Original Scientific Article
DOI: 10.5937/gakv94-35640
UDC 336.76

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SIMILARITIES AND DIFFERENCES IN THE ISSUANCE OF SECURITIES AND DIGITAL ASSETS – THE ISSUE OF LEGAL RESPONSIBILITY OF THE ISSUER[**]

ABSTRACT: The evolution of the financial market has given rise to new instruments of trade – digital assets. Considering the diversity and inhomogeneity of digital assets, the author analysed the legal position of digital tokens compared to that of securities, including their resembling features. Therefore, in the first part of the paper, the author analyses the issuance of digital assets. The central part of the paper is dedicated to a critical review and analysis of the issuer's legal responsibility for a faulty or deficient prospectus, that is, a white paper, with particular reference to the network of (passively) responsible individuals. Hence, this research aims to highlight the similarities and differences accompanying the issuance of securities and digital assets (tokens). Finally, using the normative and comparative method, the author concludes that despite the many

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[**] The paper was received on December 29, 2021, the amended version of was submitted on March 3, 2022 and the paper was accepted for publication on June 10, 2022.

The translation of the original article into English is provided by the *Glasnik* of the Bar Association of Vojvodina.

The paper was written as part of the Research Program of the Institute of Social Sciences for 2022, which is supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia

advantages of legalizing the issuance and secondary trading of digital assets, the issuance of digital tokens is accompanied by risks and certain inequalities compared to the issuance of securities.

Keywords: issuer's responsibility, securities, issuance of securities, prospectus, digital assets, digital tokens, initial coin offering, white paper

INITIAL CONSIDERATIONS

The history of the financial market, stock, and over-the-counter business testifies to numerous frauds, embezzlements, and speculations, the main participants of which were, among others, the issuers of securities. The rapid development of technologies has given birth to new financial instruments, such as digital assets (digital currencies, cryptocurrencies). The functioning of the digital (virtual) currency market raises a number of legal questions about the potential risks of their use. These risks primarily arise from the specific technological infrastructure on which digital currencies are based. On the one hand, regulatory bodies are expected to monitor the development of the financial market without hindering financial innovation. However, they are also expected to take the interests of public order into account, i.e., the preservation of financial stability and, above all, protection against financial fraud (such as preventing money laundering and terrorist financing), as well as to protect unknowledgeable investors. In this regard, the question often raised before the regulatory authorities refers to the possibility of applying existing regulations (primarily, regulations that regulate the capital market) to various emerging forms of digital assets.

The Republic of Serbia adopted the Law on Digital Assets on December 29, 2020, thus joining the ranks of the few countries regulating the issuance and circulation of virtual currencies at the legislative level.[1] This paper will analyse the legal position of digital tokens, bearing in mind the diversity and inhomogeneity of digital assets and currencies (*security tokens*). Digital tokens are similar to serial securities in the sense that they provide their holders with certain rights and obligations. Since the initial public offering of virtual currencies, i.e., digital tokens, is used to finance the development of newly founded companies and start-ups, the question of applying regulations on the protection of investors and the capital market also arises. In this regard, the decisions of the newly adopted Law on Digital Assets *de lege lata* and *de lege ferenda* are

[1] Law on Digital Assets, *Official Gazette of the RS*, no. 153/2020.

linked to the decisions of the Law on the Capital Market regarding the responsibility of the issuer for the issuance of financial instruments, with the aim of providing protection to unknowledgeable investors. The subject matter of this research is limited to identifying responsible persons (passive identification), as well as the conditions under which they could be held responsible for reporting to the public and the publication and content of the prospectus, i.e., white paper in the issuance of virtual currencies. In this context, the paper will analyse the responsibility of the issuer for the publication of the prospectus, that is, the issuer of the white paper in the issuance of digital tokens in parallel, explicitly pointing out the need for a clear delimitation of the issuer's responsibility according to the Law on the Capital Market and the Law on Digital Assets.

THE ISSUANCE OF DIGITAL (VIRTUAL) CURRENCIES

The functioning of the virtual currency market (digital assets, digital currencies), which has been in its infancy in recent years, raises a series of legal questions about the risks of their use, primarily arising from the technological infrastructure on which they are based. The risks associated with the use of digital currencies have not yet been covered by a standardized legal and regulatory framework, although, at the global level, there are initiatives primarily aimed at preventing the abuse of virtual currencies for money laundering and terrorist financing purposes.[2] As part of the EU's Digital Finance Strategy (DFS), the Markets in Crypto-Assets Regulation (MiCA) has been proposed, which is currently in the first reading stage in the Council. The Republic of Serbia is one of the few countries that has regulated the use of virtual currencies at the legislative level, with the adoption of the Law on Digital Assets in 2020.

The Law on Digital Assets (hereinafter: LoDA) defines virtual currency, i.e., digital asset, as a digital representation of value that can be digitally bought, sold, exchanged, or transferred and used as a medium of exchange or for investment purposes. It also states that digital assets shall not include a digital representation of currencies that are a legal form of payment and other financial assets governed by other laws unless.[3] LoDA makes a distinction between two types of digital assets - virtual currencies (cryptocurrencies) and

[2] Jovanić, T. (2021). Kriptovalute kao nov izazov zaštite potrošača. In: *Zaštita kolektivnih interesa potrošača*. Belgrade: Union University Faculty of Law, 396.

[3] Law on Digital Assets, Art. 2, paragraph 1, item 1.1.

digital tokens.[4] Based on its legal definition, it appears that a digital asset is an asset/property/good on which a particular person has the right of ownership, is digitally recorded (in a digital database, such as *Distributed Ledger Technology - DLT* or any other technology that can serve this purpose), has a certain value, can be digitally bought, sold, exchanged or transferred, and the purpose of its use is for exchange or for investment purposes.[5] Therefore, LoDA explicitly states that digital assets are not used for payment, i.e., that cryptocurrency is not money but a transaction in which cryptocurrency is provided for a service or a good is considered an exchange. *De facto,* this activity is a payment*,* but *de jure,* it is not. The concept of exchange was used to satisfy the National Bank of Serbia's stance that cryptocurrencies are not money, which further affected the legal position, as well as the tax treatment of cryptocurrencies.[6]

On the other hand, issuing digital tokens is a way for business entities to get fresh capital, i.e., funds for the realization of their business plans and strategies, through the *Initial Coin Offering* (*ICO*). *Crowdfunding,* i.e., mining, an innovative and powerful way of raising fresh capital for newly founded companies from a comparative point of view, is probably the biggest benefit of the Law on Digital Assets for Serbian start-up companies.

The issuer of digital assets can be a domestic or foreign natural and/or legal person or entrepreneur. The issuance of virtual currencies (cryptocurrency) is under the jurisdiction of the National Bank of Serbia, while the Securities Commission is entrusted with the jurisdiction over the issuance of digital tokens. If a digital asset contains features of virtual currencies and digital tokens, it falls under the jurisdiction of both institutions.[7] The law governing the capital market will be applied to the issuance of digital assets with all the features of a financial instrument and to the secondary trading and the provision of services connected with such digital assets. As an exception to this rule, the law governing the capital market shall not apply to the issuing

[4] The Law defines virtual currency as a type of digital assets that is not issued or guaranteed by a central bank or public authority, that is not necessarily attached to a legal tender and that does not have the legal status of money or a currency, but that is accepted by natural or legal persons as a means of exchange and that can be bought, sold, exchanged, transferred, and stored electronically. On the other hand, a digital token is defined as a type of digital assets and means any intangible property representing, in digital form, one or more property rights, which might include the right of a digital token user to specific services. Law on Digital Assets, Art. 2, items 2 and 3.

[5] Sovilj, R. (2021). Legal Aspects of Digital Asset Market in the Republic of Serbia. In: *Regional Law Review*. Belgrade: Institute of Comparative Law, 301.

[6] Motika, Ž. (2021). *ICO u Srbiji – Izdavanje digitalne imovine po Zakonu o digitalnoj imovini*. Available at: https://lawlife.rs/index.php/pravo/178-ico-u-srbiji-izdavanje-digitalneimovine-po-zakonu-o-digitalnoj-imovini (Accessed on 10. 12. 2021).

[7] Law on Digital Assets, Art. 10.

of digital assets that have all the features of a financial instrument, nor to the secondary trading and the provision of services connected with such digital assets if all of the following conditions are met: 1) digital assets have no characteristics of shares; 2) digital assets are not fungible with shares; and 3) the total value of digital assets issued by a single issuer during a period of 12 months does not exceed EUR 3,000,000 in the dinar equivalent at the official middle exchange rate of the dinar against the euro determined by the National Bank of Serbia on the day of the issue, i.e., during the primary sale.[8] Therefore, issuers who decide to issue digital assets that cumulatively meet all three aforementioned requirements can implement the issuance under a significantly simplified procedure, meeting only the requirements of the Law on Digital Assets as *lex specialis*, without the obligation to comply with the significantly stricter rules of the Law on the Capital Market both formally, and in terms of content capital. This reflects the advantage of the issuance and secondary trade of digital assets compared to the previous solutions of the Law on the Capital Market, from the point of view of entrepreneurs and start-up companies, since their access to funds is facilitated.

According to the proposal for a Regulation on Markets in Crypto-assets, the issuer of virtual currencies can only be a legal entity that offers any type of virtual currency to the public or requests the receipt of virtual currency on a virtual currency trading platform. This unequivocally implies that the issuer is not necessarily the creator or creator of the virtual currency itself. Therefore, issuers are economic entities that issue virtual currencies or provide different services related to different virtual currencies.[9] The issuance of virtual currencies can take place in the form of a public offer made through the publication of a white paper or trading on crypto-assets trading platforms. The proposal for the Regulation requires that the issuers of virtual currencies must be exclusively legal entities, which are obliged to draft a white paper, notify the competent authorities, and publish it.[10]

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[8] Law on Digital Assets, Art. 7, items 1 and 2.

[9] Horvath, A. (2021). Protection of Consumers provided in the Proposal for a Regulation of Markets in Crypto-assets. In: *Zaštita kolektivnih interesa potrošača*. Belgrade: Union University Faculty of Law, 435.

[10] There are exceptions to this rule, referring to situations where publishing a white paper is not necessary and it does not apply: 1) the crypto-assets are offered for free; 2) the crypto-assets are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions; 3) the crypto-assets are unique and not fungible with other crypto-assets; 4) the crypto-assets are offered to fewer than 150 natural or legal persons per Member State where such persons are acting on their own account; 5) over a period of 12 months, the total consideration of an offer to the public of crypto-assets in the Union does not exceed EUR 1, 000,000, or the equivalent amount in another currency or in crypto-assets; 6) the offer to the public of the crypto-assets is solely addressed to qualified

RESPONSIBILITY OF THE ISSUER FOR THE ACCURACY AND COMPLETENESS OF INFORMATION IN THE ISSUANCE OF SECURITIES AND VIRTUAL CURRENCIES (DIGITAL ASSETS)

Prospectus *vs.* white paper

The procedure of public issuance of securities presupposes a series of legal actions by which the issuer highlights the offer and sells securities to investors. One of the key stages in the procedure is certainly the publication of the prospectus. As a written document, a prospectus contains detailed information about a particular public issuance (which investors can reasonably expect), concerning the issuer and the securities to be offered to the public for sale.[11] In this regard, the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market or MTF, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities.[12] The primary role of the prospectus is protective, given that its main goal is to protect the interests of potential investors. Establishing the obligation to publish it in the case of a public offer of securities seeks to alleviate the information asymmetry between the issuer, on the one hand, and the investors and the general public, on the other hand, prior to the implementation of the transaction.[13]

The issuer must not abuse its position by inconspicuously displaying unfavourable data and emphasizing favourable data in the prospectus to create a false impression among investors about any fact related to the issue significant for evaluating the level of profitability and risk of the purchase of the offered securities. If the investor suffers damage as a result of an incorrect, incomplete, or "embellished" prospectus (e.g., after the issuance, the price of the issued securities falls when the flaw in the prospectus is discovered), the question of responsibility of the issuer and its helpers in the issuance arises.[14]

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investors and the crypto-assets can only be held by such qualified investors. Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. Art. 4 (2).

[11] Jovanović, N. (2000). Obaveznost javne ponude za prodaju vrednosnih papira u međunarodnom, uporednom i domaćem pravu. *Pravo i privreda*, 5–8, 438.

[12] Law on the Capital Market, *Official Gazette of RS,* No. 31/2011, 112/2015, 108/2016 and 9/2020, Art. 15, para. 1.

[13] Marjanski, V. (2010). Nedostaci prospekta. *Pravo i privreda*, 4–6, 304.

[14] Jovanović, N. (2009). *Berzansko pravo*. Belgrade: Faculty of Law, University of Belgrade, 470.

As with the prospectus, the obligation to publish a white paper on virtual currencies/crypto-assets is a means of consumer protection, i.e., of investors. Namely, the role of drafting and publishing the white paper in the issuance of virtual currencies is identical to the role of the prospectus in connection with the issuance of securities. They are both meant to present a large amount of information about the crypto-asset issued in a fair, clear, and non-misleading way, including the potential dangers and risks in relation to the crypto-assets, and even about the issuer.[15]

The Proposal for a Regulation on Cryptocurrency Markets states that the crypto-asset white paper should contain the following information: a detailed description of the issuer and a presentation of the main participants involved in the project's design and development; a detailed description of the issuer's project, the type of crypto-asset that will be offered to the public or for which admission to trading is sought, and the reasons why it will be offered or why admission to trading is sought; a detailed description of the characteristics of the public offer, the number of crypto-assets that will be issued or for which admission to trading is sought, the issue price of the crypto-assets and the subscription terms and conditions; a detailed description of the rights and obligations attached to the crypto-assets and the procedures and conditions for exercising those rights; information on the underlying technology and standards applied by the issuer of the crypto-assets allowing for the holding, storing and transfer of those crypto-assets; a detailed description of the risks relating to the issuer of the crypto-assets, the crypto-assets, the offer to the public of the crypto-asset and the implementation of the project financed by the issuance of the offered crypto-assets.[16]

However, the Law on Digital Assets states that issuing digital assets in the Republic of Serbia is allowed, regardless of whether the relevant white paper has been produced and/or approved.[17] Since LoDA does not establish an obligation to issue a white paper, it is left as an option for issuers.[18] It is worth

[15] Horvath, A. (2021). Protection of Consumers provided in the Proposal for a Regulation of Markets in Crypto-assets. In: *Zaštita kolektivnih interesa potrošača*. Belgrade: Union University Faculty of Law, 441.

[16] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. Art. 5 (1).

[17] Law on Digital Assets, Art. 16, para. 2.

[18] Using the legal possibility, the publisher Vladimir Pavićević, a broker from Jagodina, announced an initial offer for the purchase of 7,700,000 individual units of the "Lazar" digital currency. The National Bank of Serbia responded with an urgent announcement that it did not issue any approval for the white paper that is normally published during the issuance of virtual currencies, emphasizing that an announcement against provisions of the Law on Digital Assets prescribes a monetary fine of up to 5,000,000 dinars. Upon the announcement of the NBS, the issuer stated that there is no place for sanctions, referring

noting that the Law on Digital Assets is significantly more liberal regarding the obligation to publish a white paper in comparison to the Law on the Capital Market, which specifies and lists the conditions under which the issuer is not required to create and publish a prospectus on the issuance of securities, especially regarding the level of risk and uncertainty that accompanies the issuance of digital tokens.[19] Taking into account the risk of partial or complete loss of invested funds as well as the fact that the rules governing deposit insurance are not applied to investing in digital tokens, regulations on investor protection (governing the protection of users of financial services) remain a questionable solution provided by the Law on Digital Assets on the optional creation and publication of a white paper. As there is no legal obligation to publish a white paper, the question of the situations in which the issuer will decide to prepare and publish a white paper remains open.

The Law on Digital Assets defines a white paper as a document published at the issuance of digital assets, containing information on the issuer of digital assets[20] and the initial offering that allows investors to make an informed decision related to investing in digital assets and understand the risks associated with the initial offering and the digital assets being offered. The white paper must also contain a warning about the risks typical for the purchase of / investment in digital assets, which are the subject of the initial offering.[21] If digital tokens are issued to finance the issuer, that is, a specific project of the issuer, the white paper must contain details on the planned use of the collected funds.

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to Article 17 (para. 2, item 4) of LoDA, which allows advertising of the initial offer of digital assets for which no white paper has been approved if the value of the digital assets is less than 100,000 euros, which, in this case, was fulfilled, since the value of the Lazar digital property was 64,245 euros. In this example, we can see that the legal provision on the optional publication of the white paper leads to potential abuses on the market, but also to the discretionary decision-making of the competent supervisory authorities. More about this topic is available at: *https://www.ekapija.com/news/3337442/izdavalac-domace-kriptovalute-lazar-tvrdi-da-je-sve-po-zakonu-planira-izdavanje*, (Accessed on 23.12.2021).

[19] For more information, see: Law on the Capital Market, Art. 12.

[20] If the issuer of digital assets is a legal entity, the white paper must contain the following information about the issuer: 1) business name of the issuer; 2) address of the issuer's headquarters; 3) legal form of the organization of the issuer; 4) personal identification number of the issuer; 5) name of the appropriate register of business entities where the issuer is registered; 6) telephone number and e-mail address of the issuer; 7) date of establishment and registration of the issuer's organization; 8) if the issuer is part of a group, information about the group and the position of the issuer within that group; 9) data on related parties of the issuer. If the issuer is a natural person, the white paper must contain the issuer's name and surname, ID number, if the issuer is a citizen of the Republic of Serbia, and the passport number and the country of issuance of the passport if the issuer is a foreigner, as well as the issuer's e-mail address. Rulebook on the White Paper and Subsequent White Papers Related to Digital Tokens, *Official Gazette of the RS*, No. 69/2021, Art. 3.

[21] Law on Digital Assets, Art. 20.

On the other hand, if digital tokens are issued with a purpose other than financing a specific issuer's project, it is necessary to state this in the white paper with a suitable explanation of the reason for issuing digital tokens.[22]

The initial offering of digital assets for which no white paper has been approved may not be advertised in the Republic of Serbia except under the act of the supervisory authority. As an exception to this rule, the issuer may advertise an initial offering of digital tokens for which a white paper has not been approved in the following cases: 1) the initial offering is addressed to fewer than 20 natural and/or legal persons; 2) the total number of digital tokens to be issued does not exceed 20; 3) the initial offering addressed to buyers/investors buying/investing in digital assets is no less than EUR 50,000 in the dinar equivalent at the official middle exchange rate of the dinar against the euro determined by the National Bank of Serbia on the date of purchase/investment, per buyer/investor; 4) the total value of digital assets issued by a single issuer during a period of 12 months does not exceed EUR 100,000 in the dinar equivalent at the official middle exchange rate of the dinar against the euro determined by the National Bank of Serbia.[23]

The Law on Digital Assets leaves the possibility for the competent authority (the Securities Commission) to reject the request of the issuer of digital assets to publish the white paper for reasons stated in the Law on Digital Assets (e.g., issuer's bankruptcy, liquidation, white paper content is misleading or incorrect, etc.), or additional reasons the competent authorities may determine by by-laws. So, this represents an opportunity for the issuers of by-laws to follow their attitudes toward digital assets and introduce additional restrictions.[24]

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[22] It is necessary to incorporate additional information about the rights and obligations arising from issuing digital tokens in the white paper: 1) a detailed description of the rights and obligations that the holder of the digital token has towards the issuer, i.e., towards a third party (if such rights exist), and at least a description of the obligations of the issuer of the digital tokens; 2) the possibility of managing the digital tokens, with a description of all restrictions within the right to manage the tokens, 3) a description of the planned method of trading on the secondary market; 4) a plan on joining the existing platforms for trading digital tokens, i.e., a plan for forming a new platform for trading digital tokens (if it exists); 5) the number of digital tokens offered, that is, the method of determining the number of digital tokens offered; 6) type, i.e., properties of digital tokens, including information on whether digital tokens are exchanged for other digital assets and/or money, as well as whether digital tokens have all or some of the features of financial instruments, and if they do, an indication of what those instruments are. Rulebook on the White Paper and Subsequent White Papers Related to Digital Tokens, Arts. 4 and 5.

[23] Law on Digital Assets, Art. 17.

[24] Motika, Ž. (2021). *ICO u Srbiji – Izdavanje digitalne imovine po Zakonu o digitalnoj imovini*. Available at: https://lawlife.rs/index.php/pravo/178-ico-u-srbiji-izdavanje-digitalneimovine-po-zakonu-o-digitalnoj-imovini (Accessed on 10. 12. 2021).

The Law on Digital Assets stipulates that publishing a white paper that has not been approved in accordance with this Law is allowed only if it is clearly indicated that the relevant white paper has not been approved during publishing and the initial offering of digital assets.[25] The issuer of digital tokens (or any third party) for whose initial offering a white paper has not been approved may not advertise the initial offering in print and electronic media, on open platforms and surfaces, or via the Internet.[26] Hence, when the publication of a white paper is not approved by the supervisory authority or not requested, and even when a white paper is not written, the issuance of digital assets is not prohibited. However, advertising them is prohibited under such circumstances.[27]

Bearing in mind the provisions of the Law on Digital Assets that refer to the approval of the white paper and advertising, we believe that the white paper should, in principle, exist not only for the sake of compliance with the rules of the Law on the Capital Market relating to the content of the prospectus but above all, for presenting credibility to potential investors. This would send the message that there is a professional team with a competitive product in which significant time and effort have been invested behind the initial offering of digital tokens. Apart from the arguments above, if we assume that digital tokens are similar to serial securities, we can see that the issuer of digital tokens is in a privileged position compared to the issuer of securities, since there is no legal obligation to publish a white paper. This is another reason why introducing mandatory publication of the white paper is necessary – to enable and provide equality for all market participants.

PERSONS RESPONSIBLE FOR THE LACK OF ACCURACY, COMPLETENESS OR CLARITY OF THE PROSPECTUS OR WHITE PAPER

The legal responsibility for the content of the prospectus or the white paper arises if its content is deficient - misleading or incomplete. The content of the prospectus, that is, the white paper, is considered deficient/defective when it does not comply with the regulations on its completeness, accuracy,

[25] Law on Digital Assets, Art. 17, item 3.

[26] Regulation (Rulebook) on Advertising Initial Offerings of Digital Tokens for which no White Paper or Subsequent White Paper has been approved, *Official Gazette of the RS*, No. 69/2021, Arts. 3–7.

[27] Sovilj, R. (2021). Legal Aspects of Digital Asset Market in the Republic of Serbia. In: *Regional Law Review*. Belgrade: Institute of Comparative Law, 305.

and clarity. Depending on the nature of the defect, the prospectus may be incomplete, inaccurate, misleading, or falsified ("embellished", "deceptive").[28] The issue of legal responsibility, that is, liability for the content of a prospectus, is complex. It includes several legal issues, such as: inaccuracy and incompleteness of the prospectus; the issue of causality (causal relationship between the flawed content of the prospectus and the resulting damage); the issue of the burden of proof; identification of persons who may be responsible for the content of the prospectus (passive identification) and the nature and principles of their responsibility; the question of the influence of the degree of guilt of their liability (if they are held accountable according to the principle of subjective responsibility); the persons who can submit a claim for compensation (actively legitimized persons); as well as the question of the extent of compensation and the statute of limitations of compensation claims.[29]

Firstly, it is necessary to determine the person responsible for the deficient content of a prospectus. Both in domestic law and in comparative legislation, the issuer is assumed to be the person responsible for the content of a prospectus.[30] Such a solution is logical, considering that the issuer actually "produces" the information contained in the prospectus. As a rule, the issuer is the addressee of the obligation to publish a prospectus, whether it is a prospectus published during a public offering of securities, or a prospectus published when securities and other financial instruments are listed on a regulated market (stock exchange), i.e., a multilateral trading platform.[31]

The Law on the Capital Market from 2011 foresees possible liability for the content of the prospectus concerning a wide range of persons while generally not providing the conditions under which those persons are responsible for the content of the prospectus. When the prospectus or abbreviated prospectus contains false, inaccurate, or misleading information, i.e., if essential facts are omitted, the responsibility lies with: 1) The issuer, director, and members of the management board of the issuer, unless a member of the management

[28] Marjanski, V. (2010). Nedostaci prospekta. *Pravo i privreda*, 4–6, 311.

[29] Marjanski, V. (2013). Lica odgovorna za sadržaj prospekta. *Collected Papers of the Faculty of Law in Novi Sad*, 4, p. 276.

[30] The law defines the issuer of securities as any local or foreign legal entity governed by private or public law, which issues or proposes the issuance of financial instruments (securities), and in the case of depository receipts, the issuer is considered to be the person who issues the securities represented by those depository receipts. The issuer is considered a public company provided it meets at least one of the following requirements: 1) it has successfully executed a public offering of securities in accordance with the prospectus whose publication has been approved by the Commission; 2) its securities are admitted to trading on a regulated market, MTF or OTF in the Republic. Law on the Capital Market, *Official Gazette of the RS*, No. 129/2021, Art. 2, item 1, points 99 and 100.

[31] Marjanski, V. (2013). *Op. cit.,* 277.

board has specifically voted against the authorization of the public offering;[32] 2) Any person making an offer (offeror), and who is not an issuer; 3) Any guarantor of the securities;[33] 4) Any investment firm providing underwriting services (market maker) or serving as an agent in connection with the public offering; 5) The issuer's independent auditors, but only with respect to the financial statements included in or accompanying the prospectus, covered by their audit report, and 6) Any other person upon whose authority or expertise a statement is included in the prospectus that has assumed responsibility for the adequacy and accuracy of such a statement (e.g., an accountant, a lawyer).[34] Based on the letter of the law, we conclude that the issuer, as well as the other listed persons, are objectively responsible for any damage suffered by the investors due to any kind of deficiency of the prospectus.[35] The aforementioned provision of the Law unequivocally implies that the issuer is objectively liable for damage to investors even if they were not aware of the flaw or deficiency in the prospectus. The issuer, thus, cannot dispute liability by claiming not to be at fault since it is not a condition for the occurrence of the liability.[36]

[32] The recently adopted Law on the Capital Market makes a clear distinction that the person responsible for the content of the prospectus can be the director or members of the board of directors of a company with unicameral management or members of the supervisory board, executive directors, or members of the executive board of a company with bicameral management or members of the administrative and executive boards of banks, unless one of these persons voted against the public offer and/or inclusion in trading on the organized market. Law on the Capital Market, 2021, Art. 45, item 1, pt. 2. The newly adopted Law eliminated the omission made in the Law on the Capital Market from 2011, which provided for the responsibility of the members of the board of directors, which is in contradiction with the Corporate (Company) Law, which was adopted at the same time. Namely, the Company Law states that companies do not have a board of directors, but in the case of bicameral management, in addition to the assembly and one or more directors, they have a supervisory board. This is why the aforementioned provision on management members' responsibility for the prospectus's deficiency remained inapplicable in practice. Company Law, *Official Gazette of the RS,* No. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021, Art. 198.

[33] Interestingly, the legislator predicted the guarantor's liability for the poor content of the prospectus in the issuance of securities without defining who the guarantor is. A guarantor is a person who provides some type of security (personal or real) to fulfil the obligations arising from bond-law securities issued by the issuer through a public offering.

[34] Law on the Capital Market 2011, Art. 19, item 1, pts. 1–6. Compare with: Law on the Capital Market 2021, Art. 45, item 1, pts. 1–7.

[35] Jovanović, N. (2011). Novi zakonodavni „mućak" Srbije u MiFID okruženju. In: *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije* (ed. Vuk Radović). Belgrade: Faculty of Law, University of Belgrade, 271.

[36] At this point, it should be mentioned the provision of the former Law on the Securities Market, which provided that only the issuer and their sponsor are objectively liable to the investors for the damage they suffer as a result of the flawed content of the prospectus,

When it comes to the responsibility of other persons (e.g., the bidder who is not the issuer, directors and members of the board of directors of the issuer,[37] issuance guarantor, sponsor or agent of the issuance related to the public offering of securities), the Law on the Capital Market does not contain an explicit norm on their joint liability with the issuer. However, in the absence of a special provision of the Law regarding this matter, the general rules of the Law on Contracts and Torts on the liability for loss or injury of several persons for the same damage may be applied. Namely, for damage (loss or injury) caused by several persons, all participants are held jointly liable.[38] Joint liability for loss shall also apply to the persons causing damage if they acted independently from one another, should their share in the damage caused be impossible to determine. Should there be no doubt that damage is caused by two or more persons who are in some way interconnected, and should it be impossible to establish who is liable for damage, such persons shall be liable jointly and severally.[39]

The issuer may be financially and criminally liable to investors. However, sanctioning the issuer and its helpers in the issuance based on general criminal offenses proved to be ineffective in practice. Prevalent crimes such as fraud, evasion, and embezzlement are based on the perpetrator's guilt and, most often, on his intent.[40] Since legal entities usually participate in securities trading, proving guilt is challenging. For this reason, stock market laws foresees special criminal acts, the perpetrators of which are objectively held

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while on the other hand, other persons who participated in the preparation of the prospectus (members of the issuer's management team, auditor, accountant, lawyer, etc.) answer subjectively, whereby their conscientiousness is assumed (that they knew, or should have known due to the nature of the work they perform, that the information stated in the prospectus is incorrect or incomplete). Law on the Securities Market and Other Financial Instruments, *Official Gazette of the RS*, No. 47/2006, Art. 27, item 7.

[37] In comparative law, there are joint and several liabilities of the members of the management board of the issuer for damage caused to investors due to the shortcomings of the prospectus if two conditions are cumulatively met: that they participated in the preparation of the prospectus and were negligent, i.e., that they knew, or due to the nature of the work they perform, they should have known that the information in the prospectus is incomplete or untrue. The law of Great Britain stipulates that all persons who held the position of director at the time of publication of the prospectus are liable. The responsibility derives from their position, regardless of whether or not they participated in the preparation of the prospectus. Davies, P. (2003). *Gower and Davies' The Principles of Modern Company Law*, Seventh edition. London: Sweet & Maxwell, 674.

[38] The Law of Contracts and Torts (Law on Obligations), *Official Gazette of SFRY,* No. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of SRY*, No. 31/93, *Official Gazette of Serbia and Montenegro*, No. 1/2003 – Constitutional Charter, *Official Gazette of RS*, No. 18/2020, Art. 206, item 1.

[39] The Law of Contract and Torts (Law on Obligations), Art. 206, items 3 and 4.

[40] Jovanović, N. (2009). *Berzansko pravo*. Belgrade: Faculty of Law, University of Belgrade, 484.

responsible as soon as they have committed the act, regardless of their psychological attitude towards the act and its consequences. This provides better protection for investors because stricter sanctions deter professionals from market abuse and misconduct. However, the domestic stock exchange law does not regulate criminal acts that would sanction the persons responsible for the flaws in the prospectus.[41]

The responsible person, who is not the issuer, can prevent their responsibility in two ways. First, suppose the prospectus or report has not yet been published. In that case, the responsible person can resign as they learn about the defect in the prospectus that they cannot remove before publication. This method of preventing liability should be equated with the issuance of a written opinion of the responsible person (e.g., a member of the board of directors) in which the errors in the prospectus and disagreement with it would be pointed out.[42] Another way to prevent liability can be applied if the responsible person finds out about the flaw in the prospectus or report after publication. In that case, the responsible person can prevent liability by adequately informing the public that the prospectus or the report is flawed and published without their consent.[43] Suppose the responsible person reasonably believed in the truth and accuracy of the information in the prospectus and report, even if there was an immaterial omission he was aware of at the time of publication. In that case, they will not be liable if they take reasonable steps to correct the error and inform investors. Also, the responsible person will not be held responsible if they relied on the opinion of an expert whom they justifiably believed to have adequate expertise and experience.[44]

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[41] In domestic law, with the adoption of the Law on the Capital Market in 2011, the criminal offenses sanctioned by the responsible persons in the event of a flawed prospectus were derogated. Namely, according to the Law from 2006 regulating the securities market, two specific criminal offenses were established: 1) issuing of securities by publishing a defective prospectus and 2) publication of a defective report on the issuer's operations. A person who, in the prospectus, as well as in any other form of public advertising in connection with the issuance and trading of securities, publishes false information about the issuer's legal and financial position, its business opportunities, or other false facts relevant to making an informed investment decision, or does not publish complete information about those facts will be punished by a fine or imprisonment for up to three years. If this part causes a disturbance in the regulated market (stock exchange), the perpetrator is liable to a prison sentence of one to five years. More on this subject available at: Law on the Securities Market and Other Financial Instruments, Art. 248.

[42] Jovanović, N. (2008). *Finansijska tržišta* (eds. Vasiljević, M., Vasiljević, B., Dejan Malinić, D.). Belgrade: Securities Commission, 467.

[43] Jovanović, N. (2009). *Berzansko pravo*. Belgrade: Faculty of Law, University of Belgrade, 491. Marjanski, V. (2013), Lica odgovorna za sadržaj prospekta. *Collected Papers of the Faculty of Law in Novi Sad*, 4, 284.

[44] Smith, D. (1999). *Company law*. Butterworth, Heinemann, Oxford, 97.

On the other hand, if we compare the solutions related to the responsibility of issuers of digital tokens in relation to issuers of securities, we notice that the legislator strives to provide adequate legal protection to investors in digital assets. Namely, the Law on Digital Assets prescribes the obligation of the issuer to put the interests of investors before their own and operate honestly, fairly, and professionally in accordance with the best interests of the investors. The legislator prescribes that all marketing activities undertaken by the issuer must be accurate, clearly stated, and not mislead potential investors.[45] Before establishing a business relationship with a digital asset user or performing a digital asset transaction, a digital asset service provider is obliged to inform the digital asset user about the risks of a digital asset transaction, including the risk of a partial or complete loss of money, or other assets, as well as about the fact that digital asset transactions are not subject to regulations governing deposit insurance or investor protection or laws governing financial services consumer protection.[46]

The Law on Digital Assets explicitly states that the issuer and the issuer's responsible person or legal representative shall be held liable if the white paper contains incorrect, inaccurate, or misleading data, or significant omissions.[47] Besides the issuer, those responsible for the flaws of a white paper may be: 1) independent auditors of the issuer (audit firm, auditor entrepreneur and/or licensed certified auditor), solely in connection with the information from the financial statements that have been included in the white paper and covered by their audit report; 2) any other person responsible for the accuracy and completeness of information in the part of the white paper they have assumed responsibility for – solely in connection with that information (e.g., accountant, lawyer).[48] Based on the statements above, we note that the scope of the persons responsible for the deficiency of the white paper is identical to the provisions of the Law on the Capital Market, referring to the responsibility of the independent auditor and other persons for the defective content of the prospectus.[49]

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[45] Jovanić, T. (2021). Kriptovalute kao nov izazov zaštite potrošača. In: *Zaštita kolektivnih interesa potrošača*. Belgrade: Union University Faculty of Law, 423.

[46] Law on Digital Assets, Art. 15, item 2.

[47] The mentioned persons are required that the white paper must contain a statement declaring that, according to their knowledge, the data in the white paper are in accordance with the facts and that no facts that could affect the veracity and completeness of the white paper have been omitted. In addition, the white paper must contain information about the issuer or the issuer's representative. Rulebook on the White Paper and Subsequent White Papers Related to Digital Tokens, Art. 9, items 1 and 2.

[48] Law on Digital Assets, Art. 21, items 1 and 2.

[49] Compare with the Law on the Capital Market from 2021, Art 45, item 1, pts. 6 and 7.

Responsibility of the Securities Commission for the accuracy and completeness of the information in the prospectus or the white paper

The Law on the Capital Market explicitly excludes the responsibility of the Securities Commission for the authenticity and completeness of the information stated in any part of the approved prospectus or the summary of the prospectus for a public offering or admission to trading on a regulated market or MTF.[50] We consider this solution only partially correct. The Securities Commission does not examine the accuracy of the information stated in the prospectus, so the exclusion of its responsibility in that regard is justified. However, since the Commission examines the completeness of the information in the prospectus, from the aspect of the existence or non-existence of data required by law and by-laws, the exclusion of the Commission's responsibility in that part cannot be considered justified. In that case, the Republic of Serbia should be held responsible due to the failure of the employees of the Securities Commission, whose founder is the Republic of Serbia, to perform their official duties.[51]

Even in comparative legislation, there is no single solution regarding the responsibility of the competent regulatory authority in the capital market. The EU Prospectus Regulation excludes the responsibility of the competent regulatory authority, providing that national law is exclusively applicable. According to the Regulation, EU member states are obliged to apply their federal regulations on the legal responsibility of the competent regulatory body only to prospectuses approved by their competent authority.[52] Therefore, the issue of legal responsibility of the competent regulatory authority in the capital market is left to the member states to regulate autonomously within the scope of their domestic regulations.

The same solution related to the exclusion of the Securities Commission's responsibility for the authenticity and completeness of the information specified in the prospectus was also accepted for the issuance of digital tokens.[53] Namely, the Republic of Serbia, the Securities Commission, and other com-

[50] Law on the Capital Market, Art. 19, item 5. The same solution is provided for in Art. 45, item 7 of the recently adopted Law on the Capital Market.

[51] Marjanski, V. (2013). Lica odgovorna za sadržaj prospekta. *Collected Papers of the Faculty of Law in Novi Sad*, 4, 289.

[52] 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, *Official Journal of the European Union*, L 168, Art. 20, item 9.

[53] On the position of the Securities Commission, see: Sovilj, R., Stojković-Zlatanović, S. (2017). Uloga Komisije za hartije od vrednosti u postupku nadzora nad poslovanjem investicionih društava. In: *Pravnički dani – Prof. dr Slavko Carić – Nezavisnost pravosuđa*. Novi Sad: Faculty of Law for Commerce and Judiciary, 351–362.

petent and public authorities are not responsible for any potential damage and losses that investors and/or third parties suffer as a result of investing in issued digital tokens.[54]

In this regard, an essential issue for all future providers of services related to digital assets concerns the issuance of permits and the supervision of implementing the Law. Namely, the Law states that the National Bank of Serbia and the Securities Commission will not have discretion when making decisions but will issue licenses only if they determine that all conditions and requirements stipulated by the Law have been met. Thus, we justifiably raise the question of how well-educated, informed, and qualified the existing staff of the state administration is for decision-making and supervision of a very delicate subject, such as the issuance of digital tokens.

CONCLUSION

The importance of informing the public about any planned and undertaken investments cannot be overstated. Concealment of data, that is, providing inaccurate and incomplete information in the prospectus/white paper and report, as well as the untimely publication of the issuer of securities/virtual currencies report, can have unforeseeable consequences not only on the subject issue and trade but also on the entire financial market of a country. Therefore, legally regulating the issuance of securities, that is, virtual currencies/assets, by determining the conditions under which issuers and other responsible persons will be held liable for the deficiency of the issuance was necessary.

By adopting the Law on Digital Assets, Serbia has positioned itself among the few countries with a detailed legal and tax framework regulating the use of virtual currencies/assets. This paves the way for innovation and attracting foreign knowledge and capital, which should inevitably contribute to the further development of the digital property industry. Given that the state has recognized the opportunities brought by the issuance and trade of virtual currencies, the opportunity for developing the financial market of digital assets and thereby compensating for the gap that has followed the capital market for the last 30 years has emerged. Naturally, it yet remains to be seen to what extent the competent authorities will be able to monitor the implementation of the Law in practice with existing technology and resources, especially considering the decentralized nature of blockchain technology.

[54] Rulebook on the White Paper and Subsequent White Papers Related to Digital Tokens, Art 7, item 2.

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