

ESMA Call for evidence on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation

Response Deutsche Börse Group

Deutsche Börse Group (DBG) welcomes the opportunity to respond to the ESMA Call for evidence on prospectus liability. **We would like to focus our response on Question 9, whether Article 11 Prospectus Regulation should be amended to replicate the liability regime under Article 15 of the Markets in Crypto-Assets Regulation.**

The MiCA Regulation provides, for the first time, an independent basis for liability claims under EU law for infringements resulting from crypto-asset white paper information that is not complete, fair or clear or that is misleading. So far, the Prospectus Regulation has only regulated the "whether" of liability, while the "how" is left to the respective Member State law.

According to Article 15 paragraph 1 MiCA Regulation, **the addressees of liability are "offeror, person seeking admission to trading or operator of a trading platform and the members of its administrative, management or supervisory body"**. Thus, the organs of the above-mentioned liability addressees are also defendants. Contrary to the wording "its", all respective organs of the liability addressees are to be understood, not just the organ of the trading platform. The use of the singular "its" dates back to the Commission's draft, according to which originally only the issuer was to be the addressee of liability. The fact that the wording was not later changed to the plural is an editorial mistake. **Until now, such external liability of the corporate bodies was unusual in capital market law.** The decision of the EU legislator to introduce this for crypto securities assumes that issuers of crypto assets are often start-ups with low capitalisation. In the case of liability limited to the company, the investor would generally not be able to enforce his claims for infringements. This situation is not transferable to listed securities.

Unlike MiCA Regulation, prospectus liability has so far only provided for liability of organs as an option. **Article 11 Prospectus Regulation leaves it to the Member States to impose prospectus liability vis-à-vis "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"**. The German legislator has implemented this in such a way that damages can be claimed "from those who have assumed responsibility for the prospectus and from those who issued the prospectus". Under German law, a member of the executive body is liable only in exceptional cases if he has influenced the prospectus and is therefore to be regarded as the person responsible for the prospectus. Liability of organs is therefore alien to prospectus liability. **We therefore reject a cumulative external liability of the organs in prospectus law as alien to the system.**

In contrast to prospectus law, **MiCA Regulation does not provide for a time limit on liability.** Under German law, liability claims due to defective securities prospectuses are limited in time. Pursuant to Section 9 paragraph 1 sentence 1 German Securities Prospectus Act (Wertpapierprospektgesetz), only acquisition transactions within six months of the first introduction of the securities are covered. If Article 15 MiCA Regulation were to be applied to prospectus law, this would lead to an intensification of liability. This runs counter to the EU legislator's goal of relieving SMEs and promoting listings.

Article 15 MiCA Regulation aims to **create an EU-wide uniform minimum liability standard** for the liability requirements and therefore refrains from making references to Member State law. **However, essential aspects, such as whether fault is required, are not regulated.** Although it can be assumed from the sense and purpose of the provision that the EU legislator did not intend to create strict guarantee liability with Article 15 MiCA Regulation, this ambiguity can ultimately only be clarified by referring the case to the European Court of Justice. Article 15 MiCA Regulation also does not regulate other relevant aspects of liability, such as the statute of limitations of the liability claim and the consequences of infringements. In the end, these inadequate EU regulations lead to legal uncertainty for those harmed by inadequate crypto asset white papers.

From our perspective, the liability provisions in MiCA Regulation are not legally compatible with the Prospectus regime. Therefore, Article 11 Prospectus Regulation should not be amended to replicate the liability regime under Article 15 MiCA Regulation.

DBG hopes that these comments will support ESMA in its advice to the Commission.