KROMANN REUMERT

COMMENTS TO ESMA'S CALL FOR EVIDENCE ON POTENTIAL FURTHER STEPS TOWARDS HARMONISING RULES ON CIVIL LIABILITY PERTAINING TO SECURITIES PROSPECTUSES UNDER THE PROSPECTUS REGULATION

Thank you for the opportunity to comment on this topic. The answers are provided by Kromann Reumert, a Danish law firm regularly advising issuers and investors in connection with public offerings and listings in Denmark. Our answers focus on prospectuses regarding equity securities.

Q1 [Intentionally omitted]

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)?

There have only been few judicial decisions in Denmark concerning prospectus liability. To our knowledge, there is only one leading judicial decision where an issuer was held liable for incorrect information in the prospectus, which is the BankTrelleborg-case that relates to a prospectus concerning issuance of equity securities.

In the BankTrelleborg-case, the issuer had pledged certain deposits (in the amount of approx. DKK 300 million). The issuer was not allowed to pledge the deposits under its financing agreements (in the total amount of approx. DKK 1,3 billion), and the banks under these agreements were therefore entitled to terminate the financing agreements due to the issuer's default. The published prospectus did not include any mentioning of the pledge, but rather stated that no pledges had been granted or issued. Nor did the prospectus include any reference to the fact that the banks were entitled to terminate the financing agreements as a result of the pledged deposits. The issuer was in financial distress and a couple of months after the prospectus had been published, another Danish bank acquired the issuer and squeezed out the minority shareholders.

A group of the squeezed-out minority shareholders filed a claim for damages against the continuing, combined bank on the basis that they had subscribed for shares in Bank-Trelleborg at a too high price. The case was tried before the Danish Supreme Court. The Supreme Court found that the prospectus was incorrect, as it stated that no pledge had been granted, and that it lacked information about the banks' right to terminate the financing agreements. Further, the prospectus included a statement that the issuer had a material liquidity buffer, which the Supreme Court found was misleading. The issuer had not previously prepared a prospectus and had not engaged any advisors in the preparation of the prospectus nor performed any procedures to verify the statements made in the prospectus (i.e. a verification procedure which is common in connection with public offerings of equity securities in Denmark). The Supreme Court stated that the pledges could have been easily and quickly identified by investigations, which were, however, not performed, and that the issuer thereby had not ensured that procedures were determined and followed for purposes of investigation and control of such material information in connection with the prospectus preparation process. On this basis, the Supreme Court found that the issuer had acted negligently.

The claimants claimed that they had suffered a loss in an amount equal to the difference between the subscription price in connection with the subscription for shares and the subsequent redemption price in connection with the aforementioned squeeze-out. In this regard, the Supreme Court stated that when a subscription for shares is made on the basis of a prospectus that includes incorrect and missing information, that is material to the issuer, it must be assumed that subscriptions would not have been made if the prospectus had been correct and complete, even if the subscribers have not read the

prospectus. The Supreme Court found that the claimants had incurred a loss in the claimed amount and that it was foreseeable (in Danish: *adækvat*). The Danish bank was therefore held liable.

Other leading prospectus liability cases in Denmark include the Nordisk Fjer-case, the Hafnia-case and the Amagerbanken-case. In those cases, the Supreme Court did not rule that the issuer or any other person were liable towards subscribers for shares.

The Nordisk Fjer-case concerned potential prospectus liability for the bank/manager in connection with a convertible bond issue. The issuer (Nordisk Fjer) went into insolvency proceedings twelve months after the issue and later bankrupt. The claimant claimed that the bank knew that the financial situation of the issuer was much worse than it appeared from the prospectus. Here the Supreme Court found that the bank had acted in accordance with market practice at the time and that the issuer was a well-reputed issuer.

In the Hafnia-case, the issuer (Hafnia) completed a fully underwritten rights issue and one month later went into insolvency proceedings. The Supreme Court found that prospectus liability for incorrect or missing information in the prospectus presupposes that such incorrect or missing information, based on an assessment of the prospectus as a whole, materially affect the assessment of the issuer, which the Supreme Court did not find was the case as the prospectus, in the Court's assessment, included information about the issuer's financial situation. In the prospectus, the board of directors referred to certain added value in its assessment of the issuer, the value of which turned out to be materially lower than estimated in the prospectus, but the Supreme Court found that the estimates made of the added value when made were reasonable, and therefore the prospectus was not misleading.

In the Amagerbanken-case, a bank in financial distress completed a capital increase and six months later, the bank made a write-down of its assets of approx. DKK 3 billion and was declared bankrupt. The write-down was estimated to be materially lower in the prospectus compared to the actual write-downs made six months later. Referring to the criteria for prospectus liability from the Hafnia-case, i.e. in order for a person to be held liable for inadequate information in a prospectus such information must, based on an assessment of the prospectus as a whole, materially affect the assessment of the issuer, the Supreme Court found that the issuer was not liable.

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

We find that it would be helpful if there were guidance as to who is entitled to claim damages, though we acknowledge it is difficult to specify exactly who should be entitled to claim damages to cover all possible situations and we believe it would be more prudent for such to be determined under national law. For instance, in our view it is clear that a person acquiring the securities directly from the issuer during an offer period on the basis of a prospectus would be entitled to claim damages (of course subject to any other conditions for claiming damages under national law being meet), but we do not believe that a person acquiring securities in the secondary market would in all situations be entitled to claim damages. Thus, it is not clear under the Prospectus Rules whether an investor purchasing securities in the secondary market can rely on the information in a prospectus published by the issuer, including if the investor acquires securities of the issuer after the offer period has closed. When the offer period has closed, the issuer is no longer required to publish a prospectus supplement in the event of material new circumstances and is only required to publish information, including inside information, pursuant to the Market Abuse Regulation, information to be published under the rules transposing the Transparency Directive into national laws and other market and national rules, but would not necessarily be required to publish information that under an offer period would require the publication of a prospectus supplement. If a material new circumstance occurs, making information in the

prospectus no longer accurate, but which does not trigger a statutory disclosure obligation of the issuer, and an investor acquires securities of the issuer in the secondary market at that time, the investor would in our opinion not be entitled to claim damages against the issuer. It may be considered to introduce an objective last date when investors shall have acquired shares in order for them to be able to rely on the prospectus in pursuing claims against the issuer or other persons responsible for the prospectus. Ideally, this should be at the end of the offer period (i.e. only investors subscribing shares in the offer are entitled to rely on the prospectus, potentially expanded to investors that have acquired shares in the issuer in the secondary market during the same period). If such period should be expanded, it could be until the next ordinary financial reporting of the issuer.

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?

Yes. We believe Article 11 should determine that persons responsible for the prospectus can only be held liable if having acted, as a minimum, negligently. It is acknowledged that the standard of 'negligence' may vary from member state to member state, and it may be helpful to include a community wide definition of 'negligence'. For instance, it would in our opinion be of importance that the so called 'business judgment rule' is recognised as exculpating directors from liability. Recognising such standard would incentivise directors to apply reasonable care and render decisions on a fully informed basis as regards the preparation of the prospectus and the offering as such. This would, in our opinion, also be in accordance with the declaration made by the persons responsible for the prospectus under Article 11(1) on the completeness and accuracy of the prospectus, which is made to the best of such persons' knowledge.

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?

Yes. In line with Article 15(4) of the Markets in Crypto-Asset Regulation, we believe it would be fair (and would also be the starting point under Danish prospectus liability rules) that it is the responsibility of the claimant to present evidence of the issuer or other persons being liable for a prospectus. It must be assumed that in preparing a prospectus, the persons responsible, potentially together with advisers, have diligently prepared the disclosures in that prospectus, and therefore if any investors were to claim that the prospectus is incorrect or incomplete, it should be for such investor to produce evidence of its allegations. If the opposite were to apply, persons responsible for a prospectus could end up spending excessive amount of time on defending unfounded claims from investors having made bad investments or just not having earned as much as the investor had hoped when investing.

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

No. We believe it would be inappropriate if specific rules of expiry of claims would apply to prospectus liability claims compared to other claims. At least in Denmark, we have no specific statute of limitation concerning prospectus liability (the statute of limitation is three years under Danish law, which is the main rule under the Danish Act on Statute of Limitation) and we believe that a harmonisation creating a specific rule of expiry on prospectus liability, which is shorter than the main rule or shorter than a specific rule of expiry concerning other claims, could motivate claimants to seek to bring other claims, for instance claims on management liability, under a statute of limitation for prospectus liability, which could create unnecessary uncertainty as to what statute of limitation would apply .

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 increase the number of cross border offerings?

In our experience, potential liability concerns are not a decisive factor when issuers decide whether or not to do cross-border offerings in the EU. It is more a matter of the costs in engaging local counsel often being too high compared to the potential investor base in other EU countries, and even if another EU country is relevant, it is often sufficient to rely on the available exemptions from the obligation to publish a prospectus in order to do offerings in such countries.

A harmonisation of the rules on civil liability should in our view not be introduced for purposes of easing cross-border offerings. As set forth in our answers to questions 3, 4, 5, 8 and 9, we would welcome some guidance and clarification on certain aspects of the prospectus liability, but we do not think that a general harmonisation of the prospectus liability rules would be prudent.

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

We believe that Article 11 should be amended to state that all claims concerning prospectus liability under the Prospectus Regulation is settled under the laws and courts of the home EU member state of the issuer, and if the issuer is a non-EU domiciled issuer, then the EU member state having approved the prospectus. Such inclusion could, in our opinion, help to reduce issuers' concerns (to a certain extent). We recognise that a third country's courts would not necessarily acknowledge such inclusion if a claim were brought against the issuer (or other persons) in that third country, but it would strengthen the issuer's position (and the position of other persons being held liable) that the EU member states have considered and concluded what laws and jurisdiction should apply in respect of prospectus liability under EU prospectus rules.

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

Not in its entirety, but we believe specific aspects could be replicated.

The liability regime in the Markets in Crypto-Asset Regulation is not a fault or culpability regime, but, based on the wording of Article 15, the offeror (or the other mentioned persons) will be held liable if Article 6 has been infringed, regardless of any fault or the materiality of the incomplete, unfair, unclear or misleading white paper. We find that it would be inappropriate to introduce a similar liability regime under the Prospectus Regulation as it would discourage companies from becoming listed or from raising capital via publication of prospectus. Contrary to the prospectus regime under the Markets in Crypto-Asset Regulation, the prospectus regime under the Prospectus Regulation, and prior hereto the Prospectus Directive and before that national prospectus and market rules, is a well-established regime. As ESMA also notes in the Call for Evidence, part of the background of Article 15 of the Markets in Crypt-Asset Regulation might be that a prospectus under this regime does not undergo any approval process, contrary to the prospectuses under the Prospectus Regulation. Further, crypto-assets are, in general, by nature more risky products than the securities covered by the Prospectus Regulation. We therefore understand the need from investors' perspective to have a strict liability regime in respect of white paper information under the Markets in Crypto-Asset Regulation, but we do not think this is appropriate or necessary under the Prospectus Regulation.

We find that a provision such as Article 15(4) of the Markets in Crypto-Asset Regulation regarding burden of proof should be inserted in Article 11 of the Prospectus Regulation. Please refer to our answer to question 5 above.

We would further welcome that Article 11 or another relevant provision in the Prospectus Regulation specified that a person responsible for the prospectus could only be held liable for any misrepresentation or omission of facts from the prospectus if such fact or omission is material for the investor's investment decision. We believe such is in accordance with Article 6(1) of the Prospectus Regulation and the Danish prospectus practice. Article 6(1) of the Prospectus Regulation provides that:

"*1. Without prejudice to Articles 14(2), 14a(2) and 18(1), a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of:*
(a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor;
(b) the rights attaching to the securities; and
(c) the reasons for the issuance and its impact on the issuer."

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?

Under Danish law, listed companies are required to give financial guidance for at least the coming year, including assumptions hereto. Thus, in respect of financial forward-looking information, this is a statutory requirement in Denmark.

Other than the financial guidance for the next financial year, the risk of liability is, in our experience, a decisive factor in respect of disclosure and non-disclosure of forward-looking information in a prospectus. The disclosure of forward-looking information is, to some extent, driven by investor demands, and often during prospectus preparation processes, time and money are spent satisfying investor demands while at the same time ensuring that issuer and directors do not expose themselves to liability risks from any forward-looking information. Forward-looking information is inherently uncertain but at the same time issuers naturally wants to satisfy investor demands. We would therefore welcome safe harbour provisions in respect of forward-looking information as we believe it would ease this, sometimes, difficult situation of the issuer wanting to both satisfy investor demands and not expose itself to unnecessary liability risks, and it would generally stress the uncertain nature of forward-looking information.

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

Yes. We find that the UK proposal as described in the Call for Evidence would address the concerns and is fair. We do not believe that the safe harbour rules should not be applicable in an IPO, as we understand applies under the US safe harbour rules, as the concerns of liability risk should not differ from other situations in which the issuer disclose forward-looking information.