



Corporate Newsletter Switzerland

Prospectus Liability

In Switzerland, prospectus liability aims to protect the confidence and capital of investors, and the reliability of information distributed on the capital markets. But a recent decision of the Swiss Federal Supreme Court highlights once again the difficulty of making a successful claim for prospectus liability under Swiss corporate law and the illusory nature of investor protection.

Under Swiss corporate law, prospectus liability applies to all persons who contributed to publishing an incorrect or misleading prospectus or similar document in relation to the incorporation or the issue of shares or other debt instruments. Consequently, a wide circle of persons can be made liable for a prospectus, including not only the founders and the board of directors but also bank institutions and investment counsel promoting the subscription.

The establishment of prospectus liability requires not only damage, a negligent or intentional failure to perform a duty, but also a natural and adequate causality between the negligent or wilful behaviour and the incurred damage. The information published in the prospectus must be the cause of the investor's intention to acquire and the subsequent damage.

In the decision rendered by the Swiss Federal Supreme Court (August 28 2006), two shareholders sued the directors of a software company for prospectus liability, trying to recover losses incurred due to the drop in share price that occurred shortly after the company's IPO. The claimants asserted that the prospectus was misleading and incomplete, in particular because information regarding a flaw in the software (which was the company's most important product) and problems with clients was withheld.

The question of whether the prospectus was misleading was left unaddressed because the concept of the first instance primarily focused on the causality and rejected the claim on the grounds of lack of causality.

Swiss doctrine is divided on the burden of proof for casualty. Some argue that the claimant is not required to prove that it has relied on the alleged incorrect prospectus because it could legitimately assume that the market value reflects all information available. This argument leads to the fact that the defendant must prove that causality is lacking. The Swiss Federal Supreme Court made it clear that a change of the burden of proof does not apply in the field of prospectus liability and so it is the investor who must prove cause. However, considering the difficulty of the proof and the investor's interest in protection, the Swiss Federal Supreme Court held that no such strict proof is required, only proof that the causality is likely (proof of probability).

Consequently, the Swiss Federal Supreme Court rejected the claimants' argument stating that, regarding application of prospectus liability, it is generally assumed that potential misleading and incorrect information in a prospectus always causes the decision to purchase and the damage resulting from investment. In contrast, the Swiss Federal Supreme Court came to the conclusion that claimants had not furnished the required proof of probability because, according to the findings of facts of the first instance, the jumping market trends, the euphoric mood in the new market, the investor's faith in the future as well as the willingness to take risks were more relevant to the investment decision than the information published in the prospectus.

The recent decision acts as yet another disincentive to potential claimants, so claims for corporate prospectus liability are likely to remain scarce.

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