

Prospectus liability in EU: an overview of existing legal regimes

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prospectus

information document that must be published before securities are offered to the public is intended to provide interested investors with the information they need to decide whether or not to purchase them.

Prospectus under Macedonian law (Law on securities)

“Prospectus” shall mean a written document that contains all the relevant information that enables a purchaser of securities described in the document, to make an assessment as to the issuer’s legal standing, financial standing and business operation, risks of investment, and rights that derive from the offered securities

Regulation in EU

The Prospectus Directive -
Directive 2003/71/EC [2003]
OJ EU L345/64

WAS REPLACED WITH

- Regulation 2017/1129 [2017] OJ EU L168/12 (Prospectus Regulation) directly applicable in all Member States, with effect from 21 July 2019
- Character – financial supervision law
- Contains civil liability provisions

Civil liability provision


Article 11 (1)

- Member States shall ensure that responsibility for the information given in a prospectus, and any supplement thereto, attaches to at least the issuer or its administrative, management, or supervisory bodies, the offeror, the person asking for admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible for the prospectus, and any supplement thereto, shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.




Exclusion of the provision

- Article 11(2), provides that civil liability solely for the summary prospectus is expressly excluded unless the summary:
- (a) is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus;
- or (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.



Materiality in the Context of Prospectus Liability

- Article 6(1) of Prospectus Regulation that determines which information must be included in the prospectus. In fact, it clearly states that a prospectus “*shall contain the necessary information which is material to an investor for making an informed assessment of:*
 - *(a) the assets and liabilities, profit and losses, financial position and prospects of the issuer and of any guarantor;*
 - *(b) the rights attaching to the securities; and*
 - *(c) the reasons for the issuance and its impact on the issue*
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Discretion for the issuer

- Prospectus Regulation emphasises a certain discretion for the issuer to decide which information is material by providing that “As long as they present it in a fair and balanced way, the issuer should be given the discretion to select the information that they deem to be material and meaningful”.



Legal basis of prospectus liability

Incorrect or incomplete prospectus throughout the European Union



(A) introduction of specific statutory provisions related to prospectus liability and eventually general civil law provisions (Germany, Spain, Italy);



(B) relying solely on their general civil law liability (France);



(C) mixed forms in which prospectus liability is the result of a combination of general liability law and special legislation (Luxembourg and the Netherlands).

The case of Macedonia

Mixed form of prospectus liability

1. Specific rule in the Law on securities
2. Application of the general rules of liability from the Law on Obligations

Obligation with regard prospectus under Macedonian law

- The issuer shall submit a Request for Approval to the Commission in order to issue Securities through the process of public offer, the issuer shall also submit the following documentation:...
- A statement of the management, appointing a person who is designated by the issuer as the one who is responsible for the contents of the Prospectus and who assures that:
 - the issuance is in compliance with this Law and the act of issuance;
 - the data and information contained in the Request for Approval are true and correct; and
 - the data and information contained in the Prospectus are true and correct and the Prospectus does not omit any Price Sensitive Information, except omissions approved by the Commission;

Actions Relating to Fraudulent Offering Prospectus

Article 179, Law on securities Macedonia

A person who has purchased a Security that has been offered pursuant to a Prospectus that, unbeknownst to such person, contains an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, shall be entitled to sue the following persons in an authorized Court to recover the consideration paid for such Security together with interest calculated at deposit interest rate, less the amount of any income received thereon, upon the tender of such Security to the issuer, or for damages if he no longer owns the Security:

(a) the issuer of the Security;

(b) any person who signed the Prospectus;

(c) any person who was a member of the Board of Directors, Supervisory Board or Management Board, as the case may be, of the issuer at the time of issuing the Prospectus; and

(d) any accountant or authorized auditor who has, with his/her consent, been named as having prepared or certified any part of the Prospectus or as having prepared or certified any report or valuation or Financial Statements used in preparation of the Prospectus.

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Damage scope

- The damages that may be recovered pursuant to paragraph (1) of this Article shall be no greater than the price at which the Security was offered to the public and shall represent the difference between the amount paid for the Security and:
 - (a) the determined value according to expert opinion of such Security as of the time such lawsuit was brought;
 - (b) the price at which such Security was sold in the Secondary Market prior to the lawsuit and
 - (c) the price at which such Security is sold at on the Secondary Market after lawsuit.

Persons Responsible for the Prospectus

- As provided under Article 11(1), the Member States are asked to choose the persons responsible for the prospectus. Under the national law in Germany, France, Italy, Spain, Luxembourg and the Netherlands, the issuer itself is held responsible for the content of the prospectus. In addition to this, directors or members of the supervisory board of the issuer may be responsible.

INITIATIVE

HARMONIZATION OF PROSPECTUS LIABILITY REGIMES IN EU

- FROM MONETARY UNION
- THROUGH BANKING UNION
- TOWARDS CAPITAL MARKETS UNION