Who Is Responsible For A Company’s Prospectus When The Company’s Shares Have Been Admitted For Trading On A Regulated Market?

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Introduction
Who is responsible for a company’s prospectus when the company’s shares have been admitted for trading on a regulated market? At times a discussion arises as to whether others than the company itself or its board of directors could be held liable to pay damages for financial losses caused by errors or omissions in the prospectus. By outlining the basis for the responsibility of a company’s prospectus based on securities, company and tort law¹ this paper is aiming to describe and discuss the situation in Sweden with special focus on the Exchange’s perspective.²

Introduction

A company must issue a prospectus in a number of situations. This paper focuses on the obligation of a limited liability company to prepare a prospectus when applying for admission to trading of its shares on a regulated market.

Prospectus Directive

On 31 December 2003, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (the “Prospectus Directive” or the “Directive”) entered into force. The Directive is supplemented by a Commission Regulation³ (the “Prospectus Regulation”) which contains detailed implementation provisions, in particular as to the contents of prospectuses. The Prospectus Directive is intended to create common disclosure standards for public issues of securities throughout the EU and to facilitate mutual recognition of prospectuses and listing particulars. The Directive requires a prospectus to be filed and approved by the regulatory authority in the issuer’s home member state when an issuer makes an offer of securities to the public in any EU member state or offers securities which are listed on an EU regulated market – unless one of the exemptions of exclusions set out in the Directive is applicable. The Directive was required to be implemented by each of the EU member states by 1 July 2005.

Liability

The Prospectus Directive does not harmonise the laws of the member states on prospectus liability. However, Article 6 requires member states to provide under their

¹ Potential responsibility based on marketing law will not described in this paper. For a discussion regarding the applicability of the Swedish Marketing Act, see for example Lindqvist, Fredrik, Skadeståndsansvar för prospect? En fråga med många teorier – kan marknadsföringslagen ge ett klart svar?, JT 1996/97 p. 371.
² When the situation does not tell differently the “Exchange” means the Stockholm Stock Exchange.
national laws that the issuer, its management, administrative or supervisory bodies are liable for the information given in a prospectus. Member states must further ensure that their laws on civil liability apply to those persons responsible for the information given in the prospectus, who are to be named in the prospectus. Accordingly, the Directive requires that each member state must have laws on prospectus liability, but the scope and application to those rules may vary widely between different member states.

Member States shall, however, ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

1. Sweden

1.2 Background

Under Swedish law there are no explicit rules regarding legal person’s liability for errors or omissions in a prospectus. Nor are there any explicit rules which govern the liability of persons participating and advising in the preparation of a prospectus. Statutory provisions setting out rules regarding liability for errors or omissions in a prospectus only exist for persons exercising corporate functions in a public limited company and to a certain extent the auditors. Liability for errors or omissions in a prospectus will therefore to a large extent have to be based on general tort law.

According to the Tort Liability Act pure financial damage means financial damage which has been caused without any relation to personal injury or material damage. The letter of the Tort Liability Act only allows a claim for damages in case of a pure economic loss if the act causing the damage was criminal. When, however, there is no criminal offence involved, the situation is less certain. From the preparatory documents of the Tort Liability Act it follows, however, that the purpose of the rule was not to put obstacles in the way for the development by case law towards a broader scope of liability for pure economic loss. In latter years the Supreme Court has imposed liability in several cases where no criminal offence has been involved. One important case in this area is the “Kone-case”.

1.3 The statutory ground

1.3.1 The Financial Instruments Trading Act

According to Ch. 2, sec. 1 of the Financial Instruments Trading Act a prospectus must be prepared when transferable securities are offered to the public or admitted to trading if nothing else follows from secs. 2-7. When an application is made to have transferable securities admitted to trading on a regulated market the prospectus shall according to Ch. 2, sec. 10 be prepared by the one that makes the application. With regards to a public company, this normally means the board of directors of the company. According to Ch 2, sec. 15 a person can only be held liable for errors or omissions in the summary of the

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4 Cf. Appendix 1, secs. 1.1 and 1.2 of the Prospectus Regulation.
5 Swe. Skadeståndslag (1972:207).
6 Ch. 1, sec. 2.
7 Ch. 2, sec. 2.
8 Prop. 1972:5 s. 568.
9 NJA 1987 s. 692.
prospectus, including any translation thereof, if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

1.3.2 The Companies Act

The Companies Act\textsuperscript{11} Ch. 29, sec. 1 imposes liability on the founder, members of the board of directors and the managing director vis-à-vis the company, shareholders, or others. According to the Companies Act, each member of the board of directors who, in the performance of his or her duties, intentionally or negligently causes damage to the company, to a shareholder or other person as a consequence of a violation of the Companies Act, the applicable annual reports legislation or the articles of association shall compensate such damage. Where the company has prepared a prospectus, the aforesaid also apply with respect to damage resulting from a breach of the prospectus requirements in the Financial Instruments Trading Act or the Prospectus Regulation as regards information contained in the prospectus as well as the format, incorporation by reference and publication of such prospectus and dissemination of advertisements.

The same principles of liability are applicable to the company’s auditors.\textsuperscript{12} In order to be correct, the audit shall be as detailed and extensive as required by generally accepted auditing standards.\textsuperscript{13}

1.3.3 The Tort Liability Act

According to the Tort Liability Act pure financial damage means financial damage which has been caused without any relation to personal injury or material damage. The Tort Liability Act only allows a claim for damages in case of a pure economic loss if the act causing the damage was criminal.\textsuperscript{14} When there is no criminal offence involved the situation is, however, less certain. In principle, the traditional view has been that a prerequisite for getting damages covered for pure financial loss in other cases is that the right to damages is set out in law. In general, a claimant seeking damages has to initially show that he or she has suffered a loss. Then negligence on behalf of the damage-causing subject must be shown. Direct causation must be proven. In addition, under general principles of Swedish tort law, the causal link must be “adequate”.

1.3.3.1 Damages

The basic principle for receiving damages is that the extent of injury must be proven (as is the case for the infringement and the causal link). However, if proof regarding the extent of injury cannot be adduced (or can only be adduced with difficulty), the court may estimate the injury at a reasonable amount.\textsuperscript{15} Compensation for loss of income shall equal the difference between on the one hand the income which the plaintiff would have earned in the absence of the infringement, and on the other hand the income actually earned.\textsuperscript{16} Compensation for loss of or damage to property shall include compensation for the value of the property or for the repair expenses together with compensation for diminished value and other expenses incurred as a result of the loss or damage.\textsuperscript{17}

\textsuperscript{11} Swe. Aktiebolagslag (2005:551).
\textsuperscript{12} Ch. 29, sec. 2.
\textsuperscript{13} Cf. Ch. 9, secs. 3-4.
\textsuperscript{14} Ch. 2, sec. 2.
\textsuperscript{15} Ch. 35, sec. 5 of the Swedish Code of Judicial Procedure (Swe. Rättegångsbalk (1942:740))
\textsuperscript{16} Ch. 5, sec 1, para. 2.
\textsuperscript{17} Ch. 5, sec. 7.
1.3.5 Penal Sanctions

As mentioned the Tort Liability Act only allows a claim for damages in case of a pure economic loss if the act causing the damage was criminal. Hence it is interesting to look closer at the specific criminal actions sanctioned. Penal Code\(^{18}\) Ch. 9, sec. 9 applies specifically to the spread of misleading information among the public, irrespectively if it is done in prospectuses, economic reporting or other situations. Penal Code Ch. 15, secs. 10 and 11 also prohibit untrue affirmation and false certification. If the erroneous piece of information forms part of the economic reporting in the prospectus, the sanction against false accounting in the Penal Code Ch. 11 sec. 5 applies. Section 8 in the Insider Crime Act\(^{19}\), which makes stock price manipulation a criminal offence, normally also applies to erroneous information in prospectuses.

1.3.6 Liability under Exchange’s rules and regulations

The Exchange’s sanctions are based on warning, fine and delisting. When admitted to trading, the company signs an undertaking to follow the Exchange’s Rule Book for Issuers, thereby entering into an agreement subject to contract law. The Rule Book for Issuers does not contain any provisions on liability.

1.4 Case law

The most interesting case regarding liability for pure financial loss is the Kone-case. Kone, a credit company, had granted a real estate company a loan based on a valuation certificate. This was issued by the professional real estate valuer, X as an employee of company Y. The valuation certificate showed significant errors and deficiencies. For example the fact that there existed obstacles preventing exploitation of the real estate in question had not been mentioned in the certificate. The Supreme Court stated in its judgement that a person that has rightly placed its trust in a valuation certificate must not bear the consequences of an injury ultimately caused by a valuer acting negligently. Company Y was therefore deemed liable against Kone because of X’s negligent acting.

It should be noted that X had not committed any crime. Nor was there a contractual relationship between X, company Y and Kone. The Supreme Court referred explicitly to the statement in the preparatory documents of the Tort Liability Act that the purpose of the rule was not to put obstacles in the way for the development by case law towards a broader scope of liability for pure financial loss. The Supreme Court thus established that liability for pure financial loss not only exists in relation to a client but also, in certain cases, in relation to third parties.

A prerequisite is, however, that the certificate does not contain a limitation of liability clause in respect to third parties. In addition, such a certificate must have been issued by someone who undertakes to professionally value the real estate. Finally, it should be obvious to the valuer that the certificate will be used for different purposes and by many people. The scope of the case is also clearly defined to cover only valuation certificates relating to real estate.

The Supreme Court’s definition does, however, not mean that one could not draw any general conclusions from the case.\(^{20}\) The Supreme Court confirms the statement in the preparatory documents that the purpose of Ch. 2, sec. 2 in the Tort Liability Act is not to put obstacles in the way for the development by case law towards a broader scope of liability for pure financial loss. This has also been confirmed in another Supreme Court


\(^{19}\) Swe. Lag (2005:377) om straff för marknadsmisbruk vid handel med finansiella instrument.

case where a liquidator where held liable for pure financial loss in a non-contractual relation. In both cases it is a matter of professional experts’ liability in relation to a third party.

In sum the Kone-case can be said to have established five criteria for when liability for pure financial loss based on a valuation certificate in a non-contractual relation can occur without any act of crime and statutory basis:

- The certificate must have been issued by someone who undertakes to professionally value the real estate;
- It should be obvious to the valuer that the certificate will be used for different purposes and by many people;
- One that has rightly placed their trust in a valuation certificate must not bear the consequences of an injury ultimately caused by a valuer acting negligently;
- The valuer has acted negligently; and
- The certificate does not contain a limitation of liability clause in respect of third parties.

Against this background a non-contractual liability for errors or omissions in a prospectus could by analogy with the Kone-case potentially be laid on for example investment firms and other parties involved in the preparation of the prospectus.

1.5 Liability

1.5.1 Liability of the company itself

It is uncertain whether a company may be held liable to pay damages to its shareholders if the claim is related to the subscription or acquisition of securities issued by the company. New enactments regarding prospectus liability were proposed in a Swedish Government Official Report, pursuant to which the company could be held liable for the information in a prospectus. The proposal was, however, withdrawn and the liability provisions were not implemented in Swedish legislation.

It is often held that payment of damages by a company to its shareholders is contrary to the rules on protection of the creditors to the company. In any case, the principle of equal treatment prohibits payment of damages from the company to some but not all of its shareholders. It should nevertheless be noted that a company may be subject to the administrative sanctions under the regulation of the Financial Supervisory Authority and the NASDAQ OMX Stockholm Rulebook for issuers.

1.5.2 Liability of the board members

As explained in section 1.3.2 each member of the board of directors is liable to shareholders and third parties for damage resulting from a breach of the prospectus rules, for example in case of errors and omissions in the prospectus. An assessment of such liability would in practice be made on an individual basis for each member of the board of directors and would require that the relevant Board member has acted intentionally or negligently.

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21 NJA 1996 s. 700.
22 SOU 2005:18, p. 58.
24 SOU 2005:18, p. 58.
### 1.5.3 Liability of the investment firm

The investment firm plays an important role in the preparation of a prospectus and in marketing the company before a listing on a regulated market. The liability of the investment firm is, however, not clarified by law.\(^{25}\) In a situation where a representative of the investment firm has caused damage, liability to pay compensation for the investment firm would therefore have to be searched in general laws of tort.

On the face of it the assignment carried out by an investment firm in preparing a prospectus bares resemblance of a real estate valuer. It may therefore be interesting to make an analogy with the Kone-case in order to investigate the potential liability of an investment firm when preparing a prospectus.

The first criterion set out by the Supreme Court in the Kone-case is that the real estate valuation certificate must have been issued by someone who undertakes to professionally value the real estate. The same professionalism is to be found when looking at investment firms in relation to their participation in the prospectus preparation. Investment firms have more in-depth knowledge of the prospectus rules and are hired by the company for this expertise. In addition to the preparation of the prospectus it is the investment firms who value the company in question and helps to market the shares to investors. Investment firm’s participation in drafting a prospectus and valuing the company must therefore be considered as professional business practice.

Secondly, the Supreme Court underpinned that it should be obvious to the valuer that the certificate will be used for different purposes and by many people. The same would normally apply to the employees of investment firms that prepare a prospectus. Based on the prospectus, it should be possible to make an informed assessment of the issuer’s operations and financial position. It can therefore form the basis for an investor to decide to invest capital. A prospectus is thus very similar to the real estate valuation certificate. In addition, the fundamental purpose of a prospectus is that it should be read by others than the customer. In conclusion the investment firms generally have to be aware that the prospectus is used for different purposes and by different people.

Thirdly, the Supreme Court stated that one that has rightly placed their trust in a valuation certificate must not bear the consequences of an injury ultimately caused by a valuer acting negligently. The prospectus should in general be a document that an investor rightly could put its trust in. The prospectus is often the basis of an investor’s decision to risk money in a corporation and it is thus similar to a real estate valuation certificate. Where an investment firm is acting with its logo on the front of the prospectus it can be seen as a kind of guarantee that it has complied with the rules and reviewed the content after their best ability.\(^{26}\) It is, however, worth noting that investment firms normally do not assume responsibility or express themselves directly in the prospectus. There are thus, no direct statements to draw any confidence from.\(^{27}\) If, however, the investment firm

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\(^{25}\) Have the investment firm made a declaration of responsibility for parts of the prospectus in accordance with the Prospectus Regulation the situation is, however, likely to be more clear.


\(^{27}\) In practice a “verification process” has developed. The verification process could be described as a form of due diligence where a lawyer, often hired by for example the investment firm preparing the prospectus, reviews the information in the prospectus together with the company’s management and auditors in order to verify that the information is correct and complete. The process is, however, normally not made public. Cf. regarding the process in Denmark under section 2.3.
conducts its own investigations of the company, it would probably be enough to create confidence among investors that the prospectus is free from errors or deficiencies.

Fourthly, the Supreme Court stated that the certificate must not contain a limitation of liability clause in respect of third parties. In general a limitation of liability clause is valid if the tortfeasor has not acted intentionally or with gross negligence and there is no direct statutory reason as to why it would not be possible to include such a clause in a prospectus. In order for the provisions regarding liability set out in the Prospectus Directive and the Prospectus Regulation not to become null and void there would, however, probably have to be some limitation to the scope of the limitation of liability clauses. The validity of a specific limitation of liability clause ultimately has to be decided on a case-by-case basis.

The fifth criterion, whether the damage has been caused by negligence or not, also has to be decided on a case-by-case basis, in light of the legal principles and the investment firm’s special expertise in this area described above.

The description shows that it may well be scope for a court to follow the principles of the Kone-case also with regards to errors committed by an investment firm in the preparation of a prospectus. One must, however, be careful with drawing too far reaching analogies from Kone-case and analyze each case individually.

1.5.4 Liability of the auditor

The auditors have a special professional responsibility and stands under supervision by the Supervisory Board of Public Accountants. The Companies Act imposes liability on the auditor in a manner similar to its imposition of liability on members of the board of directors. An auditor could therefore, for example, be held liable if the auditor has made errors resulting in erroneous statements in the audit which in turn are included in the prospectus. The job of the auditors in general bares a high resemblance of the work of a real estate valuer and an analogy with the Kone-case similar to the description for investment firms may be possible.

1.5.5 Liability of other consultants

Also other consultants than auditors, such as lawyers and technical experts, are often involved in preparing a prospectus. These consultants can be hired directly by the person responsible for preparing the prospectus, or by an investment firm which has been assigned by the company. The assignment often includes to make a due diligence investigation of the issuing company, valuing different assets, participation in the design of the prospectus and advise on the rules to be observed in the preparation of the prospectus.

Certain groups of people who usually participate in the preparation of a prospectus, such as lawyers and auditors, stands under special supervision. The profession of lawyers are regulated by law. There is a general bar associations and a lawyer is the person who is a members of the association. In order to be admitted as a member it is required that the applicant meets certain requirements. The association is supervising the activities of its members.

The fact that various categories of persons are involved in preparing a prospectus should be well known to investors. They lack, however, normally knowledge of which external consultants that participated, if that is not stated in the prospectus. Hence, there is a
difference compared to an investments firm, who routinely have its name on the front of prospectus and where its participation is otherwise clear from the prospectus content. It happens, however, that opinions and reports prepared by various experts are included as part of the prospectus, for example valuation certificates, fairness opinions or analysis and opinions on various legal or other issues. In these cases it is normally apparent that the documents have not been prepared by the issuing company. In such a case an analogy with the Kone-case, similar to the description for investment firms, may be possible.

1.5.6 Liability of the financial supervisory authority

According to Ch. 2 sec. 25 of the Financial Instruments Trading Act the Financial Supervisory Authority (“the FSA”) has the right to approve a prospectus when Sweden is the home country. An approval will be granted if the prospectus is complete, consistent and comprehensible and also otherwise fulfil the requirements set out in the Financial Instruments Trading Act and the Prospectus Regulation. According to the preparatory documents of the Financial Instruments Trading Act the FSA should in the approval process make sure that the prospectus is not unclear or incomplete and react against obvious errors. It is, however, not the FSA’s responsibility to verify the information given in the prospectus and an approval by the FSA is no guarantee for the correctness and completeness of the information given in the prospectus. This is logical when keeping in mind that the prospectus has been prepared by the company and its advisors. Since the name of the board of directors, the investment firm, the auditor and any other person having responsibility for verifying certain information in the prospectus should be clearly stated in the prospectus it would not make sense for the FSA to once more make the same investigations.

The government’s liability to pay damages for pure financial loss caused by malfeasance is set out in Ch. 3 sec. 2 of the Tort Liability Act. As described the FSA’s responsibility has been limited to make sure that the prospectus is not unclear or incomplete and react against obvious errors. Against this background it appears that an investor would have difficulties in claiming that the government should for example cover the costs rendered to the investor by errors or omissions in a prospectus approved by the FSA as long as the FSA has carried out at least a basic review of the prospectus.

1.5.7 Liability of the Exchange

It is the responsibility of the FSA to approve a prospectus when Sweden is the home country. The Exchange has no statutory obligation to review the prospectus when a company is seeking admission for trading. The responsibility of the Exchange is limited to merely checking that the prospectus has been approved by and registered with the FSA. Consequently, the Exchange cannot based on statutory grounds be held liable for any errors or omissions in a prospectus approved by and registered with the FSA.

A separate question is whether the Exchange could be said to hold a responsibility for the quality of the companies it admit to trading. This question falls outside the scope of this paper and only a short note will be made here.

29 Cf. Article 1.1 and 1.2 of the Prospectus Regulation.
30 Cf. Article 2.1 q of the Prospectus Directive.
32 Cf. Annex 1, sec. 1.1 and 1.2 of the Prospectus Regulation.
33 Cf. NJA 1991 s. 138.
34 Ch. 13, sec. 3 of the Securities Market Act (Swe. lag (2007:528) om värdepappersmarknaden).
The Securities Market Act contains a general statement that a securities exchange shall conduct its business honestly, fairly and professionally and in such a manner as to maintain public confidence in the securities market.\textsuperscript{35} It also states that financial instruments may only be admitted to trading on a regulated market where the conditions exist for fair, orderly and efficient trading in the financial instruments and, in the case of transferable securities, provided they are freely negotiable.\textsuperscript{36} Apart from these provisions the Exchange has been left with the responsibility to decide on the detailed requirements that should apply for admission to trading. In the preparatory documents to the Securities Market Act it is noted that there has hardly been the intention of MiFID that the requirements for admission in itself would serve to safeguard investors or the integrity of the market. That a certain instrument live up to ever so high standards of dissemination and historical information does not in itself safeguard that the investors get the information they need or that market abuse and other irregularities can be prevented. This is rather taken care of by the other rules that become applicable once an instrument is admitted to trading on a regulated market.\textsuperscript{37}

The Exchange’s detailed listing requirements are set out in the Rule Book for Issuers. When a company and the Exchange agree to initiate a listing process, the Exchange appoints an “Exchange Auditor”. The Exchange Auditor makes an assessment as to whether it would be appropriate to list and admit the shares of the company to trading on the Exchange. The assessment will cover, but not be limited to, the following aspects:

- Whether there will be sufficient conditions for appropriate trading in the shares;
- The company’s ability to comply with the listing requirements, in particular requirements pertaining to disclosure of financial and other price-sensitive information;
- Whether the directors of the board and the management are fit and proper to direct the business of the company and its responsibilities towards the Exchange and the stock market; and
- The information provided in the prospectus.

The Exchange Auditor presents a report in respect of his or her findings and submits the report to the Exchange’s Listing Committee together with a recommendation in respect of the listing decision to be made by the Listing Committee.\textsuperscript{38} The Exchange Auditor normally has a close contact with the company and its advisor’s during the listing process and also comments on the draft prospectus. Also the Listing Committee can give comments on the draft prospectus. It is, however, not the responsibility of the Exchange Auditor nor the Listing Committee to verify the information presented by the company in the prospectus or elsewhere. One of the fundamental responsibilities of the Exchange is to maintain public confidence in the securities market but as stated in the preparatory document mentioned above it cannot be the purpose that the Exchange’s listing requirements should safeguard the investors and market. For this reason an analogy with

\textsuperscript{35} Ch. 13, sec. 1 of the Securities Market Act.


\textsuperscript{37} Cf. prop. 2006/07:115.

\textsuperscript{38} The Listing Committee consists of a majority of independent members.
the Kone-case would not be relevant as the Exchange cannot be said to make any valuation of the company nor it shares.

2 Denmark

2.1 Background

The responsibility for preparing a prospectus primarily falls on a company’s board of directors. The liability of the advisors participating in the process of preparing the prospectus will be decided by the agreement with the company subject to the exchange rules and the professional requirements covering for example auditors and lawyers. In accordance with the Prospectus Regulation all persons responsible for the information given in the prospectus and, as the case may be, for certain parts of it, with, in the latter case, an indication of such parts, should be presented.

Also the company’s auditors shall make a declaration in the prospectus confirming that the prospectus contains all facts relating to the company that are known to the auditors and which are likely to affect the investors’ and their investment advisers’ assessment of the company’s assets and liabilities, financial position, results and outlook for the future.

2.2 Statutory ground

According to the Securities Trading Act an operator of a regulated market shall lay down clear and transparent regulations governing admission of securities for trading on the regulated market. The regulations shall ensure that securities admitted for trading are traded in an honest, proper and effective manner, and that when these are shares, they are freely negotiable. An operator of a regulated market shall, in admission of securities for trading on the regulated market, ensure that the regulations laid down by it are met, and that an approved and published prospectus has been presented.

According to the Securities Trading Act an issuer or a person requesting admission of securities to trading on a regulated market, may not give rise to admission of the securities to trading until an approved prospectus for the relevant securities has been made available to the public. Similarly, an issuer may not make an offer of securities to the public until an approved prospectus for the relevant securities has been made available to the public. The Danish FSA shall make decisions regarding the approval of the prospectus. The prospectus shall include the information deemed necessary for investors and their investment advisors to form a well-founded estimate of the assets and liabilities, financial position, results and future prospects, and of any guarantor, and of the rights attaching to the securities offered to the public or admitted to trading.

A prospectus shall be drawn up in conformity with the regulations laid down by the Danish FSA, and shall be presented in such a manner that it is possible to understand the contents and to assess the importance of the information given.

Companies may incur criminal liability according to the regulations in chapter 5 of the Criminal Code.

According to the Copenhagen exchange’s rules for issuers of shares financial intermediaries and other parties responsible for the offering of shares shall in connection with the preparation of a prospectus, ensure that they obtain all relevant information.

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40 Cf. Bekendtgørelse (223 af 10/03/2010) om prospekter for værdipapirer, der optages til handel på et reguleret marked, og ved offentlige udbud af værdipapirer over 2.500.000 euro.
about the company, including all internal interim reports and accounts for the financial year in question, deemed necessary to give investors and their investment advisers a true and fair view of the company’s activities. For the purpose of preparation, these parties shall scrutinise the information in consultation with the company’s management and its auditors.\footnote{Sec. 2.2.4.}

According to the Danish Companies Act\footnote{Dan. lov (nr 470 af 12/06/2009) om aktie- og anpartsselskaber.} founders, members of the board of directors and of the management board who, in the performance of their duties have caused damage to the company due to wilful misconduct or negligence shall be liable to pay damages. The same rule shall apply where damage has been inflicted upon a third party. The company’s auditors are also covered by the rule.\footnote{Ch. 22, sec 361.}

\section*{2.3 Liability}

In practice a “verification process” has developed in Denmark. The verification process could be described as a form of due diligence where a lawyer, often hired by for example the investment firm preparing the prospectus, reviews the information in the prospectus together with the company’s management and auditors in order to verify that the information is correct and complete. The findings in verifications process is normally summarized in a verification document, which is presented to the company’s board of directors before the prospectus is finalized. The verification document is in general not made public.\footnote{Cf. Andersen, Paul Krüger and Jul Clausen, Nis, Børsretten I - Regler og markedsaktører, 3 ed.}

Both the company’s representatives and the advisers that are involved in preparing the prospectus could in case of negligence be liable to pay damages for financial loss caused by errors or omissions in the prospectus.\footnote{Cf. regarding the liability of founders, members of the board of directors and directors section Ch. 16, sec. 140 of the Companies Act (Dan. Aktieselskapsloven nr 649 af 15/06/2006).} In Danish law there is no provision stating that only pure financial damages caused by criminal action will be covered. In order for a claimant to be successful in claiming damages, negligence and an adequate causal link has to be shown. Case-law shows that it is not certain when an investor successfully can claim damages for loss caused by errors or omissions in a prospectus and that a case-by-case evaluation has to be done.\footnote{Cf. especially the ruling by the Danish Supreme Court in the “Hafnia-case” (UfR 2002.2067 H) regarding an emission in a financial institution followed by the bankruptcy thereof. The Hafnia-case showed that liability to pay damages for errors or omissions in a prospectus should be assessed according to the general principles of tort.}

\section*{3 Norway}

\subsection*{3.1 Statutory ground}

According to the Securities Trading Act\footnote{No. Lov om verdipapirhandel.} a prospectus shall be prepared upon admission to trading of transferable securities on a Norwegian stock exchange or authorized market place.\footnote{Ch. 7, sec. 3.} A prospectus shall contain such information as, depending on special circumstances of the offerer and the nature of the securities offered, is necessary to enable the investors to make a well-informed assessment of the issuer’s and any guarantor’s financial position and prospects and of rights attached to the securities.
mentioned. The information in the prospectus shall be described in an easily understandable and analyzable form.\textsuperscript{49} 

The company’s board of directors is responsible for ensuring that the prospectus meets the prescribed requirements. The prospectus shall identify who is responsible. Those who are responsible for the prospectus shall make a statement to the effect that, to the best of their knowledge, the information in the prospectus is in accordance with the facts, and that the prospectus does not contain misleading or incomplete information regarding circumstances which are of significance when assessing the question of whether or not to accept the offer, or that there are no omissions in the prospectus which are of such a character that they could change the lexical content of the prospectus.\textsuperscript{50}

A prospectus must be approved by the FSA\textsuperscript{51} before it may be published.\textsuperscript{52} The FSA shall ensure that the prospectus contains information required by law or regulations.\textsuperscript{53}

According to the Norwegian Companies Act\textsuperscript{54} members of the board of directors and the management board, the CEO, shareholders and auditors who, in the performance of their duties have caused damage to the company, other shareholder or third parties due to wilful misconduct or negligence shall be liable to pay damages.\textsuperscript{55} The Act also contains penal sanctions.\textsuperscript{56}

3.2 Liability

The company’s board of directors is responsible for preparing a prospectus and ensuring that the prospectus meets the prescribed requirements and the members of the board can be liable to pay damages for errors or omissions caused by negligence. The Securities Market Act does not contain any specific provisions regarding damages and any claim therefore has to be based on general tort law.

Both the company’s representatives and the advisers that are involved in preparing the prospectus could in case of negligence be liable to pay damages for financial loss caused by errors or omissions in the prospectus. In Norwegian law there is no provision stating that only pure financial damages caused by criminal action will be covered. In order for a claimant to be successful in claiming damages negligence and an adequate causal link has to be shown. Case-law shows that it is not certain when an investor successfully can claim damages for loss caused by errors or omissions in a prospectus and that a case-by-case evaluation has to be done.\textsuperscript{57}

4 Finland

4.1 Background

The Finnish prospectus liability regulation is currently quite dispersed. The present legal status is part of the ongoing overhaul of the Finnish securities markets legislation and the issue of prospectus liability is the subject for a sub-working group in the legislative process. The sub-working group has been assigned to draft a proposal on the prospectus liability to be finalized by end of 2010. The issue of updating the Finnish regulation on

\textsuperscript{49} Ch. 7, sec. 13 in the Securities Trading Act. Cf. also Forskrift om opplysninger i prospekter (9. desember 2005).
\textsuperscript{50} Ch. 7, sec. 18 in the Securities Trading Act.
\textsuperscript{51} No. Finanstilsynet.
\textsuperscript{52} Ch. 7, sec. 7 in the Securities Trading Act.
\textsuperscript{53} Ch. 7, sec. 8 in the Securities Trading Act.
\textsuperscript{54} No. Lov om aksjeselskaper.
\textsuperscript{55} Ch. 17, sec. 1.
\textsuperscript{56} Ch. 17, sec. 3.
\textsuperscript{57} Cf. especially the Supreme Court ruling in the Labogas-case (Rt 1996 s. 1463).
prospectus liability has been on the agenda also previously in connection with the implementation of the Prospectus Directive in Finland. Then a working group was set up and drafted a report on the issue. The regulation was, however, not changed pursuant to the working group’s report.

4.2 Statutory ground

The responsibility to draw up a prospectus is regulated in the Finnish Securities Markets Act.\textsuperscript{58} According to the Act, anyone who offers securities to the public or applies for the admission to public trading of a security shall be under an obligation to publish a prospectus relating to the securities before the entry into force of the offer or the admission to trading and to have it available for the public. In addition to the issuer, for example an investment firm having been assigned to handle the application for admission to public trading may also be liable for the preparation and publication of the prospectus. Certain exceptions apply to this general provision. The information which shall be included in the prospectus shall meet the criteria of being “sufficient to the investor making a founded assessment on the securities and their issuer as well as on the possible guarantor”.\textsuperscript{59}

According to the Securities Markets Act, anyone who causes damage by an action that is against the Act or against provisions issued there under is liable to compensate the damage he or she has caused.\textsuperscript{60} Adjustment and allocation of the damages among two or more parties liable therein shall be governed by the Finnish Tort Liability Act’s\textsuperscript{61} provisions. Further, the regulation in the Securities Markets Act on marketing of securities shall be taken into account.\textsuperscript{62}

The prospectus liability can also be viewed from a criminal law perspective. The Finnish Criminal Code\textsuperscript{63} contains provisions criminalizing, among other things, intentional or gross negligent provision of false or misleading information in relation to professional marketing or acquisition of securities.

4.3 Liability

Under the Securities Markets Act the prospectus liability arises out of the liability to draft and publish a prospectus in connection with an application for admission to trading on a regulated market. Liability may also arise out of the information on what is issued to the markets through prospectus as the Act contains the requirements on what kind of information that must be included to the prospectus.\textsuperscript{64}

In the Finnish legal doctrine it has been discussed whether the above-mentioned general liability provision in the Securities Markets Act requires negligence and whether the clause is compelling or optional on a contractual basis. Further, it has been discussed which party that is liable to compensate damages, is it for example the company itself, the board of directors of the issuer or both.\textsuperscript{65}

Further, also for example an investment firm having been assigned by a company to handle the application for admission to trading can be covered by the liability under the

\textsuperscript{58} Swe. \textit{Värdepappersmarknadslag (495/1989)}. Ch 2, sec. 3.
\textsuperscript{59} Ch. 2, sec. 3a.
\textsuperscript{60} Ch. 2, sec. 2.
\textsuperscript{61} Swe. \textit{Skadeståndslagen (412/74)}.
\textsuperscript{62} Ch. 2 secs. 1 and 1a.
\textsuperscript{63} Swe. \textit{Strafflag (39/1889)}. Ch. 51, sec. 5.
\textsuperscript{64} Ch. 2, sec. 3a.
\textsuperscript{65} The liability of the board of directors is regulated in the Limited Liability Companies Act (624/2006) (Swe. \textit{Aktiebolagslag}).
Securities Markets Act.66 The provisions of the Securities Markets Act leaves a large scope of interpretation as there are many different kinds of other parties who handle the offer or the application for admission to public trading, apart from investment firms also for example legal advisers.

According to the Securities Market Act67 the investment firm, the issuer or anyone seeking admission of the securities for trading is liable to keep adequate and material information available to all investors on a non-discriminatory basis. According to the Finnish FSA’s Standard 5.2a on Securities offerings and listing the division of liability between the issuer and the investment firm shall be viewed from the following perspective: while the company seeking admission to trading bears primary responsibility for fulfilment of the disclosure requirements, the mutual responsibilities between the company and the investment firm are determined so that the investment firm is subject to the disclosure requirements to the extent that it has access to information referred to in the relevant sections of the Securities Markets Act.68 The responsibility of the investment firm further extends to the disclosure of such information on the issuer that the lead investment firm can reasonably be expected to obtain upon acceptance of an assignment.

Based on above, the party being liable for prospectus in accordance with the Finnish legislation can be for example the issuer, the investment firm, the board of directors of the issuer, the auditor and other consultants which have participated in the preparation of the prospectus and the basis on which their liability may arise may vary between the Securities Markets Act, the Limited Liability Act, the Act on Auditing and the Tort Liability Act.

5. Closing remarks

The description of prospectus liability in this paper shows that there are some legal uncertainty in Swedish, as well as Danish, Finnish and Norwegian, law as to who can be held liable for errors and omissions in a prospectus issued for the application of admission to trading on a regulated market. In Sweden the question has been subject to a Government Official Report without any major changes of law and the question is currently being investigated by a governmental working group in Finland. The relevant case-law is limited in the Nordic countries and one can maybe interpret this fact as showing that the uncertainty does actually not cause any real problem. On the other hand, with the current legal uncertainty, it may only take one high-profile court case for the issue to be back on the law makers table once again.

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66 Ch. 2, secs. 2 and 3.
67 Ch. 2, sec. 2.
68 Ch. 2, secs. 2, 3a, 3b.