Prospectus liability in a Scandinavian Perspective

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Since the beginning of the century there has been no litigation regarding prospectus liability in the Nordic countries, mainly due to the fact that the legislator and the courts have given priority to the interest of creditors´ before the interest of investors. This situation is, however, now changing. Under the influence of the Anglo-American legal tradition and EC law, the protection of investors has been stressed, thus reflecting an awareness of risk-capital investments as an indispensable condition for the development of industry and society. In all four Nordic countries the legislature as well as the courts have identified the need for increased investor protection, and the existing rules are changed or reinforced.

This article describes the historic development of prospectus liablity in the Nordic Countries until today. There are however still a lot of questions in connection with prospectus liability that are unsolved. The EC-commission has proposed a revised prospectusdirective, where one of the central questions is the scrutinization of the prospectus. Furthermore the question of jurisdiction is unclear, not the least in the case of cross border listing and acquisition over the Internet. A uniform international framework is something to strive for, but this still lies in the future.

Introduction

Regulation ruling the issue and sale of securities were promulgated around the mid 1970´. The regulation has, however, until now not been sufficient, and the legal situation has led to that no litigation in this area has taken place, in Sweden since 1935.[1]

In accordance with the law, liability can be imposed on a series of different grounds in all the Nordic countries:

- liability according to company law,
- tort liability,
- criminal liability, and
- liability pursuant to stock exchange rules and regulations.

In the doctrine is stated that liability for transactions on the secondary market is covered by the Sales of Goods Act.[2] Also applicable is the Mercantile Agents Act with regard to the relation between a shareholder who makes an offer of selling or acquiring securities and the investment bank.[3] Trade on the primary market must, however, due to the lack of sufficient regulation, be assessed under the general tort law.

Liability can be imposed by applying these legal grounds, separately or cumulatively. Which of these legal grounds is applicable depends upon the character of the act in question, and which party that has committed the violation. Among the potential liable parties when these questions are at hand, the most prominent is the issuer itself, i. e. the company. In the Nordic countries, as in all other countries whose legal systems we usually compare with, a company is liable for the actions of it's representatives.[4] A company cannot act on it's own behalf; it is dependent upon actions from the board and the executives. The directors and officers act on behalf of the company, thus the company is committed in connection with the action and obliged to

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1 NJA 1935 s 270.

2 Hultmark, C, Kontraktsbrott vid köp av aktie, Stockholm 1992, Lindskog, S, En avhandling om aktieöverlåtelser, SvJT 1993 p 93.

3 Idem.

4 Helllner, J, Juridiska personers skadeståndsansvar, i Teori och praxis, Skrifter tillägnade Hjalmar Karlgren, Stockholm 1964, p 149 f., 158 f.

fulfil it's engagement. The acquisition of shares in an issue is however not considered to be a purchase in legal terms, and thus not covered by the regular legal rules regarding contracts or sale of goods. Furthermore, liability to pay damage can be imposed on a company in many situations, such as in case of environmental damage. In the case of damage to the investors there is, however, a major exception from the possibility of claiming damage from the company. According to the legal system in all four Nordic countries a company cannot be held liable to pay compensation to a shareholder, nor to an investment bank or a third party, based on the fact that the representatives have mislead the market.

The rare, vulnerable entity

In the first years of shareheld companies those companies were treated as individuals, independent from its representatives. The companies were looked upon with an anthropomorphic view, and seen as independent bodies. These entities should be protected from activities, or deeds, committed by their representatives, that could harm the company in question. Thus, in the judgments from the supreme courts you can find the explanation that a shareholder who acquired shares in reliance upon a misleading offering material, could not get compensation from the company. Not even rescission of the purchase was possible. The company should not be harmed due to the activities of its representatives. So in a case where shares in a company were sold in connection with false or misleading statements, the acquisition could not be declared void – the company should pursue it's existence, and the company could not be held liable to pay damage towards it's investors in cases of this kind.[5] In the courts reasoning was stated that the acquisition could be declared void, but only if the ownership had not yet been registered.[6] In the doctrine followed a discussion whether the acquisition could be annulled on any ground at all after it's registration, since there are grounds of invalidity of different strengths, weak and strong. The conclusion was that the subscription

5 NJA 1918 s 398, RGZ 54, 128, RGZ 62, 29, Rt 1926 s 512.

6 Karlgren, H, Några aktierättsliga anteckningar i anledning av ett par rättsfall, SvJT 1938 p 183 at p 203 ff; Danielsson, E, Aktiekapitalet, Lund 1952, s 83 ff.

may only be invalidated by reason of so-called strong grounds for invalidity, such as duress of actual or threatened violence.[7]
A few cases from the turn of the century hold the liable party obliged to repurchase the shares from the injured party, however only the fysical representatives of the company.[8] In Norway this was according to the Company law 19. July 1910 nr 1, sec 13 and sec 27, where it was stated that if an invitation to acquire shares was erroneous, the issuer or the members of the board should be liable to repurchase the shares from the injured investor.[9] This rule has however not been applied since the first decades of the 20´ century.

The Kreuger impact
A special problem in connection with companies is that several conflicts of interest might occur. Those are for instance the conflict between the majority owners and the minority, between the executives and the owners, between the creditors and the shareholders. The legal rules regarding companies are built up trying to safeguard all these interests through a sometimes delicate balance act. Particularly importance has been laid on the interest of the creditors and the investors, the shareholders. Since companies owned through shares are connected with a responsibility for it's owners which is limited to the share capital, i.e. the initial investment in the company through the acquisition of shares, the share capital has to be protected in the interest of the creditors. And the creditors´ interest has been given priority before the interest of the investors.
This goal has been pursued in most countries in Europe up until not so many years ago; In the United States, the investor protection rendered more importance as early as in the 1930´ when the Securities Act 1933 and Securities Exchange Act 1934 were adapted. Through the rules in Section 11 and 12 of the 1933 Act and 10b-5 in the 1934 Act investors are given full protection if they are misled when investing in a company. It is stated that president Roosevelt, as he signed the new

7 Karlgren, H, Om stiftelseurkund och aktieteckning vid bildande av aktiebolag i svensk rätt, Lund 1930, p 87 f.
8 Rt. 1915 s 265.
9 Se Augdahl, P, Augdahl, P, Aksjeselskapet etter norsk rett, Oslo 1959, p 79; Rt 1911 s 782, Rt 1912 p 846.

acts, exclaimed "now we are moving from caveat emptor to caveat venditor", i.e. from buyer beware to seller beware.[10]

At about the same time, a significant case was decided in Sweden. In the wake of the collapse off the Kreuger-empire a long series of litigation followed, which influenced the development of the administration of justice regarding private and criminal law of Sweden. The Kreuger-companies had issued and sold participating debentures, which became worthless when the companies failed and went bankrupt. In connection with the transactions, the brothers Ivar and Torsten had published substantial fraudulent information regarding the companies. They had, among other things, in the books entered their own contributions to the companies as income to show profit, and they had been very creative in their bookkeeping. One of the brothers, Ivar, committed suicide when the empire collapsed, and the other brother, Torsten was convicted for "fraud against the public", while he had violated the fraud-rule in the Penal Law.[11] His conviction prompted a new offence to be added to the Swedish Penal law, that of swindle, since the legislature found a need for a special rule to be applicable in these situations.[12]

In another of the cases, the very debated NJA 1935 s 270, purchasers of participating debentures sought damages from the bankrupts estate alleging they had been misled when purchasing their debentures. The Supreme court however held that a shareowner could not receive damages from a company on the ground of misleading information, due to the need for creditors protection, and this decision has been upheld since then. The legislature, the scolars and the academy have been in agreement of this being lex lata, still valid.[13]

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10 Hazen, T L, The Law of Securities Regulation, Minnesota 1996, p 7.

11 NJA 1933 s 724.

12 Penal Code Ch 9 sec 9.

13 Denmark: Gomard, B, Aktieselskaber og anpartsselskaber, Køpenhavn 2000, p 101; Schaumburg-Müller, P, - Werlauff, E, Ansvar før børsemission, UfR 1997 p 456 ff.; Schaumburg Müller, P, - Bruun Hansen, E, Dansk børsret, Køpenhamn 1996, p 145; Stokholm, J, Verifikation, UfR 1994 p 87 ff; Werlauff, E, Anpartaftalers bindende virken, Køpenhamn 1996, p 69. Norway: Augdahl, P, Aksjeselskapet etter norsk rett, Oslo 1959, p 287 f.; Marthinusen, H F – Aarbakke, M, Aksjeloven, Oslo 1996, p 108; Normann Aarum, K, Styremedlemmers erstatningsansvar i aksjeselskaper, Oslo 1994, p 402 ; Sæbø, R, Insidehandel med verdipapir, Bergen 1994, p 569 ff., Sweden: Karlgren, H, Några aktierättsliga anteckningar i anledning av ett par rättsfall, SvJT 1938 p 187; af Sandeberg, C, Prospektansvaret – caveat emptor eller caveat venditor, Uppsala 2001; SOU 1997:22 p

The same view has been pursued in Norway and Finland and upheld by the courts.[14] In Denmark, however, there has been a slightly different situation regarding the possibility of invalidating a subscription. In older cases regarding misleading information in connection with subscription of shares the subscription has been declared void in spite of the fact that the transaction was registred.[15] In the doctrine is stated that the courts reasoning in those cases still is valid.[16]
In Germany, in the early 1900´, the Reichsgericht, Germany´s former Supreme Court, stated that investment in securities is of ones own risk, and the company can not be held liable towards its shareholders.[17] Cases have however been tried off and on over the years in Germany.[18] It has thus been the investment bank cooperating with the issueing company in the offering of the shares and in publishing the prospectus that has been held liable. One of the reasons for this is that until some years ago it was the bank that according to the legislation should apply for the listing of a company's shares, and the issuer did not have a very important role in the view of the German legislator. Another reason is that the banks had, and still have, a big impact on the leading of the companies in Germany.

The EC impact
However, with the rise of the EC, and in the light of the internationalisation and the increased competition between the markets, investor protection has become a priority in the member states. Even the legislature realised that a well functioning market for financial instruments is essential for the development of the trade and industry. The EC Commission identified the necessity of member states to enact serious investor protection measures from many aspects. Since the allocation of means is essential for the development of the market and the countries, and it is important that the public has confidence in the market so that they invest their savings in the market, it is crucial, in order to sustain the public confidence in the

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14 Rt 1932 s 145, Rt 1934 s 946.
15 UfR 1911.267 H, UfR 1921.450 H.
16 Schaumburg-Müller, P, - Werlauff, E, Ansvar för børsemission, UfR 1997 p 456 ff.
17 Warneyers Rechtsprechung 1908, nr. 146.
18 BGHZ 123, 126; BGH Die AG 1982, 278; OLG Düsseldorf, Die AG 1984, 188.

market, to create clear rules of responsibility and liability for the information on which the investors shall rely at the point of making decisions of investment. Thus directives regarding the purchase and sell of securities were promulgated. These were Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing and Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of. The directives have been substantially amended several times, thus, in the interests of clarity and rationality, the directives in July 2001 were codified by grouping them together in a single text, Council Directive 2001/34/EEC.

The coordination of the conditions for the admission of securities to official listing on stock exchanges situated or operating in the member states is stated likely to provide equivalent protection for investors at community level, because of the more uniform guarantees offered to investors in the various member states. It is meant to facilitate both the admission to official stock exchange listing, in each such state, of securities from other member states and the listing of any given security on a number of stock exchanges in the community, and to make for greater interpenetration of national securities markets by removing obstacles and therefore contribute to the prospect of establishing a European capital market. As to ensure the effective protection of investors and the proper operation of stock exchanges, the rules relating to regular information to be published by companies, the shares of which are admitted to official stock-exchange listing within the community, should apply not only to companies from member states, but also to companies from non-member countries.

In Council Directive 2001/34/EEG is stated that a policy of adequate information of investors in the field of transferable securities is likely to improve investor protection, to increase investors' confidence in securities markets and thus to ensure that securities markets function

correctly.[19] Investor protection was subsequently given priority in Germany through the rise of the securities laws, primarily Börsengesetz, and in Great Britain, in the Financial Services Act, a few decades ago. The rules were implemented in the German legislation together with sanctions,[20] and after some changes over the years the Börsengesetz vom 17. Juli 1996 states liability for all the parties involved in the acquisition of the shares. One very interesting aspect is that as of July 1st 1998, the prime sanction is, according to § 45 Börsengesetz, imposing upon the culprit liability to repurchase the shares from the suffering party. The transaction shall be wound back *zug um zug* as is expressed in the judgements.[21] Thus the rules that, as described above, were at hand a hundred years ago in Norway regarding the board members are now taken back into use. According to the German system, the transactional causation between the errouneous information and the purchase of the shares does not have to bee shown by the investor, but is presumed for a limited amount of time, at the maximum of twelve months after the issue took place. This is the timeperiod that according to the German practise, the issue is surrounded by an *anlagestimmung*.[22]

Also in Great Britain the EC directives were implemented, through Financial Services Act, FSA, Part IV, 1985. The rules have been altered several times since. You still, however, could see very little action in this legal area and only a few cases have been tried. In Great Britain, to obtain damages in the case of pure economic loss, you have to show a very close relation to the guilty party. This requires a contractual agreement, or the guilty party must be considered carrying a special fiduciary duty towards the harmed party. The acquisition of shares in an issue is not considered to be contractual, but often what is called a "semi-contractual relationship". Furthermore, a person who had subscribed to shares could not receive damages from the company based on the view that the shareholders, through the articles of incorporation, had agreed not to claim damages from the company.[23] Thus in Great Britain, as in the Nordic countries, there has been very

19 Council Directive 2001/34/EEG preambel 31.
20 "Stabilisation Finansplatses Deutschland", Bundestags-Drucksache 13-8933, p 54.
21 BGHZ 123, 107.
22 ZIP 196.1037 BGH, ZIP 1998.1528 BGH.
23 Houldsworth v. City of Glasgow Bank (1880) 5 App Cas 317.

limited litigation in the securities field. This limitation was set aside by the Companies Act 1985, and thus according to the current Financial Services and Markets Act 2000 Section 90 the issuer, the directors, the bank and other parties that have been involved in producing a prospectus have a joint and several liability towards the investors, and can all be held liable.[24]

Liability for the company in the Nordic countries in the 21st century
Denmark, Finland and Sweden all have joined the EC, and Norway has signed the EEC-agreement. Thus all countries have implemented the rules of the EC prospectus directive. The Commission however has chosen to let the member countries themselves solve the question of sanctioning the rules. This has in the Nordic countries led to that, unlike in Great Britain and Germany, the rules were implemented without a following sanction, neither civil nor penal. In Sweden the Stock Exchange and Clearing Act[25] and the Financial Instruments Trade Act[26] contain all the rules given in the directives. But they provide no remedy for leaving misleading information in offerings, so that liability must be assessed under the general law of tort. The situation is similar in the legislation in the other Nordic countries. But over the last years the question of investor protection has reached the Nordic countries, and the legislature as well as the courts have appreciated that a change of the old principal, which has ruled since the early 1900´, must be abandoned. In Sweden, the first cases regarding prospectus liability have been tried, so far all regarding liability of the investment bank that has been cooperative in the issue.[27] These cases all have tried the liablity for a bank that has been cooperative when a company has issued securities to the employees, and the securities then have become worthless when the company has gone bankrupt. So far, in all these cases, the courts have stated that the bank has not been enough active in the process of creating the prospectus to be liable. But in one case, that will be tried in superior

24 Examples of the few cases tried since 1985 is Possfund Custodian Trustee Ltd. And another v. Diamond and other McGrigor Donald, (1996) 2 All E.R. 774, (1996) 1 W.L.R. 1351 (1996), Smith New Court Securities Ltd.v. Scrimgeour Vickers Asset Management Ltd. and Another (1996) 4 All E.R. 769 (1996) 3 W.L.R. 1051, (1997).
25 Lag (1992:453) om börs- och clearingverksamhet.
26 Lag (1991:980) om handel med finansiella instrument.
27 NJA 1996 s 3, T 866/95 Hovrätten för Västra Sverige, RH 1995:57, RH 1995:57.

court during 2002, the courts held that liability should be imposed on the investmentbank that cooperated in the issue, but that this decision should not be taken by the courts, but by the legislator. The bank was thus not held liable in the lower court, but the expectation is that a superior court in this case will take the resposibility to alter the legal situation without a legislative ground.
Furthermore, the Swedish legislature finally has decided that the present situation does not correspond with a modern view of prospectus liability. Thus it is proposed that beginning January 1, 2004 the company shall be held liable through a new rule in the Financial Instruments Trade act.[28]
In Denmark, the EC rules have been implemented by the promulgation of the Securities Trade Act 1998.[29] The first case regarding prospectus liablility is presently tried in the law suit regarding the big insurance company Hafnia Holding, which went bankrupt a few months after a big issue. The prospectus held some severe irregularities, and Sø- og Handelsretten held all involved parties liable.[30] In the Hafnia case the court examines thoroughly the four different grounds where the prospectus was stated to be erroneous by the plaintiffs: 1) the expected income for the nextcoming year, 1992, 2) a bankloan was granted upon a sharecapital of one billion DRK, 3) several guarantees left by the company were left out of the prospectus, 4) the information regarding goodwill was incorrect. The judgement is comprehensive, but notable is that 1) the court held that the prospectus should be understandable to a private investor, 2) the investor should not be responsible to consider advise from a bank or information in media, but should be able to rely on the information in the prospectus solely. The company, however in bank rupcy, and the board of directors were held liable on the ground of regular culpability. Two of the directors were however not held liable, on the ground that they had not been employed by the company when the prospectus was formed. The investment bank was held liable on the ground proffesional liability, i.e. a more rigid limit of culpability.
The Hafnia-case is going to be tried by the Supreme Court, Højesteret, during 2002, but the ruling is expected to stand.

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28 SOU 2001:1.
29 Lov om værdipapirhandel m.v. 797 af 6. November 1998.
30 Sø- og Handelsrettens begrundelse og konklusion I dom af 2. September 1999.

In Norway the EC-directives were implemented 1997 by the promulgation of the Securites Trade Law, replaced 2001.[3132] A few cases regarding prospectus liability have been tried over the last years, but the courts still have upheld the old view, and no liability has yet been imposed to any of the defendants, company, bank or directors.[33] The uncertainty regarding the possibility to obtain damage from a company in connection with the acquisition of shares was appreciated by the parties in connection with the Norwegian governments sale of the shares in the big gas-company Statoil during 2001. A special law was promulgated for the purpose of being able to pay compensation, stating "the company can agree to form guarantees to indemnify the party that has suffered a loss as a result of misleading information in the prospectus".[34] In section 3 is explicitly stated that indemnification can be claimed "not prevented by otherwise legal company or stock exchange regulation".

Liability for the directors and officers

As stated above, the acts implementing the EC-directives were implemented without any sanction, civil or criminal, regarding prospectus regulation. In the Swedish, Danish and Finnish Company law liability for the representatives of the company when violating the rules in the Company law is stated. To obtain damage the injured party must show 1) that these particular rules have been violated, 2) that he has suffered a loss, 2) that the liable party has been negligent in publishing misleading information in connection with the offering, and 4) that there is transactional causation between the misleading information and the loss. The Norwegian legislator has however chosen to remove the liability towards shareholders and third parties from the Company law.[35] The company laws of all four countries, however, contain very few rules regarding prospectuses. Whereas the securities laws implementing the EC directives do not state any

31 Lov 19. Juni 1997 nr 79 om verdipapirhandel.

[32] Børslov 17.11.2000 nr. 80.

33 Rt 1996 s 1463, Rt 1997 s 1010.

34 Lov om garantistillelse fra Statoil ASA ved emisjon og salg av statens aksjer, 18.05.2001 nr. 22 I 2001 hefte 6.

35 Lov 13. juni 1997 nr 45 om aksjeselskaper.

sanctions, the general law of tort must supplement the securities regulation and the company's acts.

Apart from a few cases of severe swindle there has been no action against boards or executives.[36] This is partly due to the lack of regulation, but also due to the fact that people in the Nordic countries do not have the cultural tradition of tort litigation. Furthermore, since the loosing party is liable to pay the litigation costs for the plaintiff, the injured party might not want to risk the big cost a suit might entail. This is particularly the case since the courts are not used to the questions at hand - there is an uncertainty of the outcome of the dispute, since there is an uncertainty of how the courts would reason.

In the Swedish legal system, liability for pure economic loss has been permitted only in connection with criminal acts. The main principle under Swedish law of tort is that damages for pure economic loss (i.e. economic loss inflicted without any injury to person or property) may only be rewarded if it has been caused by a criminal act Ch 2 Sec. 4 of the Tort Liability Act. There are some exemptions to this principle found primarily in statutory law, but also in case law. The Tort Liability Act Ch 2 sec 4 thus allows a claim for damages if the act causing the damage was criminal. When there is no criminal offence involved, the situation is more uncertain. Recently, however, a set of judgements of the Supreme Court of Justice has imposed liability in cases where no criminal offence has been involved by analogy with the rule in The Tort Liability Act as precedent.[37] However, none of these exemptions do directly relate to incorrect information or misrepresentations in prospectuses.

The above mentioned rule has for many years been considered to be a general barrier rule against liability when crime is not at hand. In the proposal for a new Company law, the legislature thus has included a civil sanction in the Company law explicitly so that directors and officers are to be held liable when they violate, besides the Company law, the Stock Exchange and Clearing Act and the Financial Instruments Trade Act.[38]

In Finland prospectus liability for the directors and officers is tried

36 RH 1990:102, Fermenta; RH 1997:82, Invent.
37 Particularly NJA1987 s 692.
38 SOU 2001:1 p 262.

following the Kansallisanti-issue.[39] The plaintiffs state that the prospectus contained different irregularities: 1) In the prospectus it was erroneously stated that the owners of the company had subscribed to shares to a certain amount, 2) The prospectus did not inform of the company´s future merger with Föreningsbanken i Finland (to form Merita Bank), 3) The information regarding the economic situation of the company and future earnings were erroneous and optimistic.
The court so far has decided that there is a lack of transactional causation between the damage and the erroneous information. The case is to be tried in superior court during 2002.[40]

Liability for the investment bank
The liability for the investment bank responsible for the offering is not regulated in the Nordic countries, whereas liability follows from the general rules of tort. In the case of underwriting, when the investment bank purchases the entire sale before the shares are sold to the investors, the bank can be held liable by imposing the rules of the The Sales of Goods Act.[41] Otherwise, again, the case must be judged according to the general law of tort, entailed by the implications stated above.
In Sweden the legislator has formed a commission investigating in what way rules should be formed regarding the liability for banks and financial services. The results of this investigation is expected to be published during next year.[42]

Under discussion: Conditions for compensation and the circle entitled to compensation
To permit compensation for damages several fundamental conditions must be fulfilled. Initially the plaintiff has to show that he has suffered a loss. Then negligence on behalf of the damage-causing subject must be shown. The culpability can however be objectified, thus culpability is shown if the liable party has undertaken or neglected a certain action and by this behaviour violated or disregarded a norm of

39 Helsingfors tingsrätt, dom 8644, 27.3.1997, Dnr 95/16286.
40 Helsingfors hovrätt, dnr S 97/704.
41 af Sandeberg, id. p 338.
42 Ju 2001:03, Dir. 2001:41, government draft Law on Financial Services to Consumers.

conduct upheld by the rule of law. In the case of prospectus liability the plaintiff has to show transactional causation, which means that the prospectus did contain erroneous information, that the liable party hereby violated the regulations and that this caused the loss. A controversial question is to what extent there also must exist proximate cause between the blameworthy conduct and the incurred damage. When a correction of an erroneous piece of information in a prospectus is published and a change of the quotation is stated it is probably not so controversial to attribute the change of the quotation to the piece of information. But the loss causation is somewhat complicated in the context of a market. The plaintiff has to prove that the loss was caused by the erroneous information. At the same time the variation in quotation may be due to circumstances other than the alleged defectiveness. Different methods such as an event study or tools from financial theory must be applied to establish the size of the damage caused by the erroneous piece of information.

The legal literature contains several theories to limit the liability, which is otherwise feared to be imposed upon responsible parties vis-à-vis ”the world at large”. The assessment of compensation is dependent on the conditions of culpability and causation. General principles place the burden of proof with regard to causation on the claimant, i.e., it is the claimant-investor who has to show that an erroneous piece of information has affected the quotation in such a way that it has caused him a loss. The burden of proof that no negligence exists will then be placed on the defendant, who can invoke various *defences*.

The requirement of reliance as a basis for assessing prospectus liability is discussed among the scolars. One objection is that the individual investor rarely relies solely on the information in the prospectus, but rather primarily on the interpretations of analysts and professional investors. A requirement of reliance entails that only professional investors with the skill to make use of the information in the prospectus would be granted compensation, whereas non-professional investors, such as laymen, who relied exclusively on the information presented by professionals in the media and in public relations marketing materials would not be entitled to compensation.[43]

43 Normann Aarum, K, Styremedlemmers erstatningsansvar i aksjeselskaper, Oslo 1994, pp. 246, af Sandeberg, C, id. pp. 127.

In cases where objectively erroneous information is established, culpability might be presumed.
One way of limiting the circle entitled to compensation is to state that only primary market transactions are to be compensated, thus the investors that have not acquired the shares from the company itself will not be compensated. This is the solution that the Swedish legislator has chosen, and the possibility of compensation shall also cover the situation when the investment bank has acquired the shares as an underwriter.[44] The problem is however not yet solved.

Final remarks
In the Nordic countries, historically, investors' need for protection has not been provided to the same extent as the protection of creditors. That investor protection has been neglected is most likely due to the fact that company law has withstood the influence of market forces; instead, considerations of the market have been left to the trade law oriented branch of capital market law, which has emerged in recent years. A traditional company law view is not designed to make a legal assessment based on the allocation function of the capital market. Securities investment was for a long time reserved for a select few; during that time the approach of the Parliaments was influenced by the German attitude, stating that investment in the securities market is a risk-taking action, and that the investor himself shall bear the risk of a possible loss. Under the influence of the Anglo-American legal tradition and EC law, the protection of investors has been stressed, thus reflecting an awareness of risk-capital investments as an indispensable condition for the development of industry and society.
Finally the judicial systems in the Nordic countries have realized that it cannot be reasonable that all the risk connected to a transaction on the capital market is placed upon the investor. In all the Nordic countries the trend is obvious. We are finally moving from caveat emptor towards caveat venditor in the securities field, and it is unquestionable that we in a few years will have regulations regarding prospectus liability as well as practise in Denmark, Finland, Norway and Sweden.

44 SOU 2001:1.