

The influence of the EU prospectus rules on private law

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Key points

- This article examines the extent to which the civil courts are bound under EU law by the EU prospectus rules when judging issues of liability. The following questions are discussed: (i) May civil courts be more flexible than the EU prospectus rules?; (ii) May civil courts be stricter than the EU prospectus rules?; (iii) How do the EU prospectus rules influence the requirement of relativity in the Member States where this is a condition for liability in tort?; (iv) How do the EU prospectus rules influence the proof of causal link?; (v) How do the EU prospectus rules influence determination of the extent of the loss or damage?; (vi) How do the EU prospectus rules influence a limitation or exclusion of liability?; (vii) Should civil courts apply the EU prospectus rules of their own motion? (viii) How do the EU prospectus rules influence the liability of the financial regulator which must approve the prospectus?
- The article concludes that the influence of the EU prospectus rules on private law is potentially considerable, but that the subject is unfortunately surrounded by much uncertainty. EU legislation on prospectus liability would be the best solution, not only for reasons of legal certainty but also for the sake of uniform investor protection and a truly level playing field in Europe. However, in the current political climate (less rather than more Europe), that is likely to be a non-starter for the time being. Our hopes must therefore be pinned on the CJEU, which will hopefully provide more clarity in the years ahead.

1. Introduction

The information document (prospectus) 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. Once the prospectus has been approved by the competent financial regulator, it serves as a European passport. In other words, the securities to which the offer relates may be offered to the public on the basis of the approved prospectus throughout the EU/EEA.¹

The Prospectus Directive² was replaced by the Prospectus Regulation,³ which is directly applicable in all Member States, with effect from 21 July 2019. Like its predecessor, the Prospectus Regulation is primarily regarded as an instrument of EU financial supervision law. In other words, under the Prospectus Regulation the competent financial regulator may enforce information obligations through administrative law in the event of

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1 See Art 24 of the Prospectus Regulation (see note 3).

2 Directive 2003/71/EC [2003] OJ EU L345/64 (Prospectus Directive).

3 Regulation 2017/1129 [2017] OJ EU L168/12 (Prospectus Regulation).

non-compliance, for example by imposing an administrative fine on the issuer. But there is clearly a close link with civil liability law too. This article examines the extent to which the civil courts are bound under EU law by the EU prospectus rules when judging issues of liability. The following questions are discussed below.

1. May civil courts be more flexible than the EU prospectus rules?
2. May civil courts be stricter than the EU prospectus rules?
3. How do the EU prospectus rules influence the requirement of relativity in the Member States where this is a condition for liability in tort?
4. How do the EU prospectus rules influence the proof of causal link?
5. How do the EU prospectus rules influence determination of the extent of the loss or damage?
6. How do the EU prospectus rules influence a limitation or exclusion of liability?
7. Should civil courts apply the EU prospectus rules of their own motion?
8. How do the EU prospectus rules influence the liability of the financial regulator which must approve the prospectus?

2. Prospectus Regulation and civil liability

Liability of the persons responsible for the prospectus

General

The Prospectus Regulation may be primarily regarded as an instrument of EU financial supervision law, but it also contains rules on civil liability. Article 11(1) of the Prospectus Regulation provides in this connection as follows:

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 the 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.⁴

It is apparent from Article 11(2), first sentence, of the Prospectus Regulation that it must be possible for the information included in the prospectus to result in liability, in accordance with national law on civil liability:

Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.⁵

In my view, these provisions mean that the situation is as follows.

⁴ Art 6(1) of the Prospectus Directive contained a similar provision.

⁵ Art 6(2), first paragraph, of the Prospectus Directive contained the same provision.

Does responsibility rest with the issuer or with the administrative, supervisory or management body?

The Member State may evidently choose whether the party to be held responsible for the information contained in the prospectus is the issuer *or* the issuer's administrative, supervisory or management body. Under national law on liability, the issuer itself is normally held responsible for the content of the prospectus,⁶ rather than one or more of the bodies of the issuer as listed in the Prospectus Regulation. Besides the issuer, it is usually quite conceivable that directors or, for example, members of the supervisory board of an issuer may be liable, but in such cases a raised liability threshold must usually be met.⁷

Offeror of the securities

I interpret Article 11(1) and (2) of the Prospectus Regulation as meaning that a Member State can choose to hold not only the issuer 'but also' the offeror of the securities responsible and hence potentially liable for the content of the prospectus. If only new shares are issued, the offeror of the securities is naturally the issuer itself. In such cases, it makes no difference whether a Member State provides only for the issuer to be responsible and have potential liability or extends this to the offeror of the securities as well. But often existing securities too (or even existing securities alone) are offered to the public by the current shareholders or major shareholders. In short, if not only the issuer but also the offeror of the securities can be held responsible and hence potentially liable for all or part of the content of the prospectus, the focus will not only be on the issuer itself. Instead, the shareholders or major shareholders who offer their securities to the public may be held responsible and hence also potentially liable for all or part of the content of the prospectus.⁸

6 In this sense, for example, Germany, French, Italian, Spanish, Luxembourg and Dutch law. See: S Mock, Chapter 20 (Germany), § V.1.(i), in: Busch, Ferrarini & Franx (2020); T Bonneau, Chapter 21 (France), § V, in: Busch, Ferrarini & Franx (2020); P Giudici, Chapter 22 (Italy), § V, in: Busch, Ferrarini & Franx (2020); J Redonet Sánchez del Campo, Chapter 23 (Spain), § V, in: Busch, Ferrarini & Franx (2020); V Hoffeld, Chapter 25 (Luxembourg), § V, in: Busch, Ferrarini & Franx (2020); JP Franx, Chapter 24 (the Netherlands), § V, in: Busch, Ferrarini & Franx (2020).

7 Under, for example, German law, French law and Dutch law a raised threshold for director liability must be met. See: S Mock, Chapter 20 (Germany), in: Busch, Ferrarini & Franx (2020), § XIII; T Bonneau, Chapter 21 (France), in: Busch, Ferrarini & Franx (2020), § V; JP Franx, Chapter 24 (the Netherlands), in: Busch, Ferrarini & Franx (2020), § XIII. Under Italian law, it seems possible, at least theoretically, to hold directors liable on the basis of the ordinary rules of tort, evidently without a raised liability threshold being applicable. See P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § XIII. Under Spanish law, simple fault seems sufficient. See: Redonet Sánchez del Campo, Chapter 23 (Spain), in: Busch, Ferrarini & Franx (2020), § XIII. Under Luxembourg law, directors can theoretically be held liable under ordinary tort law, but in practice the civil courts are unlikely to grant such claims. They generally assume that if third parties (investors) suffer damage as a result of the actions of a director, they must submit a claim to the company itself. See: V Hoffeld, Chapter 25 (Luxembourg), in: Busch, Ferrarini & Franx (2020), § XIII (iv). In the UK, in PRR 5.3.2R, under (b)(i) and (iii) it is mentioned that each person who is a director of the *equity* (not: non-equity) issuer and each person who is a senior executive of the *equity* (not: non-equity) issuer is a responsible person (see G McMeel, Chapter 26 (UK), in: Busch, Ferrarini & Franx (2020), § IV). In § V of Chapter 26 it is stated that 'under UK law, it is clear that the persons who are liable for misleading prospectus information are those identified in PRR 5.3'. In § VIII of Chapter 26 it is stated that there is a fault requirement. From the foregoing it seems to follow that under UK law and within the context of prospectus liability directors of 'equity' issuers and each person who is a senior executive of the 'equity' issuer can be held liable based on a simple fault requirement.

8 Under Italian law, for example, major and other shareholders who are selling shares are responsible only for the information about their identity. See: P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § IV. In the Netherlands, the liability of a selling shareholder who is a major shareholder or even 100% shareholder of the issuer is not excluded because in such cases the transaction will normally also be initiated and coordinated by that shareholder. See: JP Franx, Chapter 24 (the Netherlands), in: Busch, Ferrarini & Franx (2020), § V.4.

Person asking for admission to trading on a regulated market

Like its predecessor, the Prospectus Regulation distinguishes between (i) an offer of securities to the public and (ii) an admission to trading on a regulated market.⁹ These activities can be combined. An example is an initial public offering (IPO). But this need not be the case. A stock exchange listing can also be requested on its own, without being accompanied by the offering of securities to the public. But even then there is an obligation to publish a prospectus.¹⁰

It goes without saying, therefore, that Article 11(1) and (2) of the Prospectus Regulation means that a Member State is obliged to designate a party who is responsible and hence potentially liable for the content of the prospectus both where (i) securities are offered to the public, and (ii) there is admission to trading on a regulated market.

As already apparent above, where securities are offered to the public, the Member State ‘must’ provide that responsibility attaches to the issuer (‘or’ to the issuer’s administrative, management or supervisory bodies), and ‘may’ also choose in certain circumstances to hold the offeror of the securities (‘not’ being the issuer) responsible and hence also potentially liable for the content of the prospectus (or possibly only part of the prospectus).

As regards admission to trading on a regulated market, the Member State ‘must’ provide that responsibility for the content of the prospectus and hence also potential liability attaches to the applicant for the admission. The applicant for admission will normally be the issuer itself.

Guarantor

Finally, I turn to the guarantor. Often a financially strong guarantor is involved, particularly in the case of offers of newly issued bonds to the public (for example through a special purpose vehicle). I interpret Article 11(1) and (2) of the Prospectus Regulation as meaning that in such cases national law on civil liability may provide that the guarantor ‘rather than’ the issuer is responsible and hence potentially liable for the information contained in the prospectus.¹¹

Minimum harmonization

The use of the phrase ‘at least’ in Article 11(1) of the Prospectus Regulation makes clear that this is a minimum requirement. Individual Member States may go further by holding other parties involved in the preparation of a prospectus responsible and hence potentially liable for all or part of the content of the prospectus, such as the lead manager (ie the bank acting as lead party for the prospectus) and the issuer’s auditor. For example, they may

9 See Art 1(1) of both the old Prospectus Directive and the current Prospectus Regulation.

10 There are exceptions to the prospectus obligation with regard to both the offering of securities to the public and the admission to trading on a regulated market. See: K Lieveise, Chapter 7 (The Obligation to Publish a Prospectus and Exemptions), in: Busch, Ferrarini & Franx (2020).

11 In at least Dutch practice, the guarantor will as a rule be liable for investor claims pursuant to the guarantee itself. However, it is interesting to note that the term ‘guarantor’ is not defined, which raises the question of whether the term should also include parent companies that have only undertaken a ‘keep well’ obligation towards the issuer.

also choose to hold the issuer and the board responsible together and hence potentially jointly and severally liable for the information contained in the prospectus.

Provisions of national law governing civil liability

In some Member States there are specific statutory provisions governing liability for prospectuses.¹² In others the general provisions of civil liability are applicable in such cases.¹³ And between these two ‘extremes’, there are also ‘mixed forms’ in which liability for an incorrect or incomplete prospectus is based on a combination of general liability law and special legislation.¹⁴ This is immaterial from the perspective of Article 11(2), first sentence, of the Prospectus Regulation, provided that national civil law makes it possible for the persons responsible for the prospectus to be held liable for an incorrect or incomplete prospectus, within the fairly broad parameters laid down by Article 11(1) and (2) of the Prospectus Regulation (see (i) to (vi) above).

Liability for the summary

Civil liability solely for the summary of the prospectus is expressly excluded in Article 11(2), first part of the second sentence, of the Prospectus Regulation:

However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof (...).

Nonetheless, the principle that no civil liability attaches to any person on the basis of the summary is subject to two exceptions (Article 11(2), second sentence at (a) and (b)), namely where 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.¹⁵

12 This is the case, for example, under German, Italian, Spanish and UK law. See: S Mock, Chapter 20 (Germany), in: Busch, Ferrarini & Franx (2020), § II; P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § II; J Redonet Sánchez del Campo, Chapter 23 (Spain), in: Busch, Ferrarini & Franx (2020), § II; G McMeel, Chapter 26 (UK), in: Busch, Ferrarini & Franx (2020), § II.

13 This is the case, for example, under French law. See: T Bonneau, Chapter 21 (France), in: Busch, Ferrarini & Franx (2020), § II.

14 As under Luxembourg law, but also in fact under Dutch law, where, however, the scope of the special legislation is not confined to liability for the prospectus. See: V Hoffeld, Chapter 25 (Luxembourg), in: Busch, Ferrarini & Franx (2020), § II; JP Franx, Chapter 24 (the Netherlands), this volume, § II.

15 Art 11(3) of the Prospectus Regulation includes some details about the situation that occurs where a registration document or universal registration document has been used as a constituent part of an approved prospectus. The provision reads as follows: ‘The responsibility for the information given in a registration document or in a universal registration document shall attach to the persons referred to in paragraph 1 only in cases where the registration document or the universal registration document is in use as a constituent part of an approved prospectus. The first subparagraph shall apply without prejudice to Articles 4 and 5 of Directive 2004/109/EC [i.e. the Transparency Directive, DB] where the information under those Articles is included in a universal registration document.’

It must therefore be possible for the persons responsible for the prospectus to be held liable under civil law on the basis of the summary, read in conjunction with other parts of the prospectus.¹⁶

3. Information obligations under the EU prospectus rules

The basic principle

The following basic principle governs the information that must be included in a prospectus, according to the Prospectus Regulation (Article 6 (1)):

Without prejudice to Article 14(2) [concerning the simplified prospectus that may be published in the case of secondary issuances, *DB*] and Article 18(1) [under which the competent authority may authorise the omission of certain information from the prospectus, *DB*], a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of:

- (a) the assets and liabilities, profits 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 issuer.

That information may vary depending on any of the following:

- (a) the nature of the issuer;
- (b) the type of securities;
- (c) the circumstances of the issuer;
- (d) where relevant, whether or not the non-equity securities have a denomination per unit of at least EUR 100 000 or are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in the securities.¹⁷

The Prospectus Regulation also sets requirements for the use of language and the manner of presentation. See Article 6(2) of the Prospectus Regulation:

The information in a prospectus shall be written and presented in an easily analysable, concise and comprehensible form, taking into account the factors set out in the second subparagraph of paragraph 1.¹⁸

Although this does not strictly follow from Article 6(1) and (2) of the Prospectus Regulation, it is apparent from recital 27 in the preamble to the Regulation that the application of the rule is influenced by the type of investor to whom the offer is addressed. If the offer is intended solely for qualified (ie wholesale) investors, the language used may presumably be rather more specialized than if the securities are being offered solely or partly to retail investors.

16 Art 6(2), second paragraph, of the Prospectus Directive contained a provision which was admittedly less detailed, but had the same tenor.

17 Art 5(1) of the Prospectus Directive contained a provision which was admittedly less detailed, but had essentially the same tenor.

18 Art 5(1) of the Prospectus Directive contained a comparable provision, although it did not contain the word 'concise'.

Finally, it is worthwhile noting that it is apparent from recital 27 in the preamble to the Prospectus Regulation that a prospectus should not contain information which is not material or specific to the issuer and the securities concerned. This could obscure the information relevant to the investment decision and thus undermine investor protection.

Elaboration of the basic principle

The basic principle in Article 6, paragraph 1, of the Prospectus Regulation has been elaborated in detail in the various Annexes to Delegated Regulation (EU) 2019/980.¹⁹ See Article 13(1), first sentence, of the Prospectus Regulation:

Minimum information and format

1. The Commission shall adopt delegated acts in accordance with Article 44 to supplement this Regulation regarding the format of the prospectus, the base prospectus and the final terms, and the schedules defining the specific information to be included in a prospectus, including LEIs [Legal Entity Identifiers, *DB*] and ISINs [International Securities Identification Numbers, *DB*], avoiding duplication of information when a prospectus is composed of separate documents.²⁰

Delegated Regulation (EU) 2019/980 is based on the standards governing financial and non-financial information drawn up by international securities regulators, in particular by the International Organisation of Securities Commissions (IOSCO), and on Annexes I, II and III to the Prospectus Regulation (see Article 13(3) of the Prospectus Regulation²¹). These annexes provide for a detailed structure with headings, which are then elaborated in the various annexes to Delegated Regulation (EU) 2019/980. This distinguishes between various types of issuance (primary/secondary issuances, type of securities, offers to whole-sale/retail). To ensure that Delegated Regulation (EU) 2019/980 is applied uniformly as far as possible, the European Securities and Markets Authority (ESMA) has published guidelines defining and interpreting the information obligations under Delegated Regulation (EU) 2019/980.²²

Risk factors

In practice, prospectuses contain so many risk factors that it is hard to identify the most relevant. This market practice is intended to protect issuers and their advisers from civil liability, but is detrimental to investor protection. According to the Prospectus Regulation, risk factors should in future be limited to those risks which are material and specific to the issuer and its securities. The issuer must present the risk factors in a limited number of categories, based on the probability of their occurrence and the expected magnitude of their negative impact (Article 16(1) of the Prospectus Regulation). This is intended to give

19 [2019] *OJ EU* L166/26. Delegated Regulation (EU) 2019/980 replaces Regulation (EU) No 809/2004, [2004] *OJ EU* L149/1.

20 Art 7(1) of the Prospectus Directive contained a similar provision.

21 Art 7(3) of the Prospectus Directive contained a similar provision, although it referred to 'the indicative Annexes to this Directive'. The word 'indicative' has been omitted in Art 13(3) of the Prospectus Regulation. This suggests that the Prospectus Regulation aims for a higher degree of harmonization than existed under the Prospectus Directive.

22 ESMA, *Final Report, ESMA Guidelines on disclosure requirements under the Prospectus Regulation* (ESMA31-62-1426) (15 July 2020), Annex III. This power is based on Art 16(3) of Regulation (EU) No 1095/2010 [2010] *OJ EU*, L331/84 (ESMA Regulation).

investors a better understanding of the potential risks when making their investment decision. ESMA has published guidelines which provide a detailed explanation of how regulators that have to approve prospectuses should apply these new rules in practice.²³

Summary

As noted above, civil liability on the basis of the summary, when read together with other parts of the prospectus, is not excluded (Article 11(2), second paragraph, of the Prospectus Regulation). It is therefore necessary to briefly consider the requirements which a summary must satisfy. A summary must contain the key information that investors need in order to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market, and is intended to be read together with the other parts of the prospectus to aid investors when considering whether to invest in such securities (Article 7(1), first sentence, of the Prospectus Regulation).²⁴

The content of the summary must be accurate, fair and clear and must not be misleading. It is to be read as an introduction to the prospectus and must be consistent with the other parts of the prospectus (Article 7(2) of the Prospectus Regulation). The summary must be drawn up as a short document written in a concise manner and of a maximum length of seven sides of A4-sized paper when printed. The summary must be presented and laid out in a way that is easy to read, using ‘characters of readable size’. In addition, it must be written in a language and a style that facilitate the understanding of the information, in particular, in language that is clear, non-technical, concise and comprehensible for investors (Article 7(3) of the Prospectus Regulation).

The summary must consist of the following four sections: (a) an introduction, containing warnings;²⁵ (b) key information on the issuer; (c) key information on the securities; (d) key information on the offer of securities to the public and/or the admission to trading on a regulated market (Article 7 (4)). Only the most important risk factors may be

23 ESMA, *Final Report—ESMA Guidelines on risk factors under the Prospectus Regulation*, 29 March 2019 (ESMA31-62-1217). ESMA’s obligation to adopt guidelines in relation to risk factors is based on Art 16(4) of the Prospectus Regulation. Under Art 16(5) the Commission is *empowered* (but not obliged) to adopt delegated acts in accordance with Art 44 to supplement the Prospectus Regulation by specifying criteria for the assessment of the specificity and materiality of risk factors and for the presentation of risk factors across categories depending on their nature. The Commission has not yet exercised this power.

24 However, no summary is required where the prospectus relates to the admission to trading on a regulated market of non-equity securities provided that: (i) such securities are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities; or (ii) such securities have a denomination per unit of at least EUR 100,000. See Art 7(1) of the Prospectus Regulation.

25 The summary must contain the following warnings: (i) the summary should be read as an introduction to the prospectus; (ii) any decision to invest in the securities should be based on a consideration of the prospectus as a whole by the investor; (iii) where applicable, that the investor could lose all or part of the invested capital and, where the investor’s liability is not limited to the amount of the investment, a warning that the investor could lose more than the invested capital and the extent of such potential loss; (iv) where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under national law, have to bear the costs of translating the prospectus before the legal proceedings are initiated; (v) civil liability attaches only to those persons who have tabled the summary including any translation thereof, but only where the summary is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or where 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 such securities; (vi) where applicable, the comprehension alert required in accordance with point (b) of Art 8(3) of Regulation (EU) No 1286/2014 (ie the PRIIPs Regulation (PRIIPs stands for ‘Packaged Retail Investment and Insurance-based Products’)).

mentioned in the summary. The maximum is 15 (Article 7(10) of the Prospectus Regulation).²⁶ The key financial information about the issuer to be included in the summary has been specified in Delegated Regulation (EU) 2019/979 (on the basis of Article 7(13) of the Prospectus Regulation).²⁷

4. Unlawfulness and imputability

May civil courts be more flexible than the EU prospectus rules?

General

The first question that arises in view of the foregoing is whether a breach of the information obligations under the Prospectus Regulation (see Section 3 above) constitutes, by definition, an unlawful act, which is also *imputable* to the person responsible for the content of the prospectus.²⁸ Or may the civil courts also be more flexible?

European principle of effectiveness

This question must be answered by reference to the European principle of effectiveness (also known as *effet utile*). Naturally, Article 11(2), first sentence, of the Prospectus Regulation, as discussed above (which provides that Member States must ensure that their laws, regulations and administrative provisions on civil liability apply to the persons responsible for the information given in a prospectus) itself expresses this principle, but the European principle of effectiveness has been defined in more detail by the Court of Justice of the European Union (CJEU) in recent years.²⁹

The Austrian case of *Immofinanz*³⁰ concerned the private law consequences of rules from the Prospectus Directive, the Transparency Directive and the Market Abuse Directive. The CJEU held as follows in paragraph 40 of the judgment:

While it is true that, unlike Article 25(1), of the Prospectus Directive, Article 28(1), of the Transparency Directive and Article 14(1), of the Market Abuse Directive do not expressly refer to the civil liability regimes in the Member States, the fact remains that the Court has previously ruled that, in respect of the award of damages and the possibility of an award of punitive damages, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed (see, by analogy, the judgments of 13 July 2006, *Manfredi and Others*, C-295/04-C-298/04, *Court Reports*, p. I-6619, paragraph 92, and 6 June 2013, *Donaue Chemie and Others*, C-536/11, not yet published in the *Court Reports*, paragraphs 25-27.

26 The predecessor of Art 7 of the Prospectus Regulation regarding the summary was Art 5(2) of the Prospectus Directive.

27 [2019] OJ EU L166/1.

28 Or possibly non-performance.

29 For a general consideration of the European principle of effectiveness, see for example AS Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (2nd edn, Intersentia 2016) nos 109–130. For a consideration of the European principle of effectiveness specifically in relation to MiFID II, see: VPG De Serière, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht.2. Rechtspersonenrecht. Part IV. Effectenrecht* (Securities law) (WoltersKluwer 2018) nos 745 ff.

30 CJEU 19 December 2013, no C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG*).

The CJEU had previously taken a similar line in relation to the Markets in Financial Instruments Directive (MiFID) in the Spanish case of *Genil v Bankinter*.³¹ In that judgment the CJEU had held that in the absence of EU legislation it was for the Member States themselves to determine the contractual consequences of non-compliance with the know-your-customer (KYC) rules under MiFID, but that the principles of equivalence and effectiveness had to be observed (paragraph 57).³² The CJEU referred in this connection to paragraph 27 of a judgment of 19 July 2012 concerning a tax matter (*Littlewoods Retail and Others*, Case C-591/10) and the case law cited there. This paragraph reads as follows:

In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or compound interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law *or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible* [DB's italics] (see, to that effect, previously cited cases *San Giorgio*, paragraph 12; *Weber's Wine World and Others*, paragraph 103; and the judgment of 6 October 2005 in the case of *MyTravel*, C 291/03, Court Reports p. I 8477, paragraph 17).

The principle of effectiveness therefore means that the conditions which an investor must fulfil in order to bring a civil liability action may not be such that success is difficult, if not impossible to achieve. The judgment appears to mean that civil courts may not be more flexible than is possible under the EU prospectus rules. Where, in a specific case, information which should be included in a prospectus according to the EU prospectus rules is missing or incorrect and the aggrieved investors bring a civil action for damages, the civil courts may not dismiss this claim by holding that in the particular circumstances the rule applied in private law is more flexible. If this were not the case, the principles of legal certainty, investor protection and the European level playing field would be put in considerable jeopardy. All this is even more true under the current Prospectus Regulation than under its predecessor, the Prospectus Directive. For the sake of legal certainty, uniform investor protection and a European level playing field, the instrument of a directly applicable regulation has been explicitly chosen.³³

For the record, from the perspective of European financial supervision law, the stricter information obligations under the Prospectus Regulation would, of course, continue to apply in any event, even if a civil court were to apply a more flexible criterion contrary to the European principle of effectiveness. Naturally, this does not detract from the requirements that European financial supervision law sets for the prospectus. Only if the prospectus meets the requirements of the EU prospectus rules will a regulator be able to approve the prospectus, despite the adoption of a more flexible attitude by a civil court.

31 CJEU 30 May 2013, no C-604/11, ECLI:EU:C:2013:344 (*Genil 48 SL and Others v Bankinter SA and Others*).

32 CJEU 30 May 2013, no C-604/11, ECLI:EU:C:2013:344 (*Genil 48 SL and Others v Bankinter SA and Others*).

33 See recital 5 in the preamble to the Prospectus Regulation.

Materiality criterion?

Should the information which is required by the Prospectus Regulation and is specified in detail in implementing acts always be treated as information ‘which is material to an investor for making an informed assessment’ as referred to in the principal standard included in Article 6(1) of the Prospectus Regulation? Or, to put it another way, if a mandatory item of information has not been included or is incorrect, does it ‘necessarily’ follow that information which is of material importance for investors in making an informed decision is missing? If that is the case, a defence by the issuer and, for example, the lead manager to the effect that the non-recorded or incorrectly displayed information item is not material would always have to be rejected by a civil court in view of the European principle of effectiveness. We could call this a ‘settled’ materiality criterion. In a Dutch context, this would mean that once it has been established that a certain information item prescribed by the EU prospectus rules has not been included or is incorrect, the unlawfulness on account of a breach of a statutory duty is a given, with the possible exception of cases where there is a ground of justification (see (iv) below).³⁴

However, the question is whether this is the correct interpretation in view of Article 18(1) of the Prospectus Regulation. Article 18(1) provides that the competent authority which must authorize the prospectus *may* (but not must) authorize the omission from the prospectus, or constituent parts thereof, of certain information to be included therein, where it considers that any of the following conditions is met. The following conditions are mentioned at (b) and (c):

(b) disclosure of such information would be seriously detrimental to the issuer or to the guarantor, if any, provided that the omission of such information would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer or guarantor, if any, and of the rights attached to the securities to which the prospectus relates;

(c) such information is of minor importance in relation to a specific offer or admission to trading on a regulated market and would not influence the assessment of the financial position and prospects of the issuer or guarantor, if any.³⁵

Evidently, the system of EU prospectus rules leaves some scope for a defence that an item of information not included for investors in the specific case was not material in making an informed investment decision. Even if one assumes that a non-materiality defence can succeed in the system of the EU prospectus rules only if the competent authority has allowed the omission of information in a specific case on the basis of (b) or (c) of Article 18(1) of the Prospectus Regulation, the failure of a non-materiality defence in other cases does not by definition result in liability. After all, an issuer or lead manager can always argue that there is no causal link, because whatever is incorrect or incomplete in the prospectus is not

³⁴ In so far as relevant here, Art 6:162 of the Dutch Civil Code provides as follows: ‘2. *Except where there are grounds of justification, the following are deemed tortious: an infringement of a right and an act or omission in breach of a statutory duty or a rule of unwritten law about generally accepted standards*’ [DB’s italics].

³⁵ Art 8(2), opening words and (b) and (c), of the Prospectus Directive contained provisions of a similar nature.

material and the investor could not therefore have suffered any damage as a result of the missing or incorrect information. For more information, see Section 6 below.

Grounds of justification

In Dutch tort law, an act may cease to be unlawful if a ‘ground of justification’ exists.³⁶ It has to be asked to what extent this escape route is still available in view of the EU prospectus rules and the European principle of effectiveness. In my view, the answer is that this is the case only if the Prospectus Regulation itself allows this. Article 18(1), opening words and (a), provides that the competent authority which must authorize the prospectus *may* (but not must) authorize the omission from the prospectus of certain information to be included therein where it considers that disclosure of such information would be contrary to the public interest.³⁷ Where information that is material to investors is thus omitted from the prospectus with the blessing of the competent authority, I believe that the issuer or lead manager who is held liable on this basis by aggrieved investors may be able, in principle, to hide behind the opinion of the regulator. In the Dutch context, this defence seems to be capable of being classified as reliance on a ground of justification that invalidates the unlawfulness of the conduct.

Soft law

Where there has been an infringement of information obligations that can be found in the Prospectus Regulation itself and in implementing acts, this will, in principle, constitute an unlawful act on account of a breach of a statutory duty (see (iii) above), at least in the Dutch context. As noted above, to ensure uniform application of Delegated Regulation (EU) 2019/980 as far as possible, the European Securities and Markets Authority (ESMA) has published guidelines defining and interpreting the information obligations under Delegated Regulation (EU) 2019/980.³⁸ In practice, ESMA guidelines are, of course, authoritative, but, strictly speaking, lack statutory status. These guidelines are often described rather vaguely as ‘soft law’. I would assume that the civil courts must not ignore them and should therefore take them into account, but strictly speaking they are not bound by them ‘unless’ ESMA guidelines can be regarded as unwritten law, where appropriate. The latter may be appropriate if guidelines reflect a specific market practice. Under Dutch law at least, acting contrary to unwritten law (like acting in breach of a statutory duty) is also a ground for holding that the act is unlawful.³⁹

³⁶ See footnote 34.

³⁷ Art 8(2), opening words and (a), of the Prospectus Directive contained the same provision.

³⁸ ESMA, *Final Report, ESMA Guidelines on disclosure requirements under the Prospectus Regulation* (ESMA31-62-1426) (15 July 2020), Annex III. This power is based on Article 16(3) of Regulation (EU) No 1095/2010 [2010] OJ EU, L331/84 (ESMA Regulation).

³⁹ Art 6:162(2) of the Dutch Civil Code reads as follows: ‘Except where there are grounds of justification, the following are deemed tortious: an infringement of a right and an act or omission in breach of a statutory duty or *a rule of unwritten law about generally accepted standards*’ [DB’s italics]. For a recent consideration of the influence of ESMA guidelines on private law, with particular reference to MiFID II, see: Federico Della Negra, *MiFID II and Private Law. Enforcing EU Conduct of Business Rules* (dissertation European University Institute, Florence), Hart/Bloomsbury 2019, p 84 ff.

Imputability

Article 11(1) of the Prospectus Regulation provides that a prospectus must contain a declaration by the persons responsible for the prospectus that

to the best of their knowledge [DB's italics] the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

Does this mean, for example, that the issuer or the lead manager can successfully defend a claim for liability brought by aggrieved investors by contending that it did not know (i) that the information contained in the prospectus was not in accordance with the facts and/or (ii) that the prospectus made an omission likely to affect its import? I would answer this question in the affirmative. However, I believe that in view of the objective of investor protection and the European principle of effectiveness, the words ‘did not know’ should include ‘was not required to know’. If this were not the case, investor protection would indeed be in a bad way.

It would generally be hard for the issuer to show that it did not know or was not required to know (i) that the information contained in the prospectus was not in accordance with the facts and/or (ii) that the prospectus made an omission likely to affect its import. After all, this is information about its own business.

In any event, this approach means that there is scope for a due diligence defence by the lead manager. In other words, if the lead manager adequately investigated the issuer, but certain information did not emerge during the due diligence process, the lead manager can defend a claim for liability by arguing that he did not know and was not required to know (i) that the information contained in the prospectus was not in accordance with the facts and/or (ii) that the prospectus made an omission likely to affect its import. In the Dutch context, this defence will mean that the unlawful act cannot be imputed to the lead manager in the absence of fault.⁴⁰

May civil courts be stricter than the EU prospectus rules?

Immofinanz and Genil v Bankinter

The judgments of the CJEU in the *Immofinanz* and *Genil v Bankinter* cases do not seem to provide a definitive answer to the question of whether civil courts may apply stricter standards than the European prospectus rules.⁴¹ If, for example, a civil court imposes ‘stricter’ information obligations than those resulting from the European prospectus rules, this does not in any event appear to be at odds with the principle of effectiveness as formulated by the CJEU in *Immofinanz* and *Genil v Bankinter*. It should be noted, however, that

40 A due diligence defence is accepted under Dutch law. See: JP Franx, Chapter 24 (the Netherlands), in: Busch, Ferrarini & Franx (2020), § VIII. In so far as relevant here, Art 6:162 of the Dutch Civil Code provides as follows: ‘1. A person who commits a tort against another *which is imputable to him* [DB’s italics] must repair the damage suffered by the other in consequence thereof. (...) 2. A tort can be imputed to the tortfeasor if it is due to his *fault* [DB’s italics] or to a cause for which he is accountable by law or by generally accepted principles.’ A due diligence defence is also available under Spanish law. See: Redonet Sánchez del Campo, Chapter 23 (Spain), in: Busch, Ferrarini & Franx (2020), § VIII.

41 CJEU 19 December 2013, no C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG*); CJEU 30 May 2013, no C-604/11, ECLI:EU:C:2013:344 (*Genil 48 SL and Others v Bankinter SA and Others*).

the question whether civil courts may apply stricter standards than the European rules was not at issue in the *Immofinanz* and *Genil v Bankinter* cases and was therefore not answered explicitly. These judgments were solely about the private law consequences of a breach of European rules.

However, none of this precludes the possibility that it could be argued on the basis of other principles of EU law that civil courts may not apply stricter standards than the EU prospectus rules. Some pointers can be found in the CJEU's judgment in the case of *Nationale-Nederlanden v Van Leeuwen* concerning exorbitant management costs charged in connection with life insurance policies.⁴²

Nationale-Nederlanden v Van Leeuwen

Legal framework

Article 31 of the Third Life Assurance Directive⁴³ (now repealed and replaced by more recent versions) plays a crucial role in this dispute and provides as follows:

1. Before the assurance contract is concluded, at least the information listed in point A of Annex II shall be communicated to the policyholder.
2. The policyholder shall be kept informed throughout the term of the contract of any change concerning the information listed in point B of Annex II.
3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment.
4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.

The obligation to furnish the policyholder with the information listed in Annex II to the Third Life Assurance Directive was transposed into Dutch law in Article 2 of the 1998 Regulation on the Furnishing of Information to Policyholders (the 1998 Regulation). In view of the text of the 1998 Regulation, the Netherlands did not at that time make use of the possibility of imposing a duty to furnish additional information under Article 31(3) of the Third Life Assurance Directive.

It has been established that *Nationale-Nederlanden*, in compliance with Article 2(2)(q) and (r) of the 1998 Regulation, furnished the policyholder with information about how the costs and risk premiums would affect the return. However, the policyholder did not receive a summary or full overview of the actual and/or absolute costs and their composition. Nor was this obligatory under the 1998 Regulation. In short, it has been established that *Nationale-Nederlanden* furnished the policyholder with all information it was obliged to provide under the 1998 Regulation.

⁴² CJEU 29 April 2015, no C-51/13, ECLI:EU:C:2015:286 (*Nationale Nederlanden v Van Leeuwen*).

⁴³ Directive 92/96/EEC, OJ L360/1.

Nonetheless, in its interim judgment Rotterdam District Court held as follows about the fact that Nationale-Nederlanden had not sent the policyholder a summary or full overview of the actual and/or absolute costs and their composition:

Although Nationale-Nederlanden fulfilled the requirements referred to in Article 2(2)(q) and (r) of the 1998 Regulation regarding the provision of information to policyholders, it nonetheless infringed the open rules (including, in this legal action, the general and/or special duty of care owed by Nationale-Nederlanden to Van Leeuwen in the context of their contractual relations, pre-contractual good faith and/or requirements of reasonableness and fairness) by confining the information it furnished to information about the effect of costs and risk premiums on the return.⁴⁴

Nationale-Nederlanden argued that it could not be required to furnish additional information on the basis of open and/or unwritten rules.

Questions referred for a preliminary ruling

The District Court referred the following two questions to the Court of Justice for a preliminary ruling:

1. Does EU law, and in particular Article 31(3) of the Third Life Assurance Directive, preclude an obligation on the part of a life assurance provider on the basis of the open and/or unwritten rules of Dutch law—such as the reasonableness and fairness which govern the contractual and pre-contractual relationship between a life assurance provider and a prospective policyholder, and/or a general and/or specific duty of care—to provide policyholders with more information on costs and risk premiums of the insurance than was prescribed in 1999 by the provisions of Dutch law implementing the Third Life Assurance Directive (in particular, Article 2(2)(q) and (r) of the 1998 Regulation)?
2. Are the consequences, or possible consequences, under Dutch law of a failure to provide that information relevant for the purposes of answering question 1?

Duties to furnish additional information on the basis of reasonableness and fairness?

The first question referred for preliminary ruling was answered in the affirmative. In short, the civil courts may, by reference to the requirements of reasonableness and fairness under Articles 6:2 and 6:248 of the Dutch Civil Code,⁴⁵ impose duties to furnish information additional to that required under the 1998 Regulation, provided that three ‘cumulative’ conditions are fulfilled (this is a matter for the referring court to decide):

44 Rotterdam District Court, 28 November 2012, ECLI:NL:RBROT:2012:BY5159, para 2.9.

45 Art 6:2 of the Dutch Civil Code reads as follows: ‘1. Creditor and debtor are obliged to act towards each other in accordance with the requirements of reasonableness and fairness. 2. A rule that would be binding on them by virtue of law, usage or juristic act does not apply if this would be unacceptable according to the criteria of reasonableness and fairness.’ Art 6:248 of the Dutch Civil Code reads as follows: ‘1. A contract has not only the legal consequences agreed by the parties but also those consequences which, by virtue of the nature of the contract, follow from the law, usage or the requirements of reasonableness and fairness. 2. A rule that would be binding on the parties as a consequence of the contract does not apply if this would be unacceptable according to the criteria of reasonableness and fairness.’

1. the information required must be clear and accurate;
2. the information required must be necessary to enable the policyholder to understand the essential elements of the commitment;
3. legal certainty for the insurer is sufficiently safeguarded (paragraphs 21, 29, 30, 31 and 33).

The first two conditions follow from the express wording of Article 31(3) of the Third Life Assurance Directive, Annex II and recital 23 in the preamble to the Third Life Assurance Directive (paragraph 21). The third condition expresses the principle of legal certainty under EU law. The CJEU held that the legal basis for the use by the Member State concerned of the possibility provided for in Article 31(3) of the Third Life Assurance Directive must be such that, in accordance with the principle of legal certainty, it enables the insurer to identify with sufficient foreseeability what additional information it must furnish and the policyholder may expect (paragraph 29). An additional duty to provide information based on the requirements of reasonableness and fairness under Article 6:2 of the Dutch Civil Code would not seem at first sight to fulfil this requirement since this rule is extremely vague and has little if any predictive value. So that seemed to be good news for *Nationale-Nederlanden*.

But the Court of Justice then went on to formulate two arguments that were favourable to the policyholder and unfavourable to *Nationale-Nederlanden*. It held that when deciding whether the legal certainty principle had been fulfilled the national court may (not ‘must’) take into consideration the fact that it is for the insurer to determine the type and characteristics of the insurance products which it offers, so that, in principle, it should be able to identify the characteristics of its products offered and which are likely to justify a need to provide additional information to policyholders (paragraph 30). In short, the ball was played back into the insurer’s court. It knew best what information it should furnish to its clients in order to ensure that they understood the insurance product. What perhaps played a role in this connection was that, according to the CJEU, the fact that the policyholder should receive a summary or full overview of the actual and/or absolute costs and their composition to be able to understand the operation of the product was so apparent that the insurer itself should have realized it was necessary to furnish this information to the policyholder. The CJEU added in this connection that, in accordance with the description of the grounds of the 1998 Regulation, its application was governed, in particular, by the national private law in force, ‘including the requirements of reasonableness and fairness’ set out in Article 6:2 of the Dutch Civil Code (paragraph 31). In short, the CJEU clearly considered that *Nationale-Nederlanden* could and should have known that its responsibility did not begin and end with literal compliance with the 1998 Regulation.

Consequences of *Nationale-Nederlanden v Van Leeuwen*

It seems to follow from the *Nationale-Nederlanden* judgment that EU law is blind to the distinction between public and private law when it comes to implementing rules of

EU law.⁴⁶ After all, in the *Nationale-Nederlanden* case, the CJEU had no problem with the fact that Annex II to the Third Life Assurance Directive⁴⁷ was transposed into Dutch law in Article 2 of the 1998 Regulation on the Furnishing of Information to Policyholders (the 1998 Regulation) (public law), whereas the Member State option in Article 31(3) of the Third Life Assurance Directive to furnish additional information may be implemented by means of the requirement of reasonableness and fairness under Article 6:2 of the Dutch Civil Code (private law).

If it is indeed true that EU law is blind to the distinction between public and private law, this also has an important bearing on whether civil courts may impose stricter standards than the information obligations under the EU prospectus rules. These rules provide for maximum harmonization. If EU law is truly blind to the distinction between public and private law when it comes to the transposition of EU legal rules, the maximum harmonization standard will also apply to the civil courts. They may not therefore impose stricter information obligations than those that result from the EU prospectus rules, regardless of whether these are included in a directive or a regulation. In the above-mentioned *ImmoFinanz* judgment about the private law impact of, for example, the EU prospectus rules, the CJEU admittedly noted that in the absence of EU legislation it was for the Member States themselves to determine what effect a breach of these rules had under private law, provided that it was not impossible or extremely difficult to recover compensation for the loss or damage suffered, but this referred to the sanction and not to the legal rule itself.

If this line of reasoning is rejected because it is considered that the civil courts may in certain circumstances be stricter than the EU prospectus rules, the present judgment in any event showed that legal certainty was an important factor that the civil courts had to take into consideration in deciding whether they may impose stricter criteria than apply under the rules of EU financial supervision. To prevent the EU passport function of the prospectus from being undermined, the civil courts should, in my view, in any event attach extra importance to the EU principle of legal certainty (see section ‘The operation of the prospectus as a European passport’ below).

Article 6(1) Prospectus Regulation and Delegated Regulation (EU) 2019/980

The Prospectus Regulation contains the basic rule that a prospectus must contain the necessary information which is material to an investor for making an informed assessment of the issuer and the securities (Article 6(1) of the Prospectus Regulation). As noted previously, this basic rule has been elaborated in detail in the various Annexes to Delegated Regulation (EU) 2019/980. The statutory basis for this is Article 13 of the Prospectus Regulation, which is entitled ‘Minimum information and format’. In my view, the use of

46 But see: MW Wallinga, *EU investor protection regulation and private law. A comparative analysis of the interplay between MiFID and MiFID II and liability for investment losses* (dissertation, University of Groningen 2018) p 69.

47 Directive 92/96/EEC, OJ L 360/1. This has now been repealed and replaced by more recent versions. See CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale Nederlanden v Van Leeuwen*), para 3.

the term ‘minimum information’ should not be read as meaning that the general rule allows scope for additional information obligations. Instead, I interpret the heading ‘Minimum information and format’ as meaning that the drafter of the prospectus is, in principle, free to include more information than the information required by law. This interpretation is supported by recital 2 in the preamble to Delegated Regulation (EU) 2019/980:

The content and the format of a prospectus depend on a variety of factors, such as the type of issuer, type of security, type of issuance as well as the possible involvement of a third party as a guarantor and the question of whether or not there is an admission to trading. It is therefore not appropriate to lay down the same requirements for all types of prospectuses. Specific information requirements should be laid down instead and should be combined depending on those factors and the type of prospectus. *This should however not prevent an issuer, offeror or person asking for admission to trading on a regulated market to provide in the prospectus the most comprehensive information available* [DB’s italics].

In short, the drafter of a prospectus is, in principle, free to include extra information, but the competent authority cannot compel this by withholding approval of the prospectus. The reason why the qualification ‘in principle’ is added is because this power to include extra information may no longer be construed as a licence to swamp investors with information. As previously noted, recital 27 in the preamble to the Prospectus Regulation provides that a prospectus should not contain information which is not material or specific to the issuer and the securities concerned. This could otherwise obscure the information relevant to the investment decision and thus undermine investor protection. Indeed, if this is the case, the competent authority may not approve the prospectus as there would otherwise be a breach of the rule in Article 6(2) of the Prospectus Regulation, to the effect that the information in a prospectus must be written and presented in an easily analysable, concise and comprehensible form.

The operation of the prospectus as a European passport

It is also important to consider for a moment the practical consequences of a decision by a civil court in a given Member State to impose stricter information obligations than the detailed obligations set out in the Annexes to Delegated Regulation (EU) 2019/980. If it is desired to offer securities to the investing public in the relevant jurisdiction, it will, after all, be necessary to take into account the stricter information obligations under private law in order to prevent liability. In such a jurisdiction, it will no longer be sufficient to draw up a prospectus in accordance with the detailed information obligations included in the Annexes to Delegated Regulation (EU) 2019/980, and allowance will have to be made for stricter information obligations under private law. This would seriously undermine the functioning of the prospectus as a European passport. After all, the idea behind the EU prospectus rules is that a prospectus that has been approved by the competent authority in one Member State can also be used to offer securities to investors in all other Member States. Prospectuses could no longer adequately fulfil this function if it were necessary

when drawing them up to take into account stricter information obligations under private law, possibly even varying from one Member State to another.⁴⁸ Such a situation would be at odds with the concepts of the level playing field, legal certainty and maximum harmonization underlying the Prospectus Regulation. All this is even more true under the current Prospectus Regulation than under its predecessor, the Prospectus Directive. After all, the instrument of a directly applicable regulation was expressly chosen for the sake of legal certainty, uniform investor protection and a European level playing field. See recital 5 in the preamble to the Prospectus Regulation:

It is appropriate and necessary for the rules on disclosure when securities are offered to the public or admitted to trading on a regulated market to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on persons involved in offers of securities to the public and in admissions of securities to trading on a regulated market are applied in a uniform manner throughout the Union. Since a legal framework for the provisions on prospectuses necessarily involves measures specifying precise requirements for all different aspects inherent to prospectuses, even small divergences on the approach taken regarding one of those aspects could result in significant impediments to cross-border offers of securities, to multiple listings on regulated markets and to Union consumer protection rules. Therefore, the use of a regulation, which is directly applicable without requiring national law, should reduce the possibility of divergent measures being taken at national level, and should ensure a consistent approach, greater legal certainty and prevent such significant impediments. The use of a regulation will also strengthen confidence in the transparency of markets across the Union, and reduce regulatory complexity as well as search and compliance costs for companies.⁴⁹

Example 1

An example may help to clarify this. According to the Prospectus Regulation, risk factors should in future be limited to those risks which are material and specific to the issuer and its securities (Article 16(1) of the Prospectus Regulation). A situation may not arise in which an issuer or, for example, a lead manager incurs civil liability because a court holds that the prospectus wrongly failed to mention a risk which, although it has materialized, cannot be classified as a risk that is material and specific to the issuer and its securities. After all, under Article 16(1) of the Prospectus Regulation, the inclusion of risk factors that are not material and specific to the issuer and its securities is no longer permissible and would have meant that the competent authority would have refused to approve the prospectus.⁵⁰

48 See also PO Mülbert, *EU-rechtliche Kapitalmarktinformationsvorschriften und mitgliedstaatliche Haftungsregeln—Möglichkeiten und Grenzen am Beispiel der Prospektverordnung (EU) 2017/1129*, in: M Dreher, I Drescher, PO Mülbert and DA Verse (Hrsg.), *Festschrift für Alfred Bergmann zum 65. Geburtstag am 13. Juli 2018* (De Gruyter 2018) 529–40, at 538–9.

49 See also recitals 27 and 60 in the preamble to the Prospectus Regulation.

50 cf PO Mülbert, *EU-rechtliche Kapitalmarktinformationsvorschriften und mitgliedstaatliche Haftungsregeln—Möglichkeiten und Grenzen am Beispiel der Prospektverordnung (EU) 2017/1129*, in: M Dreher, I Drescher, PO Mülbert and DA Verse (Hrsg.), *Festschrift für Alfred Bergmann zum 65. Geburtstag am 13. Juli 2018* (De Gruyter 2018) 529–40, at 537–8.

Example 2

Let us now consider another example. A civil court holds that a prospectus has wrongly failed to mention a certain risk that has materialized, and that this risk should be considered material and specific to the issuer and its securities. Naturally, the possibility of such a finding can never be entirely excluded, but there is real danger of hindsight bias. The civil court must really give proper consideration to whether it was reasonable for the person who drew up the prospectus to believe that the risks then classified as material and specific to the issuer and its securities had been included. To prevent hindsight bias, the civil courts would therefore do well to exercise restraint in this regard.

Securities not covered by the Annexes to Delegated Regulation (EU) 2019/980

Naturally, it is always possible that at some point securities are offered that are not covered by the Annexes to Delegated Regulation (EU) 2019/980. This situation is addressed in recital 24 in the preamble to Delegated Regulation (EU) 2019/980:

Due to the rapid evolution of securities markets, there is the possibility that certain types of securities that are not covered by the Annexes to this Regulation will be offered to the public or admitted to trading. In such a case, to enable investors to make an informed investment decision, competent authorities should decide in consultation with the issuer, offeror or person asking for admission to trading on a regulated market which information should be included in the prospectus.

Investor protection and a European capital market

In view of what has been said above, it seems to me that investor protection is adequately guaranteed by the information obligations under the EU prospectus rules and that consequently civil courts do not actually have a good reason to impose stricter information obligations under private law than those arising from the EU prospectus rules. In addition, investor protection is admittedly a key objective of the EU prospectus rules, but it is not the only one. Another key objective is the creation of a European capital market. See recital 4 in the preamble to the Prospectus Regulation:

Divergent approaches would result in fragmentation of the internal market since issuers, offerors and persons asking for admission to trading on a regulated market would be subject to different rules in different Member States and prospectuses approved in one Member State could be prevented from being used in other Member States. In the absence of a harmonised framework to ensure uniformity of disclosure and the functioning of the passport in the Union it is therefore likely that differences in Member States' laws would create obstacles to the smooth functioning of the internal market for securities. Therefore, to ensure the proper functioning of the internal market and improve the conditions of its functioning, in particular with regard to capital markets, and to guarantee a high level of consumer and investor protection, it is appropriate to lay down a regulatory framework for prospectuses at Union level.⁵¹

51 See also recital 1 in the preamble to the Prospectus Regulation.

Differentiation between retail and wholesale investors?

Nor should the fact that an offer of securities is directed solely at retail investors be a reason for the civil courts to impose stricter information obligations than those arising from the EU prospectus rules. As Delegated Regulation (EU) 2019/980 explicitly differentiates between offers to retail investors and offers to wholesale investors in the case of non-equity securities, this distinction has already been incorporated in the EU prospectus rules. See also recital 7 in the preamble to Delegated Regulation (EU) 2019/980:

The information contained in prospectuses for non-equity securities should be adapted to the level of knowledge and expertise of each type of investor. Prospectuses for non-equity securities in which retail investors can invest should therefore be subject to more comprehensive and distinct information requirements than prospectuses for non-equity securities that are reserved to qualified investors.

Delegated Regulation (EU) 2019/980 does not make this distinction where the offer relates to equity securities. In those cases, the European legislator apparently saw no reason to differentiate between information obligations on the basis of whether the offer relates to retail or wholesale investors. The civil courts should consider themselves bound by this. In short, the civil courts should, in my view, differentiate between retail and wholesale investors with regard to the content of the information obligations only in so far as the EU prospectus rules do the same.

Use of language

The Prospectus Regulation also sets requirements for the use of language and the manner of presentation. See Article 6(2) of the Prospectus Regulation:

The information in a prospectus shall be written and presented in an easily analysable, concise and comprehensible form, taking into account the factors set out in the second subparagraph of paragraph 1.

As noted previously, although this does not strictly follow from Article 6(1) and (2) of the Prospectus Regulation, it is apparent from recital 27 in the preamble to the Regulation that the application of the rule is influenced by the type of investor to whom the offer is addressed. It may be assumed that the language used in a prospectus will have to be somewhat less specialized (ie less technical) in the case of an offer of securities addressed solely or partly to retail investors than if the offer is addressed solely to wholesale investors. In short, the civil courts may, in my view, differentiate between retail and wholesale investors with regard to the language requirements. For example, a civil court may hold that a prospectus addressed partly to retail investors may contain all the information items that are required under the EU prospectus rules, but that Article 6(2) of the Prospectus Regulation has nevertheless been infringed because the information has been formulated in such technical terms that it misleads retail investors.

Inclusion of non-material information

The same applies if a prospectus contains all kinds of information which is not material or specific to the issuer and the securities concerned. This could otherwise obscure the information relevant to the investment decision and thus undermine investor protection (see recital 27 in the preamble to the Prospectus Regulation). In short, a civil court will be able to hold, for example, that although a prospectus contains all the information items required under the EU prospectus rules, these rules have nonetheless been infringed because the prospectus contains too much superfluous information. This will probably mainly play a role if an offer is wholly or partly aimed at retail investors, but even where an offer is intended solely for wholesale investors it is quite conceivable that a large amount of superfluous information would violate the EU prospectus rules (Article 6(2)).

5. The influence of the EU prospectus rules on the relativity requirement

In some jurisdictions the principle of proximity or relativity must be fulfilled in order to bring a successful action in tort.⁵² In so far as relevant here, this means that the information obligation that has been infringed under the EU prospectus rules must be intended in part to offer protection against the loss suffered by the investor. Although the *ImmoFinanz* judgment admittedly appears to show that, in the absence of a European regulation, it is up to the Member States themselves to determine the private law consequences of an infringement of, inter alia, the EU prospectus rules, other considerations such as the principle of effectiveness must always be taken into account.⁵³

In this connection, the principle of effectiveness means that the conditions to be fulfilled by an investor in bringing a civil action against an issuer or lead manager may not be such as to exclude or virtually exclude the possibility of success. In my opinion, the European principle of effectiveness means that a claim for damages on account of an infringement of the EU prospectus rules may not fail by virtue of the requirement of relativity. After all, these rules are expressly intended to provide investor protection (besides creating a European capital market).⁵⁴

This is in keeping with what can be found in Explanatory Memorandum to the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, or 'Wft'), where it is stated that all provisions of the Wft are intended in part to protect the clients' financial interests. The same applies to other private law relationships of the firm, for example with shareholders and bondholders.⁵⁵ Although the prospectus rules have now disappeared from the Wft and are now contained in a directly applicable EU regulation, the scope of their protection has naturally not changed.

⁵² See, for example, Art 6:163 DCC (the Netherlands) and § 823 BGB (Germany).

⁵³ CJEU 19 December 2013, no C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v ImmoFinanz AG*) para 40.

⁵⁴ See also recital 3 in the preamble to the Prospectus Regulation.

⁵⁵ See *Parliamentary Papers II* 2005/2006, 29 708, no 19, p 393.

6. The influence of the EU prospectus rules on the proof of causal link

Another interesting question about the effect of the Prospectus Regulation on civil liability concerns its influence on proving causal link. To answer this question, it is necessary first of all to consider the judgment of the Dutch Supreme Court in the leading *World Online* case in 2009, where the European principle of effectiveness was applied in relation to proof of causal link in the context of prospectus liability under the predecessor of the Prospectus Regulation, namely the Prospectus Directive.⁵⁶

That case concerned loss allegedly suffered by investors in internet company World Online as a consequence of, among other things, a misleading prospectus published on the occasion of the company's flotation. In brief, the Supreme Court held as follows. As it was often hard to prove a *condicio sine qua non* link (a 'but for' link) in relation to liability for a prospectus, the investor protection which the EU Prospectus Directive was intended to provide could prove illusory in practice. Although this Directive admittedly contained detailed provisions about what information must be included in the prospectus, it did not regulate liability for the prospectus. It did, however, require the Member States to ensure that their laws, regulations and administrative provisions on civil liability applied to those persons responsible for the information given in a prospectus (Article 6(2), first paragraph, of the Prospectus Directive). According to the Supreme Court, this meant that effective legal protection had to be provided in accordance with the rules of national law. The basic principle applied by the Supreme Court was that a *condicio sine qua non* link ('but for' link) must exist between the incorrect prospectus and the decision to invest. In the case of professional investors, however, a court may well be justified in concluding that, in view of their knowledge and experience, they were not actually influenced by it in making their investment decision. The Supreme Court held that in such cases it is possible to revert to the basic rule that the investor bears the burden of proving the causal link.⁵⁷

The distinction that the Supreme Court makes with regard to the proof of the causal link between retail and wholesale investors does not always seem to me to be consistent with the EU prospectus rules. As mentioned previously, Delegated Regulation (EU) 2019/980 explicitly differentiates between offers to retail investors and wholesale investors in respect of non-equity securities. If certain information items are to be included in a prospectus intended for wholesale investors, the basic assumption should be that the wholesale investor also needs this information in order to make an informed investment decision. If information items that are mandatory in a wholesale prospectus are missing or incorrect, the basic assumption (as in relation to retail investors) should be that a *condicio sine qua non* link ('but for' link) exists between the incorrect prospectus and the investment decision of the wholesale investors. This basic assumption can then be challenged by the defendant.

⁵⁶ Dutch Supreme Court 27 November 2009, ECLI:NL:HR:2009:BH2162.

⁵⁷ Ibid, paras 4.11.1 and 4.11.2.

The distinction made by the Supreme Court with regard to the proof of the causal relationship between retail and wholesale investors may, however, be consistent with the EU prospectus rules where a prospectus used to offer securities to both retail and wholesale investors is admittedly both correct and complete, but is couched in very technical terms. As wholesale investors may presumably be expected to understand this language, they will have the burden of proving or showing that they were misled by the prospectus.

Finally, other approaches that help investors to prove causal link may also, of course, be consistent with the European principle of effectiveness.⁵⁸

7. The influence of the EU prospectus rules on determination of the extent of the loss or damage

Another intriguing question is what influence the Prospectus Regulation has on determining the extent of the loss or damage. The European principle of effectiveness means that the conditions to be fulfilled by an investor in bringing a civil action against an issuer or lead manager may not be such as to exclude or virtually exclude the possibility of success. I would assume that this means that claims for damages for an infringement of the EU prospectus rules should not be excluded or significantly restricted.

Merely awarding nominal damages is, in my opinion, contrary to the European principle of effectiveness. In any case, it is apparent that not only damages for tort or non-performance are consistent with the European principle of effectiveness. A claim for undue payment after an underlying contract has been set aside with retroactive effect may also be compatible with this principle.⁵⁹ The Member States seem to have a degree of autonomy in this respect, provided they do not exclude or significantly restrict claims for damages for an infringement of the EU prospectus rules.

This is not a purely theoretical problem, as can be seen from section 21 of the German *Wertpapierprospektgesetz* (WpPG). This statutory provision substantially limits investors' rights to compensation. For example, under the WpPG an investor who has bought securities on the basis of an incomplete or incorrect prospectus and still holds them can never claim more than the introductory price of the security, in exchange for the security, even though the investor has paid a lot more for it. Whether this statutory provision is

58 On this point, see CJM Klaassen, *Bewijs van causaal verband tussen beweerdelijk geleden beleggingsschade en schending van informatie- of waarschuwingplicht*, in D Busch, CJM Klaassen and TMC Arons (eds), *Aansprakelijkheid in de financiële sector* (OO&R-reeks no 78), Kluwer, Deventer, p. 151. In such cases, the French courts apply the theory of loss of opportunity or the theory of loss or damage suffered as a consequence of a limitation of freedom of choice, whereas under German, Italian and Spanish law there is a rebuttable presumption that an incorrect or incomplete prospectus has led to the investment decision. According to Luxembourg law, however, investors still seem to have the full burden of proving a causal link between the incorrect or incomplete prospectus and their investment decision. See: T Bonneau, Chapter 21 (France), in: Busch, Ferrarini & Franx (2020), § IX; S Mock, Chapter 20 (Germany), in: Busch, Ferrarini & Franx (2020), § IX; P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § IX; Redonet Sánchez del Campo, Chapter 23 (Spain), in: Busch, Ferrarini & Franx (2020), § IX; V Hoffeld, Chapter 25 (Luxembourg), in: Busch, Ferrarini & Franx (2020), § IX.

59 For an example, see CJEU 19 December 2013, no. C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v ImmoFinanz AG*) para. 19.

consistent with the principle of effectiveness is doubtful, because it substantially limits the loss or damage eligible for compensation (see also Section 8 below).⁶⁰

Finally, the European principle of effectiveness does not prevent the amount of damages from being reduced by reference to doctrines such as contributory negligence and an investor's duty of mitigation. These doctrines can, after all, be regarded as general principles of EU law.⁶¹

8. The influence of the EU prospectus rules on a limitation or exclusion of liability

The European principle of effectiveness means that the national conditions to be fulfilled by an investor in bringing a civil action against an issuer or lead manager for breach of information obligations under the Prospectus Regulation may not be such as to exclude or virtually exclude the possibility of success. It could be argued that this also means that clauses in the prospectus (or elsewhere) that exclude or substantially restrict liability for infringement of the information obligations under the Prospectus Regulation are contrary to the principle of effectiveness. An issuer or lead manager is not bound by the European principle of effectiveness, but the civil courts are. A case can therefore be made for saying that in civil proceedings, for example against an issuer or lead manager, the civil courts should ignore clauses in so far as they purport to exclude or substantially limit liability for breach of the EU prospectus rules. In my view, the same should apply to national laws that exclude or substantially limit liability for infringement of the EU prospectus rules. Consider section 21 WpPG, as discussed in the previous section. Whatever the case, it makes no difference from the perspective of the European principle of effectiveness how the civil courts ensure that claims for damages for breach of the EU prospectus rules are not excluded or substantially limited.⁶²

60 According to S Mock, Chapter 20 (Germany), in: Busch, Ferrarini & Franx (2020), § IX.2.(i).

61 See AS Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (2nd edn, Intersentia 2016) nos 134–35 (with further references).

62 Under German, Italian and Luxembourg law, provisions that exclude or limit the liability of persons responsible for a prospectus are invalid. See: S Mock, Chapter 20 (Germany), in: Busch, Ferrarini & Franx (2020), § XI; P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § XI; V Hoffeld, Chapter 25 (Luxembourg), in: Busch, Ferrarini & Franx (2020), § XI. Under French law, a limitation or exclusion of liability will have only limited effect since (i) it only applies between contracting parties and not in relation to third parties in tort claims and (ii) it may not relate to essential contractual clauses. Moreover, it will have no effect if there has been intent or gross negligence. See: T Bonneau, Chapter 21 (France), in: Busch, Ferrarini & Franx (2020), § XI. In the Netherlands, the Supreme Court held in the case of *Coop* (HR 2 December 1994, ECLI: NL: HR: 1994: ZC1564) that an issuer may legitimately include a provision in the prospectus to the effect that it does not accept responsibility for certain parts of the prospectus that relate to information provided by third parties (eg its accountant). Nonetheless, disclaimers of this kind have not become commonplace in the Dutch market, and the author of the Dutch chapter doubts (rightly in my opinion) whether such disclaimers are consistent with the European principle of effectiveness. Finally, it is noted in the Dutch chapter that it is not unusual in international practice and also in the Netherlands for a general disclaimer to be included in a prospectus for the benefit of the underwriters, to the effect that 'no representation or warranty whatsoever is made by them as to the accuracy and completeness of the information in the entire prospectus'. The author of the Dutch chapter observes (rightly in my view) that it is doubtful whether a Dutch court would permit such a far-reaching disclaimer, at least in relation to the underwriters who were actively involved in drawing up the prospectus. See: JP Franx, Chapter 24 (the Netherlands), in: Busch, Ferrarini & Franx (2020), § XI. This will particularly apply to the lead manager. In the UK, the matter would appear to be one for the general law whereby any exemption in a contract or a notice of disclaimer is subject to restrictions on excluding or restricting liability in the Unfair Contract Terms Act 1977, s 3(1) of the Misrepresentation Act 1967 and Pt 2 of the Consumer Rights Act 2015. See: G McMeel, Chapter 26

9. Assessment by national courts of their own motion of compliance with the EU prospectus rules in cases involving private investors

Another intriguing question that has an important bearing on the extent to which the EU prospectus rules impact civil liability is whether the civil courts are obliged to assess of their own motion whether the information obligations under the EU prospectus rules have been infringed. I would certainly not exclude that possibility. It is clear from settled case law of the CJEU that the European principle of effectiveness requires the national courts to assess of their own motion whether clauses in contracts between traders and consumers are unreasonably onerous and therefore ‘unfair’ within the meaning of Directive 93/13/EEC. The CJEU can also instruct the civil courts to investigate of their own motion whether the arrangement is applicable.⁶³ The CJEU seems to extend the protection to the entire field of EU consumer protection law. For example, it has also held that national courts should assess of their own motion whether there has been compliance with the Consumer Sales Directive (CSD).⁶⁴

The information obligations under the European prospectus rules should, in my view, be regarded as consumer protection provisions in so far as they relate to private investors.⁶⁵ In that case, national civil courts should assess of their own motion whether there has been an infringement of the information obligations under the European Prospectus Rules in disputes between private investors and parties responsible for the content of the prospectus, such as the issuer and the lead manager.

10. The European prospectus rules and liability of financial regulators

Assessment by the regulator

A prospectus requires the approval of the competent authority (ie the financial regulator) before it can be used to offer securities to the public (Article 2(r) and 20(4) of the Prospectus Regulation). To harmonize as far as possible the manner in which financial

(UK), in: Busch, Ferrarini & Franx (2020), § XI. Customary disclaimers are typically included in Spanish prospectuses and are found acceptable by the Spanish financial regulator CNMV, including on forward looking statements, reliance by the managers on information delivered by the issuer, etc, provided that disclaimers may not seek to exonerate a person responsible for the content of the prospectus of its liability under the Securities Market Act and Royal Decree 1310/2005 as these are mandatory provisions of imperative law which are meant to protect investors and which may not be waived or overridden by the parties. See: Redonet Sánchez del Campo, Chapter 23 (Spain), in: Busch, Ferrarini & Franx (2020), § XI.

63 See CJEU 26 October 2006, no C-168/05; CJEU 4 June 2009, no C-243/08; CJEU 6 October 2009, no C-40/08; CJEU 30 May 2013, NJ 2013/487; CJEU 28 July 2016, no C-168/15.

64 See CJEU 3 October 2013, no C-32/12; CJEU 4 June 2014, no C-497/13. See also A Ancery and B Krans, *Ambtshalve toepassing van consumentenrecht: grensbepaling en praktische kwesties* (Ars Aequi 2016) 825–30. See also AGF Ancery, *Ambtshalve toepassing van EU-recht: ook financieel toezichtrecht?*, MvV (2018) 94–99 (it should be noted that Ancery is less optimistic about an obligation of the courts to assess of their own motion whether terms are compliant with EU financial supervision law). For a general consideration of assessment by the courts of their own motion by reference to European law, see AS Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (2nd edn, Intersentia 2016) nos 124–30.

65 One of the key aims of the Prospectus Regulation is investor protection (see recital 3 in the preamble to the Prospectus Regulation).

regulators approve prospectuses, these criteria are specified in more detail in Chapter V of Delegated Regulation (EU) 2019/980, and ESMA too needs to develop guidelines.⁶⁶ It goes without saying that the regulator is not responsible for checking whether all information in the prospectus is correct. After all, that would require the regulator to conduct a due diligence investigation into the issuer, which would naturally be going much too far. Moreover, the due diligence investigation is the task of the lead manager.

Nonetheless, a liability claim could conceivably be brought by aggrieved investors against a regulator which approves or rejects a prospectus in contravention of the Prospectus Regulation and Delegated Regulation (EU) 2019/980. As noted previously, according to the Prospectus Regulation, prospectuses should in future include only risks that are material and specific to the issuer and its securities (Article 16(1) of the Prospectus Regulation). ESMA has published guidelines which provide a detailed explanation of how regulators that have to approve prospectuses should apply these new rules in practice.⁶⁷ It is evident from these guidelines that these authorities are expected to adopt a fairly proactive and critical approach. If a risk factor is not material and specific to the issuer and its securities, the regulator should press for the risk factor to be modified or removed. Suppose that the persons who have drawn up the prospectus agree to this. And next suppose that the issuer and lead manager, as the persons who have drawn up the prospectus, are held liable by investors who consider that the prospectus wrongly fails to mention a given risk that has materialized and which the investors consider should be classified as material and specific to the issuer and the securities. The parties held liable by the investors then refer them to the regulator, which has expressly pressed for removal of the corresponding risk factor.

Italy

Whatever may be the case, the highest civil court in Italy has held in a case of this kind that the Italian regulator was liable in tort as it was abundantly clear that the information contained in the prospectus was incorrect and incomplete.⁶⁸ In response to this case, the liability of the regulator in Italy is now limited to intent and gross negligence.⁶⁹

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Recently, the CJEU held that national legislation on liability which required that the financial regulator must have acted intentionally, went further than the sufficiently serious breach which EU law sets as a condition for the liability of national government bodies—including financial regulators—which act in breach of EU rules.⁷⁰ From previous case law of the CJEU on the liability of other national government bodies for an infringement of

66 The power of the Commission and ESMA to do this is based on Art 20(11) (Commission) and (12) (ESMA).

67 ESMA, *Final Report—ESMA Guidelines on risk factors under the Prospectus Regulation*, 29 March 2019 (ESMA31-62-1217).

68 Court of Cassation, 3 March 2001, no 3132. See: P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § V.

69 See: P Giudici, Chapter 22 (Italy), in: Busch, Ferrarini & Franx (2020), § V.

70 CJEU, 4 October 2018, ECLI:EU:2018:80, *Ars Aequi Maandblad* (2019) 59, with annotation by D Busch & SAM Keunen (also available in English on ssrn: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346240>); *Nederlandse Jurisprudentie* 2019/

EU law, it can be deduced that the condition of ‘gross negligence’ also goes beyond the requirement of a sufficiently serious breach.⁷¹ Generally speaking, therefore, it seems that national laws that limit the liability of financial regulators to intent or gross negligence are contrary to EU law in so far as liability is based on acts in breach of EU law.

Article 20(9) of the Prospectus Regulation

However, there is an exception to the above rules regarding the liability of financial regulators for approving or rejecting a prospectus. Article 20(9) of the Prospectus Regulation provides in this connection as follows:

This Regulation shall not affect the competent authority’s liability, which shall continue to be governed solely by national law [*the competent authority is the financial regulator, DB*]. (...).⁷²

This provision leaves little room for misunderstanding. In so far as it concerns liability of the financial regulator for wrongfully approving or rejecting a prospectus, national liability limitations may go beyond the ‘sufficiently serious breach’ criterion of EU law.

11. Conclusions

The influence of the EU prospectus rules on private law is potentially considerable, but the subject is unfortunately surrounded by much uncertainty. EU legislation on prospectus liability would be the best solution, not only for reasons of legal certainty but also for the sake of uniform investor protection and a truly level playing field in Europe. However, in the current political climate (less rather than more Europe), that is likely to be a non-starter for the time being. Our hopes must therefore be pinned on the CJEU, which will hopefully provide more clarity in the years ahead. But to achieve this the CJEU is dependent on the willingness of national civil courts to submit preliminary rulings with precisely formulated questions that give it sufficient insight into the facts of the case. Otherwise there is a considerable risk of abstract judgments capable of varying interpretations, which are of little help in developing either theory or practice. It is an open secret that supreme court judges are sometimes reluctant to refer questions to the CJEU for a preliminary ruling. They would rather not have their freedom curtailed. Moreover, they are well aware that it is better not to ask a question if the answer may well not be to their liking. Naturally, however, the litigants and their lawyers can urge the civil court to refer questions for a preliminary ruling.

28, with annotation by VPG de Serière; *Maandblad voor Vermogensrecht* 2019/04, with annotation by R Meijer (*Nikolay Kantarev v Balgarska Narodna Banka*).

71 The CJEU has already held in respect of national legislation limiting the liability of the highest Italian court to cases of gross negligence and bad faith that this goes beyond a sufficiently serious breach (CJEU 13 June 2006, ECLI:EU:C:2006:391 (*Traghetti*) and CJEU 24 November 2011, ECLI:EU:C:2011:775 (*Commission v Italy*)). As it makes no difference for the purposes of this principle what government body is responsible for the breach, it seems likely that the CJEU will extend this reasoning to other government bodies such as financial regulators.

72 Art 13(6), first paragraph, of the Prospectus Directive contained the same provision.