retail investors' ability to secure redress in prospectus liability disputes. Under the current patchwork of national rules, investors generally must prove the issuer's misconduct, causation, and their resulting losses – an especially complex burden given the technical nature of prospectus disclosures, entailing important legal fees, notably if collective action is not facilitated. BETTER FINANCE therefore suggests that once an investor demonstrates, by reference to relevant regulatory approvals or any official filings, that a prospectus statement is materially misleading or incomplete, a presumption of causality should apply, thus shifting the burden to the issuer to show that the investor's losses were unrelated to the identified misstatements. This mechanism ensures that only claims backed by a basic evidentiary threshold can trigger the presumption, mitigating any risk of frivolous litigation.

Such a provision would dovetail with other suggested reforms – particularly the move toward a unified negligence standard – by creating a coherent EU liability framework. It would also address investor concerns about the high cost and complexity of proving causation, especially in cross-border scenarios. Noting that this presumption does not aim to open the floodgates to baseless claims but rather to ensure to level the playing field in cases where investors, lacking insider knowledge or resources, would otherwise struggle to challenge sophisticated issuers.

Harmonisation of Expiry of Claims Rules (Prescription)

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

The current patchwork of national rules concerning both statutes of limitations and the complete extinguishment of claims has led to significant legal uncertainty, particularly for retail investors with cross-border holdings. In some Member States, only the enforceability of the claim ends after a set period, whereas in others the underlying right to claim is fully extinguished, leaving no recourse at all. This inconsistency is particularly problematic in complex securities cases, where misleading or incomplete information might emerge only years after the investment was made.

BETTER FINANCE advocates for a harmonised approach under the Prospectus Regulation, introducing a dual framework of a minimum 5 to 10-year limitation period for

initiating claims and a minimum of 15-year statute of limitations (expiery) to ensure procedural fairness. This approach reflects the reality that many prospectus deficiencies are only uncovered over time – often as market conditions change or new information comes to light. This window would better reflect the reality that many prospectus deficiencies are only uncovered over time – often as market conditions change or fresh information comes to light. To prevent issuers from benefiting if they deliberately withhold or conceal pertinent facts, policymakers should also include a tolling provision that pauses or extends the limitation period until any active concealment ends. Adopting these measures across all Member States would reinforce fairness, ensure consistency for cross-border retail investors, and bolster overall confidence in Europe's capital market.

Liability's Impact on Cross-Border Offerings

Q7) *Is Further Harmonisation of Civil Liability Rules for Prospectus Information Needed?*

We believe it is indeed needed. Although the Listing Act 2024 introduced limited clarifications on liability (particularly regarding prospectus summaries for issuers), it did not truly address the deeper divergences across Member States in areas such as standards of fault, limitation periods, and damage calculations. As a result, issuers seeking to offer securities in multiple jurisdictions must still navigate disparate national liability frameworks, each with its own procedural rules and deadlines for claims. For example, a company preparing a cross-border equity issuance might face different evidentiary thresholds and damage caps in each Member State, significantly increasing legal costs and uncertainty when drafting or updating its prospectus. Meanwhile, retail investors confronting these patchwork rules can be deterred from pursuing legitimate claims outside their home jurisdiction, undermining market conduct and creating opportunities for regulatory arbitrage – thus perpetuating an uneven playing field.

BETTER FINANCE therefore strongly supports further harmonisation of civil liability rules under the Prospectus Regulation By establishing uniform standards – including harmonised fault criteria, a 5 to 10-year limitation period for claims, and a minimum of 15-year expiery periods – legislators would reduce legal fragmentation for both issuers and investors, ensuring fairness and consistency in cross-border redress mechanisms. This single set of rules would potentially lower transaction costs, enhance the predictability of legal proceedings, while enabling retail investors across the EU to access consistent redress mechanisms. Ultimately, this combination of legal clarity for market participants and simpler claim procedures for retail investors would foster a more integrated capital market, build trust in cross-border offerings, and fulfil the EU's broader objective of ensuring accessible and efficient financing for companies throughout the single market.

Liability and Third Country Impact

Q8) ***Can Amendments to Article 11 Help Reduce Issuers' Liability Concerns, Especially with Third-Country Impact?***

Clarifying and strengthening the liability provisions in Article 11 would allow the EU to set a high standard of investor protection while providing a clear, predictable framework that facilitates cross-border offerings; those shall include those by third-country issuers. Currently, issuers from outside the EU can also significant face legal uncertainties when they attempt to navigate multiple (and sometimes conflicting) liability regimes across Member States. By introducing uniform liability standards; covering degrees of fault, time limits, and the scope of damages the EU could help third-country issuers fully understand and comply with their obligations, thus reducing legal risks, compliance and transaction costs.

A harmonised approach would also reinforce the EU's competitiveness in global capital markets. Clear guidance on how EU liability rules interact with third-country regimes, along with principles like proportionality and the mutual recognition of judgments, would streamline compliance, increase cross-border market engagement, and maintain consistent protections for retail investors. In practice, this balanced model shall ensure that investors remain well-protected, while trusted issuers from third countries consider listing in Europe under clear rules. By establishing the EU as a secure and transparent market by default, lawmakers can encourage greater global participation from both investors and issuers. This would expand investment opportunities, foster deeper cross-border financial integration, and enhance the overall attractiveness of the EU's capital markets, setting a high standard for market integrity and trust.

Liability Provisions – Consistency with PR & MiCA

Q9) ***Should Article 11 of the Prospectus Regulation (PR) be amended to replicate the liability regime under Article 15 of the Markets in Crypto-Assets Regulation (MiCA) more generally?***

We agree there is a strong case for amending Article 11 of the PR to align it with the liability regime under Article 15 of MiCA. Such alignment would address inconsistencies and ensure that investor protections for traditional securities are not weaker than those available for crypto-assets, which would otherwise produce an uneven playing field. MiCA establishes a prescriptive and uniform liability framework, clearly defining fault, burden of proof, and the scope of damages, thereby offering retail investors transparent and consistent avenues for legal claims. By contrast, the PR delegates critical details – such as fault thresholds, evidentiary requirements, and relief mechanisms – to individual Member States, creating legal uncertainty for both issuers and investors.

From BETTER FINANCE's perspective, replicating those key elements of MiCA in the PR would not harmonise liability rules across asset classes, enhance protections for retail investors, and improve logical consistency. Besides being inconsistent, we believe it is

ultimately detrimental to offer clearer liability standards for crypto-assets than for traditional financial instruments that underpin the real economy. A scenario where crypto-assets appear more transparent and legally secure than real-economy equity or debt instruments should be avoided. Ensuring an equitable and sufficiently protective regime for all asset classes would foster balanced market development, deter regulatory arbitrage toward high-risk speculative investments, and maintain a level playing field for issuers seeking financing for productive economic activities.

Further aligning these regimes would not only bolster legal certainty, reduce regulatory arbitrage (forum-shopping), and strengthen investor trust in EU capital markets, it would also boost companies' financing by establishing a single, uniform, high-standard liability framework for all prospectus-like disclosures. Such a reform would benefit market participants and consumers alike while supporting equity financing, rather than prescribing (apparent) stronger investor protection pertaining to crypto-assets alone.

Safe Harbour for Issuer (forward-looking provision)

Q10) ***Should Liability Risks and Non-Disclosure Concerns Prompt a 'Safe Harbour Provision' to enable companies to issue more Forward-Looking Information? 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.***

In certain instances, liability risks indeed discourage companies from sharing forward-looking statements, potentially reducing meaningful disclosures about future prospects. While issuers often fear litigation if their projections later prove inaccurate, overly rigid liability regimes can also deprive investors of valuable insights into a company's strategic direction. Meanwhile, many issuers feel incentivised to emphasise only optimistic scenarios, risking sharing incomplete or biased disclosures. Therefore, a carefully tailored 'safe harbour provision' is necessary to reconcile these concerns, fostering more transparent forward-looking information without compromising investor protection. To address this issue, a carefully tailored safe harbour provision could strike a balance between encouraging transparency and maintaining investor protection. By shielding issuers from liability for forward-looking statements – provided they meet specific disclosure requirements – this framework would create a safer environment for meaningful, balanced communication of future-oriented data.

A conditional EU-wide safe harbour provision could address these challenges by providing issuers with legal protections for forward-looking statements, provided they adhere to strict conditions that ensure investor protection.

Such a safe harbour provision shall take inspiration from both the US model, which limits liability to reckless or knowingly false statements, and the UK Protected Forward-Looking Statements framework, which similarly encourages transparency while maintaining accountability. BETTER FINANCE believes any such EU framework should protect investors while ensuring issuers from undue liability only if forward-looking statements are accompanied by clear, factual information and specific risk disclosures. These disclosures should thus identify key assumptions, material risks, and uncertainties that

could affect outcomes. In addition, certain ‘high-risk contexts’, such as IPOs, pre-IPOs, SPAC secondary issuances, and specific speculative ventures, should be excluded from safe harbour protections. In particular, we caution against not delineating ESG-related forward-looking statements, due to their high potential for “promotional misstatements” and greenwashing (i.e. false transition plan claims or advancement thereof) – those should be calibrated; or remain outside the scope of such protections. More generally, any forward-looking statement protections should be void if statements are misleading, omit key information, or reflect reckless or knowingly false disclosures. Finally, any promotional content must be distinctly flagged and differentiated from factual forward-looking statements to ensure transparency; and therefore, fall out of scope.

Contour of an EU-level ‘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.***

As discussed in Q10, a harmonised EU-wide safe harbour provision could address liability risks that deter meaningful disclosures, such as forward-looking statements. However, such potential ‘safe harbour’ provision must be carefully designed to encourage transparency while maintaining robust investor protections. A tailored conditional framework should strike the right balance between fostering corporate disclosure and ensuring the issuer’s main accountability – drawing on best practices from the US and UK, exposed previously.

Thus, BETTER FINANCE cautions that such a safe harbour should shield issuers from liability only if their statements are factual, clear, specific, and accompanied by detailed risk disclosures. Protections must automatically void if statements are misleading, omit material information, or reflect recklessness, wilful misrepresentation, or insider manipulation. These conditions are essential to prevent misuse and build trust in corporate disclosures. In particular, the scope of the safe harbour should exclude high-risk contexts such as IPOs, pre-IPOs, and SPAC-related issuances, as well as delineate ESG-related statements, which are prone to promotional exaggeration (and greenwashing) and rely on accurate transition plans. Only such delienation and/or exclusions ensure investor protections are not compromised in situations of heightened risk. To uphold transparency, issuers must provide balanced and meaningful disclosures. Statements about a company’s development potential or strategic initiatives must be flagged as promotional material if they lack a factual foundation. Forward-looking disclosures should be grounded in verifiable data, clearly labelled, and accompanied by cautionary warnings outlining assumptions, risks, and uncertainties.

Finally, BETTER FINANCE reminds of the importance of implementation and oversight. Standardised disclosure templates would also prove useful in ensuring consistency across Member States, while the duty of periodic regulatory audits and reviews needs to monitor compliance and prevent abuse. By establishing clear conditions, exclusions, and safeguards, this framework would balance transparency with accountability. Properly implemented, it would enhance trust in EU capital markets, mitigate liability

concerns, and promote the integrity of corporate reporting while fostering sound issuer-investor insight sharing.

BETTER FINANCE
The European Federation of Investors and Financial Services Users
44, Rue d'Arenberg, 1000 Brussels — Belgium
+32 2 514 37 77 | betterfinance.eu | policy@betterfinance.eu