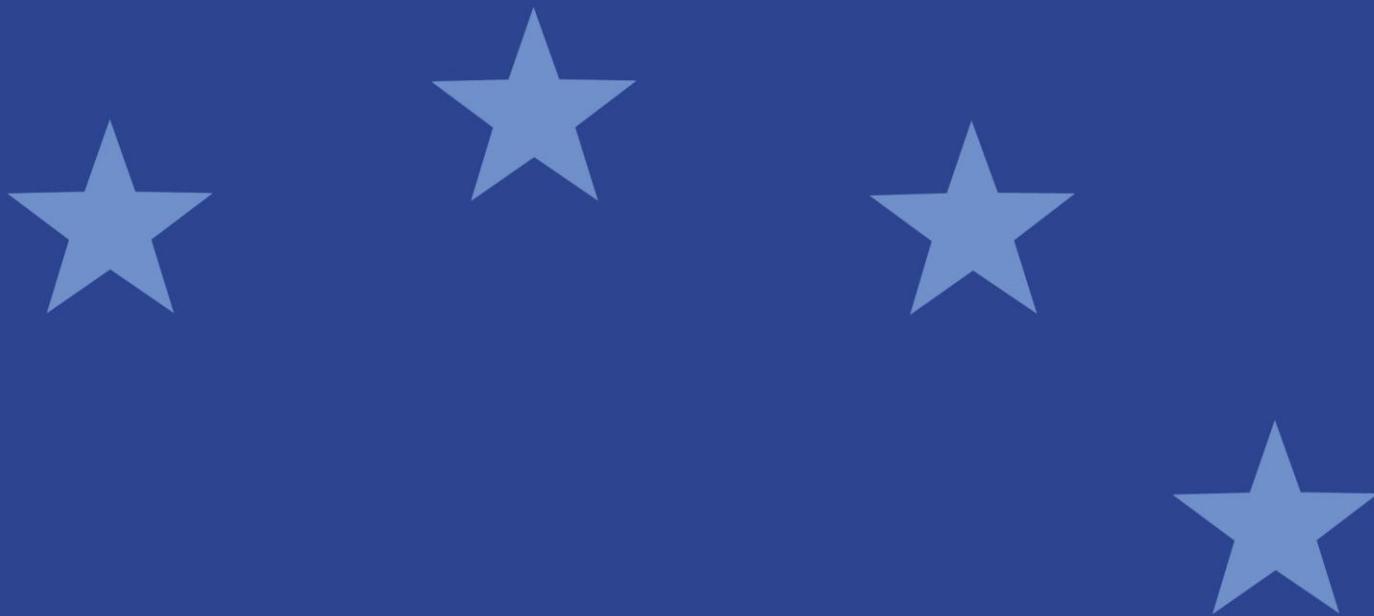




European Securities and  
Markets Authority

## **Annex III** **Individual responses from EEA States**

Comparison of liability regimes in Member States in relation to the Prospectus Directive



## **Disclaimer**

The content of this annex corresponds to the responses from the individual national competent authorities of the EEA States. The content has not been amended by ESMA aside from aligning the formats in order to set out the contributions in a uniform manner in this Annex. Where a letter head from a national competent authority is applied it is done so upon request.

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**Answers to the Prospectus Liability Questionnaire**  
**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

There are specific prospectus liability provisions in the Capital Market Act (CMA).

Additionally, the general liability provisions according to civil law apply, important starting point for liability being the breach of precontractual duties to inform the investor (culpa in contrahendo), see answer to question 4 below.

The requirements for liability according to the provisions in the CMA and according to general civil law are to be assessed separately and it is not allowed to merge them (no cherry picking).

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

According to Art. 11, para. 1, fig. 1 – 4 of the CMA investors have the right to claim damages arising out of placing their trust in the correctness or integrity of the information contained in the prospectus or any other information required to be published pursuant to the CMA that is relevant for assessing securities or investments from the following:

1. the issuers for any incorrect or incomplete information for which they are responsible themselves or for which their staff or any other persons whose services were used to draw up the prospectus are responsible,
  2. the prospectus auditors for prospectuses for any incorrect or incomplete information due to their own negligence or of their staff or of any other persons whose services were used to audit the prospectus,
    - 2a. the prospectus auditors for prospectuses of investments for any incorrect or incomplete scrutiny due to their own gross negligence or of their staff or of any other persons whose services were used to audit the prospectus,
    - 2b. Wiener Börse AG (the Vienna Stock Exchange Company) for prospectuses of securities admitted to trading on Wiener Börse (Vienna Stock Exchange), but only for incorrect or incomplete information in the statement by Wiener Börse AG stating that it has scrutinized the prospectus and found it to be complete, coherent and comprehensible caused by its own gross negligence or by its staff or other persons whose services were used to prepare this statement,
  3. any person who, either in their own name or for third parties, have accepted the investor's contract declaration, and the broker of the contract if the person acting as intermediary is professionally engaged in trading or brokering securities or investment transactions and this person or his or her staff knew of the incorrectness or incompleteness of the information pursuant to fig. 1 or of the audit, or were unaware of this due to gross negligence,
  4. the auditor of the annual accounts, who, knowing of the incorrectness or incompleteness of the information in the meaning of figure 1 and knowing that the annual accounts confirmed by him or her form part of the prospectus, has given the annual accounts an audit opinion.
3. Are the persons under the previous question subject to joint and/or several liability?

If liability affects more than one damaging party – according to Art. 11 CMA – they are subject to joint and several liability. Their liability is not reduced by the fact that others are also liable to compensate the same damages.

According to general civil law several damaging parties are subject to joint and several liability in case the damage was caused jointly and willfully or in case it is impossible to define which proportion of the damage was caused by the individual damaging party. The proportion of the damage is not definable even if a single damaging party caused the whole damage.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

See answer to question 2. above.

“Culpa in contrahendo”, i.e. the precontractual duty to inform the investor, starts from the premise that beginning with the first (precontractual) contact between the parties an obligation by law arises imposing the duty of information, protection and prudence on them. There is a duty of information whenever according to the principles of fair trading the other party may expect to be informed. The right to claim damages may arise from the intentional or negligent infringement of these duties.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

According to Art. 11 CMA (see answer to question 2. above) the issuer is also liable in case of slight negligence. This applies also to Austrian offerors of securities or investments of a foreign issuer.

Prospectus auditors for prospectuses of securities (Art. 11, para. 1, fig. 2) are already liable in case of slight negligence, auditors for prospectuses of investments (Art. 11, para. 1, fig. 2a), however, only in case of gross negligence.

Persons who, either in their own name or for third parties, have accepted the investor's contract declaration, and the broker of the contract are only liable in case they have knowledge of the incorrectness or incompleteness of the information or of the audit or were unaware of this due to gross negligence (Art. 11, para. 1).

The auditor of the annual accounts (Art. 11, para. 1, fig. 4) is liable in case he or she had knowledge of the incorrectness or incompleteness of the information in the meaning of fig. 1 and knowing that the annual accounts confirmed by him/her form part of the prospectus, has given the annual accounts an audit opinion.

According to general civil law liability is already triggered in case of slight negligence.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

The issuer's and prospectus auditor's liability is independent from a contractual relation to the investor.

Liability according to Art. 11, para. 1, fig. 3 CMA (see answer to question 2 above) is restricted to the investor whose contract declaration was accepted or who was the beneficiary of the broker services.

Liability for “culpa in contrahendo”, i.e. the precontractual duty to inform the investor, according to general civil law requires a first (precontractual) contact between the parties.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

See below

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

Answers to question 7 and 8:

No prospectus specific rules of burden of proof exist, thus both plaintiff and respondent must claim and prove the circumstances furthering their own legal position. Hence, the party asserting a claim bears the burden of allegation and the burden of proof for all facts supporting the claim. Conversely, the party contesting the claim has to plead and prove all impeding, peremptory and inhibitory circumstances.

In a normal case, the investor bears the burden of proof to assert the damage and causality necessary to establish liability. In principle, the aggrieved party has also to prove the fault of the damaging party. If however, the aggrieved and the damaging party are already in a special relationship under the law of obligations or if a legislative provision which entitles the aggrieved party to receive damages when violated was breached, the damaging party has to prove that the fault does not lie with him or her (reversal of the burden of proof).

Art. 11 para. 1 fig. 2 CMA contains a special provision reversing the burden of proof: If a reason for excluding (partiality or other statutory reasons for exclusion) the prospectus auditor exists, the investor does not have to prove the fault of the issuer and the prospectus auditor.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

Prospectus claims are subject to the rules of litigious civil procedure. According to these rules, the courts' power of decision is in general restricted to substantive motions and the related submissions of the parties (see Art. 405 Code of Civil Procedure).

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The investor's recoverable damages are those that were caused by the breach of trust. He or she must be put in the position he or she would be in, if the wrong had not affected his or her decision. However, the investor does not have to be put into the position as if the incompleteness or misstatements were true, i.e. as if the prospectus was complete and/or correct.

According to Art. 11 para. 6 CMA, the legal liability towards each investor is limited to the amount representing the purchase price, plus fees and interest starting from the payment of the purchase price, in case the damaging behaviour was not led by intent. If the securities have been acquired gratuitously (without payment) the last paid purchase price, plus fees and interest starting from the payment of the purchase price is decisive.

The limitation of liability contained in Art. 11 para. 6 CMA does not apply to liability based upon general civil law.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

According to Art. 11 para. 6 CMA, the liability cannot be ex ante excluded or limited to the detriment of investors.

In principle, liability based upon general civil law can be limited contractually. However, the Consumer Protection Act prohibits exclusion or limitation of liability for intent or gross negligence towards consumers. Towards non-consumers an exclusion of liability could be potentially unconscionable and therefore void.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

According to Art. 11 para. 7 CMA, investors have to file claims with the competent court within ten years starting with the end of the offering period for which the prospectus was used. Otherwise their claims are precluded by the statute of limitations.

Claims based upon general civil law are precluded within three years from notice of damage and the damaging party. The statute of limitations can be suspended (for example due to settlement negotiations) or interrupted (for example by filing the claim to the court).

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

The civil liability for prospectuses is neither exempted from the scope of the Rome I Regulation nor of the Rome II Regulation. The Rome II Regulation explicitly mentions liability ex culpa in contrahendo (Art. 2 para. 1) and governs unfair competition (Art. 6). Prospectus liability as contractual liability is subject to the provisions of the Rome I Regulation determining the applicable law.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

As far as the Ministry of Justice and the Financial Market Authority are aware, no institutionalised arbitration board or mediation committee for disputes over prospectus liability exists in Austria.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Under Austrian rules of civil procedure, no procedure similar to class actions exists.

**Administrative Liability**

16. *Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)?*

Anyone who publicly offers securities or investments, or professionally mediates such deals infringes administrative law and shall be fined by the FMA up to EUR 50,000 if the prospectus or the information to be modified or supplemented violate the provisions of the CMA. The prospectus auditor and issuer are responsible and shall be fined for incorrect information given in the prospectus or in the modified or supplementary information. The advertiser shall be fined for any type of advertising that refers to a public offering of securities or investments or to the admission to trading on a regulated market that does not correspond with the provisions of the CMA.

Criminal liability requires that the offence has been committed with intent (at least "dolus eventualis" - blind willfulness or recklessness). As soon as preliminary investigations by public prosecution are finished for lack of intent the Austrian Financial Market Authority (FMA) starts administrative proceedings (see answers to questions 17, 37, 39 below).

*Can several persons be held liable for different parts of the prospectus?*

No.

17. *For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?*

Those persons are liable for negligence (intent: public prosecution, criminal/penal proceedings) and have the burden of proof as to their liability. If they fail to prove their lack of liability, they are held responsible for negligence.

18. *Can the sanctions be imposed on both legal and natural persons or solely on one type of person?*

The administrative fines can only be imposed on natural persons (representatives of a legal person) but the legal person is liable for the payment of the fines imposed on its representatives.

19. *Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?*

The FMA imposes administrative fines.

20. *For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?*

Fines are imposed in case of untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus.

21. *What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of*

*trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?*

The FMA imposes administrative fines up to 50.000 Euro.

Additionally the FMA has the authority to

1. require issuers, offerors or persons asking for admission to trading on a regulated market to include in the prospectus supplementary information, if necessary for investor protection;
2. require issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them, to provide information and documents;
3. require auditors and managers of the issuer, offeror or person asking for admission to trading on a regulated market, as well as financial intermediaries commissioned to execute the offer to the public or ask for admission to trading, to provide information;
4. to suspend a public offering or the admission to trading for at the most ten consecutive banking workdays if it has reasonable grounds for suspecting an infringement of the provisions of the CMA or of Articles 74 ff Stock Exchange Act;
5. prohibit or suspend advertisements for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of this Directive have been infringed upon;
6. prohibit a public offer if it finds that the provisions of the CMA have been infringed or if it has reasonable grounds for suspecting that they would be infringed;
7. suspend or ask the relevant regulated markets to suspend trading on a regulated market for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of the CMA have been infringed;
8. prohibit trading on a regulated market if it finds that the provisions of the CMA or of Articles 74 ff Stock Exchange Act have been infringed;
9. make public the fact that an issuer is failing to comply with its obligations.

*22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?*

The FMA takes into account the same aggravating and mitigating factors that are applied by the criminal courts (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors).

*23. What is the range of fines (maximum –or unlimited- and minimum amounts)?*

The FMA may impose fines up to 50.000 Euro.

*24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction? If yes, please provide details.*

Yes, there is a statutory limitation period of 18 month for initiating administrative proceedings starting from the end of the incriminated act.

*25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?*

No, although – according to general administrative proceedings rules – it is possible to refrain from imposing a fine in case of slight negligence.

*26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.*

The FMA has the right to disclose violations of the provisions of the CMA or of the Stock Exchange Act to the public in accordance with fig. 1 through 3.

1. In the event of any official action in the course of current proceedings, the FMA shall refrain from naming the parties involved unless these are already known to the public, or there is a major interest of the public in knowing these names.
2. In the event of sanctions, the FMA may respond to inquiries or disclose the names of persons or companies against whom sanctions have been imposed, or the names of the companies for whom persons are responsible against whom sanctions have been imposed as well as the sanctions imposed.
3. The FMA shall refrain from giving such information on official acts or from making a related disclosure in the following cases:
  - a. if the response to an inquiry or the disclosure would put the stability of financial markets at considerable risk, or
  - b. if the response to an inquiry or the disclosure would lead to excessive damage to one of the persons affected by the information released or by the disclosure, or
  - c. if the information given would stop, hamper, delay or endanger proceedings or measures that would benefit the general good.

This provision, however, turned out to be unconstitutional and therefore actually has never been applied. It is up to legislation to amend the provision.

*27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?*

Yes, previous appeal to an administrative *authority*, which, however, is a tribunal according to Art. 6 of the European Human Rights Charta, is allowed.

*28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?*

Decisions of the FMA imposing fines are subject to appeal to an administrative authority which, however, is a tribunal according to Art. 6 of the European Human Rights Charta.

The last stage of appeal (extraordinary appeal) is the complaint to the Supreme Administrative and/or Constitutional Court.

## **Criminal Liability**

29. *Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.*

There are specific penal provisions in the CMA punishing prospectus related offences.

30. *Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.*

Anyone who gives incorrect advantageous information or conceals adverse facts in a published prospectus is criminally responsible. Primarily this will be the issuer himself (while other persons involved can be held responsible for aiding and abetting).

31. *Can legal persons be held liable for criminal offences?*

The Austrian Federal Statute on the Responsibility of Entities for Criminal Offences (Verbandsverantwortlichkeitsgesetz) provides for general criminal liability of legal persons and other entities for all criminal offences (including prospectus related offences), in addition to and independent from the liability of the natural persons prosecuted for the same act.

32. *What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?*

Anyone who in connection with a public offering of securities or investments, which are subject to the obligation to publish a prospectus pursuant to the CMA,

1. offers securities or investments for which no approved prospectus, modifications or supplements to the information have been published in a timely manner;
2. gives incorrect advantageous information on substantial circumstances or conceals adverse facts in a published prospectus or in the changed or supplementary information with a view to influencing the decision on the acquisition shall be punished.

33. *Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?*

The penal provision of the CMA requires that the offence has been committed with intent in the broadest sense meaning "dolus eventualis" (blind willfulness or recklessness).

34. *What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).*

The criminal sanction is a prison sentence of not more than two years or a fine not exceeding 360 daily rates as laid down by the court according to the personal and economic situation of the damaging party (ranging between a minimum of EUR 4 and a maximum of EUR 5000) unless the violation is more severely punishable by other laws. Furthermore, as a consequence of a conviction a public official might also lose his official position.

35. *Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?*

Previous administrative sanctions imposed for other acts of a similar nature can be taken into account as an aggravating circumstance and might therefore result in higher penalties.

A previous administrative sanction imposed for the same act prevents further criminal prosecutions (“ne bis in idem”, see Art. 50 of the European Charta of Fundamental Rights).

36. *Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.*

The general limitation period is five years counted from the end of the criminal act.

37. *Can the competent authority initiate criminal proceedings?*

The Austrian Financial Market Authority is obliged to file a report to the public prosecutor due to suspected violation of the penal provisions of the Capital Markets Act. Criminal proceedings, however, can only be initiated by the public prosecutor who is acting according to the principle of legality, which makes it mandatory for law execution to start an investigation if there is suspicion that a criminal offense has been committed.

38. *Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.*

See answer to question 37

39. *Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?*

Criminal offences need to be committed intentionally, whereas administrative offences are committed negligently. A criminal conviction excludes an additional administrative sanction for the same act (“ne bis in idem”, see Art. 50 of the European Charta of Fundamental Rights).

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer ‘no’ to this question, the questions thereafter do not require an answer.

Private Investors had the right to obtain restitution for losses from the Government until October 27, 2008. Then the amendment to the Financial Market Authority Act (FMAA) came into force and restricted liability to damages directly caused to entities supervised by FMA (see below answer to question 41.)

41. Who is entitled to sue for damages?

According to Art. 3 Financial Market Authority Act (FMAA) the Federal Government shall be liable pursuant to the provisions of the Public Liability Act for damage caused by the FMA’s bodies and employees in the execution of the supervisory acts. Damage is such that was directly caused to the legal entities which are subject to supervision pursuant to FMAA.

Art. 3 FMAA was amended in 2008 and liability restricted to damages directly caused to entities supervised by FMA. The new provision came into force on October 27, 2008. According to the explanatory notes to the Act of 2008 claims of other persons (third party claims) shall be excluded.

42. What circumstances must be proven by the plaintiff?

The plaintiff must prove his damage and that this was unlawfully, culpably – and directly – inflicted by a body or employee of the FMA in the execution of the supervisory acts. The Federal Government is also responsible for slight negligence of the FMA's bodies and employees in the execution of the supervisory acts.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The Federal Government must prove that the plaintiff's damage resulted from a performance of duties (or discretion) in the execution of the supervisory powers by the FMA, which was at least justifiable.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

Only financial compensation of damages is recoverable.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

If the Federal Government reimburses the damages it is entitled to demand reimbursement from the FMA's bodies or employees. The bodies of the FMA will have to reimburse the Federal Government for damages it paid if they have acted with gross negligence or intentionally. The bodies and employees of the FMA, however, are not liable in case of slight negligence.

In cases of public liability claims against the Federal Government, the FMA has to support the Federal Government by providing information and documents. This legal duty also applies in reimbursement proceedings against bodies or employees of the FMA.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

The general time limit for initiating proceedings (prescription period) is three years. It starts with plaintiff's knowledge of the damage and the opponent of a possible lawsuit.

47. Is a class action available?

No.



Date

## Prospectus Liability Questionnaire

### Civil liability (restitution for losses from the author of the breach)

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

A public offer that occurs without prospectus (duly approved by the competent authority) is considered null and void.

The prospectus is treated as pre-contractual information. Therefore if a prospectus containing false or misleading information has been published, the misled investor can sue the person(s) responsible for the prospectus in tort (Article 1382 of the Belgian Civil Code). The plaintiff must prove that the information was false or misleading and must prove his damages. Nonetheless, where the investor can demonstrate that the said information could influence the market materially (Article 61 of the Law of 16 June 2006, the 'Prospectus Law'), there is a presumption that the damages in question are due to this false or misleading information. The onus is on the person(s) responsible for the prospectus to demonstrate that the damages were caused by something else.

If the investor can demonstrate that his/her consent was obtained deceitfully due to the information contained in the prospectus, he/she may have the contract annulled.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

As required by Article 6.1 of the Prospectus Directive, the prospectus must mention the identity of the persons that are responsible for it (i.e. for its whole content). These persons must be identified by their name and function, or, in the case of legal persons, their name and registered office. Only the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor can be mentioned as being responsible for the whole content of the prospectus.

3. Are the persons under the previous question subject to joint and/or several liability?

Yes, these persons are jointly and severally responsible for the whole prospectus.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

These persons are responsible for any damage caused by false or misleading information in the prospectus.

If a public offer occurs without a duly approved prospectus, the offeror or the issuer (the person that made the offer without prospectus) is also responsible for any damages caused to the investors. The obligation to draft and publish a prospectus rests on the person who makes the offer.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Responsibility is based on tort (Article 1382 of the Civil Code). Any act of a person which causes damages to another makes him by whose fault the damages occurred liable to make reparation for the damages. Negligence may also lead to liability. Intent is not required.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

There must be a causal relation between the false or misleading information and the damages suffered, so that only original purchasers can sue (i.e. those who have invested on the basis of the information contained in the prospectus).

If financial intermediaries are misled by the prospectus and as a result suffer damages, they can also sue the person(s) responsible for it.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Prospectus liability requires that the securities have been acquired during the public offer period. The investor must demonstrate that the prospectus includes false or misleading information as well as his damages. Belgian law provides for a presumption that these damages are due to the false or misleading information in question. The investor must only demonstrate that the information which turns out to be false or misleading could influence the market materially (Article 61 of the Prospectus Law).

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

In order to avoid liability, the defendant may demonstrate that the investor did not suffer any damages. The defendant may also reverse the above-mentioned presumption of causal relation if he can demonstrate that the damages suffered were caused by something other than the false or misleading information contained in the prospectus.

The defendant may also demonstrate that the information in the prospectus is not false or misleading. In theory even non-material prospectus deficiencies may lead to civil liability, but in practice, if the deficiency is not material, the defendant should be able to demonstrate that the damages were not caused by the deficiency in question.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

Judges are not bound by the legal qualifications or rules to which the parties refer. Nevertheless, judges can not take *ultra petita* decisions. It means that they are bound by what the parties ask them. Nevertheless judges must bring up public order questions on their own initiative. These principles are not specific to prospectus liability (general principles).

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Where liability is based on tort (in opposition to contractual liability), all damages can be recovered (under contractual liability only damages that could be expected are recoverable).

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

No. The Prospectus Law prohibits such a possibility.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

The time limit to file a claim in tort is 5 years. This 5 year prescription begins to run when the person who suffered the damages has been informed about his/her damages (or their aggravation) and about the identity of the person(s) responsible. Nevertheless, no claim can be filed 20 years after the damages occurred.

Prescription can be suspended or interrupted under Belgian civil law. No specific rule applies to prospectus liability.

Each person responsible mentioned under question 2 is subject to the same time limit.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

Under Article 114 of the Belgian Private International Law Code, claims resulting from a public issue of securities are governed, at the choice of the security holder, by the law applicable to the legal entity (i.e. the issuer) or by the law of the State where the public issue took place.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

No alternative mechanism has been put in place in Belgian law in order to claim damages. Nevertheless, out-of-court settlements are possible, as well as arbitration or ADR mechanisms.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

No, there is no provision for class action under Belgian law (even if reforms leading to such procedures have already been discussed).

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Article 71 of the Prospectus Law provides that where it establishes an infringement of the provisions of the law or its implementing decrees or of European Regulation No 809/2004, the FSMA can impose on the person responsible an administrative fine that, for the same offence or same totality of offences, shall not be less than 2,500 euros and not more than 2,500,000 euros.

The FSMA can impose such fines on issuers or offerors where public offers occur on Belgian territory without a duly approved prospectus.

The FSMA can also impose such fines on the person(s) responsible for the prospectus if it turns out that the information contained in the prospectus was misleading or false. The persons who can be fined are those mentioned in the prospectus as being responsible for it (see question 2). Only the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor can be mentioned as being responsible for the whole content of the prospectus. In addition, the prospectus can also mention person(s) who are responsible for only some parts of the prospectus. If the information contained in these parts of the prospectus turns out to be false or misleading, the FSMA can also impose an administrative fine on them.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

No intent is required. Negligence may lead to administrative liability. To calculate the fine, the FSMA will of course take the degree of fault into account (proportionality).

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Both legal and natural persons can be fined.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

Administrative fines can be imposed by the FSMA (which is the competent authority within the meaning of the PD). Within the FSMA, decisions to impose a fine are taken by its Sanctions Committee, after an investigation led by the Investigations Officer.

An appeal against these fines can be lodged at the Court of Appeal of Brussels.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Any breach of the Prospectus Law may give rise to administrative fines (Article 71 of the law).

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Where it establishes an infringement of the provisions of the law or its implementing decrees or of European Regulation No 809/2004, the FSMA can impose on the person responsible an administrative fine that, for the same offence or same totality of offences, shall not be less than 2,500 euros and not more than 2,500,000 euros.

If the offender does not contest the factual elements of the case, regardless of their legal qualification), the FSMA's Investigations Officer can propose a settlement procedure (cash amount to be paid to the Treasury, like administrative fines), which has to be accepted by the FSMA's Management Committee (see question 25 below).

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Any penalty must be calculated by the Sanction Commission taking into account the various elements of the file (proportionality) : the offender's position, the duration of the infringement, the repeated character of the offence, the cooperation with the competent authority, the damages caused, the obtained capital gain, etc...

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Administrative fines shall not be less than 2,500 euros and not more than 2,500,000 euros.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

There are no specific prescription rules for administrative fines. Nevertheless, the Management Committee of the FSMA could take into account the prescription rules that are applicable in criminal law (under the Prospectus Law, criminal offences are prescribed after 5 years from the moment of

the occurrence of the violation) as guidelines to decide not to bring administrative proceedings for offences that occurred many years before.

As administrative fines have a criminal character (within the meaning of the European Convention on Human Rights), the Sanction Commission must take its sanction decisions within a reasonable period of time after the offender has been informed that investigations are being led against him.

[]

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Yes. If the offender does not contest the factual elements of the case, regardless of their legal qualification), the FSMA's Investigations Officer can propose a settlement procedure (cash amount to be paid to the Belgian Treasury, like administrative fines), which has to be accepted by the FSMA's Management Committee.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes, the Law of 2 August 2002 on the supervision of the financial sector and on financial services provides that the administrative sanctions are published on the FSMA's website. The publication is by name unless this could seriously jeopardise financial markets or cause disproportionate damage to the parties involved. If an appeal is lodged against the FSMA's decision, the decision is published anonymously until the Court has handed down its judgment).

The Law of 2 August 2002 also provides that any settlement must be published on the FSMA's website. That publication may be anonymous.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No, an appeal against the administrative sanction can be lodged directly to the Court of Appeal of Brussels.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes, an appeal can be lodged to the Court of Appeal of Brussels. Afterwards an appeal before the Court of Cassation is possible (but only with legal arguments - no factual arguments are accepted).

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, criminal sanctions punish some prospectus related offences (those mentioned in Article 69 of the Prospectus Law). No specific procedure applies. The general criminal procedure is thus applicable.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

According to Article 69 of the Prospectus Law, *those who* knowingly publish a prospectus or a supplement to the prospectus in Belgium that contains false or incomplete information that may be misleading to the public (about the financial situation of the issuer, the rights of the securities holders, etc...) can be criminally sanctioned.

31. Can legal persons be held liable for criminal offences?

Yes. Under Belgian law, legal persons are criminally liable for offences which are intrinsically linked to their corporate purposes or to their interests, as well as for offences which are committed for their account. Where the responsibility of the legal person is due to the intervention of an identified natural person, only the legal or natural person who committed the most serious offence can be punished. Criminal law does not provide for guidelines on how to compare the criminal offences in order to identify “the most serious offence” committed by a legal or natural person. This identification occurs on a case-by-case basis.

If the natural person committed the offence knowingly and intentionally (*sciens et volens*), he/she can be punished together with the legal person responsible.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Pursuant to Article 69 of the Prospectus Law, only the following persons can be punished under criminal law:

- those who refuse to communicate information when they are required to and those who communicate false or incomplete information (whether a prospectus has been approved by the competent authority or not),
- those who make public offers without a duly approved prospectus,
- those who make public offers through non-registered intermediaries,
- those who publish advertisements for public offers without prior approval of the FSMA,
- those who communicate important information only to qualified investors or to specific categories of investors, and not to all the investors to whom the public offer is intended,
- those who do not communicate the result of the public offer to the FSMA or to the public in case of an offer of equity securities,
- those who contravene suspension or interdiction measures that were decided by the FSMA and those who contravene its refusal to approve a prospectus,
- those who knowingly publish a prospectus or a supplement to the prospectus in Belgium that contains false or incomplete information that may be misleading to the public (about the financial situation of the issuer, the rights of the securities holders, etc...),
- those who knowingly publish advertisements in Belgium that contain false or incomplete information that may be misleading to the public (about the financial situation of the issuer, the rights of the securities holders, etc...),
- those who publish a prospectus or a supplement to a prospectus claiming that it has been approved by the competent authority although this is not the case,
- those who knowingly publish a prospectus or a supplement to a prospectus that is different from the one that has been approved by the competent authority,
- those who knowingly publish advertisements that are different from the ones that have been approved by the FSMA,
- those who spread information about a future public offer before a file has been introduced to the competent authority in order to get the prospectus approved.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Most of the above-mentioned listed offences need not have been committed intentionally to be sanctioned. Unintentional offences (committed because of negligence) can also lead to criminal

sanction. This is the case for example with the obligation to publish a prospectus whenever a public offer is made. Even issuers in good faith who did not know that a prospectus was required can be fined.

Nevertheless, certain offences must have been committed knowingly to be criminally sanctioned. This is the case for the publication of prospectuses including false or misleading information. Only issuers/offerors who knew that the information was false can be criminally sanctioned (as opposed to administrative sanctions that can be imposed on issuers who unintentionally publish false or misleading information in their prospectuses).

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Punishment of a prison term of between one month and one year and of a fine ranging from 75 to 15,000 euros can be imposed on those who commit one of the offences listed in Article 69.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Yes, according to Article 73 of the Law of 2 August 2002, administrative fines that are imposed by the Sanctions Committee of the FSMA and that have become definitive, as well as settlements that have been enacted before the criminal court judge has made a definitive pronouncement on the same or related facts, shall be imputed to the amount of any penal fine that may be imposed for those facts in respect of that same person.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

The criminal offences listed in Article 69 are prescribed after 5 years.

37. Can the competent authority initiate criminal proceedings?

As a matter of principle, the FSMA can (but need not) inform the criminal authorities if it is aware that offers have been made in a way that could constitute a criminal offence.

If an administrative procedure has been initiated by the FSMA for a breach of the Prospectus Law that may also be a criminal offence, the Management Committee of the FSMA informs the criminal authorities (Article 71, §5 of the Law of 2 August 2002).

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

There is an exception to the FSMA's obligation of professional secrecy that allows it to transmit information to the authorities competent for criminal matters. The FSMA can also be heard as a witness during trials.

Moreover, as stated under question 37, if an administrative procedure has been initiated for a breach of the Prospectus Law that may also be a criminal offence, the Management Committee of the FSMA informs the criminal authorities (Article 71, §5 of the Law of 2 August 2002).

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

According to Article 73 of the Law of 2 August 2002, administrative fines that are imposed by the FSMA's Sanctions Committee and that have become definitive, as well as settlements that have been enacted before the criminal court judge has made a definitive pronouncement on the same or related facts, shall be imputed to the amount of any criminal fine that is imposed for those facts in respect of that same person.

Conversely, the Sanctions Committee may take into account the amount of any penal fine that may previously have been imposed when imposing an administrative fine, *although the Law of 2 August 2002 does not formally provide for an imputation mechanism.*

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

According to Article 68 of the Law of 2 August 2002, the FSMA, the members of its bodies and the members of its staff shall not bear civil liability for their decisions, acts and conduct in the exercise of the legal tasks of the FSMA, save in the event of fraud or gross negligence.

In other words if the FSMA, the member of its bodies or of its staff commit fraud or gross negligence when reviewing a prospectus for approval, then they can be sued for damages.

41. Who is entitled to sue for damages?

Any person who claims to have suffered damages due to decisions, acts or conduct by the FSMA (or its bodies and staff) is entitled to sue for damages.

42. What circumstances must be proven by the plaintiff?

The plaintiff must prove that he suffered damages, and also prove that there was fraud or gross negligence on the part of the FSMA (or its bodies or staff), as well as demonstrate a causal relation between them.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The FSMA may prove that its behaviour was not fraudulent or grossly negligent, or that the damages were due to another element, or that the damages are less extensive than claimed.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

No cap or other limitation is provided by law. If the plaintiff can demonstrate that his/her damages are due to fraud or gross negligence on the part of the FSMA (or its bodies/staff), he/she can recover all his/her damages.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Under Belgian law (Article 1384 of the Civil Code), an employer is liable in tort for the damages caused by his employees where: (i) the employee has committed a wrongful act; (ii) which has caused damage to a third party; and (iii) the wrongful act has been committed during, and on the occasion of, the exercise of his functions as an employee. Article 18 of the Law of 3 February 1978 (on employment contracts) limits the possibilities for the employer to get compensation from his employees for intentional wrongful acts, gross negligence, as well as the customary slight negligence. In the public sector, the same rules apply (Law of 10 February 2003).

In other words, investors who have suffered damages from fraud or gross negligence by the FSMA's employees within the scope of their functions will have grounds for an action against these employees and against the FSMA, entitling them to be indemnified for the damages they have suffered. The employees and the FSMA will be held liable towards the plaintiff. If the FSMA has indemnified the plaintiff, it has a right of recourse against the employees involved.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

The time limit to file a claim in tort is 5 years. This 5-year prescription starts when the person who has suffered the damages has been informed about his/her damages (or their aggravation) and about the identity of the person(s) responsible. Nevertheless no claim may be filed later than 20 years after the damages occurred.

Prescription can be suspended or interrupted under Belgian civil law. No specific rule applies to prospectus liability.

47. Is a class action available?

No, there are no class actions under Belgian law (even if reforms leading to such procedures have already been discussed).

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## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

*Under national law civil liability may arise as a result of tort - Every person must redress the damage he has guiltily caused to another person*

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

*According to Public Offering of Securities Act (art. 81) - the prospectus contains 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, is necessary to enable investors to make an accurate assessment of the economic situation and financial position, assets and liabilities, profit and losses, and prospects of development of the issuer and of the guarantors of the securities, as well as of the rights attaching to such securities. A prospectus may not contain untrue, misleading or deficient particulars.*

*The prospectus shall be signed by the issuer and the offeror or by the person asking for admission of the securities to trading on a regulated market, as well as by the guarantor of the securities, who declare that the prospectus conforms to the statutory requirements.*

*The prospectus clearly identifies the persons (referred to in next question) by name and position or, respectively, by business name, registered office and address of the place of management, who declare that to the best of their knowledge, the information contained in the prospectus is accurate and complete.*

*The persons who signed the prospectus will be responsible (in any case) for damages caused by tort, according national law.*

3. Are the persons under the previous question subject to joint and/or several liability?

*According to Public Offering of Securities Act (art. 81) - the members of the management body of the issuer and the procurator, as well as the offeror, the person asking admission of the securities to trading on a regulated market, and the guarantor of the securities are jointly responsible for any detriment as may be inflicted by reason of any untrue, misleading or deficient particulars in the prospectus. The persons referred to in article 34 (2) of the Accountancy Act are jointly responsible with the persons referred to in sentence one for any detriment as may be inflicted by any untrue, misleading or deficient particulars in the financial statements of the issuer, and the registered auditors are jointly responsible with the said persons for any detriment as may be inflicted by the financial statements thereby audited.*

*See the answers of the above question.*

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

*See the answers of above questions. The persons who signed the prospectus and who are responsible for its preparation, are liable for damages caused by tort.*

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

*The above said persons are liable, regardless of the form of fault.*

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

*Any person who has suffered damage is entitled to sue for damages.*

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

*Plaintiff must prove that the damage was the direct result of wrongful and culpable conduct of the defendant.*

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

*The respondent in order to avoid liability must prove that he was not aware of the incompleteness or misstatement in the prospectus and that this lack of awareness was not the result of negligence, the deficiency in the prospectus is immaterial and therefore did not influence the price of the security; a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place.*

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

*No*

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

*Compensation is payable for all material damages which are the direct and immediate consequence of any untrue or misleading information in the prospectus. According to the national law, non-pecuniary damages are determined by the court of justice.*

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

*In all cases of tort, fault is assumed until proven otherwise. Civil liability is mandatory for the persons under above questions for information prepared by them.*

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

*According to the national law, with the expiration of five years are lapsed any claims for which the law does not provide another term. The responsible persons mentioned under question 2 are subject to the same time limit.*

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

*It is a matter of law enforcement*

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

*The civil court is not the only way to receive restitution of losses . The court settlement is also a possible way to receive restitution of losses.*

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

*A class action may be brought on behalf of persons who are harmed by the same infringement where, according to the nature of the infringement, the circle of the said persons cannot be defined precisely but is identifiable.*

*Any persons who claim that they are harmed by an infringement under previous sentence, or any organizations responsible for the protection of injured persons or for protection against such infringements, may bring, on behalf of all injured persons, an action against the infringer for establishment of the harmful act or omission, an action for the wrongfulness of the said act or omission, and an action for the blame.*

*Any persons who claim that the collective interest thereof has been harmed or is likely to be harmed by an infringement referred in previous sentence, or any organization responsible for the protection of injured persons, of the harmed collective interest or for protection against such infringements, may bring, on behalf of all injured persons, an action against the infringer for cessation of the infringement, for rectification of the consequences of the infringement of the harmed collective interest, or for compensation for the damages inflicted on the said interest.*

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

*See the answers of questions N<sup>o</sup>2 and N<sup>o</sup>3.*

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

*See the answer of question № 5*

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

*There can not be a single answer to this question. According to the national law the administrative responsibility is personal. According to Public Offering of Securities Act any legal person or sole trader shall be liable to a pecuniary penalty in amounts defined in art. 212, par. 8 of Public Offering of Securities Act.*

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

*The Bulgarian Financial Supervision Commission as the home competent authority imposes administrative sanctions in case of a breach of the PD framework.*

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

*The Bulgarian Financial Supervision Commission applies sanctions for untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a prospectus only. Sanctions that may be imposed by the Bulgarian Financial Supervision.*

*An advertisement and insert may not contain any untrue or misleading information, or any information inconsistent with the information contained in the prospectus as submitted to the FSC. The FSC shall exercise supervision as to the conformity of the advertisements and inserts with the requirements of the Public Offering of Securities Act and the instruments on the application thereof. The FSC imposes a fine for such kind of infringements.*

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

*According to Public Offering of Securities Act the sanctions are pecuniary penalties. The Bulgarian Financial Supervision Commission or its Deputy Chairperson may suspend, for a period not exceeding ten consecutive working days, or discontinue the sale of, or the effecting of transactions in, specified securities as well as refuse to grant approval to a prospectus for a new issue of securities*

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

*According to national law the factors that have to be taken into account in determining the punishment are the following: the gravity of the infringement, the motives for the commission thereof and other extenuating and aggravating circumstances, as well as the property status of the offender.*

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

*Depending on the infringements of the law (Public Offering of Securities Act) the range of fines can amount from BGN 200 to BGN 10 000. In the event of a repeated violation the offender will be liable to a fine in an amount up to BGN 20 000. Legal persons or sole traders (depending on the infringements) shall be liable to a fine in an amount from of BGN 500 to 20 000 (in the event of a repeated violation - the offender will be liable to a fine in an amount up to BGN 50 000).*

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

*Administrative-penal proceedings shall not be instituted if a statement of establishment of the violation has failed to be drawn up within three (3) months following the detection of the offender, or if two years have elapsed since the commission of such violation.*

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

*See the answer of question № 24. No, there is no any settlement procedure in place.*

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

*No, we do not. However, the decisions for the imposed sanctions are published in the register, lead by the Financial Supervision commission. The Financial Supervision Commission publish information about the sanction that have been imposed in the public register for each issuer. This information is available to the website of the FSC and included the type of the infringement, the amount of the sanction and the date of which the sanction come into force.*

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

*Decisions of the Deputy Chairperson of the Bulgarian Financial Supervision Commission, can be appealed in front of the Bulgarian Financial Supervision Commission before the court appealing, but the administrative appeal is not mandatory pre-requisite for the court appeal. Decisions of the Bulgarian Financial Supervision Commissioner its Deputy Chairperson can be appealed in court.*

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

*Yes, they are.*

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

*According to art. 81, paragraph 2 of Law of public offering of securities the prospectus shall be signed by the issuer, offeror or the person asking for the admission of the securities to trading on a regulated*

market, as well by the person guaranteeing the securities, who shall declare that the prospectus satisfies the requirements of the law. According to art. 313, paragraph 1 of Criminal Code a person who asserts an untruth or holds back a truth in a written declaration or an electronic message which by virtue of a law, decree or regulation of the Council of Ministers are submitted to a state authority for certifying the truth about certain facts, shall be punished by imprisonment for up to three years or by a fine from BGN one hundred to thirty hundred. Where the act under paragraph (1) has been committed for the purpose to avoid payment of due taxes, the punishment shall be imprisonment for up to three years or a fine from up to BGN one thousand. The punishment under paragraph (1) shall also be imposed on a person who asserts an untruth or holds back a truth in a private document or an electronic message in which under an express provision of a law, decree or regulation of the Council of Ministers he is especially obliged to certify the truth, and uses these documents as proof of the untrue certified facts or statements. A person who, with reference to public offering of securities in a prospectus or review of the economic position uses untrue beneficial data, or holds back unfavourable data, which is of material importance in making decisions on acquisition of securities, shall be punished by imprisonment for up to three years and a fine of up to BGN five hundred.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

*See the answer of question N<sup>o</sup> 29.*

31. Can legal persons be held liable for criminal offences?

*According to art. 35, paragraph 1 of Criminal Code the penal responsibility is personal*

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

*See the answer of question N<sup>o</sup> 29.*

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

*Regardless of the form of fault, person could be held liable.*

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

*See the answer of question N<sup>o</sup> 29.*

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

*No, can not be taken into account.*

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

*According to art. 80, paragraph 1, point 4 of Criminal Code penal prosecution shall be excluded by prescription where it has not been investigated in the course of five years in respect of acts punishable by imprisonment for more than one year.*

37. Can the competent authority initiate criminal proceedings?

*In case of suspicion of crime the Bulgarian Financial Supervision Commission may refer the competent authority which is the Prosecutor's Office of the Republic of Bulgaria.*

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

No

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

*According to the national legislation when an infringement is being prosecuted by the prosecuting authorities, administrative proceedings shall not be instituted. Where it is established that the act for which the administrative proceedings are instituted, constitutes a crime, the proceedings are terminated and the materials are sent to the prosecutor.*

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

*According to Act on the Liability for Damage Incurred by the State and the Municipalities, the State and the municipalities shall be liable for any damage inflicted on individuals and legal persons by legally non-conforming acts, actions or omissions of State bodies and municipal authorities and officials upon or in connection with the performance of administrative activity.*

41. Who is entitled to sue for damages?

*See the answer to question N° 6.*

42. What circumstances must be proven by the plaintiff?

*See the answer to question N° 7.*

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

*To avoid liability the competent authority have to prove that its decisions are legal and that they are taken after analysis and assessment of all documents and information, presented in any procedure.*

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

*The Government and the municipalities shall owe compensation for all damage to property or any other damage being the direct and immediate consequence of damaging behaviour and regardless of whether inflicted by the officer concerned in a culpable manner. If the damage had resulted on account exclusively of the victim's culpable behaviour, no compensation shall be owed by the Government.. Where the victim had contributed to the damage in a culpable manner, the compensation owed shall be reduced.*

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

*No, it cannot. In accordance with article 18, paragraph 10 of Financial Supervision Commission Act the members of the Commission, as well as officials of the Commission administration designated according to the procedure established in this Act, shall not incur pecuniary liability for any damages inflicted in the course of exercise of the supervision functions and powers thereof, except if they have committed a criminal offence or have acted intentionally.*

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

*See the answer to question N<sup>o</sup> 12*

47. Is a class action available?

*Yes, it is available. Please see answer 15.*

DRRAFT

QUESTIONS – CYPRUS SANCTIONING REGIME IN ACCORDANCE WITH CYPRUS PROSPECTUS LAW (referred to as ‘the Law’)

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Yes. Civil liability may arise from Cyprus Prospectus Law, as well as from other civil liability regimes (e.g. Cyprus Tort Law, Cyprus Contract Law).

The explanations given in the following Questions focus on Cyprus Prospectus Law as the other civil liability regimes do not cover specifically prospectus issues– their provisions are wider.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Yes.

In accordance with the Law, the persons signing the prospectus are responsible for the information contained in it, and these namely are:

- (1) the issuer, offeror or person asking for the admission of securities to trading on a regulated market,
- (2) if the offeror or the person asking for the admission of securities to trading have the form of a legal person, the three (3) executive members of the Board of the issuer or the person asking for admission of securities to trading, and at all times, the President of the Board and the Managing Directors,
- (3) any persons stated in the prospectus as responsible for providing the information presented in it,
- (4) the underwriter responsible for the drawing up of the prospectus (in the case of an IPO or a first admission to trading on a regulated market).

The persons who submitted the summary note and any of its translations, and asked for its publication or its notification, bear civil liability only if the said note is misleading, inaccurate or inconsistent when read together with the main part of the prospectus.

Any person who, within his professional duties, issues any type of statements which constitute a basis for the preparation of the prospectus or taken into account for the preparation of the prospectus, must exercise due care in order to ensure the accuracy, completeness and clarity of the said statements.

Also, the parties mentioned in (1), (2) and (3) above and the person who issues any type of statements for the preparation of the supplement, are also responsible for the information contained in the supplement to the prospectus. The underwriter responsible for the drawing up of the prospectus is responsible only if he signs the supplement.

3. Are the persons under the previous question subject to joint and/or several liability?

All natural and legal persons signing the prospectus are jointly and severally liable for loss the investors sustained as a result of any omissions or imprecisions in the prospectus.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

The following persons:

- (1) the issuer, offeror or person asking for the admission of securities to trading on a regulated market,
- (2) if the offeror or the person asking for the admission of securities to trading have the form of a legal person, the three (3) executive members of the Board of the issuer or the person asking for admission of securities to trading, and at all times, the President of the Board and the Managing Directors,
- (3) any persons stated in the prospectus as responsible for providing the information presented in it, have a duty as to the accuracy, completeness, clarity and update of the prospectus so as to give a true, full and objective information to investors, and are liable for losses as a result of any omissions or imprecision in the prospectus.

The underwriter responsible for the drawing up of the prospectus has a duty to ensure accuracy, completeness, clarity and update of the prospectus aiming at the true, fair and objective information given to the investors, and also to ensure the legality of the publishing procedure of the prospectus and of the public offer of securities.

The underwriter responsible for the drawing up of the prospectus is liable against the investors, who acquired securities based on erroneous, deficient or insufficient information contained in the prospectus, in respect of every damage that those investors sustained as a result of the falling of the price of the securities, after the deficiencies in the prospectus were revealed.

Furthermore, the person who, within his professional duties, issues any type of statements which constitute a basis for the preparation of the prospectus or taken into account for the preparation of the prospectus, is responsible against the investors for every loss they may sustain in case the prospectus contained inaccuracies or material omissions due to deficiencies in the said statements and primarily due to imprecisions or material omissions contained therein.

Additional to the above, any person can be held liable if an offer of securities to the public is made in Cyprus without the publication of a prospectus which has been approved by the Cyprus Securities and Exchange Commission (CySEC) or notified to CySEC by a competent authority of another member state.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Negligence / Intent.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Investors who suffered loss, and includes any person who responded to the public offer and purchased securities on the regulated market, based on inaccurate or incomplete information of the prospectus.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Circumstances to be proven by the plaintiff are not prescribed in the national legislation. Nevertheless all of the examples mentioned in the question could be circumstances that need to be proven in Court.

Clarifications:

Specific circumstances to be proven by the plaintiff, as the examples mentioned in the question, are not prescribed in the national legislation.

In an action before Court for damages, the plaintiff must prove fault by the respondent (breach of the obligations imposed by the Law), casual link and damage. In an action for damages, intent is not an element that the plaintiff is required to prove in order to succeed in his case.

We note that there is no precedent for civil actions relating to prospectuses before the Cyprus Courts.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

In a claim for damages against persons signing the prospectus, the burden of proof lies with the persons signing the prospectus (the respondents) for:

- (a) the accuracy, completeness, clarity and update of the prospectus, or
- (b) lack of liability as to any errors in the prospectus.

Additional, with regard to the underwriter responsible for the drawing up of the prospectus, there is a rebuttable presumption as to the lack of liability, provided that the content of the prospectus was the subject of legal and financial due diligence examination exercised at the request of the underwriter, through independent legal advisors and auditors.

Also, the underwriter responsible for the drawing up of the prospectus, in order to avoid liability, must prove that he is not responsible for the deficiencies contained therein.

The persons who submitted the summary note and any of its translations, and asked for its publication or its notification, in order to avoid liability, must prove that the said note is not misleading, inaccurate or inconsistent when read together with the main part of the prospectus - no liability arise solely on the basis of the summary note.

The person who, within his professional duties, issued any type of statements which constitute a basis for the preparation of the prospectus or taken into account for the preparation of the prospectus, in order to avoid liability, he must prove, as the author of the statements, that he is not responsible for the deficiencies contained in the prospectus.

With regard the examples mentioned in the question, all of those could be circumstances that can be alleged in Court.

Clarifications:

Specific circumstances to be proven by the respondent, as the examples mentioned in the question, are not prescribed in the national legislation.

In an action for damages, a respondent can avoid liability if he demonstrates that no fault was committed on his behalf (no breach of the obligations imposed by the Law), or that the plaintiff suffered no damage/loss or that there is no casual link.

We note that there is no precedent for actions relating to prospectuses before the Cyprus Courts.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No specific reference is made for this in the Law.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Damages are decided by the Court. The Law does not provide specifically on the quantification of the compensation.

Clarifications:

The decision to award damages rests exclusively to the Court.

The Court may decide to award material damages/loss of profit to any person who responded to the public offer and purchased securities on the regulated market, based on inaccurate or incomplete information of the prospectus, if fault by the respondent, damage and causal link is proven by the plaintiff.

We note that there is no precedent for actions relating to prospectuses before the Cyprus Courts.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

With the exemption of persons who submitted the summary note and any of its translations, provisions in the Law about civil liability are mandatory.

Persons who submitted the summary note and any of its translations, expressly limit their liability by including a warning in the summary note that are liable only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Yes.

Any claim against the persons signing the prospectus (except the underwriter responsible for the drawing up of the prospectus), bears a statutory bar of two (2) years from the date the securities were made available or were admitted to trading on a regulated market, as the case may be.

In case of malicious intention by the persons signing the prospectus (except the underwriter responsible for the drawing up of the prospectus), the statutory bar of two (2) years does not apply in respect of the persons who have acted maliciously.

Any claim against the underwriter responsible for the drawing up of the prospectus bears a statutory bar of one (1) year from the date the securities are allotted or of their admission to trading on a regulated market.

In case of malicious intention by the underwriter responsible for the drawing up of the prospectus, the statutory bar does not apply.

Any claim against the person who issued statements which constituted a base for the preparation of the prospectus or taken into account for the preparation of the prospectus, bears a statutory bar of one (1) year from the date of the securities were made available or, as the case may be, of their admission to trading on a regulated market.

In case of malicious intention by the author of the statements, the statutory bar does not apply.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

Depending on the particular facts of each offering, there are several laws that would deal with this matter and these include the Civil Wrongs Law Cap. 148, the Companies Law Cap. 113 and the Cyprus Prospectus Law. There are no statutory provisions for solving conflicts of laws but these are dealt with according to common law principles.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes. Judicial proceeding before a civil court is the only way to receive restitution of losses.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

No class action is available.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Yes.

The persons signing the prospectus are responsible for the information contained in it, and these namely are:

- (1) the issuer, offeror or person asking for the admission of securities to trading on a regulated market,
- (2) if the offeror or the person asking for the admission of securities to trading have the form of a legal person, the three (3) executive members of the Board of the issuer or the person asking for admission of securities to trading, and at all times, the President of the Board and the Managing Directors,
- (3) any persons stated in the prospectus as responsible for providing the information presented in it,
- (4) the underwriter responsible for the drawing up of the prospectus (in the case of an IPO or a first admission to trading on a regulated market).

All the persons signing the prospectus are responsible as to the accuracy, completeness, clarity and update of the prospectus as a whole.

Any person, who, within his professional duties, issues any type of statements which constitute a basis for the preparation of the prospectus or taken into account for the preparation of the prospectus, is responsible to ensure the accuracy, completeness and clarity of the said statements.

Also, the parties mentioned in (1), (2) and (3) above and the person who issues any type of statements for the preparation of the supplement, are also responsible for the information contained in the supplement to the prospectus. The underwriter responsible for the drawing up of the prospectus is responsible only if he signs the supplement.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Sanctions can be imposed to any person that violates the Law (both legal and natural persons).

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The competent authority to impose administrative sanctions in case of breach of the Cyprus Prospectus Law is the Cyprus Securities and Exchange Commission.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Major breaches that sanctions are applied:

- (a) Offer of securities to the public in Cyprus without the publication of a prospectus approved by CySEC or notified to CySEC by a competent authority of another member state,
  - (b) Admission to trading on a regulated market in Cyprus without the publication of a prospectus approved by CySEC or notified to CySEC by a competent authority of another member state,
  - (c) Inaccurate, imprecise, untrue or misleading information in the prospectus,
  - (d) Incomplete or ambiguous information in the prospectus,
  - (e) Publication of a prospectus or supplement prior the approval of CySEC,
  - (f) Breaches in relation to the content and publication of the prospectus and the supplement,
  - (g) Breaches in relation to the content and publication of the annual document,
  - (h) Inaccurate or misleading advertisements and advertisements inconsistent with the prospectus.
21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

For all the infringements referred to in the previous question the Law provides for an administrative fine, the amount of which depends on the nature of the breach.

Furthermore, CySEC has the power to:

- (i) suspend a public offer or admission to trading for a maximum of ten consecutive working days if it has reasonable grounds for suspecting that the provisions of the Law have been infringed,
  - (ii) prohibit a public offer if it finds that the provisions of the Law have been infringed or if it has reasonable grounds for suspecting that they are infringed,
  - (iii) prohibit or suspend advertisements of a public offer or admission of securities to trading for a maximum of ten consecutive working days if it has reasonable grounds for believing that the provisions of the Law have been infringed,
  - (iv) suspend or ask the relevant regulated markets to suspend trading on a regulated market for a maximum of ten consecutive working days if it has reasonable ground for believing that the provisions of the Law have been infringed,
  - (v) prohibit trading on a regulated market if it finds that the provisions of the Law have been infringed.
  - (vi) make public the fact that an issuer is failing to comply with its obligations.
22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The Law does not make a specific reference.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Fines that can be imposed depend on the nature of the breach:

- (i) For offering securities to the public in Cyprus without the publication of an approved prospectus, the fine is up to a maximum of €170.000, and in case of a repeated violation up to a maximum of €340.000.

Alternatively, subject to certain conditions, CySEC may impose a fine equal to one third (1/3) of the proceeds of the illegally conducted public offer, and in case of a repeated violation, a fine equal to one second (1/2) of the proceeds of the illegally conducted public offer.

- (ii) For admission to trading on a regulated market in Cyprus without the publication of an approved prospectus, the fine is up to a maximum of €170.000, and in case of a repeated violation up to a maximum of €340.000.
- (iii) For violations relating to the accuracy, completeness, clarity and update of the prospectus, the fine is up to a maximum of €170.000, and in case of a repeated violation up to a maximum of €340.000.
- (iv) For other breaches which are specifically outlined in the Law (other than the aforementioned), the fine is up to a maximum of €85.000, and in case of a repeated violation up to a maximum of €170.000.
- (v) In any other case, which is not covered by (i), (ii) and (iii), the fine is up to a maximum of €42.500, and in case of a repeated violation up to a maximum of €85.000.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

No time limits for administrative liability.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Yes.

CySEC may proceed with a compromise of any violation or possible violation, act or omission for which there is reasonable suspicion that a person has committed in violation of the provisions of the Law.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes. In case there is a decision for violation of the Law, CySEC publishes an announcement of its decision including information on the nature of the breach, the identity of the person responsible for it, the amount of the fine imposed and the factors taken into account in determining the amount of the administrative fine.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes.

**Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes.

Cyprus Prospectus Law provides for criminal sanctions in relation to a specific prospectus offence (See question 32). In this case specific criminal sanctions apply.

For other prospectus related offences, if the conduct constitutes a criminal offence in accordance with the Cyprus Criminal Code or Cyprus Market Abuse Law, criminal sanctions can be imposed in accordance with those laws.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

No. National law does not prescribe specific parties. Any person can be held criminally responsible for the offence.

31. Can legal persons be held liable for criminal offences?

Yes. Legal persons can be held liable.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Under Prospectus legislation it is a criminal offence to make an offer of securities to the public in Cyprus without the publication of a prospectus which has been approved by CySEC (competent authority) or notified to CySEC by a competent authority of another member state.

Other prospectus related offences (e.g. false statements, misleading statements), may constitute criminal offences according to the Cyprus Criminal Code or Cyprus Market Abuse Law.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

No specific reference is made for this in the Law.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

According to the Cyprus Prospectus Law, the fines for the offence committed as described in Q32 is: imprisonment not exceeding two (2) years or fine, not exceeding €170.000, or both. In case of a second or repeated conviction of the same offence, imprisonment not exceeding four (4) years or fine not exceeding €340.000, or both.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

No specific reference is made for this in the Law. It is up to the discretion of the judge.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

No time limits in the Law.

37. Can the competent authority initiate criminal proceedings?

No. Only the Attorney – General can initiate criminal proceedings against a party in Court.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

If during the exercise of its power, CySEC establishes a possible violation that may prima facie constitute a criminal offence, it draws up its findings or a report of the facts and submits them, along with all the information it possesses, to the Attorney-General for further action.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

No. Administrative sanctions can be imposed irrespective of criminal proceedings.

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Generally, the law would not provide such protection.

41. Who is entitled to sue for damages?

42. What circumstances must be proven by the plaintiff?

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

47. Is a class action available?

## QUESTIONS

**General comment**

**While there are academic articles and commentaries on the subject of prospectus liability, in the Czech Republic, there is no case law available. The opinion below is an expert opinion but should not be relied upon as legal advice, nor as the authoritative interpretation of the applicable laws.**

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise?

No. There is only one civil law liability regime. However, the liability can stem from breach of different law provisions (e.g. Capital Market Undertaking Act, Commercial Code).

If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

n/a

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Under Capital Market Undertaking Acts these parties are: an issuer, offeror, person asking for admission to trading on regulated market, guarantor.

Under general provisions of the Civil and Commercial Code the liable company can ask its directors (or those who are responsible) for recovery of damages.

3. Are the persons under the previous question subject to joint and/or several liability?

Abovementioned persons (issuer, offeror, person asking for admission to trading on regulated market, guarantor) are jointly and severally liable for the prospectus.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Abovementioned persons are liable for untrue information provided in the prospectus and for missing material information in the prospectus.

Private liability for public offer without the prospectus may be based on general liability rules.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Abovementioned persons are liable for intent or negligence.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Both, primary market original purchasers and secondary market investors are entitled to sue for damages.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

The plaintiff must prove all of the abovementioned circumstances apart from fault (culpability). The acquisition may arguably happen outside the period of the validity of the prospectus, provided that the damage (such as sale at a loss) was incurred during this period due to material misstatement in the prospectus.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

The respondent must prove any abovementioned circumstances to avoid his/her liability.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

Yes, a judge can use under certain circumstances the evidence which was not presented by the parties.

10. What damages are recoverable?

Recoverable damages are: (i) actual damages (suffered loss) and (ii) loss of profit.

Does the law provide specific provisions on the quantification of compensation?

No.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

Regarding prospectus the relevant provisions on civil liability are mandatory (there is no possibility to limit liability).

12. Is there a time limit to file the claim?

Yes, 2 years (subjective) and 3/10 years (objective, depending on the level of culpability).

Can it be suspended or interrupted?

Yes, the time limit is suspended by filing motion with the court.

When does the prescription begin?

The period of prescription begins on the next day after the damage due to misstatement in the prospectus was incurred.

Is each responsible person mentioned under question 2 subject to the same time limit?

Yes.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings?

There are no specific conflict of laws rules on the prospectus liability in the Czech law. General rules on non contractual damage would apply.

Is there any provision to solve conflicts of law?

No specific provision.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses?

Yes (other than voluntary restitution by the liable persons).

If other, please explain.

n/a

15. Is a class action available?

Class actions are generally not available under the Czech law.

If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

n/a

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)?

Under Czech Capital Market Undertakings Act any legal or natural person – entrepreneur is liable for issuance without publishing prospectus and/or for prospectus prepared contrary to law (i.e. prospectus without prescribed information, missing information, untrue information). These persons usually are: an issuer, offeror, person asking for admission to trading in a regulated market.

Can several persons be held liable for different parts of the prospectus?

No.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Both legal person and/or natural person-entrepreneur are strictly liable. Natural person non-entrepreneurs are liable for intent or negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Generally speaking the same sanctions can be applied both to legal and natural persons.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The Czech National Bank (CNB) is the competent authority.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

The CNB can impose sanction for all of the above mentioned breaches.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

All of the above mentioned sanctions may be applied for the infringements referred to in the previous question, where appropriate. Suspension of trading is not considered a sanction but a measure to protect the integrity of the market.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

In addition to all above mentioned factors, level of culpability (intent, negligence) is also taken into account in case of natural persons – non entrepreneurs. The approach to legal persons and/or natural persons- entrepreneurs is similar.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

The maximum penalty amounts up to 10,000,000 CZK (approx. 400,000 EUR). No minimum limit is set.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

There is 1 year time limit, which commences the day after the CNB gained knowledge of the breach (subjective time limit), and 5 years time limit, which commences the day after the breach occurred (objective time limit).

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No. However, the CNB is authorised not to impose sanction under certain conditions.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person?

Yes.

If yes, please provide details.

In a public statement published on its website the CNB identifies the responsible person, its conduct which breached the law and specifies the imposed sanctions.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Yes, it is necessary before the defendant goes to a court.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences?

No specific prospectus related criminal sanctions (though misconduct in this area could be classified as fraud, manipulation or wrongful issue of a security).

If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

30. General criminal provisions apply. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)?

No.

If yes, please provide details.

n/a

31. Can legal persons be held liable for criminal offences?

Generally yes, for a limited set of offences, including fraud.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Some criminal offences, such as fraud, can be committed by false statements or omissions of material information made on purpose.

33. Does the law require that the offence has been committed intentionally?

Different for different offences, fraud requires the intent. If not, for which degree of fault would a person be held liable?

n/a

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

No special prospectus related offences, all of the above for fraud (the imprisonment is up to 2 to 10 years, depending on the damage done and other factors)

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Ne bis in idem applies, so the criminal sanction cannot be imposed to the same person which has already been subjected to an administrative fine. However, the administrative fine will usually be imposed to the issuer, while the criminal sanction the management.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)?

Yes

If yes, please provide details.

For fraud it could be up to 15 years, but mostly 3 – 5, depending on the damage done and other factors.

37. Can the competent authority initiate criminal proceedings?

38. No, the CNB can only forward the case to the police for investigation. If the police found ground for accusation they are entitled to do so under the Criminal Proceeding Code. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

39. Yes, the CNB can inform Police and the prosecutor on their suspicions, findings and observations. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

n/a

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the

prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Yes, through general rules on liability for execution of public powers.

41. Who is entitled to sue for damages?

42. Any person is entitled to sue and any person who suffered damage due to breach of duties of the state is entitled to damages. What circumstances must be proven by the plaintiff?

The plaintiff must prove breach of the law caused by an activity (or omission) of the competent authority.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The competent authority must prove that their actions were in line with the law. The administrative decisions are presumed to be in line with the law unless annulled by an administrative court.

44. What damages are recoverable?

Recoverable damages are: (i) actual damages (suffered loss) and (ii) loss of profit.

Does the law provide for specific provisions on the quantification of the compensation?

No.

Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

There is no limitation; however the Government liability is proportionate.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability?

Yes.

If yes, please provide details.

In the case of employees' intent, the regress covers all damages. In the case of his/her negligence, a court will decide the amount based on personal circumstances of the employee, up to 4,5 multiple of his/her salary.

46. Is there a time limit for initiating the proceedings?

Yes. There is a subjective limit of 3 years, objective limit of 10 years.

Can it be suspended or interrupted?

It is suspended for up to 6 months when the request for damages is submitted.

When does the prescription begin?

Prescription begins the day after the day of breach of law (or legal effects of a court decision to this effect where necessary).

47. Is a class action available?

No.

DRAFT

**MEMO**

**DANISH FINANCIAL  
SUPERVISORY AUTHORITY**

27 February 2013  
Securities Division  
J.no.6364-0030  
/MBD

**Prospectus Liability Questionnaire from ESMA – answers from the  
Danish FSA**

**Civil liability (restitution for losses from the author of the  
breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.
  - a. Civil liability for prospectuses is incurred on basis of the general Danish tort rules. It is non-contractual liability.
2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).
  - a. There are no rules concerning which persons who can be held responsible under civil liability. This means any person (natural or legal) can be held responsible if they have acted liable. However, they are only liable for the part of the prospectus they are responsible for. The issuer will be responsible for the entire prospectus.
3. Are the persons under the previous question subject to joint and/or several liability?
  - a. If several persons are liable for the same part of the prospectus, they will be joint and several liable.
4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

- a. The persons (natural or legal) are liable for all breaches of duties. There are no specific rules concerning this. Liability is based on culpa.
5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?
  - a. Liability is based on culpa. Persons (natural or legal) are liable when they are negligent – and therefore also when they have intent. However, a case from the Danish Supreme Court shows that the company (the legal person) issuing the securities is not as likely to be found negligent as the management of the company. Lawyers, accountants and other advisors are under a strict professional liability assessment of negligence.
6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?
  - a. All persons (legal or natural) who have had a financial loss can sue for damages. Both the original purchaser and a subsequent investor must prove foreseeability and causation (see also the answer to the question below regarding foreseeability and causation).
7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?
  - a. The plaintiff must prove at least negligence (i.e. prove of intent will also make a person liable) in regard to the information in the prospectus and a financial loss as well as foreseeability. This means that the plaintiff must prove that information in the prospectus was negligent and this was known or should have been known to the defendant, that the plaintiff has incurred a loss, and that the loss was foreseeable given the negligent information. There is an assumption in case law that a proven negligence in the prospectus has causation to a loss incurred because of an investment based on the prospectus.
8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

- a. The respondent must prove that the person has not acted negligent, that the plaintiff has no financial loss and/or there is no causation and foreseeability between the negligence and the loss. It is enough to prove that one of the listed parameters is not met. A case from the Danish Supreme Court shows that an investor is expected to read the entire prospectus. Therefore, the question of negligence must be evaluated against the entire prospectus.
9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of)? If yes, please explain.
  - a. In civil liability cases there is a principle of negotiation. This means the judge only takes information from the parties into consideration.
10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?
  - a. Financial loss is recoverable. There are no rules about quantification of compensation.
11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?
  - a. Civil liability is mandatory. There are no possibilities to exclude.
12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?
  - a. The general Rule of Limitation set a time limit of 3 years. It applies to all persons. The deadline starts when the loss occurs. The time limit can be interrupted if the debtor recognizes its obligation or when the creditor takes legal action.
13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?
  - a. The competent law must be chosen in the prospectus.
14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.
  - a. The case must be brought before the civil courts unless the parties reach a settlement out of court.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

- a. Class actions are available. Class actions are regulated in the Administration of Justice Act, chapter 23a. The law prescribes the conditions which must be met before a class action is possible. One of the conditions is that class action must be the best way to handle the claim.
- b. It is the court who appoints the representative for the class act. The representative can be an association of investors if being a representative in such matters are within the scope of the association.

### **Administrative sanctions**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?
  - a. No. There are no specific parties mentioned in the ruler regarding information in the prospectus. Any person responsible for information in the prospectus can be held liable. Several persons can be held liable for different parts of the prospectus.
17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?
  - a. Persons (natural or legal) who violate the Danish law are at fault when they are negligent (and therefore also when they act gross negligent or have intent). According the executive orders persons are at fault when they are gross negligent or have intent when violating the executive orders.
18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?
  - a. The order from the Danish FSA to stop the infringement can be given to both natural and legal persons.
19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?
  - a. It is the Danish FSA who can give orders to stop an infringement.
20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?
  - a. The Danish FSA can give orders to stop an infringement for all breaches of the Danish regulation, see the answers to question 30 below.
21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?
  - a. The Danish FSA can give orders to the relevant persons to remedy the infringement. The Danish FSA can also suspend the trade of the relevant securities.
22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?
  - a. An order to stop an infringement of the rules is given without regard to aggravating or mitigating factors.

- b. Suspension of trade is executed if the Danish FSA finds it appropriate. Therefore, aggravating or mitigating factors are taken into account.
- 23. What is the range of fines (maximum –or unlimited- and minimum amounts)?
  - a. There are no administrative fines in regard to prospectuses. The Danish FSA will report the violation of the rules to the police, which can bring the case before the courts, where a fine can be imposed.
- 24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.
  - a. The time limit for initiating administrative proceedings is 5 years. The limit is calculated from the point where the liable action stopped. In connection with prospectuses this means that when the liable action is e.g. wrong information in a prospectus the time limit is calculated from the time where the offer period stopped and the prospectus expired.
- 25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?
  - a. No.
- 26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.
  - a. The administrative sanctions against legal persons are published on the Danish FSAs webpage. The identity of the legal person is stated in the announcement.
  - b. Administrative sanctions to natural persons are not published.
- 27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?
  - a. Administrative sanctions must be brought before an administrative body (Companies Appeal Board / Erhvervsankenævnet) before the person can appeal to the courts.
- 28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?
  - a. If a case regarding administrative sanctions has been brought before the Companies Appeal Board it can subsequently be brought before the courts.

### **Criminal sanctions**

- 29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.
  - a. Yes. Some of the rules concerning prospectuses are punishable with fines. There are specific rules for prospectuses in the Securities Act as well as in the Danish Criminal Code. Furthermore the persons can be punished for breach of general rules in the Danish Criminal Code concerning fraud etc.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.
- a. No. There are no specific parties mentioned in the ruler regarding information in the prospectus. Any person responsible for information in the prospectus can be held liable.
  - b. However, there are specific parties mentioned regarding making an offer or having securities admitted for trading. It is the issuer or the person the person admitting the securities who are responsible for a prospectus is approved before the offer is made or the admitting is requested.
31. Can legal persons be held liable for criminal offences?
- a. Yes, legal persons can be held liable for criminal offences. They can be fined.
32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?
- a. The criminal offences are:
    - i. The issuer or person admitting the securities for trading (which also includes the board of directors and the management of the issuing company) may not request the securities admitted for trade or make a public offering before the prospectus is approved.
    - ii. All persons who have given information in the prospectus are obligated to secure that the prospectus contains all relevant information for the investors. This means e.g. that the person must meet the requirements in the annexes to no. 809/2004 and the amendments.
    - iii. The issuer is also responsible for some formal requirements.
33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?
- a. An offence does not have to be committed intentionally before it can be punished. The same rules are breached even by gross negligence. Furthermore, the rules regarding having a prospectus approved before making an offer to the public or admit securities for trading are breached even by simple negligence.
34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).
- a. Legal persons can be fined. There are no rules regarding the sum of the fines. Natural persons can be fined or imprisoned for up to 1½ year.
35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?
- a. Yes. The judge can take previous sanctions into account – both administrative and criminal sanctions. There are no specific rules that apply in this case, but it will usually have an impact on the amount of the fine.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.
- a. The time limit for initiating criminal proceeding is 5 years. The time limit is calculated from the time where the criminal action stopped. See also answer to question 24.
  - b. The criminal proceedings must be handled as fast as possible by the prosecutor and the courts. There are no specific time limits. However, it can have an effect on the sanction if the process by the courts has been very long. In these cases the sanction can be eased.
37. Can the competent authority initiate criminal proceedings?
- a. No. The Danish FSA will forward the case to the police. The police will then investigate the case. If the police find that there are grounds for indictment, the police can present the offender with a fine, and the case can be closed without going to court if the offender accepts the fine. Otherwise the police will send the case to the public prosecutor, who will bring the case to the courts. The police can also initiate a case.
38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.
- a. Yes. The Danish FSA forwards cases to the police, if the FSA finds that the regulations, where criminal sanctions are applied, are breached.
39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?
- a. The Danish FSA will not impose administrative sanctions if the police have initiated criminal proceedings.
  - b. However, administrative sanctions can be imposed before criminal proceedings are initiated and this will not exclude criminal proceedings.

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.
- a. Government liability is incurred on basis of the general Danish tort rules, which also applies to civil liability.
41. Who is entitled to sue for damages?
- a. Any person (legal or natural) can sue for damages if they have incurred a financial loss.
42. What circumstances must be proven by the plaintiff?
- a. The plaintiff must prove at least negligence (i.e. prove of intent will also make a person liable) and a financial loss. The plaintiff must also prove causation and foreseeability between the negligence and the loss.

- b. Approval from The Danish FSA is to secure that the prospectuses contains all relevant information according to the law. However, the Danish FSA does not check whether the information is correct. Therefore, the government can be liable if the prospectus lack information, which it should contain on basis of the regulation. But government liability cannot concern false information.
- 43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?
  - a. The Government must prove that it has not acted negligent, that the plaintiff has no financial loss and/or there is no causation and foreseeability between the negligence and the loss. It is enough to prove that one of the listed parameters is not met.
- 44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?
  - a. The financial damages are recoverable. There are no rules about quantification or limitations of liability.
- 45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.
  - a. No. There is a general principle in Danish law that an employer is responsible for the actions of the employee. The employee is not obligated to pay damages.
- 46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?
  - a. The general Rule of Limitation set a time limit of 3 years. The deadline starts when the loss occurs. The time limit can be interrupted if the Government recognizes its obligation or when the plaintiff takes legal action.
- 47. Is a class action available?
  - a. Class actions are available. Class actions are regulated in the Administration of Justice Act, chapter 23a. The law prescribes the conditions which must be met before a class action is possible. One of the conditions is that class action must be the best way to handle the claim.

**Prospectus Liability Questionnaire (ESMA/2012/CSFC/18 Ann 1)**

**Responses from the Estonian FSA**

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

- There are specific provisions regarding liability for information contained in a prospectus in the Securities Market Act. In addition, the liability provisions of the civil law apply: breach of pre-contractual duties, contractual liability, the right to cancel a contract if entered into under the influence of a relevant mistake or fraud and tort liability.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

- The Securities Market Act provides that the correctness and completeness of information included in a prospectus shall be approved in the prospectus by the issuer and, upon existence, by the offeror. The approval of the issuer shall be signed by all members of the management board of the issuer or of the body substituting therefor. The approval of the offeror shall be signed by an offeror who is a natural person or, in the case of a legal person, at least one member of the management board of the offeror or of the body substituting therefor who has the right to represent the offeror. An auditor shall confirm the accuracy of the information presented in the annual or semi-annual reports contained in the prospectus by his or her signature.

The obligation to compensate for damages if information contained in a prospectus proves to be different from the actual circumstances applies to the issuer or offeror.

The obligation to compensate for damage also rests with the issuer or offeror if a third party is the source of the information presented in the prospectus.

If the correctness and completeness of information contained in a prospectus is signed by both the issuer and the offeror, each of the persons may be held liable for certain parts of the prospectus. The liability depends on whether the person was aware or should have been aware of the fact that the information was inaccurate.

The general civil law provisions do not prescribe specific persons who can be held responsible but in the context of liability for information contained in a prospectus, the issuer and the offeror as the obligated persons to draw up the prospectus may be held liable.

The auditor bears proprietary liability for the direct proprietary damage wrongfully caused to a client or third party by provision of audit service.

3. Are the persons under the previous question subject to joint and/or several liability?

- The persons may be subject to joint and several liability.

Under the Securities Market Act, the issuer or the offeror are liable for compensation of damages.

The general civil law provisions stipulate that if several persons are liable, on the same or different grounds, to a third party for the same damage caused to the third party, they shall be solidarily liable for payment of compensation. In this case, liability in the relations between these persons shall be divided taking into account all circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person.

If several persons may be liable for damage caused and it has been established that any of the persons could have caused the damage, compensation for the damage may be claimed from all such persons. In this case, compensation for damage may be claimed from each person to an extent in proportion to the probability that the damage was caused by the person concerned. A person obligated to compensate for damage shall be released from liability if the person proves that the damage was not caused thereby.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?
  - The persons are liable for compensation of damages if the prospectus contains information which is significant for the purpose of assessing the value of the securities and such information proves to be different from the actual circumstances or in case of omission of material information in the prospectus.
  
5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?
  - Under the Securities Market prospectus liability provisions, if the prospectus contains information which is significant for the purpose of assessing the value of the securities and such information proves to be different from the actual circumstances, the issuer or the offeror shall compensate the owner of the security for damage sustained thereby due to the difference between the actual circumstances and the information presented in the prospectus, provided that the issuer or offeror was or should have been aware of such difference. This also applies if the prospectus is incomplete due to the omission of relevant facts, provided that the incompleteness of the prospectus results from the issuer or the offeror hiding of the facts.
  - The obligation to compensate for damage also rests with the issuer or offeror if a third party is the source of the information presented in the prospectus.
  - Therefore, the degree of fault required is in case of incorrectness of the information at least negligence, and in case of omission of relevant information, intent is required.
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6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?
  - Under the Securities Market Act, any purchaser of the securities is entitled to sue for damages. The plaintiff must be able to prove that he has born damages which are the result of the inaccurate information contained in the prospectus.

Under general contract and tort law, anyone is entitled to sue for damages.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the

misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

- In civil court action, each party shall prove the facts on which the claims and objections of the party are based.

The plaintiff must prove that the prospectus contains information which is significant for the purpose of assessing the value of the securities and such information is different from the actual circumstances or that significant information has been omitted from the prospectus. The plaintiff must also prove that the damages were caused by the inaccurate information and In addition, the amount of losses must be shown.

The fault of the defendant is presumed.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

- The defendant can claim and prove all of the circumstances named in the question to avoid liability. According to the Securities Market Act, in case of incorrect information in prospectus, the defendant can avoid liability if he can prove that he was not aware or should not have been aware of the incorrectness of the information. In case of omission of material information, the defendant can avoid liability by showing that the incompleteness of the information did not result from hiding of the facts by the defendant. Furthermore, in case of a qualified investor, the defendant can claim that the qualified investor should have realised, at the moment of acquiring the security and by exercising due care in its activities, that the information contained in the prospectus was inaccurate or incomplete (unless the qualified investor proves intent of the defendant).

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

- No. The court may make a proposal to the parties to submit further evidence, but the court decision must be based only on evidence provided by the parties.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

- The plaintiff may claim compensation for direct patrimonial damages and loss of income.
- The Securities Market Act provides that the issuer has the right to compensate for the damage by acquiring the security from the person that sustained the damage for the price that the latter paid to acquire the offered security. By acquiring securities in this manner from the person that sustained the damage, the person causing the damage is released from the obligation to compensate for any other damage to the person that sustained the damage.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

- The provisions on civil liability are mandatory and any agreements which exclude, limit or reduce compensation or the limitation period prescribed in the law would be null and void.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

- The limitation period for a claim based on the Securities Market Act is 5 years as of the beginning of the offer of the relevant security on the basis of a prospectus which contains inaccurate information or is incomplete.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

- There are no specific provisions regarding civil liability of prospectuses related to international public offers.

According to the Private International Law Act, liability for obligations of a legal person shall be governed by the law of the state according to which the legal person is founded. If a legal person is actually managed in Estonia or the main activities of the person are carried out in Estonia, the legal person shall be governed by Estonian law.

Claims arising from unlawful causing of damage shall be governed by the law of the state where the act or event which forms the basis for causing the damage was performed or occurred.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

- Yes, a civil court proceeding is the only way to receive restitution of losses.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

- No, class action is not available.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

- The Securities Market Act provides administrative liability in case of provision of incorrect or inaccurate information to possible investors in a prospectus or in any other manner by an issuer or offeror and violation of the requirement to inform all potential investors on equal terms during an offer of securities. Both natural and legal persons may be held liable, e.g. the issuer and the members of the management board of the issuer as natural persons.

The issuer and offeror can be held liable for different parts of the prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

- In order to apply administrative liability, at least negligence<sup>1</sup> must be proved.

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<sup>1</sup> Negligence can be: 1) recklessness - the person foresees the occurrence of circumstances which constitute the necessary elements of an offence but, due to inattentiveness or irresponsibility, seeks to avoid the occurrence of such circumstances; or 2) carelessness -

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

- Sanctions can be imposed on both legal and natural persons.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

- The competent body for imposing administrative sanctions in case of breach of the PD framework is the Estonian Financial supervision Authority (“EFSA”) designated in accordance with the PD.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

- Administrative sanctions are applied for the following breaches:
  - 1) violation of requirement to register prospectus or public offer of securities without a prospectus if prospectus was required;
  - 2) violation of requirements regarding publication of the prospectus;
  - 3) violation of procedure for announcement or suspension of offer;
  - 4) provision of incorrect or inaccurate information in a prospectus or in any other manner and violation of the requirement to inform all potential investors on equal terms during an offer of securities;
  - 5) violation of requirements for advertising the offer;
  - 6) violation of obligation to repurchase securities;
  - 7) violation of requirement to draw up an annex to prospectus.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

- Sanctions for the above listed breaches are a fine of up to 32 000 euros for legal persons and a fine of up to 1200 euros for natural persons.

In addition to the administrative sanctions, the EFSA may impose other administrative measures:

- 1) request the issuer whose securities are offered publicly to promptly disclose information, if the obligation to disclose such information arises from the Securities Market Act;
- 2) request the issuer to suspend or terminate a public offer if:

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the person is unaware of the occurrence of a circumstance which constitutes a necessary element of an offence but should have foreseen the occurrence of the circumstance in the case of attentive and conscientious performance.

- the requirements of the Securities Market Act and legislation established on the basis thereof or other legislation concerning the public offer are violated or there is reason to believe that the specified requirements are violated;
- the terms and conditions of the offer as prescribed in the prospectus have not been complied with;
- the information submitted upon registration of the prospectus has been rendered inaccurate to a significant extent.

In case of a listed company, the EFSA may request suspension or termination of trading.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

- In imposition of an administrative sanction, the respective general provision of the Criminal Code stipulates that the mitigating and aggravating circumstances, the possibility to influence the offender not to commit offences in the future, and the interests of the protection of public order must be taken into consideration.

The mitigating circumstances are listed non-exhaustively:

- prevention of harmful consequences of the offence, and provision of assistance to the victim immediately after the commission of the offence;
- voluntary compensation for damage;
- appearance for voluntary confession, sincere remorse, or active assistance in detection of the offence;
- commission of the offence due to a difficult personal situation;
- commission of the offence under threat or duress, or due to service, financial or family-related dependent relationship;
- commission of the offence in a highly provoked state caused by unlawful behaviour;
- commission of the offence by a pregnant woman or a person in an advanced age;
- conciliation with the victim.

The aggravating circumstances are provided as an exhaustive list:

- self-interest or other base motives;
- commission of the offence with peculiar cruelty, or degradation of the victim;
- commission of the offence knowingly against a person who is less than 18 years of age, pregnant, in an advanced age, in need of assistance or has a severe mental disorder;
- commission of the offence against a person who is in a service, financial or family-related dependent relationship with the offender;
- commission of the offence during a state of emergency or state of war;

- commission of the offence by taking advantage of a public accident or natural disaster;
- commission of the offence in a manner which is dangerous to the public;
- causing of serious consequences;
- commission of the offence in order to facilitate or conceal another offence;
- commission of the offence by a group;
- taking advantage of an official uniform or badge in order to facilitate commission of the offence.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

- Up to 32 000 euros for legal persons and up to 1200 euros for natural persons.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

- Administrative sanctions can be imposed for offences considered as misdemeanours, which expire after 2 years have passed between the commission thereof and the entry into force of the corresponding judgment or decision.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

- In the case of a minor misdemeanour, the EFSA may impose a cautionary fine (3-15 euros for natural persons, 15-60 euros for legal persons) or caution the person subject to proceedings only orally.

Cautionary fine is not considered an administrative sanction, it is not registered and it can't be taken into account when considering the repetitiveness of an offence.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

- Yes. The EFSA has the right to disclose, in full or in part, a ruling made in a misdemeanour matter or an administrative act as of the date of its issue if this is necessary for the protection of investors, clients of financial supervision subjects or the public or for ensuring the lawful or regular functioning of the financial market.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

- No.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

- Yes.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

- Yes. The Estonian Criminal Code provides for criminal sanction for investment fraud, i.e. receiving an investment through presentation of false information in a prospectus or among other information addressed to the public by a person engaged in economic activities.

Depending on the specific facts and circumstances of the case, other general provisions of the Criminal Code could be applicable, e.g. general provision on fraud.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

- No. According to the Penal Code, a person engaging in economic activities who receives an investment through presentation of false information in a prospectus or among other information addressed to the public shall be punished by a pecuniary punishment or up to 5 years' imprisonment. Therefore, the law does not prescribe specific parties, but it can be derived from the above cited provision that criminal liability for investment fraud applies only to persons engaged in economic activities.

31. Can legal persons be held liable for criminal offences?

- Yes. Under Estonian law, legal persons can be held liable for certain criminal offences, including investment fraud.

A legal person shall be held responsible for an act which is committed in the interests of the legal person by its body, a member thereof, or by its senior official or competent representative. Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. The criminal liability of legal persons does not apply to the state, local governments or to legal persons in public law.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

- The Criminal Code provides for criminal sanction for investment fraud, i.e. receiving an investment through presentation of false information in a prospectus or among other information addressed to the public.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

- Yes. The provision of investment fraud requires the activity to be committed intentionally, including with indirect intent.<sup>2</sup>

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<sup>2</sup> Intent can be deliberate intent, direct intent or indirect intent: 1) deliberate intent - the aim of the person is to create circumstances which belong to the necessary elements of an offence and the person is aware that such circumstances occur or if he or she at least foresees the occurrence of such circumstances. Also if the person assumes that the circumstances which constitute the necessary elements of an offence are an essential prerequisite for the achievement of the aim; 2) direct intent – the person knowingly creates circumstances which belong to the necessary elements of an offence and wants or at least tacitly accepts the creation of the

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

- The criminal sanction for investment fraud (art 211 of the Criminal Code) is pecuniary punishment (fine) in the amount of 30 to 500 daily rates or imprisonment for up to 5 years.

The daily rate is calculated by the court on the basis of the average daily income of the convicted offender. The court may reduce the daily rate due to special circumstances, or increase the rate on the basis of the standard of living of the person. The minimum daily rate is 3.20 euros.

Average daily income is calculated on the basis of the income subject to income tax received by the person during the year immediately preceding the year in which criminal proceedings were commenced against the person or, if the data pertaining to such year are not available, during the year preceding such year, less the income tax.

A fine may be imposed as a supplementary punishment together with imprisonment unless imprisonment has been substituted by community service.

In case of a legal person, the sanction is a fine of 3200 to 16,000,000 euros.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

- No. The Criminal Code provides an exhaustive list of aggravating circumstances which the judge is obliged to take into consideration when determining the sanction. The list does not include previous administrative sanctions.
- According to the Criminal Code, if a person commits an act which comprises the necessary elements of both a misdemeanour (*i.e.* a regulatory offence) and a criminal offence, the person shall be punished only for the criminal offence. If a punishment is not imposed for the criminal offence, the same act may be punished for the misdemeanour.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or sending criminal proceedings, for applying the sanction)? If yes, please provide details.

- The Criminal Code provides as a general rule that no one shall be convicted of or punished for the commission of a criminal offence in the second degree (including investment fraud) if the time between the commission of the criminal offence and the entry into force of the corresponding court judgment is 5 years.

The limitation period is subject to provisions on interruption. The limitation period of offence is interrupted:

- 1) in the case a suspect, accused or person subject to proceedings absconds from pre-trial proceedings, extra-judicial proceedings or court, until the person is detained or appears before the body conducting the proceedings;
- 2) upon commencement of criminal proceedings in a matter of an act with elements of a misdemeanour, until the termination of the criminal proceedings.

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circumstances; 3) indirect intent - the person foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstance may occur.

The limitation period shall not be resumed if more than fifteen years have passed from the commission of the criminal offence.

37. In addition, in case of investment fraud, the Penal Code provides that a judgment shall not be executed if 3 years have passed since the entry into force of the judgment. Can the competent authority initiate criminal proceedings?

- No.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

- Yes. The law does not explicitly require the EFSA to submit its findings or observations to the prosecutor for criminal proceedings. However, the obligation may be derived from the provisions of the Estonian Financial Supervision authority Act, which provides that one of the functions of the EFSA is to apply measures prescribed by legislation to protect the interests of clients and investors. The Criminal Proceedings Act provides that an investigative body or a prosecutor's office commences criminal proceedings based on a report of a criminal offence or other information indicating that a criminal offence has taken place and after ascertainment of criminal elements.

According to the Estonian Financial Supervision Authority Act, as a general rule, all information relating to financial supervision carried out by the EFSA is confidential. However, the EFSA has the right to disclose information on the results of financial supervision to courts and investigative bodies hearing a criminal matter in connection with acts detected during financial supervision or the acts of a subject of financial supervision or the head or an employee thereof if such acts contain elements of a criminal offence.

39. Furthermore, the Code of Misdemeanour Procedure applicable in case of regulatory offences provides that a misdemeanour procedure shall not be commenced and the proceedings commenced shall be terminated if the act in question contains elements of a criminal offence. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

- Yes. Administrative sanctions are imposed in accordance with the Code on Misdemeanour Procedure, which states that misdemeanour procedure shall not be commenced and the proceedings commenced shall be terminated if the act in question contains elements of a criminal offence. According to the Criminal Code, if a person commits an act which comprises the necessary elements of both a misdemeanour (*i.e.* a regulatory offence) and a criminal offence, the person shall be punished only for the criminal offence. If a punishment is not imposed for the criminal offence, the same act may be punished for the misdemeanour.

If the public prosecutor decides not to initiate criminal proceedings, the EFSA may impose administrative sanctions provided in the Securities Market Act. The offences provided in the Securities Market Act are considered misdemeanours.

Criminal proceedings do not exclude the possibility to impose other administrative measures by the EFSA, e.g. to require the issuer whose securities are offered publicly to disclose information, if the obligation to disclose such information arises from the Securities Market Act, or to request that the public offer be terminated or suspended if the legal requirements concerning the public offer are violated; there is reason to believe that the specified requirements are violated or the terms and conditions of the offer as prescribed in the prospectus have not been complied with; or the information submitted upon registration of the prospectus has been rendered inaccurate to a significant extent.

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

- Yes. There are no specific provisions regarding the liability of the government or the EFSA in case of non-performance of its duties by the EFSA when approving a prospectus. The general liability of the EFSA for rights violated or damage caused in the conduct of financial supervision, and the bases of and procedure for the restoration of violated rights and the payment of compensation for damage caused is provided by the State Liability Act.

41. Who is entitled to sue for damages?

- Anyone who has incurred damages as a result of unlawful activities of the EFSA if damage could not be prevented and cannot be eliminated by the protection or restoration of rights by the EFSA issuing an administrative act or taking of a measure.

42. What circumstances must be proven by the plaintiff?

- The following circumstances must be proven by the plaintiff:
  - 1) incurrence of direct patrimonial damage or loss of income;
  - 2) the incurred damages are a result of unlawful activities by the EFSA;
  - 3) the damage could not be prevented;
  - 4) the damage can't be eliminated by the EFSA issuing an administrative act or taking of a measure (e.g. suspension of the offer).

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

- The EFSA is relieved of liability if the damage could not be prevented even while fully observing diligence necessary for the performance of public duties.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

- The plaintiff may sue for direct patrimonial damage or loss of income. The law does not provide for specific provisions on the quantification of the compensation.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

- Yes. The EFSA may file a claim of recourse against a person if the damage was caused by the person performing the functions of the EFSA. Compensation on the basis of a claim of recourse is possible only if the damage occurred as a result of unlawful activity of the person.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

- In order to receive compensation on the basis of a claim of recourse, the EFSA shall make a written proposal to the person, specifying the extent of, procedure for and the term of compensation for damage and the circumstances which are the basis for claiming compensation. The person shall be given at least 2 weeks to respond.

A proposal to receive compensation may be made within 3 months as of the date when the EFSA became or should have become aware of the circumstances which are the basis of the claim of recourse, but not later than within 3 years as of the causing of damage regardless of whether or not the EFSA became aware of the circumstances. The said term shall not commence before payment of compensation for damage to the injured party by the EFSA is decided or the EFSA authority is ordered to pay compensation to the injured party.

If a person fails to respond to the proposal in due time, refuses to compensate for damage or fails to compensate for damage during the term indicated in the proposal, the EFSA has the right of recourse to an administrative court within 30 days as of the appearance of such circumstances.

47. Is a class action available?

- No.

## FIN-FSA's answers

### Civil liability (restitution for losses from the author of the breach)

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Prospectus civil liability arises out of tort regime. In some cases the contractual liability regime may also apply, but the tort regime of the SMA is always applicable to damages arising out of breach of prospectus rules.

The main provisions for the regimes are stipulated in the SMA, the Tort Liability Act, the Limited Liability Companies Act (hereinafter "Companies Act"), the Sale of Goods Act and the Consumer Protection Act. Contractual liability regime is also governed by general principles of contract law.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

The law does not specifically prescribe the persons who can be held liable for information contained in the prospectus. Pursuant to the SMA, anyone who causes damages through intentional or negligent procedure that is against the SMA or provisions issued thereunder (including relevant Regulations and Decisions by the European Commission).

Pursuant to the SMA, the issuer, offeror and/or person applying for admission to trading is subject to the obligation to publish the prospectus. Moreover, the person commissioned to handle the offer or application for admission to trading (i.e. managers of the offer) is also covered by the obligation. Liability of the directors of the legal persons is stipulated by law applying to the relevant legal person.

3. Are the persons under the previous question subject to joint and/or several liability?

The allocation of the liability is determined case by case. The main rule is that where the damage has been caused by two or more persons, or they otherwise are liable in the same damages, the liability shall be joint and several.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

For any intentional or negligent procedure that is against the SMA or provisions issued thereunder (including relevant Regulations and Decisions by the European Commission). All of the above examples are covered by the provision.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Intent or negligence.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

The circle of persons entitled to sue for damages is not specifically stated in the legislation. It will be determined in case law. According to a Report published in 2005 by a Prospectus Liability Working Group set up the Ministry of Finance, prospectus liability should not be limited only to subscriptions and/or to securities offered for sale to the public in a public offer, if investment decisions are made on the basis of the information presented in the prospectus.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

The plaintiff has to prove at least the losses suffered and the causal link between the losses and the misleading or false statement (or omission of information). The burden of proof relating to negligence or intent will depend on the circumstances of the case.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

The respondent can avoid liability by proving (i) the lack of negligence/intent, (ii) the lack of causal link between the misstatement and the damages, or (iii) the lack of damages.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The recoverable damages are not specifically determined by the legislation. According to a Report published in 2005 by a Prospectus Liability Working Group set up the Ministry of Finance the objective is to impose compensation based on the interest fulfilment principle, i.e. an investor shall be put in the same economic position where he/she had been if there had been no errors or deficiencies in the prospectus.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

The liability provisions of the SMA are mandatory.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

The general period of limitation is 3 years from the moment the person became or should have become aware of the damage and person liable for that. The right to claim for damages however ceases, if the limitation period has not been interrupted within 10 years of the act that gave rise to damages.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

There are no specific provisions on conflict of law issues, general conflict of law principles apply.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

The Act on Class Actions does not apply to a civil case concerning the conduct of an issuer of securities as referred to in the SMA.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

The administrative sanctions can only be applied to those natural or legal persons that have breached an obligation addressed directly to them. Pursuant to the SMA, the issuer, offeror and/or person applying for admission to trading is subject to the obligation to publish the prospectus. Moreover, the person commissioned to handle the offer or application for admission to trading (i.e. managers of the offer) is also covered by the obligation. Several persons can be held liable for different parts of the prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Intent or negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

The sanctions can be imposed on both legal and natural persons. However, in case of natural persons the obligation that they have breached must be directly addressed to them.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

FIN-FSA and, in case of penalty payments exceeding EUR 1 Million, Market Court on application by FIN-FSA.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

For any intentional or negligent procedure that is against the SMA or provisions issued thereunder (including relevant Regulations and Decisions by the European Commission). All of the above examples are covered by the provision.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Depending on the case, the FIN-FSA may either:

- suspend the public offer for maximum of 10 days at a time,
- prohibit the unlawful procedure and/or issue an order to remedy the infringement,
- impose a conditional fine,
- issue an administrative fine,
- issue a public warning,
- issue a penalty payment, or
- suspend the admission to trading of the security

22. Are there any *aggravating* or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Pursuant to the Act on FIN-FSA, the assessment is an overall assessment, which shall take into account at least the nature, scope severity and duration of the breach / infringement, level of negligence (or intent) and, in case of penalty payments, the financial position of the person subject to the penalty payment.

Mitigating factors include the following:

- the person has initiated corrective action on his own initiative,
- the practice or level of negligence is considered minor, or
- issuing administrative fine or penalty payment would otherwise be evidently unfair.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Administrative fines:

- Natural persons: EUR 500 – EUR 10.000
- Legal persons: EUR 5.000 – EUR 100.000

Penalty payments:

- Natural persons: max. 10 % of taxable income or EUR 100.000, whichever is lower
- Legal persons: max. 10 % of turnover or EUR 10 Million, whichever is lower

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

No. However, general principles of administrative law (including the principles of human rights) most likely limit the imposition of administrative sanctions in cases where significant amount of time has elapsed since the act has taken place.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes. The FIN-FSA publishes the administrative sanctions on its website.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes. The general regime for securities markets offences applies.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

The criminal liability can only be applied to those natural or legal persons that have breached an obligation of the SMA. Pursuant to the SMA, the issuer, offeror and/or person applying for admission to trading is subject to the obligation to publish the prospectus. Moreover, the person commissioned to handle the offer or application for admission to trading (i.e. managers of the offer) is also covered by the obligation.

31. Can legal persons be held liable for criminal offences?

Yes, but only together with a natural person.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Securities markets information offence:

- false or misleading information, or

- omission of information which the SMA requires to disclose and which is likely to have a material effect on the value of the security

Market manipulation:

- (among others) disclosure or dissemination of false or misleading information, if the person knew or he should have known that such information is false or misleading.

Gross market manipulation:

- same as market manipulation above, where the breach has caused considerable economic damages or is likely to significantly deteriorate confidence to the functioning of the market and the act as a whole has been gross.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Securities markets information offence: intentionally or through gross negligence

Market manipulation and gross market manipulation: intentionally or through negligence

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Securities markets information offence and market manipulation: fine or imprisonment for at most two years

Gross market manipulation: imprisonment for at least four months and at most four years

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

While it is not explicitly stated in the law, recent case law by the Supreme Court the principle of *ne bis in idem* should also apply between administrative sanctions and criminal sanctions.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Pursuant to the Penal Code, a sentence shall not be passed if charges have not been brought

- within ten years, if the most severe penalty is imprisonment for more than two years and at most eight years (applies to gross market manipulation)
- within five years, if the most severe penalty is imprisonment for over a year and at most two years (applies to market manipulation and securities markets information offence)

37. Can the competent authority initiate criminal proceedings?

No.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes. Basically all criminal cases relating to securities markets offences are initiated through investigations by the FIN-FSA and subsequent request to the police to initiate criminal proceedings.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Yes. Pursuant to the Act on FIN-FSA, no administrative fine or penalty payment may be imposed if the matter is pending and subject to pre-trial investigation, consideration of charges or criminal hearing in a court of law, nor may any administrative fine or penalty payment be imposed where a legally valid judgement has been passed regarding the same offence.

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

The liability of administrative authorities is covered by the Tort Liability Act. Pursuant to the Act, a public corporation shall be vicariously liable in damages for injury or damage caused through an error or negligence in the exercise of public authority. However, the liability arises only if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it.

If a person who has suffered injury or damage owing to an erroneous decision by a state or municipal authority has without an acceptable reason failed to appeal against the said decision, he/she shall not be entitled to damages from the state or the municipality for injury or damage that could have been avoided by appealing.

No action for damages can be brought for injury or damage caused by a decision of the Government, a Ministry, the Cabinet Office, a court of law or a judge, unless the decision has been amended or overturned or unless the person committing the error has been found guilty of misconduct or rendered personally liable in damages. Where a decision of an administrative authority has been appealed against in the Government or the Supreme Administrative Court, no action in damages can be brought for injury or damage caused by the decision in so far as it has been allowed to stand.

If the liability in damages is deemed manifestly unreasonable or if, in view of the extent of the injury or damage and the other circumstances, there is a special reason for the same, the damages may be adjusted.

There is no case law available relating to the application of the above provision to prospectus approvals.

41. Who is entitled to sue for damages?

Anyone that claims to have suffered damages provided that the above conditions are met (cf. second and third paragraph in our response to the previous question).

42. What circumstances must be proven by the plaintiff?

The plaintiff has to prove at least the losses suffered and the causal link between the losses and the act of the authority. The burden of proof relating to negligence may depend on the circumstances of the case.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The Government and/or the competent authority can avoid liability by proving (i) the lack of erroneous / negligent act, (ii) the fact that the act, in view of its nature and purpose, has met the reasonable requirements set for it, (iii) the lack of causal link between the act of the authority and the damages, or (iv) the lack of damages.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

The recoverable damages are not specifically determined by the legislation and there is no case law available. According to a Report published in 2005 by a Prospectus Liability Working Group set up by the Ministry of Finance the objective for civil liability is to impose compensation based on the interest fulfilment principle, i.e. an investor shall be put in the same economic position where he/she had been if there had been no errors or deficiencies in the prospectus. Supposedly, this would also apply to Government liability.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Yes. Pursuant to the Tort Liability Act, An employee shall be liable in damages for injury or damage caused by him/her through an error or omission at work to an amount deemed reasonable in view of the extent of the injury or damage, the nature of the act, the status of the person causing the injury or damage, the needs of the person suffering the same, and other circumstances. If the negligence of the employee has been merely slight, he/she shall not be rendered liable in damages. If the injury or damage has been caused deliberately, full damages shall be awarded unless it is deemed that there are special reasons for reducing the damages.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

The general period of limitation is 3 years from the moment the person became or should have become aware of the damage and person liable for that.

47. Is a class action available?

No.



Paris, le 13 mars 2013

## ESMA - Prospectus Liability Questionnaire - AMF Answers

### INTRODUCTORY NOTE

The answers to this questionnaire provided by the AMF are intended to give an overview of the French civil, administrative, government, criminal liability and sanctions regime in connection with securities prospectuses.

Therefore, the answers to this questionnaire should not be considered as a comprehensive and detailed description of all potentially applicable legal provisions in this context. Moreover, the answers should not prejudice positions and/or interpretations of the competent courts or the AMF regarding any legal provisions and regulations described hereafter.

### Civil liability (restitution for losses from the author of the breach)

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Liability attaching to drawing up a prospectus is mainly a tortious liability based on Article 1382 of the French Civil Code, which is the basis of the standard liability regime.

Persons may be jointly and severally liable to tort proceedings as a result of drawing up a prospectus.

The civil liability could also be based on Article 1137 and followings of the French Civil Code which describe the contractual liability regime.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

See answer to question 5 below.

3. Are the persons under the previous question subject to joint and/or several liability?

See answer to question 5 below.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

### 1/ the legal representative:

The legal representative of the issuer or the person selling the securities to the public is delivering a signature on the prospectus stating that "*to the best of his knowledge, the information contained therein is in accordance with the facts and makes no omission likely to affect its import*".

## **2/ the statutory auditors:**

The statutory auditors shall state, in most cases, whether the financial statements that have undergone an audit or a limited review and that are presented in a prospectus give a true and fair view of the issuer. They shall declare that any forward-looking information, whether estimated or pro forma, presented in a prospectus registration document or, where such is the case, the updates or corrections thereto, has been properly prepared in accordance with the indicated basis and that the accounting basis is consistent with the issuer's accounting policies. They shall examine all the other information in a prospectus. This overall examination and any special verification shall be carried out in accordance with a standard issued by the national institute of statutory auditors (Compagnie Nationale des Commissaires aux Comptes) on prospectus verification.

## **3/ the ISP:**

Where one or more investment service providers take part in the first admission to trading on a regulated market admission of equity securities, such investment service provider(s) shall certify to the AMF that they have exercised customary professional diligence and found no inaccuracies or material omissions likely to mislead investors or affect their judgement.

During the three years following the first admission to trading of an issuer's securities, where the prospectus prepared for the public offer or admission comprises a registration document or a recent prospectus and a securities note, the investment service provider(s) shall certify only the information in the securities note, provided the investment service provider, exercising customary professional diligence, before the offer or admission.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The fault is ranging from simple negligence to deliberate tortious intent, depending on the circumstances and the person to whom civil liability can be attached. The issuer and its managers may be responsible for the whole information contained in the prospectus. Other person could be responsible for part of the prospectus or regarding a specific type of information.

## **1/ the issuer & the managers:**

The issuer who discloses false or misleading information may be civilly liable to the third parties for the damage suffered. In that case, the issuer can be held responsible for harmful consequences committed by their representative, in accordance with Article 1384 – 5 of the French Civil Code.

The legal representative of the issuer, the executive managing director may be also held liable in accordance with Article 1382 of the French Civil Code and Articles L. 225 – 251 of the French Commercial Code<sup>1</sup>.

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<sup>1</sup> Article L.225-251 of the French Commercial Code provides that the directors and managing directors shall be individually or jointly and severally liable to the company or third parties either for infringements of the laws or regulations applicable to public limited companies, or for breaches of the memorandum and articles of association, or for tortious or negligent acts of management

Besides, the members of the Board of Directors or of the Executive Board may be held liable if they have approved the text of the prospectus prior to it being filed with the AMF.

## **2/ the statutory auditors:**

The civil liability of the statutory auditors is incurred in the event of harmful consequences resulting from any fault or negligence that they may have committed in the exercise of their duties (in accordance with Article L. 882-17 of the French Commercial Code).

## **3/ the ISP:**

The ISP's third party liability may also apply in some cases. ISPs participating in a financial operation on behalf of an issuer are subject to common professional due diligence practices.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Any person who suffers detriment as a result of inaccurate or misleading information may sue for damages.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Bringing action against the civil liability of the persons that have signed the prospectus implies establishing 3 facts:

- loss or damage,
- fault (ranging from simple negligence to deliberate tortious intent, depending on the circumstances),
- a causal link between the two.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

According to French legislation relative to civil liability, in order to reduce the amount of compensation payable or to avoid liability, the respondent must prove that the plaintiff has been negligent (the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place).

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Damages that are recoverable are material damages (it is also possible to claim for loss of opportunity). However, the law does not provide specific provisions on the quantification of compensation.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

No.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Article L. 225-254 of the French Commercial Code provides that any action for liability against the directors or managing director, either by an individual or individuals or by the company, must be brought within three years of the act or event causing the loss or damage, or, if the same was concealed, the discovery thereof. Nevertheless, where the act is defined as a criminal offence, the said period shall be extended to ten years.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

There is no specific law to deal with issues on civil liability of prospectuses related to international public offerings neither provision to solve any conflict of law.

We can not detail all the possible cases that can arise but considering a French issuer (having its registered office in France) which offers securities in France and other countries, the competent law applicable to a French plaintiff is the French law.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

No. You can also receive restitution of losses before a criminal court and in theory it is possible to claim for restitution of losses before an administrative court (ie answer to question 39).

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

No. Nonetheless, according to Article L. 452-1 of the French Monetary and Financial Code, some associations of investors have the legal capacity to file claims in order to protect the collective interest of investors or some of the investors.

Indeed, properly “declared associations” having as their explicit purpose, as defined in their articles of association, the defence of investors in transferable securities or financial products, may bring legal proceedings before any jurisdiction, even through the filing of civil actions, in connection with facts which cause direct or indirect damage to the interests of investors in general or to certain categories of investors (L. 452-1 the French Monetary and Financial Code).

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

See answer to question 4 above.

Yes, the AMF's General Regulation states that the issuer and its senior managers may be recognised as administratively liable for the whole information contained in the prospectus. Auditors may also be recognised liable, if it can be shown that they knew or ought to have known that the certified accounts which appear in the prospectus contained false, imprecise or misleading information.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

As the administrative breach is objective, there is no requirement to demonstrate intent, but the inexact, imprecise or insincere nature of the information regarding the financial situation of the issuer which is likely to be incorrectly interpreted must be demonstrated.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Yes, both (please refer to our answer to question 16).

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The authority competent for sanctioning breaches detected in the contents of the prospectus is the one that approved the prospectus; however through the rules regarding false information, an authority in a jurisdiction where the information has been made public may also impose sanctions.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

All breaches listed in the questions could be sanctioned. In practice, sanctions are essentially applied in case of failure relating to financial statement and to risk factors.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

All the sanctions mentioned are envisaged in the regulation.

For breaches of the PD framework, the sanctions could be among others: fines and/or publication of ruling (nominative or anonymous).

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The financial situation of the issuer, the deceitful nature or not of the errors, duration and possible repetition, and the damage caused are taken into account, but in administrative cases, no compensation is possible for the investors who suffered the damage.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

The maximum is set at EUR 100 million or ten times the profits that may have been made. Furthermore, as regards individuals acting under the authority or on behalf of investment service providers, the maximum is EUR 15 million for market abuse, EUR 300,000 for other breaches or five times the profits that may have been made.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

As stated in the French Monetary and Financial Code: “The Enforcement Commission cannot hear a case based on acts that took place more than three years previously if no action seeking to uncover, declare or punish said acts was carried out during said period.”

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Yes, but only with regard to professionals who are regulated by the AMF and thus normally not available for corporate issuers, their senior managers or legal auditors. At this time, there is no jurisprudence for procedures relating to the PD.

When applicable, this procedure involves the reaching of an agreement between the AMF’s General Secretary and the person(s) concerned which includes the payment of a sum of money to the public treasury. This agreement is made public.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes, the principle is that sanctions are published, as well as the identity of the person(s) found responsible, other than in circumstances where such publication could seriously disrupt the financial markets or cause undue damage to the parties involved.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Cases relating to the PD are most often handled by the Court of Appeals of Paris.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, under Article L. 465-2, paragraph 2, of the French Monetary and Financial Code, criminal sanctions apply to any person that publishes any false or deceptive information. Punishment is thus incurred by: whoever publicly disseminates, via whatever channel or means, any false or deceptive information concerning the prospects or the situation of an issuer whose securities are traded on a regulated market, or the likely performance of a financial instrument or asset, as within the meaning of paragraph II of Article L. 421-1, admitted to trading on a regulated market, which might affect the price thereof. There are also general criminal provisions against forgery and the use of forged documents (Article 441-1 of the French Criminal Code). Under the terms of this article, “forgery consists of any fraudulent alteration of the truth liable to cause harm and made by any means in a document or other medium of expression of which the object is, or effect may be, to provide evidence of a right or of a situation carrying legal consequences.”

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

Article L. 465-2 of the French Monetary and Financial Code applies to “whoever publicly disseminates [...] any false or deceptive information. In particular, this applies to “persons or entities responsible for the prospectus”, as described in Article 212-14 of the AMF General Regulation. According to this Article “the persons responsible shall be clearly identified in the prospectus by their names and functions, or, in the case of legal persons, their business names and registered offices. The signature of the persons or entities responsible for the prospectus or registration document, and for the updates and corrections thereto shall be preceded by a declaration confirming that, to the best of their knowledge, the information contained therein is in accordance with the facts and makes no omission likely to affect its import.”

31. Can legal persons be held liable for criminal offences?

The offence of disseminating false or deceptive information has been extended to legal persons (Article L. 465-3 of the French Monetary and Financial Code). Legal persons incur the penalties set out under Articles 131-37 through 131-39 of the French Criminal Code in the case where the offence has been committed in its interests by one of its bodies or representatives, it being specified that the criminal liability of a legal person does not preclude that of an individual.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Article L. 465-2, paragraph 2, of the French Monetary and Financial Code, imposes penalties on whoever disseminates any false information which can impact the price of the financial instrument. This therefore presupposes an action and, in principle, excludes omission. This applies in the case of any person that commits the offence of intentionally disseminating false or deceptive information.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Yes, the criminal offence of disseminating false or deceptive information is an “intent” offence. The law requires proof that the perpetrator of the offence intentionally disseminated false information, i.e. in full knowledge that the information was false and seeking the desired result. Article L. 465-2 of the French Monetary and Financial Code is thus in accordance with the principle set out in Article 121-3 of the French Criminal Code which states: “There is no felony or misdemeanour in the absence of intent to commit it (...).” Judgements against company executives therefore specify that the perpetrator acted in bad faith.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

The offence of disseminating false or deceptive information is sanctioned by a term of two years' imprisonment and a fine of EUR 1,500,000, which amount may be increased to a figure representing up to ten times the amount of any profit made, and where the fine shall not be less than the amount of that same profit.

Forgery and the use of forged documents are punishable by three years' imprisonment and a fine of EUR 45,000.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Article L. 621-16 of the French Monetary and Financial Code states that "When the Disciplinary Committee of the Financial Markets Authority (AMF) has imposed a financial penalty which has become final before the criminal judge has given a final ruling on the same facts or related facts, the latter may order that the financial penalty be set off against the fine he imposes."

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

As for any offence, the limitation period for prosecution is three years (Article 8 of the Criminal Procedure Code). This limitation period runs from the day on which the information was disseminated.

The limitation period that applies with regard to applying sanctions is five years as of the date on which the sentence became final (Article 133-3 of the French Criminal Code).

37. Can the competent authority initiate criminal proceedings?

No, however, in accordance with Article L. 621-15-1 of the French Monetary and Financial Code, the competent authority must "immediately" send report of any matter likely to constitute a criminal offence to the Public Prosecutor.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Article L. 621-15-1 of the French Monetary and Financial Code states that if an allegation notified is likely to constitute an offence relative to disseminating false or deceptive information, the competent authority must immediately send the investigation report to the Public Prosecutor.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

No, in theory, it is possible for administrative sanctions and criminal sanctions to be imposed simultaneously. The principle of sanctions being imposed simultaneously is nonetheless limited for two reasons: first, in practice, it is uncommon for a single case to be prosecuted according to two regimes, and, second, due to the imputation mechanism provided for under Article L. 621-16 of the French Monetary and Financial Code (ie question 35).

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

There is no specific law which provides investors with the right to obtain restitution for losses from the Government and/or the competent authority in the event that the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework. The judge would apply the common liability law.

41. Who is entitled to sue for damages?

Any person who suffers detriment as a result of a fault from the authority responsible for the approval of the prospectus.

42. What circumstances must be proven by the plaintiff?

The plaintiff must prove the fault of the authority.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The competent authority has to demonstrate that it has not committed any fault or there is no casual link between damage and fault.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

Damages that are recoverable are material damages (it is also possible to claim for the loss of opportunity).

However, the common liability law does not provide any specific provision on the quantification of the compensation.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

In theory, it is possible.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

The plaintiff shall submit a complaint to the competent authority within the 4 years from the date of the damage.

The competent authority has 2 months to answers.

Then the plaintiff can submit a complaint to the Administrative Court within 2 months.

47. Is a class action available?

No.

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**Prospectus Group  
PRO**

## **ESMA - Prospectus Liability Questionnaire - BaFin Answers**

### **INTRODUCTORY NOTE**

The answers to this questionnaire provided by BaFin want to give an overview of the German civil, administrative, government, criminal liability and sanctions regime in connection with securities prospectuses. Therefore, the answers to this questionnaire should not be considered as an exhaustive and detailed description of all potentially applicable legal provisions in this context. Moreover, the answers should not prejudice positions and/or interpretations of the competent courts or any other competent authorities regarding any legal regulations described in the following. The relevant courts are exclusively competent to finally decide upon legal matters.

### **QUESTIONS**

#### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

In Germany there are special rules dealing with the civil liability for incorrect or incomplete prospectuses and with the civil liability for failure to publish a prospectus. These special rules are implemented in the German Securities Prospectus Act (*Wertpapierprospektgesetz*, **WpPG**).

In addition, the general rules of the German civil law apply (e.g. tort law, contract law) (section. 25 (2) WpPG).

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Civil liability for incorrect or incomplete prospectuses under the Securities Prospectus Act attaches to those persons (i) who assume responsibility for the prospectus (section 21 (1) no. 1 WpPG), and to those persons (ii) who are responsible for the issuing of the prospectus (section 21 (1) no. 2 WpPG).

Persons who assume responsibility are primarily the persons who sign the prospectus. The Securities Prospectus Act stipulates that the offeror (who usually is identical with the issuer) has to sign the prospectus (section 5 (3) WpPG). In addition, the applicant for admission has to sign the prospectus, if the prospectus is to be used for the admission of securities to trading on an organised market (section 5 (3) WpPG).

In case a person assumes only responsibility for a certain part or certain parts of the prospectus this person would only be liable for the incorrectness of these certain parts of the prospectus. However, at least one person needs to be responsible for the prospectus as a whole.

Persons who are responsible for the issuing of the prospectus are persons who have not signed the prospectus but who are nevertheless to be considered as the factual initiator of the prospectus, *inter alia* because of their own economic interest in the issue (e.g. principal shareholders, members of the board of directors).

Civil liability for failure to publish a prospectus under the Securities Prospectus Act attaches to the issuer and the offeror (section 24 (1) WpPG).

Contract law and tort law do not provide for specific parties who can be held responsible for incorrect or incomplete prospectuses. Liability attaches to those persons who fulfil the elements defined by the applicable legal provisions. However, (pre)contractual liability can only be triggered if the purchaser purchased the securities directly from a person who is responsible for the prospectus.

3. Are the persons under the previous question subject to joint and/or several liability?

The persons are subject to joint and several liability (e.g. section 21 (1) and section 24 (1) WpPG).

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Under the Securities Prospectus Act a person can be held liable if information contained in a securities prospectus that are material for the assessment of the securities are incorrect or incomplete (section 21 (1) WpPG).

Moreover, under the Securities Prospectus Act a person can be held liable if a prospectus has not been published in contravention of the obligation to publish a prospectus as stipulated in the Securities Prospectus Act (section 24 (1) WpPG).

In addition, the general rules of the German civil law apply:

Under contract law a person can be held liable for a breach of a pre-contractual obligation to inform (*culpa in contrahendo*). Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract (section 311 (2) and (3) of the German Civil Code, *Bürgerliches Gesetzbuch*, **BGB**).

Under tort law a person can be held liable for the violation of protective law, i.e. person who commits a breach of a statute that is intended to protect another person (section 823 (2) BGB). Such a statute is *inter alia* section 264a of German Criminal Code (*Strafgesetzbuch*, **StGB**) which provides a specific provision for capital investment fraud (see below section "Criminal Liability"). Moreover, a person can be held liable if it intentionally inflicts damage on another person in a manner contrary to public policy (section 826 BGB).

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

In case of an incorrect or incomplete prospectus, a person is not liable if it can prove (i) that it was not aware that the information contained in the prospectus was incorrect or incomplete, and (ii) that such lack of awareness was not the result of gross negligence. Therefore, persons are liable for intent and gross negligence.

In case of a failure to publish a prospectus, either intent or negligence is sufficient for liability. The same applies to possible claims under tort and contract law.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Under the Securities Prospectus Act any purchaser of the securities is entitled to sue for damages, i.e. irrespective of the market place (primary or secondary market).

Under contract and tort law generally anyone is entitled to sue for damages.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

According to the general principle the plaintiff has to prove that the prospectus is incorrect or incomplete. Moreover, the plaintiff has to prove the purchase price, the selling price (if any) and the purchase costs. In addition, he has to prove that he purchased the securities (i) after the publication of the prospectus, and (ii) within six month after the first trading of the securities or after the first public offering respectively (section 21 (1), section 22 (1) no. 1 WpPG). In case of a failure to publish a prospectus, the plaintiff has to prove that he purchased the securities (i) before a prospectus was published, and (ii) within six month after the first public offering of the securities (section 24 (1) WpPG).

With regard to contract and to tort law the general principle applies, i.e. the plaintiff and the respondent have to prove all circumstances supporting their own legal position.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

In case of an incorrect or incomplete prospectus, a person is not liable if it can prove (i) that it was not aware that the information contained in the prospectus were incorrect or incomplete, and (ii) that such lack of awareness was not the result of gross negligence (section 23 (1) WpPG). Moreover, a person is not liable if it can prove (i) that the securities have not been purchased on the basis of the prospectus (but on the basis of other reasons), (ii) that the circumstances which are subject to

incorrect or incomplete information did not cause a decrease of the market price of the securities, (iii) that the purchaser knew that the information contained in the prospectus were incorrect or incomplete, (iv) that there was a clear and precise corrigendum published in Germany in the context of the annual report or the interim financial statements of the issuer, in an ad-hoc information or a similar publication before the purchase of the securities, or (v) the claim is solely based on information provided in the summary of the prospectus or a translation thereof, but only if the information is misleading, incorrect or inconsistent when read together with the other parts of the prospectus, or the summary does not contain (if read together with the other parts of the prospectus) all necessary key information (section 23 (2) WpPG).

In case of a failure to publish a prospectus, a person is not liable if it can prove that at the time of the purchase the purchaser was aware of the obligation to publish a prospectus (section 24 (4) WpPG). Moreover, a person is not liable if it can prove that the purchaser would have purchased the securities even a prospectus was published.

With regard to contract and to tort law the general principle applies, i.e. the plaintiff and the respondent have to prove all circumstances supporting their own legal position.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

As a general rule, the judge does not have the faculty to take facts into consideration which were not presented by the parties. However, facts presented (or implied) by a party that are common knowledge with the court need not be substantiated by evidence (section 291 of the German Code of Civil Procedure, *Zivilprozessordnung*, ZPO).

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

According to the Securities Prospectus Act recoverable damages are the purchase price capped at the first issuance price. In case there is no first issuance price the first market price is considered as the first issuance price. In return for the damages the purchaser has to assign the securities to the responsible person. In case the purchaser is not holder of the securities any longer, he is entitled to the difference between the purchase price (capped at the first issuance price) and the selling price. Additionally, the usual purchase costs are recoverable (section 21 (1) and (2), section 24 (1) and (2) WpPG).

With regard to contract and to tort law the general principle applies, i.e. a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred (section 249 (1) BGB). The damage to be compensated for also comprises the lost profits (section 252 BGB).

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

There is no possibility to exclude or limit liability under the Securities Prospectus Act in advance. Any such clause (e.g. inserted in the prospectus or any other document) or agreement would be void (section 25 (1) WpPG).

According to the German Civil Code in principal the obligor may not be released from liability for intention in advance (section 276 (3) BGB). However, in absence of an agreement between an investor and the issuer and/or offeror this rule has no impact in case of a violation of pre-contractual obligations or tort claims.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

There are no specific provisions in the Securities Prospectus Act regarding the limitation period. Therefore, the general statute of limitation does apply which is three years (section 195 BGB). The limitation period commences at the end of the year in which (i) the claim arose and (ii) the purchaser obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence. Notwithstanding knowledge or a grossly negligent lack of knowledge, the claims become statute-barred ten years after the date upon which they arise (section 199 BGB).

Moreover, the standard rules for the suspension of the limitation period apply, e.g. suspension if negotiations between the parties are in progress in respect of the claim or the circumstances giving rise to the claim (section 203 BGB).

The same time limits apply for claims regarding the violation of pre-contractual obligations or tort claims.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

The Securities Prospectus Act is silent with respect to conflicts of law. Therefore, general conflict of law rules would apply.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Generally a judicial proceeding before a court is the only institutionalized way to receive restitution of losses.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

The German Capital Market Investors' Model Proceeding Act (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG) as part of German civil procedural law applies *inter alia* to claims for compensation of damages due to false, misleading or omitted public capital markets information. The definition of "public capital markets information" expressly includes information in prospectuses under the Securities Prospectus Act. Application for the establishment of a model case may be made by the plaintiff and the defendant of an individual law-suit, but not by a third party. Thus, investor association may only act on behalf of the plaintiff. Investors need to file individual law-suits before being qualified for participation in a model case. Subject of a model proceeding is the establishment of the existence or non-existence of conditions justifying or ruling out entitlement or

the clarification of legal questions may be sought, provided the decision in the legal dispute is contingent thereupon.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

BaFin may impose administrative sanctions and/or fines on any person violating the specific provisions as stipulated in the Securities Prospectus Act. In practice, especially the issuer and/or the offeror are subject to administrative liability.

Administrative sanctions and/or fines can be imposed on several persons. However, administrative liability of several persons for different parts of a prospectus is unknown to German prospectus law, i.e. is not provided by the relevant provisions described below.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Wilful and negligent or gross negligent violations of the Securities Prospectus Act are subject to administrative sanctions.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Sanctions can be imposed on both legal and natural persons (cf. section 30 of the Act on Regulatory Offences, *Gesetz über Ordnungswidrigkeiten*, **OWiG**).

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

BaFin is the competent body for imposing administrative sanctions.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Firstly, BaFin has the power to prohibit public offers (i) if, contrary to the obligation to publish a prospectus as stipulated in the Securities Prospectus Act, no prospectus has been published, or (ii) if, contrary to the Securities Prospectus Act, a prospectus is published, if the prospectus or the registration document is no longer valid, or (iii) if the approval of the prospectus is not evidenced by a certificate of approval for the competent authority of the home member state, or (iv) if the prospectus does not comply with the languages requirements set out in the Securities Prospectus Act (section 26 (4) WpPG).

What is more, if BaFin is made aware of circumstances on the basis of which reasonable grounds exist to suspect a material mistake or significant omission in respect of the contents of a prospectus that is to be used as the basis for admission to trading of securities on an organized market, which could result in the deception of the public, it may request that the offeror suspend the public offer until the matter is resolved (section 26 (8) WpPG). In addition, BaFin has the power to revoke the approval of a prospectus and prohibit the respective public offer if the prospectus is found to contain a mistake or omission in respect of its contents (section 26 (8) WpPG).

With regard to advertisements, BaFin may order that the advertisements be suspended for a maximum of ten consecutive days in each case if it has reason to believe that the provisions for advertisement provided by the Securities Prospectus Act have been contravened (e.g. no reference to a published securities prospectus in the context of advertisement, incorrect or misleading or inconsistent information with the information contained in the prospectus). Moreover, BaFin may prohibit advertisements containing information that is likely to be misleading as to the scope of the prospectus examination set out in the Securities Prospectus Act (section 15 (6) WpPG).

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Beside the sanctions specified in the answer to question no. 20 (i.e. prohibition of public offer, revocation of approval of a prospectus, suspension and/or prohibition of advertisements) BaFin may impose administrative fines on any person who *inter alia* wilfully or gross negligently (i) offers securities in contravention of the obligation to publish a prospectus as stipulated in the Securities Prospectus Act, (ii) publishes a prospectus without the prior approval by BaFin (section 35 WpPG).

Moreover, BaFin may publish incontestable measures that it has adopted due to contraventions of prohibitions or requirements of the Securities Prospectus Act on its website, provided that this is necessary to resolve or avoid irregularities, unless such publication would place the financial markets in considerable danger or would cause disproportionate damage to the parties involved (section 30 WpPG).

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The actual amount of administrative fine is - within the framework provided by the Securities Prospectus Act and the Act on Regulatory Offences (OWiG) - subject to discretion by BaFin. However, the significance of the administrative offence and the charge faced by the wrongdoer shall form the basis for the assessment of the fine. The wrongdoer's financial condition shall also be taken into account (section 17 (3) OWiG). Moreover, the fine shall exceed the financial benefit that the wrongdoer has obtained as commission of the administrative offence. If the statutory maximum (see answer to question 23) does not suffice for that purpose, it may be exceeded (section 17 (4) OWiG). As a general principle and in absence of more specific rules, the maximum sanction for a negligent action shall not exceed half of the maximum regulatory fine imposable (section 17 (2) OWiG). Aggravating or mitigating factors are not stipulated in the relevant regulations exclusively. Therefore,

other aggravating factors (e.g. repeated violation) and other mitigating factors (e.g. cooperation with BaFin) may be taken into account.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

The maximum fine is EUR 500,000 (section 35 (3) WpPG). The minimum fine is EUR 5 (section 17 (1) OWiG).

However, the fine shall exceed the financial benefit that the wrongdoer has obtained as commission of the administrative offence. If the statutory maximum does not suffice for that purpose, it may be exceeded (section 17 (4) OWiG).

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

There are no specific provisions in the Securities Prospectus Act regarding the limitation period for fines. Therefore, the standard limitation period does apply which is three years (section 31 (2) OWiG). Generally, the statute of limitation starts to run as soon as the act is completed (section 31 (3) OWiG).

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

As described in the answer to question 21, BaFin may publish incontestable measures that it has adopted due to contraventions of prohibitions or requirements of the Securities Prospectus Act on its website. The identity of the sanctioned person may not be disclosed if an anonymization does not conflict with the purpose of the publication.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Prior to appealing to court, the lawfulness and expedience of an administrative sanction imposed by BaFin has to be reviewed in preliminary proceedings by an administrative body (section 68 (1) of the Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung*, VwGO).

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes.

## **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Even if German law does not provide a specific criminal prospectus regime, German law provides with section 264a of German Criminal Code (*Strafgesetzbuch*, **StGB**) a specific provision for capital investment fraud which covers *inter alia* prospectus related offences.

In addition to the aforementioned specific criminal sanction certain other criminal law provision with a broad scope of application (e.g. section 263 StGB: fraud) could apply in connection with the publication of an incorrect securities prospectus.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

No, any person can be held criminally responsible according section 264a and/or section 263 StGB.

31. Can legal persons be held liable for criminal offences?

No, according to German Law only natural persons can be held criminally liable.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

According to section 264a StGB (capital investment fraud), whosoever in connection with (i) the sale of securities, subscription rights or shares intended to grant participation in the yield of an enterprise; or (ii) an offer to increase the capital investment in such shares, makes incorrect favourable statements or keeps unfavourable facts secret in prospectuses or in representations or surveys about the net assets to a considerable number of persons in relation to circumstances relevant to the decision about acquisition or increase, shall be liable.

According to section 263 StGB (fraud), whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable.

It should be noted that in contrast to fraud (section 263 StGB) capital investment fraud (section 264a StGB) does not require any property damage.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Capital investment fraud and fraud has to be committed intentionally. However, conditional intension (*dolus eventualis*) is sufficient.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

The criminal sanctions for capital investment fraud (section 264a StGB) are imprisonment of up to three years or a fine, and for fraud (section 263 StGB) up to five years or a fine.

The German Criminal Code does not stipulate specific amounts of fines for specific offences. A fine shall be imposed in daily units. The minimum fine shall consist of five and, unless the law provides otherwise, the maximum shall consist of three hundred and sixty full daily units. The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day net income of the offender or the average income he could achieve in one day. A daily unit shall not be set at less than one and not at more than thirty thousand Euros.

In extraordinary cases the court has the possibility to make an order for professional disqualification as an additional measure (section 70 StGB).

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

In case an act is at the same time a criminal offence and a regulatory offence a concurrence of sanctions is excluded by law (see answer to question 39). However, in case of different acts it is not ruled out that a previous administrative sanction might be taken into account by a judge in the context of the determination of the criminal sanction.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Prosecution is subject to the statute of limitations. In case of capital investment fraud and fraud the limitation period is five years starting commencing as soon as the offence is completed (section 78 (3) no. 4 StGB). In case a court would consider a prospectus to be press work a shorter limitation period under press law could apply.

37. Can the competent authority initiate criminal proceedings?

BaFin itself cannot initiate criminal proceedings. Criminal Proceedings can only be initiated by the public prosecution office.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

BaFin reports (possible) offences to the public prosecution office (cf. section 27 (1) sentence 3 no. 1 WpPG, section 41 OWiG).

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

If an act is at the same time a criminal offence and a regulatory offence, only the criminal law shall be applied (section 21 (1) OWiG). However, the act may be sanctioned as a regulatory offence if no criminal sanction is imposed (section 21 (2) OWiG).

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

No. As BaFin performs its functions and exercises its powers exclusively in the public interest (section 4 (4) of the Act Establishing the Federal Financial Supervisory Authority, *Finanzdienstleistungsaufsichtsgesetz*, FinDAG), it is assumed that investors generally have no individual right to obtain restitution for losses from BaFin in connection with incorrect or incomplete prospectuses.

41. Who is entitled to sue for damages?
42. What circumstances must be proven by the plaintiff?
43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?
44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?
45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.
46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?
47. Is a class action available?



HELLENIC REPUBLIC  
CAPITAL MARKET COMMISSION

**Answers to the questionnaire on prospectus liability regimes – HCMC (Updated March 2013).**

**Civil liability (restitution for losses from the author of the breach)**

1. *Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.*

Under Article 914 of the Greek Civil Code (CC), a party which has suffered pecuniary damage by an action of another party acting unlawfully and in fault has standing to bring an action for damages against the party that caused the damage. This article establishes the general tortuous (delictual) liability regime in Greek civil law. Furthermore, according to Article 71 CC a legal entity is liable for compensation under Article 914 CC for the acts and omissions committed by its representatives, provided its representatives have acted in the context of performing their duties. Such representatives remain jointly and severally liable together with the legal entity they represent for such damage (*liability in solido*), so that the injured party can sue both the legal entity and the person causing the damage, but can recuperate damages only once.

Tort is generally more difficult to defend because the plaintiff has to prove not only the damage suffered and the causal link between damage and fault, but also the fault of the defendant beyond reasonable doubt. For this reason, a specific provision was adapted into the Greek legal system, namely Article 25 of Law 3401/2005 “*on the prospectus to be published when securities are offered to the public or admitted to trading*”, which transposed Directive 2003/71/EK of the European Parliament and of the Council. This article determines the civil responsibility of the persons accountable for the information contained in a prospectus. This responsibility is primary *ex lege*, and its legal base is the tort (delict) according to Article 914 CC. The first paragraph of Article 25 stipulates that the persons who are accountable according to Article 6 are liable for a period of 12 months after the prospectus was made public for any positive damage suffered from the liability of the responsible persons concerning the exactitude and the completeness of the prospectus. A course of action based on this special regime is preferable, mainly due to the reversal of the burden of proof in favor of the investor, as explained below under the relevant questions. On the other hand, this course of action entails compensation only for actual damage and shorter prescription.

For issuers and offerors contractual liability could also be founded on the general provisions of the CC. However, for other parties that could potentially be held responsible for information contained in a

prospectus (e.g. external auditors) contractual liability cannot be founded since a direct contractual bond with the investor cannot be established.

Although in the Greek legal system there is no specific Law regulating the protection of consumers of financial instruments (apart from Ministerial Decision Z1/629/30.5.2005 regulating the distant selling of financial instruments), prospectus liability through the general provisions of Law 2251/1994 on Consumer Protection cannot be ruled out.

2. *Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).*

According to Article 6 of Greek Law 3401/2005 “on the prospectus to be published when securities are offered to the public or admitted to trading”, the responsibility for the information contained in a prospectus rests with the issuer, the offeror or the person asking for admission to trading on a regulated market, the members of the Board of Directors, as well as the underwriter or financial advisor. Other persons besides the above (e.g external auditors, legal counsels, CFOs) can be held responsible for information contained in certain specific parts of a Prospectus provided that the prospectus specifies persons responsible for these parts.

3. *Are the persons under the previous question subject to joint and/or several liability?*

The above mentioned persons are subject to joint and several liability.

4. *For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?*

The above persons are liable for any information contained in a prospectus required by Article 5 paragraph 1 of Law 3401/2005. Such information is required in order for the investors to be able to assess in a comprehensive manner an issuer's (and possibly its guarantor's) assets and obligations, financial standing, profits, losses and prospects, as well as any rights incorporated in these securities. Such information must be presented in an intuitive and comprehensible manner.

There are no specific civil liability provisions for a public offer without a duly approved prospectus.

5. *For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?*

Under Greek law, both contractual and tort liability require fault. There are two degrees of fault: intent and negligence. In order to claim compensation for tort before the Greek Courts, the plaintiff would have to prove the existence of fault (intent or negligence) in relation to the infringement.

A differentiation regarding the fault liability that is required from the CC for tort is introduced in paragraph 3 of Article 25 of Greek Law 3401/2005 “*on the prospectus to be published when securities are offered to the public or admitted to trading*”. This provision provides for damages on a quasi strict-liability basis, with a reversed burden of proof, meaning that the claimant has no obligation to invoke or prove fault on the part of the wrongdoer, but in order to be exonerated the latter must prove that the damage was not the result of his fault. So the persons responsible for the completeness and accuracy of the prospectus are liable unless they can prove that they did not know about the untrue or missing information and that their ignorance is not caused by fault (intent or negligence).

6. *Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?*

Based on civil (contractual and tort) law, entitled is any person who can prove damages, as well as the causal link between damages and liability of the responsible person. However, according to Article 25 of Law 3401/2005 “*on the prospectus to be published when securities are offered to the public or admitted to trading*”, which establishes a specific prospectus civil liability regime, entitled is any investor who acquired securities during the first 12 months after the prospectus was made public. Both original purchasers in the primary market and subsequent investors in the secondary market are entitled to sue for damages, although the latter cannot base their action on contractual liability provisions.

7. *What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?*

According to Article 25 paragraph 2 of Law 3401/2005, the injured party is required to prove the damage suffered and the causal link between damage and fault. The plaintiff is not required to prove the fault (intent or negligence) of the liable person. See also the answer to the question 1.

8. *What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a*

*supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?*

According to paragraph 3 of Article 25 of Law 3401/2005, in order to avoid liability the respondent must prove that the damage suffered by the plaintiff was not the result of his fault (intent or negligence). So the respondent is liable unless he can prove that he was unaware of the untrue or missing information and that his ignorance was not a consequence of his fault (intent or negligence).

9. *Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.*

In accordance with Article 106 of Code of the Civil Procedure (CCP), civil courts take into consideration only the allegations set forth by the litigants, who have the burden of submitting evidence in support of their allegations. Article 107 of CCP introduces derogation from the rule of Article 106 of CCP and empowers the Court to order evidence in support of litigant allegations by one or more means recognized as evidence by the CCP.

Facts constituting public knowledge are considered proven and are taken into account by the Court on its own initiative (Article 336 CCP).

10. *What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?*

According to the first paragraph of Article 25 of Law 3401/2005, recoverable is any actual damage (*damnum emergens*) suffered. Monetary compensation does not cover lost profit (*lucrum cessans*) according to this provision, although the latter is not ruled out by general civil law provisions concerning contractual or tortious liability.

11. *Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?*

The legislator's objectives of ensuring investor protection and strengthening investor confidence in the capital market, by means of establishing a special prospectus liability via Article 25 of Law 3401/2005, could be compromised if that liability could be mitigated or dispensed with contrary agreements between the parties involved. On this ground paragraph 6 of Article 25 stipulates that "*any clause or agreement restricting liability or discharging liable persons is null and void, in relation to investors*".

12. *Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?*

In Greek Civil Law the prescription period for claims arising from tort is 5 years from the time the

injured party becomes aware of the damage and of the identity of the person legally responsible for this damage. The prescription period can be interrupted or suspended in certain cases expressly specified by the CC.

A shorter prescription is provided for by paragraph 4 of Article 25 of Law 3401/2005, according to which claims for damages against the liable persons are prescribed after three years from the prospectus publication.

*13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?*

There is no specific conflict of law provision for civil liability arising from prospectuses and there is no clear precedent in the Greek jurisprudence. In the absence of an express clause defining a competent court and applicable law in the terms of the offer, a claim arising from a prospectus could be dealt with under tort law, meaning that the applicable law is that of the State where the tort actually happened (*lex loci delicti commissi*).

*14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.*

A judicial proceeding before a civil court is the only way to receive restitution of losses.

*15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).*

Under Greek law, an action for damages may be brought jointly by more than one party (joinder of claims) if: (a) the claimants' right for damages arises from the same factual and legal basis; or (b) the object of the dispute consists of similar claims based on a similar factual and legal basis.

Public interest litigation is provided by Law 2251/1994 on Consumer Protection. According this, a union of consumers with at least 500 members that has been registered in the Registry of Consumers Unions may bring an action for the protection of the general interests of the consumers.

Collective claims and class actions are not provided for by Greek law.

### **Administrative Liability**

*16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?*

According to Article 6 of Greek Law 3401/2005 “on the prospectus to be published when securities are offered to the public or admitted to trading”, the responsibility for the information contained in a prospectus rests with the issuer, the offeror or the person asking for admission to trading on a regulated market, the members of the Board of Directors, as well as the underwriter or financial advisor. Other persons besides the above can be held responsible for information contained in certain specific parts of a Prospectus provided that the prospectus specifies persons responsible for these parts.

Especially for the members of the Board of directors of companies, Article 7, paragraph 3 (d) of Law 3340/2005 “*for the protection of Capital market from actions of persons that possess inside information and market manipulation*” stipulates that the dissemination of false, inaccurate or misleading information by those persons by means of a prospectus constitutes market manipulation, an infringement that is sanctioned according to Article 23, paragraph 1 of the above law.

17. *For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?*

Administrative liability is strict and the only defense is that the breach did not actually take place.

18. *Can the sanctions be imposed on both legal and natural persons or solely on one type of person?*

The sanctions can be imposed on both legal and natural persons.

19. *Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?*

The competent body for imposing administrative sanctions in case of a breach of the PD framework is the Hellenic Capital Market Commission.

20. *For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?*

For all of the above; applicable are both Law 3401/2005 (regarding prospectuses) and Law 3340/2005 (regarding market manipulation).

21. *What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?*

All the sanctions mentioned above are envisaged, although the penalty of reprimand is not made public.

*22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?*

Law 3401/2005 stipulates that the admeasurement of fines takes into consideration, indicatively, the value of the illegal transactions, the consequence of the infringement to investors and to the orderly operation of the market, the achieved economic profit if any, as well as any relapse. Apart from the above, Law 3340/2005 takes also into consideration the effect of the infringement on the diffusion of accurate and valid information to investors, the degree of collaboration with HCMC, as well as the needs of special and general prevention.

*23. What is the range of fines (maximum –or unlimited - and minimum amounts)?*

The fines range from 3.000 € to 1.000.000 €.

*24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.*

No, although some administrative court decisions provide that the administration must act within a reasonable time (usually five years).

*25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?*

No, there is not.

*26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.*

Publication of sanctions is at the discretion of the Hellenic Capital Market Commission. However, it is common practice for the Hellenic Capital Market Commission to publish the imposed sanctions.

*27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?*

An administrative (called remedial) appeal is allowed by Article 24 of the Administrative Procedure Code giving the right to the interested party to apply for revocation or amendment thereof (application for remedy) to the administrative authority that issued the deed.

28. *Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?*

Yes, before administrative courts.

### **Criminal liability**

29. *Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.*

According to Article 10 of Law 876/1979 for public offers not governed by Law 3401/2005 (on prospectuses) a special permit from the Hellenic Capital Market Commission is required. Failure to acquire such a permit incurs a sentence of at least three months imprisonment (up to five years) and a fine up to 15.000 €.

By article 56 of codified Law 2190/1920 on Limited Companies, criminal sanctions (imprisonment and a fine of at least 1.000 €) are foreseen for any founder, member of the Board or Director of a Limited Company, who, in order to influence the subscription of shares or their price, disseminates false information to the public by means of any publication, knowing that this information is false.

By Article 30, paragraph 1 of Law 3340/2005, criminal sanctions (imprisonment of at least one year up to five years) are incurred for market manipulation aimed at forming artificially the price or the volume of a financial instrument in order to acquire financial benefit for oneself or a third party, by means of disseminating knowingly misleading or false information through the public media, the Internet, or any other means. Indicatively, Article 7 paragraph 3 (d) regards members of the Board of a company to be responsible for the dissemination of false, inaccurate and deceiving information through a prospectus. Imprisonment of up to ten years is imposed by Article 30, paragraph 2 to anyone who by profession or by habit commits the crime of Article 30 paragraph 1, provided that: a) the value of the illegal transactions exceeds one million euros or b) the illegal gains for oneself or a third party are in excess of three hundred thousand euros.

Apart from the above, the general criminal provisions (e.g. concerning fraud) also apply.

30. *Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.*

See previous answer.

For legal persons see the following answer.

31. *Can legal persons be held liable for criminal offences?*

According to the Greek legal system legal persons cannot be held liable for criminal offences. These offenses are attributed to the natural persons who direct them.

32. *What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?*

See question n° 29.

33. *Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?*

Intent is required.

34. *What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).*

See question n° 29.

35. *Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?*

Preceding administrative sanctions imposed by the Hellenic Capital Market Commission can be taken into consideration but are not binding for the criminal courts.

36. *Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.*

When a public offer is carried out without a permit of the Hellenic Capital Market Commission the prescription time is 5 years which is extended to 8 years from the date of the first discussion of the case in the courts.

When “market manipulation” has been committed through a prospectus, the prescription time is 5 years, unless the offence is a felony for which imprisonment of up to ten years is imposed (to anyone who, according to Article 30, paragraph 2 of Law 3340/2005 by profession or by habit commits the crime of Article 30 paragraph 1, provided that: a) the value of the illegal transactions exceeds one million Euros or b) the illegal gains for oneself or a third party are in excess of three hundred thousand Euros – see answer to question 29). In that case, the prescription time is 15 years

37. *Can the competent authority initiate criminal proceedings?*

No. See the next answer.

38. *Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.*

For cases described in question n° 29 the Hellenic Capital Market Commission files a request to the prosecutor's office to initiate criminal proceedings.

39. *Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?*

No, they do not.

### **Government Liability (restitution for losses from the Government)**

40. *Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.*

Yes it does. Article 105 of the Introductory Law of the Greek Civil Code contains provisions on (civil) State responsibility for the wrongful acts of State organs. This provision establishes the individual's right to seek compensation from the State in cases of damages due to infringement of the law. The element of fault - intention or negligence - on the part of the State organ is not required for the establishment of State responsibility in this case.

Based on Article 105 of the Introductory Law of the Greek CC, investors can bring an action for compensation against the Hellenic Capital Market Committee before administrative courts.

41. *Who is entitled to sue for damages?*

Any investor who has suffered damages from actions or omissions of the organs of the Hellenic Capital Market Commission as a consequence of the approval of a prospectus is entitled to sue for damages.

42. *What circumstances must be proven by the plaintiff?*

State responsibility is established on condition that the following prerequisites are met:

(i) Material or moral damage or loss is suffered by individuals; (ii) the illegal acts or omissions are committed by State organs or officials in the exercise of their official duties; (iii) these illegal acts constitute a violation of rules of domestic law (including the Constitution, international law, formal laws and administrative acts), and (iv) causal link between the acts or omissions and the damages caused.

*43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?*

Liability can be avoided or mitigated if the Hellenic Capital Market Commission can prove (a) that the plaintiff's own actions or omissions had contributed to the creation or extent of the incurred damage (contributory negligence), (b) that recovery (apart from moral damages) has otherwise been obtained.

*44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?*

Both actual damage and lost profit are recoverable, according to provisions about tort.

*45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.*

Yes. The liable State organ or official can be sued exclusively by the State in cases of intention or gross negligence, according to the Greek Civil Servant Code (Law 2683/1999, Article 38), which stipulates that civil servants are responsible to the State in regard with any actual damages caused to the latter as a result of fraud or gross negligence in the performance of their duties or for damages paid by the State to any third parties as a result of their illegal acts or omissions in the performance of their duties, when these are the result of fraud or gross negligence. Civil servants are not responsible to the third parties that suffered the damages for their actions or omissions.

*46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?*

In Greek Civil Law the general prescription period for claims arising from tort is 5 years from the time the injured party becomes aware of the damage and of the identity of the person legally responsible for this damage. The prescription period can be interrupted or suspended in certain cases expressly specified by the CC.

*47. Is a class action available?*

See the answer to question n° 15.

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

**YES, see explanation in the following answers.**

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

**The issuer and the dealer in securities (or the dealer acting as the syndicate leader where applicable), the person who has provided guarantees for the commitments embodied in securities, the offeror or the person requesting admission of the securities for trading on a regulated market, shall be subject to liability for the information contained in the prospectus. The prospectus shall contain specific information concerning the person who/that is held liable for the contents of the prospectus or any part of it, including the name and address of this person and his role in the offering procedure**

3. Are the persons under the previous question subject to joint and/or several liability?

**In the undermentioned cases the issuer and the offeror, or the person requesting admission of the securities to trading on a regulated market and the dealer shall be subject to joint and several liability for any and all damages sustained by the investors:**

**- the subscription of securities, including the purchase contract, that were offered in the absence of a prospectus approved by the HFSÁ and without having published a public notice, and without the involvement of an investment service provider, shall be null and void.**

**- the subscription of securities, including the purchase contract, shall be null and void where the shares of a private limited company are offered publicly or presented for admission to trading on a regulated market in the absence of a decision by the general meeting for the company's transformation.**

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

**Any and all damage caused to an investor by supplying misleading information or by concealing material information in connection with the offering of securities. The liability of any person shall cover all information contained in the prospectus, as well as the lack of any necessary information.**

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**Strict liability.**

(1) The issuer and the dealer in securities (or the dealer acting as the syndicate leader where applicable), the person who has provided guarantees for the commitments embodied in securities, the offeror or the person requesting admission of the securities for trading on a regulated market, shall be subject to liability for any and all damage caused to an investor by supplying misleading information or by concealing material information in connection with the offering of securities. The prospectus shall contain specific information concerning the person who/that is held liable for the contents of the prospectus or any part of it, including the name and address of this person and his role in the offering procedure. The liability of any person shall cover all information contained in the prospectus, as well as the lack of any necessary information.

(2) A signed declaration of liability shall be annexed to the prospectus by all persons held liable under Subsection (1) of this Section. The declaration shall stipulate that all data and information in the prospectus are true and correct, and that it contains all information necessary for investors to make an informed assessment of the issuer or the person who has provided guarantees for the commitments embodied in securities and the securities to which it pertains.

(3) No civil liability shall attach to any person solely on the basis of the executive summary, including the translation thereof into any language, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

**original purchasers in the primary market**

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

**Any data or information in the prospectus is untrue or incorrect, or the prospectus doesn't contain all information necessary for investors to make an informed assessment of the issuer or the person who has provided guarantees for the commitments embodied in securities and the securities to which it pertains.**

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

**The opposite and controversial circumstances stated by the plaintiff in Answer 7.**

In relation to Questions 7 and 8 damage, fault and causal link have to be proven by the plaintiff.

The respondent can avoid liability. A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

**NO, the judge doesn't have a faculty to take into consideration other facts than presented in the claim for damages.**

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

**All the type of damages (actual damage, profit lost, reliance interest, costs and expenses) are recoverable, there are no specific provisions on the quantification of compensation.**

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

**The liability cannot be validly excluded or limited.**

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

**The person referred to in answer 2 shall be subject to the liability defined under Answer 4 for five years from the publication of the prospectus or notice to which it pertains.**

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

**Law-Decree No. 13 of 1979 on International Private Law :**

- **Ownership and other rights related to custody accounts and dematerialized securities shall be governed by the laws of the country where the securities account or securities custody account is located and to which any transfer has been made to the benefit of the owner or holder of other right. Where there is any reference made in the foreign law to Hungarian law with respect to any dispute, such cross-reference shall be disregarded.**
- **Obligations arising under equity securities shall be governed - in terms of transfer, termination and enforcement - by the law of the country where the legal person is established.**

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

**NO.**

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

**YES.**

**In Hungary since 2010 class action lawsuit is the legal tool allows for a group of investors who have become the casualties of illegal business acts to collectively file**

**claims thereby significantly boosting the amount of compensation a company may have to pay if found guilty.**

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

**see Answer 2**

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**see Answer 5**

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

**Sanctions can be imposed on both of them.**

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

**Only the HFSA as the designated competent authority in accordance with the PD.**

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

**see Answer 7**

It can be sanctioned all of the breaches mentioned in the question.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

- **issue an official warning to issuers and the organizations under its control, to their executive officers and employees, and to persons acquiring a qualifying holding in the event of any infringement of the relevant statutory provisions, internal regulations and the authorization concerning the offering of securities with the said provisions, or - if necessary - shall order compliance within the prescribed deadline;**
- **impose fines in the cases and in the measure prescribed by law;**

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial

position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

**The HFSA shall assess and weight the data and information available and shall take measures and/or impose sanctions consistent with the gravity of the violation, breach or negligence in relation:**

- a) to the gravity of the infringement or negligence;**
- b) to the impact the act has on the principle of prudent and sound management and on the market;**
- c) to the impact the act has on other members of the entire financial system;**
- d) to the risk engendered by the infringement or negligence, the extent of damages, and the inclination to mitigate damages;**
- e) to the cooperation of the responsible parties with the Authority;**
- f) whether or not the person affected by the sanction has acted in good or bad faith, and the material gains acquired by that person through the infringement or negligence;**
- g) to the suppression of the data, facts and information on which the action is based, or the intention to do so;**
- h) to the repeated occurrence and frequency of the infringement;**
- i) to the clients of the institution; and**
- j) to the operation of the institution in question the capital markets.**

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

**The amount of the fine which may be imposed on the bodies and persons referred to in Answer 16 may be between one hundred thousand and two billion HUF.**

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

**No sanction shall be imposed in connection with any negligence or breach of duty after a period of two years from the time when the HFSA has gained knowledge of the act, or after five years from the time it was committed.**

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

**NO.**

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

**YES, the HFSA shall publish on its official website: its decisions reached in the course of regulatory proceedings and the announcement of administrative agreements (and its recommendations concerning the fundamentals of the judicial principles of the HFSA in relation to the bodies and persons referred to in Answer 2.**

**In the course of the disclosures defined above, the HFSA shall comply with the relevant legislation on the protection of personal data, banking secrets, payment secrets, securities secrets, fund secrets, insurance secrets, occupational retirement secrets and business secrets.**

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

**NO.**

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

**YES.**

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

### **General criminal provisions apply**

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

**NO.**

31. Can legal persons be held liable for criminal offences?

**YES.**

32. What conducts constitute a criminal offence under your legislation?

- **Violation of Accounting Regulations:** Any person who: a) violates annual reporting, bookkeeping and auditing obligations, b) infringes the documentation system, prescribed in the Accounting Act or in the regulations adopted under its authorization, and thereby prevents the overview or inspection of his financial situation, or causes an error that is construed as having a significant impact on true and fair view under the Accounting Act concerning the given financial year, is guilty of a felony punishable by imprisonment for up to five years.

- **Illegal Conduct by Executive Employees of Economic Operators:** Any executive employee of an economic operator who deceives any one or more members of the economic operator a) by disclosing or broadcasting false information concerning the financial position of an economic operator or the executive officer of such economic operator in connection with his office, or concerning financial instruments in relation to the economic operator, or by concealing information; b) by concluding any fictitious transaction relating to financial instruments; is guilty of a misdemeanor punishable by imprisonment for up to two years.

- **Capital Investment Fraud:** Any person who induces other persons to make a new capital investment or to increase an existing one, or to sell or reduce a capital investment, a) by disclosing or spreading false information concerning the financial position of an economic operator or the executive officer of such economic operator in connection with his office, or concerning financial instruments in relation to the economic operator, or by concealing information; b) by concluding any fictitious transaction relating to financial instruments; is guilty of a felony punishable by imprisonment for up to three years.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

**YES, except in case of Violation of Accounting Regulations is committed unintentionally, due to negligence.**

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

**Criminal sanctions are imprisonment** (Violation of Accounting Regulations: punishable by imprisonment for up to five years; Illegal Conduct by Executive Employees of Economic Operators: punishable by imprisonment for up to two years; Capital Investment Fraud: felony punishable by imprisonment for up to three years), **community service work; financial penalties (75.000 HUF to 108.000.000 HUF); restraint of profession; expulsion, deprivation of civil rights, banishment and civil forfeiture.**

**All the sanctions other than imprisonment can be applied to all three crimes set out.**

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

**NO.**

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

**The statute of limitation shall expire upon the lapse of time equal to the highest sentence prescribed, or not less than three years, unless the law provides otherwise.**

**The first day of the period of limitation is the day when the crime is actually committed; the day when the act resulting in consequence is carried out; the day when the perpetrator could discharge his duty without the consequences set out in the penal laws; in the case of crimes which manifests in the maintenance of an unlawful state, the day when this state ceases to exist.**

The statute of limitation shall be interrupted by any act of the authorities acting in criminal proceedings against the perpetrator in connection with the crime. The period of limitation shall restart on the day of the interruption.

The maximum time limit – if any act of the authorities acting in criminal proceedings against the perpetrator in connection with the crime don't interrupt the time limit – is the lapse of time equal to the highest sentence prescribed, or not less than three years.

37. Can the competent authority initiate criminal proceedings?

**YES.**

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

**YES.**

The authority members and functionary, as well as if a separate law requires the public body must denounce/make charge/accusation - if the offender is known, with indication of it - (became aware of the responsibility of the crime).

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

**NO.**

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

**YES, in case the HFSA is responsible for the approval of the prospectus did not perform its duties according to the PD framework.**

41. Who is entitled to sue for damages?

**see Answer 6**

42. What circumstances must be proven by the plaintiff?

**see Answer 40**

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

**the opposite and controversial circumstances stated by the plaintiff in Answer 4**

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

**see Answer 10**

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

**NO.**

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

**NO**

47. Is a class action available?

**YES.**



## QUESTIONS

### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

The Act on the Sale of Goods no. 50/2000 covers the sales of financial instruments and, in the case of a consumer, the Act on Consumer Purchase no. 48/2003 covers such transactions. When there is no contractual relationship between the person which has purchased securities and the person which caused damage by way of a prospectus the acts on the Sale of Goods and Consumer Purchase do not apply. In such cases the general rules of Icelandic tort law allow for the pursuit of damages on the grounds of damage inflicted by untrue information in a material aspect and omission of material information in the prospectus, either by intent or negligence.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Article 3 of regulation no. 242/2006 on Public Offers of Securities of 210 million ISK or more and the admittance of Securities to trading, states that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import. 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.

At least one person needs to be responsible for the whole content of the prospectus. Several parties can however be held liable for different parts of the prospectus. In the case of two or more persons liable for different parts of the prospectus the main rule of joint liability holds.

3. Are the persons under the previous question subject to joint and/or several liability?

Article 3 of regulation no. 242/2006 does not state whether those responsible are subject to joint or several liability. Therefor the general principle of Icelandic tort law of joint liability must be applied to such situations. However, there is an exception to the general principle and the liability could therefore in some cases be several.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?



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Prospectus liability applies to untrue information in a material aspect, omission of material information in the prospectus and selling of securities to the public without having published a PD compliant prospectus.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Article 3 of regulation no. 242/2006 does not state for which degree of fault those persons are liable. Therefore the general principle of Icelandic tort law applies, i.e. either intent or negligence is sufficient for liability. Lawyers, accountants and other advisors are under a strict professional liability assessment of negligence.

Art. 27, 40 and 57 of the Act on the Sale of Goods no. 50/2000 and art. 24, 33 and 46 of the Act on Consumer Purchase no. 48/2003 contain rules on strict liability that can be applied to prospectus liability if there is a contractual relationship between parties.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

There are no rules that specify who is entitled to sue for damages. Therefore the main rules of Icelandic law must be applied, that is that a person (legal or natural) who has suffered damage can sue for damages on the grounds of prospectus liability.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

That the plaintiff incurred loss or damage, that the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

In order to avoid liability the defendant may demonstrate that the investor did not suffer any damages, that the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus or a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No.



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10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Financial loss is recoverable and damages equal the damage caused. There is no specific provision on the quantification of compensation.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

The person responsible for the prospectus cannot exclude, proportionate or limit liability. The provisions in the regulation about the specific parties who can be held responsible for information contained in a prospectus is mandatory, and it applies to civil liability. In the case of consumer purchase the laws are peremptory and as such do not allow exclusion or limitation of liability.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

According to the Act on Statute of Limitations no. 150/2007 the time limit to file a claim for damages is four years from the date that necessary information on the damage and the one responsible were acquired or should have been acquired. If a claimant does not make a claim because he lacks necessary information on the claim or the one responsible then his claim will not be limited until one year after the day he acquired or should have acquired such information, to the maximum of 10 years from the date that the claim would otherwise have been limited. A claim for damages can be made in a criminal case or within a year from a conviction in a criminal case, even though a claim has been limited. The time limit to file a claim is suspended when the one responsible admits the validity of the claim, when a lawsuit is initiated to get the claim validated by a judge or when a demand is made for a set-off of the claim before a judge.

Each responsible person mentioned under question 2 is subject to the same time limit.

If the acts on the Sale of Goods and Consumer Purchase do apply the buyer needs to notify the seller without unreasonable delay or at least submit a complaint within two years from the date of accepting delivery of goods.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

According to our jurisdiction the competent law would be where the issuer has his registered office. The Securities transaction Act is silent with respect to conflicts of law, therefore general conflict of law rules would apply.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes, except for settlement.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Yes, the Act on Civil Procedure no. 91/1991 allows for the forming of a class action association for three or more persons for a specific lawsuit. They need to form a specific lawsuit association. Associations of investors do not have the legal capacity to file claims on behalf of their members.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Article 3 of regulation no. 242/2006 on Public Offers of Securities of 210 million ISK or more and the admittance of Securities to trading, states that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

Several persons can be held liable for different parts of the prospectus however at least one person needs to be responsible for the whole content of the prospectus. In the case of two, or more persons, liable for different parts of the prospectus the main rule of joint liability holds.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Administrative fines will be imposed regardless of whether a violation is committed by intent or negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Art. 141 of the Act on Securities Transactions no. 108/2007 states that FME can impose sanctions on any who violate, among other things, Art. 45 on information in a prospectus. No distinction is made between legal and natural persons in this regard.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

FME is the competent body for imposing administrative sanctions.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Sanctions can be applied for untrue information in a material aspect, omission of material information in the prospectus and selling of securities to the public without having published a PD compliant prospectus.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?



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FME may impose administrative fines in the case of untrue information in a material aspect, omission of material information in the prospectus and selling of securities to the public without having published a PD compliant prospectus.

If FME considers that rules concerning public offerings of securities have not been complied with, it may suspend an offering and grant a time limit for rectification, if possible. FME may issue a public statement on the case in question and levy periodic penalty payments or fines on those connected with the public offering of securities as provided for in the Act on Official Supervision of Financial Activities no. 87/1998.

Once FME has received an application for approval of a prospectus, it may require additional information in a prospectus, require information and documents, suspend a public offering of securities or admission to trading on a regulated market for a maximum of 10 consecutive working days on any single occasion, prohibit or suspend advertisements for a maximum of 10 consecutive working days on any single occasion, prohibit a public offering of securities, suspend or request the relevant regulated markets to suspend trading for a maximum of 10 consecutive working days on any single occasion, prohibit trading on a regulated market and make public the fact that an issuer has failed to fulfill obligations according to Chapter VI of Act on Securities Transactions no. 108/2007.

Once securities have been admitted to trading on a regulated market, FME may, in addition require the issuer to disclose all material information which may have an effect on the assessment of the securities admitted to trading on a regulated market, suspend or request the relevant regulated market to suspend trading provisionally or indefinitely and have on-site inspections of issuers carried out within its jurisdiction.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The determination of fines shall take into account the seriousness of the violation, its duration, the violating party's willingness to co-operate and whether the violation is repeated.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Administrative fines for natural persons can range from 10.000 - 20.000.000 ISK.

Administrative fines for legal persons can range from 50.000 - 50.000.000 ISK.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

The time limit for imposing liability is 7 years from the date that the infringement ceased. In connection with prospectuses this means that when the liable action is e.g. wrong information in a prospectus the time limit is calculated from the time where the offer period stopped and the prospectus expired. The time limit is halted when the FME notifies a person about inquisition on an infringement. Such a halt has an effect on all who partook in said infringement.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?



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The FME can reach a settlement with the infringing party in cases where the infringement is not major and does not incur criminal liability.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes, FME publishes on FME website the sanctions that have been imposed and the identity of the responsible person.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Icelandic legislation provides for criminal sanctions to punish prospectus related offences. There is a specific criminal prospectus regime (Art. 145 of the Act on Securities Transactions no. 108/2007). In addition general criminal provisions, such as those on fraud, are applicable.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

Article 3 of regulation no. 242/2006 on Public Offers of Securities of 210 million ISK or more and the admittance of Securities to trading, states that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

Article 145 of the Act on Securities Transactions No. 108/2007 applies to the parties set out in this answer.

31. Can legal persons be held liable for criminal offences?

Yes, they can be fined.



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32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Fines or imprisonment can be applied for untrue information in a material aspect, omission of material information in the prospectus and selling of securities to the public without having published a PD compliant prospectus.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Violations which are subject to fines or imprisonment are subject to sanctions whether committed by intent or negligence.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

The criminal sanctions are fines or imprisonment of up to two years. The amount of fines is not stated in the Act on Securities Transactions no. 108/2007 and will be decided based on, among other things on the financial gain or savings that were a consequence of the offence or its objective.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Yes.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Yes, according to the Act on General Penal Code No. 19/1940 there is a 5 year time limit for imposing criminal liability.

Time limitation is counted as of the day when a punishable offence or inactivity ended. The time limit can be interrupted but there is no maximum time limit. However, an investigation shall not sever a time limitation if the Investigator discontinues the investigation, a Prosecutor decides not to prosecute the suspected party, or if a Prosecutor revokes an indictment. This shall also apply if investigation is suspended for an indefinite period. In case a criminal investigation is suspended by reason of a suspect's evasion this will sever the time limitation, but the time during which the investigation was conducted shall not be included therein. If a Case is dismissed from the District Court and measures are not taken to amend the flaws in the Case preparation within 6 months as of the day when the Case was dismissed, the prior investigation already conducted shall not sever the time limitation.

37. Can the competent authority initiate criminal proceedings?

Criminal proceedings are subject to police investigation, following charges submitted by FME.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes, FME can submit its findings to the police for criminal proceedings. In the case of a major infringement FME shall submit its findings to the police.



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39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Yes, FME must choose whether to impose administrative sanctions or to submit its findings to the police for criminal proceedings.

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Yes. Governmental liability is incurred on basis of the general Icelandic tort rules. However, case law strongly indicates that Governmental liability for public administrations like the FME is narrower than the general rule.

41. Who is entitled to sue for damages?

Any person (legal or natural) can sue for damages if they have incurred a financial loss.

42. What circumstances must be proven by the plaintiff?

The plaintiff must prove intent or negligence and financial loss and causal link between the two.

Approval from the FME is to secure that the prospectus contains all relevant information according to the Securities transaction Act and relevant regulations. However, the FME does not check whether the information is correct. Therefore, the FME can only be liable if the prospectus lacks information which it should contain according to relevant regulations.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The FME must prove that it has not acted negligent/with intent, that the plaintiff has no financial loss and/or that there is no causal link between the negligence/intent and the financial loss. It is enough to prove that one of the listed conditions is not met.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

The financial damages are recoverable. There are no rules about quantification or limitations of liability.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Yes, however there is a general principle in Icelandic law that the employer is responsible for the actions of the employee. The employee would probably only be liable if he would act beyond his job description or act with intent or gross negligence.



46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

According to the Statute of Limitations Act no. 150/2007 the time limit to file a claim for damages is four years from the date that necessary information on the damage and the one responsible were acquired or should have been acquired. The time limit can be interrupted if the Government recognizes its obligation or when the plaintiff takes legal action.

47. Is a class action available?

Yes, the Act on Civil Procedure no. 91/1991 allows for the forming of a class action association for three or more persons for a specific lawsuit. They need to form a specific lawsuit association. Associations of investors do not have the legal capacity to file claims on behalf of their members.



**PROSPECTUS LIABILITY QUESTIONNAIRE OF MAY 16<sup>TH</sup> 2012  
EUROPEAN SECURITIES AND MARKETS AUTHORITY  
(ESMA/2012/CFSC/18 ANN 1)**

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**RESPONSES FROM THE CENTRAL BANK OF IRELAND**

September 05 2012



## Introduction

The Central Bank of Ireland (the “**Bank**”) has been designated competent authority in Ireland for the purposes of Directive 2003/71/EC (the “**Prospectus Directive**”) by the Prospectus (Directive 2003/71/EC) Regulations, 2005 (S.I. No. 324 of 2005) (the “**Regulations**”). As a result, the Bank is the body charged with overseeing compliance with and acting to remedy non-adherence with relevant provisions of the Regulations, the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (the “**2005 Act**”), and any other implementing measures such as the Central Bank’s Prospectus Rules (December 2011) (altogether, “**Irish Prospectus Law**”).

The Bank has considered the questions outlined in the ESMA Prospectus Liability Questionnaire of May 16<sup>th</sup> 2012 and set out the position which exists in Irish law, as of the date of this document as follows:<sup>1</sup>

### 1. Civil liability (restitution for losses from the author of the breach)

1.1. *Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.*

Typically, civil liability will only arise in the context of tort for breach of Irish Prospectus Law, although parties are free to contract with each other to adhere with the terms of such law, in which case contractual liability may also emerge. Generally, therefore, only tortious liability will exist, and this is on account of the creation of a specific statutory tort in section 41 of the Act which provides that a listed group of persons may be liable for omitting information required by law or including untrue information in a prospectus to which the Directive applies.

Please clarify whether the liability regime out of which prospectus liability can arise can be considered as a specific liability regime or general tort.

**CBI:** The response to this question is somewhat complex. Section 41 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 creates a specific regime which imposes liability on specified persons in the event of an untrue statement being contained in, or required information being excluded from, a prospectus. This liability may be invoked through an action in tort. In addition, it may be open for a claimant to sue a relevant person in the tort of negligence, depending on the circumstances. As a result, it is perhaps most correct to state that a specific tort is created.

1.2. *Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).*

Yes, as introduced above, the following persons (herein referred to as “**promoters**” for ease of reference) may be held liable loss or damage occasioned by any party as a result of an omission (to the extent that something is required by law) or misstatement in a prospectus to which the Directive applies:

<sup>1</sup> Note that for the purposes of this document, the domestic regime which applies to Prospectuses which fall outside the scope of the Prospectus Directive has not been considered and answers should be construed accordingly.



- (i) the issuer who has issued the prospectus or on whose behalf the prospectus has been issued,
- (ii) the offeror of securities to which the prospectus relates,
- (iii) every person who has sought the admission of the securities to which the prospectus relates to trading on a regulated market,
- (iv) the guarantor of the issue of securities to which the prospectus relates,
- (v) every person who is a director of the issuer at the time of the issue of the prospectus,
- (vi) every person who has authorised himself or herself to be named and is named in the prospectus as a director of the issuer or as having agreed to become such a director either immediately or after an interval of time,
- (vii) every person being a promoter of the issuer, and
- (viii) every person who has authorised the issue of the prospectus (not being the competent authority designated under Irish prospectus law).<sup>2</sup>

In addition, Irish Prospectus Law specifies that an expert who has given consent to have statements contained in a prospectus to which the Directive applies, may be liable for untrue statements given in certain circumstances.

1.3. *Are the persons under the previous question subject to joint and/or several liability?*

More than one of the persons outlined in 1.2 above may be subject to a successful claim with respect to liability for loss of damages arising out of a particular act or omission. To the extent that more than one person is held jointly liable for such damage or loss arising out of an act or omission, that person shall be jointly and severally liable with all others held liable with respect to that same act or omission in terms of the damages awarded.

1.4. *For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?*

The persons outlined in the response to question 1.2 may be liable for loss or damage incurred by a person who acquires securities to which the prospectus relates which is occasioned by them, and which relates to either:

- (a) an untrue statement; or
- (b) an omission of information required by EU Prospectus Law.<sup>3</sup>

Note, however, that such persons may be able to claim one or more exemptions, e.g. the prospectus was issued without the relevant person's knowledge or consent and public notice of that fact was given forthwith on the person becoming aware of that fact.

It is not clear from the answer if these sanctions may apply to breaches related with the prospectus. Please clarify.

48. **CBI:** Failure to comply with national law implementing the Prospectus Directive, the Directive itself, or certain implementing measures may constitute a "prescribed contravention" for the purposes of the Prospectus (Directive 2003/71/EC) Regulations 2005 (S.I. No. 324 of 2005 (S.I. No. 324 of 2005), i.e. Regulation 93 defines the term as follows:

<sup>2</sup> See Section 41 of the 2005 Act. Note, however, that the same Act provides that only a subset of such persons may be liable in the case of a non-equity security prospectus, in which case a restricted regime regarding liability may apply.

<sup>3</sup> This term has a defined meaning in Irish legislation (as outlined in section 38 of the 2005 Act), and any measures directly applicable in the State in consequence of the Prospectus Directive.



49. “prescribed contravention” means a contravention of -

50.(a) these Regulations,

51.(b) any obligation imposed by the Bank pursuant to a power exercised under these Regulations, or

52.(c) any other provision of EU prospectus law;

53.

**54.** The Central Bank may commence its ASP process with respect to the conducting of a “prescribed contravention” by any person. As a result, any breach of the Directive or local law implementing it may result in Administrative sanctions being pursued.

1.5. *For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?*

The statutory scheme setting out liability with respect to a prospectus contains no specific provisions with respect to degrees of fault, however, it can be seen as most correctly categorised as one establishing strict liability but with respect to which specific defences (as outlined in the statute) may be availed of.

Thus, while it is not necessary to prove intent, a promoter may be capable of claiming the defence outlined at section 43(3)(b) to the 2005 Act which allows a person to avoid liability where:

*“the prospectus was issued without [the promoter’s] knowledge or consent, and that on becoming aware of its issue he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent”*

1.6. *Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?*

The relevant statutory tort extends rights to sue for damages to all persons who acquire any securities on the faith of a prospectus for the loss or damage they may have sustained as a result of the relevant untrue statement or omission.

1.7. *What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?*

In order to establish that the defendant is liable to make recompense to a plaintiff, the plaintiff would need to show a Court that:

(a) The Plaintiff had acquired securities to which the prospectus relates;

(b) The prospectus concerned was valid at the time when the securities were purchased;

(c) The prospectus either contained an untrue statement or an omission of required information;



- (d) The Defendant caused or was responsible for the statement or omission;
- (e) The Plaintiff incurred loss or damage; and
- (f) The Plaintiff's loss or damage was occasioned by the statement or omission concerned.

1.8. *What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?*

Civil liability may be avoided by a promoter where he or she successfully demonstrates:

- (a) that, having consented to become a director of the issuer, the defendant withdrew, in writing, his or her consent before the issue of the prospectus, and that it was issued without his or her authority or consent, or
- (b) that the prospectus was issued without the defendant's knowledge or consent, and that on becoming aware of its issue the defendant forthwith gave reasonable public notice that it was issued without his or her knowledge or consent, or
- (c) that after the issue of the prospectus and before the acquisition of securities thereunder by the plaintiff(s) to the suit, the defendant, on becoming aware of any untrue statement therein or omission of material information required by EU prospectus law to be contained therein, withdrew, in writing, his or her consent thereto and gave reasonable public notice of the withdrawal and of the reason therefor, or
- (d) the suit is brought by the plaintiff(s) solely on the basis of a summary of a prospectus, including any translation thereof, and that summary is not misleading, inaccurate or inconsistent when read together with other parts of the prospectus, or
- (e) that liability is sought with respect to: (i) a statement contained in the prospectus (which did not purport to be made on the authority of an expert or of a public official document) or (ii) a matter required by law, which was omitted but the defendant had reasonable grounds to believe, and did up to the time of the issue of the securities, believe, that the statement was true or that the matter whose omission caused loss was properly omitted, or
- (f) that liability is sought with respect to an untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, but that untrue statement was, however, a correct and fair representation of the statement or copy of or extract from the document, or
- (g) that liability is sought with respect to a statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, but such statement fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation, and the defendant had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it (and were relevant, consent had been given to its being published) and had not withdrawn, in writing, that consent before the publication of the prospectus or, to the defendant's knowledge, before issue of securities thereunder.

In addition, certain defences are open to 'experts' whose statements are contained in a prospectus.



1.9. *Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.*

As a general rule, Courts in Ireland must decide cases on the basis of evidence presented before them by the parties to a dispute. While that is the case, particular applications (e.g. applications for wardship) may take place on the basis of processes and a trial judge will in any event be granted considerable freedom as to the conduct of a particular case within the bounds of the rules of evidence, constitutional obligations with respect to fair procedures, legislation governing the conduct of courts, etc.

1.10. *What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?*

The relevant provision of Irish Prospectus Law outlines that a Plaintiff may be entitled to compensation. No specific provisions are provided on the quantification of compensation; however, common law principles with respect to computation would apply as in any other action for damages. For example, a Plaintiff's right to damages may be curtailed as a result of their failure to mitigate losses despite being presented with an opportunity to do so.

1.11. *Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?*

Although we are not aware of any case law on the matter, we do not consider that there is a possibility to exclude, proportionate, or limit liability a promoter's liability with respect to a prospectus, other than in the circumstances outlined in the answer to question 1.8 outlined above. This is on account of the following:

- The provisions of Irish Prospectus Law which establish the statutory tort allowing an investor to seek compensation from various persons involved in the production of a prospectus in the event of misstatement or omission do not provide for any restriction on the exclusion of liability by such persons. In other statutory torts where liability may be limited, the circumstances in which that have been done are expressly provided for.<sup>4</sup> Given that the 2005 Act outlines in sections 42 and 43 the circumstances in which liability may be excused, it appears as though the Oireachtas has codified the entirety of the circumstances in which liability may be excluded;<sup>5</sup>
- Although exclusionary clauses may be recognised in Irish law as a matter of contract as well as tort, a party seeking to exclude or limit liability through an exclusion clause in a Prospectus would face the challenge of not having a contractual agreement with the investor concerned and no clear agreement between promoter and investor; and
- Finally, section 52 of the 2005 Act states as follows:

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<sup>4</sup> See, for example, section 5 of the Occupiers' Liability Act 1995.

<sup>5</sup> As a side note, the Irish Courts have, in the past, shown themselves willing to restrict such clauses and indeed seek some form of agreement as to their acceptance. Thus, in *Baldwin v Foy and Forrest Way Riding Holidays Ltd* [1997] IEHC 111 the Irish High Court ruled that the defendants were negligent in permitting the plaintiff, who was a novice horsewoman to ride cross-country on unsuitable terrain on a four year old horse. The rider incurred damages as a result of an accident with the horse and succeeded in her action, notwithstanding that there were a number of disclaimer notices posted in the area through which she rode, one of which stated that riding was a "risk sport" and that "animals can be unpredictable." The trial judge held that the notices concerned could not be seen to be a disclaimer from the defendant and "it [was] not possible to draw an inference from the evidence that the Plaintiff agreed to waive any right of action she might have in respect of negligence on the part of the Defendants."



52. *A condition – [...] requiring or binding an applicant for securities to waive compliance with any requirement of this Part [...] shall be void.*

Provisions imposing statutory liability are contained within the relevant Part of that Act.<sup>6</sup>

1.12. *Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?*

Yes. The general time limit for instituting actions for personal injuries is two years from the date of accrual of the cause of action, or the date of discovery of the necessary information to make a claim, whichever is later, with respect to a claim for a breach of duty.<sup>7</sup>

1.13. *According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?*

No statutory provision exists with respect to conflict of laws and prospectuses alone. In this respect general conflict of laws principles would apply.

1.14. *Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.*

Typically yes, however, where an entity is a consumer for the purposes of the Central Bank Act, 1942 (Financial Services Ombudsman Council) Regulations, 2005 (SI 190/2005), they may bring a complaint to the Financial Services Ombudsman (the “FSO”). The FSO is given power by Part VII B of the Central Bank Act 1942 to investigate and make findings with respect the conduct of a regulated financial service provider involving-

- (a) the provision of a financial service by a financial service provider, or
- (b) an offer by a financial service provider to provide such a service, or
- (c) a failure by a financial service provider to provide a particular financial service that has been requested.

It would be for the FSO to decide whether or not a “financial service” was involved in a particular case with respect to a prospectus. The Ombudsman’s decisions are open to appeal to the High Court as a result of 57CL of the Central Bank Act 1942.

1.15. *Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).*

Although theoretically available in some circumstances, (for example, Order 15 rule 9 of the Rules of the Superior Courts 1986 facilitates a rudimentary form of class action known as a “representative action”),<sup>8</sup> such actions are quite restrictive in terms of when available, and even where available, the

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<sup>6</sup> See section 41 (Part 5) of the 2005 Act.

<sup>7</sup> See Quill, E: *Torts in Ireland* (2009)(3<sup>rd</sup> ed.), Gill and MacMillan: Dublin, p.494.

<sup>8</sup> See the Law Reform Commission’s 2003 consultation paper on the issue of multi-party litigation on Ireland for a full account of the advantages and limitations of such forms of class actions, and those of the limited number of other class action suits available in Ireland.



right to pursue actions in this manner is invoked quite rarely. Multi-plaintiff litigation is, however, not uncommon in Ireland and multi-Plaintiff personal injury litigation is reasonably commonplace in Ireland (see for example various cases brought with respect to army deafness, blood product contamination and effects of tobacco usage, amongst others), and a typical mechanism for doing this has been through the bringing of a “test case”, which has implications for later cases “waiting in the wings”. When a precedent decision is set, remaining parties will be inclined to settle so as to mitigate costs, although each subsequent case will technically be judged on its own merits and require causation to be proved in each circumstance.

## 2. Administrative Liability

2.1. *Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?*

Any entity which is required to perform a particular function or discharge a particular obligation under the regulations may be liable to administrative sanction where such function or obligation is not performed or discharged. This includes persons such as issuers, offerors, market operators, etc.

Clarifications regarding whether the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it.

**CBI:** Apart from experts (to whom specific rules apply), potentially any of the following persons may be held liable for the whole content of a prospectus (insofar as it is misleading or omits something required by law), subject to one of the relevant defences not applying:

- (i) the issuer who has issued the prospectus or on whose behalf the prospectus has been issued,
- (ii) the offeror of securities to which the prospectus relates,
- (iii) every person who has sought the admission of the securities to which the prospectus relates to trading on a regulated market,
- (iv) the guarantor of the issue of securities to which the prospectus relates,
- (v) every person who is a director of the issuer at the time of the issue of the prospectus,
- (vi) every person who has authorised himself or herself to be named and is named in the prospectus as a director of the issuer or as having agreed to become such a director either immediately or after an interval of time,
- (vii) every person being a promoter of the issuer,
- (viii) every person who has authorised the issue of the prospectus (not being the competent authority designated under Irish prospectus law).



An “expert” who’s opinion has been cited in a prospectus may be liable only with respect to any untrue statement in the prospectus, what was made by the expert (or purported to have been made), where that expert consented to such a statement being used.

Please clarify whether several persons can be held liable for different parts of the prospectus.

55. **CBI:** Specific parties are listed as having particular obligations under the relevant national law. Where those obligations are breached, those parties may be liable to administrative sanction.

56. Otherwise, certain of the obligations imposed by national law are of general application, i.e. they apply to all persons. See for example, regulation 12 of the Prospectus (Directive 2003/71/EC) Regulations 2005 (S.I. No. 324 of 2005) which states that:

*57. Subject to Regulations 9 and 10, no offer of securities to the public shall be made in the State without publication of a prospectus in respect of the offer that -*

*58.(a) in a case where the State is the Home Member State, has been approved by the Bank pursuant to these Regulations and any other provisions of Irish prospectus law, or*

*59.(b) in a case where the State is a Host Member State, has been approved by the competent authority of the Home Member State pursuant to the applicable provisions of EU prospectus law.*

60. In the event of breach of a general obligation such as regulation 12, one or more than one responsible person may be found liable for administrative sanction.

2.2. *For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?*

The degree of fault to which persons may be held liable is strict liability.

2.3. *Can the sanctions be imposed on both legal and natural persons or solely on one type of person?*

The Regulations, and administrative sanctions, apply to both natural and legal persons without differentiation.

2.4. *Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?*

The competent body for imposing administrative sanctions is the Central Bank, which is also the Central Competent Authority in Ireland, designated for the purposes of Article 21 of the Directive – see regulation 78 of the Regulations. The Bank may, where it seeks to do so, apply to Court to endorse penalties imposed.

2.5. *For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the*



*public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?*

Breach of any of the obligations outlined in the Regulations may result in sanction through the Administrative Sanctions powers outlined in Part 15 of the Regulations. Specific breaches are not enumerated for being open to sanction, unlike the case for criminal law offences (the situation with respect to which is outlined in 3 below).

2.6. *What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?*

The Regulations require that no particular form of sanction be imposed in any one circumstance. The Bank's sanctioning powers may be summarised as follows and the Bank is not expressly prohibited or required to impose any one or more of these in any particular circumstance:

- (a) a private caution or reprimand,
- (b) a public caution or reprimand,
- (c) a direction to pay to the Bank a monetary penalty (but not exceeding €2,500,000 in any case),
- (d) a direction disqualifying the person from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for such time as is specified in the order,
- (e) if the person is continuing to commit a prescribed contravention, a direction ordering the person to cease committing the prescribed contravention, and
- (f) a direction to pay to the Bank all or a specified part of the costs incurred by the Bank in investigating the matter.

2.7. *Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?*

No. The Regulations are silent with respect to factors to be taken into account when assigning administrative sanctions.

2.8. *What is the range of fines (maximum –or unlimited- and minimum amounts)?*

With respect to fines which may be imposed by the Bank, when in receipt of an adverse assessment, there is no minimum amount with respect to a fine which may be levied. The Regulations do, however, outline that a maximum fine of two million, five hundred thousand euro (€2,500,000) may be imposed as a result of any one adverse assessment.

2.9. *Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.*



No time limits for initiating or concluding administrative proceedings are imposed in the relevant regulations.

*2.10. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?*

Yes, the Regulations provide that the Bank may enter into settlement agreements where it suspects that a person has committed or is committing a contravention. Such an agreement is binding on both parties and may result in the imposition of formal sanctions or otherwise (see regulation 106 of the Regulations).

*2.11. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.*

Yes, The Bank must publish details of all sanctions imposed, with the exception of a private reprimand, unless the Bank considers that the disclosure would:

- (a) seriously jeopardise the financial markets, or
- (b) cause disproportionate damage to the parties involved.

(see regulation 103 of the Regulations)

*2.12. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?*

No, while other administrative sanctions regimes operated by the Central Bank do allow for appeal to an administrative tribunal, adverse assessments with respect to breaches of the Regulations may only be appealed to the Courts. No other appeal is provided for in the Regulations.

*2.13. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?*

Yes, regulation 98 of the Regulations allows the recipient of an adverse assessment to appeal that assessment, and any penalties associated with the same, to the High Court.

### **3. Criminal liability**

*3.1. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.*

Yes, specific offences are created and maximum sanctions specified with respect to breach of certain obligations imposed under Irish prospectus law.

*3.2. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.*



No, the relevant legislation provides that where a prospectus is issued and-

(a) includes any untrue statement, or

(b) omits any information required by EU prospectus law to be contained in it,

any person who authorised the issue of the prospectus (not being the competent authority designated under Irish prospectus law) shall be guilty of an offence unless certain circumstances may be proven.

3.3. *Can legal persons be held liable for criminal offences?*

Yes. As a general rule, a company, in Irish law, is capable of committing a crime and incurring the punishment prescribed, e.g. a fine.

3.4. *What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?*

Irish prospectus law criminalises a range of conduct, with different penalties prescribed depending on the perceived seriousness of the offence. The conduct criminalised includes (note these are summaries of the relevant “criminalised” activities):

- Provision of an untrue statement in a prospectus (section 48 of the 2005 Act);
- Omission of information required by EU Prospectus law (section 48 of the 2005 Act);
- Inclusion of a statement attributed to an expert outside of prescribed requirements (Section 45(3) of the 2005 Act);
- Offering securities without complying with the provisions of Irish Prospectus Law, where required (Reg. 14 of the Regulations);
- Having securities admitted to trade without complying with the provisions of Irish Prospectus Law, where required (Reg. 15 of the Regulations);
- Admitting securities to trading in circumstances where it is known that admission involves a contravention of Irish Prospectus Law (Reg. 16 of the Regulations);
- Failing to file a prospectus with the Bank where required (Reg. 38 of the Regulations);
- Failing to publish or make available a prospectus where required (Regs. 44 & 46 of the Regulations);
- Failing to supply a prospectus to an investor where required (Reg. 49 of the Regulations);
- Failing to comply with a requirement concerning advertisement (Reg. 74 of the Regulations);
- Obstructing or impeding an Authorised Officer appointed by the Bank under the Regulations (Reg. 86 of the Regulations); and
- Having a person subject to certain administrative sanctions under the Regulations involved in the management of a financial services provider (Reg. 105 of the Regulations).

3.5. *Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?*



Irish criminal law generally requires that in order for an act or omission to incur criminal liability, the person concerned must have both committed the act or omission concerned and intended – or may be presumed to have intended – to do so. Thus there must be both the occurrence of the *actus rea* or ‘guilty act’ and *mens rea* or ‘guilty mind’.

3.6. *What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).*

Irish prospectus law criminalises a range of conduct, with differing penalties applying dependent on how serious the offence is deemed to be. In terms of penalties, these are limited to being either “summary only” penalties or “each way” penalties; i.e. some offences are liable to having summary only penalties imposed upon conviction, and others may attract “each way” penalties depending on the type of prosecution undertaken.

The “summary only” penalties are:

- A fine of not exceeding €5,000, or
- A term of imprisonment, not exceeding 12 months.

The “each way” penalties are:

- On summary conviction the “summary only” penalties, or
- On conviction on indictment, a fine not exceeding €1,000,000 or imprisonment for a term not exceeding five years, or both.

3.7. *Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?*

On the understanding that this question does not relate to determining whether or not an offence has occurred (i.e. criminal liability has already been found to exist and the question which now arises is the penalty to be imposed), the answer is yes; a trial judge may take in account the previous conduct of the convicted person of relevance.

3.8. *Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.*

Criminal offences in Ireland fall within three categories: (i) those triable on indictment; (ii) those triable summarily; (ii) and “hybrid” offences which may be tried either way.

With respect to (i) and (iii), the answer is no. Delay, however, in certain circumstances may be seen as unduly prejudicial to the rights of the accused and a prosecution may not be allowed to proceed where the trial judge considers the delay has reduced chances of a fair trial. An example of where such a finding might be made is where the delay has meant that key witnesses are no longer available to give evidence. Otherwise there is no limit on the bringing of criminal proceedings.

With respect to (ii), the answer is yes. Section 10(4) of the Petty Sessions (Ireland) Act 1851 provides that a prosecution must be initiated within six months of an offence being committed. This restriction may be disapplied with respect to particular offence, however, that has not taken place with respect to any of the offences provided for in Irish Prospectus Law.



All offences under Irish Prospectus law fall into either categories (ii) and (iii), with the effect that some prosecutions may be brought without hard time limit, but others are restricted to occurring within six months of the relevant offence occurring.

*3.9. Can the competent authority initiate criminal proceedings?*

Yes, in certain circumstances. The Bank is entitled to prosecute persons for conduct criminalised by Irish prospectus law, such as providing untrue statements or omitting required information from a prospectus, provided such prosecution is in a “summary manner”, i.e. where a penalty of not greater than five thousand euro or twelve months imprisonment is sought. The Director of Public Prosecutions may initiate proceedings “on indictment” in which case greater penalties may be sought. The Bank has the power to refer matters to relevant law enforcement authorities in the State where it seeks to do so. See section 48(1) of the Investment Funds, Companies, and Miscellaneous Provisions Act 2005 and section 61DA of the Central Bank Act 1942.

*3.10. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.*

Yes. Where the Bank is not the prosecuting authority, it is required to provide the relevant law enforcement body within the State (or otherwise) any information relevant which leads the Bank to suspect the commission of an offence may have occurred. See section 33AK(3) of the Central Bank Act 1942.

*3.11. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?*

Yes, the Regulations explicitly state that where a person receives a fine as an administrative sanction and the conduct which led to the imposition of the fine may also constitute an offence under the law of the State, that same person cannot then be prosecuted for such an offence on grounds of the same conduct, and vice versa. Other, lesser, administrative sanctions may be imposed without impacting on the ability of criminal proceedings being taken, however, and vice versa. See regulation 104 of the Regulations.

#### **4. Government Liability (restitution for losses from the Government)**

*4.1. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer ‘no’ to this question, the questions thereafter do not require an answer.*

No. Irish legislation provides for no such right.

Applicants may challenge the Central Bank’s action by way of a judicial review, however, in that case, the challenging party would need to show: (i) standing (that they had an interest in the proceedings); (ii) loss occasioned by the Bank’s action; and (iii) bad faith on behalf of the Bank. This form of redress is not provided for in legislation and is open with respect to the action of any Irish state body.

*4.2. Who is entitled to sue for damages?*

See 4.1



4.3. *What circumstances must be proven by the plaintiff?*

See 4.1

4.4. *What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?*

See 4.1

4.5. *What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?*

See 4.1

4.6. *Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.*

See 4.1

4.7. *Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?*

See 4.1

4.8. *Is a class action available?*

See 4.1



# CONSOB

COMMISSIONE NAZIONALE  
PER LE SOCIETA' E LA BORSA

## ESMA Prospectus Liability Questionnaire – Consob answers

### INTRODUCTORY NOTE

The answers to this questionnaire provided by Consob want to give an overview of the Italian civil, administrative, government, criminal liability and sanctions regime in connection with securities prospectuses. Therefore, the answers to this questionnaire should not be considered as an exhaustive and detailed description of all potentially applicable legal provisions in this context and do not affect under no circumstances future positions of the authority. Moreover, the answers should not prejudice positions and/or interpretations of the competent courts or any other competent authorities regarding any legal regulations described in the following. The relevant courts are exclusively competent to finally decide upon legal matters.

### QUESTIONS

#### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

In Italy article 94 (8) (9) of Legislative Decree no. 58/1998 (hereinafter, the "Consolidated Law") provides for a specific civil liability regime which could arise as a result of the content and use of a defective prospectus (please see below). According to the decisions of the Supreme Court (see for example order No. 8034/2011 and ruling No. 14056/2010), prospectus liability is an extra-contractual civil liability (i.e. tortious liability, article 2043 Civil Code)<sup>1</sup>.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

According to article 94, paragraph 8, of the Consolidated Law, *"The issuer, offeror and any guarantor, if applicable, as well as any other persons responsible for the information contained in the prospectus shall be liable, each in relation to the parts of the prospectus of own responsibility, for the damages suffered by the investor having relied reasonably on the truth and completeness of the information contained in the prospectus, unless he/she/it gives evidence to have taken all reasonable care in order to ensure that such information was in accordance with the facts and contained no omission likely to affect its import"*.

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<sup>1</sup> However, it is worth noting that some Courts stated that prospectus liability is a contractual civil liability.

Furthermore, according to article 94, paragraph 9, of the Consolidated Law: *“The intermediary responsible for the placement shall be liable for false information or omissions that could influence the decisions of a reasonable investor, unless said intermediary proves that the diligence, provided for by the previous paragraph, was adopted”*.

The provision of article 94, paragraph 8, of the Consolidated Law is also applicable to the person asking for the admission to trading as regards the prospectus required for the admission to trading on a regulated market (article 113 (1) of the Consolidated Law).

3. Are the persons under the previous question subject to joint and/or several liability?

As stated in the response to question 2, article 94, paragraph 8, of the Consolidated Law provides that each person mentioned therein - *"the issuer, offeror and any guarantor, if applicable, as well as any other persons responsible for the information contained in the prospectus"* - shall be liable only in relation to the part of the prospectus of own responsibility.

When more than one person have responsibility for the same specific part of the prospectus to whom a claim for compensation refers, they are all subject to joint and several liability (article 2055 of Civil Code).

The intermediary responsible for the placement is subject to a joint and several liability, pursuant to article 94, paragraph 9, of the Consolidated Law, together with the persons responsible for specific parts of the prospectus.

In the event of joint liability, a plaintiff can choose the person from whom to claim full compensation. The person who has paid this amount in full has the right of recourse against the other persons deemed responsible and, following the exercise of such a right, the Court can reallocate the damages to each party in proportion to the comparative responsibility assigned to the other parties, taking into account the seriousness of the respective fault and the consequences resulting therefrom (article 2055, paragraph 2, of Civil Code).

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

The persons mentioned in the answer to question No. 2 are liable for both untrue information in a material aspect and omission of material information in the prospectus, provided that the damage and the causal link between this damage and the abovementioned breaches of duties are also established in accordance with the provisions of the Civil Code (article 94, paragraphs 8 and 9, of the Consolidated Law). See also the answer to question No. 7 below.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Those persons are liable not only for intent but also for negligence (see article 94, paragraphs 8 and 9, of the Consolidated Law, in the answer to question No. 2 above). The fault is presumed and the

respondent shall prove to have taken all reasonable care in order to ensure that the information contained in the prospectus was in accordance with the facts and the prospectus contained no omission likely to affect its import (please see below).

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Investors are entitled to sue for damages suffered for having reasonably relied on the truth and completeness of the information contained in the prospectus (article 94, paragraphs 8) and 9), of the Consolidated Law).

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

On the basis of article 94, paragraphs 8) and 9) of the Consolidated Law (see answer to question No. 2 above), the plaintiff must prove:

- that the prospectus omitted material information or contained untrue information,
- the damages suffered,
- the causal link between the investment decision and the incomplete or false information contained in the prospectus (i.e. "reliance"), and
- the causal link between the damages and the misinformation or omission in the prospectus.

However, according to the Supreme Court decisions (see for example ruling No. 14056/2010), the causal link on the reliance of the investor is presumed, unless the defendant proves otherwise.

When the claim for compensation is brought to Court after five years from the publication of the prospectus, the plaintiff must also prove to have discovered the false nature of the information or the omission in the two years prior to the action is taken (article 94 paragraph 11 of the Consolidated Law).

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

On the basis of article 94, paragraphs 8) and 9) of the Consolidated Law (see answer to question No. 2 above), in order to avoid liability, the respondent must prove:

- that the part of the prospectus containing the misinformation or the omission did not fall within his responsibility (paragraph 8), or
- to have taken all reasonable care in order to ensure that the information contained in the prospectus was in accordance with the facts and the prospectus contained no omission likely to affect its import (paragraphs 8 and 9); or
- the circumstances to disprove the evidence the claimant has provided (please, see answer to question No. 7); or
- the absence of the causal link on the investor's reliance which, as said above, is presumed.

The respondent can also demonstrate the contributory negligence of the claimant or other facts interrupting the causal link.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No, the judge does not have such a faculty.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The Consolidated Law does not indicate which damages are recoverable nor provides for specific provisions on the quantification of compensation.

Pursuant to the general rules of the Civil Code relating to the assessment of damages in the context of extra-contractual liability (article 2056 of Civil Code), recoverable damages encompass the "*damnum emergens*" and the "*lucrum cessans*" which are a direct consequence of the tort. The "*damnum emergens*" is the amount of the loss which the plaintiff has suffered. The "*lucrum cessans*" is the gain the plaintiff has been deprived of (article 1223 of Civil Code as referred to in article 2056 of Civil Code).

When the precise amount of the damages cannot be proved, they are equitably quantified by the judge (article 1226 of Civil Code, as referred to in article 2056 of Civil Code). Moreover, pursuant to the "*contributory negligence rule*" set out in article 1227 of Civil Code, as referred to in article 2056 of Civil Code, compensation is decreased according to the seriousness of the fault of the claimant and the extent of the consequences stemmed from the claimant's behaviour. Compensation is not due for damages which the claimant could have avoided using ordinary diligence.

Finally, according to the Supreme Court's decisions (see ruling No. 14056/2010), compensation should be quantified on the basis of the difference between the price paid by the investor for the securities and the intrinsic value of the securities if the prospectus had contained true and complete information. It should not take account of the value of the securities immediately after the disclosure of the misinformation or the incompleteness of the prospectus.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

Article 94, paragraph 8, of Consolidated Law states that the persons responsible for the information contained in the prospectus shall be liable each in relation to the part of the prospectus of own responsibility (see answer to question No. 2).

No other limitations of liability are possible.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Claims for compensation may be brought within five years of publication of the prospectus, unless the investor can prove having discovered the false nature of the information or the omission in the two years prior to the action is taken (article 94 paragraph 11 of the Consolidated Law).

The said time limit can be interrupted by an action before court. On the contrary, it is debatable whether or not this term could be either suspended or interrupted for causes different from an action brought before a competent Court.

Each responsible person mentioned in answer to question No. 2 is subject to the same time limit.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

As stated in answer to question No. 1, according to the jurisprudence of the Supreme Court (see, for example, order no. 8034/2011), the civil prospectus liability is a liability in tort. Therefore, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) could be considered in order to determine the competent law to deal with issues on civil liability of prospectuses related to international public offerings. According to the general rule set forth in article 4 of Regulation No. 864/2007, the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country where the damage occurs or, when the defendant and the claimant are both habitually resident in the same country at the time when the damage occurs, the law of that country<sup>2</sup>.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Restitution of loss can also be received on the basis of a settlement agreement (article 1965 Civil Code), that is a transaction stipulated out of court.

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<sup>2</sup> In the event that prospectus liability is regarded by the court as a form of “culpa in contrahendo” liability, the competent law should be the law applicable to the contract determined in accordance with Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I).

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

As far as prospectus liability is concerned, Italian jurisdiction does not lay down provisions on the class action.

In this regard, the general provision on the class action, introduced recently in Italy (see article 140 bis of Consumer Code, which came into force on 1 January 2010), does not apply to the prospectus liability.

### **Administrative liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

As far as public offers are concerned, article 191 of the Consolidated Law provides for the application of administrative sanctions against "whoever" violates the provisions on prospectus referred to in such article.

Several persons can be held liable for different parts of the prospectus to the extent they have violated the provisions referred to in the above-mentioned article 191.

As far as the admission to trading is concerned, article 192-ter of Consolidated Law provides that only the issuer or the person asking for the admission to trading is subject to administrative sanctions when they violate the provisions referred to in such article.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Those persons are liable for intent or negligence (article 3 of Law No. 689/1981).

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

As regards public offer, the sanctions shall be imposed on natural persons. Nevertheless, article 195, paragraph 9, of the Consolidated Law provides that companies and entities, which offenders belong to, shall be jointly and severally liable with the latter for payment of the sanction and of the expenses for the publication of the measure applying the sanction. Therefore, Consob can directly require the payment of sanctions to the legal entities those natural persons belong to. The above-mentioned legal entities shall exercise the right of recourse against the natural persons responsible for the offences.

As regards the admission to trading on a regulated market, the sanction shall be imposed on either the issuer or the person asking for the admission to trading (article 192-ter, paragraph 1, of Consolidated Law).

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The administrative sanctions referred to in answer to question No. 16 are imposed by Consob, as competent authority designated in accordance with the PD (Article 195 of Consolidated Law).

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Administrative sanctions are provided, for example, for the following violations:

- offering of securities to the public without having transmitted to Consob a prospectus for approval (articles 94(1) and 191(1) of the Consolidated Law);

- the prospectus does not contain the information that, according to the characteristics of the financial products<sup>3</sup> and the issuer, is necessary to enable the investors to make an informed assessment of the assets and liabilities, profits and losses, financial position and prospects of the issuer and of any guarantor, and of the financial products and related rights (articles 94(2), 113, 191(2) and 192-ter of the Consolidated Law);

- the prospectus has not been drawn up in compliance with the prospectus rules (contained in the Consolidated Law and in Consob Regulation No. 11971 on Issuers) or with the Consob's request for supplementary information, if any (articles 94(3) (5) (6) (7), 95 (1) (2) (4), 96, 97, 113 (3), 191(2) and 192-ter of the Consolidated Law);

- advertisements related to a public offer/admission to trading on a regulated market do not comply with the relevant provisions (articles 101, 191 (2), 113 (4) and 192-ter of the Consolidated Law);

- the offeror, the issuer and the person placing the financial products, as well as persons in a control relationship with, or related to, such persons fail to comply with the provisions that prohibit to divulge information not consistent with the prospectus;

- any person who fails to comply with Consob's decision to suspend or prohibit the public offering. Consob may suspend the public offering as a precautionary measure for a maximum of ten consecutive working days on any single occasion in the event of a well-founded suspicion of violation of the PD provisions and of the related implementing measures. Consob may prohibit the public offering: a) if there are grounds to suspect violation of the PD provisions and of the related implementing measures; b) if violation of the PD provisions and of the related implementing measures are confirmed (articles 99 (1), lett. a), c), b), and 191 (2) of the Consolidated Law).

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<sup>3</sup> In Italy "Financial products" means financial instruments as referred to in article 4, paragraph 1, no. 17, of Directive 2004/39/EC (MiFID) and any other form of investment of financial nature.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

For the infringements referred to in the previous answer the sanctions envisaged are as follows:

- for offering of securities to the public without having transmitted to Consob a prospectus for approval (articles 94(1) and 191(1) of the Consolidated Law): a pecuniary administrative sanction not less than  $\frac{1}{4}$  of the total amount of the offering up to twice the same amount or, if the total amount of the offering is not known, from EUR 100,000 up to EUR 2,000,000.  
The application of the said pecuniary sanction is accompanied, as “ancillary sanctions”, by the temporary loss (from 2 months up to 3 years) of the integrity requirements envisaged by the Consolidated Law for acting as tied agent (as referred to in MiFID) or director/statutory auditor of authorized firms, as well as of the capacity to be appointed as member of the management or supervisory body of an issuer whose securities are admitted to trading on a regulated market or of an undertaking belonging to the same group of the latter (article 191(3) of the Consolidated Law);
- for all the other violations listed in the previous answer: a pecuniary administrative sanction from EUR 5,000 up to EUR 500,000 (articles 191(2) and 192-ter of the Consolidated Law).

Furthermore, Consob can exercise the powers set out by Articles 21, paragraphs 3 and 4, and 23 of Directive 2003/71/CE (e.g. prohibition or suspension of a public offer or trading, make public the fact that an issuer is failing to comply with its obligation, prohibition or suspension of advertisements, etc.).

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Yes, there are. Italian law provides several factors to be considered when determining the amount of the administrative sanction within the range set out by the law: the seriousness of the violation (which takes also into account the degree of fault and the seriousness of the intent), the financial position of the offender, the cooperation with the competent authority, the cooperation to eliminate or mitigate the consequences of the violation, as well as the personality of the offender (article 11 of Law No. 689/1981).

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Please, see answer to question No. 21.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

The time limit for initiating and ending the administrative sanctioning proceeding is one hundred eighty days as from Consob has ascertained the violation or within three hundred sixty days if the party concerned is abroad. The interested party shall submit its reasoning within thirty days. Consob has to issue a decree stating the grounds for its decision and notify the charges to the parties concerned. The proceedings shall allow all parties the opportunity to state their case and have access to the investigation file. Transcripts shall be taken of the proceedings. Investigatory and adjudicatory functions shall be separate.

However, the pecuniary administrative sanctions cannot be applied after five years from the day on which the violation has been committed (article 28 (1) of Law No. 689/1981).

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No settlement procedure with Consob is available.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

The measure imposing sanctions shall be published in abridged form in Consob's Bulletin. The publication includes the identity of the responsible person. Taking into account the nature of the offence and the interests involved, Consob may establish further methods of publicizing the measure, charging the related expenses to the offender, or excluding publication of the measure where such publication may place the financial markets at serious risk or cause disproportionate damage to the parties (article 195 of the Consolidated Law).

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

No, there is not.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Against the sanctions imposed by Consob the party concerned may appeal a civil court. Furthermore, the competent court's decision may be appealed against the Supreme Court for legitimacy reasons.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, it does. Article 173-*bis* of the Consolidated Law provides criminal sanctions to punish prospectus related offences. See also answer to question No. 34 below.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

The above-mentioned article 173-*bis* of the Consolidated Law punishes "whoever" commits the prospectus offences set out in such provision. Please see answers to questions below.

31. Can legal persons be held liable for criminal offences?

No, legal persons cannot be held liable for criminal prospectus related offences (see also Supreme Criminal Court, Plenum, 23 June 2011, No. 34476).

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Untrue information or omission of material data or material information in a prospectus for public offerings or admission to trading. See also answer to question 33 below.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Yes, it does. The offence has to be committed with the specific intent of deceiving the addressees of the prospectus, with a view of obtaining an undue profit for himself or for others.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

The criminal sanction set out in article 173-*bis* of the Consolidated Law is imprisonment from one to five years. There are also some general "ancillary sanctions" set out in the Criminal Code, applying under certain conditions to all crimes, including prospectus related offences. For instance, a conviction for not less than three years of imprisonment implies the disqualification from public office for a period of five years (article 29 of Criminal Code); or, a conviction for not less than six months of imprisonment implies the disqualification from managerial and auditor roles of a legal person when the convict has committed the crime abusing of the powers, or violating the duties, related to the above-mentioned roles (article 32-*bis* of Criminal Code).

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

No, it cannot.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Yes, there is a time limit of six years for imposing the criminal prospectus related sanction (article 157 of Criminal Code). Such a time limit could be suspended or interrupted (articles 159-160 of Criminal Code), but the defendant however can no longer be subject to a criminal sanction after a period from seven years and six months, or after a longer period up to a maximum of twelve years, depending on whether or not the court has ascertained the criminal offender is recidivist, habitual, recurrent (article 161 of Criminal Code).

37. Can the competent authority initiate criminal proceedings?

No, it cannot.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes, it should. Pursuant to Article 4(11) of the Consolidated Law, while performing their supervisory functions, Consob's employees are "public officials" and shall report any irregularities they detect exclusively to Consob, even when such irregularities appear to be a criminal offence. It is up to the Board of Consob ("Commissione") to resolve if, how and when reporting to the criminal prosecutor.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Generally speaking, they do not.

Nevertheless, if the subject matter of a criminal proceeding is the same fact as the subject matter of an administrative proceeding, it should be applied the provision of article 9 of Law No. 689/1981, according to which when a same fact is punished by both a criminal provision and an administrative provision, the special provision shall apply. As regards prospectus liability, in Italy the criminal provision should be regarded as special against the administrative provision. Therefore, in such a case, criminal proceedings can impact the possibility for a competent authority to impose administrative sanctions.

### **Government liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

The Italian law does not provide for a special liability regime of the Government or Consob in the context of its approval of prospectuses.

However, pursuant to article 2043 of Civil Code and article 24 paragraph 6-*bis* of Law No. 262 of 2005, Consob, its staff and the members of its Commission are held liable for damages resulting from acts or behaviours committed intentionally or with gross negligence in the performance of their supervisory functions. Therefore, investors can claim damages against Consob for losses incurred due to the subscription/acquisition of securities based on misinformation in a prospectus on the ground of the general tort provision of the Italian Civil Code concerning non-contractual obligations (article 2043 Civil Code), if they prove Consob's intent or gross negligence in performing its activity of controlling the prospectus (article 24, paragraph 6-*bis* of Law No. 262 of 2005).

41. Who is entitled to sue for damages?

Investors who claim for damages due to untrue information or material omission in the prospectus approved by the competent authority (CONSOB).

42. What circumstances must be proven by the plaintiff?

The plaintiff must prove:

- that the prospectus omitted material information or contained untrue information;
- the tortious behaviour on part of Consob based on a violation of a Prospectus Directive provision (as implemented in the Italian laws and regulations) regarding the scrutiny of the completeness of the prospectus, including the consistency of the information given and its comprehensibility;
- the evidence of intent or gross negligence by Consob in performing its control on the prospectus;
- the losses suffered by the investor; and
- the causal link: that the damages was caused by the tortious behaviour of Consob and that the investment decision was actually based on the incomplete or misleading prospectus (i.e. reliance).

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

In order to avoid liability, Consob must demonstrate the circumstances to disprove the evidence the plaintiff has provided (please, see answer to question No. 42).

The defendant can also prove the contributory negligence of the plaintiff or other facts interrupting the causality (article 2697 Civil Code).

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

The criteria for determining the recoverable damages are the same already described above in the section concerning civil liability. Please, see answer to question No. 10.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

As stated in the answer to question No. 40, according to Italian law (article 24, paragraph 6–*bis* of Law No. 262 of 2005), Consob, its employees and the members of its Commission, in performing their supervisory functions, are held liable for damages caused by gross negligence or with intent.

Consob can bring an action against its own employees for compensation paid to investors, provided that such employees have caused the damages with intent or gross negligence.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

Yes, there is a time limit of 5 years (article 2947 Civil Code).

The time limit can be suspended and interrupted.

The prescription begins when the investor suffers the damage.

47. Is a class action available?

No, it is not. Article 140-bis of Consumer Code should not be applicable vis-à-vis the competent authority.

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

**By initiating legal proceedings in court according to the general Civil Law and Civil Procedure Law, an investor shall be entitled to demand that the loss be covered by the persons named in the prospectus as responsible for the fairness of the information contained therein, where it has incurred loss due to false or incomplete information contained in the issue prospectus. Thus the investor can demand loss resulting from tort.**

**P.S. FCMC cannot give more detailed explanation or practice on issue as no investors has ever tried to initiate court proceedings based on false or incomplete information contained in the issue prospectus.**

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

**Our national law does not prescribe specific parties who can be held responsible for information contained in a prospectus. The Law on Financial Instruments Market prescribes that an issue prospectus shall contain the name, surname and position of persons or the firm name, legal address and registration number of legal persons that are responsible for the fairness of the information contained therein. An issue prospectus shall also contain each such person's statement to the effect that, to the best of their knowledge, the information contained in the issue prospectus reflects the true situation and that the facts that are likely to influence the importance of the information contained in the issue prospectus have not been concealed. If a person is not responsible for all information contained in an issue prospectus, there shall be an indication in the issue prospectus to the part for what person is responsible for.**

**Thus, only the persons listed in the prospectus are responsible for information contained in a prospectus.**

3. Are the persons under the previous question subject to joint and/or several liability?

**Separation of liability is not stated in national laws. If a person is not responsible for all information contained in an issue prospectus, there shall be an indication in the issue prospectus as to the part that person is responsible for and this is a part the person is liable for.**

**The size or amount of liability for each responsible person shall be stated by the court.**

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

**The persons are liable for the information contained in the issue prospectus so it reflects the true situation and that the facts that are likely to influence the importance of the information contained in the issue prospectus have not been concealed.**

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**No exceptions. Persons are liable for intent, negligence and strict liability. Negligence is necessary to prove.**

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

**Every investor can sue for damages the persons responsible, if this investor has incurred loss due to false or incomplete information contained in the issue prospectus.**

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

**The plaintiff shall prove that he has relied on valid prospectus, the prospectus omitted material information or contained untrue statements, give the detailed calculation on losses suffered, show the relation between the losses and information included the prospectus- t.i., losses were caused by the misleading prospectus and the plaintiff had relied on the misleading prospectus for the investment decision.**

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

**The primary proof shall be given by the plaintiff. The respondent in order to avoid liability shall give his own explanations to the all counts in reclamation of plaintiff to show he is not responsible for the facts provided to the court.**

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

**Each party shall prove the facts upon which they base their claims or objections. Plaintiff shall prove that his claims are well-founded. Defendant shall prove that his objections are well-founded. Evidence shall be submitted by the parties and by other participants in the matter. If the parties or other participants in the matter are unable to submit evidence, the court shall, at their motivated request, require such evidence.**

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

**Damages or losses calculated or condemned by the court are recoverable. It depends on request of suer – whether it asks for recovery of material damages or loss of profit. The laws do not provide specific provisions on the quantification of compensation; it is under the assessment of the judge to set the limit- specific sum which has to be compensated.**

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

**The provision setting civil liability is mandatory to be included in the prospectus. The same amount of liability is provided in the Law on Financial Instruments Market. The liability is full for all information a person is responsible for.**

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

**The claim can be submitted in time period of 10 years for each responsible person. The prescription begins after 10 years. If proceedings in a matter are stayed, the computation of a time period is suspended. The computation of a time period is suspended from the time when a circumstance has occurred as is cause for a stay of proceedings. The computation of a procedural time period shall be continued from the day when proceedings are renewed in the matter. In general the prescription period begins from the day the person has got to know about the deed he/she can sue the persons mentioned in Q.2. All persons mentioned in Q.2. have the same time limit they can be accused.**

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

**The competent law to deal with issues on civil liability of prospectuses related to international public offerings will be the Civil Law, Civil Procedure Law, Law on Financial Instruments Market.**

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

**A judicial proceeding before a civil court is the only way to receive restitution of losses. Although it is possible for the guilty person deliberately plead guilty and recoup for the losses.**

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

**Any natural or legal person may be a party (a plaintiff or a defendant) in a civil matter. An action may be brought by several plaintiffs against one defendant, one plaintiff against several defendants, or several plaintiffs against several defendants. Each co-plaintiff and co-defendant acts independently in relation to the other party and other co-participants. Co-participants may assign the conducting of the matter to one of the co-participants or to one joint representative. Class action is available but no such cases have been in practice.**

**Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

**See above answer no 2.**

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**See above answer no 5.**

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

**The sanctions can be imposed on a guilty person whether he is legal or natural person.**

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

**The authority designated in accordance with the PD , that is, the Financial and Capital Market Commission (FCMC) is a competent authority for imposing administrative sanctions in case of a breach of the PD regulation.**

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

**FCMC where financial instruments have been offered to the public in violation of the requirements of Law on Financial Instruments Market, the Commission shall be entitled to warn an issuer or impose a penalty of up to 10 000 lats on an issuer. In case of a failure to comply with the requirements for a public offer, the admission of financial instruments to trading on regulated markets and Regulation (EC) No 809/2004, the Commission shall be entitled to issue a warning or impose a penalty of up to 10 000 lats.**

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

**See previous answer.**

**Besides that, the FCMC has rights to require, in a motivated manner, an issuer or a person making a public offer to include in an issue prospectus supplementary information, if necessary for the protection of investors, suspend a public offer made by any issuer or any person making a public offer for a period of up to 10 business days, where the FCMC has legal grounds for considering that the requirements of making a Public Offer hereof have been or will be violated, prohibit or suspend advertisements for a period of up to 10 business days, where the FCMC has grounds for considering that the requirements of making a Public Offer hereof have been violated, prohibit a public offer, where the FCMC detects that the requirements of making a Public Offer hereof have been violated or where the FCMC has grounds for considering that they would be violated, make public the fact that an issuer is failing to fulfil its obligations and liabilities.**

**FCMC shall be entitled to make public information on measures taken and sanctions imposed against an issuer or a person making a public offer for violations of the requirements of making a Public Offer hereof, except cases when such disclosure of information may cause serious disruptions in the financial market or disproportionate damage to the parties involved.**

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

**All the factors mentioned in the question are taken into account. When determining the type of administrative measures and sanctions, FCMC shall take into account all relevant circumstances including the gravity and the duration of the violation, the degree of responsibility of the responsible person, the financial strength of the responsible person, the impact of the violation on retail investors' interests, the cooperative behavior of the responsible person, previous violations by the responsible person.**

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

**Maximum amount of fine is penalty up to 14 228 Euro. See answer to no 20. Minimum- a warning.**

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction? If yes, please provide details.

**An administrative matter in FCMC shall be initiated on the basis of a submission (when such submission is received), on the basis of an initiative of FCMC (it becomes aware of facts on the basis of which, in accordance with the norms of law, an appropriate administrative act must or may be issued, and also where an institution has grounds for considering that such facts may exist) or the basis of an order by a higher institution or of a notification by another authority (when it becomes aware of such fact). But there are no time limits for imposing liability. The general term is 10 years in Civil Law. But the time limit starts from the moment of the detection of the breach.**

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

**Yes, the FCMC in any step of administrative procedure case can agree on administrative agreement if the offence allows for that and is possible. Such proposal can be set forth by the FCMC or another (guilty) party. The agreement includes all liabilities that shall be settled by the party in order for FCMC not to apply any stronger sanctions.**

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

**Yes, see no. 21.**

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

**No. The appellate procedure is before a court.**

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

**Yes. An administrative act issued by the FCMC may be appealed to the Administrative Regional Court. The Court shall hear the case as the court of first instance. The case shall be heard by a court composed of three judges. The judgment of the Administrative Regional Court may be appealed to a court of cassation.**

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

**National legislation provides for criminal sanctions to punish prospectus related offences. The general criminal provisions apply to this regime.**

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

**Persons putting into circulation financial instruments are criminally responsible. For a anyone who commits putting into circulation financial instruments of a legal person before the legal person has commenced activity or without registration of financial instruments as prescribed by law, or knowingly providing false information concerning the public issue of financial instruments, the applicable punishment is deprivation of liberty for a term not exceeding five years, or custodial arrest, or community service, or a fine not exceeding one hundred times the minimum monthly wage.**

**For anyone who commits preparing and putting into circulation of financial instruments if such do not comply with the provisions of the articles of association, issuing prospectus or other document issued for this purpose, or issuing of a certificate of deposit (investment) without receipt of the relevant deposit, the applicable punishment is deprivation of liberty for a term not exceeding eight years, or a fine not exceeding one hundred and fifty times the minimum monthly wage, with or without confiscation of property.**

31. Can legal persons be held liable for criminal offences?

**A natural person may be held criminally liable who, on the day of the commission of a criminal offence, has attained fourteen years of age. In a legal person matter, a natural person who has committed a criminal offence acting as an individual or as a member of the collegial institution of the relevant legal person on the basis of a right to represent the legal person, to act on behalf of or to take decisions in the name of such legal person, or realising control within the scope of the legal person or while in the service of the legal person, shall be criminally liable therefore, thus legal person can be held liable for criminal offences.**

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

**A criminal offence is constituted by- putting into circulation financial instruments of a legal person before the legal person has commenced activity or without registration of financial instruments, or if such putting does not comply with the provisions of the articles of association, issuing prospectus or other document issued for this purpose. "Putting into circulation financial instruments" is the wording from the Criminal Law and it includes public offering of securities that has been made without an approved prospectus.**

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

**In general, an offence (act or failure to act) committed deliberately (intentionally) or through negligence, provided for in Criminal law, and for the commitment of which criminal punishment is set out, shall be considered a criminal offence. The offences mentioned in answer No. 30 require the offence to be committed intentionally. The intent is a part of corpus delicti, if the police cannot prove the intent of the breach – no criminal proceedings can be turned against a person. The Criminal law provides that the offence shall be committed intentionally. Negligence includes intent. So if a offence is committed with negligence it is committed deliberately (intentionally)**

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

**See no. 30.**

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

**No.**

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

**A person may not be held criminally liable if from the day when he or she committed the criminal offence, the following time period has elapsed:**

**1) five years after the day of commission of a less serious crime (first part of answer no.30)**

**2) ten years after the day of commission of a serious crime (second part of answer no.30)**

37. Can the competent authority initiate criminal proceedings?

**FCCM shall submit an application (findings, observations etc.) to the law enforcement authorities (the Police) for initiating the criminal proceedings. FCCM does not have rights to initiate criminal proceedings. As it is said in the previous sentence- FCCM is not authorised to initiate criminal proceedings, FCCM can only send materials to the Police which in its turn decides whether there is reasonable grounds to initiate the criminal proceedings.**

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

**See the previous answer.**

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

**Criminal proceedings exclude the possibility for FCMC to impose administrative sanctions. *Ne bis in idem* principle is applied.**

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

**The FCMC, its employees and proxies shall not be held liable for any loss incurred by participants of the financial instruments market or third parties, and proceedings shall not be instituted against them for the activities that they performed on entitlement, in a precise manner, on motivated grounds and in good faith to duly carry out the supervision function in due course of law and other regulatory provisions.**

**In other cases not mentioned above the liability is applied.**

41. Who is entitled to sue for damages?

**Person who has suffered damages.**

42. What circumstances must be proven by the plaintiff?

**Existence of losses, damage, amount of it and causal relationship between FCMC and losses.**

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

**FCMC shall give counterarguments to proofs set in the previous answer.**

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

**Damages or losses calculated or condemned by the court are recoverable. No limitations.**

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

**Yes, if a person is responsible according to Para 2 of answer No.40.**

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

**No set in the laws but the general term can be applied- 10 years from the event when losses (or other) have been suffered.**

47. Is a class action available?

**No cases so far as it is also not stipulated in laws**

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

*Depending on situation all of civil liability regimes mentioned above can be applied. Different regimes also could be combined.*

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

*According to the Art. 7 of The Law on Securities of the Republic of Lithuania „the responsibility for the correctness and completeness of the information presented in the prospectus attaches to the issuer, the underwriter, the administrative, management and supervisory bodies of the issuer, offeror of securities and the person seeking admission to trading on a regulated market. Other persons may be designated as responsible for the information presented in the prospectus apart from the mentioned persons and the corporate bodies.“ The persons responsible shall be clearly identified in the prospectus: name, last name and current position of the natural person, name of the legal person and the registered address and the declaration of responsible persons. Usually as liable persons for whole prospectus on behalf of the issuer are head of the administration of the issuer and financial director.*

3. Are the persons under the previous question subject to joint and/or several liability?

*Responsible persons (for the whole prospectus) are subject to joint liability.*

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

*Above mentioned persons are liable for the correctness and completeness of the information presented in the prospectus.*

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

*Can be liable for all degree of fault. Strict liability might be applied, no state of mind is required.*

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

*An investor who suffered damage due to an inaccurate or incomplete information presented in the prospectus have a right to claim indemnity from the responsible persons in the manner stipulated in the Civil Code (Art 7 part) of The Law;*

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the

misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

*There is no a determined list of circumstances to be proven by the plaintiff. Basically it depends on the content of claim (e.g. restitution for losses, recognition of a deal as void.) According to general rules of Lithuanian civil law, plaintiff, who is seeking compensation for his/her losses should always prove: 1) the violation of law or the contract; 2) the fault (different notions) of the defendant; 3) the amount of losses; 4) causal relationship/link between the violation of law/the contract and the amount of suffered losses. So to clarify your additional question, damage, fault and causal link have to be proven by the plaintiff.*

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

*The law does not set a list of circumstances to be proven neither by the plaintiff, neither by the defendant. General rules of civil process shall be applied. However all mentioned circumstances might be relevant in order to avoid liability.*

*It has been set in Article 177 of the Civil Procedure Code, that any actual data shall be considered as evidence in a civil case, and, according to the procedure established by laws, used by court to state that there are or there are no circumstances which can be used as justification for claims and replications, and other circumstances that may be significant for finding a fair solution of the case.*

*In addition, Article 178 of the Civil Procedure Code stipulates for the parties to prove the circumstances used to justify their claims and replications, except cases when the circumstances referred to do not need to be substantiated (for example, when the court has ruled already on the same dispute).*

*If the respondent successful in proving that one of the necessary circumstances is missing, for example causal link between the damage and the fault, the respondent may avoid civil liability.*

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

*Yes. The judge has such a faculty. For example, a judgement which has been already determined in a similar case must be taken into consideration. Also in some cases facts concerned with public interest shall be taken into consideration.*

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

*An investor who suffered damage due to an inaccurate or incomplete information presented in the prospectus shall have a right to claim indemnity from the responsible persons in the manner stipulated in the Civil Code (The Law on Securities Art. 7, part 2. There is no other provisions in this Law on the damages recovery or on the quantification of compensation.*

*According to general rules of Lithuanian civil code, losses might be direct (for example, incurred expenses) and indirect (for example, loss of possible future profit). Both types might be compensated, the plaintiff should prove the amount of his losses, the amount might also be established by the court.*

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

*There are no specific provisions. The general provisions of civil law must be applied. A person might be responsible only for a part of information provided in prospectus (e.g. financial information) Limits of responsibility of a person also might be determined in an employment contract, guarantor agreement, etc.*

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

*General provisions of the Civil code shall be applied. A time limit to file the claim for damage is 3 years. The prescription begins when a person learns about violation of his rights. The prescription might be suspended in certain cases (set in the art.1.129 of the Civil code).*

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

*The Law on Securities (Art. 4) defines the requirements for the preparation, approval and publication of the prospectus to be complied by, where the securities of the issuer whose home Member State is the Republic of Lithuania, are intended to be offered publicly or admitted to trading on a regulated market in the Republic of Lithuania or other Member State of the European Union. Where the home Member State of an issuer is other than the Republic of Lithuania the requirements set forth in this Section shall be complied with where the securities are intended to be offered publicly or admitted to trading on a regulated market of the Republic of Lithuania.*

*According to such regulation Lithuanian law is competent to deal only with cases of civil liability arising from prospectuses related to public offerings or trading in a regulated market in Lithuania.*

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

*It is not prohibited agreeing on a restitution of losses without judicial proceedings. Anyway such agreeing is not regulated by laws.*

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

*Yes, a class action is available. Associations also have legal capacity to file claims on behalf of their members if such a right is set in its statute of association.*

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

*According to the Art. 7 of The Law on Securities „the responsibility for the correctness and completeness of the information presented in the prospectus attaches to the issuer, the underwriter, the administrative, management and supervisory bodies of the issuer, offeror of securities and the person seeking admission to trading on a regulated market. Other persons may be designated as responsible for the information presented in the prospectus apart from the mentioned persons and*

*the corporate bodies. “There is no prohibition for several persons be held liable for different parts of the prospectus (but it is not common practise).*

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

*Can be liable for all degree of fault.*

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

*Which sanctions can be imposed depends on the circumstances, nature and difficulty of the infringement, and on the statement of responsibility in the prospectus. Administrative sanctions can be imposed on natural persons and pecuniary penalties on the issuer and other legal persons responsible for the information in the prospectus (financial intermediary, underwriter, offeror of securities e.t.c.). There is the possibility to sanction both legal and natural or solely one person.*

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

*The designated competent body for imposing administrative sanctions in case of a breach of the PD in Lithuania: Board of the Bank of Lithuania imposes administrative sanctions for natural persons and issuers – banks and insurance companies; Supervision Service Committee of the Bank of Lithuania - for other legal persons.*

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

*All in this question mentioned breaches can be the object of sanctions.*

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

*In respect of persons who have infringed the provisions on prospectuses of the Law on Securities also failing to obey the instructions or obligations of the Bank of Lithuania can be imposed the following sanctions: 1) warn concerning the irregularities in their performance and impose the time limits for the elimination thereof; 2) impose administrative sanctions for natural persons specified in the Code of Administrative Offences of the Republic of Lithuania or pecuniary fines for legal persons specified by the Law on Securities.*

*According Art. 42 of the Law on Securities, when performing the functions Bank of Lithuania have the right to:*

*Part 1) require the persons to disclose the information required by the Law and submit other related documents. Where the persons concerned seek to avoid publishing such information the Securities Commission shall have a right to publish such information itself;*

*Part 4) obligate to amend and correct the submitted inaccurate and misleading information, issue other instructions and obligations;*

*Part 6) for 10 business days suspend the public offering of securities and admission of the same to trading on a regulated market in the presence of any reasonable suspicion that the operations are performed in violation of the terms established by legal acts or prospectuses;*

Part 7) require to suspend or terminate the trading in specific securities in a regulated market and the multilateral trading facility;

According to the Art. 47 of the same Law - to impose the following pecuniary penalties for the legal persons:

Part 1) upon persons organising or conducting public offering of securities or trading in securities on a regulated market, in case the prospectus has not been published in advance or the public offering of securities or trading on a regulated market has been prohibited or suspended, – up to the total nominal value of the securities offered for public trading or admitted to trading on a regulated market;

Part 2) upon persons responsible for the accuracy and completeness of the information provided in the prospectus who have provided incomplete, inaccurate or misleading information this infringing the requirements of Article 6 of this Law - in the amount of up to LTL 100,000 (28,862.0 eur);

Part 6) upon persons who have failed to fulfil the requirements on advertisements – up to LTL 100,000. Moreover if Bank of Lithuania has grounds to suspect the violation of the provisions of advertisements it have a right to prohibit or to suspend the advertising of securities for a period not exceeding 10 successive working days. If persons fails to fulfil the instructions of the supervision authority – it has the right to prohibit advertisements at all;

Part 7) upon persons who have failed to fulfil the requirements on prospectus supplement (Art.10 of this Law – up to LTL 50,000;

In case of the same infringements by natural persons, according to the Code of Administrative Offences of the Republic of Lithuania can be imposed caution or fine.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

According to The law on Securities (Art. 47) when imposing a sanction, the supervisory authority have regard to 1) the extent of the damage incurred by the infringement, 2) the duration of the infringement, 3) the amount of the income or other pecuniary advantage received as a result of the committed infringement or other advantage received from the infringement, 4) mitigating or aggravating circumstances.

Voluntary prevention of the detrimental consequences of an infringement by a person suspected of commitment of the infringement, his assistance to the supervisory institution in the investigation of the infringement, compensation of losses or elimination of the incurred damage shall be considered as mitigating circumstances. The supervisory institution may also recognise other circumstances which have not been indicated in this paragraph as extenuating.

Aggravating factors of an infringement - a failure to co-operate with the supervisory institution, impeding of the investigation procedure, concealment of the infringement, persistent infringement despite a commitment to discontinue illegal actions or a repeated infringement for which a sanction specified in this Law has already been imposed shall be considered as aggravating circumstances. The aggravating circumstances referred to in this paragraph shall not be taken into consideration when they are the qualifying circumstances of the infringement.

According to Articles 30 to 32 of the Lithuanian Republic Code of Administrative Violations of Law, any sentence shall be imposed taking into account the nature of offence, the offender's personality, and circumstances that can mitigate and aggravate offender's responsibility. A body (an official) who examines administrative law violation cases may impose a penalty which is lesser than a minimum penalty under the sanction or impose a penalty which is milder than provided for in the sanction, or to not impose any administrative penalty at all by taking into account the aforesaid circumstances, as well as responsibility mitigating circumstances and other mitigating circumstances that were not specified by laws.

*The size of penalty is determined based on the average between minimum and maximum size of the penalty under the sanction taking into account mitigating and aggravating circumstances. In case of the presence of mitigating circumstances, the penalty size shall be reduced from average to minimum, and in case of the presence of aggravating circumstances, the penalty size shall be raised from average to maximum. In case of the presence of both mitigating and aggravating circumstances, the penalty size shall depend on their number and weight.*

*Circumstances mitigating responsibility for an administrative violation of law are as follows:*

*1) sincere regret by the offender and his help in solving the violation and finding individuals involved in it;*

*2) the offender by his own will has compensated the losses and repaired the damages;*

*3) the law was violated due to serious personal circumstances;*

*4) etc.*

*Circumstances aggravating responsibility for an administrative violation of law are as follows:*

*1) the violation of law is committed by a group of individuals;*

*2) the violation of law has caused serious consequences and huge property losses;*

*3) a repeated violation, similar to that for which the individual had already been sentenced and for which the individual had been imposed an administrative penalty;*

*4) etc.*

*Aggravating circumstances specified in Paragraph 1 of the present Article and other laws shall not be taken into account, if they have been specified in the disposition of the article as a qualifying circumstance of the violation.*

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

*Pecuniary fines for the legal entities ranges from LTL 50,000 (EUR 14,481.00) to LTL 100,000 (EUR 28,862.00); In case organising or conducting public offering of securities or trading in securities on a regulated market, in case the prospectus has not been published in advance or the public offering of securities or trading on a regulated market has been prohibited or suspended, – up to the total nominal value of the securities offered for public trading or admitted to trading on a regulated market;*

*By the Code of Administrative Offences of the Republic of Lithuania, administrative sanctions for natural persons varies from LTL 1,000.00 to LTL 10,000.00 (EUR 289.62 – 2,896.20 ), in case of the repeated infringement - from LTL 5,000.00 to LTL 15,000.00 (EUR 1,448.1 – 4,344.30), in case of damage - by LTL 20,000 (EUR 5,792.40)*

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

*A decision concerning imposition of sanctions (pecuniary fine for the legal entities) may be passed where no more than 2 years have passed from the date of the committing of the infringement, and in the case of a continuous or an ongoing infringement – from the date of committing the last actions of the continuous infringement or the date of the establishment of the ongoing infringement. (Art. 46 of the Law on Securities).*

*Administrative fine for the natural persons may be passed where no more than six months have passed from the date of the committing of the infringement, and in the case of a continuous or an ongoing infringement – from the date of establishment of infringement (Art. 35 of the Code of Administrative Offences of the Republic of Lithuania).*

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

*Yes. The Bank of Lithuania has the right not to impose a sanction, provided all of the following requirements are satisfied: 1) the legal person proves it has made every effort to prevent the infringement; 2) the legal person immediately and voluntarily prevents detrimental consequences of the infringement; 3) the infringement is minor.*

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

*The sanctions imposed by the supervisory institution shall be made public not later than within three working days, with the exception of the cases when such publication would incur damage to a market or would incur disproportionate damage to the parties involved (Art. 83 part 4 of the Law on Markets in Financial Instruments).*

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

*No.*

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

*Yes. (in 1 month period after the decision is taken).*

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

*There are no criminal sanctions for the prospectus related offences.*

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details. *Criminal liability in Lithuania is not established.*

31. Can legal persons be held liable for criminal offences? *Criminal liability in Lithuania is not established.*

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)? *Criminal liability in Lithuania is not established.*

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable? *Criminal liability in Lithuania is not established.*

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office). *Criminal liability in Lithuania is not established.*

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)? *Criminal liability in Lithuania is not established.*
36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details. *Criminal liability in Lithuania is not established.*
37. Can the competent authority initiate criminal proceedings? *Criminal liability in Lithuania is not established.*
38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details. *Criminal liability in Lithuania is not established.*
39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions? *Criminal liability in Lithuania is not established.*

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

*Lithuanian legislation does not directly provide the right to obtain restitution for losses from the Government and/or the competent authority. Anyway such right is not restrained in the laws. No any case law or decisions of this kind is available until now in Lithuania.*

41. Who is entitled to sue for damages?

*The law does not provide a list of specific parties who can sue for damages. Any person who suffered damage is entitled to sue for it.*

42. What circumstances must be proven by the plaintiff?

*There is no a determined list of circumstances to be proven by the plaintiff. Basically it depends on the content of claim.*

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

*Probably it would need to prove an appropriate performance of its duties.*

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

*There is no any specific legal regulation. Every case needs an individual assessment of all circumstances.*

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

*There is such a possibility to bring an action against employees of competent authority for compensation, but it depends on the content of employee agreement, also statutes of a competent authority.*

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

*General provisions of the Civil code shall be applied. A time limit to file the claim for damage is 3 years. The prescription begins when a person learns about violation of his rights. The prescription might be suspended in certain cases (set in the art.1.129 of the Civil code).*

47. Is a class action available?

*Yes*

Luxembourg, 11 March 2013

## **A- General Considerations in relation to the CSSF's answers to the ESMA questionnaire**

The answers by the *Commission de Surveillance du Secteur Financier* (the “**CSSF**”) to this questionnaire have no legal effect, they do not present or represent any interpretation of or official position by the CSSF regarding existing laws, regulations or other forms of Luxembourg legislation. This document should not and cannot be relied upon for any purpose other than for the purposes for which it was prepared. In particular, the answers provided by the CSSF to this questionnaire should not be relied upon as a substitute for, or as guidance on, any aspect of the supervisory practices of the CSSF or regulatory system of Luxembourg. The CSSF answers to the questionnaire aim to provide an overview of (i) the Luxembourg sanctioning regimes (both administrative and criminal) in connection with violations of part II of the Luxembourg law on prospectuses for securities dated 10 July 2005 (the “**Prospectus Law**”) and (ii) the civil liability regimes applicable to the person responsible for the prospectus or as the case may be to CSSF as a result of an infringement to its duties under part II of the Prospectus Law (the “**Part II of the Prospectus Law**”).

The answers provided below are limited to prospectuses drawn-up, approved by the CSSF and published in accordance with Part II of the Prospectus Law which governs offers of securities to the public and admissions of securities to trading on a regulated market, which are subject to European Union Law harmonisation under Directive 2003/71/EC (the “**Prospectus Directive**”). For sake of clarification, it should be underlined that the answers to this questionnaire will not cover the specific liability regimes applicable under parts III and IV of the Prospectus Law.

The CSSF answers to the questionnaire are limited to those situations where a prospectus contains misstatements, misleading information or omissions which infringe the requirements of the Prospectus Law (hereinafter a “**Defective Prospectus**”).

The CSSF answers to the questionnaire are subject to the actual application of the Prospectus Law and any other Luxembourg regulations referred to hereinafter which will in particular depend on the relevant scope of application of these regulations and the relevant facts and circumstances of the matter.

All references to laws and regulations in this questionnaire are meant to refer to these regulations together with any amendments made thereto as of the date of this questionnaire.

Any answer to this questionnaire is subject to and does not prejudice of the actual positions from any other Luxembourg national competent authorities and in particular the relevant Luxembourg competent jurisdictions which should be exclusively competent to decide upon civil and criminal liability matters in relation to a Defective Prospectus in accordance with the constitutional principle of separation of powers.

In light of the extensive scope of certain questions or/and their generic terms, the answers provided by the CSSF to this questionnaire should not be considered as providing an exhaustive and detailed description of all potentially applicable legal provisions as regards the matters discussed in this questionnaire.

## **B- Additional Considerations in relation to the specific parts of the questionnaire**

### **(i) Civil Liability Considerations**

As regards the CSSF answers to this questionnaire in relation to “**Civil liability**”, these answers focus exclusively on the civil liability provisions as set-out under Part II of the Prospectus Law together with certain additional considerations from the standpoint of the Luxembourg civil code (the “**Civil Code**”) provisions on extra-contractual civil liability which (i) complete the above-mentioned Prospectus Law civil

liability regime and (ii) are generally used by plaintiffs on a principal or subsidiary basis in civil liability proceedings before the Luxembourg Courts.<sup>1</sup> Thus, the answers to the below questionnaire as regards civil liability only include incidental references to other Luxembourg specific statutory regimes that could also potentially apply in the context of a Defective Prospectus depending on the facts and circumstances of the matter and subject to the exact scope of application of these regulations. The answers to this questionnaire do not address in any detail these specific liability regimes.

The CSSF answers as regards civil liability will also take into consideration certain civil and criminal procedural rules as respectively set-out in the *Nouveau Code de Procédure Civile* (the “**Code on Civil Procedure**”), the *Code d’Instruction Criminelle* (the “**Code on Criminal Procedure**”) and the *Code de la Consommation* (the “**Consumer Code**”).

It should be further underlined that the CSSF competence in relation to the regulations referred to under this part of the questionnaire is limited to the sole application of the Prospectus Law provisions and certain provisions of the Consumer Code.

### **(ii) Administrative Liability Considerations**

As regards the CSSF answers to this questionnaire in relation to “**Administrative Liability**”, the answers provided are exclusively limited to the application of the Prospectus Law and do not take into consideration any other administrative sanctions or measures that could be imposed as a result of the potential application of other regulations such as the Luxembourg law on market abuse dated 9 may 2006 (the “**Market Abuse Law**”) or the Consumer Code.

For sake of clarification the terms “*Administrative Liability*” for the purposes of the CSSF’s answers to this questionnaire mean the administrative sanctions or measures that may be adopted by the CSSF in case of non-compliance with the provisions of the Prospectus Law and should not be interpreted as dealing with the liability of the CSSF as regards its duties under the Prospectus Law (these issues being addressed under the part of the questionnaire relating to “*Government Liability*”).

The answers provided under this part of the questionnaire cover both the administrative sanctions (as set-out under article 25.1 of the Prospectus Law) and certain other administrative measures<sup>2</sup> (as set out under article 22.3 of the Prospectus Law) which could be adopted by the CSSF (“*décisions administratives faisant grief*”).

### **(iii) Criminal Liability Considerations**

As regards the CSSF answers to this questionnaire in relation to “**Criminal liability**”, the answers provided by the CSSF on applicable criminal sanctions are limited to the relevant provisions set-out in the Prospectus Law except for certain incidental references to the potential application of other regulations or case law of general application.

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<sup>1</sup> See in this respect the Luxembourg government comments on article 9 of the Prospectus Law draft bill N° 5444 stating that “*Les dispositions de droit commun en matière de responsabilité civile au Luxembourg s’appliquent aux personnes responsables des informations fournies dans les prospectus pour les offres au public de valeurs mobilières au Luxembourg ou pour les admissions de valeurs mobilières sur un marché réglementé situé ou opérant au Luxembourg*”. The CSSF answers to this questionnaire do not cover aspects of contractual civil liability because liability in connection with information contained or omitted in a Defective Prospectus is more likely to result in a civil liability claim on extra-contractual grounds.

<sup>2</sup> Depending on the exact circumstances upon which these administrative measures are adopted, these measures could also constitute administrative sanctions.



**(iv) Government Liability Considerations**

With respect to the CSSF answers to this questionnaire in relation to “***Government Liability***”, the answers provided to the questionnaire are limited to the liability of the CSSF as competent authority under Part II of the Prospectus Law (except for the summary description of the potential liability of the CSSF agents in the answer to question 45). The answers to this part of the questionnaire will not address the Luxembourg government/State liability under the Prospectus Law.<sup>3</sup> The answers to this part of the questionnaire are limited to the CSSF activity in the context of its approval of prospectuses in accordance with Part II of the Prospectus Law. Such activity undertaken by the CSSF should be interpreted in light of article 2.1.a) of the Prospectus Law, which defines the term approval “*approbation*” as “the positive act at the outcome of the scrutiny of the completeness of the prospectus by the home member state competent authority together with the consistency of the information given and its comprehensibility”).

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<sup>3</sup> G. Ravarani “*La responsabilité civile des personnes privées et publiques*” - Pasirisie luxembourgeoise, 2006 (2<sup>e</sup> Edition), states in relation to the CSSF and the commissariat aux assurances that “(...) *l’Etat n’est pas responsable des fautes commises et des dommages causés par ces organismes dans l’exécution de leurs missions de surveillance respective*” (paragraph 154, pages 134, and 135).

## QUESTIONS

### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Under Luxembourg law, there are several civil liability regimes out of which liability could arise as a result of the content and use of a Defective Prospectus. Among the various regulations that may apply figure in particular (i) the Prospectus Law and (ii) the rules on extra-contractual civil liability of the Civil Code that are generally applicable and may also apply as fallback provisions in addition to or together with the specific civil liability grounds existing under the Prospectus Law.

The Prospectus Law does not foresee an autonomous civil liability regime as it mainly establishes the situations upon which civil liability may be sought and the relevant persons incurring liability.<sup>4</sup> Subject to the specific facts and circumstances of the matter, all the other parameters of liability (and in particular the determination of a fault, the resulting damage and of the causal link between the fault and the damage, the time limits to initiate legal proceedings) should in principle be determined by the Luxembourg competent courts in accordance with the relevant rules of the Civil Code applicable to extra-contractual liability and the Code on Civil Procedure.<sup>5</sup>

It should also be noted that, depending on the specific facts and circumstances of each case, information contained or omitted in a Defective Prospectus could constitute an infringement to certain other specific Luxembourg statutory regimes which could give rise to civil liability as result of the committed infringement.<sup>6</sup> This could be in particular the case with respect to potential violations of the following regulations (subject to their particular scope of application):<sup>7</sup>

- The Consumer Code provisions in relation to unfair commercial practices;<sup>8</sup> or
- The financial sector law dated 5 April 1993 in relation to the conduct of business rules when providing investment services to clients.<sup>9</sup>

As none of these regulations provide for an autonomous civil liability regime for prospectuses and do not correspond to national provisions of implementation of the Prospectus Directive (as regards

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<sup>4</sup> The Prospectus Law establishes in particular disclosure requirements upon which the existence of a fault has to be considered (under its article 8 and 9) and provides for the identification of the person who should take responsibility for the content of the prospectus (article 9).

<sup>5</sup> See in this respect the Luxembourg government's comments on article 9 of the Prospectus Law draft bill N° 5444 stating that "Les dispositions de droit commun en matière de responsabilité civile au Luxembourg s'appliquent aux personnes responsables des informations fournies dans les prospectus pour les offres au public de valeurs mobilières au Luxembourg ou pour les admissions de valeurs mobilières sur un marché réglementé situé ou opérant au Luxembourg".

<sup>6</sup> As regards the Civil Code provisions on extra-contractual civil liability, it is generally admitted by the legal doctrine that the infringement of a requirement imposed by law is sufficient to prove the existence of a fault.

<sup>7</sup> The below list of additional regulations that could give rise to civil liability is not meant to be exhaustive. See also answers in relation to the administrative and criminal liability and the breaches of the laws described thereof as the infringement(s) to these regulations could be also sufficient to prove the existence of a fault.

<sup>8</sup> Article L-122.3 under title II concerning unfair commercial practices, sub-section 2 misleading omissions read together with its implementing regulation dated 19 May 2011 and more precisely article R-121-1 subparagraphs 9) and 10) provide that the omission of information required under articles 8 and 10 of the Prospectus Law and under chapters II and III of the Prospectus Regulation EC 809/2004 should be considered as a misleading omission and should hence qualify as a misleading commercial practice.

<sup>9</sup> Article 37-3 (2) of the financial sector law dated 5 April 1993 provides that all information, including marketing communications, addressed by a credit institution or investment firm to clients or potential clients shall be fair, clear and not misleading.

liability for prospectuses), we will only refer for the purposes of the developments below to the civil liability regime resulting from the application of the Prospectus Law and/or the Civil Code.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

**(i) Prospectus Law:** Pursuant to article 9.1 of the Prospectus Law, responsibility for the information given in a prospectus attaches to the issuer, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

At least one person responsible must be liable for the entire prospectus, it being understood that with respect to certain parts of the prospectus, such liability might be limited to the correct reproduction of content for which another person responsible is liable.

**(ii) Civil Code:** The Civil Code provisions on extra-contractual civil liability do not provide for specific parties responsible for the information contained in a prospectus (any person falling under the scope of application of the Civil Code relevant provisions is subject to potential civil liability as further described below).

3. Are the persons under the previous question subject to joint and/or several liability?

**(i) Prospectus Law:** The Prospectus Law does not indicate whether civil liability should be incurred on a joint and/or several liability bases. The potential existence of joint and/or several liability should in principle be determined pursuant to the applicable rules of the Civil Code in relation to extra-contractual liability as further described below.<sup>10</sup>

**(ii) Civil Code:** Article 1202 of the Luxembourg Civil Code provides as a general rule that joint liability may not be presumed. It must be expressly stipulated by the parties or expressly provided by law.<sup>11</sup>

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

**(i) Prospectus Law:** Pursuant to article 8.1 jointly read with article 9.1 of the Prospectus Law, the responsible person(s) for the Defective Prospectus could be subject to civil liability as a result of the following breaches of duties (provided that a damage and a causal link between this damage and the abovementioned breaches are also established in accordance with the provisions of the Civil Code):

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<sup>10</sup> See footnote 5 above.

<sup>11</sup> Article 1202 provides that “*La solidarité ne se présume point: il faut qu'elle soit expressément stipulée. Cette règle ne cesse que dans les cas où la solidarité a lieu de plein droit, en vertu d'une disposition de la loi*”.

- Untrue information stated in the prospectus; or
- Omission from the prospectus of any information 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.

As an exception to the above rule, article 9.2 of the Prospectus Law provides 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, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities.

Civil liability could more generally be triggered in case of an infringement to other provision(s) of Part II of the Prospectus Law to the extent it constitutes a fault and provided that a damage and causal link between this damage and such infringement are also established in accordance with the provisions of the Civil Code).

**(ii) Civil Code:** Articles 1382<sup>12</sup> and 1383<sup>13</sup> of the Civil Code provide that extra-contractual civil liability may arise as a result of any fault, negligence or imprudence committed by the author.

Three conditions have to be fulfilled in order to establish extra-contractual civil liability ((i) a fault or negligence/ imprudence, (ii) a damage and (iii) a causal link between the previous two factors). Every plaintiff who can prove a fault (article 1382), negligence or imprudence (article 1383), a damage and a direct link between this fault, negligence or imprudence and his damage, should be entitled to have a civil liability claim in indemnification on extra-contractual grounds.

As regards the Civil Code provisions on extra-contractual civil liability, it is generally admitted by the legal doctrine that the infringement of a requirement imposed by law is sufficient to prove the existence of a fault. The infringement to the law or regulation will be deemed to constitute a fault.<sup>14</sup>

Alternatively (or on a subsidiary basis) to establishing a fault, investors may also establish the existence of a negligence by the person responsible for the Defective Prospectus under the general rules of the Civil Code on extra-contractual liability (article 1383).

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**(i) Prospectus Law:** The Prospectus Law does not provide for which degree of fault civil liability is incurred in connection with a Defective Prospectus. Therefore, the degree of fault upon which civil

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<sup>12</sup> Article 1382 of the Civil Code provides that any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it.

<sup>13</sup> Article 1383 of the Civil Code provides that one shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence.

<sup>14</sup> See in this respect G. Ravarani "La responsabilité civile des personnes privées et publiques" who points out that "La preuve d'une faute est facile lorsqu'elle se matérialise dans l'observation d'une norme spécifique imposant aux citoyens un comportement défini dans les situations qu'elle prévoit. De telles normes sont en premier lieu constituées par les lois et règlements qui tendent à exiger directement des individus certains comportements. Figurent dans cette catégorie en premier lieu les règles du droit pénal. Mais, plus généralement, toute disposition écrite et impérative imposant un certain comportement aux individus qui se trouvent places dans la situation qu'elle prévoit (...). Et la faute se dégagera de ce que l'agent n'a pas eu le comportement que la loi lui imposait" (paragraph 53 page 50).

liability on extra-contractual grounds is incurred should in principle be determined pursuant to the applicable rules of the Civil Code, as further described below.<sup>15</sup>

**(ii) Civil Code:** Pursuant to the Civil Code provisions on extra-contractual liability, every plaintiff who can prove a fault pursuant to article 1382 of the Civil Code (or a negligence/imprudence in accordance with article 1383 of the Civil Code), a damage and a direct link between this fault or negligence/imprudence and his damage, should in principle be entitled to have a claim in indemnification.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

**(i) Prospectus Law:** The Prospectus Law does not state who should be entitled to sue for damages. The rules of the Civil Code applicable to extra-contractual liability should in principle be applicable for the purposes of determining the rightful plaintiff in connection with a Defective Prospectus.<sup>16</sup>

**(ii) Civil Code and Code on Civil Procedure:** Pursuant to the Civil Code provisions on extra-contractual liability, in principle, any person who can prove a fault pursuant to article 1382 of the Civil Code (or a negligence or imprudence in accordance with article 1383 of the Civil Code), a damage and a direct link between this fault, negligence or imprudence and his damage, should in principle be entitled to claim for indemnification.

In addition to the abovementioned rules, plaintiffs should also comply with the Code on Civil Procedure. In order to bring before the competent Luxembourg Courts a civil liability claim against the responsible person(s) for a Defective Prospectus, each plaintiff will have in particular to establish that he has sufficient standing (“*qualité à agir*”) and a legitimate and direct interest (“*intérêt à agir*”) to initiate proceedings in accordance with article 50 of the Code on Civil Procedure.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

**(i) Prospectus Law:** The Prospectus Law does not provide for the circumstances to be proven by the plaintiff in the context of her/his civil liability claim for a Defective Prospectus. The rules of the Civil Code applicable to extra-contractual liability should in principle be applicable to this particular matter.<sup>17</sup>

**(ii) Civil Code:** Pursuant to the Civil Code general rules on extra-contractual liability, it corresponds in principle to the plaintiff to prove each of the three elements underlying the extra-contractual civil liability of the defendant (i.e. the fault or negligence/imprudence, the damage and the causal link between the two previous factors).

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<sup>15</sup> See footnote 5 above.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

**(i) Prospectus Law:** The Prospectus Law does not provide for exemption grounds as regards the potential civil liability of the defendant arising in the context of a Defective Prospectus. The rules of the Civil Code applicable to extra-contractual civil liability should in principle be applicable in this context.<sup>18</sup>

**(ii) Civil Code:** Pursuant to the Civil Code general rules on extra-contractual liability, the defendant may avoid in principle civil liability on extra-contractual grounds by proving that one or more of the components underlying her/his liability are not established/proven by the plaintiff (i.e. the fault/negligence, the damage or the causal link between the fault/negligence and the damage).

Even in those cases where the plaintiff is in position to prove that the defendant has committed a fault or negligence in the context of the Defective Prospectus, that this fault has caused him a damage and that it exists a causal link between the fault, the negligence/imprudence and the damage suffered by him, the defendant may allege in her/his defence that the plaintiff is responsible for part of the financial loss as a result of his contributory negligence or fault. In this case, the defendant should, in principle, bear the charge of evidencing the contributory negligence or fault made by the plaintiff.<sup>19</sup>

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

**(i) Prospectus Law:** The Prospectus Law does not regulate this particular matter. The rules of the Code on Civil Procedure as described below should in principle be applicable in this respect.<sup>20</sup>

**(ii) Code on Civil Procedure:** Article 56 of the Code on Civil Procedure provides as a general rule that the judge decisions must not be based upon evidence/facts which are not part of the debate between the parties as regards the litigated matter. Notwithstanding the above general rule and within the debated facts, the judge can take into consideration facts that the parties would not have specifically invoked as the basis of their claim(s).<sup>21</sup>

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

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<sup>18</sup> Ibid.

<sup>19</sup> See in this respect G. Ravarani “*La responsabilité civile des personnes privées et publiques*” who states that “*la jurisprudence luxembourgeoise est attachée à l’obligation de la victime de modérer, de contenir autant que possible son dommage en prenant toutes les mesures raisonnables à cet effet, et qu’il appartient à l’auteur du dommage qui fait état de ce que la victime a la possibilité raisonnable de minimiser son dommage de le prouver*” (paragraph 1092, page 831).

<sup>20</sup> See footnote 5 above.

<sup>21</sup> Article 56 of the Code on Civil Procedure provides that “*Le juge ne peut fonder sa décision sur des faits qui ne sont pas dans le débat. Parmi les éléments du débat, le juge peut prendre en considération même les faits que les parties n’auraient pas spécialement invoqués au soutien de leurs prétentions*”.

**(i) Prospectus Law:** The Prospectus Law does not regulate this particular matter (it does not indicate which damages are recoverable and does not provide for specific provisions on the quantification of compensation). The rules of the Civil Code as described below should in principle be applicable in this respect.<sup>22</sup>

**(ii) Civil Code:** In the context of a civil liability claim on extra-contractual grounds under articles 1382 or 1383 of the Civil Code, a person is in principle entitled to claim compensation for a broad scope of damages suffered and in particular any financial loss where the three criteria of the extra-contractual civil liability described above are fulfilled.

Damages might cover material damages and loss of profit proven to be suffered by the plaintiff as a result from the negligent or wilful omissions or misrepresentations in the prospectus.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

**(i) Prospectus Law:** Based upon article 9.1 of the Prospectus Law, it should not be possible for the responsible person(s) as determined in accordance with the Prospectus Law to exclude, proportionate or limit his civil liability in connection with the content of the prospectus except for the particular circumstances in which the Prospectus Law or/and Prospectus Directive legal framework allows a limitation to such liability. This is in particular the case in relation to:

- The specific liability regime applicable to the summary of the prospectus; or<sup>23</sup>
- The potential limitation on liability concerning the use of the prospectus as a result of the consent (and conditions attached thereto) granted by the person responsible for the prospectus in accordance with the provisions of article 5. 2 last paragraph of the Prospectus Law.<sup>24</sup>

**(ii) Civil Code:** The civil liability regime imposed by the Prospectus Law pursuant to article 9.1 as regards the content of the prospectus should be mandatory (subject to the limitations provided by the Prospectus Law and the Prospectus Directive legal framework). Subject to the above, the responsible person(s) for the prospectus as determined in accordance with article 9.1 of the Prospectus Law should not be allowed to exclude or limit her/his civil liability by a clause inserted in the prospectus.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

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<sup>22</sup> See footnote 5 above.

<sup>23</sup> Article 9.2 of the Prospectus Law.

<sup>24</sup> The Directive 2010/73 EU of 24 November 2010 indicates in its recital 10 that "(...) Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the person responsible for drawing up the prospectus as long as this is valid and duly supplemented in accordance with Articles 9 and 16 of Directive 2003/71/EC and the issuer or the person responsible for drawing up the prospectus consents to its use. The issuer or the person responsible for drawing up the prospectus should be able to attach conditions to his or her consent. The consent, including any conditions attached thereto, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement. In the event that consent to use the prospectus has been given, the issuer or person responsible for drawing up the initial prospectus should be liable for the information stated therein and in case of a base prospectus, for providing and filing final terms and no other prospectus should be required. However, in case the issuer or the person responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference and, in case of a base prospectus, final terms".

**(i) Prospectus Law:** The Prospectus Law does not provide for any time limit to file a civil liability claim in connection with a Defective Prospectus. The rules of the Civil Code as described below should in principle be applicable in this respect.<sup>25</sup>

**(ii) Civil Code:** Pursuant to article 2262 of the Civil Code, the time limit to initiate a legal claim on civil extra-contractual grounds before the Luxembourg Courts is of 30 years.

In general, prescription begins from the date of the coming into existence of the damage. However, if proven by the plaintiff, prescription begins only from the date on which the plaintiff becomes aware of the damage.<sup>26</sup>

The civil proceedings mentioned above can be suspended or interrupted in accordance with the Civil Code provisions (articles 2242 to 2259).

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

Under Luxembourg private international law, the regulation that should address potential conflict of law rules in relation to the applicable extra-contractual civil liability regimes that may find to apply as a result of a Defective Prospectus in the context of international public offerings is the Regulation (EC) n 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the “Rome II Regulation”).

The Rome II Regulation provides as a general rule that in case of conflict of laws the applicable law is applicable is the “*law where the damage occurs*”.<sup>27</sup> The Rome II Regulation further specifies that this rule applies “*irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred*”.<sup>28</sup>

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

To the extent the plaintiff’s claim for damages is based upon an act which qualifies as a criminal offence, the plaintiff could decide to bring her/his civil claim before the competent criminal Courts that are competent to decide upon the criminal proceedings. Pursuant to Article 3 of the Code on Criminal Procedure, civil proceedings can be brought in principle before the criminal Courts by any person who has suffered a loss as a result of a criminal offence provided that its conditions are met.<sup>29</sup>

The Luxembourg law dated 24 February 2012 on arbitration in civil and commercial matters may also be applicable in this context.

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<sup>25</sup> See footnote 5 above.

<sup>26</sup> G. Ravarani “*La responsabilité civile des personnes privées et publiques*”- Pasiris luxembourgeoise, 2006 (2<sup>o</sup> Edition), p. 915.

<sup>27</sup> Article 4.1, under chapter II “*Torts/Delicts*” of the Rome II Regulation. Articles 4.2 and 4.3 provide nonetheless certain derogations to this general rule where (i) both the defendant and the person sustaining damage have their residence in the same country (the law of this country being applicable in such case), or (ii) where the tort is more closely connected with another country.

<sup>28</sup> Article 4.1, under chapter II “*Torts/Delicts*” of the Rome II Regulation.

<sup>29</sup> Article 3 of the Code on Criminal Procedure “*L’action civile peut être poursuivie en même temps et devant les mêmes juges que l’action publique, à moins que celle-ci ne se trouve éteinte par prescription*”.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

For the purposes of the answer below, we understand that a class action for the purposes of this questionnaire means the possibility to bring a claim on behalf of a more or less determined (or yet unknown) group of plaintiffs against a defendant or a group of defendants (in the present context against the person subject to civil liability for a Defective prospectus).

Based upon the above understanding on the meaning of class action, no class action is currently available under Luxembourg law.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Pursuant to articles 25.1 read together with article 22.3 of the Prospectus Law, the following parties could potentially be held liable for information contained in a prospectus in case where they publish or cause to be published false information in a prospectus or a supplement to the prospectus and more generally where they carry out an offer of securities to the public or obtain an admission of securities to trading on a regulated market in breach of the legal provisions of the Prospectus Law:

- i. The issuer;
- ii. The offeror or persons asking for admission to trading of securities on a regulated market; the persons that control or are controlled by the issuer;
- iii. The persons in charge of the statutory audit of the accounts;
- iv. The managers of the issuer, or
- v. The financial intermediaries commissioned to carry out the offer to the public or to ask for admission to trading on a regulated market.

Article 25.1 of the Prospectus Law does not specify whether several persons could be held liable in relation to different parts of the prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The Prospectus Law does not specify whether the administrative measures or/and sanctions as respectively foreseen under articles 22.3 and 25.1 of the Prospectus Law should be sought on negligence or strict liability grounds. The administrative measures or/and sanctions foreseen under articles 22.3 and 25.1 may be imposed by the CSSF upon becoming aware of (or as regards certain measures provided under article 22.3 when suspecting the existence of) the relevant misconduct(s) described under these articles. By reason of absence of an indication of degree of fault in the law, it is up to the CSSF to decide what degree of fault it applies in this respect.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

**(i) Breaches that may be sanctioned by an administrative fine:** Pursuant to article 25.1 read together with article 22.3 of the Prospectus Law, the administrative fine foreseen under article 25.1 of the Prospectus Law may be imposed by the CSSF on either legal or natural persons provided that these persons are mentioned under article 22.3 of the Prospectus Law.

**(ii) Breaches that may be subject to other administrative measures:** Pursuant to article 22.3 of the Prospectus Law, the administrative measures foreseen under this article may be adopted by the CSSF in relation to either legal or natural persons subject to the specific facts and circumstances of the matter.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

Pursuant to articles 25.1 and 22.1 of the Prospectus Law, the CSSF is the competent authority to impose the administrative sanctions and/or measures foreseen under the Prospectus Law in case of a breach of its provisions.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

In case of breaches of the Prospectus Law, the CSSF may take administrative measures such as information requests and injunctions (i). In certain cases of breach of the Prospectus Law and where the CSSF's requests and injunctions are not complied with, the CSSF may also impose administrative fines (ii).

**(i) Breaches that may be subject to administrative measures:** Article 22.3 of the Prospectus Law provides for certain administrative measures (such as information requests and injunctions) that may be adopted by the CSSF where it notices<sup>30</sup> or has reasonable grounds for suspecting<sup>31</sup> that provisions of the Prospectus Law (including article 17, which proscribes inaccurate or misleading advertisement and advertisement inconsistent with the prospectus) have been infringed.

**(ii) Breaches that may be sanctioned by an administrative fine:** Pursuant to article 25.1 of the Prospectus Law, administrative sanctions can be imposed on the persons mentioned under article 22.3 in the following cases:

- An offer of securities to the public is carried out or an admission of securities to trading on a regulated market is obtained in breach of the provisions of the Prospectus Law;
- Non-compliance with requests for information made by the CSSF;
- Where information provided to the CSSF proves to be incomplete or inaccurate;
- In case of non compliance with the CSSF injunctions; or

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<sup>30</sup> The administrative measures that the CSSF may adopt upon noticing an infringement to the Prospectus Law are set out in particular under article 22.3. f), h) i) or j) of the Prospectus Law.

<sup>31</sup> The administrative measures that the CSSF may adopt upon suspecting on reasonable grounds that an infringement to the Prospectus Law has been committed can be found in particular under article 22.3. d), e), f), or g) of the Prospectus Law.

- In case of publication of false information in a prospectus or a supplement to a prospectus.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

**(i) Breaches that may be sanctioned by an administrative fine:** The sanction that may be imposed by the CSSF is an administrative fine of between EUR 125 and EUR 125,000 (article 25.1 of the Prospectus Law).

**(ii) Breaches that may be subject to other administrative measures:** The administrative measures that may be adopted by the CSSF are as follows:

- Suspension of a public offer or admission to trading on a regulated market for a maximum of 10 consecutive working days (article 22.3.d) of the Prospectus Law);
- Prohibition or suspension of advertisements for a maximum of 10 consecutive working days on (article 22.3.e) of the Prospectus Law);
- Prohibition of a public offer (article 22.3.f) of the Prospectus Law);
- Suspension of trading at any time on a regulated market situated or operating within the territory of Luxembourg or possibility to request other regulated markets which are concerned to suspend trading on a regulated market for a maximum of 10 consecutive working days (article 22.3.g) of the Prospectus Law);
- Prohibition of trading on a regulated market situated or operating within the territory of Luxembourg (article 22.3.h) of the Prospectus Law);
- To make public the fact that the issuer, offeror or person asking for admission to trading on a regulated market is failing to comply with its obligations (article 22.3.i) of the Prospectus Law); or
- To impose on the issuer, offeror or person asking for admission to trading on a regulated market to cease any practice which is contrary to the Prospectus Law (article 22.3.j) of the Prospectus Law).

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The Prospectus Law does not provide for aggravating or mitigating factors to be taken into account by the CSSF when adopting the administrative fine and/or measures stated under articles 25.1 or 22.3 of the Prospectus Law.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Pursuant to article 25.1 of the Prospectus Law, the range of the administrative fine that may be imposed by the CSSF on the persons referred to in Article 22(3) of the Prospectus Law is between EUR 125 and EUR 125,000.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

The Prospectus Law does not provide for specific time limits in relation to the imposition of administrative decisions adopted by the CSSF in accordance with articles 22 and 25. The CSSF would have nonetheless to comply with the general rules of administrative law.

Administrative decisions by the CSSF under the Prospectus Law should be adopted in accordance with the general rules of administrative law and within a reasonable timeframe in case where article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950 is applicable. This article provides that “*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”. However, a specific time limit cannot be derived from case law based on this provision.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

The Prospectus Law does not provide for a settlement procedure with the CSSF that could lead to a formal administrative sanction/measure not being imposed on the responsible person(s).

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Pursuant to article 25.3 of the Prospectus Law, the CSSF is authorized to make public the measures and sanctions taken in respect of infringements of the provisions adopted pursuant to the Prospectus Law, unless the disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

There is no previous appeal to an administrative body prior to appealing to the competent Court pursuant to article 27 of the Prospectus Law once the administrative measure/sanction has been imposed by the CSSF in accordance with article 22.3 and/or 25.1 of the Prospectus Law.

However, the persons targeted by administrative measure(s) and/or sanction(s) imposed by the CSSF, might ask the CSSF to reconsider its decision before appealing to the competent Court (so called “*recours gracieux*”).

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Article 27 paragraphs 1. and 2. of the Prospectus Law provide as follows:

1. An appeal to a Court of unlimited jurisdiction may be made before the *Tribunal Administratif* against decisions taken by the CSSF pursuant to the Prospectus Law. The right to appeal shall run for a period of three months from the date of notification of the decision.

The decision of the *Tribunal Administratif* shall be subject to a right of appeal to the *Cour administrative* within a period of 40 days running from the date of notification of the decision by the registry of the jurisdiction of first instance.

The expiry of the above-mentioned time period shall end any possibility to appeal without prejudice to the provisions of the law dated 22 December 1986 on the lifting of time limits. The time periods shall not be extended on account of distance of the residence of the natural or legal person subject to supervision.

2. The right of appeal to the administrative Courts has a non-suspensive effect.

A request for stay of execution may be filed by separate application with the President of the *Tribunal Administratif* or the judge replacing him.

The stay of execution may only be ordered under the twofold condition that, on the one hand the enforcement of the contested decision would cause the applicant to suffer a serious and permanent damage, and that, on the other hand the grounds relied upon in support of the appeal against the decision appear to be serious. The stay shall be dismissed if the case is ready to go to Court and to be decided upon within a short period.

The proceedings before the President of the *Tribunal Administratif* shall be oral. The case shall be pleaded at a hearing to which the parties have been called to appear. The President may, if the request is justified, grant postponements.

The order shall have immediate effect upon notification. The order shall not be subject to any right of appeal. The order shall cease to have effect once the Tribunal has decided on the substance of the case or part of the substance. The judge who has heard the application for stay of execution cannot sit in the Court hearing the merits of the case.

The President of the *Tribunal Administratif* responsible for deciding upon interim measures or the judge replacing him may order all measures aimed at safeguarding the interests of the parties or of the persons who have an interest in the result of the case, except for measures concerning civil rights. Such an application is examined and decided upon in accordance with the procedure laid down for an application for stay of execution.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

The Prospectus Law (article 26) provides for a criminal fine in case where a person would knowingly carry-out an offer of securities to the public within the territory of Luxembourg without a duly approved prospectus in accordance with the provisions of the Prospectus Law.

In addition to the abovementioned specific criminal sanction, as set out under article 26 of the Prospectus Law, and subject to the specific facts and circumstances of the matter, certain other general and specific criminal law related provisions under respectively the Luxembourg *Code Pénal* (the “**Criminal Code**”) and certain other particular statutory regimes could also apply.

As none of those provisions are specifically related to a criminal liability regime for prospectuses and do not correspond to national provisions of implementation of the Prospectus Directive, the answers provided to the following questions on criminal liability will be limited to the sole criminal law related

provisions as set-out in the Prospectus Law (except for questions 31, 35, 36, 38, and 39 which make also incidental references to other regulations or case law of general application).

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

The criminal sanction of the Prospectus Law (article 26) apply generally to any person who knowingly carries-out an offer of securities to the public within the territory of Luxembourg without a duly approved prospectus in accordance with the provisions of this law.

31. Can legal persons be held liable for criminal offences?

Under Luxembourg law, legal persons can be held liable for criminal offences (Art 34 *et sq* of the Criminal Code).

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Under article 26 of the Prospectus Law, an offer of securities made intentionally to the public within the territory of Luxembourg without a duly approved prospectus in accordance with the provisions of this law is subject to a criminal fine.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Article 26 of the Prospectus Law provides for intentionality as a prerequisite to the offence contemplated therein being committed.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Article 26 of the Prospectus Law provides for a criminal fine between 250 to 125,000 Euros.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

The Luxembourg competent Court determining the criminal sanction that may be imposed under article 26 of the Prospectus Law is bound by the principle of *non bis in idem*, as further described in the answer to question 39.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or sending criminal proceedings, for applying the sanction)? If yes, please provide details.

The Code on Criminal Procedure provides as a general rule and subject to its specific provisions that:

- i. The limitation period for a public prosecution for facts constituting a **felony** (*crime*) is 10 years starting from the date of the event (article 637);

- ii. The limitation period for public prosecution in relation to matters constituting a **misdemeanour** (*délit*) is 5 years from the day on which it was committed (article 638); and
- iii. A public prosecution in respect of a **minor offence** (*contravention*) is time-barred after one year has passed from the day on which it was committed (article 640).

Any act of investigation or prosecution interrupts the limitation periods mentioned above (articles 638 as regards misdemeanours and article 640 as regards minor offences read together with article 637 of the Code on Criminal Procedure).

37. Can the competent authority initiate criminal proceedings?

Subject to the answers provided under question 38 and as a general rule, the CSSF is not competent to initiate criminal proceedings against the persons in breach of their obligations under the Prospectus Law.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Pursuant to article 23.(2) of the Code on Criminal Procedure, the CSSF is required to inform the state prosecutor immediately and pass on any relevant information, reports or other documentation in relation to any criminal offence (where it qualifies as crime or a misdemeanour).

Pursuant to article 23.(3) of the Code on Criminal Procedure, the CSSF is required to inform the state prosecutor of any facts that could constitute evidence of money laundering or of terrorism financing and to communicate any relevant information, reports or other documentation in relation to these facts.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

In the context of administrative sanctions that may be adopted by the CSSF in accordance with the Prospectus Law in addition to any criminal proceedings that may be initiated in connection with the same facts, the CSSF should take into consideration the principle of *non bis in idem*.<sup>32</sup>

In this respect, the CSSF should in particular take into consideration, where assessing the potential adoption of any administrative sanction under articles 25.1 of the Prospectus Law, whether such

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<sup>32</sup> This principle should be applied by the CSSF in light of the following provisions:

- Article 4 (1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.

- Article 14 § 7 of the United Nations Covenant on Civil and Political Rights which provides as follows: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

- Article 50 of the Charter of Fundamental Rights of the European Union, which was solemnly proclaimed by the European Parliament, the Council and the Commission in Strasbourg on 12 December 2007 (OJ 14.12.2007, C 303/1) which provides that “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”.

sanctions would be imposed in connection with identical facts (or facts which are substantially the same) for which criminal proceedings have concluded.<sup>33</sup>

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

**(i) Prospectus Law:** The Prospectus Law does not provide for a specific liability regime of the CSSF in the context of its approval of prospectuses.<sup>34</sup> Subject to the specific facts and circumstances of the matter, investors could potentially have a civil liability claim on extra-contractual grounds against the CSSF, as competent authority responsible for the approval of a prospectus under the Prospectus Law, where the CSSF did not perform its duties according to the requirements of this law, as further described below.

**(ii) Other Regulations:** In the absence of any specific rules set-out in the Prospectus Law as regards the liability regime applicable to the CSSF, it should be understood that the applicable rules in this respect are those set out in the law dated 23 December 1998 establishing the CSSF (hereinafter the "**CSSF Law**")<sup>35</sup> in relation to the degree of fault by the CSSF as completed by the rules of the Civil Code (Article 1382 and 1383) in relation to the determination of the damage and the causal link between the damage and the CSSF wrongdoing (i.e. its gross negligence as further described below).

Article 20.2 of the CSSF Law provides that for the CSSF to assume liability for an individual damage incurred by third parties, "*it must be demonstrated that the damage was caused through gross negligence in the choice and implementation of the means used by the CSSF in furtherance of its mission*".

It results from the above provision, that the civil liability regime applicable to the CSSF is derogatory to the civil liability rules on extra-contractual liability applicable to the Luxembourg public administration (as set-out in the law of 1 September 1988 concerning the civil liability of the State and public collectivities and articles 1382 et sq of the Civil Code). Indeed, the CSSF Law imposes a gross negligence standard of liability whereas the normal extra-contractual regime applicable to the persons (including the state and its administrations) is based upon simple fault (or negligence).<sup>36</sup>

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<sup>33</sup> The CSSF should take into consideration, amongst others, the positions of the Luxembourg administrative courts in relation to the application of this principle as well as the recent decision of the European Court of Human Rights of 10 February 2009, *Zolotukhine v. Russia* which provides in particular under points 82 and 83 that "Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*".

<sup>34</sup> The Prospectus Law does not provide for any express provision on how investors (or any other parties concerned by its decisions) may obtain indemnification in case of fault or negligence committed by the CSSF in the context of its approval duties under the Prospectus Law.

<sup>35</sup> See in this respect the Luxembourg government's comments on the proposed prospectus draft bill n° 5444. The government in relation to article 7 of this draft bill stated that "*La responsabilité de la Commission afférente à l'approbation du prospectus est régie par le droit national. Les dispositions y afférentes de la loi du 23 décembre 1998 portant création de la Commission de surveillance du secteur financier sont d'application*".

<sup>36</sup> The constitutionality of the CSSF sui generis and differentiated regime of civil liability as set out under article 20.2 of the CSSF Law has been recently challenged before the Luxembourg Constitutional Court (*Arrêt 63/11 de la Cour Constitutionnelle* dated 1st

41. Who is entitled to sue for damages?

**(i) Prospectus Law:** The Prospectus Law does not indicate who is entitled to sue for damages. This should be determined in accordance with the CSSF Law.

**(ii) CSSF Law and Other Regulations:** Pursuant to article 20.2 of the CSSF Law, companies or professionals subject to the CSSF supervision, their clients or any third parties may sue for damages the CSSF to the extent they can prove a gross negligence committed by the CSSF in the choice and implementation of the means used in furtherance of its mission.<sup>37</sup>

42. What circumstances must be proven by the plaintiff?

**(i) Prospectus Law:** The Prospectus Law does not indicate what circumstances must be proven by the plaintiff. This should be determined in accordance with the CSSF Law.

**(ii) Other Regulations:** Article 20.2 of the CSSF Law provides that for the CSSF to assume liability for an individual damage incurred by the (...) third parties, “*it must be demonstrated that the damage was caused through gross negligence in the choice and implementation of the means used by the CSSF in furtherance of its mission*”.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

**(i) Prospectus Law:** The Prospectus Law does not state the circumstances upon which the CSSF may avoid liability. Such circumstances should be determined in accordance with the Civil Code rules on extra-contractual liability.

**(ii) Other Regulations:** The CSSF as defendant may avoid liability on extra-contractual grounds where one or more of the components underlying its liability are not established/proven by the plaintiff (and more particularly where its gross negligence in the choice and implementation of the means used by it in furtherance of its mission cannot be established).

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

**(i) Prospectus Law:** The Prospectus Law does not provide for specific provisions on the quantification of the damages in case of civil liability of the CSSF. Such quantification should be determined in principle in accordance with the Civil Code rules on extra-contractual liability.

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April 2011; Mémorial A- N 65). The Luxembourg Constitutional Court had in particular to consider whether the CSSF specific liability regime provided by article 20.2 was not in breach of the article 10 bis first paragraph of the Luxembourg Constitution providing for the equality of all Luxembourgish before the law as a constitutional right (“*Les luxembourgeois sont égaux devant la loi*”). In this landmark decision, the Luxembourg Constitutional Court confirms the constitutionality of the CSSF specific liability regime. Among the various considerations justifying the Luxembourg Constitutional Court decision, the judges have pointed out in particular that the specific liability regime of the CSSF compared to the one applicable to the other public administrations and individuals was justified in light of the specific and differentiated missions of the CSSF (i.e. its surveillance and prudential supervision of the financial sector).

<sup>37</sup> The plaintiff should further establish damage, and a direct link between the abovementioned CSSF gross negligence and their damage in accordance with the Civil Code rules on extra-contractual liability.

**(ii) Civil Code:** In the context of a civil liability claim on extra-contractual grounds under articles 1382 or 1383 of the Civil Code, a person is in principle entitled to claim compensation for a broad scope of injuries and in particular all financial injuries.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

**(i) Prospectus Law:** The Prospectus Law does not provide for specific provisions on this matter.

**(ii) Case Law:** The Luxembourg Courts case law seems unsettled although a significant number of Court decisions exclude the public officials' liability in case where they commit a fault in the performance of their duties.<sup>38</sup>

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

**(i) Prospectus Law:** The Prospectus Law does not provide for any time limit to file a civil liability claim on extra-contractual grounds against the CSSF in connection with a potential infringement of its prospectus approval duties under Part II of the Prospectus Law. The rules of the Civil Code as described below should be applicable in this respect.

**(ii) Civil Code:** Pursuant to article 2262 of the Civil Code, the time limit to initiate a legal claim on civil extra-contractual grounds before the Luxembourg Courts is of 30 years.

The Civil proceedings mentioned above can be suspended or interrupted in accordance with the Civil Code provisions (articles 2242 to 2259).

47. Is a class action available?

Please refer to our answer to question 15 of this questionnaire.

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<sup>38</sup> See G. Ravarani "La responsabilité civile des personnes privées et publiques" (paragraphs 139 to 141, pages 118 to 121).

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

In terms of Article 94 of the Maltese Companies Act, 1995, the persons who are responsible for or who have authorised the issue of a prospectus shall be jointly and severally liable for any damage sustained by a person subscribing for securities on the faith of that prospectus, by reason of any untrue statement included in such prospectus.

Liability can also arise under the Listing Rules drawn up by the Malta Financial Services Authority acting as Listing Authority under the Financial Markets Act, 1990 and which are binding on all entities having their securities admitted to trading on a regulated market in Malta. In this regard, an administrative penalty can be imposed by the Listing Authority for breach of the requirements of the Prospectus Directive as transposed in the Listing Rules and which are applicable to listed entities and to persons seeking a listing on Malta's regulated markets.

In terms of an amendment to Article 94 of the Companies Act, no person shall be liable for statements made in the summary to the Prospectus, including the translation thereof, except when such statements are misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or if it does not provide when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. Furthermore in terms of Listing Rule 1.29 no person shall be liable for statements made in a summary which is part of a Prospectus 9, including the translation thereof, except when such statements are untrue when read together with the other parts of the Prospectus or the summary does not provide, when read together with other parts of the Prospectus, Key Information in order to aid investors when considering whether to invest in such securities.

Apart from the above, given that a prospectus may be considered as a contract between the issuer of the security and the investor therein civil liability may also arise under the general civil law provisions contained in the Civil Code (Chapter 16 of the Laws of Malta), in particular Articles 960 to 1011 of the Civil Code.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Whilst there could be cases where third parties, such as experts, assume responsibility for parts of the prospectus, it is the Issuer of the security, acting through its Board of Directors that has overall responsibility for the prospectus.

In terms of Article 94 of the Companies Act, the persons who are held responsible for the information contained in the prospectus are:

- (a) those who are responsible for or who have authorised the issue of a prospectus;
- (b) the persons who have tabled a summary including the translation thereof
- (c) Experts - only in the case of any untrue statements made by them and disclosed in the prospectus.

3. Are the persons under the previous question subject to joint and/or several liability? The directors of the Issuer have Joint and Several liability.
4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

In terms of Article 94 of the Companies Act, persons indicated in the response to question 2 above are liable in the case of untrue statements contained in the prospectus.

Moreover, in terms of Article 89 of the Companies Act, it is not lawful for a public company to issue any form of application for its shares or debentures unless the company is registered and a prospectus is published.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The Degree of fault established is wilful intent or negligence.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

In terms of Article 94 of the Companies Act, any person subscribing for shares or debentures on the faith of that prospectus may sue for damages. The law is generic and does not limit to purchasers on the primary market.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

In terms of Article 94 of the Companies Act, the plaintiff has to prove that he has suffered damage by subscribing to shares or debentures on the faith of the prospectus by reason of any untrue statement contained therein.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to *the prospectus correcting the problem was published before the acquisition of the securities took place*)?

In terms of Article 94 (2), a respondent may avoid liability if he can prove that:

(a) he had reasonable grounds to believe and did, up to the time of the allotment of the shares or debentures believe, that the statement was true; or

(b) as regards an untrue statement made by an expert, that he had reasonable grounds to believe and did, up to the time of the allotment of the shares or debentures believe, that the person making the statement was competent to make it; or

(c) on becoming aware of the untrue statement before any allotment is made under the prospectus, he gave reasonable public notice of the untruthfulness of the statement.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

Yes, during proceedings in court, the presiding judge has the right to ask questions to the parties and their answers thereto may be taken into account by the judge in arriving at a decision.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Although damages are recoverable, there is no specific quantification for this purpose under Maltese Law.

In terms of Article 1135 of the Civil Code, under the law of obligations, the damages due to the creditor are, generally, in respect of the loss which he has sustained, and the profit of which he has been deprived.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

Yes they are mandatory and there is no possibility to exclude, proportionate or limit liability in the prospectus.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Actions for damages not arising from a criminal offence are barred by the lapse of two years.

In terms of Article 2317 of the Civil Code, prescription starts to run from the day on which an action may be exercised, irrespective of the state or condition of the person to whom the action is competent.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

In the case of commercial partnerships registered in Malta, the relevant law is Maltese Law (namely the Maltese Companies Act, 1995). In the case of issuers of securities admitted to trading on a regulated market in Malta, the relevant legislation are the Financial Markets Act (Cap. 345 of the Laws of Malta) as well as the Listing Rules issued thereunder. In the case of a conflict of laws, the general principles of Private International Law will apply.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes. However, it is pertinent to point out that a wronged investor has the right to make a complaint to the MFSA's Consumer Complaints Manager who may make a recommendation for the restitution of losses, which recommendation however, cannot be enforced. Accordingly, the only way for a person to obtain enforceable restitution of losses is through an action in Court.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

The Collective Proceedings Act (Cap 520 of the Laws of Malta) does not at present allow collective proceedings to be instituted in the case of breaches of financial services legislation.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Although the issuer of the security, acting through its Board of Directors is overall responsible for the prospectus, there are cases where third parties, such as experts or guarantors are also subject to a degree of responsibility.

In terms of Article 19 of the Financial Markets Act, the following persons may be held responsible for a breach of the disclosure requirements contained in the Listing Rules:

- (a) the issuer of listed financial instruments
- (b) an applicant for admissibility to listing
- (c) any other person subject to the listing Rules (this category usually comprises companies which have already been granted a listing)

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Such persons are liable in fault for wilful intent and negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Administrative Sanctions can be imposed on both legal and natural persons.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The Malta Financial Services Authority acting as Listing Authority under the Financial Markets Act is the competent body for imposing administrative sanctions in case of a breach of the PD framework relating to admissibility to trading whilst the Registrar of Companies can impose administrative penalties for breach of the PD framework relating to offers to the public.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Sanctions are applied for the following breaches of the PD framework:

- Untrue information in a material aspect

- Omission of material information in the prospectus
- Selling of securities to the public without having published an approved prospectus
- Inaccurate or misleading advertisements
- Advertisements inconsistent with the prospectus
- Publication of a prospectus which is not approved
- Failure to comply with and ensure fulfilment of the terms of the prospectus.
- Issue of a prospectus in contravention of the requirements of Article 92(1) of the Companies Act
- In the case of companies incorporated in Malta, the issue of a prospectus before the registration thereof with the Registrar of Companies.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

In terms of Article 18 of the Financial Markets Act, the Listing Authority may impose an administrative penalty and in terms of Article 17(1) (a) may also suspend the listing of an entity for any breaches to the Listing Rules which transpose the requirements of the PD.

In terms of Schedule 11 of the Companies Act, the Registrar may impose penalties for any breaches of the PD as transposed into the Companies Act.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Although there are no specific aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions in Malta which should be taken into account when assigning the type of sanction or the amount of the fine, in practice the Authority will take certain circumstances into account in arriving in its decision. Such circumstances would include, for example, the amount of cooperation (or lack of cooperation) which the regulated entity demonstrates with the Authority on the issue at hand as well as the breaches history of the entity involved.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

In terms of Article 19 of the Financial Markets Act, the maximum fine which can be imposed by the Listing Authority for any breach of the Listing Rules is of €150,000. There is no minimum amount established.

In terms of the Schedule 11 of the Companies Act, the maximum penalty which can be imposed by the Registrar of Companies is of €2329.37

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

In terms of Article 19(4) of the Financial Markets Act, the Listing Authority may not take action against any issuer, applicant or any other person after the end of the period of two years beginning with the first day on which it knew of the contravention unless proceedings against that issuer, applicant or person, in respect of the contravention were begun before the end of that period.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Prior to arriving at a decision to impose a formal Sanction the Listing Authority will write to the entity concerned asking for explanations for any breaches to the applicable requirements. If such explanations are not satisfactory, the Listing Authority will proceed with the imposition of the administrative sanctions contemplated by law after taking into consideration any representations submitted by the entity concerned.

The Authority requests representations from its licence holder prior to the imposition of a sanction to ensure that such licence holder is given adequate opportunity to state its case and give its reasons as to why the Authority should not take any sanction in its regard. This approach is mainly in line with the principle of natural justice – audi alteram partem.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

The generic details relating to the sanction imposed and the identity of the person concerned will be disclosed on the website of the Malta Financial Services Authority. (<http://www.mfsa.com.mt/pages/AdministrativeMeasuresPenalties.aspx>)

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

An issuer may appeal to the Financial Services Tribunal set up under the Malta Financial Services Authority Act from a decision of the Listing Authority to impose an administrative sanction on an entity which is subject to its regulation.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

There is a right of appeal before the Financial Services Tribunal from a decision of the Listing Authority to impose an administrative sanction. There is a further recourse to the Court of Appeal from a decision of the Financial Services Tribunal. However such further appeal is only limited to points of law.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

In terms of Article 41 of the Financial Markets Act, any person who is guilty of an offence under the provisions of article 40 of the Act (which establishes as an offence, inter alia, the failure to comply with

any Listing Rules, which, in turn transpose the requirements of the Prospectus Directive), shall be liable to a criminal fine, imprisonment or both.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

As referred to in the reply to question 29, above, Article 40 of the Financial Markets Act, imposes criminal liability on **any person** responsible for a breach of, inter alia, the Listing Rules (which transpose the requirements of the Prospectus Directive).

31. Can legal persons be held liable for criminal offences?

Yes.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Any person who fails to comply with any condition, obligation or requirement arising in terms of the Financial Markets Act or the Listing Rules shall be guilty of an offence in terms of Article 40 of the Financial Markets Act.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

For a person to be considered guilty of a criminal offence, the offence must have been committed intentionally.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

In terms of Article 41 of the Financial Markets Act, any person found guilty of a criminal offence within the meaning of this Act is liable to a criminal fine of €466,000 and/or up to a maximum of 4 years' imprisonment.

The provisions of Article 41 of the Financial Markets Act are also applicable to legal persons.

Furthermore, in terms of Article 41A of this Act, if it appears to the MFSA or to the Listing Authority that a person has contravened any of the provisions of this Act or of any regulations made under this Act or has contravened or failed to comply with any condition, obligation, requirement, Financial Market Rules, Listing Rules or directives made or given under any of the provisions of this Act, the competent authority or the Listing Authority, as the case may be, may publish a statement to that effect.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

In general, the presiding judge has discretion as to whether to take into account administrative sanctions when determining a criminal sanction.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

In terms of Article 699 (d) of the Criminal Code (Chapter 9) of the Laws of Malta, proceedings taken with respect of crimes liable to imprisonment for a term of less than four years but not less than one year; are prescribed after the lapse of 5 years.

Commencement of Time Limit:

In terms of Article 691(1) of the Criminal Code: With regard to a completed offence, the period of prescription shall run from the day on which the offence was completed; with regard to an attempted offence, from the day on which the last act of execution was committed; with regard to a continuous offence, from the day on which the last violation took place; and with regard to a continuing offence from the day on which the continuance ceased.

In terms of Article 692 of the Criminal Code, the period of prescription in respect of crimes shall not commence to run when the offender is unknown.

Interruption/ Suspension of Prescription

In terms of Article 691(2) of the Criminal Code, where the criminal action cannot be instituted or proceeded with except on a special authorization, or after the determination of any issue upon separate proceedings, the period of prescription shall be suspended, and shall continue from the day on which the authorization is granted or the issue is determined.

Furthermore, Article 693 of the Criminal Code, provides that:

- (1) The period of prescription is interrupted by any act of the proceedings served on the party charged or accused in respect of the fact with which he is charged.
- (2) The period of prescription is also interrupted by the warrant of arrest or, where there are no grounds for the arrest, by the summons, although the warrant of arrest or the summons shall have had no effect on account of the fact that the party charged or accused had absconded or left Malta.
- (3) Where the period of prescription has been interrupted, it shall recommence to run from the day of the interruption.
- (4) The interruption of prescription shall operate in regard to all persons who took part in the offence, even though the act of interruption takes place against one person only.

Maximum Time Limit

There is no maximum time limit for interruption. If prescription is interrupted, it starts to run again from the date of the interruption, irrespective of the number of times it is so interrupted.

37. Can the competent authority initiate criminal proceedings?

The Competent Authority cannot initiate proceedings. In terms of Article 41 (b) of the Financial Markets Act, no criminal proceedings for an offence under this Act shall be commenced without the consent of the Attorney General.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

The MFSA may be summoned to provide evidence of its findings in the course of criminal proceedings as well as to the Attorney General during the latter's preparation of the relative prosecution.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

There is nothing in the Financial Markets Act and/or the Companies Act which excludes the possibility of administrative sanctions being imposed if criminal proceedings have been instituted.

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

NO.

41. Who is entitled to sue for damages?

42. What circumstances must be proven by the plaintiff?

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

47. Is a class action available?



This document contains the answers of the Netherlands Authority for Financial Markets (“AFM”) to ESMA’s Prospectus Liability Questionnaire of May 16, 2012. The answers provide for a general overview of provisions in Dutch civil, administrative and criminal law in relation to prospectus liability. Please note that these answers should not be relied upon in specific cases.

### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Under Dutch civil law, no specific prospectus liability regime exists. Prospectus liability claims can be based on the general tort law provision of section 6:162 of the Dutch Civil Code (“DCC”).

Furthermore, two *species* of tort law are relevant here (these have a similar regime when it comes to potential defendants, burden of proof etc.):

I Investors that qualify as consumers can base their claim on chapter 6.3.3a DCC (sections 6:193a - 193j DCC) in which the Unfair Commercial Practices Directive has been implemented (in effect since 15 October 2008).

II In the same chapter, the Misleading and Comparative Advertising Directive has been implemented (sections 6:194-196 DCC) – since 15 October 2008 only investors that do not qualify as consumers can base a prospectus liability claim on the ground of misleading advertisement.

If a contractual relationship exists between the investor and the defendant, the defendant could also base his claim on contractual liability (section 6:74 DCC). However, as prospectus liability does not often seem to be based on contractual liability we will not discuss this alternative in further detail. Claims based on the assertion that the contract was entered into under the influence of an error (*dwaling*) or as a result of duress, fraud or undue influence (*misbruik van omstandigheden*) etc. are also considered to fall outside the scope of the subject matter of the Chapter Civil liability of this questionnaire.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

In general the issuer, offeror or person asking for the admission to trading on a regulated market or guarantor is *responsible* for the information given in a prospectus in accordance with article 6 of the Prospectus Directive. However, *civil liability* cannot be based directly on this provision as implemented in the Dutch Act on Financial Supervision and the DCC does not prescribe specific parties. Pursuant to relevant case law and/or literature, civil liability can be based on:

I General tort law, section 6:162 DCC: the issuer, in some cases its board of directors or one of its directors, the lead manager, other members of the syndicate or sponsoring banks, and possibly advisors such as an auditor whose (incorrect) statements are incorporated in the prospectus and existing shareholders that offer their shares simultaneously with the issue/listing. With exception of



advisors such as an auditor, the responsible persons would be liable for the whole content of the prospectus.

II Unfair commercial practices, sections 6:193a-j DCC: A commercial practice shall be unfair if a 'trader' acts:

- a. contrary to the requirements of professional diligence, and
- b. the ability of the average consumer to take an informed decision is or may be appreciably impaired, because of which the average consumer takes or may take a transactional decision that he would not have taken otherwise.

In particular, commercial practices shall be unfair, if a 'trader' conducts:

- a. a misleading commercial practice as meant in sections 6:193c up to and including 6:193g DCC, or;
- b. an aggressive commercial practice as meant in sections 6:193h and 6:193i DCC.

A trader (*handelaar*) is (i) a natural or legal person who is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader. who have committed an unfair commercial practice, in this case the publication of a misleading prospectus (ii) the issuer, as well as the lead manager and/or other members of the syndicate or sponsoring banks that distribute the prospectus through their offices, and (iii) existing shareholders that offer their shares simultaneously with the issue/listing insofar as they qualify as 'trader'. Insofar as use of the - whole - prospectus (publication, distribution, offering on the basis thereof) by 'traders' qualifies as an unfair commercial practice, these 'traders' will likely be liable for the whole content of the prospectus.

III Misleading advertisement – sections 6:194-196 DCC:

If the defendant can be held liable under this section, he will be liable for the whole content of the prospectus as he will have made public or caused to have made public the prospectus as a whole; insertion of a disclaimer for certain parts of the contents can only, possibly, lead to non-applicability of the reversal of the burden of proof laid down in section 6:195 DCC (see question 11). Parties that can be held responsible are (i) the person that makes public or causes to be made public misleading information regarding goods or services which he, or the person for whom he acts, offers in the conduct of a profession or a business (ii) the issuer, the lead manager and/or other members of the syndicate or sponsoring banks that distribute the prospectus through their offices and (iii) possibly existing shareholders, mainly directors (who also have a certain level of influence on the content of the prospectus), that offer their shares simultaneously with the issue/listing. It is argued that a claim against *e.g.* an auditor cannot be based on sections 6:194-196 DCC because they are not considered to be persons that make public or cause to be made public.

3. Are the persons under the previous question subject to joint and/or several liability?

The general rule of section 6:102 DCC prescribes that, if for example the court deems both the issuer and the lead manager liable for the same damages, they are jointly and severally (*hoofdelijk*) liable for such damages.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

- Publication of a misleading prospectus. This is for instance the case when certain important information is omitted.



- Committing an unfair commercial practice (see question 2 for a definition of an unfair commercial practice).
- Publication of misleading advertisements.

In the Netherlands there are specific administrative and criminal but no specific civil liability provisions which prohibit a public offer without a duly approved prospectus. However civil liability could also arise from breaches of these specific administrative and criminal liability provisions.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

[Section 162(3) DCC] A tortfeasor is responsible for the commitment of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles. In this context, fault is interpreted as negligence (*verwijtbaarheid*).

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

In the Netherlands any person who claims to have suffered damages is entitled to sue for damages. In general the people who claim to have suffered damages will be investors and financial intermediaries that have bought financial instruments in the primary and secondary market, but given the circumstances also other parties may have suffered damages and are entitled to sue for damages.

Also, pursuant to the Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*) the Authority for the Financial Markets may, where financial services or activities are concerned, not only file a petition pursuant to section 3:305d DCC but also impose certain public law sanctions if collective consumer interests are or may be damaged due to, for example, unfair commercial practices. Please note that, in view of the latter option, this Act is also relevant for the Chapter Administrative Liability of this questionnaire (see for instance question 20).

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Tort in general requires: tortuous behaviour, accountability, loss and causation.

The plaintiff must prove that:

- the defendant was responsible for the prospectus (publication, distribution);
- that the prospectus was misleading and that the defendant was aware thereof (can be held accountable);
- that the plaintiff relied on the misleading prospectus for his investment decision; and
- that the plaintiff suffered losses due to this investment.



Pursuant to section 6:193a et seq. DCC, the investor must prove that the defendant performed an unfair commercial practice against him and that the investor has incurred losses as a result thereof.

Pursuant to section 6:194 et seq. DCC, the investor must prove that the defendant has published or made public such prospectus, and that the investor has incurred losses as a result thereof.

In the Netherlands the causal link between the misleading information and the damage is not presumed, but in case the claim is based on either unfair commercial practices or misleading advertisement, the burden of proof is reversed (section 6:193j DCC and section 6:195 DCC respectively): (i) the defendant must prove that the prospectus was materially correct and complete and (ii) the defendant is assumed to be liable for the damages incurred due to the prospectus unless he proves these damages are not incurred due to his fault or that he is not accountable there for. The causal link between the prospectus and the investment decision is assumed.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

The defendant can avoid liability if he can prove that he was neither at fault nor accountable. Basically, the defendant can avoid liability if he can successfully dispute the allegations made by the plaintiff as set out under question 7.

With regard to the possible insertion of a disclaimer, see question 11.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

In general, sections 24 and 25 of the Dutch Code of Civil Proceedings provide rules for facts that the court may take into judicial notice of. No specific provisions apply to prospectus liability proceedings.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

[Chapter 6.1.10 DCC] Recoverable are: damages for pecuniary loss (to property, rights and interests, (*vermogensschade*)) and of other (non-pecuniary) loss, the latter to the extent provided for by law. Pecuniary damages comprise both loss incurred and profit deprived. Non-pecuniary losses are immaterial damages (such as emotional damages). As to the quantification of damages, the court shall assess the damage in a manner most appropriate to the nature of such damages. In the event the extent of the damages cannot be determined precisely, it shall be estimated. The recovery of damages can only be claimed for losses that are related to the event giving rise to the liability of the tortfeasor, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such event.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?



In contractual relations, it is possible to exclude or limit liability except in case of intent or gross negligence (*opzet of grove schuld*). Under tort law on the other hand, the general view is that an exoneration is not acceptable as it would render protection provided by it ineffective. However, it is argued that in case of claims based on section 6:194 et seq. DCC, insertion by *e.g.* a lead manager of a clause stating explicitly that statements in the prospectus are not originating from him and that he cannot stand for the correctness thereof prevents application of reversal burden of proof. Nevertheless, the lead manager can still be held liable.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Article 3:310 (1) DCC - Claims based on tort have a time limit of five years after the victim becomes aware of the damages and the identity of the person responsible, with a maximum time span of twenty years after the event that caused the damages occurred. The limitation period can be interrupted or suspended by sending a notice to that effect to the responsible party. In principle, the limitation period is the same for all responsible persons, provided of course that the identity of such person is known to the victim.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

This is a matter of Dutch international private law, book 10, chapter 14 DCC in conjunction with the Rome II regulation. Insofar as any claim based on tort would fall outside the scope of the Rome II regulation (and the relevant applicable treaties), section 10:159 DCC stipulates that the provisions of the Rome II regulation will apply nonetheless (this section came into force 1 January 2012).

The principal rule for applicable law is laid down in section 4 of the Rome II regulation: applicable is the law of the country in which the direct damage occurs (the country where the investor's investment account is located).

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

The Collective Settlement of Mass Damage Act (*WCAM*) provides for judicial endorsement of a *voluntary* settlement contract concluded between the alleged tortfeasor and the representative organisations acting on behalf of the investors that sustained losses as a result of the alleged tort committed. This is an opt-out system: the collective settlement is declared binding on all investors in the class that is involved in the settlement, unless they opt out by providing written notice.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Section 3:305a DCC provides for class action proceedings. Investors have to find an investors association willing to start these proceedings or they have to establish an association/foundation with full legal capacity themselves. The articles of such association/ foundation have to state that it seeks the protection of similar interests of other persons. Article 3:305a DCC provides for a declaratory judgment, it does not provide for the opportunity to claim damages from the alleged tortfeasor for all parties that sustained losses due to the tort committed collectively. Nor does it provide the option of forcing victims into settling mass claims with some degree of finality - for a collective *settlement* procedure, see question 14.



### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

There is a specific provision in Dutch financial supervision law which prescribes that the prospectus must state whether the responsibility for the information contained in the prospectus lies with the issuer, its management or supervisory board, the offeror, the person asking for the admission to trading on a regulated market or guarantor (in accordance with article 6 of the Prospectus Directive). For certain specific breaches of the PD framework these responsible persons can be held liable by the Authority for the Financial Markets that can impose sanctions. There are no specific provisions in Dutch administrative law which describes specific liabilities for different parts of the prospectus. Furthermore see question 2.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

There are no specific provisions in Dutch administrative law which prescribes for which degree of fault persons are liable for information contained in a prospectus. General provisions of Dutch law apply which are the same in civil, administrative en criminal law. In general the issuer, offeror or person asking for the admission to trading on a regulated market or guarantor are responsible if damages occur or offences have been made due to their fault or to a cause for which they are accountable by law or pursuant to generally accepted principles. In this context, fault is interpreted as negligence (*verwijtbaarheid*). See also question 5.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Sanctions can be imposed on both legal persons and natural persons in charge.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

Administrative sanctions can be imposed by the Authority for the Financial Markets.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Administrative sanctions can be applied for the following breaches:

- offering securities to the public in the Netherlands or have securities admitted to trading on a regulated market situated or operating in the Netherlands without having a prospectus generally available in respect of the offer or admission which has been approved by the Authority for the Financial Markets or by a competent authority of another Member State.



- If the issuer does not publish and/or file the final terms, information regarding the final price and the final number of securities to be offered or a supplement with the Authority for the Financial Markets.
- If advertisements do not meet the requirements mentioned in article 15 PD (e.g. inaccurate, misleading, inconsistent with the prospectus) or do not warn if no prospectus is required to be published.
- If the prospectus is not published in accordance with article 14 PD.
- Breaches of the articles 26 (5), 27, 29, 30 and 34 of the Prospectus Regulation.

There are no specific prospectus related provisions in Dutch administrative law for sanctioning untrue information. However, in case of untrue information in a material aspect or omission of material information in a prospectus, administrative sanctions can be applied due to the fact that this will generally lead to numerous other breaches such as not filing a supplement and/or misleading advertisements and other inaccuracies, or inconsistencies between advertisements and the prospectus. Financial enterprises shall also ensure that the information published or provided by it or on its behalf with regard to a financial product, financial service or ancillary service, including advertisements, shall be accurate, clear and not misleading and shall not be detrimental to the information to be supplied or made available pursuant to the Act on financial supervision. If financial enterprises do not comply with this provision due to untrue information in the prospectus they can also be sanctioned.

In case of unfair commercial practices (pursuant to the Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*)) - see questions 2 and 6.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

I Instruction orders (if an issuer, offeror or person asking for the admission of securities to trading on a regulated market fails to comply with any of the provisions laid down in the PD framework (Chapter 5.1 Dutch Act on Financial Supervision or the Prospectus Regulation), the supervisor may oblige this person, by issuing an instruction, to adhere to a particular line of conduct (for instance to remedy the infringement) within a reasonable time specified by the supervisor with regard to the points set out in the instruction order);

II Orders for incremental penalty payments;

III Administrative fines; and

IV Public warnings (in case of offering securities to the public in the Netherlands or have securities admitted to trading on a regulated market situated or operating in the Netherlands without having a prospectus generally available in respect of the offer or admission which has been approved by the Authority for the Financial Markets or by a competent authority of another Member State.

Suspension of trading and suspension of licences are sanctions which can be imposed by the Authority for the Financial Markets but primarily in case of other breaches and not solely for breaches of the PD framework.



22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

When assigning the type of sanction or the amount of the fine aggravating and mitigating factors can be taken into account. Depending on the gravity (damages caused), degree of fault and duration of the infringement fines the amounts can be higher or lower. Recidivism within five years doubles the fine. On the basis of the financial position of the infringer the amount of the fine can be lowered to € 0,00.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

In the Netherlands the size of a fine is not limited if the economic gain is higher than EUR 2.000.000. In that case the fine will be twice the economic gain.

If the economic gain is lower than EUR 2.000.000 the range is maximized at EUR 4.000.000 and in case of recidivism within 5 years EUR 8.000.000.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

The power to impose an administrative fine expires five years after the violation took place.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

There are no formal settlement procedures within the Authority for the Financial Markets.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes, depending on the gravity the supervisor shall publish fines and orders for incremental penalty payments after its announcement or after this has become irreversible by law or in case of orders for incremental penalty payments when payment has been forfeited, unless publication is or might be considered contrary to the object of the supervisor (supervision of compliance).

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

In the Netherlands an appeal to an administrative body is neither required nor allowed regarding decisions relating to the supervision on prospectuses (with an exception for administrative fines):

With regard to all decisions (mentioned in the answer on question 21 except the decision to impose an administrative fine) of the Authority for the Financial Markets which relate to the supervision on the prospectus there is no need to lodge an objection with the Authority for the Financial Markets before appealing to court. The appeals against these other decisions shall be lodged directly with the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*). No higher appeal lies against the decision of the Trade and Industry Appeals Tribunal.

Only in case a person wants to appeal the decision of an administrative fine to a court, he must necessarily first lodge an objection with the Authority for the Financial Markets.



28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes, an interested party may appeal a decision to impose an administrative fine to a court. Normally this procedure consists of three stages: first an objection against the sanction with the Authority for the Financial Markets; secondly appeal to the District Court of Rotterdam; and thirdly appeal to the higher court (the Trade and Industry Appeals Tribunal or *College van Beroep voor het bedrijfsleven*).

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, offering securities to the public in the Netherlands or have securities admitted to trading on a regulated market situated or operating in the Netherlands without having a prospectus generally available in respect of the offer or admission which has been approved by the Authority for the Financial Markets or by a competent authority of another Member State is a criminal offence. The general criminal provisions apply (Act on Economic criminal offences).

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

No persons can be held criminally responsible for information contained in a prospectus except for civil offences such as fraud. Only offering/admitting securities to trading without a prospectus is a criminal offence. Anyone can be the offeror/issuer and can commit this offence. The offeror/issuer and/or the person in charge of the offeror/issuer can be criminally liable.

A person or legal person who has made false statements or omissions of material information on purpose can be held liable for fraud. Anyone can commit fraud and can be held responsible. The (legal) person(s) who has/have committed the crime (for instance the offeror/issuer/guarantor, the directors or other persons in charge of the offeror/issuer/guarantor, lead manager, distributors, auditors, experts, etc.) risk being criminally prosecuted by the Public Prosecutor.

31. Can legal persons be held liable for criminal offences?

Yes, also legal entities can commit the criminal offence described in the question above and can be held liable for criminal offences (see article 51 (1) of the Dutch Penal Code).

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

There is a specific criminal provision with regard to the offering/admitting securities to trading without a prospectus.

There are no other specific criminal provisions to punish specific prospectus related offences but of course also general criminal provisions apply which makes it possible to punish intentional offences such as fraud.



33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

With regard to offering/admitting securities to trading without a prospectus intent is not required and only influences the maximum of the type of sanction or the amount of the penalty which has to be paid. For fraud intent is required.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

**Offering/admitting securities to trading without a prospectus:** 1) intentionally = maximum 2 years imprisonment, community service or a maximum criminal fine of € 78.000,--\*; and 2) unintentionally = maximum 6 months imprisonment, community service or a maximum criminal fine of € 78.000,--\*.

**Fraud:** maximum 4 years imprisonment, community service or a maximum criminal fine of € 78.000,--\*.

\*Note that the maximum of the administrative fines are much higher than the criminal fines, see question 23.

These criminal sanctions can also be imposed on legal entities. There are no specific other criminal sanctions for legal entities. However criminal offences – committed by for instance a financial enterprise such as a bank, an investment company, a depositary or any other financial enterprise which operates under a license of a competent authority – can lead to a situation that the license holder no longer complies with the rules laid down by or pursuant to Dutch legislation such as the Act on financial supervision which may result in either permanently or temporarily withdrawal, modification or limitation fully or in part of the license by the competent authority. The withdrawal, modification or limitation of a license is however not a criminal sanction but an administrative sanction.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Generally a judge can take an administrative sanction into account when determining the criminal sanction. It is possible to impose a criminal sanction when other non-punitive administrative sanctions (such as instruction orders, orders for incremental payments, public warnings and/or suspension of trading or licenses, see also question 21) have already been imposed. Vice versa it is also possible to impose non-punitive administrative sanctions (such as instruction orders, orders for incremental payments, public warnings and/or suspension of trading or licenses, see also question 21) after criminal sanctions have already been imposed.

However when a punitive administrative sanction (a fine) has been imposed the ‘ne bis in idem’ principle prohibits that a person is punished again with a criminal sanction for that same crime.

The ‘ne bis in idem’ principle is stated by Dutch law in article 68 (1) of the Dutch Penal Code: “Except in cases in which judgments are susceptible to review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands, the Netherlands Antilles or Aruba has rendered final judgment on the substance of the charges against him.” Consequently if a criminal sanction has been imposed no other punitive administrative sanction (the administrative fine) can be imposed for the



same offence and vice versa. Furthermore there is of course relevant case law / jurisprudence and legal literature about the scope and application of the 'ne bis in idem' principle. Also note that regarding the coordination of administrative and criminal proceedings the Authority for the Financial Markets works together throughout the FEC-cooperation and can exchange information with and submit findings and observations to the Public Prosecutor (see questions 37 and 38).

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

The right to impose criminal liability lapses:

1) in three years for all (minor) offences (see for instance unintentionally offering/admitting securities to trading without a prospectus in question 34);

2) in six years for felonies if the maximum imprisonment is no more than 3 years (see for instance intentionally offering/admitting securities to trading without a prospectus in question 34); and

3) in twelve years for (serious) felonies if the maximum imprisonment is more than 3 years (see for instance Fraud in question 34).

In general the time limit commences on the day following the day on which the offence or felony has been committed. Every act of prosecution interrupts the time limit (prescription period).

In case of interruptions of time limits as a result of acts of prosecution also the maximum time limits of article 72 (2) of the Dutch Penal Code apply. This article states that the right to impose criminal sanctions also lapses in case of interruptions in ten years for all (minor) offences and in a period that is twice the length of the initial time limit for all other felonies (so in this case twelve years for felonies if the maximum imprisonment is no more than 3 years and in twenty-four years for (serious) felonies if the maximum imprisonment is more than 3 years).

37. Can the competent authority initiate criminal proceedings?

The Authority for the Financial Markets can initiate criminal proceedings by 1) reporting a crime to the Public Prosecutor; and by 2) sharing information with and submitting findings and observations about crimes in the financial sector to the Financial Expertise Centre (FEC) (a multidisciplinary form of cooperation between seven partners with supervisory, control, investigation and prosecution tasks in the financial sector. These seven organisations (FEC-partners) which work together in the Financial Expertise Centre (FEC) are: 1) Authority for the Financial Markets (AFM); 2) Tax Authorities; 3) Ministry of the Interior; 4) De Nederlandsche Bank (DNB); 5) Fiscal Information and Investigation Service (FIOD); 6) Public Prosecutor; and 7) Police.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes, the Authority for the Financial Markets can exchange information with and submit findings and observations to the Public Prosecutor through the FEC-cooperation.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Yes, the 'ne bis in idem' principle prohibits that a person is punished twice for the same crime.



See for a clarification 'ne bis in idem' principle question 35

**Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

The general civil liability regime of article 6:162 DCC applies. Currently no specific provisions to that effect are included in Dutch legislation except for a limitation on liability included in the Act on financial supervision which limits the liability of the Authority for the Financial Markets and the Dutch Central Bank to intent or gross negligence (*opzet of grove schuld*).

See also questions 43 and 44 about how the Government and/or competent authority can avoid liability and for the limitation of Government liability.

The Authority for the Financial Markets and the Dutch Central Bank also provides a complaints scheme which is based on Dutch administrative law. If, through the complaints scheme, a complaint is assessed to be well-founded, the Authority for the Financial Markets and the Dutch Central Bank may *inter alia* offer compensation.

41. Who is entitled to sue for damages?

See question 6.

42. What circumstances must be proven by the plaintiff?

See question 7 (and question 43 below).

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

See question 8, provided that pursuant to case law, the criterion is that of a regulator, acting properly and in due care (*behoorlijk en zorgvuldig handelende toezichthouder*).

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

Re. the first question, see question 10. Re. the second question, as per 1 July 2012, the liability of the Authority for the Financial Markets and the Dutch Central Bank is limited to intent or gross negligence (*opzet of grove schuld*) (section 1:25d Financial Markets Supervision Act).

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.



Pursuant to article 7:661(1) DCC an employee who, in performance of the contract, causes damages to his employer or to a third party cannot be held liable by his employer, except when these damages are a result of intent or gross negligence on his – the employee's – part.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

See question 12.

47. Is a class action available?

See question 15.

The Financial Supervisory Authority of Norway answers to this questionnaire have no legal effect, they do not present or represent any interpretation of or official position by the Financial Supervisory Authority of Norway regarding existing laws, regulations or other forms of Norwegian legislation, including case-law by the Norwegian courts. This document should not and cannot be relied upon for any purpose other than for the purposes for which it was prepared. In particular, the answers provided by the Financial Supervisory Authority of Norway to this questionnaire should not be relied upon as a substitute for, or as guidance on, any aspect of the supervisory practices of the Financial Supervisory Authority of Norway or regulatory system of Norway.

In light of the extensive scope of the questions or/and their generic terms, the answers provided by the Financial Supervisory Authority of Norway to this questionnaire should not be considered as providing an exhaustive and detailed description of all potentially applicable legal provisions as regards the matters discussed in this questionnaire.

Any answer to this questionnaire is subject to and does not prejudice of the actual positions from any other Norwegian national competent authorities and in particular the relevant Norwegian competent courts of law, which should be exclusively competent to decide upon civil and criminal liability matters in relation to the prospectus rules in accordance with the constitutional principle of separation of powers.

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Civil prospectus liability may arise on the basis of a breach of the prospectus rules, in the Norwegian Act on Securities Trading<sup>1</sup> (Securities Trading Act) chapter 7 and the Norwegian Regulations to Securities Trading Act<sup>2</sup> chapter 7. However, the Norwegian Securities Trading Act does not constitute an autonomous civil liability regime as it mainly establishes the situations upon which civil liability may be sought, the relevant persons incurring liability as well as the necessary level of fault. Subject to the specific facts and circumstances of the matter, all the general parameters of liability, including the determination/level of a fault, the resulting damage and of the causal link between the fault and the damage, have to be considered and determined on the basis of general Norwegian liability principles.

In addition civil prospectus liability may arise on a contractual basis, where the prospectus constitutes a legal binding contract between the issuer and the investors. The Financial Supervisory Authority of Norway assumes that the description in the first section will be the easiest way for claiming civil liability. Thus the answers below will focus on this.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

The board of the company is responsible for the information in the prospectus, cf. the Securities Trading Act section 7-18. .

"Section 7–18            Responsibility

(1) In the case of an offer for subscription or purchase of shares made by the company that has issued the shares, the board of the company shall be responsible for ensuring that the prospectus meets the prescribed requirements. The same applies to admission to trading on a regulated market.

(2) The prospectus shall identify who is responsible.

(3) 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, and that there are no omissions in the prospectus which are of such a character that they could change the lexical content of the prospectus."

The responsible persons are liable for the whole content of the prospectus.

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<sup>1</sup> 29 th of June, number 75, 2007

<sup>2</sup> 29 th of June, number 876, 2007

3. Are the persons under the previous question subject to joint and/or several liability?

The members of the board of the company may be liable cf. Norwegian Public Limited Liability Companies Act<sup>3</sup> section 17-1. The general rule is joint and several liability cf. Act relating to compensation in certain circumstances<sup>4</sup> section 5-3.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

The responsible are liable for all the mentioned examples.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Negligence and intent.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Natural or legal persons who have had an economic loss cf. Act relating to compensation in certain circumstances section 4-1.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

A compensatory basis, economic loss, basis of liability and adequate cause in fact.

All the mentioned examples may be relevant for the consideration of the necessary conditions.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

No compensatory basis, no economic loss, no basis of liability or no adequate cause in fact.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

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<sup>3</sup> 13th of June, number 45, 1997

<sup>4</sup> 13th of June, number 26, 1969

Economic loss, cf. Act relating to compensation in certain circumstances section 4-1. No, the law does not provide specific provisions on the quantification of compensation. The actual loss will be a natural compensation.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

The board of the company is responsible for the information. It is not possible to exclude the liability, i.e. with a clause in the prospectus.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

This is regulated in the Act relating to the limitation period for claims<sup>5</sup>. The general limitation period is three years cf. section 2. The limitation period can be interrupted. Concerning claims for damages, there are special rules, cf. section 9. Claims for damages or redress shall be subject to a limitation period of three years from the date on which the injured party obtained, or should have himself acquired, necessary knowledge of the damage and the person responsible. Nevertheless, the limitation period shall be at the latest 20 years after the commission of the tort or other basis for liability ceased. Section 9 does not apply to claims based on contract.

Each responsible person mentioned under question 2 is subject to the same time limit.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

The Securities Trading Act, general principles of contract law and non-statutory rules on tort. Norway has subscribed to the Lugano Convention.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Yes, for claims based on the same or on materially the same actual basis and legal basis.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

The board of the company is responsible for the information in the prospectus, cf. the Securities Trading Act section 7-18.

"Section 7-18                      Responsibility

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<sup>5</sup> 18th of May, number 18, 1979

(1) In the case of an offer for subscription or purchase of shares made by the company that has issued the shares, the board of the company shall be responsible for ensuring that the prospectus meets the prescribed requirements. The same applies to admission to trading on a regulated market.

(2) The prospectus shall identify who is responsible.

(3) 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, and that there are no omissions in the prospectus which are of such a character that they could change the lexical content of the prospectus."

The responsible persons are liable for the whole content of the prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Negligence or intent.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

The sanctions can be imposed on legal persons, as the board of the company represents the company in its dealings with external parties, cf. Norwegian Public Limited Liability Companies Act section 6-30. The board of the company may be liable cf. Norwegian Public Limited Liability Companies Act section 17-1.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The Financial Supervisory Authority of Norway.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Sanctions may be applied in all the mentioned examples. The Financial Supervisory Authority of Norway has not yet imposed violation penalty. Letters with criticism, because of omission of material information in the prospectus and admission to trading without published prospectus, has been published.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Untrue information in a material aspect – Violation penalty, prohibition of the offer, temporarily prohibit the issuer from implementing an offer for up to 10 business days, prohibit announcements for up to 10 business days

Omission of material information in the prospectus - Violation penalty, prohibition of the offer, temporarily prohibit the issuer from implementing an offer for up to 10 business days, prohibit announcements for up to 10 business days

Selling of securities to the public without having published a PD compliant prospectus - Violation penalty, prohibition of the offer, temporarily prohibit the issuer from implementing an offer for up to 10 business days, prohibit announcements for up to 10 business days

Inaccurate or misleading advertisements - Violation penalty, prohibition of the offer, temporarily prohibit the issuer from implementing an offer for up to 10 business days, prohibit announcements for up to 10 business days

Advertisements inconsistent with the prospectus – Violation penalty, prohibition of the offer, temporarily prohibit the issuer from implementing an offer for up to 10 business days, prohibit announcements for up to 10 business days

The Financial Supervisory Authority of Norway may criticize an issuer in a public letter, in all the mentioned examples.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Concerning the amount of the violation penalty, according to the Securities Trading Act section 17-4(5), importance shall in particular be attached to "the scale and effects of the violation as well as the degree of guilt found"

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

There is no indication of the range of fines in the laws, regulation or administrative provisions.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

A specific time limit is not regulated in law. However, there will be a time limit, based on general administrative principles. The time limits in the Act relating to the limitation period for claims may be relevant in the consideration.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

See question 20. When sanctions are imposed, this will be public. Letters with criticism have already been made public.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Concerning violation penalty, this is regulated in the Securities Trading Act section 17-4 (7):

"Action may not be brought against a decision handed down under this section until the party has utilised the right of appeal and appeal has been decided by the appeal authority. Action may however invariably be brought where six months have elapsed since the date the declaration of appeal was submitted for the first time, and the absence of a decision by the appeal authority is not the result of negligence on the part of the appellant."

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Basically yes, but normally not before the administrative ways of appeal have been utilised. The Department of finance is the administrative organ of appeal for prospectus decisions made by the Financial Supervisory Authority of Norway. After a final decision by the Department, the case may be taken to the ordinary courts, starting with the court of first instance.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Specific criminal prospectus regime is regulated in the Securities Trading Act section 17-3. Violations of the obligation to publish a prospectus or to give misleading or incorrect information in a prospectus may lead to a fine or imprisonment not exceeding 1 year.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

Cf. the Securities Trading Act section 17-3 "anyone" can be held criminally responsible. In practice this will be the issuer, represented by the members of the board of the company.

31. Can legal persons be held liable for criminal offences?

Yes, in the case a penal clause has been violated by somebody acting on behalf of the actual legal person. This is so even if no natural person can be punished for the offence. In these cases the penalty is fines. (Criminal code section 48a and the Securities Trading Act section 17-3.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Violations of the obligation to publish a prospectus or to give misleading or incorrect information in a prospectus. Omission of material information in a prospectus may constitute a criminal offence as well.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

The requirement is that the violation is done wilfully or through negligence, cf. the Securities Trading Act section 17-3 (2).

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Fines (no indication of the range) and imprisonment not exceeding 1 year, cf. the Securities Trading Act section 17-3.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

Basically no, because of the general prohibition to impose dual penalty.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

The period of limitation for these offences leading to fines or imprisonment up to 1 year, is 2 years, cf. Criminal code § 67. The commencement of this period will basically be the day the criminal offence ceased to exist.

37. Can the competent authority initiate criminal proceedings?

No, this has to be done by the relevant body for criminal proceedings under the Department of justice.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

The CA can submit findings, but this is a right and no obligation. This has not yet been done in the area of prospectuses.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

It impacts the possibility for the Financial Supervisory Authority of Norway to impose administrative sanctions, because there exists a general prohibition to impose dual penalty.

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Cf. the non-statutory rules on tort, the Financial Supervisory Authority of Norway may be responsible, for damages where it has shown gross negligence.

41. Who is entitled to sue for damages?

Persons or legal persons who have had an economic loss cf. Act relating to compensation in certain circumstances section 4-1.

42. What circumstances must be proven by the plaintiff?

A compensatory basis, economic loss, basis of liability and adequate cause in fact.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

No compensatory basis, no economic loss, no basis of liability or no adequate cause in fact.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

Economic loss, cf. Act relating to compensation in certain circumstances section 4-1. No, the law does not provide specific provisions on the quantification of compensation. The actual loss will be a natural compensation. The law does not provide for a limitation to the Government liability.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Yes, at least if an employee, with intent, commits a materially violation.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

See answer to question 12.

47. Is a class action available?

Yes.

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

Act on public offerings, conditions governing the admission of financial instruments to organised trading, and on public companies (implementing the PD) does not constitute an autonomous civil liability regime although it contains e.g. the list of potential liable entities, general provisions of the joint and several liability. There are not specific rules in such an act, so principles and general provisions concerning the liability for torts (related to the prospectus and public offerings) are emerging from the Polish Civil Code which is applicable in the whole extension.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

According to the Act on public offerings, conditions governing the admission of financial instruments to organised trading, and on public companies (implementing the PD), the entity responsible for the authenticity, integrity and completeness of information contained in the issue prospectus shall be:

- 1) the issuer – for all information;
- 2) the selling securities holder – for information about the selling securities holder and the sales of securities conducted by him\*;
- 3) guarantor – for information about this entity and the established hedging;
- 4) firm commitment underwriter - for information about the firm commitment underwriter and the subscription for or sales of securities conducted by him;
- 5) entity preparing or participating in preparation of information – for information it prepared or in the preparation of which it participated.

The liability referred to the entities mentioned above shall also rest with the persons who, in their activities pertaining to trading in financial instruments, use information specified in these provisions, unless they were not and could not be aware of such information being untrue or omitted.

This does not exclude the liability based on the general rules of Polish Civil Code which may be applicable for example to auditors, experts whose reports were used or cited in the prospectus.

In some specific circumstances emerging from principle rules of Polish Civil Code, it is also possible to take legal action against members of management board of entities above.

- \* please note, that the aforementioned act is being amended and it is under the legislative procedure – according to the amended version, the liability of selling securities holder shall be extended for all information contained in the prospectus if selling securities holder is a parent company for the issuer or company having the material impact on the issuer. Are the persons under the previous question subject to joint and/or several liability?
3. Are the persons under the previous question subject to joint and/or several liability?  
The entities mentioned under the previous question are subjected to joint and several liability and this cannot be limited or excluded.
  4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

1. The entities (see point 2 above) are responsible for the authenticity, integrity and completeness of information contained in the prospectus. They shall be obliged to repair damage caused by making available to the public of information that is unreliable, untrue or incomplete or by omission of information, unless this entity or the persons for whom it is responsible, are not at fault.

2. The entity which has prepared a summary or translation of documents mentioned above shall be liable exclusively for damage caused in the event that such a summary or translation is misleading, inaccurate or contradictory when read with other parts of the issue prospectus.

3. The liability referred to in points 1 and 2 above shall also rest with the persons who, in their activities pertaining to trading in financial instruments, use information specified in these provisions, unless they were not and could not be aware of such information being untrue or omitted.

However there are not any specific rules in the act implementing the PD, concerning the liability for selling securities without duly accepted and published prospectus, but liability for such infringements is possible under the general rules of the Polish Civil Code.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The entities are liable for intentional fault or negligence. It emerges from the principle rules concerning the civil liability (the Polish Civil Code) which are also applicable to the potential disputes between the entities operating on the capital market. It concerns the liability of issuers, selling security holders, guarantor, firm commitment underwriter, other entities preparing or participating in preparation of information in the prospectus and the entities which, in their business activities, pertaining to trading in financial instruments, use information contained in the prospectus. The liability of the latter requires awareness of the fact that such information has been untrue or omitted.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Generally speaking, formally every entity (legal or natural persons and other entities having legal capacity), which has borne damage and has legal capacity to sue is potentially entitled to sue for damages. Actually it refers to the persons, whose activity is connected with the capital market, in particular investors who use the information given in the prospectus as the basis for the investment decision to purchase securities during the public offer or to purchase the securities on the secondary market. To sue effectively for damages regarding liability for prospectus information and activities emerging from public offerings of securities, it is necessary to prove legal and factual interest (damage first of all).

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

The plaintiff must prove damage bearing because of unreliable, untrue or incomplete or by omission of information in the prospectus. The plaintiff needs to prove a damage (a loss) arising from an occurrence of breach, a fault on the part of the liable person and the causal link between them.

It emerges from one of the general principle of Polish Civil Code which states that the burden of proof relating to a fact shall rest on the person who attributes legal effects to that fact. There are not specific rules implementing in the regulations concerning the public offers and functioning the regulated market.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

The respondent in order to avoid liability should prove the circumstances which object the lawsuit claims (act or omission, fault, damage and causal link between the act or omission and the damage).

Please note, that one of the key rules of the Polish Civil Code sounds that the burden of proof relating to the fact shall rest on the person who attributes legal effects to that fact is applicable in whole extension.

Additionally it should be stated that the liability referred to the entities mentioned above (point 2) shall also rest with the persons who, in their activities pertaining to trading in financial instruments, use information specified in these provisions, unless they were not and could not be aware of such information being untrue or omitted. It means that such entities in order to avoid liability have to prove the latter circumstances.

Apart from the aforementioned principle rules, there are exceptions enabling to avoid or limit liability (for details see the answer to the question no 11).

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

According to the one of the general rules of the Code of the Polish Civil Procedure, which is also applicable to the disputes connected with the capital market, the burden of proof relating to a fact shall rest on the person who attributes legal effects to that fact. So, in the civil litigation the evidence of the fact which is necessary for recognition of the civil liability must be provided by the plaintiff.

The evidence delayed (if the party of litigation could provide it in the time when it is necessary according to the Code of the Civil Procedure but fail to do it) can be rejected by the court. It is the aspect of discretionary judge's power.

Only the facts publicly and officially known are taking into account without the motions by the parties. The judge may exceptionally also allow the evidence not indicated by the parties only in the justified circumstances as for example: because of the public interest. This is the discretionary judge's power.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The recoverable damages mean compensation both the damage (*damnum emergens*) and loss of opportunity – loss of profit/income (*lucrum cessans*). The Polish Civil Procedure requires to prove amount of damage (loss) which should be meant as an ordinary, relevant effects of the act or omission, but the Polish Civil Code does not provide any further details on the quantification of compensation.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

The provisions of the Polish Civil Code regarding civil liability generally do not create a possibility to exclude, proportionate or limit liability. Exceptionally, in some specific circumstances it is possible to dismiss the lawsuit for example if the defendant proves that the plaintiff would exercise right in a manner which would contradict its socioeconomic purpose or bona fide principle. It is also exceptionally possible that, by the judgment, the awarded charge (damages) can be spread out in installments. There are also some limitations of responsibility at the stage of judgments' execution, but they have not any material impact on the general principles.

All these principles are applicable for all civil litigations (there are not any specific rules for the disputes on the financial market).

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

There is not any specific legal regime in the act concerning the public securities offers. The principle rules of Polish Civil Code are applicable in full extension.

Subject to the exceptions provided for in the law, claims become barred by the statute of limitations. After the limitations period has run, the person against whom a claim is made may avoid satisfying it through allegation. The general provision in the Polish Civil Code (applicable to the liability for torts related with prospectus and public offerings) states that the time-limit to file a claim is three years from the date, when the person who suffered the damage learned about it and learned about the

person liable to redress, but not later than 10 years from the date when the event that caused the damage occurred.

Limitations periods cannot be shortened or extended by a legal act.

#### Suspension

There is not any specific regulation in the act concerning the public securities offers. The principle rules of the Polish Civil Code are applicable in full extension, but they are mainly emerging from family relationship, so it generally does not concern the capital market.

#### Interruption

General rule is that the running of the limitations period is interrupted:

- 1) by any action before a court or other authority appointed to hear cases or enforce claims of a given type or before an arbitration tribunal taken directly to either assert or establish, or satisfy or secure a claim;
- 2) by recognition of a claim by the person against whom the claim is made;
- 3) by commencement of mediation.

Every entity (see point 2 above) has the same time -limit in the aforementioned area.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

The conflicts of law and law applicable in the particular case as general is described in Act of Polish Private International Law, which generally refers to the aspects of international contractual obligations or non – contractual obligations. This Act is applied if it is not contrary to such EU regulations as:

- REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I)

REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

The restitution of damages is also possible through the arbitration procedure independent of judicial system or through mediation within the litigation or independently. There are not any objections to finish the legal dispute by settlement, which through the formal judicial approval can be subsequently enforced on equally principle as the judgements.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Yes – class action is available. The class action can be lodged by the group of minimum 10 persons, but the group must indicate their representative. The claims must present the same sort of claims and they must arise from the same facts of the case. The group of natural or legal persons is obliged to constitute a power of attorney to barrister or solicitor in order to lodge the claim to the court. The associations of investors have the legal capacity to file claims on behalf of their members, only in the case, when they are also the aggrieved party. The written permission of investors is necessary for taking the legal action on behalf or instead of them.

#### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

The entity responsible for the authenticity, integrity and completeness of information contained in the issue prospectus at the area of administrative liability shall be:

- 1) the issuer – for all information;
- 2) the selling securities holder – for information about the selling securities holder and the sales of securities conducted by him\*;
- 3) any other entity participating in a public offering;
- 4) management board;

This does not exclude the liability based on the general rules of the Polish Civil Code.

\* please note, that the aforementioned act is being amended and it is under the legislative procedure – according to the amended version, liability of selling securities holder shall be extended for all information contained in the prospectus if selling securities holder is a parent company for the issuer or company having the material impact on the issuer

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The administrative liability in Poland does not differentiate the degree of fault, but PFSA takes into account particular circumstances or financial factors of the entity - they are not taking into account as a general condition of liability but as a factor determining the amount of the fine

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

The sanction can be imposed on both legal and natural persons.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The competent body responsible for imposing administrative sanctions is PFSA.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

I.

The sanctions are applied on an issuer or selling securities holder for fail to perform or unduly performed the following obligations in the connection with prospectus:

a) an issuer concluding a standby underwriting agreement does not obtain appropriate authorization in the form of a resolution adopted by the appropriate decision-making body of the issuer and, in the case of standby underwriting of shares - in the form of a resolution of the General Shareholders Meeting of the company.

b) issuers of securities admitted to trading on a regulated market does not ensure that under the same circumstances holders of securities of the same type are given equal treatment.

c) the issuer or the selling securities holder does not provide information to the PFSA about the form and deadline of making publicly available of detailed terms and conditions of individual offerings.

d) after the approval of the registration document the issuer or the selling securities holder does not immediately submit its final version to the PFSA.

e) the issuer or the selling securities holder does not make available in the Republic of Poland the issue prospectus drawn up under the notification procedure without prior receipt by the PFSA of the documents from home state authority.

f) the lack of possibility to withdraw the subscription by the person who had subscribed securities in the case when the supplement is made available to the interested investors after the commencement of subscription or sales, of before the supplement was made available within 2 business days from the day when the supplement has been made available.

g) admission of financial instruments other than securities to trading on a regulated market without an approval by the PFSA, and making available to the public, of the terms and conditions of trade.

- h) the issuer or the selling securities holder does not submit its final version to the PFSA and make the issue prospectus available to the public.
- i) the issuer or the selling securities holder does not submit information to the PFSA concerning the form and deadline of making the issue prospectus available to the public no later than on the business day preceding the day on which the issue prospectus is being made available to the public.
- j) the entity making the issue prospectus available, at the request of an interested party submitted within the validity period of the issue prospectus, does not make available a free-of-charge printed copy of that issue prospectus at the place at which such request was accepted.
- k) the issuer or the selling securities holder does not make available to the public individual documents constituting a part of the issue prospectus separately and does not make available of all the remaining documents and information included by reference.
- l) information regarding public offering or admission to trading on a regulated market, that are made available to the public in any manner and form by the issuer, the selling securities holder, or by other entities acting on behalf of, or on instructions from, the issuer or the selling securities holder, contradict information contained in the issue prospectus.
- m) the issue prospectus and any supplements thereto made available to the public do not consistent in their form and substance with the issue prospectus and supplements approved by the PFSA.
- n) the issuer, the selling securities holder, or any other entity participating in a public offering, subscription or sales on behalf of fails to perform or unduly performs the order imposing by PFSA that the commencement of such public offering, subscription or sales be withheld or that such public offering, subscription or sales already underway be discontinued, in each case for a period of not more than 10 business days
- o) the issuer, the selling securities holder, or any other entity participating in a public offering, subscription or sales on behalf of breaches the prohibition the commencement or continuation of the public offering, subscription or sales, or seeking admission or introduction of the securities to trading on a regulated market
- p) the entity responsible fails to submit on time the supplement to the issue prospectus
- in the cases above- PFSA may also issue a decision excluding the securities from trading on a regulated market for a definite or indefinite period, or impose, taking into account in particular the financial standing of the entity on which the penalty is to be imposed, a fine of up to EUR 250.000 or apply both these sanctions jointly.

## II.

An entity seeking admission of financial instruments other than securities to trading on a regulated market shall submit to the PFSA an application for approval of the terms and conditions of trade.

For gross infringement of the obligations PFSA may impose fines on the person who performed the function of a member of the management board of a public company or an investment fund association which is a body of a closed-end investment fund.

According to the regulation implementing PD, untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus are proclaimed as a crimes, but PFSA has the following measurement to react quickly in the case of such infringements:

1. If the issuer, the selling securities holder, or any other entity participating in a public offering, subscription or sales on behalf of, or on instructions from, the issuer or the selling securities holder, violates the law in connection with a public offering, subscription or sales in the Republic of Poland, or there is a reasonable suspicion that such violation has occurred or may occur, PFSA may:
  - 1) order that the commencement of such public offering, subscription or sales be withheld or that such public offering, subscription or sales already underway be discontinued, in each case for a period of not more than 10 business days, or
  - 2) proscribe the commencement or continuation of the public offering, subscription or sales, or

3) publish, at the expense of the issuer or the selling securities holder, information concerning the illegal activities with respect to the public offering, subscription or sales.

With respect to a given public offering, subscription or sales, PFSA may apply abovementioned measure more than once.

2. If the issuer, or any other entity acting on behalf of, or on instructions from, the issuer, violates the law in connection with the seeking of admission of securities to trading on a regulated market in the Republic of Poland, or there is a reasonable suspicion that such violation has occurred or may occur, PFSA may:

- 1) order that the seeking admission or introduction of the securities to trading on a regulated market be withheld for a period of not more than 10 business days;
- 2) proscribe seeking admission or introduction of the securities to trading on a regulated market;
- 3) publish, at the expense of the issuer, information concerning the illegal activities with respect to seeking of admission or introduction of securities to trading on a regulated market.

With respect to given seeking admission or introduction of the securities to trading on a regulated market, PFSA may apply the abovementioned measure more than once.

3. PFSA may apply the abovementioned measures also if the contents of the documents or information submitted to the PFSA or made available to the public indicate that:

- 1) the public offering, subscription or sales of securities on the basis thereof, or admission of the securities to trading on a regulated market would materially compromise investors' interests;
- 2) circumstances exist that, in the context of legislation in force, may lead to termination of legal status of the issuer;
- 3) activities of the issuer were, or are, conducted in gross violation of applicable laws, which may have material impact on the assessment of issuer's securities, or, in the context of legislation in force, may lead to termination of legal status or to the bankruptcy of the issuer; or
- 4) the legal status of the securities does not comply with applicable laws, and in the context of those laws there is a risk that the securities would be considered nonexistent or burdened with a legal defect having material impact on their assessment.

4. The issuer or the selling securities holder may conduct promotional activities within the meaning of Regulation 809/2004 and in the form specified therein.

Where promotional activities are conducted, all promotional materials should expressly state:

- 1) that such materials are of a purely promotional or advertising nature;
- 2) that the issue prospectus has been, or will be, published;
- 3) the places at which the issue prospectus is, or will be, available.

Information provided under promotional activities should be consistent with information contained in the issue prospectus made available to the public or with information whose inclusion in the issue prospectus is required by provisions of the Act or Regulation 809/2004 at the moment when the issue prospectus has not yet been made available to the public, as well as they may not mislead investors as to the situation of the issuer and the assessment of its securities.

Where drawing up, approval, and making available of the issue prospectus to the public is not required, any and all information presented to investors as part of promotional activities should be made available in the same scope to all the entities to which the public offering is addressed.

If a violation of the obligations laid down above is found to have occurred, PFSA may:

- 1) order that the commencement of the promotional activities be withheld or that the promotional activities already underway be discontinued, in each case for a period not exceeding 10 business days for the purpose of rectifying the identified irregularities, or
- 2) proscribe the promotional activities, this in the event that:
  - a) the issuer or the selling securities holder evades rectifying the irregularities identified by

PFSA within the deadline set above, or

b) the contents of the promotional or advertising materials violate statutory provisions; or

3) publish, at the expense of the issuer or of the selling securities holder, information concerning illegality of the promotional activities, specifying the identified violations.

If a violation of the obligations laid down above is found to have occurred, PFSA may also impose upon the issuer or the selling securities holder a fine of up to PLN 250.000 (c.a. EUR 60.000)\*.

\* please note, that the aforementioned act is being amended and it is under the legislative procedure – If a violation of the obligations laid down above have occurred, the maximum range of administrative fines will be EUR 1.250.000 for legal and natural person.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

I.

PFSA may issue a decision excluding the securities from trading on a regulated market for a definite or indefinite period, or impose, taking into account in particular the financial standing of the entity on which the penalty is to be imposed, a fine of up to EUR 250.000 or apply both these sanctions jointly.

II.

PFSA may:

- 1) order that the commencement of such public offering, subscription or sales be withheld or that such public offering, subscription or sales already underway be discontinued, in each case for a period of not more than 10 business days, or
- 2) proscribe the commencement or continuation of the public offering, subscription or sales, or
- 3) publish, at the expense of the issuer or the selling securities holder, information concerning the illegal activities with respect to the public offering, subscription or sales.
- 4) order that the seeking admission or introduction of the securities to trading on a regulated market be withheld for a period of not more than 10 business days;
- 5) proscribe seeking admission or introduction of the securities to trading on a regulated market;
- 6) publish, at the expense of the issuer, information concerning the illegal activities with respect to seeking of admission or introduction of securities to trading on a regulated market.

III.

If a violation of the promotional activities have occurred, PFSA may:

1) order that the commencement of the promotional activities be withheld or that the promotional activities already underway be discontinued, in each case for a period not exceeding 10 business days for the purpose of rectifying the identified irregularities, or

2) proscribe the promotional activities, this in the event that:

a) the issuer or the selling securities holder evades rectifying the irregularities identified by

PFSA within the deadline set above, or

b) the contents of the promotional or advertising materials violate statutory provisions; or

3) publish, at the expense of the issuer or of the selling securities holder, information concerning illegality of the promotional activities, specifying the identified violations.

If a violation of the obligation laid down above is found to have occurred, PFSA may also impose upon the issuer or the selling securities holder a fine of up to c.a. EUR 60.000.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The administrative sanctions imposing on the entities should be proportional to the sort of the breach (it is one of the key rule of the Polish Administrative Code). At any case PFSA assess the compatibility between the sort of breach and the harshness of punishment. In determining the type of sanctions and fines, the following circumstances may be considered as an example : prior applied penalties or other remedies, voluntary cooperation with authority in explaining all the circumstances of the event, the financial situation of entity, lack of damage and materiality of the impact on the investors' decisions. voluntarily informed authorities of breach, an entity cooperates with the authority in order to explain.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

The fines imposed on both legal and natural persons each amount up to around 250 000 euro.\*

\* please note, that the aforementioned act is amending and it is under the legislative procedure –the maximum range of administrative fines will be EUR 1.250.000 for both legal and natural person

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

There are not any time-limits for imposing liability.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes. PFSA may, by way of a resolution, disclose to the public information on:

I.

1) instances of non-compliance with the provisions of the Act on Public Offerings,

2) legal measures undertaken to counteract non-compliance with the acts referred to the point above, including information on the sanctions applied and on filing a notification of a suspected offence, as well as on instigation of administrative or civil proceedings or the results of such proceedings.

II.

The information referred to in part I may not contain personal details of any persons, unless:

1) a final judgment has been issued with respect to such persons, or

2) a final decision has been issued concerning such persons' non-compliance with the provisions of the acts referred to in part I point 1, or

3) the decision concerning non-compliance with the provisions of the acts referred to in part I point 1 by such persons has been made immediately enforceable.

The regulations do not specify the way of disclose information to the public. In practice, PFSA publishes that information at its website.

PFSA also may:

1) publish, at the expense of the issuer or the selling securities holder, information concerning the illegal activities with respect to the public offering, subscription or sales,

publish, at the expense of the issuer, information concerning the illegal activities with respect to seeking of admission or introduction of securities to trading on a regulated market.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Before appealing to a court, the entity is obliged to apply for reviewing by PFSA the case again.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes (see point 27 above)

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, Polish legislation provides with criminal sanction to punish prospectus related offences. Poland introduced the specific criminal regime (the types of crimes prospectus related offences are regulated in our national act implementing the PD, but general rules and provisions of criminal responsibility and punishment are regulated in the Criminal Code which is applicable for all types of crimes).

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

The general provisions of the types of crimes related with the content of prospectus and public offerings states that the criminal responsibility may concern any person/entity responsible for the authenticity, integrity and completeness of information contained in prospectus or any person/entity offers securities without prospectus prior duly approved and disclosed according to the rules of act implementing the PD.

Aforementioned crimes relating to the public offerings and prospectus actually may be mainly committed to the issuer, the selling securities holder or additionally to all those who have prepared or participated in preparation of information in the prospectus and of course to the representatives (the management board) of such aforementioned entities.

Generally, criminal responsibility concerns natural persons - persons who performed the function of a member of the management board of such entities, but see also point 31.

31. Can legal persons be held liable for criminal offences?

Yes, Polish criminal law constitutes criminal responsibility of legal persons.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

The Polish legislation (act implementing the PD) constitutes the following criminal offences:

I. The public proposal of acquisition of securities without the statutorily required:

1) approval of an issue prospectus, or

2) making an issue prospectus available to the public or to interested investors.

II. The public proposal of acquisition of securities in a manner other than under public offering.

III. The delivery of untrue information or suppresses true information thus materially affecting such information by the person being responsible for information contained in the prospectus or other information connected with a public offering, or admission or seeking admission of securities or other financial instruments to trading on a regulated market.

IV. The delivery of untrue information or suppresses true information thus materially affecting such information by the person responsible for the information delivered to the PFSA in connection with the delay in the provision of inside information.

V. The delivery of untrue information or suppresses true information thus materially affecting the contents of the request by a person being responsible for the accuracy of information delivered to the PFSA in order to release the issuer from the obligation to make information available to the public.

VI. The failing of deliver of a supplement to the prospectus by a person acting on behalf or in the interest of a legal person or an organizational entity without legal personality.

VII. The failing to make available to the public a supplement to the issue prospectus or information memorandum by a person acting on behalf or in the interest of a legal person or an entity without legal personality.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Polish law requires that the offence has been committed intentionally. The person would be held liable for fault: direct intent (*dolus directus*) or conceivable intent (*dolus eventualis*).

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

I.

Who publicly proposes acquisition of securities without the statutorily required: approval of the prospectus, or making the prospectus shall be liable to a fine of up to EUR 250.000\* or a penalty of imprisonment for up to two years, or to both these penalties jointly.

2. Who proposes to the public acquisition of securities in a manner other than under public offering, shall be liable to the same penalty.

3. Who commits the offence specified in paragraphs 1 or 2 above, acting on behalf or to the benefit of a legal person or an entity without legal status, shall be liable to a fine amounting up to EUR 250.000\*\* or a penalty of imprisonment for up to 2 years, or to both these penalties jointly

4. In the event of a lesser crime, the perpetrator of such acts shall be liable to a fine of up to EUR 62.500\*\*\*.

II.

1. Who, being responsible for the information contained in a prospectus or other information documents, or other information connected with a public offering, or admission or seeking admission of securities or other financial instruments to trading on a regulated market, or specified information, delivers untrue data or suppresses true data thus materially affecting such information, shall be liable to a fine of up to EUR 1.250.000 or a penalty of imprisonment from six months up to five years, or to both these penalties jointly.

According to the project of act amending act implementing PD who, being responsible for the information contained in the supplement to the prospectus, delivers untrue data or suppresses true data thus materially affecting such information, shall be liable to a fine of up to EUR 1.250.000 **or** a penalty of imprisonment from six months up to five years, or to both these penalties jointly.

2. Who commits such acts, acting on behalf or in the interest of a legal person or an an entity without legal personality shall be liable to the same penalty.

III.

1. Who prevents or obstructs the performance of promptly draw up and provide, at the issuer's expense, copies of documents and of other information carriers and provide written or oral explanations to enable the PFSA to perform its statutory duties with respect shall be liable to a penalty of a detention or restriction of freedom, or to a fine.

2. Adjudication in the cases specified above shall be governed by the regulations pertaining to proceedings concerning minor offence.

IV.

Who, acting on behalf or in the interest of a legal person or an entity without legal personality, in defiance of the specified obligation, fails to deliver a supplement to the prospectus, shall be liable to a fine of up to EUR 250.000 or a penalty of imprisonment for up to two years, or to both these penalties jointly.

V.

Who, acting on behalf or in the interest of a legal person or an entity without legal personality, in defiance of the specified obligation, fails to make available to the public a supplement to the issue prospectus, shall be liable to a fine of up to EUR 250.000 or a penalty of imprisonment for up to two years, or to both these penalties jointly.

Hereby criminal liability applies to legal and natural persons. In case of legal persons the criminal liability concerns persons, who act on behalf or to the benefit of a legal person.

According to the Polish Criminal Code, it is possible to sentence the guilty person for additional criminal measurements as disqualification from public office or performing business activities previously conducted if they were connected with the committed crime.

The responsibility of legal persons is the subject of the separate regulation: According to this regulation, the legal person shall be liable to a fine of EUR 250 up to EUR 1.250.000, but not exceeding 3% of income in the financial year in which the crime was committed.

\* up to EUR 2.500.000 – amendment to the act implementing the PD which is under the legislative procedure

\*\* up to EUR 2.500.000 – amendment to the act implementing the PD which is under the legislative procedure

\*\*\* up to EUR 625.000 – amendment to the act implementing the PD which is under the legislative procedure

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

The “ne bis in idem” principle is generally applicable in Polish legal system, so it prohibits to impose dual penalty for the same act or omission. Polish regulation regarding the public offerings and prospectus strictly divided penalized acts and omissions into two groups: the infringements penalized by criminal law and the infringements penalized by administrative act. The latter should be divided into the typical administrative sanctions (fines) and other remedies (measurements) applicable for preventing the market and investors e.g. enabling the responsible person to remedy the infringement. Such measures are: suspension of trading, prohibition or suspension of a public offer, public reprimand, prohibition or suspension of advertisements (please, note the answer to the question no 20).

- So, theoretically it is not possible to apply both criminal and administrative sanctions for the same acts or omissions, but if one of the aforementioned remedies was previously applied by the competent authority (PFSA) it would be certainly taken into account by the prosecutor and the criminal court considering the case.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

According to the general Polish criminal provisions contained in the Criminal Code, criminal liability is limited by the prescription. For the crimes related with the public offerings and prospectus, the period of limitation are as follows:

1. An offence stops being punishable if, from the moment it was committed, has passed **10 years**.
2. If criminal proceedings are started against a person within the period provided for in point 1, the offence ceases to be punishable after five years in all other cases, from the end of that period.

Period of limitation on enforcement:

A sentence may not be enforced if, from the time when the judgment became final has passed:

- 1) 15 - for a sentence to imprisonment for up to five years;
- 2) 10 - a sentence to any other penalty.

37. Can the competent authority initiate criminal proceedings?

Yes. PFSA can transfer the notification of an offence to the prosecutor’s office, but the prosecutor’s office is not bound to formally initiate the criminal proceeding according to the criminal procedure. If the prosecutor’s office rejects the notification, PFSA has the right to appeal and the final decision in the area of initiating or continuing the criminal proceeding will be made by the judge.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

PFSA can act as an auxiliary prosecutor during juridical procedure.

PFSA is also entitled to appeal to the court from any prosecutor’s decision.

In the scope of its statutory tasks, on demand of the prosecutor’s office, PFSA should submit all the evidence.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

The “ne bis in idem” principle is generally applicable in Polish legal system, so it prohibits to impose dual penalty for the same acts or omissions. Polish regulation regarding the public offerings strictly divided penalized acts and omissions into two groups: the infringements penalized by criminal law and the infringements penalized by administrative act. The latter should be divided into the typical administrative sanctions (fines) and other remedies (measurements) applicable for preventing the market and investors e.g. enabling the responsible person to remedy the infringement. Such measures are: suspension of trading, prohibition or suspension of a public offer, public reprimand, prohibition or suspension of advertisements (please, note the answer to the question no 20).

So, theoretically it is not possible to conduct both criminal and administrative proceedings related to the same acts or omissions, but the goal of the administrative proceeding is different to goal of criminal one: the goal of administrative proceeding is to apply such aforementioned measures for protecting the market and investors, not to apply the penalty.

The collisions of the laws in such cases do not formally regulated, so it is necessary to solve such legal problem case by case.

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer ‘no’ to this question, the questions thereafter do not require an answer.

Yes. The investors are entitled to obtain restitution for the damage from the Treasury of State by an unlawful action or omission of public authority resulting from performing their duties by its officers.

41. Who is entitled to sue for damages?

Any entity is entitled to sue for damages: both natural and legal person, who has borne damage because of acting against the law by the authority (please, see answer to the question no 6).

42. What circumstances must be proven by the plaintiff?

General principles are described in the answer to the question no 7 and they are applicable in the full extension.

Furthermore, there are some specific provisions of the government liability emerging from the Polish Civil Code:

- if a damage was inflicted by the issue of a valid pronouncement or final decision, the redress of such damage may be demanded after the non-compliance of such pronouncement or decision with law was stated in the course of appropriate proceedings. It also refers to the case where a valid pronouncement or final decision was issued under a legislative instrument stated to be non-compliant with the Constitution, ratified international agreement or act;
- if a damage was inflicted by the failure to issue a pronouncement or decision, where the obligation of their issue is provided for in legal provisions, the redress of such damage may be demanded after the non-compliance with law of such failure to issue a pronouncement or decision was stated in the course of appropriate proceedings.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

A public entity in order to avoid liability should efficiently prove that it has fulfilled all obligations arising from legal- abiding acts and it has acted with an appropriate care. The public body should efficiently prove that the causal link between its potential negligence and the damage do not exist.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

Recoverable damages are: *damnum emergens* and *lucrum cessans* (for details and clarification, please see also the answer to the question no 10) The Polish law does not provide any specific provisions on the quantification of compensation.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Yes. The public entity can bring an action against their own employees (officers) for an action or a nonfeasance, which constitutes the gross breach of law. The employees bear the responsibility up to twelve-times amount of remuneration, unless the breach of law commits intentionally, which causes the responsibility in full amount. In order to bring an action against employees of public entities must be fulfilled the following conditions: the compensation was paid by the public entity and the gross breach of law was committed by the fault of employees.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

General principles are described in the answers to the questions no 12 and 42 and they are applicable in the full extension. There are not any specific regulations concerning the time-limits for initiating proceedings for taking legal action against the government body, but it is not specified explicitly, so it is necessary to take into consideration the doctrine and jurisprudence.

Polish legislation and judicature specifies the aspects of beginning or limitation of responsibility of public entities inexplicitly. In case of responsibility of public authorities, the dominant opinion is that the time to bring an action against the public entity begins from the moment, when the verdict prior recognized as an unlawful by competent court has become final.

47. Is a class action available?

Yes.



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## QUESTIONS

### **Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

**The regime of prospectus liability under article 6 of the Prospectus Directive is foreseen in articles 149 to 154, article 163 and article 243 of the Portuguese Securities Code, approved by Decree-Law No. 486/99 of 13 November and republished by Decree-Law No. 357-A/2007, of 31 October. It includes the amendments introduced by Decree-Laws No. 61/2002 of 20 March, No. 38/2003 of 8 March, No. 107/2003 of 4 June, No. 183/2003 of 19 August, No. 66/2004 of 24 March, No. 52/2006 of 15 March, No. 219/2006 of 02 November, Decree-Law No. 357-A/2007, of 31 October and Decree-Law No. 211-A/2008, of 3 November, Law No. 28/2009, of 19 June and Decree-Law No. 185/2009 of 12 August, Decree-Law No. 49/2010, of 19 May, Decree-Law No. 52/2010, of 26 May, Decree-Law No. 71/2010, of 18 June, Decree-Law No. 85/2011, of 29 June and Decree-Law No. 18/2013, of 6 February.**

**The regime described in the answers to the questionnaire is based in the current version of the Code.**

**The Portuguese legal frame of the responsibility attaching to the prospectus is consecrated in the Securities Code and corresponds to a special regulation among the general rules concerning civil liability regimes. This means that the plaintiff is able to choose the general civil liability regime in the following cases:**

- i) Whenever it proves to suit best the protection of its interests;**
- ii) Whenever the responsible person is not one of the parties mentioned in article 149 or 243;**
- iii) Whenever the infraction is not strictly foreseen in article 135.**

**The plaintiff is not entitled to receive compensation regarding the same damage more than once.**

**Article 135 of the Securities Code states that the prospectus must contain complete, true, updated, clear, objective and licit information, in order to enable the addressees to make an informed assessment of the offer, the securities concerned thereby and the rights attached thereto, its specific characteristics and the assets and liabilities, economic and financial position of the issuer or the guarantor, if any, and the prospects for the business and earnings of the issuer and the guarantor, if any.**

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

**In the case of a prospectus to be published when securities are offered to the public, according to number 1 of article 149, "The following are liable for damages caused by the**



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**non-compliance with the contents of the prospectus in accordance with the provisions of Article 135:**

- a) The offeror;**
- b) The members of the offeror's management body;**
- c) The issuer;**
- d) The members of the issuer's management body;**
- e) The promoters, in the case of offer for subscription for the incorporation of a company;**
- f) The members of the auditing body, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based;**
- g) The financial intermediaries in charge of assisting with the offer;**
- h) Any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same.”**

**In the case of a prospectus to be published when securities are admitted to trading, article 243 states that the following parties can be held responsible:**

- a) The issuer;**
- b) The members of the issuer's management body;**
- c) The members of the auditing body, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based;**
- e) Any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same.”**

3. Are the persons under the previous question subject to joint and/or several liability?

**According to article 151 of the Securities Code “If several individuals are liable for the damage caused, their liability is joint and several.” It is worth mentioning that according to article 150º, the liability of the offeror, the issuer and the leader of the assistance consortium is objective, in the sense that once the damage occurs there is no need to prove their fault or intention to cause the damage for them to be considered liable. Connecting both these rules, it means that in the end, the offeror, the issuer and the leader intermediary are always liable for any damage deriving from a fail to disclose all the information in an appropriate manner and that at least their responsibility is always joint and several.**

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

**According to article 149(1) of the Securities Code, parties who can be held responsible for information contained in a prospectus are liable for damages caused by the non-compliance with the mandatory content of the prospectus, e.g. whenever the information contained in the prospectus is not complete, true, updated, clear, objective and licit information, in order to enable the addressees to make an informed assessment of the offer, the securities concerned thereby and the rights attached thereto, its specific characteristics and the assets and liabilities, economic and financial position of the issuer or the guarantor, if any, and the prospects for the business and earnings of the issuer and the guarantor, if any.**



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5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**They are liable for acting with fault, i.e., willfully or negligently. According to article 149(1), the persons that can be held responsible are presumed to have acted with fault.**

**Additionally, under article 150 “The following are liable independently of fault:**

**a) The offeror, if any individual mentioned in Article 149(1) (b), (g) and (h) is held responsible;**

**b) The issuer, if any individual mentioned in Article 149(1) (d), (e) and (f) is held responsible;**

**c) The leader of the assistance consortium, if a member of the consortium is held responsible, according to Article 149(1) (g).**

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

**Anyone who is able to demonstrate to have suffered a damage caused by the non-compliance with the contents of the prospectus is entitled to sue for damages since it is possible to demonstrate the causality between the fail to comply with the mandatory content of the prospectus and the damage suffered..**

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

**According to article 342(1) of the Portuguese Civil Code, the plaintiff must prove all constitutive facts of the alleged right.** This corresponds to proving each of the elements underlying the civil liability of the defendant (i.e. the act/omission; its’ illegality; the fault or negligence, the damage and the causality between the damage and the action). **However, the plaintiff does not have to prove that the respondent has acted with fault as article 149(1) of the Securities Code enshrines a presumption of guilt.**

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?



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Under article 342, number 2 of the Portuguese Civil Code, the respondent must prove the facts which have the effect of deterring, modifying or extinguish the right alleged by the plaintiff. This corresponds to prove that at least one of the elements underlying civil liability has not been met. As article 149(1) of the Securities Code enshrines a presumption of guilt, the respondent must prove to have acted without fault.

According to article 149(3) of the Securities Code liability is excluded where the respondent can prove that the addressee knew or should have known about the shortcoming in the contents of the prospectus on the date of issue of the contractual declaration or when the respective cancellation was still possible.

According to number 4 of the same article “Liability shall be further excluded if the damages contemplated in no. 1 result only from the summary of the prospectus, or any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities.”

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

As a general rule (article 664 of the Portuguese Civil Procedure Code) the judge does not have a faculty to take into consideration facts which were not presented by the parties. However, according to number 1 of article 514 of the Portuguese Civil Procedure Code notorious facts do not require proof or allegation, and should be considered such the facts that are of common knowledge. According to number 2 of the same article, the parties don't need to allege facts which the court knows by virtue of the exercise of their duties.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

**Article 152 of the Securities Code applies. According to the precept:**

1. “The compensation should place the injured party in the exact situation it would be in if, at the moment of acquisition or alienation of securities, the contents of the prospectus had been in accordance with the provisions of Article 135.
2. The amount of the compensation is reduced should those liable prove that the damage occurred is also due to reasons other than the lack of information or forecasts contained in the prospectus.”

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

Under article 154 the provisions in the Securities Code about responsibility attaching to the prospectus are mandatory and may not be set aside or modified by any legal transaction.



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12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

**In the case of a prospectus to be published when securities are offered to the public, according to article 153 the right to compensation should be exercised within six months from the knowledge of a shortcoming in the contents of the prospectus and ceases, in any case, within two years from the date of expiry of the validity of the prospectus.**

**In the case of a prospectus to be published when securities are admitted to trading, article 243, al. b) states that “The right to indemnity should be exercised within the period of six months from the knowledge of the shortcoming in the prospectus or its amendment and ceases, in any case, two years counting from the disclosure of the admission prospectus or the amendment that contains the defective information or forecast.”**

**The time limit to file the claim can be suspended (articles 318 to 322) as well as interrupted (articles 328 to 333) according to general rules set in the Civil Code.**

**All persons mentioned under question 2 are subject to the same time limit.**

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

**General provisions regarding conflicts of law foreseen in the Civil Code applies: when the title of imputation in stake is contractual – typically in a relation between the offeror and the offeree – the obligation is regulated by the law chosen by the parties (according to Rome Convention on the Law Applicable to Contractual Obligations and article 41 of the Civil Code).**

**In circumstances where the title of imputation of civil liability is not contractual – e.g. civil liability of the auditor Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) applies. In this case the law applicable shall be the law of the country in which the damage occurs, or if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country; or the law of the country to which the the tort/delict is manifestly more closely connected if that is clear from all the circumstances of the case.**

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

**A judicial proceeding before a civil court is the regular way to receive restitution.**

**Another possible way which is foreseen in article 33 of the Securities Code, which admits the conflict to be settled by means of a a service organized and made available by the CMVM intended for the mediation of conflicts between retail investors, on the one hand, and financial intermediaries, investment advisers, management entities of regulated markets or MTFs or issuers, on the other.**



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**The mediators are designated by the CMVM’s Executive Board, which may choose individuals from its own organization or other individuals of recognized repute and competence. The choice of the mediation proceeding instead of a judicial proceeding is optional for the parties involved and does not withdraw the right to appeal before a judicial court.**

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

**Yes. According to article 31 of the Securities Code:**

***“1. The following have the right to class action for the protection of the homogeneous individual or collective interests of retail investors in financial instruments:***

***a) Non-qualified investors;***

***b) Associations for the defense of investors that fulfill the requirements detailed in the subsequent Article;***

***c) Foundations that have as an objective the protection of investors in financial instruments.***

***2. The conviction obtained should indicate the entity in charge of the receipt and management of the indemnity due to those shareholders not individually identified, designating, according to the circumstances, sinking funds, associations for the defense of investors or one or various shareholders identified in the action.***

***3. Indemnities that are not paid, due to prescription or the impossibility of identifying the respective shareholders, should revert to:***

***a) The sinking fund relating to the activity giving rise to the indemnity;***

***b) In the absence of the sinking fund described in the previous sub-article, the investors’ compensation system.”***

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

**In the case of a prospectus to be published when securities are offered to the public, according to number 1 of article 149, “The following are liable for damages caused by the**



**non-compliance with the contents of the prospectus in accordance with the provisions of Article 135:**

- a) The offeror;**
- b) The members of the offeror's management body;**
- c) The issuer;**
- d) The members of the issuer's management body;**
- e) The promoters, in the case of offer for subscription for the incorporation of a company;**
- f) The members of the auditing body, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based;**
- g) The financial intermediaries in charge of assisting with the offer;**
- h) Any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same.”**

**In the case of a prospectus to be published when securities are admitted to trading, article 243 states that the following parties can be held responsible:**

- a) The issuer;**
- b) The members of the issuer's management body;**
- c) The members of the auditing body, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based;**
- e) Any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same.”**

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

**The administrative offences set out in the Securities Code are punishable when same is of an intentional or negligent nature. The attempt to practice any of the administrative offences described in the Code is punishable.**

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

**Article 401 of the Securities Code applies, as follows:**



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**“1. Individuals, legal entities, independently of the regularity of their incorporation, companies and associations without a legal status may be liable for the offences set out in this Code.**

**2. Legal individuals and entities described in the above sub-article are liable for the offences set out in this Code when actions have been practiced, in the exercise of their respective functions, or in their name, or on their behalf, by members of their management bodies, agents, representatives or employees.**

**3. The liability of the legal person is excluded when the agent acts against the express orders or instructions of said person.**

**4. Unless an even greater sanction is applicable to the individual by another legal provision, the sanction set out for the author of the act, especially mitigated, will be imposed on the members of the management bodies of companies and similar entities as well as those responsible for the management or supervision of areas of activity where the offence takes place, whenever such individuals, being aware or in a position where they should have been aware of the offence, do not adopt measures to end the same immediately.**

**5. The liability of companies and similar entities does not exclude the individual liability of the respective agents.”**

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

**According to article 408 of the Securities Code “*The CMVM’s Executive Board has jurisdiction over the proceedings of offences, imposition of sanctions and additional sanctions as well as measures of precautionary nature set out in this Code, without prejudice to the possibility of delegation in accordance with the law.*”**

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

**Sanctions are applied to the following breaches of the PD framework:**

**i. Considered very serious offences:**

**a) Transmission or disclosure of information which is not comprehensive, true, current, clear, objective and lawful by any person or entity and through any means;**

**b) The failure to submit documents to the Information Disclosure System of the CMVM;**

**c) The provision of information to the CMVM that is not complete, true, updated, clear, objective and lawful or the failure to do so.**

**e) Performance of a public offer without approval of its prospectus by the CMVM;**



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**f) Disclosure of a public offer for distribution, decided or intended, and acceptance of subscription or purchase orders before disclosure of the prospectus;**

**g) Disclosure of a prospectus, any supplements thereto and rectifications to the base prospectus without prior approval thereof by the competent authority;**

**h) Inclusion of information in the prospectus, base prospectus, any supplements and rectifications thereto or the final terms of the offer which is complete, accuracy, updated, clear, objective and lawful in accordance with the models contemplated in Regulation no. 809/2004/EC of the Commission of 29 April;**

**i) The non-disclosure of the admission prospectus, respective addenda and rectifications, or information necessary for their update, or disclosure without the prior approval of the competent entity;**

**ii. Considered less serious offence: The disclosure of advertising material that is not in accordance with**

**a) Clear identification as an advertising message;**

**b) Approval by the CMVM when required;**

**c) Reference to the prospectus;**

**d) Prior disclosure of the preliminary prospectus, in case of withdrawal of investment intentions.**

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

**According to paragraphs f) and g) of article 360(1) of the Portuguese Securities Code, the CMVM, within the scope of its responsibilities, has the general power to give orders and disseminate information. In addition, article 214 gives the CMVM the power to order the suspension and exclusion of financial instruments from trading.**

**Specifically regarding offers, the CMVM can suspend the offer when any reparable illegality or violation of regulation is discovered (article 133(1) of the Portuguese Securities Code).**

**In the case of an infringement, the Portuguese Securities Commission may impose a fine as well as subject the infringer to an injunction to comply with the duty owed (articles 388 and 403(2) of the Portuguese Securities Code).**

**Moreover, article 404 of the Securities Code applies, as follows:**

**“1. In addition to fines and notwithstanding those set out in the General Legal Framework applicable to administrative offences, the following accessory sanctions might be imposed on those responsible for any offence:**

**a) Apprehension and loss of the object of the offence, including the benefit obtained by the infringer by the practice of the offence;**

**b) Temporary suspension of the exercise by the infringer of the profession or the activity to which the offence refers;**

**c) Disqualification from the exercise of the function of administration, management, control, supervision and, in general, representation of any financial intermediary within the scope of any or all activities of intermediation in securities or other financial instruments;**

**d) Publication by the CMVM, at the expense of the infringer and in places suitable for the accomplishment of the aims of general prevention of the legal system and protection of securities or other financial instruments markets, of the sanction imposed in view of the offence;**

**e) Revocation of the authorization or cancellation of the registration necessary for the performance of the activities of financial intermediation in securities or in other financial instruments;**

**2. The sanction described in paragraphs b) and c) of the sub-article above may not have a duration greater than five years from the definitive sanctioning decision.**

**3. The publication described in sub-article 1(d) may be made completely or partially, in accordance with the CMVM’s decision.”**

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

**Article 405 of the Securities Code applies, as follows:**

**“1. The determination of the actual fine and accessory sanctions is done pursuant to the material illegality of the act, agent's negligence, benefits obtained and prevention requirements. Whether the agent is an individual or legal entity, is also taken into account.**

**2. In the determination of the material illegality of the act and the negligence of legal entities and similar entities, the following circumstances, among others, are taken into consideration:**

**a) The danger or damage caused to investors or the market of securities or other financial instruments;**

**b) The occasional or repeated nature of the offence;**

**c) The existence of the concealment of acts which tend to impair discovery of the offence;**

**d) The existence of acts by the agent, on own initiative, aiming at, repairing the damages or preventing the dangers caused by the offence.**

**3. In the determination of the material illegality of the act and negligence of individuals, beside those described in the sub-article above, the following circumstances are taken into consideration:**



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- a) Level of responsibility, scope of functions and role in the said legal entity;
  - b) Intention to obtain, for itself or another entity, an illegitimate benefit or damages caused;
  - c) The special duty of not committing the offence.
4. In the determination of the applicable sanction, the agent's economic situation and previous conduct are also taken into consideration.”

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

According to article 388 of the Securities Code the following fines are applicable to the offences:

- a) Between €25,000 and €5,000,000 when classified as very serious;
- b) Between €12,500 and € 2,500,000, when classified as serious;
- c) Between €2,500 and €500,000, when classified as less serious.

In addition, if the economic gain doubled is more than the maximum value of the fine applicable, then the highest value shall prevail (article 388(2) of the Portuguese Securities Code).

In case of multiple infringements the fine applicable cannot exceed the double of the highest fine applicable (eg. the fine imposed in case of multiple very serious infringements cannot exceed €10,000,000) (article 19(1) of the General Legal Framework applicable to administrative offences).

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

According to article 418 of the Securities Code the statute of limitations for administrative offences proceeding is five years and the statute of limitations for sanctions imposed is five years and is calculated from the day on which the decision that determined its imposition becomes final or transits in *re judicata*.

This time of limitations for administrative offences proceeding can be suspended and interrupted but can never exceed 8 years (articles 27-A and 28 of the General Legal Framework applicable to administrative offences).

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

**No.**

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

**Article 422 of the Securities Code applies, as follows:**

- “1. Upon expiry of the judicial review period, a decision by the CMVM that convicts the agent for carrying out one or more serious or very serious administrative infractions shall be disclosed through the Information Disclosure System referred to in Article 367, by means of a statement drawn up by the CMVM or wholly, even if the judicial review has been lodged. In the latter case, specific reference to said review should be made.**
- 2. Any court decision that confirms alters or repeals a decision by the CMVM or the lower court in the sense of conviction shall be immediately notified to the CMVM and must be disclosed in the terms of the preceding number.**
- 3. The provisions of the preceding numbers shall not apply to fast-track summary proceedings where suspension of the sanction applies, the illegality of the acts or the guilt of the perpetrator are reduced or when the CMVM considers that disclosure of the decision may be detrimental to investors’ interests, severely affect the financial markets or cause actual damages to persons or entities involved, clearly disproportionate to the seriousness of the acts imputed.**
- 4. Irrespective of a final judgment having already been obtained or not, any court decisions concerning crimes against the market shall be disclosed by the CMVM in the terms of nos. 1 and 2.”**

**Moreover, the CMVM can impose, in addition to fines, the publication by the CMVM, at the expense of the infringer and in places suitable for the accomplishment of the aims of general prevention of the legal system and protection of securities or other financial instruments markets, of the sanction imposed in view of the offence. This publication is only mandatory after final judgment.**

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

**No previous appeal to an administrative body is allowed or necessary before appealing to a court.**

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

**Yes. According to article 417 of the Securities Code the Competition, Regulation and Supervision Court has the jurisdiction to recognize the judicial appeals, reviews and execution of the CMVM’s decisions in the administrative offence processes, or any other measures as determined by the CMVM within the scope of the same process that is legally subject to appeal.**

#### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

**The Portuguese Securities Code only provides for criminal sanctions to the crimes of insider trading, market manipulation and non-compliance.**



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**In addition, the Portuguese Criminal Code provides for criminal sanctions to punish the forgery of documents, which comprehends the inclusion of false material statements in a document (article 256, n.º 1, paragraph d).**

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

**No.**

31. Can legal persons be held liable for criminal offences?

**Legal persons can be held liable for the forgery of documents (article 11(2) of the Portuguese Criminal Code).**

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

**The Portuguese Criminal Code provides for criminal sanctions to punish the forgery of documents, which comprehends the inclusion of false material statements in documents (article 256, n.º 1, paragraph d).**

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

**Regarding the general rule (article 13 of the Portuguese Criminal Code), applicable to the crime of forgery of documents, only the offence committed intentionally is punished by law.**

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

**The crime of forgery of documents is punished by a maximum imprisonment of three years or a fine. If the agent of the crime is a civil servant, discharging his duties, the crime is punished by imprisonment set between one and six years. In addition, convicted agents may be disqualified, suspended from public office or from profession regulated by a public authority (articles 66 and 67 of the Portuguese Criminal Code).**

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?



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**Previous administrative sanctions are not taken into account by the criminal judge.**

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

**According to article 118 of the Portuguese Criminal Code the statute of time limits for criminal offences proceeding is five years for crimes punished under five years of imprisonment and 10 years for crimes punished by imprisonment set between five and ten years. This time limit can be suspended and interrupted (articles 120 and 121 of the Portuguese Criminal Code)**

**The statute of limitations for sanctions imposed is fifteen years for punishments equal or above five years and ten years for punishments equal or above two years and is calculated from the day on which the decision that determined its imposition becomes final or transits in *re judicata*.**

37. Can the competent authority initiate criminal proceedings?

**Only the Public Prosecutor can initiate criminal proceedings.**

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

**The CMVM according to articles 364(2) of the Portuguese Securities Code and 242(2) line b) of the Portuguese Criminal Proceedings Code should inform the public prosecutor.**

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

**No, according to article 420 of the Portuguese Securities Code criminal proceedings do not exclude administrative proceedings, except in the case of insider trading.**

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.



**CMVM**

**Yes, the Portuguese regime on government liability (Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas (RRCEE – approved by Law n 67/2007, of 31 December, amended by Law n<sup>o</sup> /2008, of 17 July) consecrates the civil liability of the State and any other public legal entities (among which CMVM). They are responsible for the damages resulting from illicit actions or omissions perpetrated with intent, with diligence and zeal manifestly inferior to those they were that were required due to post, or with mild guilt, committed by members of its agencies, employees or agents, in the exercise of administrative functions and because of this exercise, or to be assigned to an abnormal functioning of services (arts. 7., paragraphs 1 and 3, and 8., no. 1, the RRCEE)**

**However, art. 118., No. 7, of the Portuguese Securities Code provides that “Approval of the prospectus and registration do not involve any guarantee as to the contents of the information, the offeror’s, the issuer’s or the guarantor’s economic or financial situation, the feasibility of the offer or the quality of the securities.”**

41. Who is entitled to sue for damages?

**Anyone that proves to have suffered damages as a result of a wrongful act or omission committed by members of the bodies, employees or agents of the CMVM with intent, with diligence and zeal manifestly inferior to those that were required due to post or with mild guilt or which must be attributed to an abnormal functioning of services (arts. 7 and 8 of the RRCEE).**

42. What circumstances must be proven by the plaintiff?

**According to article 342(1) of the Portuguese Civil Code, the plaintiff must prove all constitutive facts of the alleged right. Thus, the author has to prove the facts constituting the liability: a voluntary action, illicit, damage and causal link between the damage and the action. However the plaintiff does not have to prove guilt, since, under Art. 10., Paragraphs 2 and 3 of RRCEE, it is assumed the existence of mild guilt.**

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

**If the author does not prove the constitutive facts of civil liability, the CMVM does not have to prove anything in order to exclude its liability, since the burden of proof rests with the author.**

**If the author proves the facts constituting the responsibility of the CMVM, pursuant to art. 342, No. 2, of the Civil Code, the CMVM must prove the facts which have the effect of deterring, modifying or extinguish the right alleged by the plaintiff (e.g, prescription of the right).**



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44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

**Article 3 of the RRCEE states the following:**

**"1 - Whoever is required to repair damage, according to the provisions of this law, must reconstruct the situation that would exist had the event requiring repair not taken place.  
2 - When natural repair is not possible, does not fully repair the damage or is excessively burdensome, cash compensation is fixed."**

There are no specific rules for calculating damages or liability caps of the CMVM. However, as already mentioned, article 118., No. 7, of the Portuguese Securities Code provides that " Approval of the prospectus and registration do not involve any guarantee as to the contents of the information, the offeror's, the issuer's or the guarantor's economic or financial situation, the feasibility of the offer or the quality of the securities."

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

**Pursuant to article 8, No. 1, members of the bodies, employees and agents of the CMVM can only be responsible for damages resulting from unlawful actions or omissions committed by them if they acted with intent or with diligence and zeal manifestly inferior to those that were required due to post, and in these cases, the CMVM will be jointly and severally liable with the holder of the organs, employees or agents (art. 8, no. 2 by RRCEE).**

**Thus, the Government is able to bring an action against the members of the bodies, officials and employees of the CMVM when they, having acted with intent or with diligence and zeal manifestly inferior to those that were required due to post, have caused damage because of their illicit actions or omissions (art. 8, no. 3, of the RRCEE).**

**The right to bring an action is mandatory in accordance with art. 6, No. 1, of the RRCEE.**

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

**Article 5 of the RRCEE states that "The right to compensation on the ground of tort against the State, other public legal persons and members of the respective bodies, employees and agents as well as the right of return is subject to a time limit under article 498 of the Civil Code, being the provisions of the same Code relating to the suspension and interruption of limitation applicable."**



**Article 498 No. 1 of the Civil Code provides that the right to compensation is barred three years from the date on which the plaintiff became aware of the right it is entitled to exercise.**

**Article 498, No. 2, provides that the right of return among those obliged extinguishes within three years from the obligation of compensation.**

**Limitation is suspended and interrupted under general law (article 318 to 327 of the Civil Code). For example: (1) limitation shall be suspended during the time that the holder is prevented from asserting his right, by reason of force majeure, during the last three months of the period (art. 321 No. 1, of the Civil Code), (2) limitation is interrupted by citation or notification of any judicial act which expresses, directly or indirectly, the intention to exercise the right (article 323, no. 1, of the Civil Code).**

47. Is a class action available?

**No. Article 31 of the Portuguese Securities Code, assuming the existence of a relationship of investment between plaintiff and defendant, does not establish legitimacy for bringing an administrative action against the CMVM aimed at ascertaining liability on the grounds of tort.**

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

No. The national civil law (Civil code) does not contain express provisions related to prospectus liabilities.

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

No. The national civil law (Civil code) does not contain express provisions related to specific parties who can be held responsible for information in a prospectus

3. Are the persons under the previous question subject to joint and/or several liability?

Not applicable, since the answer at question 2 is no.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Please, see the explanation in Question 1

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Not applicable, since the answer at question 1 is no.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Any person who feels damaged related to a prospectus can sue for damages. The law does not contain specific provisions nominating the person who can sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries).

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

There are no specific provisions regarding circumstances that must be proven by the plaintiff. Depending on the plaintiff object, the plaintiff has the obligation to provide proofs that: - his rights were damaged, - there is a fault of the respondent and - there is a causal link between them

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

There are no specific provisions regarding the circumstances that must be proven by the respondent in order to avoid liability. The respondent has the ability to avoid the liability by demonstrating that the three elements mentioned at 7 have not been met. Mention should be made that the judge has the final decision taking into consideration the proofs provided by the parties.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

No.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The law does not contain specific provisions regarding the quantification of compensation. The judge will decide the quantum of the damage to be recovered (material damage).

According to provisions of CNVM Regulation 1/2006, the offeror and/or the intermediary are held responsible in the case the offer is annulled and they have the obligation to reimburse the amounts paid by investors with an interest as well in 10 days from the offer annulment.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

According to the provisions of the C.N.V.M Regulation 1/2006, the issuer, the offeror (if different from the issuer), the intermediary, the auditor or other person who contributed to the prospectus (including a person who guarantees the obligations assumed by the issuer) are, at the case may be, responsible for the truthfulness, correctness, accuracy and completeness of the information provided by them in the prospectus and/or in the announcement (notice) of the offer. So, the persons mentioned above can limit their liability to the information provided by them and included in the prospectus.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

According to the provisions of the capital market law, the right to receive damages shall be exercised within maximum 6 months from the date when the shortcomings of the prospectus have been acknowledged, but no later than 1 year from the date when the public offer has been closed.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

The capital market law does not contain specific provisions regarding the civil liabilities of prospectuses related to international public offerings or solving conflicts of law.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes. An investor damaged in relation with a prospectus can receive the restitution of his losses only by initiating a procedure before a court.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

~~Yes.~~No An association of investors can file claims of behalf on their members.

Note - The prospectus regime is regulated by the capital market law. (see the answers in the Administrative Liability section).

The prospectus is a special type of contract which is subject to the capital market law. Any breach that can make a prospectus liability arise is subject to a claim which will be solved by the capital market authority (which administrates the capital market law- see the answers in the Administrative Liability section). If the claimant feels damaged by the capital market authority's decision, he can sue that decision. However, the person who feels damaged related to a prospectus can bring the case directly to the Court.

The answers above are without prejudice to the decisions that Court may take.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

*Law no. 297/2004 on capital market, as subsequently modified* states specific parties who can be held responsible for information contained in a prospectus:

*Art. 182 (1) The following persons are responsible for failing to comply with the legal provisions regarding the truthfulness, accuracy and exactness of the information in the prospectus/offer document and in the announcement, as the case may be:*

*a) the offeror;*

*b) the offeror's members of the Board or the sole manager;*

*c) the issuer;*

*d) the issuer's members of the Board;*

*e) the founders, in case of public subscription;*

*f) the financial auditor who has certified the financial statements whose information has been inserted in the prospectus;*

*g) the offeror's intermediaries;*

*h) any other entity which has accepted in the prospect the responsibility as regards to any information, survey or assessment inserted or mentioned.*

*(2) The following persons are responsible, irrespective of their fault, and are jointly held liable:*

*a) the offeror, if any of the entities referred to in paragraph (1), subparagraphs b), g) and h) is responsible;*

*b) the issuer, if any of the entities referred to in paragraph (1) subparagraphs d) – f) is responsible;*

*c) the manager of the intermediation group, if a member of the intermediation group is responsible.*

Also, according to Article 10 of CNVM Regulation no. 1/2006, the issuer, the offeror (when it is different from the issuer), the intermediary, the financial auditor, the person asking for admission to trading on a regulated market and any other person involved in drafting the prospectus/public offer document

(including the person who is granting the fulfilment of the issuer obligations), as the case may be, shall be responsible for the truthfulness, exactness, accuracy and completeness of the information presented in the prospectus/public offer document and/or in the announcement.

It may be the case where several persons are held liable for different parts of the prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

The law does not expressly mention for which degree of default are persons liable. Breaching the provisions of law regarding public offerings are considered offences and therefore the persons are held liable no matter if the deed is a result of intent, negligence or other. Mention should be made that the law mentions that when establishing the sanction, the personal and real circumstances of the deed and the conduct of the doer shall be taken into consideration.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Yes, the law provides for sanctions both for legal and natural persons.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

CNVM, as the competent authority designated in accordance with PD is the competent body for imposing administrative sanctions in case of a breach of the law implementing PD.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Sanctions can be applied for the following breaches of the provisions of the law related to prospectuses:

- Non- observance of the provisions stipulating that once approved, the prospectus has to be made available to the public at the latest at the beginning of the offer to the public (173 (2) of the Law 297/2004));
- Non- observance of the provisions stating that the offeror must reimburse the payments and pay damages resulting from the nullity of the transactions attached to an offer launched without a prospectus being approved by CNVM or without complying with the conditions established by CNVM in the approval decision, to investors in good faith. (art. 174 (2) of the Law 297/2004) *(Mention should be made that the Romanian capital market law stipulates that the public offer carried out without the prospectus being approved, or without complying with the conditions established by the approval decision is rightfully null and results in the enforcement of the sanctions set out by the law. Also, the CNVM Regulation no. 1/2006 stipulates that CNVM can establish the annulment of such offers and each person that consider harmed can bring the case to the competent court in order for the securities to be reversed and the funds to be reimbursed.);*
- Non-observance of the provisions stipulating that the notice (mentioning where the prospectus has been made available and where it can be obtained by the public) may be published after the issuance of the CNVM's decision approving the prospectus and also stipulating that the notice has to be published in accordance with CE Regulation no. 809/2004 (art 175(1) of the Law no 297/2004);
- Non –observance of the provisions stipulating that the issuers or the persons responsible for drawing up a prospectus, that publish their prospectus by insertion in one or more newspapers or in a printed form made available, free of charge at certain places (in accordance with the provisions of Article 14 point (a) or (b) of the Directive 2003/71/EC) shall also publish their

prospectus in electronic form on the offeror's website as well as on the website of the intermediary (art. 175(3<sup>i</sup>) of the Law no 297/2004);

- Non-observance of the provisions stating that where the prospectus is made available to the public in electronic form, a paper copy must nevertheless be delivered to the investor, upon his request and free of charge, at the premises of the offeror or of the intermediary. (art. 175 (4) of the Law no. 297/2004);
- Non-observance of the provisions stipulating that the offer becomes mandatory from the date when the notice or, as the case may be, the prospectus is published; (art. 176 (1) of the Law no 297/2004);
- Non – observance of the provisions stating that the prospectus shall be made available to the public in the form and having the content approved by CNVM (art. 176 (2) of the Law no 297/2004);
- Non-observance of the provisions stipulating that the period in which investors can agree to purchase or subscribe for the securities is the one set out in the notice and in the prospectus and may not exceed the terms established by C.N.V.M regulations. (art. 177 of the Law no 297/2004);
- Non – observance of the provisions stating that the advertisements shall be made available to the public only after they have been approved by C.N.V.M (art. 178 (1) of the Law no 297/2004);
- Non- observance of the provisions stating that making any type of advertisements for the offer, prior to the issuing of the decision approving the prospectus is prohibited. (art. 178 (2) of the Law no 297/2004);
- Non-observance of the provisions stating that the information contained in the advertisements shall be consistent with the information contained in the prospectus and also stating that the advertisements must mention that the prospectus approved by C.N.V.M. has been made public, as well as the means by which it has been made available to the public. (art. 178 (3) of the Law no 297/2004); Any inaccurate or misleading advertisements are sanctioned by CNVM, as well. non-observance of the provisions stipulating that:
  - every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, shall be mentioned in a supplement to the prospectus.
  - Such a supplement shall be published in accordance with at least the same arrangements as those applied when the original prospectus was published. (art. 179 of Law no 297/2004);
- Non- observance of the provisions stipulating that no prospectus shall be published until it has been approved by CNVM and that the offer to the public shall be made through an intermediary authorised to provide investment services.(art. 183 (1) and (2) of the Law no 297/2004);
- Non-observance of the provisions stipulating that *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, is necessary to enable investors to make an informed assessment of the assets and the liabilities, financial position, profit and loss, and prospects of the issuer and of any guarantor to the fulfilment of the obligations undertaken by the issuer, if necessary, and of the rights attaching to such securities.*(art. 184 (1) of the Law no 297/2004);
- *Non observance of the provisions stipulating that a prospectus shall be valid for 12 months after its approval, provided that it is completed by any supplements required pursuant to Article 16.* (art. 184 (2) of the Law no 297/2004);
- *Non- observance of the provisions stipulating that:*
  - The prospectus shall also include a summary that, in a concise manner and in non-technical language, provides key information in the language in which the prospectus was originally drawn up. The format and content of the summary of the prospectus shall provide, in conjunction with the prospectus, appropriate information about essential elements of the securities concerned in order to aid investors when considering whether to invest in such securities. (art. 184 (4) of the Law no 297/2004);
- Non –observance of the provisions stipulating that a registration document previously approved by CNVM, shall be valid for a period of up to 12 months and that the registration document, updated in accordance with the applicable provisions , accompanied by the securities note and the

summary note shall be considered to constitute a valid prospectus. (art. 185 (2) of the Law no 297/2004);

- Non-observance of the provisions stipulating that, in the case where an issuer has a registration document approved by CNVM, the securities note shall provide information that would normally be provided in the registration document, where there has been a material change or recent development which could affect investors' assessments since the latest updated registration document, unless such information is provided in a supplement in accordance with Article 16. The securities and summary notes shall be subject to a separate approval. (art. 185 (4) of the Law no. 297/2004);
- Non-observance of the provisions stipulating that the information incorporated by reference are the most recent available to the issuers. (art. 186 (1) of the Law no 297/2004);
- Non-observance of the provisions stipulating that the prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market and that the minimum content of the information that has to be included in a prospectus and the documents attached to the prospectus (e.g. attached to the application for the approval of the prospectus) are established by CE Regulation no. 809/2004 and by CNVM regulations, as the case may be;
- Non-observance of the CNVM rules related to cross-border offers (which implement the provisions of the PD).

CNVM Regulation which implements certain provisions of PD states, as a general rule, that the non-observance of the provisions of the CNVM regulation is considered offence and is sanctioned by CNVM. Therefore, sanctions can be applied for:

- non-observance of the provisions stating that the approved prospectus shall be submitted to the regulated market/MTF operator at the time when the notice is published or no later than one day prior to the date when the notice has been published;
- non-observance of the provisions stating that after the CNVM's approval, the offeror publishes the notice;
- non-observance of the provisions stating that no offer of securities is made to the public without prior publication of a prospectus approved by CNVM ;
- non-observance of the provisions stating that any admission of securities to trading on a regulated market is subject to a publication of a prospectus approved by CNVM;
- non-observance of the provisions requiring that a document shall be made available to investors (in the cases where the obligation to publish a prospectus is not applicable and the PD requires a document);
- Non observance of the provisions stating that once approved, the prospectus shall be filed with the competent authority of the home Member State, shall be accessible to ESMA through the competent authority and shall be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market as soon as practicable and, in any event, at a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer;
- prospectus is made available to investors starting with the date when the notice is published or one day prior to the day when the notice is published, for the whole period during which investors can agree to purchase or subscribe for the securities;
- non-observance of the provisions stipulating that the information given in the base prospectus shall be supplemented (if necessary) in accordance with the provisions implementing art. 16 of PD (21(2));
- non-observance of the provisions stating that where the final terms of the offer are neither included in the base prospectus nor in a supplement, the final terms shall be made available to investors in accordance with the provisions implementing art. 14 (2) and (3) of the PD, filed with the competent authority of the home Member State and communicated, by the issuer, to the competent authority of the host Member State(s) when each public offer is made as soon as practicable and, if possible, in advance of the beginning of the public offer or admission to trading. The final terms shall contain only information that relates to the securities note and shall not be used to supplement the base prospectus. The national provisions implementing Article 8(1)(a) of the PD shall apply in those cases;
- non-observance of the provisions regarding the validity of a base prospectus/prospectus;

- non- observance of the provisions allowing the investors to withdraw their acceptances of the purchase or subscription of securities

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

CNVM can:

- issue an order/decision requiring the responsible person to remedy the infringements;
- suspend an offer, whenever it is considered necessary, for a maximum period of 10 working days, for each suspension if it has reasonable grounds for suspecting that the provisions of the law and the regulations issued by C.N.V.M. have been infringed;
- prohibit or suspend advertisements related to a public offer, whenever it is considered necessary, for a maximum period of 10 working days for each suspension, if it has reasonable grounds for believing that the provisions of this law and the regulations issued by C.N.V.M. have been infringed;
- order the withdrawal of the approval decision, if it finds out that the public offer is made by the infringement of the provisions of the law, of the regulations issued by C.N.V.M., as well as in the following situations:
  1. if it considers that the circumstances subsequent to the approval decision trigger fundamental changes to the elements and the data which have motivated it;
  2. when the offeror informs C.N.V.M. of its withdrawing of the offer before the launching of the offer announcement;
- order the annulment of the approval decision if it has been obtained based on false or misleading information;
- make public the fact that an offeror is failing to comply with its obligations;
- issue warnings or impose fines;
- prohibit trading on a regulated market if it finds that the legislation in force has been infringed or if there are reasonable grounds for suspecting that the legislation in force has been infringed;
- suspend or require the market operator to suspend the securities from trading if it considers that the issuer's situation is such that trading would be to the disadvantage of the investors;

Mention should be made that according to the provisions of the law:

The suspension of the public offer makes it become invalid. When suspension is withdrawn or ceases, the public offer becomes valid again.

The revocation of the decision to approve the prospectus, during the time the public offer is valid, annuls the effects of the subscriptions made until the time of the revocation.

The annulment of the prospectus approval decision annuls the effects of the transactions carried out until the date of the annulment and results in the return of the securities, or, respectively, of the funds received by the offerors, voluntary or following a court decision.

CNVM can impose the following complementary contraventional sanctions, as the case may be:

- suspension or withdrawal of the licence;
- prohibition, for a period of 90 days to 5 years, of the right to have a function, to carry out an activity or to provide a service that require licence according to capital market law.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

The capital market law stipulates that, when establishing the sanction, the personal and real circumstances of the deed and the conduct of the doer shall be taken into consideration.

If two or more offences are acknowledged, the highest penalty, increased by up to 50%, shall be applied, as the case may be.

When establishing the amount of the fine imposed to a legal person the seriousness of the deed should be taken into account.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

According to the capital market law , fines are ranged as follows:

- in the case of natural persons – from 10 000 lei to 100 000 lei (from 2272 EUR to 22725EUR, taken into consideration the exchange rate of 11.02.2013 - 1 EUR =4.4003 lei)
- in the case of legal persons - from 0,1% to 10% of the total turnover of the financial year prior to the year when the fine is imposed, depending of the seriousness of the deed

Where the total turnover of the previous financial year is not available, the latest financial year where the issuer encountered a turnover, is taken into account.

In the case of newly set up legal persons, which did not encountered a turnover in the previous year or in the case of the legal persons whose turnover is not available to CNVM, the range of fine is set between 15 000 lei to 2 500 000 lei (3408 EUR to 568143 EUR, taken into consideration the exchange rate of 11.02.2013 - 1 EUR = 4.4003 lei)

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

The prescription period for applying and execution of the sanctions is 3 years from the date when the offence has been committed.

In the case of continued offences , the prescription period is 3 years from the date when the deed has been found.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

No. The law or CNVM rules do not establish such a procedure.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

The law stipulates that CNVM can publish any measure or sanction imposed for the breach of the provisions of the law or of the rules adopted for the implementation of the provisions of the law.

CNVM publishes its individual acts (orders, decisions etc) which contain the identity of the responsible persons.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Except for the case mentioned in Question 28, there is no administrative body that can or have to be appealed before bringing the case to a court.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

The capital market law stipulates that any natural or legal person considering that its rights provided for by law have been harmed, either by an administrative document or by the unjustified refusal of C.N.V.M. to address a request, may bring the case to the Administrative Court within the Bucharest Court of Appeal.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

The capital market law does not contain specific provisions regarding criminal sanctions to punish prospectus related offences. The general criminal provisions are applicable.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

No. The general criminal law does not contain express provisions related to specific parties who can be held responsible for information in a prospectus.

31. Can legal persons be held liable for criminal offences?

According to the general criminal law, the legal persons, other than the State, public authorities and public institutions can be held criminally liable in cases provided by law, for offenses committed on behalf or in the interest of the legal persons by their representatives. Criminal liability of legal persons does not exclude criminal liability of individuals who participated in committing the same acts.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

The criminal offences are expressly stated in the general criminal law that includes false statements and misleading information, (e.g. Penal Code, Art. 215 –Deception, Art. 291-Use of false)

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Yes, the general criminal law requires that the offence has been committed intentionally.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

The criminal sanctions consist of imprisonment and /or fines (e.g. in case of deception, the punishment ranges from 6 months to 15 years and in case of use of false, the punishment ranges from 3 months to 2 years or consists of fine

Art. 215 Penal Code-Deception

Misleading someone by presenting a truth as a false or a false as a truth, in order to obtain for himself or for another a material benefit unfairly and if it caused damage, is punished with imprisonment from 6 months to 12 years.

Deception committed by using names or other attributes false or any fraudulent means shall be punished with imprisonment from 3 to 15 years. If fraudulent means is in itself an offense, the rules on competition of offenses is applicable.

Induction or maintenance error on the occasion a person enters into or performs a contract, committed in such terms that without that error, the contract would have not been executed under the established terms, shall be sanctioned by the penalty provided in the preceding paragraphs.

Art. 291 Penal Code-Use of false

Using an official or under private signature document, knowing that it is false, in order to produce legal consequences, is punished with imprisonment from 3 months to 3 years when the document is official and imprisonment from 3 months to 2 years or fine when the document is under private signature.)

In the case of legal persons, the punishments range as below:

When the law provides for the offense committed by an individual a punishment up to 10 years of prison or fine, the special fine for the legal person ranges from 5,000 lei to 600,000 lei.

When the law provides for the offense committed by an individual a punishment of life prison or more than 10 years prison, the special fine for the legal person ranges from 10.000 lei to 900,000 lei (Art. 711 Penal Code)

The general criminal law provides also for additional penalties that can be imposed to legal persons (e.g. dissolution of the company, suspension of the company's activity, closure of the company's outlets)

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

No.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

According to the general criminal law provisions, the time limit for a person to be held liable may differ by the type of the criminal offence. In the case where the punishment for the criminal offence consists of 1-5 years imprisonment, the time limit for imposing criminal liability is 5 years. In the situation where the punishment for the criminal offence consists of up to 1 year imprisonment or fine, the time limit for imposing criminal liability is 3 years (Penal Code art. 122- Limitation of criminal liability)

In more detail, limitation periods in criminal liability are:

- a) 10 years for the offense the law provides imprisonment exceeding 10 years but not exceeding 15 years;
- b) 8 years for the offense the law provides for imprisonment of more than 5 years but not exceeding 10 years;
- c) 5 years for the offense the law provides imprisonment exceeding one year but not exceeding five years;
- d) 3 years for the offense the law provides imprisonment not exceeding one year or a fine.

Limitation of criminal liability for legal persons are:

- a) 10 years, the law provides for the offense of natural life imprisonment or imprisonment for more than 10 years;
- b) 5 years, the law provides for the offense committed by individual prison sentence of 10 years or a fine.

The periods shown above shall be counted from the date of the offense.

Criminal liability of legal persons is prescribed under the same conditions provided for individuals.

Interruption of prescription

The prescription shall be interrupted by the performance of any act which, by law, is mandatory to be communicated to the defendant in the criminal procedure.

Each interruption shall start a new limitation period.  
Interruption of the limitation period is applicable to all participants in the crime, even if the act of interruption is concerning only some of them.

Prescription of punishment execution  
Prescription removes the main punishment execution.

Limitation periods of punishment execution  
Limitation periods of punishment execution for individuals are:

- a) 5 years plus length of sentence to be executed, but not more than 15 years, when the punishment to be executed is up to 15 years;
- b) 3 years if the punishment is a fine.

The period of limitation of penalty fines execution for legal entities is 5 years.  
The period of limitation for execution of additional sanctions for legal persons that can not be dissolved or whose performance may not be suspended is three years, which run from the date on which the fine was executed or deemed as executed .

The time limits in para. above are counted from the date when the conviction court order became final.

Interruption of prescription execution  
The period of limitation of punishment execution is interrupted by the execution of punishment or by committing a new crime.

Suspension of the limitation in criminal liability  
The period of limitation in criminal liability is suspended during the period when a legal provision or an unforeseeable or unavoidable event prevents the criminal action or criminal proceedings to be initiated or continued.  
The period of limitation restarts from the day the suspension has ceased.

37. Can the competent authority initiate criminal proceedings?

No. In the case the capital market authority finds evidence that may lead to a criminal offense, send a criminal complaint to the Prosecutor that, after performing specific research will prepare and submit to criminal court the indictment (charge) ( in the case the Prosecutor finds that a criminal offence has been committed). If the court, after careful deliberation, finds that a criminal offence has been committed, it will establish the persons responsible and the extent of any damage and recovery.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes, see the answer to question 37. Furthermore, when the Prosecutor or the Court ask for information, the capital market authority submits its findings or observations.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Yes. The same offence can not be sanctioned both under administrative and criminal regime.

Note - The answers above are without prejudice to the decisions that Court may take.

### **Government Liability (restitution for losses from the Government**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

No. The law does not contain express provisions providing investors with the right to obtain restitution for losses from the Government/the competent authority. However, according to the capital market law, any natural or legal person that considers that its rights acknowledged by law have been harmed, either by an administrative document or by the unjustified refuse of C.N.V.M. to address a request regarding a right acknowledged by law, may turn to the Administrative Court within the Bucharest Court of Appeal.

41. Who is entitled to sue for damages?

42. What circumstances must be proven by the plaintiff?

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

47. Is a class action available?

QUESTIONS – Answered by the National Bank of Slovakia

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

The Slovak legal system in general regulates two civil liability regimes which could relate to breach of prospectus liability. The first one is regulated by the Civil Code and the second one by the Commercial Code. The Civil Code regulates the two forms of liability for damage: contractual liability and non-contractual liability. The Commercial Code has the status of speciality to the Civil Code and regulates mostly the contractual liability regime in the commercial relationships. Only a few parts of this regime are supplemented by the general regulation in the Civil Code. The non-contractual regime of liability is regulated mostly in the Civil Code. There are some exemptions. The regulation in the Commercial Code is relevant for liability arising out of breach of duties established by the Commercial Code. According to the general rule (called also the general liability regime) in the Civil Code everyone is responsible for the damage he caused by the breach of legal obligation unless otherwise stated. This rule is *lex generalis* and shall apply if the contractual liability arising from the Commercial Code is not applicable. In the case of contractual liability regime stipulated by the Commercial Code there is stated that whoever breaches an obligation arising from a certain contractual relationship shall compensate the damage thus caused, unless it is proven that the said breach was caused by the circumstances excluding responsibility. Excepting the above mentioned rules, our legal system regulates also the other forms of protection of consumers (e.g. Act on protection of consumers, Act on the consumer protection in connection with the distance financial services and on the amendment of certain acts).

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Responsibility for the information given in a prospectus bears the issuer or its statutory, management or supervisory bodies, the natural person or legal person which offers securities to the public the person asking for admission to trading on a regulated market, the person guaranteeing the redemption of the securities or the yields thereon, or the person who has drawn up the prospectus. The persons responsible shall be clearly identified in the prospectus by, in the case of natural persons, their names and functions or, in the case of legal persons, their names and registered officers. The prospectus shall also include declarations by such persons that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import for an informed assessment of the issuer or of the securities to be offered to the public or to be admitted to trading on a regulated market.

According to the Commercial Code, the company issuing the prospectus can hold its directors (who are responsible for the prospectus and thus determined in the prospectus) liable for the damages - the directors are subject to joint liability.

3. Are the persons under the previous question subject to joint and/or several liability?

The persons under the previous question are normally subject to joint liability. In justified cases the court may decide about several liability of them.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Persons are responsible for untrue and faithless information presented in a prospectus and they are also responsible for offering of securities to the public without having published a PD compliant prospectus. Such persons shall be liable for any damage caused in the event that this information is inaccurate or false. But the civil liability shall attach also to the person responsible for the summary or its translation if the summary contains information that is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Basically, the negligence (also the intent) is sufficient for liability. In the context of civil liability, the Slovak legislation doesn't know the term „strict liability“.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

In this realm, the entitled party is the subject to whom the prospect was given. It could be an original purchaser in the primary market or an investor in the secondary market.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

The plaintiff must prove the omission of material information, the incorrectness, the untruthfulness information, the inaccuracy and misleading character of information or that the prospectus was not published and also the damage caused by this fact. In that case, fault is assumed.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

The defendant has to prove, that the damage isn't caused by his fault (not even negligently).

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

The general rule states, that the judge considers only facts presented by the parties, but where it is justified by the aim of equity, the judge is entitled to discover fact without being presented by a party.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

The damage shall be compensated by the way of money, if however, the entitled party so requests, and if it is possible to common practice, then the damage shall be compensated by restitution to the former state. The compensation shall be provided for the actual damage and for the lost profits. Compensation shall not, however, be provided for damage which exceeds the amount (damage), which the liable party envisaged or could have envisaged - as a possible result of the breach of its obligation at the outset of the contractual relationship – with regard to all the facts which the liable party was conscious of, or should have known of, if all due care was taken. The injured party may demand - instead of the profit actually lost- compensation for profits usually attained in fair business conduct under the conditions similar to those of the breached contract in the injured party`s line of business.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

According to the Commercial Code, whoever breaches an obligation arising from a certain contractual relationship shall compensate the damage thus caused, unless it is proven that the said breach was caused by the circumstances excluding responsibility. An obstacle which occurs regardless of the liable party`s will, and which prevents this party from performing its obligation, shall be deemed to fall under the circumstances excluding responsibility - if it cannot be reasonably presumed that the liable party could have prevented or overcome such an obstacle or its effects - and at the outset of the obligation could not have anticipated such an obstacle. An obstacle, which occurs only during the time when the liable party was in delay with the performance of its obligation, or arises from the party`s financial situation, shall not exclude the party`s responsibility.

If the liability for damage arises from the Commercial Code, the court does not have the power to reduce the damage, not even in the cases worth special consideration. There is no possibility to limit the liability. The Commercial Code also forbids any agreements concluded between the company and its directors regarding the limitation of their liability for the caused damages.

If the liability arises from the provisions of the Civil Code, in cases worth special consideration, the court should reduce the damage, taking into account in particular how the damage occurred, as well as personal and financial circumstances of a natural person who did cause it, taking into account the situation of the individual who was harmed. The reduction can not be performed in case of damage caused intentionally.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Yes. According to the Civil code, the right to compensation of damage shall become statute-limited in two years from the day when the damaged person learnt of the damage and of the liable person. The right to compensation of damage shall become statute limited no later than in three years and, as for damages caused by intention, in ten years from the day when it came to the event from that the damage arose; this rule shall not apply to damages to health.

According to the Commercial Code, the right to compensation of damage has to be exercised within the four years period since the damaged party acknowledged the caused damage and of the liable person and no later than ten years since the breach of contractual obligation (since the damage occurred).

As regard the suspension or interruption of time limit, the Civil code enacted that if the creditor exercises his right with a court or other competent authority during the limitation period and properly continues in the commenced proceedings, the limitation period shall not run from the moment of the exercise during the proceedings. This rule shall also apply to a finally and conclusively

awarded right in case of that an enforcement of a decision was applied for with a court or other competent authority. Moreover, each responsible person mentioned above are subject to this rules.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

According to the Slovak legislation, the competent law which deal with the issues on civil liability of prospectuses related to international public offerings is the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (and other EU legal acts) and also the Act on International Private and procedural law (e.g. Tort claims shall be governed by the law of the place where the damage or the harmful event occurred).

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Except the civil proceedings, there are these three options to attain the restitution of losses:

- a. out-of-court settlement,
  - b. arbitration,
  - c. mediation.
15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

Currently, there isn't any possibility to present a class action, but the Ministry of Justice is preparing such legislation, which should be effective in 2013. However, Code of Civil Procedure under certain circumstances enables associations or groups of persons (also investors) to act together in civil liability claims.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

Yes, the responsibility for the information given in a prospectus bears the issuer or its statutory, management or supervisory bodies, the natural person or legal person which offers securities to the public, the person asking for admission to trading on a regulated market, the person guaranteeing the redemption of the securities or the yields thereon or the person who has drawn up the prospectus.

As for the second part of this question, according to the Slovak legislation several persons could be held liable for different parts of the prospectus (this provision reproduces relevant part of the PD). Furthermore, there is an established practice in Slovakia that at least one person is responsible for the whole prospectus and the National Bank of Slovakia - as an competent authority - supports this practice.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

If the National Bank of Slovakia - as the competent authority - finds any shortcomings in the operation of an issuer of securities, an offeror of securities, a person asking for admission to trading on a regulated market, a person discharging managerial responsibilities within an issuer and any person closely associated with him, consisting of non-compliance with the obligations laid down in the Securities Act or the evasion of other provisions of this Act or separate laws defining the obligations of supervised entities, the National Bank of Slovakia may take the appropriate steps according to the gravity and nature of the shortcomings and the degree of culpability.

In addition to that, in decision-making process regarding the degree of fault, the National Bank of Slovakia shall evaluate the evidence at its own discretion, each piece of evidence individually and all the pieces of evidence as they relate to each other; duly taking into regard anything that transpires during the proceedings. A decision shall be ruled by the facts of the case and the legal situation as of the date of its issue, unless provided otherwise hereunder.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Yes, according to the above mentioned provisions, the sanctions can be imposed on legal and natural persons as well.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

The National Bank of Slovakia.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Sanctions in accordance with the Securities Act may also be imposed for breaches of legally binding acts of the European Union governing the activities of supervised entities. These sanctions could be imposed on incomplete and misleading information and also on untrue, erroneous and undisclosed information in the prospectus. As regards the advertisement, according to the Securities Act, the purpose of an announcement, advertisement, poster, or other document must be clearly recognisable. The information contained therein shall not be inaccurate or misleading. Moreover, the sanctions in accordance with the mentioned Act may also be imposed for breaches of duties in the area of the public selling of securities without having published a PD compliant prospectus. The subjects could be also sanctioned for publishing inaccurate or misleading advertisements, including the advertisements inconsistent with the prospectus.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

If the National Bank of Slovakia finds any shortcomings in the operation of an issuer of securities, an offeror of securities, a person asking for admission to trading on a regulated market, a person discharging managerial responsibilities within an issuer and any person closely associated with him consisting of non-compliance with or evasion of the provisions of the Securities Act or separate laws defining the obligations of the above mentioned supervised entities, the National Bank of Slovakia may take the steps according to the gravity and nature of the shortcomings and the degree of

culpability and to impose sanctions on the issuer, the offeror of securities, the person asking for admission to trading on a regulated market, the person discharging managerial responsibilities within an issuer and any person closely associated with him in accordance with the Securities Act (*i.e. to impose measures on the abovementioned entities designed to eliminate the shortcomings; to charge them a fine of between 332 € and 663878 €; to order the publication of a correction of incomplete, incorrect or untrue information published by them under an obligation imposed by law*); to suspend issuing of securities for a period of up to ten working day or to ban issuing of securities.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

If the National Bank of Slovakia finds any deficiencies in the operation of selected subjects according to the Securities Act (issuers included), the National Bank of Slovakia may take the appropriate steps according to the gravity, nature, degree of culpability and impose the sanctions. In the process of decision making, the National Bank of Slovakia takes also aggravating and mitigating factors into consideration (e.g cooperation with the National Bank of Slovakia, size and financial position of the offender, damages done etc.).

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

The range of fines consist of the minimum amount (332 €) and the maximum amount (663878 €).

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction? If yes, please provide details.

Remedial measures and fines may be imposed within two years from the detection of shortcomings, but no later than within 10 years from their origination.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Yes, the National Bank of Slovakia may outside sanction proceedings, discuss the shortcomings in the operation of a certain subjects, according to the Securities Act. Furthermore, if the National Bank of Slovakia reveals a minute violation of a duty prescribed by the Act on Supervision of the Financial Market before commencing proceedings on the imposition of a remedial action or sanction under a separate law, it shall consider whether to initiate the proceedings at all or whether to adjourn the matter, if regarding the minute nature of such violation the proceedings would be inexpedient. In so doing, the National Bank of Slovakia shall primarily draw upon the nature, severity, duration and consequence of the unlawful conduct. If the National Bank of Slovakia does not commence any proceedings, it shall have a record made on the adjournment of the matter; a decision on the adjournment shall not be issued.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

According to the Slovak legislation, the National Bank of Slovakia is entitled to publish the exactly specified sanctions as e.g. the pronouncement of enforceable decision or the justification of a

decision, or of its part, should it deem to be expedient in terms of information available to the supervised entity's clients, the enforce ability of a decision or in terms of the effectiveness of supervision of a supervised entity.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Yes, a previous appeal may be examinable by the decision of the Bank Board (i.e. the Bank Board of the National Bank of Slovakia). Specifically, an appeal against a decision of the first instance shall be decided on by the Bank Board. The Bank Board may supplement evidence, provided that this can be done in the appeal proceedings without causing a risk of procrastination in the proceedings and if it is necessary for a decision to be made on the matter, whilst executing the evidence and performing other acts in the proceedings either by itself or through a designated organisational unit of the National Bank of Slovakia.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Compliance with law of final decisions of the National Bank of Slovakia issued under the Act on Supervision of the Financial Market may be reviewed by courts under the Civil Procedure Code. The examination of such decisions is within the competence of the Supreme Court of the Slovak Republic.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Yes, the Slovak legislation enacts selected criminal sanctions by which the Criminal Code could punish prospectus related offences. Particularly, it concerns the criminal act as Forgery, Fraudulent alteration and Illicit manufacturing of money and securities; Uttering Counterfeit, Fraudulently Altered and Illicitly Manufactured Money and Securities; Capital Fraud or Distortion of data of record keeping at Economic and Business area. Moreover, we could take into consideration the other forms of criminal offences as the Insider Trading or Abusing Participation in Economic competition. But it is necessary to note, the special regime for criminal sanction in the area of prospectus is missing in the valid legislation.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

In connection with criminally responsibility for information contained in the prospectus, the Slovak legislation may use the general provisions of criminal offences of the Criminal Code (e.g. Abusing Participation in Economic competition or Insider Trading). These general provisions punish only the natural person for wrongful action. On the other hand, the specific measures which could penalize the misconduct for information contained in the prospectus are absent.

31. Can legal persons be held liable for criminal offences?

No.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

In the context of prospectus, the Criminal Code enacts that subjects may be held responsible for the unwarranted utilization of information and procedures. Moreover, the activities which could break the legal rules and which could imperil the good manners are banned. Correspondingly, it could relate to the various types of conducts as false statements, conceding of misleading information, aiding or abetting, fraudulent concealment, obstruction of justice, etc.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Yes, the above mentioned criminal offences suppose the wilful misconduct.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

That depends on circumstances and sort of criminal offence (e.g. degree of infliction, intention, aggravating circumstances etc.). For example, according to the mentioned provision (i.e. Fraudulent alteration and Illicit manufacturing securities) any person who procures counterfeit, fraudulently altered or illicitly manufactured securities for himself or another, or who has such securities in his possession, shall be liable to a term of imprisonment of three to eight years. Further, any person who counterfeits, fraudulently alters or illicitly manufactures securities, or who counterfeits, fraudulently alters or illicitly manufactures securities with the intention of using them as genuine or as securities of a higher denomination, or who uses counterfeit, fraudulently altered or illicitly manufactured securities as genuine, shall be liable to a term of imprisonment of seven to ten years. The Criminal Code also enables stricter punishment of the person who commits the offence referred by acting in a more serious manner or on a larger scale (ten up to twenty years). In addition of the selected provisions, the person may be also punished by other form as by the prohibition which to undertake certain activities. Under certain circumstances the liable person could be sentenced to the punishment other than imprisonment (e.g. prohibition to undertake certain activities). ---This prohibition shall mean that, during the execution of this sentence, the sentenced person is not allowed to perform a certain job, profession, or hold a specific office, or perform an activity, which is subject to special authorisation, or whose performance is governed under a separate regulation. Besides, the Criminal Code enables impose sanction against uttering counterfeit, fraudulently altered and illicitly manufactured securities. For this criminal offence any subject shall be liable to a term of imprisonment of up to two years. As regards the infringements concerning the provision of fraudulent information, according to the Criminal Code, there is possible to impose a sentence on any person who enriches himself (or other as well) to the detriment of another person's property through misrepresentation of another person or through taking advantage of another person's mistake, and thus causes small damage (i.e. small damage shall mean the damage amounting to more than 266 €). Such a person shall be liable to a term of imprisonment of up to two years. When such a person commits the above mentioned offence and causes larger damage (i.e. larger damage shall mean the damage which is at least ten times higher than the aforesaid amount), this person shall be liable to a term of imprisonment of one to five years. The higher sanctions may be imposed on the basis of aggravating circumstances (e.g. if someone commits this offence and causes substantial damage (i.e. substantial damage shall mean the damage which is at least one hundred times higher than the aforesaid amount) through its commission or by reason of specific motivation or acting in a more serious manner. In this cases, the penal sanction is from three to ten years.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

No.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

The time limit for the initiating criminal proceeding depends on the facts of the case e.g. the time limit for the initiating criminal proceeding in the realm of securities shall become statute-barred on the expiry of the limitation period, which is ten years. The limitation period shall not include the period, during which the offender could not be made to stand trial because of legal impediments; the period, during which the offender stayed abroad with the intention to avoid criminal prosecution, the probationary period, in case of a conditional stay of criminal prosecution, the period, during which the bringing of indictment was temporarily postponed and also the period, during which the criminal prosecution was interrupted. Limitation of criminal prosecution shall be interrupted by the bringing of an indictment for the criminal offence, which is subject to the limitation, and by the subsequent acts of criminal procedure authorities, a judge for pre-trial proceedings, or the court connected with the criminal prosecution of the offender, or when the offender commits an intentional criminal offence in the course of the limitation period. A new period of limitation shall commence to run as from the date of interruption of the initial limitation period.

37. Can the competent authority initiate criminal proceedings?

According to the Slovak legal system only the law enforcement authorities (police and prosecutor) are entitled to take legal action to initiate criminal prosecution; however a motion to take the legal action can be proposed by anybody.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

Yes, the competent authority is entitled to submit the observations and findings to the prosecutor for criminal proceeding. Particularly if in performing supervision, the National Bank of Slovakia as the competent authority, establishes any facts indicating that a criminal act has been committed, it shall notify of this forthwith the competent criminal law enforcement authority. If, in performing supervision, the National Bank of Slovakia finds a suspicious business operation or a breach of supervised entities' duties in the prevention or detecting of the laundering of proceeds from criminal activities and financing terrorism, it shall immediately inform the financial police department of the Police Corps and a State authority fulfilling the duties in the field of the constitutional system protection and the State internal order and security.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Information that is obtained by the competent authority may solely be used to perform supervision of supervised entities and to discharge by the competent authority other tasks prescribed by law. The competent authority may disclose or provide this information to other authorities (also for the purpose of criminal proceedings) or to disclose it only subject to approval from the foreign supervisory authority, which provided this information. In accord with this fact, it is permissible to start the criminal proceeding with administrative proceeding simultaneously. Furthermore, if in the course of proceedings a preliminary issue arises which is relevant for establishing the facts of the case and for a decision to be made by the National Bank of Slovakia (as the competent authority), whereas a final decision has already been made on the same issue by another competent authority, such a decision shall be binding on the National Bank of Slovakia. Otherwise the National Bank of Slovakia may judge a preliminary issue on its own or file a motion to commence proceedings on the preliminary issue with the competent authority. Nevertheless the National Bank of Slovakia may not make its own judgement on the commitment of a crime, the commitment of a misdemeanour or another violation and the offender involved therein, or on the personal condition of a natural person or on the existence of a legal person, if decisions on such matters fall within the jurisdiction of courts or another relevant public agency.

### Government Liability (restitution for losses from the Government)

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Yes, on the basis of the Act No 514/2003 Coll. on responsibility for damage caused by the performance of the public authority, the competent authority (e.g. the National Bank of Slovakia) may be held as responsible for damages caused by an incorrect legal procedure or unlawful decision. Therefore, investors are entitled to bring an action against the competent authority, where the procedure or decision made by this authority was legally wrong.

41. Who is entitled to sue for damages?

The entitled parties (with the right to file a suit) are only (1) the legal person to whom damage was caused, (2) the person/subject who should have been involved in an incorrect legal procedure or unlawful decision and (3) the subject who suffered damage due to an incorrect legal procedure or unlawful decision of the competent authority.

42. What circumstances must be proven by the plaintiff?

The plaintiff has to prove the real damage, the lost profits and non-pecuniary damage (e.g. damage to good name, etc.). Furthermore, the plaintiff must prove the omission of material information, the incorrectness, the untruthfulness information, the inaccuracy and misleading character of information and also the damage caused by this fact. In that case, fault is assumed.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The competent authority has to prove that decision was attained in full compliance with the law and order.

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

According to the Slovak law, it could be recoverable the real damage and lost profits. Moreover, it is possible to claim the non-pecuniary damage. With regard to the specific provisions on the quantification of the compensation, there is/are no general provisions deal/s with assessment of damages, but some special regulations enact the quantification of the compensation. As far as the prospectus area, the special act which adjusts this question is absent.

In this way, we would like to inform you that recently it has been approved the amendment of the Act No 514/2003 Coll. on responsibility for damage caused by the performance of the public authority, which restrict legal responsibility of selected state authorities (e.g. National Council of the Slovak republic).

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

Yes, the competent authority could bring an action against their own employees for compensation paid to investors. Their liability is limited to a maximum amount. According to the Slovak Labour Code the employee bears liability for compensatory damages also in case of negligence.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

Before bringing an action to the court, the applicant has to preliminarily discuss his claim with the appropriate authority. This authority shall respond within 6 months. The right to claim for damages is subject to limitation under the provisions of civil law. The right to claim compensation for damages is limited to two years from the day damaged person detected the damage and got knowledge, who is liable for. Furthermore, the right to sue compensation is limited to no later than in three years. If the damaged brings an action to the court or other competent authority during the limitation period and properly continues in the proceedings, the limitation period is suspended.

According to the Slovak Labour Code, an employer shall negotiate the demanded compensation for damages with the employee and notify him/her of it within one month at the latest from the day it was ascertained that damages had occurred and that the employee was liable for it. Moreover, the time limit for initiating the proceedings (the limitation) period shall be three years long and shall start running from the day when the right could be exercised for the first time. The right to compensation of damage shall become statute-limited in two years from the day when the damaged person learnt of the damage and of the liable person. Furthermore, the right to compensation of damage shall become statute limited no later than in three years and, as for damages caused by intention, in ten years from the day when it came to the event from that the damage arose; this rule shall not apply to damages to health. With regard to the suspension or interruption of time limit, if the creditor exercises his right with a court or other competent authority during the limitation period and properly continues in the commenced proceedings, the limitation period shall not run from the moment of the exercise during the proceedings.

47. Is a class action available?

Currently, there isn't any possibility to present a class action, but the Ministry of Justice is preparing such legislation, which should be effective in 2013.

## QUESTIONS

**Civil liability (restitution for losses from the author of the breach)**

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions. No.
2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Yes. Persons who are liable for the information contained in a prospectus are stated in article 58/1 of ZTFI (ZTFI stands for Zakon o trgu finančnih instrumentov – Market in Financial Instruments Act) and they are responsible for the content of whole prospectus.

## Article 58

(Liability relating to the prospectus)

(1) The prospectus must contain data on all the persons responsible for the accuracy and completeness of the information contained in the prospectus, namely at least the following persons depending on the purpose of compiling the prospectus:

1. on the issuer and the members of its management or supervision bodies,
2. on the issuer, offeror or the person demanding admission of securities to trading on a regulated market, if the offeror or the applicant is not at the same time the issuer,
3. on potential guarantor for the liabilities arising from securities.

3. Are the persons under the previous question subject to joint and/or several liability?

They are subject to joint liability.

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Persons, responsible for information included in the prospectus, are jointly liable for damage caused to the investor as a result of incorrect or incomplete information in the prospectus. Persons, who actually sell securities or require the admission of securities to trading on a regulated market without prior publication of prospectus are liable for described actions and that can be issuer, offeror or person demanding admission of securities to trading on the regulated market.

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Strict liability.

## Article 58 (ZTFI)

(3) The persons from the first paragraph hereunder shall be jointly and severally liable to the investor for any damages caused to the investor as a result of incorrect or incomplete information contained in the prospectus, unless they are able to provide exonerating evidence that:

1. they acted with all due professional care in the drawing up of the prospectus and the verification of the accuracy and completeness of information contained in the prospectus,

2. upon the purchase of securities, the investor knew about the inaccuracy or incompleteness of information contained in the prospectus,
  3. the investor had the right to withdraw from accepting the offer of securities to the public pursuant to the fifth paragraph of Article 80 hereof but failed to exercise this right,
  4. individual pieces of information were left out of the prospectus in accordance with Articles 60 and 61 hereof, or
  5. information is concerned which is not likely to be considered by a reasonable investor as important when deciding on the purchase of securities.
6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Probably first buyers on the primary market are entitled to sue.

#### Article 28 (ZTFI)

(Investor)

Investor is the buyer of securities or the person on which the offer for the purchase of securities is addressed.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Real damage (for example much lower price of share after initial offer because some important fact of the issuer was not included in the prospectus) caused because of incomplete or incorrect information in prospectus.

#### Article 58/3 of ZTFI:

The persons from the first paragraph hereunder shall be jointly and severally liable to the investor for any damages caused to the investor as a result of incorrect or incomplete information contained in the prospectus, unless they are able to provide exonerating evidence that:

1. they acted with all due professional care in the drawing up of the prospectus and the verification of the accuracy and completeness of information contained in the prospectus,
  2. upon the purchase of securities, the investor knew about the inaccuracy or incompleteness of information contained in the prospectus,
  3. the investor had the right to withdraw from accepting the offer of securities to the public pursuant to the fifth paragraph of Article 80 hereof but failed to exercise this right,
  4. individual pieces of information were left out of the prospectus in accordance with Articles 60 and 61 hereof, or
  5. information is concerned which is not likely to be considered by a reasonable investor as important when deciding on the purchase of securities.
8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a

supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

Circumstances in above mentioned in Article 58/3 of ZTFI.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain. No.
10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Article 58 (ZTFI)

(5) If the information contained in the prospectus is incomplete or inaccurate, it shall be deemed that the damage caused to the investor by reducing the value of their investment in securities in view of the purchase price paid is the result of such incomplete or inaccurate information unless the responsible person is able to prove that there is no such causal connection.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)? They are mandatory.
12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Obligations Code

Compensation Claims

Article 352

- (1) Compensation claims for damage inflicted shall become statute-barred three years after the injured party learnt of the damage and of the person that inflicted it.
- (2) In each case the claim shall become statute-barred five years after the damage occurred.

Claims between specific persons

Article 358

The statute-barring period shall not run:

1. between spouses
2. between parents and children, as long as the parental right lasts
3. between a ward and the guardian thereof or between a ward and the care authority, as long as the guardianship lasts and as long as bills are not issued
4. between persons cohabiting in an extra-marital union

Insurmountable Obstacles

Article 360

The statute-barring period shall not run while for reason of insurmountable obstacles the creditor is unable to demand the performance of the obligation through the court.

Influence of grounds for suspension on statute-barring period

Article 361

- (1) If a statute-barring period cannot run because of any lawful grounds, it shall begin to run when such grounds cease.
- (2) If the statute-barring period began to run before the grounds for which it was suspended arose, it shall resume when such grounds cease; the time that passed before the suspension shall be counted towards the period stipulated by the statute of limitations.

## Claims by persons with incapacity to contract

## Article 362

- (1) The statute-barring period shall run against minors and other persons with incapacity to contract, irrespective of whether they have a lawful representative.
- (2) However the statute-barring of a claim by a minor without a representative or by any other person with incapacity to contract without a representative may not occur until two years have passed since such person gained full capacity to contract or obtained a representative.
- (3) If a period of less than two years is stipulated for the statute-barring of any claim and the creditor is a minor without a representative or any other person with incapacity to contract without a representative the statute-barring period for the claim shall begin to run when the creditor gains capacity to contract or obtains a representative.

## Statute-barring of claims by persons engaged in military service

## Article 363

Statute-barring against a person engaged in military service or on military exercises, performing alternative civilian service or training for tasks in the police reserves may not occur until three months have passed from the completion of military service, the end of the military exercises, the completion of alternative civilian service or the completion of training in the police reserves.

## Acknowledgement of debt

## Article 364

- (1) Statute-barring shall discontinue when the debtor acknowledges the debt.
- (2) A debt may be acknowledged by the debtor not only through a declaration made to the creditor but also indirectly, for example by paying something into an account, by paying interest or by providing security.

## Filing of suit

## Article 365

Statute-barring shall discontinue with the filing of a suit or any other act by the creditor against the debtor before the court or other relevant authority to determine, secure or collect a claim.

## Statute-barring period in event of discontinuance

## Article 369

- (1) After discontinuance the statute-barring period shall begin to run anew, and the time that passed prior to the discontinuance shall not count towards the period stipulated by the statute of limitations.
- (2) A statute-barring period discontinued by the debtor's acknowledgement shall begin to run anew from the acknowledgement.
- (3) If the statute-barring period discontinued with the filing of a suit or any other act by the creditor against the debtor before the court or any other relevant authority to determine, secure or collect a claim, by the exercise of an offset of the claim in a dispute or by the registration of the claim in any other procedure it shall begin to run anew on the day the dispute is completed or is otherwise settled.
- (4) If the statute-barring period discontinued with the registration of the claim in bankruptcy proceedings it shall begin to run anew on the day such proceedings are completed.
- (5) This shall also apply if the statute-barring period discontinued with a petition for compulsory execution or security.
- (6) A statute-barring period that begins to run anew after discontinuance shall end when the time stipulated by the statute of limitations for the discontinued statute-barring period passes.

## Article 403

- (1) If the statute-barring period is not running or is discontinued against one debtor it shall continue to run for the other joint and several debtors and may reach completion; however a debtor against whom the obligation has not become statute-barred and that must perform the obligation shall have the right to demand that the other debtors against whom the obligation has become statute-barred each reimburse their part of the obligation to such debtor.
- (2) The waiver of completed statute-barring shall have no effect against the other debtors.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

Private International Law and Procedure Act:

Article 1

(1) This Act contains rules for determining the law that shall be used in all personal, family, social labour, property and other civil law relations with an international element.

Article 30

For non-contractual indemnity obligation, the law of the place where the offense was committed should be valid. If it is more favorable for impaired person, a place where the effect has taken place is valid instead of the law of the place where the offence was committed, but only if the place of the consequences has been and had to be foreseen by the person responsible for dispute.

(2) If the law determined under the first paragraph of this Article is not closely related to dispute and there is obvious connection with another law, the application of that law should be valid. The same law also governs the jurisdiction of the courts and other authorities of the Republic of Slovenia in cases with an international element, as follows:

Article 48

(1) The Court of the Republic of Slovenia has jurisdiction in case the defendant has his residence or a registered seat in the Republic of Slovenia.

(2) If the defendant's residence or his registered seat are not in the Republic of Slovenia nor in any other country, the Court of the Republic of Slovenia has jurisdiction, if the defendant's temporary residence is in the Republic of Slovenia.

Article 49

(1) If the same charge applies to more than one defendant who are in legal community or whose obligations relate to the same legal and factual basis, the Court of the Republic of Slovenia has jurisdiction also in case where one of the defendants has a permanent address or a seat in the Republic of Slovenia.

Article 55

(1) In matters of non contractual indemnity obligation the Court of the Republic of Slovenia has jurisdiction even in cases when a damage has been committed in the territory of the Republic of Slovenia or if harmful consequence has occurred in the territory of the Republic of Slovenia.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Arbitration Act:

Article 1

(1) This Law applies to arbitration with seat in Slovenia regardless of the fact whether parties are foreign or domestic persons (hereinafter: domestic arbitration).

Article 4  
(subject of arbitration and the parties of arbitration)

(1) Any claim for indemnification could be subject of arbitration agreement. Other claims may be the subject of an arbitration agreement only if parties to the claim can agree on settlement.  
(2) Any natural or legal person may enter an arbitration agreement, including the Republic of Slovenia and other entities of public law.

Article 5  
(agreement on jurisdiction of foreign arbitration)

– Citizens of the Republic of Slovenia and legal persons with registered seat in the Republic of Slovenia may agree to settle the dispute decided by foreign arbitration, except in cases where the decision over disputes is exclusively a competence of the competent court in the Republic of Slovenia.

ARBITRATION AGREEMENT

Article 10  
(definition and form of arbitration agreement)

(1) An arbitration agreement is an agreement of parties to submit to arbitration all or some disputes which have already originated among them or which may arise in connection with certain contractual or non-contractual legal relationship. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of an independent agreement.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members). No.

**Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

First answer is yes and the second answer is no. Persons who are liable for the information contained in a prospectus are responsible for the content of whole prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Those persons are liable for all degrees of fault - intent and negligence.

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Sanctions can be imposed on both groups of persons and in the case of legal person the sanction is imposed also to the responsible person of that legal person. Sanctions are described in Article 556 and 557 of ZTFI.

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

Competent authority – in Slovenia this is Securities Market Agency.

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

For all above mentioned breaches, stated in article 556 and 557 of ZTFI.

#### Article 556

##### (Severe violations of Chapter 2)

(1) A fine from 25,000 to 250,000 euros shall be imposed for an offence on a legal entity, a fine from **25.000 to 500.000 euros** legal person who is under the Companies Act-1 considered medium or large company:

1. offering securities to the public in the Republic of Slovenia without prior publication of the appropriate prospectus for such securities in line with this act, if the publication of the prospectus is mandatory (the first paragraph of Article 36 hereof);
2. that admitted securities to trading on a regulated market in the Republic of Slovenia without prior publication of the appropriate prospectus for such securities in line with this act, if the publication of the prospectus is mandatory (the second paragraph of Article 36 hereof);
3. that published the prospectus without first obtaining the approval for such prospectus from the Supervisory authority of the home Member State (the first paragraph of Article 37 hereof);
4. if the information in the published prospectus is incorrect or incomplete (the second paragraph of Article 53 hereof);
5. that published an invalid prospectus (Article 62 hereof);
6. if the subscription or payment of securities is organised or carried out in contravention of Article 79 hereof;
7. if it failed to publish the supplement to the prospectus or the supplement to the summary of the prospectus, or if such supplement is not published in the same manner as the prospectus (the first, third and fourth paragraph of Article 80 hereof);
8. that published the supplement to the prospectus without first obtaining the approval from the supervisory authority of the home Member State (the second paragraph of Article 80 hereof);
9. if it failed to publish the prospectus in the prescribed language(s) (Article 85 hereof).

(2) A fine from 800 to 10,000 euros shall be imposed on a businessman or an individual, self-employed, who commits an offense under the first paragraph of this article.

(3) A fine from 800 to 10,000 euros shall be imposed on the responsible person of a legal person or an entrepreneur or individual who is self-employed, who commits an offense under the first paragraph of this article.

(4) A fine from 130 to 5,000 euros shall be imposed on an individual committing a violation and the first paragraph of this article.

(5) A violation from the first paragraph hereunder, committed in relation to securities of a third country issuer, the fine shall be imposed on an authorised investment firm from the first paragraph of Article 87 hereof, the responsible person of the firm and the person that authorised such firm.

(6) If the nature of the offense under the preceding paragraphs is particularly severe because the amount of damage or the amount of illegal proceeds obtained or the perpetrator's intent or greed, the offender is a legal person, is punishable by a fine from 41,000 to 750,000 euros, legal a person who is under the Companies Act-1 considered to be medium or large company with a fine ranging from

41,000 to 1,500,000 euros, a businessman or an individual, self-employed, a fine of between 41,000 and 450,000 euros, an individual with a fine from 400 to 15,000 responsible person or legal entity or individual entrepreneur, self-employed and a fine of 2,500 to 30,000 euros.

#### Article 557

(Minor violations of Chapter 2)

(1) A fine from 12,000 to 250,000 euros shall be imposed for an offence on a legal entity, a fine from **12.000 to 500.000** legal person who is under the Companies Act-1 considered medium or large company:

1. if it fails to inform the agency on the implementation of exceptions referred to in Articles 49, 50 and 51 of this Act in accordance with Article 52 of this Act within three working days prior to the beginning of the offer to the public or the admission of securities for marketing in a regulated market;
2. if it did not publish the final offer price and amount of securities and/or fails to act in accordance with the first paragraph of Article 59 hereof or fails to inform the agency or the supervisory authority of another Member State and publish such information in accordance with the second paragraph of Article 59 hereof;
3. if it fails to submit the final prospectus to the agency and publish it within the deadlines from the second paragraph of Article 73 hereof;
4. if it fails to ensure the availability of the prospectus as provided for in the first paragraph of Article 74 hereof;
5. if it fails to send or deliver to the applicant, upon the latter's request and free of charge, a printed copy of the prospectus, if the prospectus is published in the electronic form (Article 77 hereof);
6. if it prevents the agency from exercising supervision in accordance with Article 91 hereof or fails to provide it with the information under Article 92 hereof.

2) A fine from 12,000 to 150,000 euros shall be imposed on a businessman or an individual, self-employed, who commits an offense under the first paragraph of this article.

(3) A fine from 400 to 10,000 euros shall be imposed on the responsible person of a legal person or an entrepreneur or individual who is self-employed or publisher who commits an offense under the first paragraph of this article.

(4) A fine from 200 to 5,000 euros shall be imposed on an individual who commits an offense under the first paragraph of this article.

(5) A violation from the first paragraph hereunder, committed in relation to securities of a third country issuer, the fine shall be imposed on an authorised investment firm from the first paragraph of Article 87 hereof, the responsible person of the firm and the person that authorised such firm.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Supervisory measures related to the public offer and the request for admission to trading on a regulated market are determined in Article 93 of ZTFI:

(1) In relation to the public offer and the request for admission to trading on a regulated market, the agency may request from the issuer, offeror or the person demanding admission of securities to trading on a regulated market to include additional information in the prospectus, if this is necessary in order to protect the investor's interests.

(2) If the agency reasonably suspects that the provisions of Chapter 2 hereof have been violated, it may:

1. stop the offer of securities to the public or the admission of securities to trading on the regulated market temporarily and for a maximum of ten consecutive business days,

2. prohibit or suspend advertisements for a maximum of ten consecutive business days and
3. demand from the market operator to suspend trading in securities on such market for a maximum of ten consecutive business days.

(3) In relation to the public offer of securities and the request for admission to trading on a regulated market the agency may impose the following supervisory measures:

1. prohibit a public offer of securities if it finds that the provisions of Chapter 2 hereof have been infringed or if it has reasonable grounds for suspecting that they would be infringed,
2. prohibit trading in securities on a regulated market if the provisions of Chapter 2 hereof have been infringed,
3. make public that the issuer failed to meet its obligations stipulated by Chapter 2 hereof.

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Minor Offences Act, Article 26 (General rules for determining sanctions)

(1) The sanction imposed on the perpetrator shall be determined within the limits prescribed by the regulation governing the relevant offence, in relation to the gravity of the offence and the perpetrator's negligence or intent.

(2) All circumstances that may reduce or increase the sanction shall be taken into account, and in particular: the level of the perpetrator's liability for the offence, motives for committing the offence, level of threat or violation of a protected good, circumstances in which the offence was committed, perpetrator's previous conduct, his personal circumstances, his conduct after the offence has been committed, and particularly whether he/she compensated for the damage.

(3) The determination of a fine shall take into account the perpetrator's financial condition, the amount of his salary, his other incomes, his property and his family obligations; in the case of tax and customs offences, also the proportion between the fine and the amount of the tax or duty unpaid.

(4) The sanction imposed for a previously committed offence may not be considered an aggravating circumstance when more than three years have expired from the day the offence decision or judgement became final and the day on which the new offence was committed.

(5) The determination of a fine to be imposed on a legal person and a sole trader shall take into account their economic weight and previously imposed sanctions.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Range of fines is from 25.000 to 1.500.000 euros for legal person, from 130 to 15.000 euros for natural person.

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details. Yes.

Article 570 ZTFI (Time-barring)

(1) The violations procedure referred to in the fifth paragraph of Article 556, the eighth paragraph of Article 558, the fifth paragraph of Article 560, the third paragraph of Article 561, the third paragraph of Article 563, the third paragraph of Article 564, the fifth paragraph of Article 565, the fourth paragraph

of Article 566, the fifth paragraph of Article 567 and the fourth paragraph of Article 568 hereof shall not be allowed after the expiry of three years from the day the offence had been committed.

- (2) The time-barring for the violations procedure shall be interrupted by any action by an authority responsible for procedure to prosecute the perpetrator of a violation.
- (3) The time-barring shall recommence after each interruption, however a violations procedure shall in no case be possible after six years have elapsed since the day the violation was committed.

Minor Offences Act:

Statute of limitation applying to prosecution

#### Article 42

- (1) Offence proceeding shall not be permitted if two years expire from the day the offence was committed. In cases of offences against competition protection offence proceeding shall not be permitted if five years expire from the day the offence was committed.
- (2) The statute of limitation shall not apply during the time when offence proceeding is legally not permitted to be commenced or continued.
- (3) Once an offence becomes statute-barred, all acts by the authority responsible for the proceeding aiming to prosecute the perpetrator shall be discontinued. After a discontinuation the statute of limitation shall resume, but offence proceeding shall not be permitted after the expiry of twice the time required by the law for offence proceeding to become statute-barred.
- (4) The statute of limitation shall also be discontinued if during the limitation period the perpetrator commits another offence of the same type, equally serious or more severe.

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person? No.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

The Agency may publish decisions or summaries of decisions regarding imposed supervisory measures if it considers this is necessary for the protection of investors in the market of financial instruments (second paragraph of Article 488 of ZTFI).

In practice the Agency does not publish or disclose the decisions of fines imposed and the identity of offenders that have been handed down.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

Against an order of supervisory measures in connection with the public offer and a request for admission to trading on the regulated market under Article 93 Article of ZTFI, an entity has the right to file an appeal (the first paragraph of Article 528 of ZTFI and the first paragraph of Article 532 of ZTFI). Agency decides about the appeal.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Yes. Against Agency's decisions on the appeal in case of an order as a supervisory measure as issued in accordance with Article 93 ZTFI, a judicial protection is allowed (point 1 of the fifth paragraph of Article 507 of ZTFI).

Minor Offences Act (Right to request judicial protection)

#### Article 59

(1) A request for judicial protection may be lodged against an offence decision issued in the first instance by an offence authority using fast-track proceeding. The request may be lodged by the person on whom the sanction was imposed, his legal representative or defence counsel, or the owner of the items seized.

### **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

Criminal Code - Fraud in Securities Trading

#### Article 231

(1) Whoever, in trading stocks, other securities or other financial instruments, falsely represents the balance of assets, data on profits or losses, or any other data in the prospectus, when publishing an annual report, or in any other way which has considerable influence on the value of the above mentioned securities, thereby inducing one or more persons to make a purchase or sale of, or makes any other transaction with such securities, shall be punished by a fine or sentenced to imprisonment for not more than two years.

(2) If the offence under the preceding paragraph concerns securities or other financial instruments of high value, the perpetrator shall be sentenced to imprisonment for not more than five years.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details. No.

31. Can legal persons be held liable for criminal offences?

## 5. Punishability of Legal Persons

### Liability of Legal Persons for Criminal Offences

#### Article 42

(1) Criminal liability shall be imposed on a legal person for criminal offences, which the perpetrator commits in his name, on his behalf or in his favour, providing that the statute, which regulates liability of legal persons for criminal offences, determines that the legal person is liable for the criminal offence in question.

(2) Criminal liability of legal persons shall not exclude liability of natural persons as perpetrators, instigators or aides in the same criminal offence.

(3) The law, which regulates liability of legal persons for criminal offences, shall determine the conditions for criminal liability of legal persons, sentences, admonitory sanctions or safety measures, and legal consequences of the conviction for legal persons.

Liability of Legal Persons for criminal offences Act:

#### Article 1

(1) Under the conditions, which in accordance with Article 333 of the Criminal Code of the Republic of Slovenia (Official Gazette of the RS, No. 63/94, 70/94 – correction and 23/99) shall be defined by this Act, a legal person shall be liable for a criminal offence as well as the perpetrator.

#### Grounds for the Liability of a Legal Person

#### Article 4

A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person:

1. If the committed criminal offence means carrying out an unlawful resolution, order or endorsement of its management or supervisory bodies;
2. If its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence;
3. If it has at its disposal unlawfully obtained property benefit or uses objects obtained through a criminal offence;
4. If its management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them.

#### Article 24

Legal persons may be liable for the criminal offences from the Special Part section of the Criminal Code of the Republic of Slovenia and for other criminal offences if so provided by this Act.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

Answer number 19, false representation of data in prospectus.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

YES, intentionally for natural person. Legal persons can also be held liable for negligence.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Criminal Code, Article 231

(1) Whoever, in trading stocks, other securities or other financial instruments, falsely represents the balance of assets, data on profits or losses, or any other data in the prospectus, when publishing an annual report, or in any other way which has considerable influence on the value of the above mentioned securities, thereby inducing one or more persons to make a purchase or sale of, or makes any other transaction with such securities, shall be punished by a fine or sentenced to imprisonment for not more than two years.

(2) If the offence under the preceding paragraph concerns securities or other financial instruments of high value, the perpetrator shall be sentenced to imprisonment for not less than five years.

Criminal Code (sanctions for natural persons):

Fines

Article 47

(1) A fine shall be imposed in daily instalments and may amount to minimum thirty and maximum three hundred and sixty daily instalments, while for criminal offences committed for one's own interest it may amount to maximum one thousand five hundred daily instalments.

(2) The number of daily amounts shall be fixed by the court in accordance with the general rules on sentencing. The court shall fix the daily amount by taking into account the perpetrator's daily income with regard to the official data of the tax authority as well as with respect to his family expenditure. In fixing the daily amount, the court shall base its decision on data not older than six months.

(3) If the court was not able to acquire the data on the perpetrator's daily income referred to in the preceding paragraph, then one thirtieth of the last officially published average monthly net salary in the Republic of Slovenia per employee shall be considered as the daily amount for the fine.

(4) The period of time, in which a fine is to be paid, shall be specified in the judgement. Such a period may not be shorter than fifteen days and not longer than three months. Under justifiable circumstances, the court may permit the offender to pay his fine by instalment, where the term of payment shall not exceed two years.

Liability of Legal Persons for criminal offences Act (sanctions for legal persons):

Punishments for Criminal Offences

Article 26

(1) The following types of punishments may be imposed on legal persons committing the criminal offences under the preceding paragraph:

1) For criminal offences for which a punishment of up to three years' imprisonment is prescribed for the perpetrator, a fine of up to 500.000 euros, or up to 100 (one hundred) times the amount of damage caused or property benefit obtained through the criminal offence;

2) For criminal offences for a which a punishment of over three years' imprisonment is prescribed for the perpetrator, a fine of at least 50.000 euros, or up to a maximum of 200 (two hundred) times the amount of damage caused or unlawful property benefit obtained through the criminal offence.

(2) For criminal offences for which a punishment of five years' imprisonment or harsher punishment is prescribed for the perpetrator, a punishment of confiscation of property may be imposed instead of a fine.

(3) For criminal offences under the first paragraph of this Article, a punishment of winding-up of the legal person may be applied instead of a fine if the conditions under Article 15 of this Act are met.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)? No.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Criminal Code

## Limitation of Criminal Prosecution

## Article 90

(1) Except where otherwise determine in this Penal Code, criminal prosecution is barred from taking place:

- 1) fifty years from the committing of a criminal offence, for which a prison sentence of thirty years may be imposed under the statute unless non-applicability of statute of limitations applies to the offence;
- 2) thirty years from the committing of a criminal offence, for which a prison sentence of over ten years may be imposed under the statute;
- 3) twenty years from the committing of a criminal offence, for which a prison sentence of over five years may be imposed under the statute;
- 4) **ten years from the committing of a criminal offence, for which a prison sentence of over one year may be imposed under the statute;\*\***
- 5) six years from the committing of a criminal offence, for which a prison sentence of up to one year or a fine may be imposed under the statute.

(2) If more than one sentence is prescribed for a criminal offence, the time limit referring to the most severe sentence shall apply to the offence in question.

\*\* Article 231. of Criminal Act states the following: »(1) Whoever, in trading stocks, other securities or other financial instruments, falsely represents the balance of assets, data on profits or losses, or any other data in the prospectus, when publishing an annual report, or in any other way which has considerable influence on the value of the above mentioned securities, thereby inducing one or more persons to make a purchase or sale of, or makes any other transaction with such securities, shall be punished by a fine or sentenced to imprisonment for not more than two years.(2) If the offence under the preceding paragraph concerns securities or other financial instruments of high value, the perpetrator shall be sentenced to imprisonment for not more than five years.«

## Limitation of Implementation of the Sentence

## Article 92

(1) Except where otherwise prescribed in this Penal Code, the imposed sentence may not be implemented after a lapse of:

- 1) twenty-five years from the sentence for a term of thirty years' imprisonment unless non-applicability of statute of limitations applies to the offence;
- 2) fifteen years from the sentence for a term exceeding ten years;
- 3) ten years from the sentence for a term exceeding five years;
- 4) Five years from the sentence for a term exceeding one year;
- 5) three years from the sentence for a term of up to one year or a fine.

37. Can the competent authority initiate criminal proceedings? Can the competent authority initiate criminal proceedings?

YES.

Criminal Procedure Act:

## Article 145

(1) All state agencies and organisations having public authority shall be bound to report criminal offences liable to public prosecution of which they have been informed or which were brought to their notice in some other way.

(2) In submitting crime reports the agencies and organisations from the preceding paragraph shall indicate evidence known to them and shall undertake steps to preserve traces of the crime, objects on which or by means of which the crime was committed and other items of evidence.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details. Yes.

ZTFI, Article 488a

(Persons allowed to disclose confidential information)

(1) The Agency may disclose confidential information to the following persons in the Republic of Slovenia or other Member States:

11. court, state prosecutor's office or the police if such information is required for the proceedings conducted within their competencies;

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

Yes, in this case the Minor Offences Act defines as follows (Zakon o prekrških, ZP-1, Article 11.a):

- (1) Misdemeanour proceedings shall not be conducted against and sanctions shall not be imposed on a perpetrator who within criminal proceedings has been found guilty of committing a criminal offence which also shows signs of a misdemeanour or if criminal charges have been dropped on the basis of misdemeanour action or on the basis of settlement or deferred persecution.
- (2) If criminal proceedings that have signs of a misdemeanour have been finally suspended or if final verdict of not guilty has been issued or act of indictment has been finally dropped or rejected or if criminal denouncement has been dropped, the misdemeanour proceeding against such perpetrator should be conducted only if reasons for this decision are not exclusive.
- (3) If criminal charges due to criminal actions have been filed and those actions show signs of misdemeanour or if criminal procedures are in place against a person, misdemeanour proceedings shall not be initiated and if initiated already they should be suspended and must not proceed until criminal procedures are finished and final. In that time the limitation period should not run and should proceed after the decision of paragraph 2 becomes final.

Note:

Misdemeanour = minor offence (Misdemeanour is used in older version of the English version of the law, while minor offences is more widely used also in the Agency's documents).

### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

No.

ZTFI, Article 67

(2) The agency shall not be liable for the truthfulness and completeness of information stated in the prospectus that it approved.

41. Who is entitled to sue for damages?
42. What circumstances must be proven by the plaintiff?
43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?
44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?
45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.
46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?
47. Is a class action available?

CNMV 6 April 2013

## QUESTIONS

### **Civil liability (restitution for losses from the author of the breach)**

**1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.**

Article 28 of Law 24/1988 of 28 July on the securities markets (securities markets law) creates a specific statutory regime relating to prospectus civil liability. This regime is further laid down in articles 32-37 of the Royal Decree 1310/2005, of 4 November, which partially implements said securities markets law in relation to the admission to trading of securities in official secondary markets, public offerings, and the prospectus required for these purposes. Answers to this questionnaire are based on this regime and not on the general rules of the Spanish civil law (e.g. tort or contractual law).

**2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).**

The issuer, offeror, or the person asking for the admission of the securities to trading on a regulated market, as the case may be, is responsible for the whole content of the prospectus. Also, the directors of these legal persons can be held liable in accordance with the Spanish commercial law.

The guarantor is liable for the information required by annex VI (building block on guarantees) of Regulation (EC) No 809/2004 which this party has drawn up.

In addition, other persons can be liable if they voluntarily accept liability and the prospectus expressly indicates that they consent to be liable or persons who have authorized the content of the prospectus and this is mentioned in the prospectus. In both cases, these persons can assume responsibility for certain parts of the prospectus. This would include for example an independent expert who has issued a report which is mentioned in the prospectus.

Finally, a statutory claim may also be brought against the lead manager but only if the following two conditions are met:

- the prospectus relates to a public offer of shares which are going to be admitted to trading on a regulated market for the first time; and
- it's due diligence exercise on the information included in the securities note was not carried out according to the generally accepted market standard.

**3. Are the persons under the previous question subject to joint and/or several liability?**

If more than one person is responsible for the content of the prospectus, such persons would be jointly and severally liable in relation to the claims brought forward by investors.

**4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?**

The responsible person is liable for statements in the prospectus which are untrue or inaccurate in a material aspect or omission of material information.

**5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?**

The degree of fault must be either intent or negligence.

**6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?**

Any person who has acquired (either in the primary market or in the secondary market) any of the securities to which the prospectus relates.

**7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?**

The plaintiff must prove that

- the securities were acquired after the publication of the prospectus and during its twelve month validity;
- the prospectus omitted material information or contained untrue statements;
- the deficiency in the prospectus was not publicly rectified by the issuer before the investor bought the securities;
- the investor suffered a damage and the causal link between the damage and the omission or misleading information.

The plaintiff does not need to prove the fault of the responsible person.

**8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?**

Even if the person suing the responsible person has proved all the facts set out in the previous answer, the latter will have a defence if it proves any of these circumstances:

- it acted with diligence in order to ensure that the information included in the prospectus is accurate and that it does not contain material omissions; or
- the claimant was aware of the deficiency in the prospectus when he/she bought the securities.

This exemption will not be applied when the liable person, after the approval of the prospectus, knew the falsehood or the omission of the information and did nothing in order to diligently inform investors during the validity of the prospectus.

In addition to the above, the respondent, in order to avoid liability, can reject any of the arguments on which the plaintiff bases its action (mentioned in the answer to question 7).

**9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.**

No. Facts that were not raised by the parties can not be taken into consideration by the court (excluding those of which the court may have knowledge because they derive from the proceedings e.g. implied from the documents, statements of witnesses, etc.) or for being notorious or public.

**10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?**

The law does not provide specific provisions on the quantification of the compensation. The law only refers to damages suffered as a result of the faulty prospectus. Therefore, the claimant, if successful, would be entitled to recover its actual loss, to the extent positively demonstrated.

**11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?**

The legal provisions on civil liability related to prospectus are mandatory. Therefore it is not possible to exclude, proportionate, or limit liability.

**12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?**

Yes, there is a time limit of three years.

It can be interrupted by filing a claim before the court or out of court; also, the prescription period would be suspended if the responsible person admits the wrongdoing.

The prescription period starts running when the claimant is deemed to have been able to know the wrongdoing.

Every responsible person is subject to the same time limit.

**13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?**

There are no specific provisions in the securities markets law stipulating the competent law for civil liability matters regarding prospectuses related to international public offerings or to solve conflicts of law. Notwithstanding, there is a general regime to solve conflicts of law applicable to civil liability matters to be assessed on a case by case basis.

**14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.**

If a criminal offence has been committed, the action to receive restitution of losses can be jointly exercised with the criminal action before a criminal court.

It is also possible to claim against the public administration through an administrative procedure, when the damage has been caused as a result of the functioning of the public service.

**15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).**

When several actions have the same cause and are based on the same facts, they can be aggregated into the same procedure and all of them will be processed jointly.

Investors are considered as “consumers of financial services”, and in order to protect their collective interests, article 11 of Spanish Law of Civil Procedure states that without prejudice to the individual rights of people concerned, the legal associations of consumers have the right to judicially defend the rights and interest of their associates and of themselves.

### **Administrative Liability**

**16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer’s directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?**

Please see answers to questions 1 to 3 above.

**17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)**

According to case law there is not strict liability. The degree of fault is either negligence or intent.

**18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?**

According to the Spanish securities markets law, sanctions can be imposed on legal persons as well as on natural persons.

**19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?**

The competent body for imposing sanctions for very serious infringements is the Minister of Finance, at the proposal of the Comisión Nacional del Mercado de Valores (CNMV) which is the Spanish securities supervisor.

The competent body for imposing sanctions for serious or minor infringements is the CNMV.

**20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?**

These are the breaches set out in articles 99, 100, and 101 of the securities markets law:

- Offering of securities to the public or obtaining admission of securities to trading on a regulated market without the prior provision, approval and registration of a prospectus in the CNMV, and its publication;
- Offering of securities to the public in breach of the terms and conditions set out in the prospectus;
- Provision of untrue information in a material aspect or omission of material information in the prospectus which lead to deception regarding said document;
- In case of securities that are exempted from the requirement to publish a prospectus, where the offeror has undertaken an advertising campaign in order to reach the public, three types of breaches are envisaged: not hiring the services of an investment firm or bank for the placing, selling the securities in breach of the advertised terms and conditions, or provision to prospective investors of untrue information in a material aspect or omission of material information which lead to deception regarding said document;

- Advertising the offering of securities in breach of the legal provisions;
- Not observing requests of information by the CNMV.

The first four breaches can be considered very serious or serious depending on the size of the offer or the number of investors affected. The fifth is categorized by the law as a serious offence and the last one as a minor one.

**21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?**

Very serious infringements

According to article 102 of the Spanish securities markets law, one or more of the following sanctions can be imposed for very serious infringements:

- Fine of up to the larger of the following amounts: five times the gross profit obtained as a result of the acts or omissions comprising the infringement; 5 per cent of the infringing firm's own funds; five per cent of the total funds, owned by the firm or third parties, that were used in the infringement; or 600,000 euro.
- Suspension or restriction of the type or volume of transactions which the offender may carry out in the securities markets for a period not greater than five years.
- Suspension of membership of an official secondary market or multilateral trading facility for a period not greater than five years.
- Exclusion of a financial instrument from trading on an official secondary market or multilateral trading facility.
- Withdrawal of authorization in the case of investment firms, public debt market registered dealers and other firms registered at the National Securities Market Commission. In the case of investment firms authorised by another EU Member State, the penalty involving withdrawal shall be replaced by prohibition from commencing new operations in Spanish territory.
- Suspension of an offender from the directorship or executive post at a financial institution for a period not greater than five years.
- Removal from office and disqualification from holding directorships or executive posts at the same entity for a period not greater than five years.
- Removal from office and disqualification from holding directorships or executive posts at any similar financial entity envisaged in article 84.1 and 84.2.b), c.bis) and d) of the securities market law for a period not greater than ten years.

Where the offender is a legal person, in addition to the penalty imposed on the offender for very serious infringements, one or more of the following penalties may be imposed upon those holding directorships or executive positions therein who are responsible for the infringement (article 105):

- A fine of up to 300,500 euro.
- Suspension of the offender from directorships or executive posts in the firm for a period not greater than three years.
- Removal from office and disqualification from holding directorships or executive posts in the same entity for a period not greater than five years.
- Removal from office and disqualification from holding directorships or executive posts in any firm of the type envisaged in article 84.1 of the securities markets law and in credit institutions for a period not greater than ten years.

#### Serious infringements

One or more of the following sanctions shall be imposed upon any offender committing a serious infringement:

- A fine up to the greater of the following amounts: twice the gross profit obtained as a result of the acts or omissions comprising the infringement; 2 per cent of the infringing firm's own funds; 2 per cent of the total funds, owned by the firm or third parties, that were used in the infringement; or 300,000 euro.
- Suspension or limitation of the type or volume of the transactions or activities which the offender may perform in securities markets during a period not greater than one year.
- Suspension of membership of an official secondary market or multilateral trading facility for a period not greater than one year.
- Suspension, for not more than one year, from the directorship or executive posts held by the offender in a financial institution.

Where the offender is a legal person, in addition to the penalty imposed on the offender for serious infringements, one or more of the following penalties may be imposed upon those holding directorships or executive positions therein who are responsible for the infringement (article 106):

- A fine of up to 150,250 euro.
- Removal of the offender from all directorships or executive posts in the firm for a period not greater than one year.

#### Minor infringements

A fine of up to 30,000 euro will be imposed upon any offender committing minor infringements (article 104).

**22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?**

The applicable sanctions in each case due to very serious, serious or minor infringements shall be determined according to the criteria set out in article 131.3 of Act 30/1992, of 26 November on the Legal System of the Public Administrations and the Common Administrative Procedure, and to the following (article 106 ter of the securities markets law):

- The nature and magnitude of the infringement.
- The seriousness of the danger or harm caused.
- The gains, if any, resulting from the acts or omissions constituting the infringement.
- The importance of the offending institution, measured as a function of the total size of its balance sheet.
- The infringement's adverse consequences for the financial system or the national economy.
- Whether the infringement was committed on the undertaking's own initiative.
- Repair of damage caused.
- Collaboration with the CNMV, provided that the collaboration provides evidence or information relevant to the clarification of the events being investigated.

The undertaking's prior conduct in relation to the rules on order and discipline which affect it, having consideration for the penalties imposed on it in the last five years.

To determine the applicable sanction from among those provided by articles 105 and 106 of the securities market law (on directors and managers) the following circumstances will also be taken into consideration: The party's degree of responsibility for the events.

- The party's past conduct at the same or at another entity under the rules of order and discipline, taking into consideration any sanctions that were imposed on him/her during the last five years.
- The representative position held by the party.

**23. What is the range of fines (maximum –or unlimited- and minimum amounts)?**

Very serious infringements

Fine of up to the larger of the following amounts: five times the gross profit obtained as a result of the acts or omissions comprising the infringement; 5 per cent of the infringing firm's own funds; five per cent of the total funds, owned by the firm or third parties, that were used in the infringement; or 600,000 euro.

#### Serious infringements

A fine up to the greater of the following amounts: twice the gross profit obtained as a result of the acts or omissions comprising the infringement; 2 per cent of the infringing firm's own funds; 2 per cent of the total funds, owned by the firm or third parties, that were used in the infringement; or 300,000 euro.

#### Minor infringements

A fine of up to 30,000 euro.

### **24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.**

#### Prescription period of the infringement

Article 101 bis of the Spanish securities markets act sets out:

Serious or very serious violations expire after five years and minor violations after two years.

The period for expiration of violations shall count as from the day that the violation was committed. As regards violations arising from continuous activity, the expiry date will be calculated starting from conclusion of that activity or from the last violation that was committed.

The statute of limitations period will be interrupted by the commencement of disciplinary proceedings, with the knowledge of the interested party, and shall resume if the disciplinary proceedings are halted for three months for reasons not attributable to those against whom they are directed.

#### Time limit for ending the administrative proceedings

According to article 2 of the Royal Decree 2119/1993, of 3 December, on the disciplinary procedure applicable to subjects that operate in the financial markets The maximum period to process and conclude the sanctioning procedure is one year from the adoption of the initiation decision (which can be prolonged for an additional term of 6 months); the regulation also envisages a simplified procedure of 4 months.

The time limit may be suspended for the following reasons:

- Up to 3 months, when a mandatory report to be issued by another authority or body has to be produced and incorporated to the sanctioning file.
- When a Court or Tribunal has to decide on the application of the "non bis in idem" principle regarding the facts and the individuals or entities which are the subject of the sanctioning file.

#### Time limit for applying the sanction

Regarding the limitation period for the fining decisions (or sanctioning decisions in general), it is regulated by Article 132 of the Law 30/1992 on the Legal Regime of the Public Administration and on the General Administrative Procedure which sets out:

The limitation period for the sanctions imposed for very serious infringements shall be of 3 years, for the sanctions imposed for serious infringements shall be of 2 years and for the sanctions imposed for minor infringements shall be of 1 year.

The period for expiration of sanctions shall count as from the date that the resolution imposing the sanction is firm and valid.

– The prescription period will be suspended by the commencement of the procedure for the collection of the fine, with the knowledge of the interested party, and shall resume if the proceedings are halted for more than one month for reasons not attributable to the wrongdoer.

**25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?**

Only conducts classified as minor infringements may be settled with the CNMV (hence not leading to the initiation of disciplinary proceedings) if a number of requirements set out in article 107bis of the securities markets law are met, among others that the public interest has not been affected and that the responsible person has rectified the wrongdoing to the satisfaction of the CNMV.

In general the infringements related to prospectuses are serious and very serious so an administrative sanction may not be avoided. Only a request of information not observed (which would be a minor infringement) could be settled with the CNMV.

**26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.**

Yes, the sanctions that have been imposed for committing serious and very serious infringements are published in the Spanish Official Bulletin, when they are the final administrative resolutions.

**27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?**

Before appealing to a court it is compulsory to lodge an appeal before the superior body of the one who has imposed a sanction for minor or serious infringements, and it is also possible to file a voluntary appeal before the same body in the case of a sanction for a very serious infringement. This means, in both cases, the Ministry of Finance.

**28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?**

Yes.

**Criminal liability**

**29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.**

There is a specific criminal prospectus regime in the Spanish Penal Code. Article 282 bis of Spanish Penal Code states that issuer's directors ("de facto" or "de iure") who falsify the information contained in a prospectus or information that the company must publish and make known pursuant to the stock market legislation with the aim of raising money will be punished by imprisonment. Moreover, depending upon the case, other (general) criminal provisions may be applicable to the facts.

**30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.**

According to the Spanish Penal Code, only the issuer's de facto or formally appointed directors can be held criminally liable. Additionally, see next question. Criminal liability could only be applied to the directors of other parties (e.g. lead managers) if they have acted, with wilful misconduct, as necessary accessories of the company's directors.

**31. Can legal persons be held liable for criminal offences?**

Yes (article 288 of the Spanish Penal Code).

**32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?**

Article 282 bis of the Spanish Criminal Code refers to: "falsify the economic-financial information contained in the prospectus used to issue any financial instruments or information that the company must publish and make known pursuant to the stock market legislation, concerning its resources, activities and present and future business, in order to attract investors or depositors, to place any kind of financial asset, or to obtain financing by any means".

The Spanish Criminal Code does not include the concept of 'materiality' to assess if the publication of false information is a criminal offence. However, as indicated in the response to question 34, a materiality test is used to determine the sanction (in particular if there is a very serious damage caused to investors).

**33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?**

Yes, the offence has to be committed intentionally.

**34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).**

The general penalty is imprisonment from 1 to 4 years. In case the company effectively raised money with the false information, the penalty shall be imposed in its superior half (i.e. 2.5 to 4 years).

If the damage caused to investors is considered to be very serious, the penalty will be imprisonment from 1 to 6 years and a fine from 6 to 12 months (for each day within this period the liable person has to pay an amount according to the day rate to be determined by the judge –pursuant to article 50 of Spanish Penal Code-). And, if the raised funds were a subsidy, penalties of article 308 may also apply.

In case of criminal liability of the legal person, the applicable penalties would be:

- if the offence committed by the individual is punished with more than two years imprisonment (for each day within this period the liable person has to pay an amount according to the day rate to be determined by the judge –pursuant to article 50 of Spanish Penal Code-): fine from one to three years;
- if the offence committed by the individual is punished with less than two years imprisonment: fine from six months to two years.

**35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?**

No. Moreover, when administrative authorities notice that a criminal procedure is pending, any ongoing administrative procedures must be suspended until the end of the criminal procedure.

**36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.**

Time limits for the offence (that is: for initiating criminal proceedings). Article 131 of Spanish Penal Code:

Between 5 and 10 years, taking into account the length and type of sanctions established for this specific offence.

This time limit shall be calculated from the date on which the punishable offence is committed (article 132.1 of the Spanish Penal Code).

Time limits applicable to ongoing criminal proceedings:

None (that is: there is no time limit for ending criminal proceedings).

However, the offence will elapse if criminal proceedings are completely paralysed during the time periods explained above (as applicable).

Pursuant to the Spanish Supreme Court case the term ‘completely paralysed’ means inactivity.

Time limits for applying the sanction (Article 133 of the Spanish Penal Code):

Between 5 and 15 years (as from the date of the definite judgement or breach of sentence – article 134), taking into account the sanctions foreseen for this offence.

**37. Can the competent authority initiate criminal proceedings?**

Not by itself. However, the CNMV shall report any evidence that a criminal offence might have been committed to the competent judicial authority or the public prosecutor.

**38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.**

See answer to the previous question. Also, articles 30.4 i) and 31.3.b) of the Internal Regulation of CNMV, provide that the CNMV will assist, cooperate and provide advise to judges and courts in the exercise of their duties.

**39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?**

According to non bis in idem principle, when administrative authorities notice that a criminal procedure is in process, any ongoing administrative procedures must be suspended until the end of the criminal procedure.

In order to apply non bis in idem principle, it is necessary that the two procedures have the same persons, facts and legal basis.

When the criminal procedure has finalized the administrative authority will assess again the sameness of those three elements. If one of them is not actually identical (usually, the identity of legal basis) the administrative authority may resume its enforcement proceedings but it is obliged to take into account the proven facts of the criminal court.

**Government Liability (restitution for losses from the Government)**

**40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer ‘no’ to this question, the questions thereafter do not require an answer.**

According to article 139 of the Law 30/1992, of 26 November of the Legal Regime of Public Administrations and Common Administrative Procedure, any individual will have the right to be compensated by the relevant public administration for all the damages suffered, except in case of force majeure, as a result of the functioning of the public service.

**41. Who is entitled to sue for damages?**

Any individual who has suffered a damage caused by the functioning of the public service may sue for damages.

**42. What circumstances must be proven by the plaintiff?**

The plaintiff must prove the following circumstances:

- The damage suffered; the damage must be capable of being quantitatively measured.
- The public service has not acted in accordance with the applicable legal framework.
- The plaintiff has no legal obligation to withstand the damage.
- There is a causality relationship between the damage and functioning of the public service.

**43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?**

The relevant public administration might avoid liability if it proves that the public service acted according to the applicable legal framework and/or that there is no causality relationship between the damages and the functioning of the public service.

**44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?**

The only recoverable damages are those that the individual is not legally obliged to bear (article 141 of Law 30/1992). In addition, damages which could have been avoided will not be recoverable.

The compensation will be calculated according to criteria established in the legislation on compulsory purchase and tax legislation, taking into account market valuations.

The law does not stipulate any limitation to the relevant public administration's liability.

**45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.**

According to article 145 of the Law 30/1992, the administration may initiate administrative proceedings against their own employees in case it paid compensation to investors due to relevant public administration's liability. Employees will be liable if they acted with intent or gross negligence.

To calibrate the responsibility of the employees the following criteria must be taken into account: the extent of the damages, the degree of intent (or lack of it), the level of responsibility of the employee, and link between the performance of the employee and the damages.

This liability does not prejudice the disciplinary proceedings applicable depending on the case.

**46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?**

According to article 142.5 of the Law 30/1992, the right to claim the damages expires one year after the damages were produced.

**47. Is a class action available?**

According to article 70.2 of the Law 30/1992, when the claims of several persons have an identical or very similar content and an identical or very similar legal basis, they can be filed under a single claim, unless there are other relevant specific rules that state otherwise.

## Civil liabilities

1. The Swedish Companies Act (2005) (the Companies Act) contains specific liability provisions for founders, board members, managing directors, auditors, general examiners and special examiners in a company that has prepared and issued a prospectus. According to the Companies Act, a founder, board member, managing director, auditor, general examiner or special examiner shall compensate anyone who suffers loss due to a breach of the provisions in Chapter 2 of the Swedish Financial Instruments Trading Act (1991) (the Financial Instruments Trading Act) or the Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC regarding information contained in prospectuses, as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (the EU Prospectus Regulation).

Potential prospectus liability for other persons (including an issuer) than the ones mentioned above, will be governed by general tort principles and the relevant provisions of The Swedish Tort Liability Act (1972) (the Tort Liability Act). According to the Tort Liability Act, pure economic loss (*i.e.* economic loss arising without any person having sustained personal injury or damage to property) that arises in a non-contractual relation is recoverable only if the loss is caused by the commission of a crime. It is uncertain under Swedish law whether prospectus liability can arise on a contractual basis. Please note that, unless otherwise stated, our replies in this section will focus on the liability regime set out in the Companies Act.

2. Founders, board members, managing directors, auditors, general examiners and special examiners of an issuer may be liable pursuant to the relevant provisions of the Companies Act. Apart from this, Swedish law does not contain any specific provisions as regards what parties that can be held liable for the information in a prospectus.

3. According to the Companies Act, if several persons are liable for the same damage, they shall be jointly and severally liable, however, only insofar the liability for anyone of them has not been adjusted in accordance with relevant provisions of the act. Similar principles apply pursuant to the Tort Liability Act.

4. Founders, board members, managing directors, auditors, general examiners and special examiners shall compensate anyone who suffers loss due to a breach of the provisions in Chapter 2 of the Financial Instruments Trading Act or the EU Prospectus Regulation.

5. Intent or negligence.

6. There are no rules under Swedish law that limits the right to sue to, for example, a plaintiff that has been a purchaser in the primary market.

7. In general, anyone who sues for damages under Swedish law must prove that the losses suffered was caused by the defendant's intentional or negligent behavior. Further, the plaintiff will normally also have to prove the extent of losses suffered.

8. Please see the reply under question 7 above.

9. The main rule in civil proceedings in Sweden, is that the court in its judgment only may consider facts presented by the parties.

10. Neither the Companies Act nor the Tort Liability Act contains specific provisions regarding the quantification of compensation for pure economic loss.

11. The provisions regarding prospectus liability in the Companies Act are mandatory.

12. According to the Swedish Statute of Limitations Act (1981) (the Statute of Limitations Act), the time limit to file the claim is ten years from the date on which the cause of the claim originated.

13. There are no specific provisions in Swedish law to solve conflict of law regarding prospectus liability. In general, the Rome II Regulation (EC) No 864/2007 deal with conflict of laws on the law applicable to non-contractual obligations.

14. A plaintiff and a defendant may always reach a settlement out of court. Apart from this, judicial proceedings before a civil court would be the way to recover damages for losses suffered.

15. Yes, there are general provisions which enable class action suits according to the Swedish Class Action Act (2002) (Class Action Act). Please note, however, that class actions are quite uncommon in Sweden.

#### Administrative liabilities

16. Swedish law does not provide for administrative liability for misrepresentation or misstatements in a prospectus. Administrative sanctions may only be imposed for certain breaches of the Swedish prospectus rules (please see further under question 20).

17. N/A.

18. N/A.

19. The Swedish Financial Supervisory Authority is the competent authority to impose administrative sanctions for breaches of the Swedish prospectus rules.

20. The Swedish Financial Supervisory Authority may impose administrative sanctions on a party that has a duty to prepare a prospectus, if that party (i) fails to apply for approval of a prospectus, (ii) fails to apply for approval of a supplement to a prospectus or (iii) fails to publish a prospectus or a supplement to a prospectus pursuant to the provisions in Chapter 2 of the Financial Instruments Trading Act. Swedish law does not provide for administrative sanctions on a party regarding misrepresentations or misstatements in an advertisement. The Swedish Financial Supervisory Authority may, however, prohibit advertisements (please see further question 21).

21. The Swedish Financial Supervisory Authority may impose a special fee on a party that fails to apply for approval of a prospectus or a supplement to a prospectus or fails to publish a prospectus or a supplement to a prospectus pursuant to the provisions in Chapter 2 of the Financial Instruments Trading Act.

The Swedish Financial Supervisory Authority may temporarily prohibit an offer of transferable securities to the public or an admission of transferable securities for trading on a regulated marketplace, if the Swedish Financial Supervisory Authority has reasonable cause to believe that the offer or admission for trading contravenes the provisions of the Financial Instruments Trading Act or the EU Prospectus Regulation. Such prohibition may remain in force for a period not exceeding ten business days. Further, the Swedish Financial Supervisory Authority may permanently prohibit an offer of transferable securities to the public, if the Swedish Financial Supervisory Authority establishes that a violation of the provisions of the Financial Instruments Trading Act or the EU Prospectus Regulation has taken place.

The Swedish Financial Supervisory Authority may prohibit advertisements in respect of an offer of transferable securities to the public or an admission of transferable securities for trading on a regulated marketplace, if the Swedish Financial Supervisory Authority has reasonable cause to believe that the offer or admission for trading contravenes the provisions of the provisions of the Financial Instruments Trading Act or the EU Prospectus Regulation. Such prohibition may remain in force for a period not exceeding ten business days

22. No, there are no aggravating or mitigating factors explicitly prescribed in any law or regulation. However, the Swedish Financial Supervisory Authority may, wholly or partly, waive the special fee if the violation is negligible or excusable or if there otherwise exist special reasons therefor.

23. The special fee ranges between SEK 50 000 – SEK 10 000 000 SEK.

24. According to Chapter 6 of the Financial Instruments Trading Act, a special fee may be imposed only if the party, within six months from the alleged breach, has been notified of the fact that the Swedish Financial Supervisory Authority is considering the question of a special fee. There is no other time limit for imposing a special fee according to the Financial Instruments Trading Act than the above mentioned.

25. No.
26. Yes, the decision is published on the website of the Swedish Financial Supervisory Authority.
27. No.
28. Yes, decisions by the Swedish Financial Supervisory Authority may be appealed to the administrative court.

### Criminal liability

29. Criminal liability for prospectus related offences may arise pursuant to the provisions of the Swedish Penal Code (1962) (the Penal Code).  
There is no specific criminal prospectus regime.
30. In principle no.
31. Legal persons cannot be held liable for criminal offences. However, legal persons can in certain circumstances be sanctioned with a company fine. A company fine could be issued on a company for such violations that are described under answer 32.
32. Infringements regarding the provisions regulating prospectuses can constitute different crimes depending on the circumstances in the specific case. For example, mis-representation or misstatements in a prospectus could be considered fraud or swindle pursuant to the provisions in the Penal Code. It could also be considered market manipulation due to the Swedish Market Abuse Act (2005) (the Market Abuse Act).
33. Fraud requires intent, swindle requires intent or, in certain circumstances, serious negligence and market manipulation requires intent or negligence.
34. The sanctions vary depending upon the type of crime and some crimes (for example serious fraud and serious swindle) can be punishable with up to six years of imprisonment. Less serious instances of the above mentioned crimes could be punishable with a fine.
35. In principle, yes. However, since administrative sanctions for prospectus related violations are imposed only on legal persons, the situation should seldom arise.
36. The statute of limitation varies depending upon the type of crime committed and can be up to ten years from the alleged crime was committed.

37. The Swedish Financial Supervisory Authority does not initiate criminal proceedings.
38. The Swedish Financial Supervisory Authority shall, under the Market Abuse Act, notify the prosecutor when there is reason to believe an offence has been committed pursuant to the aforesaid Act. Please also note that there may be criminal proceeding rules that give the prosecutor a right to request documents and information from the Swedish Financial Supervisory Authority.
39. In principle no. However, please see or reply under question 35.

#### Government liability

40. The Tort Liability Act stipulates that damages caused by public bodies within the negligent exercise of public authority shall be compensated. Such compensation can be awarded for pure economic loss.
41. There are no explicit rules that limit the right to sue for damages to certain plaintiffs.
42. In general, anyone who sues the Government under the above mentioned rules must prove that he or she has suffered loss due to the Government's negligent exercise of public authority. Further, the plaintiff will normally also have to prove the extent of losses suffered.
43. Please see our reply to question 42 above.
44. The Tort Liability Act does not contain specific provisions regarding the quantification of compensation for pure economic loss, nor does it contain provisions regarding limitation of the Government's liability (except for a general rule that damages can be adjusted or mitigated under certain circumstances).
45. Normally not. However, an employer may in exceptional circumstances have a right of recourse against an employee pursuant to the Tort Liability Act.
46. According to the Statute of Limitations Act, the time limit to file the claim is ten years.
47. Yes, there are general provisions which enable class action suits according to the Class Action Act. However, as mentioned above, class actions are quite uncommon in Sweden.



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## United Kingdom – Financial Conduct Authority (FCA)

### QUESTIONS

#### Civil liability (restitution for losses from the author of the breach)

1. Do you have several civil liability regimes (tort, contractual, protection of consumers of financial instruments, other) out of which prospectus liability can arise? If yes, please provide separate explanations for each of these civil liability regimes under the relevant following questions.

There are 3 main sources of prospectus liability: a statutory regime in section 90 of the Financial Services and Markets Act 2000 (FSMA), common law negligence and common law deceit.

Open Government Licence: <http://www.nationalarchives.gov.uk/doc/open-government-licence/>

2. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details (in particular, please indicate if the responsible persons would be liable for the whole content of the prospectus or only for certain parts of it).

Section 90: Yes – FCA has power to make rules specifying persons liable for a prospectus. These rules are set out in The FCA's Prospectus Rules see PR 5.5 and apply both in the context prospectuses concerning offers and admissions to trading. Forthcoming changes to these rules will extend responsibility for a prospectus to senior executives of any external management company of the issuer.

Negligence/deceit: not specified.

3. Are the persons under the previous question subject to joint and/or several liability?

Joint and several

4. For which breaches of duties or obligations are the persons under the previous question liable (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus)?

Section 90: untrue or misleading statement in the prospectus, omission of any matter required to be included (s.90(1)). No liability solely for statement in prospectus summary unless misleading when read with prospectus as a whole (s.90(12)).

Negligence/deceit: broadly similar.

Separately, a person who suffers loss may bring an action in respect of losses suffered as a result of a contravention of the prohibition on making an offer or seeking admission without an approved prospectus (Section 85(4)).

5. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Section 90: reasonable belief that the statement is true is a defence therefore standard is approximately negligence.

Negligence/deceit: self-explanatory.

S.85(4): strict subject to defences.

6. Who is entitled to sue for damages (e.g. only original purchasers in the primary market or also subsequent investors in the secondary market, financial intermediaries)?

Section 90: any person who has acquired securities to which the prospectus relates (s.90(1)).

Negligence: liability depends on establishing a duty of care. It is possible that a secondary market purchaser could establish such a duty in appropriate circumstances. It is also possible that a person that had disposed of securities in reliance on statements in a prospectus may attempt to establish a duty.

Deceit: similar to negligence.

S.85(4): person who suffers loss as a result of contravention.

7. What circumstances must be proven by the plaintiff (e.g. the securities were acquired after the publication of the prospectus and during its twelve month validity, the prospectus omitted material information or contained untrue statements, the losses suffered, the losses were caused by the misleading prospectus, the plaintiff relied on the misleading prospectus for the investment decision, negligence or intent on the part of the liable person)?

Section 90: see answers to 4 & 6 above.

Negligence: duty of care, conduct fell below required standard of care (negligence), causation, damage foreseeable, loss.

Deceit: the basic statement of the tort of deceit is found in the case of *Derry v Peek* (1889). A person is liable in this tort only if he or she knew the statement being made was false or did not care whether it was true or false (and it was in fact false). A genuine belief in the truth of the statement will protect one from liability, no matter how easily the falsity of the statement might have been discovered. In addition, since the enquiry in a deceit case is only as to what the defendant knew or believed (rather than what a reasonable person would have done in the same situation), the range of facts upon which liability is dependent is much narrower.

8. What circumstances must be proven by the respondent in order to avoid liability (e.g. the defendant was not aware of the incompleteness or misstatement in the prospectus and such lack

of awareness was not the result of negligence, the deficiency in the prospectus is not material and therefore did not influence the price of the security, the plaintiff was aware of the deficiency in the prospectus, a supplement to the prospectus correcting the problem was published before the acquisition of the securities took place)?

Section 90: FSMA Schedule 10 provides a defence for a person who reasonably believed (having made such enquiries, if any, as were reasonable) that the statement was true and not misleading, or the matter whose omission caused the loss was properly omitted. In addition there is a defence for a person who relies on an expert if he reasonably believed the expert was competent to make the statement. It is also a defence if the person responsible can show that the plaintiff knew the statement was false or knew of the omitted matter.

Negligence: that any of the factors required to establish liability (see 7) is absent, for example that the misleading statement did not cause the loss.

Deceit: as above – genuine belief that the statement was true. Causation is also relevant.

9. Does the judge have a faculty to take into consideration facts which were not presented by the parties (excluding facts which the judge may take judicial notice of). If yes, please explain.

In reality it is unlikely that this would occur, but the court has an overriding objective to deal with cases justly so in theory it might be possible.

10. What damages are recoverable? Does the law provide specific provisions on the quantification of compensation?

Compensation is at the discretion of the court. In general the measure of damages is compensation to put the plaintiff in the position it would have been in had the misrepresentation not been made. Where the misrepresentation induced the party to enter into a contract, it follows that the judge must consider what would have occurred had the party not entered into the contract. Such damages may compensate for pure economic loss, but not, in general, loss of profit. If fraud is established, it may be possible to recover for losses that were not foreseeable.

11. Are the provisions in the law about civil liability mandatory or is there a possibility to exclude, proportionate or limit liability (i.e. by a clause inserted in the prospectus)?

Section 90: mandatory, negligence: some scope to define extent of duty owed, fraud: mandatory.

12. Is there a time limit to file the claim? Can it be suspended or interrupted? When does the prescription begin? Is each responsible person mentioned under question 2 subject to the same time limit?

Section 90: not specified. Negligence and deceit: 6 years from date cause of action accrued.

13. According to your jurisdiction, what will be the competent law to deal with issues on civil liability of prospectuses related to international public offerings? Is there any provision to solve conflicts of law?

General conflict of law rules would apply.

14. Is a judicial proceeding before a civil court the only way to receive restitution of losses? If other, please explain.

Yes. FSMA provides a mechanism for FCA to seek a court order requiring restitution in some circumstances.

15. Is a class action available? If yes, please explain (in particular, do associations of investors have the legal capacity to file claims on behalf of their members).

There is no limit to the number of parties to an action. Rules of court provide procedures for management of multi-party actions, for example by consolidating claims, by hearing a representative claim first, or under a Group Litigation Order, which allows claimants to join an action by registering and binds registered claimants to any judgement. See Civil Procedure Rules - Rules and Practice Directions Pt 19.

### **Administrative Liability**

16. Does your national law prescribe specific parties who can be held responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? Can several persons be held liable for different parts of the prospectus?

FSMA section 91 provides that an issuer, offeror/person requesting admission, an applicant for approval of a prospectus or a person to whom a provision of the PD applies may be subject to an administrative penalty.

Also directors of the above that have been knowingly concerned in the relevant contravention (s.91(2)).

FSMA s.87M provides a sanction of public censure in similar circumstances.

There is no specific provision for several persons to be held liable for different parts of a prospectus.

17. For which degree of fault are those persons liable (e.g. intent, negligence, strict liability)?

Strict liability if breach established, but fault relevant to assessing application of penalty. For directors, the test is "knowingly concerned".

18. Can the sanctions be imposed on both legal and natural persons or solely on one type of person?

Yes

19. Which are the competent bodies for imposing administrative sanctions in case of a breach of the PD framework (e.g. authorities designated in accordance with the PD, the operator of the regulated market where the relevant securities are traded, the Government)?

FCA (i.e. the competent authority under the PD)

20. For which breaches of the PD framework are sanctions applied (e.g. untrue information in a material aspect or omission of material information in the prospectus, selling of securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements, advertisements inconsistent with the prospectus)?

Contravention of a provision of FSMA, prospectus rules or a provision made in accordance with the PD (s.87M, s.91(1)). Sanctions may be applied in any of the cases listed in the examples.

21. What are the sanctions envisaged for the infringements referred to in the previous question (e.g. issuance of an order requiring the responsible person to remedy the infringement, suspension of trading, prohibition or suspension of a public offer, fines, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements)?

Section 87M: public censure, section 91: financial penalty.

Separately the FCA may suspend/cancel an offer/application for admission if it considers that a provision of the prospectus regime has been breached or is likely to be breached (ss 87K and 87L)

22. Are there any aggravating or mitigating factors taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g., financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors)?

Not explicitly in statutory scheme, but such factors will be relevant to assessment of any penalty.

23. What is the range of fines (maximum –or unlimited- and minimum amounts)?

Unlimited

24. Are there any time limits for imposing liability (e.g. for initiating and/or ending administrative proceedings, for applying the sanction)? If yes, please provide details.

3 years from first day FCA knew of contravention in case of financial penalty (section 91(6) as amended by Financial Services Act 2012).

25. Is there any settlement procedure with the competent authority that may not lead to a formal sanction being imposed on the responsible person?

Yes, though often the settlement procedure results in payment of a lesser financial penalty than might otherwise have been the case.

26. Does the competent authority publish the sanctions that have been imposed and the identity of the responsible person? If yes, please provide details.

Yes. FSMA s.391 provides for publication of such information about a formal decision as the FCA considers appropriate. This will include the identity of the responsible person. There is an exception where publication would, in the opinion of the FCA, be unfair to the person against whom the action was taken or prejudicial to the interests of consumers.

27. Is there a previous appeal to an administrative body allowed or necessary before appealing to a court?

There is a right to have a case reconsidered by an independent Tribunal.

28. Are decisions by the competent authority to impose a sanction subject to the right of appeal before a court?

Decisions of the Tribunal may be appealed to a court.

## **Criminal liability**

29. Does your national legislation provide for criminal sanctions to punish prospectus related offences? If yes, please indicate whether there is a specific criminal prospectus regime and/or if the general criminal provisions apply.

It is an offence to make an offer or seek admission of securities without a prospectus where one is required (FSMA section 85(3)).

FSMA creates criminal liability for certain misleading statements and practices (S.397) that could be applied to publication of a misleading prospectus, but there is no specific offence. General criminal law offences of dishonesty such as conspiracy to defraud may well apply.

30. Does your national law prescribe specific parties who can be held criminally responsible for information contained in a prospectus (e.g. issuer, the issuer's directors, offeror, guarantor, lead manager, distributors, auditor, experts, parent company of the issuer or other shareholders)? If yes, please provide details.

See above – no

31. Can legal persons be held liable for criminal offences?

Legal persons may be held liable under the Section 85(3) and Section 397 offences referred to above.

32. What conducts constitute a criminal offence under your legislation (e.g. false statements or omissions of material information made on purpose by the liable person)?

See 29 above. See Section 397(3). In summary it is an offence under Section 397(3) where a person does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or price or value of relevant investments if done for the purpose of inducing another to acquire those investments.

33. Does the law require that the offence has been committed intentionally? If not, for which degree of fault would a person be held liable?

Criminal liability generally requires proof of intention or in some cases recklessness. Fraud offences require proof of dishonesty.

34. What are the criminal sanctions? Please provide details (e.g. number of years of imprisonment, amount of the fines, disqualification from public office).

Section 85(3) offence: up to 2 years imprisonment, unlimited fine

Section 397(3) offence: up 7 years imprisonment, unlimited fine.

35. Can a previous administrative sanction be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine)?

In the UK, criminal proceedings will usually precede any administrative action. However, technically, the Judge is able (but not required) to take a number of factors into account including administrative penalties when sentencing should it be considered relevant. The level of criminal benefit may also be confiscated following a conviction. A confiscation order is made in addition to any administrative penalty that may already have been imposed.

36. Are there any time limits for imposing criminal liability (e.g. for initiating and/or ending criminal proceedings, for applying the sanction)? If yes, please provide details.

Generally no limitation period for criminal offences.

37. Can the competent authority initiate criminal proceedings?

Yes. Typically the FCA will prosecute market abuse offences, fraud offences are more likely to be prosecuted by the national prosecutor.

38. Can/should the competent authority submit findings and/or observations to the prosecutor or other relevant body for criminal proceedings? If yes, please provide details.

The FCA is permitted, but not compelled, to disclose information and findings obtained as part of the administrative proceedings to the criminal prosecutor provided the information falls within one of the Gateways set out in [section 349 FSMA 2000](#). These Gateways include circumstances where the information is provided for the purpose of enabling the recipient to carry out the public function of bringing criminal proceedings and investigations.

39. Do criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions?

No

#### **Government Liability (restitution for losses from the Government)**

40. Does your legislation provide investors with the right to obtain restitution for losses from the Government and/or the competent authority in case the authority responsible for the approval of the prospectus did not perform its duties according to the PD framework? Please note that if you answer 'no' to this question, the questions thereafter do not require an answer.

Under FSMA, which (through an amendment), implements the Prospectus Directive, the Financial Conduct Authority ("FCA") is the UK Competent Authority for these purposes.

The legislation does not provide investors with the right to obtain restitution (or damages) for a failure by FCA to perform its PD duties. However, the Financial Services Act 2012 does require the Regulators (i.e. the FCA, the Prudential Regulation Authority and the Bank of England) to "*make arrangements ... for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions*" (i.e. establish a complaints scheme) and further requires that the complaints scheme must confer on the investigator of a complaint the power to recommend, in appropriate cases, that the Regulator should make a compensatory payment to the complainant/investor. The investigator's recommendation is not binding on the Regulator, but the investigator has the power to require that his report be published.

There are two other possible legal actions available to an investor which are not established by legislation but which are available under the general common law:

- i. A person may commence legal proceedings for judicial review of a decision of the FCA. The right to bring a claim for judicial review is a general right applying to the decisions of public bodies, now reflected in the Senior Courts Act 1981, section 31. If the applicant is successful in challenging the decision of the public authority, the decision will be "set aside" by the Court, requiring the FCA to make a new decision in light of the Court's judgment. But damages are not available as a remedy for a successful judicial review.

- ii. A person may sue the FCA for damages in tort (e.g. negligence) but as noted in answer to question 41 below, the damages are available only in very limited circumstances.

41. Who is entitled to sue for damages?

FSMA provides that neither the FCA, nor any person who is a member of staff of the FCA, is liable in damages for anything done or omitted in the discharge of its functions (FSMA, Sch 1ZA, para 25), unless it can be shown that the FCA, or the person in question, acted in bad faith or contrary to the Human Rights Act 1998 (HRA).

Anyone who can demonstrate the requisite bad faith or HRA requirement may bring a claim against the FCA for damages, although plainly unmeritorious claims are liable to be struck out on summary judgment.

42. What circumstances must be proven by the plaintiff?

In the FCA's internal Complaints Scheme, there are a number of recognised bases for complaint (see [www.fca.org.uk/your-fca/complaints-scheme](http://www.fca.org.uk/your-fca/complaints-scheme) for the full list), including showing that FCA made a mistake or demonstrated bias or lack of care.

In Judicial Review (a court application to have the FCA's decision quashed), the complainant must show that the FCA, in making its decision, made an error of law, failed to apply the proper procedure, or acted irrationally (i.e. could not possibly have reached this decision on the basis of the information before it, if it had been acted reasonably).

For damages claims against the FCA (to the limited extent that they are possible in view of FSMA Sch 1ZA, para 25), a person must establish on balance of probabilities the core elements of liability (for negligence these would include a duty of care, sufficient proximity to the FCA, causation etc), as well as the bad faith or HRA element required to overcome the point raised in answer 41 above.

43. What circumstances does the Government and/or the competent authority have to prove in order to avoid liability?

The Government has to show that it did not act improperly in the way alleged by the complainant (as outlined in answer 42).

44. What damages are recoverable? Does the law provide for specific provisions on the quantification of the compensation? Does the law provide for a limitation to the Government liability (e.g. liability cap, proportionate liability)?

See the answer to question 41. Damages are not generally available against the FCA.

45. Can the Government and/or competent authority bring an action against their own employees for compensation paid to investors due to Government liability? If yes, please provide details.

As FCA liability in damages can only arise in cases of bad faith or where required for compliance with the HRA, actions by the FCA against staff must necessarily be confined to these (rare) cases.

46. Is there a time limit for initiating the proceedings? Can it be suspended or interrupted? When does the prescription begin?

The time limit for complaints against the Regulators through the Complaints Scheme is that it must be made within 12 months of the event being challenged; for commencing a Judicial Review, it is 3 months from the decision which is being challenged.

47. Is a class action available?

In Judicial Review, this will depend on whether the claimant body has a “sufficient interest” in the decision under review.