Prospectus Liability in Europe

Within the EU, the burden of proof for misleading statements varies significantly

By Tomas Arons

Recent developments in the international enforcement of investors' rights are drawing attention back to the burgeoning field of securities litigation outside the United States, particularly in Europe.

By way of background, securities litigation in Europe is largely adjudicated on a national basis, grounded in part in the substantive law of the European Union. Under European Union law, an issuer must publish and distribute a prospectus before the issuer lists or makes an offer of securities. Under Article 6(1) of the Prospectus Directive 2003/71 of the European Parliament and of the European Council, liability for misstatements in a prospectus will attach at a minimum 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." Those responsible for the content of a prospectus must include in the prospectus "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 6(2) of the same directive imposes an obligation on the member states of the European Union to ensure that their laws, regulations and administrative provisions on prospectus liability apply to those persons responsible for the information provided in a prospectus.

Each EU member state has the ability to enact laws imposing liability in the way it sees fit, provided that such laws maintain the effectiveness of European Union law. This has led to the creation of various national laws regarding prospectus liability throughout the European Union. While the laws are largely similar, they also vary in significant ways.

Each EU member state, however, has the ability to enact laws imposing liability in the way it sees fit, provided that such laws maintain the effectiveness of the aforementioned provisions of European Union law. This has led to the creation of various national laws regarding prospectus liability throughout the European Union. While the laws are largely similar, they also vary in significant ways. For example, the United Kingdom's Financial Services and Markets Act of 2000 establishes liability for misrepresentations made by securities issuers. In order to recover under the statute, investors must prove that they relied on the alleged misrepresentations in purchasing their shares.

By contrast, under Dutch law the situation is just the opposite, with a far more permissive standard for showing an investor's reliance. Under Dutch law, investors can bring claims alleging misleading statements in a prospectus under the Unfair Commercial Practices Act of 2008. Applying a doctrine reminiscent of the US-style "fraud-on-the-market" presumption of reliance, the Dutch Supreme Court has held that in many cases the burden of proof is on the securities issuer and the lead managers (i.e., the defendants) to prove that the misleading statements were not in any way connected to the investors' decision to purchase the shares. The Dutch Supreme Court noted that defendants may be able to make this showing where, for instance, the shares were purchased prior to dissemination of the prospectus. Moreover, the burden of proof is also on the issuers to prove the completeness and correctness of the prospectus. The burdens were shifted to issuers and managers with respect to non-institutional investors because, as noted by the Dutch Supreme Court, a misleading prospectus can reasonably affect the economic behavior of an average investor who lacks knowledge and experience. Because of their knowledge and experience, however, institutional or professional investor plaintiffs still bear the burden of proving reliance and the fact that the alleged statements were misrepresentations.

While UK law may be stricter than in some neighboring countries in this respect, investors have still been able to recover some significant losses in UK courts. As noted in prior editions of *The Advocate*, a large securities class action against the Royal Bank of Scotland ("RBS") has been pending in UK courts since 2009. Investors seeking over $5 billion in damages related to misstatements that RBS made in a stock offering at the height of the 2008 financial crisis recently settled the action for approximately £800 million (approximately $1 billion). This significant settlement in the relatively nascent field of UK securities litigation is a welcome sign that while foreign securities litigation often comes with numerous inherent risks, avenues for meaningful vindication of investors' rights are taking shape.

Nearby Denmark is also home to an increasing number of shareholder suits. In the spring of 2016, twenty-five institutional investors, including Denmark's largest pension fund, filed a legal action against OW Bunker, a now-defunct marine fuel trader, in the City Court of Copenhagen. The suit claims that misstatements in OW Bunker's prospectus in connection with its 2014 IPO led to investor losses of

approximately $103 million (800 million Danish crowns). The institutional investor plaintiffs claim that the OW Bunker IPO prospectus omitted material information concerning oil-price speculation and trading with one very large customer — the Singapore company Dynamic Oil Trading. Indeed, a report drafted by administrators of OW Bunker's bankruptcy estate alleged that a draft OW Bunker prospectus contained detailed information on both the oil-price speculation and the relationship with Dynamic Oil Trading, but that this information was subsequently removed from the final prospectus.

OW Bunker, like other securities cases, was brought under the Danish Class Action Act, which became effective in January 2008 and provides for both opt-in and opt-out transactions. Danish laws pertaining to prospectus liability include but are not limited to: 1) the Danish Securities Trading Act; 2) the Danish Financial Businesses Act; 3) the Rules Governing Securities Listing on the Nasdaq OMX Copenhagen; 4) and other various derivative regulations and executive orders. The Danish Supreme Court ruled in 2002 in the important *Hafnia* case that liability for misleading prospectuses follows the general principles of Danish tort law. As a consequence, investors in such cases do not enjoy the Dutch-style burden shifting discussed above.

The recent RBS settlement and the filing of the *OW Bunker* case illustrate the development of viable avenues for recovery in securities litigation venues outside the US. As investors work to evaluate the costs and benefits to participating in such actions, it is important that they consider the similarities and differences in prospectus liability laws of the European Union member states, including significant differences regarding the applicable burdens of proof. These shifting burdens are sure to continue to have a significant effect on the outcome of foreign securities litigation.

Tomas Arons is an expert in European securities law, a senior legal advisor at Dutch shareholder association VEB, and a Professor of Law at Utrecht University in the Netherlands. His fields of expertise include securities liability law and class actions. Professor Arons obtained bachelor's degrees in Economics and Law at Maastricht University, two master's degrees in Company Law and in Financial Law at Erasmus University Rotterdam, and a master's degree in Economics at the University of Amsterdam. He can be reached at tarons@veb.net or t.m.c.arons@uu.nl.

In the UK, securities issuers can be liable for misrepresentations, but investors must prove that they relied on the alleged misrepresentations in purchasing their shares. By contrast, Dutch law is just the opposite. There, the burden of proof is on the issuers to prove the completeness and correctness of the prospectus.