

# Call for evidence

On potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses under the Prospectus Regulation

## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in the Annex. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **31 December 2024**.

All contributions should be submitted online under the relevant [consultation](#).

### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper?**

This paper is primarily of interest to issuers and other market participants who are subject to Regulation (EU) 2017/1129 of the European Parliament and of the Council (Prospectus Regulation – “PR”). It is also addressed to investors and consumer organisations.

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## 1 References, definitions, acronyms

2013 Liability Report	Report – Comparison of liability regimes in Member States in relation to the Prospectus Directive ( <a href="https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf">https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf</a> )
CfE	Call for Evidence
Commission	The European Commission
ESMA	European Securities and Markets Authority
Listing Act	In this CfE references to the Listing Act should be understood as references to the <a href="#">text</a> published on 8 October 2024. Respondents should note that the ‘Listing Act’ is not yet published in the Official Journal of the European Union.
Markets in Crypto- Assets Regulation	Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937
NCAs	National competent authorities
Prospectus Liability	Liability for information provided in securities prospectuses
Prospectus Regulation or PR	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

## 2 Executive Summary

### Reasons for publication

In December 2022, the Commission adopted a legislative proposal to simplify the listing requirements to promote better access to public capital markets for EU companies, in particular SMEs, by reducing the administrative burden on companies that seek a listing or want to remain listed on a trading venue.

A compromise was approved by the Council on 14 February 2024 and voted by the European Parliament in first reading in plenary session on 24 April 2024 respectively. On 8 October 2024, the Council adopted the Listing Act. As the legal texts will enter into force 20 days after its publication in the Official Journal of the European Union, and because some provisions have a deferred entry into application from 15 to 18 months after such date, the Commission expects that the bulk of the provisions of the Listing Act should enter into application in July 2026.

As part of the Listing Act, numerous amendments are introduced into several European legal acts, including the Prospectus Regulation. Under its new Article 48(2a), the European Commission (Commission) is asked to present a report on liability for information provided in securities prospectuses (prospectus liability) to the European Parliament and the Council by 31 December 2025. The Commission has requested the European Securities and Markets Authority's (ESMA) technical advice in this context. ESMA is launching this Call for Evidence (CfE) to obtain feedback on the issue from market participants to respond to the Commission's request.

### Contents

Section 3 of this document provides background information concerning the CfE. Section 4 sets out the various topics included along with the respective questions. Annex I (Section 5) lists all the questions set out herein.

### Next Steps

ESMA, together with the national competent authorities (NCAs), will assess the replies to this CfE and include them in its advice to the Commission. Further steps will be determined by the European Parliament and the Council based on the Commission's report to them.

### 3 Background

5. Under the Listing Act, the new Article 48(2a) of the Prospectus Regulation<sup>1</sup> (PR) states that the Commission is to present a report analysing the issue of liability for the information given in a prospectus, assessing whether further harmonisation could be warranted. Article 48(2a) PR further sets a deadline of 31 December 2025 for the Commission to deliver its report.
6. On this basis, the Commission has mandated ESMA<sup>2</sup> to provide technical advice on civil liability regarding the information given in prospectuses<sup>3</sup>, which should include an assessment and recommendations on whether further harmonisation should be considered.
7. The Commission has further specified that ESMA:
  - a. should take into account the Report on Comparison of liability regimes in Member States in relation to the Prospectus Directive (ESMA/2013/619), which it published in 2013 (2013 Liability-Report) and
  - b. compare the civil liability provisions set out in Article 11 PR with the civil liability set out in the Markets in Crypto Assets Regulation<sup>4</sup> and the need for possible alignment with or departure from those.

#### 3.1 Prospectus liability under Article 11 PR

8. As Article 11 PR is the central provision setting out specifications for Member States' civil liability regimes, it is one of the foundations of this CfE and will therefore be referred to repeatedly. Its consolidated version (including the changes in accordance with Article 1(9) of the Listing Act) reads:

*“Article 11*

*Responsibility attaching to the prospectus*

*1. Member States shall ensure that responsibility for the information given in a prospectus, and any supplement thereto, attaches to at least the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be.*

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<sup>1</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

<sup>2</sup> Cf. point 3.6 of the mandate, which is set out in Annex II

<sup>3</sup> For the purposes of the mandate and of this CfE, as regards prospectuses, “civil liability” is to be understood as liability for the information given in a prospectus and any supplement thereto, attaching to the entity or entities responsible for giving the information. For clarity, this CfE does not intend to cover other forms of legal liability (for example, criminal or administrative/governmental liability).

<sup>4</sup> Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937

*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.*

*2. 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.*

*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 including any translation thereof, unless:*

*(a) it 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.*

*3. 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 where the information under those Articles is included in a universal registration document.”*

9. Article 11(2) PR thus obliges Member States to ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. It sets out a certain easing of liability with respect to the summary by saying that no civil liability shall attach to it alone save where special circumstances apply (such as the summary being misleading or inaccurate). Article 5(1) PR stipulates that where a prospectus for a public offer or admission of securities to a regulated market has been published in the referenced cases, another prospectus shall not be required in any subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or the person responsible for drawing up such prospectus consents to its use by means of a written agreement.

## 3.2 Call for Evidence – Process

10. ESMA is launching this CfE to gather information from market participants as part of its analysis regarding the rules and regulations pertaining to civil prospectus liability. In parallel, it is working to update its 2013 Liability-Report. ESMA's advice to the Commission will be based on the outcome of both of these workstreams.
11. The questions in this CfE are designed to address different aspects of the civil liability regime, from general to more specific questions, with topics ranging from the degree of fault required for liability to the expiry of claims and so-called "safe-harbour-provisions" in relation to forward-looking-information.

## 4 Call for evidence

### 4.1 General questions

12. As the Commission's mandate under Article 48(2a) PR (as amended by the Listing Act) and subsequently the one given to ESMA by the Commission are somewhat general, so are some of the questions put to respondents in this CfE.

**Q1 Have you identified issues in respect of civil liability for information provided in securities prospectuses (e.g., divergent national liability regimes, cross-border-enforcement of judicial decisions, amount of damages); can you provide examples?**

**Q2 Are you aware of any leading judicial decisions in your jurisdiction effectively holding an issuer liable for incorrect information in the prospectus? If so, how many are there, and which type of securities did they apply to (equity securities and/or non-equity securities)?**

### 4.2 Standard parameters for liability

13. Article 11 PR provides some specifications for liability regimes to be observed in Member States' jurisdictions but does not set out all prerequisites for liability itself, leaving the exact configuration to Member States. The question is whether Article 11 PR should be more detailed and further harmonise national civil liability regimes by specifying more requirements at the European level.
14. For example, should the PR indicate who is entitled to claim damages? Should a causal link be presumed between someone's actions and damages suffered or between a person's conduct and culpability? Furthermore, there is the question of whether



a harmonised statute of limitations<sup>5</sup> would be desirable for cases of civil prospectus liability.

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

**Q4 Should Article 11 (or another provision in the PR) determine a degree of fault or culpability? If so, what specification(s) would you suggest?**

**Q5 Should Article 11 (or another provision in the PR) make any determinations as to the burden of proof? If so, what specification(s) would you suggest?**

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

### **4.3 Liability's impact on cross border offerings**

15. In discussions with stakeholders, ESMA has asked why there are relatively few offerings of equity securities that take place in more than one Member State. One of the reasons given by stakeholders is that offerors and their advisors are unfamiliar with the rules of civil liability outside of their own Member State.

16. Additionally, there have been indications from some stakeholders that limiting issuers' and offerors' liability under the PR may not effectively address stakeholders' liability concerns due to the international nature of many capital markets transactions and the impact of third countries' civil liability regimes.

**Q7 Is further harmonisation of the rules on civil liability for the information given in a prospectus in the Union needed in your view? Please explain your answer and indicate whether you think such harmonisation could help to increase the number of cross border offerings.**

**Q8 In your opinion, can any amendments to Article 11 PR help to reduce issuers' and offerors' liability concerns considering the impact of third countries' liability laws? If so, please explain where such amendments could be effective.**

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<sup>5</sup> i.e., rules to determine when a claim expires

## 4.4 Comparison with liability regime under the Markets in Crypto-Assets Regulation

17. Article 15 of the Markets in Crypto-Assets Regulation reads:

“Article 15

Liability for the information given in a crypto-asset white paper

1. *Where an offeror, person seeking admission to trading or operator of a trading platform, has infringed Article 6 by providing in its crypto-asset white paper or in a modified crypto-asset white paper information that is not complete, fair or clear or that is misleading, that offeror, person seeking admission to trading or operator of a trading platform and the members of its administrative, management or supervisory body shall be liable to a holder of the crypto-asset for any loss incurred due to that infringement.*
2. *Any contractual exclusion or limitation of civil liability as referred to in paragraph 1 shall be deprived of legal effect.*
3. *Where the crypto-asset white paper and marketing communications are prepared by the operator of the trading platform in accordance with Article 5(3), the person seeking admission to trading shall also be held responsible when it provides information that is not complete, fair or clear, or that is misleading to the operator of the trading platform.*
4. *It shall be the responsibility of the holder of the crypto-asset to present evidence indicating that the offeror, person seeking admission to trading, or operator of the trading platform for crypto-assets other than asset-referenced tokens or e-money tokens has infringed Article 6 by providing information that is not complete, fair or clear, or that is misleading and that reliance on such information had an impact on the holder's decision to purchase, sell or exchange that crypto-asset.*
5. *The offeror, person seeking admission to trading, or operator of the trading platform and the members of its administrative, management or supervisory body shall not be liable to a holder of a crypto-asset for loss incurred as a result of reliance on the information provided in a summary as referred to in Article 6(7), including any translation thereof, except where the summary:*
  - (a) *is misleading, inaccurate or inconsistent when read together with the other parts of the crypto-asset white paper; or*
  - (b) *does not provide, when read together with the other parts of the crypto-asset white paper, key information in order to aid prospective holders of the crypto-asset when considering whether to purchase such crypto-asset.*
6. *This Article is without prejudice to any other civil liability pursuant to national law.”*

18. By contrast, Article 11(2) PR calls on Member States to ensure that liability applies to the persons responsible, whereas the wording in Article 15(1) of the Markets in Crypto-Assets Regulation<sup>6</sup> is more direct and provides that the persons in question “*shall be liable*”. Further analysis of the provisions shows that Article 15 of the Markets in Crypto-Assets Regulation is more specific overall and sets out certain requirements at the European level instead of leaving them to Member States.
19. Another example for this is where Article 15(1) of the Markets in Crypto-Assets Regulation identifies the person, to whom a relevant wrongdoer is liable, as “*a holder of the crypto-asset*”, whereas Article 11 PR does not specifically identify the person. Furthermore, Article 15(4) of the Markets in Crypto-Assets Regulation provides for a European rule on the evidential burden to establish a breach of Article 6 of said Regulation, instead of leaving it to Member States. Part of the background for this may be that many Crypto-Asset White Papers do not undergo an approval process (Article 6(3) of the Markets in Crypto-Assets Regulation) and that therefore, the liability regime in said Regulation should be more prescriptive.

**Q9 Should Article 11 PR be amended to replicate the liability regime under Article 15 of the Markets in Crypto-Assets Regulation more generally? Can you name specific aspects? Please explain your answer.**

## 4.5 Safe Harbour Provision

20. For some time, there has been a debate on whether so-called “safe harbour provisions” should be introduced at the EU-level. Reference has been made to such regulation in the US and UK.

### 4.5.1 Safe harbour rules in the US

21. In the US, section 21E of the Securities Exchange Act of 1934<sup>7</sup> contains so-called ‘safe harbour’ provisions, which restrict liability for forward-looking statements in circumstances where their content is material and accompanied by cautionary statements identifying important factors that could cause the actual results to materially differ from those in the forward-looking statement. In such cases, for liability to apply, the plaintiff must prove that the statement was made knowing that it was false or misleading.
22. Specific ‘exclusions’ are provided for in section 21E, which prevent the application of the ‘safe harbour’ provisions in some situations. For example, they will not apply if the statement is made by someone who has violated anti-fraud provisions, if the issuer is

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<sup>6</sup> Articles 26 and 52 of the Markets in Crypto-Assets Regulation also contain liability provisions, which apply to issuers of asset-referenced tokens and e-money tokens but otherwise are the same as Article 15 in many ways; we focus on Article 15, because this is sufficient to address the questions at issue here, but respondents may also review Articles 26 and 52.

<sup>7</sup> <https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf>

a 'blank check'-company, the securities in question are 'penny stocks' or the forward-looking statement is made in relation to an IPO. These restrictions appear to be included for investor protection purposes, since they prevent the use of the 'safe harbour' provisions in high-risk situations.

#### 4.5.2 Safe harbour rules in the UK

23. The UK FCA is planning to amend<sup>8</sup> their national liability provisions to encourage issuers to provide more 'Protected forward-looking statements' (PFLS) to investors.<sup>9</sup> This policy follows up on the recommendations in Lord Hill's report<sup>10</sup> intended to encourage more growth companies to list their securities in the UK and appears to be inspired by the 'safe harbour' provisions in US law.

24. The main thrust of this proposal is to ensure that the person(s) responsible for a prospectus are only liable for certain protected forward-looking statements therein if:

- a. they knew the statement was untrue or misleading;
- b. they recklessly provided an untrue or misleading statement; or
- c. an omission dishonestly conceals a material fact.

#### 4.5.3 Questions on safe harbour rules

25. In this context, ESMA is seeking feedback from market participants on the following questions:

**Q10 Are liability risks driving non-disclosure of forward-looking information? Please explain your answer, indicate which sorts of forward-looking information and whether and how you believe that safe harbour provisions would help to address this situation.**

**Q11 Should a safe harbour provision be introduced at Union level? If so, please explain what the scope and requirements should be.**

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<sup>8</sup> [UK Prospectus Regime Review Outcome.pdf \(publishing.service.gov.uk\)](#)

<sup>9</sup> [CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime \(POATRs\) \(fca.org.uk\)](#), p. 58 et seq.

<sup>10</sup> [UK Listing Review 3 March.pdf \(publishing.service.gov.uk\)](#)

## 5 Annex I – Summary of the questions

- Q1** Have you identified issues in respect of civil liability for information provided in securities prospectuses (e.g., divergent national liability regimes, cross-border-enforcement of judicial decisions, amount of damages); can you provide examples?
- Q2** Are you aware of any leading judicial decisions in your jurisdiction effectively holding an issuer liable for incorrect information in the prospectus? If so, how many are there, and which type of securities did they apply to (equity securities and/or non-equity securities)?
- Q3** Should Article 11 PR specify who is entitled to claim damages? If so, what specification(s) would you suggest?
- Q4** Should Article 11 (or another provision in the PR) determine a degree of fault or culpability? If so, what specification(s) would you suggest?
- Q5** Should Article 11 (or another provision in the PR) make any determinations as to the burden of proof? If so, what specification(s) would you suggest?
- Q6** Should rules on the expiry of claims be harmonised? Please explain your answer.
- Q7** Is further harmonisation of the rules on civil liability for the information given in a prospectus in the Union needed in your view? Please explain your answer and indicate whether you think such harmonisation could help to increase the number of cross border offerings.
- Q8** In your opinion, can any amendments to Article 11 PR help to reduce issuers' and offerors' liability concerns considering the impact of third countries' liability laws? If so, please explain where such amendments could be effective.
- Q9** Should Article 11 PR be amended to replicate the liability regime under Article 15 of the Markets in Crypto-Assets Regulation more generally? Can you name specific aspects? Please explain your answer.
- Q10** Are liability risks driving non-disclosure of forward-looking information? Please explain your answer, indicate which sorts of forward-looking information and whether and how you believe that safe harbour provisions would help to address this situation.
- Q11** Should a safe harbour provision be introduced at Union level? If so, please explain what the scope and requirements should be.

## **6 Annex II – Section 3.6 of European Commission mandate to provide technical advice on the implementation of the amendments to Prospectus Regulation in the context of the Listing Act – Commission reports to the European Parliament and to the Council on civil liability of the prospectus**

*Annex II only refers to item 3.6 of the mandate: Commission reports to the European Parliament and to the Council on civil liability of the prospectus.*

Pursuant to the amended Article 48(2a) of the PR, the Commission is required to submit a report by 31 December 2025<sup>11</sup> analysing the issue of civil liability for the information given in a prospectus, assessing whether further harmonisation of the prospectus civil liability in the Union could be warranted and, if relevant, proposing amendments to the liability provisions set out in Article 11 of PR. In light of the above, the Commission invites ESMA to provide technical advice on the civil liability of the prospectus, which should include an assessment and recommendations on whether further harmonisation should be considered.

ESMA should take into account all relevant provisions of the PR, in particular Articles 11 and 48(2a), all relevant recitals of the Amending Regulation, the report on civil liability of the prospectus that ESMA published in 2013 (ESMA/2013/619<sup>12</sup>). Finally, ESMA should compare the civil liability provisions set out in Article 11 of the PR with the civil liability set out in the Markets in Crypto-Assets Regulation<sup>13</sup> and the need for possible alignment with or departure from those provisions and provisions for prospectus civil liability.

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<sup>11</sup> Recital 60 of the Amending Regulation clarifies that the requirement for the Commission to perform such assessment within the above-mentioned timeline is linked to the need of ensuring that the CMU gathers momentum and reflects market realities as soon as possible after they occur.

<sup>12</sup> [https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619\\_report\\_liability\\_regimes\\_under\\_the\\_prospectus\\_directive\\_published\\_on\\_website.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf)

<sup>13</sup> Regulation (EU) 2023/1114 of the European Parliament and of the Council.