


# Harmonizing European Financial Regulation: Is There a Need for Improved Similarity in Prospectus Liability Rules?

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**Abstract:** This paper on financial regulation addresses the extent to which rules on liability for information should be standardized across the EU/EEA region. The method applied is an analysis of legal documents. My finding is that further harmonization may lead to difficulties concerning procedural rules. Some authors suggest harmonizing the civil procedure for prospectus liability cases. This could reduce asymmetric information and thus contribute to efficient markets. However, mandatory disclosure comes with costs. These may increase if standards inconsistent with domestic procedures are imposed. The topic may be of interest for regulating other aspects of life, such as environmental information disclosure.

## 1. Introduction

The EU has come a long way in harmonizing prospectus responsibility. Among the remaining subjects is the sanctioning of violations. Some academics have called for rule similarity in the civil procedure in these cases.<sup>1</sup> However, the Member States have organizational set-ups that safeguard checks and balances in this regard. This is evidenced by the similarity sought

<sup>1</sup> Danny Busch, “The Influence of the EU Prospectus Rules on Private Law,” *Capital Markets Law Journal* 16, no. 1 (1 January 2021): 30, <https://doi.org/10.1093/cmlj/kmaa029>.

after in relevant Supreme Court rulings. The choices in the legal area of finance may inspire efforts to regulate climate change. Companies are being tasked with handling some challenges posed by climate change, and financial disclosure has been subject to strict regulations for decades. To improve environmental regulations, it may be necessary to comprehend the advantages and disadvantages of mandatory disclosure in the stock market.

The research question is whether rules in prospectus litigation should be similar across the EU/EEA area. When a company is preparing to be listed on the stock exchange or has already been listed, it must disclose a significant amount of information to the public. For instance, when raising capital, there is a need for a prospectus that outlines all material information regarding the company's finances and operations. The recent PR<sup>2</sup> struck a balance in determining the appropriate level of harmonization for prospectus responsibilities in the EU/EEA area. This study aims to analyze the current state of prospectus liability theory and explore its potential applicability to other domains.

Although legislators have addressed harmonizing securities regulation, some areas remain without common, binding standards. The problem is identifying aspects that have not yet been harmonized and analyzing if further integration is required or if some aspects would be better left to individual nations. The claim to be tested is that pursuing further harmonization will not lead to problems with other procedural set-ups. This claim will be compared to the observations in the upcoming discussion.

To investigate this claim, I will examine relevant theories and empirical legal evidence. A document analysis will be applied to connect observations and the claim. Some aspects of this judicial method will be discussed, specifically incorporating considerations to equal information. The reasoning will be presented, along with relevant objections. The conclusion will focus on securities markets. Finally, some perspectives related to climate change will be offered. The starting point to get there is the debate about the harmonization level.

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<sup>2</sup> Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 30, 2017, <http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng>.

## 2. Theoretical Discussion of Liability Harmonization

After periods of market exuberance, there are often calls for regulation to prevent securities fraud. There is an academic discussion about how far to go in harmonizing prospectus liability. Some say the burden of financial reporting may have reached a tipping point in certain jurisdictions, where the costs may outweigh the benefits.<sup>3</sup> This could be qualified, as the burden will depend on the nature of the responsibility imposed. An author has cited the current political hesitance towards deeper integration as the reason for an anticipated status quo. “EU legislation on prospectus liability would be the best solution (...).”<sup>4</sup> The arguments for common regulation are that it will provide legal certainty, uniform investor protection, and a true level playing field in the region. However, if the Member States have consistent procedural rules, attempts to regulate a particular subset of sanctions could cost more than they gain.

Sanctions are important to ensure adherence to imposed legal norms. Current theory states: “The best interpretation of EU law is a preference for administrative sanctions rather than civil and criminal sanctions.”<sup>5</sup> This position suggests that EU law favors decisions made by supervisory bodies rather than civil or criminal claims. This may reflect the legal competence of EU bodies and the subsidiarity principle, whereby nations establish procedural norms that align with their national hierarchy of enforcement institutions.

Some argue that a standard of effective remedy in criminal law should be universal in the EU.<sup>6</sup> Before this is completed, Member States should see standardization as an opportunity rather than a threat to their sovereignty. Similarly, statutes sanctioning information mistakes should be interpreted considering procedural guarantees. This could promote norm similarity before financial regulation is harmonized in this regard.

<sup>3</sup> Niamh Moloney, Eilis Ferran, and Jennifer Payne, *The Oxford Handbook of Financial Regulation*. Oxford Handbooks (Oxford: University Press, 2015), 534.

<sup>4</sup> Busch, “The Influence,” 30.

<sup>5</sup> Martin Gelter and Pierre-Henri Conac, *Global Securities Litigation and Enforcement* (Cambridge University Press, 2019), 272, <https://doi.org/10.1017/9781316258118>.

<sup>6</sup> Paweł Wiliński and Karolina Kiejnich-Kruk, “Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards,” *Review of European and Comparative Law* 54, no. 3 (30 September 2023): 164, <https://doi.org/10.31743/recl.16244>.

Objections to such regulation can be seen in the US debate over case law from Delaware. Some say the Caremark decision imposing liability on directors after inadequate internal controls should not be extended to cover monitoring voluntary ESG issues.<sup>7</sup> One of the reasons is to draw a line against business decisions. This contrasts with current EU regulations that put the valuation of environmental decisions at centre stage.<sup>8</sup> In the relevant preamble, the EU points to the fact that this area still is not harmonized.<sup>9</sup> The importance of handling asymmetric information is emphasized in this regard.<sup>10</sup>

### 3. The Method for Connecting Observations and the Claim

The starting point here for connecting observations and the claim is legal science. When searching for relevant documents, Norway, as an EEA country, is selected due to its early attention to sustainability and growing alignment with EEA/EU regulations. This will limit the discourse on legal methodology to Norwegian customs. However, this does not render the discussion irrelevant to other jurisdictions, as the methods appear to overlap significantly.<sup>11</sup> As emphasized in recent literature, comparative law can be

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<sup>7</sup> Stephen M. Bainbridge, “Don’t Compound the Caremark Mistake by Extending It to ESG Oversight,” *The Business Lawyer* 77, no. 3 (2022): 655.

<sup>8</sup> Norwegian Act on Financial Sustainability Disclosure of 22 December 2021 No. 161, as amended, accessed January 3, 2024, <https://lovdata.no/pro/#document/NL/lov/2021-12-22-161?searchResultContext=1479&rowNumber=1&totalHits=5948>; Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (14), accessed January 3, 2024, <https://lovdata.no/pro/#document/CLX3/eu/32019r2088>.

<sup>9</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (5), accessed January 3, 2024, <https://lovdata.no/pro/#document/CLX3/eu/32019r2088>.

<sup>10</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (10), accessed January 3, 2024, <https://lovdata.no/pro/#document/CLX3/eu/32019r2088>.

<sup>11</sup> Sverre Blandhol, “Er Rettsanvendelsen i EU-Domstolen Og Menneskerettsdomstolen Vesensforskjellig Fra Norsk Rettskildelære? Lov Og Rett 2005 s 316–327 – (LOR-2005–316),” 2005, 323, accessed June 20, 2023, <https://lovdata.no/pro/#document/JUS/blandhol-s-2005-01>.

a valuable tool for courts when addressing fundamental issues in European law and its interaction with national law.<sup>12</sup> This aspect of comparison is well suited to the discussion of equal information. To apply the outlined method, relevant observations in the form of legal documents are needed.

#### 4. Analysis of Legal Documents

To investigate the claim and discuss the theory, I will analyze certain observations and findings. Specifically, the relevant EU and national legislation are examined, along with the decisions of the European Court of Justice (ECJ) and the Supreme Court. The latter handled the medical product case regarding information responsibility. Claims for damages were brought against the board members.<sup>13</sup> Investors had subscribed to shares in a private placement, but the company went bankrupt due to delays in completing and selling this medical product. The legal basis was the Norwegian Private Companies Act (Aksjeloven – asl) § 17–1,<sup>14</sup> and the actual basis was alleged-ly incorrect or misleading information from the company board members.

The Supreme Court found the communications mostly accurate but determined that a failure to conduct physical testing had resulted in a misjudgment regarding the product's reusability. As the threshold for liability for misjudgment was high, these professional investors had to bear the risk of their own failed expectations. Thus, the board members were cleared of liability. A consistent set of rules was applicable to the problem, and one can ask what rule similarity would provide additional protection to the parties. European sources were hardly mentioned in the medical product reasoning, even though investor protection has recently been incorporated in the domestic statute. If there was a need for additional protection, one would expect comparative law to be relevant to highlighting solutions elsewhere.

This comparative aspect may be reflected in another Supreme Court decision on Reno Norden. In this case, board members were sued when

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<sup>12</sup> Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law*, 1st ed. (Oxford: University Press, 2015), 9, <https://doi.org/10.1093/acprof:oso/9780198735335.001.0001>.

<sup>13</sup> "Norwegian Supreme Court, HR-2022–2484-A – Medical Product," 2022, accessed June 18, 2023, <https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-2484-a>.

<sup>14</sup> Norwegian Act on Company Shares of 13 June 1997 No. 44, as amended, 1997, <https://lovdata.no/pro/#document/NL/lov/1997-06-13-44/%C2%A717-1>.

a capital emission was followed by a relatively quick bankruptcy.<sup>15</sup> The question was whether being aware of a dire financial situation constituted insider information, even when the possibility of collapse was less than fifty per cent. Even though a previous statute was invoked, recent case law from the ECJ was considered significant.<sup>16</sup> A violation was found based on the European court's emphasis on disclosure to prevent market failure. This could be interpreted as a construction of responsibility by using European sources. Reno Norden had asymmetric information regarding its desperate financial situation, and recent theory emphasizes this as a possible motive for securities fraud.<sup>17</sup> As a result, a plaintiff could risk not receiving a payout, even if the civil court case is successful.

Civil prospectus litigation is addressed by Article 11 PR,<sup>18</sup> and a natural interpretation in the current context is that it imposes a duty on nations to ensure a standard of appropriate behavior. Recent literature points to the European principle of effectiveness in this regard. For instance, the Austrian ImmoFinance case is seen as relevant.<sup>19</sup> This verdict found that in the absence of EU rules, it is the responsibility of the Member State to establish the criteria for determining the amount of damages, as long as the principles of equivalence and effectiveness are upheld.<sup>20</sup> Effectiveness should not come at the expense of procedural rights, such as the right to contradict. This is guaranteed by a domestic norm; see the Norwegian Civil Procedures Act<sup>21</sup> 11–1 (3) first sentence.

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<sup>15</sup> “Norwegian Supreme Court, HR-2022–695-A – Reno Norden,” 2022, accessed June 23, 2023, <https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-695-a?searchResultContext=2886&rowNumber=9&totalHits=31>.

<sup>16</sup> CJEU Judgment of 28 June 2012, Markus Geltl v. Daimler AG, Case C-19/11, ECLI:EU:C:2012:397.

<sup>17</sup> Gelter and Conac, *Global Securities Litigation and Enforcement*, 137.

<sup>18</sup> Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 20, 2023, <http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng>.

<sup>19</sup> CJEU Judgment of 19 December 2013, Alfred Hirmann v. Immofinanz AG, Case C-174/12, ECLI:EU:C:2013:856, section 40.

<sup>20</sup> Busch, “The Influence,” 11.

<sup>21</sup> Norwegian Act on Civil Disputes of 17 June 2005 No. 90, as amended, 2005, <https://lovdata.no/pro/#document/NL/lov/2005-06-17-90/%C2%A711-1>.

There will be corresponding regulations in the ECHR incorporated by the Norwegian Human Rights Act.<sup>22</sup> If European regulators aim to fully harmonize civil liability, they must address contradictions, which should be carefully crafted in line with the administrative structure of national enforcement bodies. In a civil case, there will be considerations for both parties. However, the balance may be distorted by new regulations, potentially leaving one party worse off. This will not constitute a Pareto improvement where no one is worse off, and some are better off. Thus, any possible harmonization of civil litigation rules should be carefully implemented.

In addition to civil litigation, administrative sanctions are the main sanction against securities fraud. In the administrative track, issues raised might be resolved without much appeal since the fines are relatively small. The administrative and criminal proceedings are addressed by Article 38 PR:

Without prejudice to the supervisory and investigatory powers of competent authorities under Article 32, and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions (...).

An interpretation of this text is that the EU does not interfere with criminal and administrative sanctions imposed by the nations but rather assumes that these sanctions already exist. When reading this in line with the principle of effectiveness, there will be strict guidelines on national procedures.<sup>23</sup> This is a natural outcome of the integration and cooperation between supervisory bodies across the EU/EEA. Although prospectus responsibility is addressed by the PR, much is left to the Member States. This responsibility applies at a general level. Under the authority granted by Article 75 (a) of the Constitution (Grunnloven) of 17 May 1814, the Securities Trading Act (Verdipapirhandelloven, vphl.) was made statutory on June 29, 2007. When addressing EU/EEA prospectuses for raising more than 8 million EUR, section 7–1 of vphl reads: “1) EØS-avtalen vedlegg IX forordning (EU) 2017/1129 (om prospekter ved

<sup>22</sup> Norwegian Act on the Human Rights of 21 May 1999 No. 30, as amended, 1999, <https://lovdata.no/pro/#document/NL/lov/1999-05-21-30/%C2%A71>.

<sup>23</sup> Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, 7th ed., UK version (Oxford: University Press, 2020), 273.

offentlige tilbud og notering på regulert marked (prospektforordningen)), som endret ved forordning (EU) 2021/337 om EU-gjenopprettingsprospekt, gjelder som lov (...).” A literal interpretation of this is a complete alignment, as the competence to make statutes is extended to include the relevant EU PR<sup>24</sup> in domestic legislation. Article 11(2) PR states: “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.” A contextual interpretation will impose an obligation on national regulators to facilitate damages claims in the event of securities fraud in the primary market. The PR thus stopped short of regulating the specifics of civil liability that apply to prospectuses.

The principles of supremacy, state liability, and national procedural autonomy are discussed in the relevant literature,<sup>25</sup> referencing the ECJ’s Rewe case.<sup>26</sup> In this case, the topic was a time limit on a refund for inspection costs, which was found to be not in line with what is now Article 4(3) TFEU.<sup>27</sup> The national court had to ensure the effective procedural protection of citizens. A similar need for effective protection of investors will arise when Article 11 PR is violated. To ensure easy access to justice and promote efficient market functioning, it is essential to consider whether harmonizing civil procedural rules will improve market functioning or if it may lead to problems with important issues such as contradiction.

## 5. Discussion of the Connection between the Documents and the Claim

This section will discuss the extent to which the observations substantiate the claim regarding further harmonization of litigation. To reach

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<sup>24</sup> Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 21, 2023, <http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng>.

<sup>25</sup> Craig and De Búrca, *EU Law*, 273.

<sup>26</sup> ECJ Judgment of 16 December 1976, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33–76, ECLI:EU:C:1976:188 at 1997.

<sup>27</sup> EU The Treaty on the Functioning of the European Union (TFEU) 12012E/TXT, (O.J.E.C. C326, 26 October 2012), accessed May 10, 2023, [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj/eng](http://data.europa.eu/eli/treaty/tfeu_2012/oj/eng).



a conclusion, a discussion of the connection between the observations and the details of the claim is needed. Different reasons and evidence will be presented. Firstly, the material statutes are now similar, but their interpretations still spark discussions. Secondly, courts strive for consistent rulings, and national courts should seek guidance from the European courts. Thirdly, the practice of making information public seems quite common across jurisdictions.

One relevant observation is incorporating the prospectus regulation into the Securities Trading Act as domestic law. By its nature, this will be an almost complete harmonization of the material rules. The EEA prospectus norms only apply to the larger offerings, while smaller ones are not subject to such a high degree of rule similarity. A possible improvement may be to reduce the financial threshold of the prospectus regulation. Supreme Court argumentation often incorporates the interpretation of EU law. There seems to be an intention to reach a conclusion in the specific case that is in line with, supported by, or at least not in conflict with international sources. This strive, which can be observed in the preface to Section 5 of the EEA Agreement, is expressed by the phrase dynamic and uniform, as stated in EEA law § 1. When the intention of establishing a singular economic area of cooperation is pursued, it promotes rule similarity. In particular, this applies to prospectus liability when the EU statutes are implemented as domestic legislation.

### 5.1. Prospectus Liability as a Starting Point

Material regulation of prospectus liability aims to ensure market functioning. This is not significantly improved by standard litigation rules. The requirement for effective access should be sufficient, as can be seen in facts found in cases regarding prospectus liability. The aim is to find the right level of harmonization. This may help others improve their understanding of regulation in various areas, such as climate change. The question in the discussion of prospectus regulation will be whether there are preferences for certain legal effects over others. This effort will clarify the prospectus liability status, even if there is no move towards a unified regulation. An assumption to be discussed is whether harmonized rules in this area will lead to improvement.

The explicit administrative consequences stem directly from regulations, while domestic law typically defines private damages.<sup>28</sup> EU law will govern reporting obligations, and administrative effects will naturally result from this system. There is no harmonization apart from the requirement for an effective process, so private claims must be resolved through a domestic civil case. Thus, identifying domestic cases and discussing them to clarify the current law regarding prospectus liability may enhance our understanding in this area. The potential findings in this analysis could potentially be applied to other situations, different points in time, or various walks of life. An objection may arise from the conflicting interests between efficient trade and climate change prevention. On the other hand, while mandatory disclosure has been a regulated and debated subject for decades, the mechanisms used in finance to address this issue may serve as inspiration for regulating environmental announcements. For instance, managing information concerning pollution can result in accountability with various legal consequences.

This subject matter is international, and a comparative analysis may be fruitful for the discussion. Gelter states that effective investor protection is provided by opt-out class action and the fraud-on-the-market theory in the US.<sup>29</sup> This theory, established in *Basic*<sup>30</sup> and affirmed in *Halliburton*,<sup>31</sup> asserts that material disclosure will affect share prices because it incorporates important information. Gelter finds that the mentioned theory helps reduce the information asymmetries common in investor litigation.

The issue of asymmetric information is also mentioned in the preamble to the PR, where it cautions that a lack of harmonization could result in fragmented markets.<sup>32</sup> The solution is a common regulation of the disclo-

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<sup>28</sup> Federico Della Negra, *MiFID II and Private Law Enforcing: EU Conduct of Business Rules*, Hart Studies in Commercial and Financial Law (Oxford: Hart, 2020).

<sup>29</sup> Gelter and Conac, *Global Securities Litigation and Enforcement*, 104.

<sup>30</sup> Justia Law, “*Basic, Inc. v. Levinson*, 485 U.S. 241,” 1988, accessed May 18, 2023, <https://supreme.justia.com/cases/federal/us/485/224/>.

<sup>31</sup> Justia Law, “*Erica P. John Fund, Inc. v. Halliburton Co., et al.*, 563 U.S. 804,” 2011, accessed April 20, 2023, <https://supreme.justia.com/cases/federal/us/563/804/>.

<sup>32</sup> Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, preamble section 4, accessed April 5, 2023, <http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng>.

sure duties, which is easy to adopt and demonstrates determination without imposing significant costs on society at large.<sup>33</sup> One could ask if this is limited to regulating the actions of mandatory disclosure or if it must also encompass the responsibility imposed in the event of a breach. Considering the principle of effectiveness,<sup>34</sup> it is preferable to harmonize both the obligation and its sanctioning. The principle of subsidiarity limits the latter, although this can lead to regulatory failure.<sup>35</sup>

This possibility of a breakdown is a central aspect of regulating securities markets. The topic is addressed in economic theory, which refers to the study of commercial activities, including the production and consumption of goods and services. Asymmetric information influences market functioning, as explained by Akerlof's lemons theory. According to this, differences in knowledge about used cars (known as lemons) may result in bid-offer price gaps and a lack of transactions.<sup>36</sup> In the first-hand market for shares, mandatory disclosure is one mechanism adopted to mitigate the problems caused by differences in quality information. A question arises as to why this regulation was adopted, as it was recently discussed in a comparison of the regulatory systems in the United States and the European Union.<sup>37</sup> The causation in this regard would be from rules to crisis rather than Akerlof's causation from asymmetric information to crisis.

The lessons from Akerlof's insight can be applied when analyzing the development of regulations following a market crash. Mandatory screening of prospectuses may improve market functioning, while litigation rules must be tailored to the structure of the financial supervision that handles most of the sanctions. Differences in sanctions are part of the academic debate about contemporary prospectus litigation.

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<sup>33</sup> Moloney, Ferran, and Payne, *The Oxford Handbook of Financial Regulation*, 514.

<sup>34</sup> Craig and De Búrca, *EU Law*, 323.

<sup>35</sup> *Ibid.*, 133.

<sup>36</sup> George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84, no. 3 (1970): 499, <https://doi.org/10.2307/1879431>.

<sup>37</sup> Min-woo Kang, "Inside Insider Trading Regulation: A Comparative Analysis of the EU and US Regimes," *Capital Markets Law Journal* 18, no. 1 (January 2023): 103, <https://doi.org/10.1093/cmlj/kmac026>.

## 5.2. Widening the Scope of Information Errors

According to recent literature on sanctions, the Reno Norden verdict has limited importance, at least in criminal proceedings.<sup>38</sup> This argument appears to be based on the interpretation of statutory law, taking into account factors such as lack of clarity and the need to balance conflicting considerations. The domestic use in this regard seems somewhat different from the general EU law principles. When discussing EU law, one would expect general principles to be applied below the treaty text in the hierarchy, followed by legislative and delegated acts.<sup>39</sup> Although arguments are inferred from the objectives in the preambles to directives in sections 47 and 48 of Geltl, these cannot be categorized as general principles, which encompass proportionality, equality, and legal certainty.

In Section 57 of the Reno Norden case, the Supreme Court derived two conflicting interpretations from these sections. Investor confidence would be strengthened by providing information, as the reasoning was in section 47 of Geltl. On the other hand, the discussion in section 48 of Geltl focused on the issue of being obligated to disclose non-material information to the public. The Supreme Court made explicit the trade-off in section 58 of Reno Norden, but this did not lead to a clear result. The Supreme Court then commented on the significant importance the EU Court places on making all price-sensitive information public but did not provide any references in this regard.

The argument seems critical as it leads to a test deciding the case. An aspect of the Reno Norden case was the extent of the loss as the company went bankrupt. This may moderate the probability requirement, as the effect follows from multiplication. The medical product verdict had a similar claim after the emission, followed by bankruptcy, but it did not lead to liability.<sup>40</sup> There was little reference to European sources, in contrast to the extensive discussion in Reno Norden. The liability norm in these cases could be subject to a possible harmonized regulation, as the outcomes

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<sup>38</sup> Knut Bergo, “Sannsynlighet, forventning og mulighet – kommentarer til HR-2022–695-A,” *Juridika*, 12 September 2022, 36, accessed June 20, 2023, <https://juridika.no/tidsskrifter/tidsskrift-for-forretningsjus/2022/1/artikkel/bergo>.

<sup>39</sup> Craig and De Búrca, *EU Law*, 148.

<sup>40</sup> “Norwegian Supreme Court, HR-2022–2484-A – Medical Product,” 2022, accessed June 20, 2023, <https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-2484-a>.

are different, and the reasoning is up to debate, at least in *Reno Norden*. While the cases settled civil liability, they may still be used as arguments with related facts in later criminal proceedings. This shows that the legal effects are interconnected and that complete harmonization of one effect, for instance, civil claims, may limit the court when deciding other effects, such as criminal cases. This has been commented on recently, where the clarity needed for criminal proceedings is highlighted as a problem when applying the *Reno Norden* case in the future.<sup>41</sup>

### 5.3. The Regulation of Liability

The topic of prospectus liability has been raised recently, and one central question is whether national courts may deviate from the liability thresholds of the PR.<sup>42</sup> This may be a less or more strict liability imposed on the persons responsible. As an effective prospectus liability norm seems to exist, the relevant question could be what gains a uniform procedural regulation would bring in the form of clarity and a level playing field. This may be held up against the cost of constructing a system colliding with the domestic procedural norms. These will be carefully crafted through legislation and jurisprudence and aligned with the administrative set-up within the national courts. Even though different elements from the balancing of regards to the civil parties may distort future criminal cases, the protection of rights should be relevant in each case a court considers.

Trying to impose common rules of contradiction will most likely lead to considerable practical problems that, in the EU, are usually left to the principle of subsidiarity reflected in Article 5 TEU.<sup>43</sup> This is commented on in the preamble to the PR<sup>44</sup>: “In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.” This could be interpreted

<sup>41</sup> Bergo, “Sannsynlighet, forventning og mulighet – kommentarer til HR-2022–695-A,” 45.

<sup>42</sup> Busch, “The Influence,” 11.

<sup>43</sup> The Treaty on European Union (TEU) 12012M/TXT (O.J.E.C. C326, 26 October 2012), accessed May 18, 2023, [http://data.europa.eu/eli/treaty/teu\\_2012/oj/eng](http://data.europa.eu/eli/treaty/teu_2012/oj/eng).

<sup>44</sup> Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, preamble section 87, accessed April 12, 2023, <http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng>.

as a reasoned decision to harmonize prospectus litigation to a certain extent while leaving further implementation to the Member States. The debate of a common procedural liability regime in the EU could serve almost as an ideal in the form of a goal that can be strived for but never achieved. This may be a reason for continuing the norm as the EU did when addressing prospectus responsibility in its recent efforts to promote the Capital Markets Union.<sup>45</sup>

Will a common norm of prospectus liability be tempting? Bush leaves clarification to the CJEU and again hinges this on the propensity of national supreme courts to refer case questions to the European institution and even the plaintiffs and their lawyers.<sup>46</sup> Over time, this will bring clarity to the norm, and jurisprudence can be applied in later claims. However, there will be a less political drive towards a Capital Markets Union with its clarifying legislation. The area will be left to the balanced application of those who know the details of the legal procedure needed to ensure citizens' rights, both in criminal and civil proceedings.<sup>47</sup> When cases are lifted to EU courts, aspects such as the four freedoms will be observed, and these may have greater value to investors than a harmonized system of civil liability norms.

A recent statement could be seen as reluctance to harmonize prospectus litigation. "The best interpretation of EU law is a preference for administrative sanctions rather than civil and criminal sanctions."<sup>48</sup> This statement highlights the explicit regulation of administrative sanctions as opposed to the criminal and civil effects that are left to the nations in line with subsidiarity and effectiveness. These aspects may be relevant when assessing regulation in other walks of life, such as environmental challenges. Some efforts to harmonize sustainability reporting are expected in the EU, despite objections against "carving in" stakeholders other than

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<sup>45</sup> Danny Busch, Guido Ferrarini, and Jan Paul Franx, *Prospectus Regulation and Prospectus Liability* (Oxford University Press, 2020), 6, accessed May 10, 2023, <https://olrl.oup.com/view/10.1093/law/97801988846529.001.0001/law-97801988846529>.

<sup>46</sup> Busch, "The Influence," 30.

<sup>47</sup> Craig and De Búrca, *EU Law*, 286.

<sup>48</sup> Gelter and Conac, *Global Securities Litigation and Enforcement*, 272.

the traditional financial ones.<sup>49</sup> The interpretation could be correct when reading the vague norms of liability and firmness in administrative sanctioning when analyzing the EU PR. As Busch emphasizes, the European courts should be referred cases to clarify the norm in the years ahead.<sup>50</sup> If this happens, regard to equal information may be commented on and later used as legal arguments.

#### 5.4. Discussion of the Applied Method

Equal information has been included in the method applied in this paper. The legal method is designed to address the link between observations and norms and is particularly useful in such an analysis. However, a special feature of this paper has been the application of the theory of asymmetric information and the resulting issues in getting all information to the markets. These issues have received little explicit attention in theory and verdicts and need some qualifications.

Equal information often leads to demands for costly mandatory reporting. Some of these costs can be difficult to reveal. The Reno Norden verdict seems to have expanded the prospectus liability using these regards, and the opposing views need to be taken into consideration. At first, the need for secrecy is central to innovation. Secondly, when environmental issues are included, the reporting burden may reach a tipping point of company bureaucracy that may divert attention from the profit-generating business. The trade-off between such regards may take the central stage when deciding future civil prospectus liability cases.

## 6. Conclusions

I believe this paper shows that a claim of similar prospectus litigation rules should be rejected as it would create problems without much gain related to market functioning. The current literature states that the burden imposed by financial reporting may have reached a tipping point relative to its gains

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<sup>49</sup> Frits-Joost Beekhoven van den Boezem, Corjo Jansen, and Ben Schuijling, *Sustainability and Financial Markets*, vol. 17, *Law of Business and Finance* (Deventer: Wolters Kluwer, 2019), 318.

<sup>50</sup> Busch, "The Influence," 30.

in some jurisdictions.<sup>51</sup> Despite academics calling for further rule similarity in civil proceedings, this paper argues that the area should still be left to the various nations. This is shown by the striving for similarity in Supreme Court reasoning and supported by regard to equal information. Central aspects of regulating financial mandatory disclosure will be relevant to crafting climate change reporting norms. The negative aspects of disclosure must be respected to achieve an effective reporting duty. Reporting requirements are easy to impose, but the burden may become excessive for regulated entities. The discussion above has shed new light on the regulation of prospectus liability. The legal effects are interconnected across disciplines such as civil and criminal law, an aspect that could also be relevant to environmental regulation, as shown in recent publications.<sup>52</sup> A call for further integration of legal effects in one area will affect other disciplines. Perhaps the flexibility given to domestic courts when deciding cases based on EU legislation is welcome.

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<sup>51</sup> Moloney, Ferran, and Payne, *The Oxford Handbook of Financial Regulation*, 534.

<sup>52</sup> Busch, "The Influence," 29.



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