

## 15. Prospectus Liability in the Netherlands<sup>1</sup>

### Consequences of the unfair commercial practice rules (*Wet Oneerlijke Handelspraktijken*, *Wet OHP*)<sup>2</sup>

#### 15.1. Introduction

The Financial Markets Supervision Act<sup>3</sup> (*Wet op het financieel toezicht*, FMSA) requires an issuer to publish and distribute a prospectus before it is admitted to listing on a regulated market or the offer of securities to the public are made. This provision implements the Prospectus Directive 2003<sup>4</sup> that harmonises public law requirements with respect to the publication and distribution of a prospectus.

If a prospectus is misleading to investors, these investors may bring a liability claim against the issuer and / or the lead manager and / or the other members of the syndicate for the losses they suffered as a result of the misleading prospectus.

Netherlands private law does not have a special regulation with respect to prospectus liability. A prospectus liability claim is normally based on the general tort law provision of Section 6:162 of the Dutch Civil Code (*Burgerlijk Wetboek*, DCC)<sup>5</sup>. Furthermore, consumers can base their claim on the *lex specialis* with respect to unfair commercial practices (Section 6.3.3a DCC), which implements the Unfair Commercial Practices Directive<sup>6</sup> and it has been in effect since 15 October 2008.<sup>7</sup> The unfair commercial practices rules are only applicable to claims by consumers. Before the entry into force of the unfair commercial practices rules, prospectus liability claims by professionals and consumers alike were subject to the rules of misleading and comparative advertising (Section 6.3.4 DCC). Since the implementation of the unfair commercial practices rules the misleading advertising rules are only relevant for professionals. This section implemented the Misleading Advertising Directive.<sup>8</sup>

A commercial practice, including the publication and distribution of a prospectus, is regarded as unfair if it is misleading to the average consumer. A prospectus is misleading if it causes or is likely to cause the average consumer to take a transactional decision, *i.e.* purchase of the securities on the conditions of the offer, which he would not have taken otherwise.

In this chapter we focus on the prospectus liability claims available to consumers against the parties involved in an initial public offering (IPO). The recent entry into force of the Netherlands

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<sup>2</sup> This contribution was finished in August 2009, before the World Online judgment. We made an update with references to this judgment in December 2009.

<sup>3</sup> Bulletin of Acts and Decrees 2006, No 475 (*Stb.* 2006, 475).

<sup>4</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L 345, p. 64-89.

<sup>5</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L 149, p. 22-39.

<sup>6</sup> Bulletin of Acts and Decrees 2008, No 398 (*Stb.* 2008, 398).

<sup>7</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, [1984] OJ L 250, p. 17-20.

Unfair Commercial Practices Act<sup>9</sup> (*Wet oneerlijke handelspraktijken*) is the primary reason for our focus on prospectus liability with respect to consumers. In our view, the significance of the unfair commercial practices rules for future prospectus liability claims has not been given adequate attention.

We will first discuss the archetypical structure of legal proceedings of a prospectus liability claim. In paragraph 15.3, the origin of the public law legal obligation to publish and distribute a prospectus is discussed while in paragraph 15.4 the relevance and the technical aspects of the book building method are explained. Paragraph 15.5 deals with the legal basis of the prospectus liability regime in the Netherlands private law. Furthermore, this paragraph emphasises the importance of the unfair commercial practices rules for consumers intending to bring a prospectus liability claim against the issuer and / or the lead manager. Paragraph 15.6 is divided in subparagraphs. Paragraph 15.6.1 contains a brief overview of the system of unfair commercial practices rules.<sup>10</sup> In order to determine who can be held liable for the publication and distribution of a misleading prospectus on the basis of these rules, we have to determine which parties in the IPO process qualify as a 'trader' (paragraph 15.6.2). In paragraph 15.6.3 we answer the question whether the publication and distribution of information outside the prospectus in the time span around the IPO is subject to the unfair commercial practices rules. Some information aspects in the prospectus are deemed material; the omission of this information qualifies the prospectus as misleading. In paragraph 15.6.4 we discuss which information aspects are material by law. Paragraph 15.6.5 explains the double reversal of proof in section 6:193j DCC. Paragraph 15.7 elaborates upon the crucial question of whether the prospectus is misleading. Paragraph 15.7.1 explains the interrelationship between public law enforcement and private law enforcement with respect to the content requirements of the prospectus. Paragraph 15.7.2 elaborates on the private law misleading norm; which type of investor does the issuer and / or lead manager need to have in mind when drawing up a prospectus. The causation element in the abstract theoretical test of whether the prospectus is misleading for the average investor is dealt with in paragraph 15.7.3. Paragraph 15.8 discusses the condition that the issuer and / or lead manager is only liable for the losses occurred as a result of the misleading prospectus if the publication and distribution of the misleading prospectus is due to his fault and if he can be held accountable for the commission of the tort. Paragraph 15.9 discusses the two bases on which you can make a prospectus liability claim. This basis of the claim is crucial with respect to the causation to be proven and the composition of the damages to be awarded. In paragraph 15.10 we briefly discuss the use and effectiveness of disclaimers in prospectuses and in paragraph 15.11 we provide some concluding remarks.

## **15.2. Prospectus liability procedure**

This paragraph sketches the archetypical structure of the legal proceedings of a prospectus liability claim, where consumers claim that the issuer and / or lead manager and / or other members of the

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<sup>10</sup> Sections 6:193a up to and including 193j DCC.

syndicate are liable for the losses occurred as result of a misleading prospectus. In a collective action on the basis of Section 3:305a (1) DCC the investors will request the court to provide a declaratory judgment (*verklaring voor recht*) that the prospectus is misleading towards the average investor. In order to have collective standing in court, the investors have to establish a foundation or association with full legal capacity. The articles of the foundation or association have to state that it seeks the protection of similar interests of other persons.<sup>11</sup> In a collective action the claimants may not request monetary compensation.<sup>12</sup> In proceedings of individual investors in which they claim damages for their losses, the court has to rule whether the issuer and / or lead manager and / or other members of the syndicate were liable for the misleading prospectus towards the individual investor. Even though the court addressed by the individual investor that claims damages is not bound by the judgment with respect to the collective action about the misleading nature of the prospectus, it is highly unlikely that the courts' judgments will diverge. In the individual court procedure the individual elements of pure causation and fault on the part of the claimant will be in dispute. The individual facts and circumstances cannot be properly dealt with in a collective procedure. The court, in principle, also rules on the amount of damages to be awarded to the individual claimant. If the court does not rule immediately, the amount of damages awarded to the claimant will be determined in the follow-up proceedings for the determination of damages (*schadestaatprocedure*<sup>13</sup>). In order to mitigate the costs of the proceedings, the investors can assign their debts (*cessie van schuldvordering*) to the aforementioned foundation or association. In that case the foundation or association is the claimant in the collective action as well as the individual proceedings.

### **15.3. Legal obligation to publish a prospectus**

The Prospectus Directive 2003 harmonises the requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated markets situated or operating within one of the Member States of the European Union.<sup>14</sup> The Prospectus Regulation 2004<sup>15</sup> lays down rules with respect to the format and publication of prospectuses and the dissemination of advertisements with respect to the securities to be issued. Notice that investment funds are also subject to a legal duty to publish a prospectus.<sup>16</sup>

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<sup>11</sup> Section 3:305a (1) DCC.

<sup>12</sup> Section 3:305a (3) DCC.

<sup>13</sup> Section 612-615b Dutch Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*).

<sup>14</sup> Article 1 Prospectus Directive 2003.

<sup>15</sup> Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, [2004] OJ L 149, p. 1-126.

<sup>16</sup> The Prospectus Directive is not applicable to units issued by collective investment undertakings other than the closed-end type (i.e. the open-end type) (Art. 1 (2) (a) / Section 52a Vrijstellingswet Wft). The Prospectus Directive is applicable to closed-end type units on the conditions that the units are transferable. Closed-end type units and open-end type units are subject to the obligation to publish a prospectus on the basis of Section 4:49 FMSA. However, section 4:49 (6) FMSA excludes the closed-end type transferable units. Open-end type units can be divided in the units for collective investment in undertakings (UCITS) which are subject to European legislation and non-UCITS which are only subject to national legislation. Notice that Annex II of the UCPD refers to the obligation to publish a prospectus laid down in Art. 1 (9) of Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses, [2002] OJ L 41, p. 20-34.

The legal duty for issuers on the EU securities market to publish a prospectus is laid down in Article 3(1) of the Prospectus Directive. In the Netherlands, this obligation is implemented in Section 5:2 FMSA. The other provisions with respect to the publication of the prospectus are laid down in title 5.1 of the FMSA. In accordance with the Prospectus Directive, the FMSA provides exceptions<sup>17</sup> to as well as exemptions<sup>18</sup> from the obligation to publish a prospectus.

The aim of the Prospectus Directive is to ensure investor protection.<sup>19</sup> Investor protection is most likely needed in legal relationships between consumers and professionals / business. For this reason the Prospectus Directive provides for the exception to publish a prospectus if the offer of securities is solely addressed to qualified investors.<sup>20</sup> Furthermore an exception is provided when the offer of securities is addressed to investors who acquire securities for a total consideration of at least EUR 50,000 per investor, for each separate offer.<sup>21</sup> If the securities on offer have a denomination per unit of at least EUR 50,000, there is also no obligation to publish a prospectus.<sup>22</sup> The aforementioned rules and regulations with respect to the obligation to publish a prospectus and the requirements with respect to its content, publication and approval have a public law nature. These rules primarily determine the legal relationship between the issuer of securities and the competent authority that has to approve the prospectus. However, as will be explained in paragraph 15.7.1, these public law provisions influence the private law norms with respect to the publication and distribution of the prospectus.

The misleading advertisement rules are applicable to legal relationships between the issuer<sup>23</sup> and investors that do not qualify as consumer. The unfair commercial practices rules determine the legal relationship between the issuer<sup>24</sup> of the securities and the consumers that acquire these securities directly or indirectly on the basis of the prospectus. We elaborate on the liability regime applicable to the issuer, lead manager, other members of the syndicate and the accountant in an IPO in paragraph 15.6.

The aforementioned public law exceptions to the obligation to publish a prospectus remove the public law enforcement with respect to the content of a prospectus in the event the issuer voluntarily publishes a prospectus as a marketing instrument for the securities on offer. The private law enforcement through the rules of liability laid down in the unfair commercial practices rule of the DCC are however applicable to securities on offer, for example, with a denomination per unit of at least EUR 50,000.

#### **15.4. Book building**

Book building is a method to determine the introduction price in the pre-listing market in order to establish the most pure price. The purpose of this method is to prevent high volatility in the after-

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<sup>17</sup> Article 3 (2) Prospectus Directive 2003 / Section 5:3 FMSA.

<sup>18</sup> Article 4 (1) Prospectus Directive 2003 / Section 5:4 FMSA.

<sup>19</sup> Recital 10 Prospectus Directive 2003.

<sup>20</sup> Article 3(2)(a) Prospectus Directive 2003 / Section 5:3(1)(a) FMSA.

<sup>21</sup> Article 3(2)(c) Prospectus Directive 2003 / Section 5:3 (1) (c) FMSA

<sup>22</sup> Article 3(2)(d) Prospectus Directive 2003 / Section 5:3 (1) (d) FMSA

<sup>23</sup> Whether the misleading advertising rules are also applicable to the other private parties involved in the IPO will be discussed in subsequent paragraphs.

<sup>24</sup> The unfair commercial practices rules are also applicable to the other private parties involved in the IPO if they qualify as trader in the sense of the Section 6:193a (1)(b) DCC. This will be discussed in paragraph 15.6.2.

listing market.<sup>25</sup> If the issuer sets the introduction price too high, there is a risk that the issuer will be unable to sell the securities. If the syndicate guarantees the securities price or the syndicate has taken over the issue, the banks that are member of the syndicate will incur these losses. A too low introduction price creates an overstressed after-listing market. The book building market resolves this problem by creating a pre-listing market in which market forces determine the introduction price. In this paragraph we sketch the book building process.

At first the lead manager (and if necessary the other members of the syndicate) determines the bandwidth of a reasonable introduction price on the basis of an analysis of the issuer's commercial activities and the position it takes in its market sector. This bandwidth will be included in the draft prospectus (*voorlopig prospectus*) instead of a fixed sales price. Separate advertisements will be published on the same day as the publication of the draft prospectus. These advertisements contain an invitation to subscribe for securities by stating the number of securities and the price for which the investor wants to buy this number of securities. The subscription qualifies as making an offer in the sense of section 6:217(1) DCC<sup>26</sup> and also in the sense of Article 1:1 FMSA. The professional investors can subscribe by use of different orders. Non-professional investors can subscribe only by market order (*bestensorder*). In order not to overburden the administrative process, only the subscriptions of large institutional investors are taken into account. After this subscription process the introduction price can be established on the basis of the draft prospectus and the securities will be distributed. This introduction price will be published in the definitive prospectus. As a result of the book building method, the underwriters are no longer subject to the risk that the securities cannot be placed with investors and that they have to pay the fixed introduction price to the issuer.

## **15.5. Legal basis of prospectus liability**

### **15.5.1. Contractual liability**

The individual investor can bring a contractual claim on the basis of the prospectus if his contractual counterparty to the securities sales contract is the issuer or lead manager or other member of the syndicate depending on the structure of the issue. In case of a *guichet* issue<sup>27</sup>, the issuer is the counterparty; the syndicate bank merely acts as an intermediary for the issuer. In that case the bank has the option to guarantee the issue but it does not become the counterparty of the investor. If the syndicate takes over the securities, the securities are actually issued to the banks. The subsequent resale of the securities to the investors makes the syndicate banks counterparty to the securities sales contract. The investor can bring a claim against the syndicate bank from which he purchased his securities.

In practice only professional investors subscribe in their own name and at their own expense (*op eigen naam en voor eigen rekening*). Therefore they qualify as a contractual counterparty and they

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<sup>25</sup> A.E. van der Pouw and T.M. Stevens, 'Bookbuilding op de Nederlandse markt', *Tijdschrift voor Ondernemingsrecht* 3 1999, p. 73.

<sup>26</sup> In principle the subscriber's offer is revocable (*herroepbaar*) in the sense of Section 6:219(1) DCC until the moment that the bank gives notice of the number of securities awarded to the subscriber.

<sup>27</sup> J.W.P.M. van der Velden, 'Contractuele prospectusaansprakelijkheid', *De Naamloze Vennootschap* 5 1997, p. 145-149.

can subsequently bring a contractual claim against the issuer or the syndicate bank. The non-professional investors, however, are not party to the sales contract; their securities brokers act in their own name (and at the investor's expense) and therefore qualify as a contractual party. The securities broker is the only person who can bring a claim against the issuer or the banks. We will limit our discussion of contractual prospectus liability at this point because most prospectus liability claims of consumers are based on a tort claim.<sup>28</sup>

#### 15.5.2. General liability in tort

Any liability in a tort claim requires the following elements to be proven by the claimant: a commission of tort (*onrechtmatigheid*); accountability (*toerekening*); loss (*schade*); and causation (*causaliteit*) between the loss and the tort committed. A tort can be committed either by an act or omission breaching a rule of unwritten law pertaining to proper social conduct, *i.e.* a violation of a duty of care (*handelen in strijd met de maatschappelijke zorgvuldigheidsnorm / schending van de zorgplicht*), or by an act or omission breaching a duty imposed by law (*handelen in strijd met de wet*).<sup>29</sup>

At first sight, it is easier for the investor to claim that the act or omission of the defendant was a breach of a duty imposed by law. In general any violation of the law in its broadest sense qualifies as 'breaching a duty imposed by law'. A duty imposed by law is every generally binding provision, whether of public, private or criminal nature, issued by the legislator or the executive.<sup>30</sup> Therefore a violation of the public law provisions of the FMSA and its statutory instruments could qualify as a commission of tort.

If the investor claims that information duties laid down in the FMSA or its statutory instruments have been violated, he may encounter difficulties with respect to the proof of causation. After all, a violation of an information duty laid down in the FMSA or its statutory instruments does not in itself make the causal relationship with respect to the losses incurred plausible. In case the publisher or distributor of the prospectus commits a tort by distributing a *misleading* prospectus, it is however more likely that the losses occurred are caused by the distribution. The private law misleading norm has a causation element *i.e.* the prospectus is misleading if the average investor would not have taken his transactional decision if he had known the correct and complete information. The consequence is that if a court establishes the misleading nature of the prospectus, the claimant has completed one hurdle with respect to causation. This relieves the claimant's burden of proof with respect to the evidence of pure causation between the losses incurred and the publication and distribution of the misleading prospectus. We will elaborate upon causation further in paragraph 15.9.

Besides the abovementioned elements that need to be proven, section 6:163 DCC states that there is no obligation to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss. The Ministerial Memorandum of Amendment to the FMSA states that the standards of the FMSA serve to protect

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<sup>28</sup> For a more detailed description we refer to Van der Velden (1997) and L. Timmerman and M.L. Lennarts, The Netherlands, in: *Prospekt- und Kapitalmarktinformationshaftung. Recht und Reform in der Europäischen Union, der Schweiz und den USA*, eds K.J. Hopt and H.-C. Voigt (Tübingen: Mohr Siebeck, 2005), 783.

<sup>29</sup> Section 6:162 (2) DCC.

<sup>30</sup> Asser-Hartkamp 4-III 2006, No 34.

consumers against damage.<sup>31</sup> The question of whether the FMSA standards also seek to protect professional investors is not answered by the Minister.

### 15.5.3. Specific liability in tort claims

Besides the general tort liability provision of Section 6:162 DCC, the DCC has sections that contain *lex specialis* rules with respect to misleading and comparative advertising and unfair commercial practices respectively. The misleading advertising rules are laid down in Sections 6:194 and 6:195 DCC. Since the adoption of the unfair commercial practices rules, laid down in sections 6:193a up to and including 193j DCC, the misleading advertising rules remain only relevant for the professionals. The unfair commercial practices rules are only applicable to consumers.

The first advantage of both sets of rules is the double reversal of the burden of proof laid down in section 6:195 DCC and section 193j DCC, respectively. We elaborate upon the double reversal of proof in paragraph 15.6.5.

The second advantage of these *legi speciali* is their protective nature as a consequence of the fact that these rules are the implementation of European directives. Even though the Misleading Advertising Directive's primary purpose is the improvement of the internal market<sup>32</sup>, Section 1 of the Misleading Advertising Directive states clearly that its purpose is the protection of consumers against misleading advertising as well.<sup>33</sup> The Unfair Commercial Practices Directive was adopted on the basis of Article 95(3) of the Treaty establishing the European Community. Article 95(3) of the Treaty establishing the European Community gives the European legislator a mandate to adopt directives with a twofold objective: improvement of the functioning of the internal market and sustainment of a high level of consumer protection.<sup>34</sup>

As already mentioned the primary objective of the misleading advertising rules is the improvement of the internal market; consumers can rely on the protective nature of these rules only subordinately. European directives adopted on the basis of Article 95 (3) of the Treaty establishing the European Community, however, provide the aforementioned objectives an equal status. As a consequence national courts are required to give its due effect to this equivalence when interpreting the unfair commercial practices rules in accordance with its purposes. The Unfair Commercial Practices Directive is one of the European directives that constitute the consumer *acquis*. The establishment of an internal market requires the adoption of a consumer *acquis*. If goods and services can move freely across borders on the basis of mutual recognition, consumers need to be provided with the necessary information with respect to these goods and services in order to be able to make an informed decision. The division between professionals and consumers is one of the basic pillars of the consumer *acquis*. The European legislator is of the opinion that consumers need a high level of protection in the internal market. Even though Section 95(3) of the

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<sup>31</sup> Parliamentary Papers II 2005 / 2006, 29 708, No 19 (Fourth Ministerial Memorandum of Amendment).

<sup>32</sup> The Misleading Advertising Directive (MAD) was adopted on the basis of Article 100 of the Treaty establishing the European Community (TEC) (in the current version of the Treaty: Article 94) in 1984. Section 95 (3) TEC was inserted in the EC Treaty in 1986 by the Single European Act.

<sup>33</sup> Article 1 MAD: 'The purpose of the Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof.'

Treaty establishing the European Community cannot be relied upon directly by a claimant as a basis for the obligations which are binding on a Member State, the national court is required when applying the domestic laws implementing the provisions of the Unfair Commercial Practices Directive, to interpret them in accordance with the purpose of attaining a high level of consumer protection.<sup>35</sup> If a national court would not be obliged to effectively apply the consumer *acquis*, Member States with a lower standard of consumer protection in their legislation would have an unfair competitive advantage. Unfair competition is a threat to the establishment of the internal market.<sup>36</sup>

Before continuing with the description of the unfair commercial practices rules, we would like to reiterate that the qualification 'professional'<sup>37</sup> in the Prospectus Directive and the FMSA is not the same as in the DCC / Unfair Commercial Practices Directive. In this contribution we take professionals to mean 'traders' in the definition of the Unfair Commercial Practices Directive.

## **15.6. The unfair commercial practices rules**

### **15.6.1 General description**

The Unfair Commercial Practices Directive was implemented in Netherlands law with the adoption of the Dutch Unfair Commercial Practices Act (*Wet oneerlijke handelspraktijken*<sup>38</sup>) This act adds a *lex specialis* to the general tort liability provision in Section 3a of title 3 in book 6 of the DCC. We will now give a short description of the contents of this *lex specialis* with respect to unfair commercial practices.<sup>39</sup> According to Section 6:193b(1) DCC a trader acts unlawfully to a consumer if he commits an unfair commercial practice. Subsection 2 states that a commercial practice is unfair if two conditions are fulfilled: a trader acts contrary to the requirements of professional diligence and if it materially distorts or is likely to materially distort the capability of the average consumer to take an informed decision with respect to the transaction that causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise. A commercial practice is specifically unfair if the trader commits a commercial practice that is misleading or aggressive.<sup>40</sup>

A commercial practice is regarded by law as misleading if it contains false information.<sup>41</sup>

Furthermore 'misleading omissions' qualify as misleading.<sup>42</sup> Sections 6:193g and 6:193i DCC contain an enumeration (the black list) of behaviour that qualifies in all circumstances as misleading or aggressive respectively and as a consequence it also qualifies as unfair.

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<sup>34</sup> The Unfair Commercial Practices Directive (UCPD) maximizes harmonisation; the national legislator may not adopt stricter consumer protection legislation.

<sup>35</sup> Paragraphs 61 and 71 in ECJ Case C-350/03 (*Schulte v Badenia*) ECR 2005 ECRI-09215.

<sup>36</sup> Article 3(1)(g) TEC.

<sup>37</sup> For the purpose of the Prospectus Directive 2003 / FMSA, a professional / 'qualified investor' is defined in Article 2 (1)(e) Prospectus Directive 2003 / Section 1:1 FMSA.

<sup>38</sup> Bulletin of Acts and Decrees 2008, No 397 (*Stb.* 2008, 397).

<sup>39</sup> For more schematic overview we refer to W.H. Van Boom, 'Inpassing en handhaving van de Wet oneerlijke handelspraktijken', *Tijdschrift voor Consumentenrecht en Handelspraktijken* 1 2008 p. 4-24.

<sup>40</sup> Section 6:193b (3) DCC.

<sup>41</sup> Section 6:193c DCC.

<sup>42</sup> Section 6:193d DCC.



The following system can be distinguished. If the commercial practice belongs to one of the categories on the black list, its unfairness is given. If it does not belong to one of these categories, then the question has to be answered whether Sections 6:193c to up to and including 193f DCC or Section 6:193h DCC are applicable in the circumstances of the case, and whether the commercial practice qualifies on the basis of these articles as misleading or aggressive, respectively. If the aforementioned articles are applicable, but the court establishes that the commercial practice is not misleading and / or aggressive in the sense of these articles, then it is also established as fact that the commercial practice is not unfair. In that case application of the general provision of Article 6:193b NCC is excluded. If the aforementioned sections are not applicable then the unfairness can be established on the basis of the general norm of Section 6:193b DCC: violation of professional diligence or influence on the economic behaviour of the average consumer.

The consumer, allegedly the victim of an unfair commercial practice, can make a motivated claim for compensation of his losses. If the consumer can demonstrate in court that the trader performed an unfair commercial practice against him then the trader's commission of a tort is established. In order to get compensation, Section 6:193j (2) DCC requires the fulfilment of the other elements establishing tort liability. The consumer has to demonstrate that he suffered a loss and that this loss was caused by the tort committed. Furthermore it has to be established that the trader is accountable for the tort committed by law or pursuant to generally accepted principles. The consumer is relieved by the reversal of proof laid down in Section 6:193j (2) DCC: if the court establishes that the trader committed a tort, then the trader is liable for all losses caused by this conduct unless he proves that these losses are not due to his fault, or due to a cause for which he is not accountable by law or pursuant to generally accepted principles. Section 6:163 DCC states that there is no obligation to repair damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss. If the action is instituted by a consumer to whom the alleged unfair commercial practice was directed, this requirement is not an obstacle. The European legislator made clear that the Unfair Commercial Practices Directive directly seeks to protect the economic interests of the consumer against unfair business-to-consumer commercial practices.<sup>43</sup> However, if a collective action is instituted by a consumer (organisation) to which the alleged unfair commercial practice was not directed, then the courts cannot establish liability.<sup>44</sup>

#### 15.6.2 Which parties in the IPO process qualify as traders?

Before we discuss who can be held liable for the publication and distribution of a misleading prospectus on the basis of the unfair commercial practices rules, we need to provide some essential definitions laid down in Section 6:193a DCC. A commercial practice is defined as any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, **directly** connected with the promotion, sale or supply of a product to consumers. This definition broadens the scope of application in comparison to the misleading and

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<sup>43</sup> Recital 8 UCPD.

<sup>44</sup> Notice that Article 11 of the Unfair Commercial Practices Directive explicitly provides that business competitors and organisations combating unfair competition have a legitimate interest to bring a claim against an offender of the unfair commercial practices rules.

comparative advertising rules laid down in Sections 6:194 and 195 DCC. Publication is no longer a requirement for application of the unfair commercial practices rules.<sup>45</sup> Therefore the protection of consumers has been improved.<sup>46</sup> Whether a private placement memorandum qualifies as publication in the sense of section 6:194 DCC is no longer relevant. Furthermore section 6:193j DCC does not, unlike section 6:195 DCC, require for application of the double reversal of proof that the defendant himself, in whole or in part, has determined or has caused to be determined the content and presentation of the information.<sup>47</sup> However, this question of whether the defendant has determined or has caused to be determined the content and presentation of the prospectus may be a relevant factor when considering the element of fault (*verwijtbaarheid*). We elaborate upon this element in paragraph 15.8.

The consumer is defined as any natural person who is acting for purposes which are outside his trade, business, craft or profession. Furthermore a transactional decision is defined as any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting. A trader is defined as any 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.

Two questions are important if we consider the consequences of the unfair commercial practice rules of the DCC with respect to prospectus liability. The first question is whose (monetary) interests enjoy the protection of these rules. In principle these rules protect the (interests of) the consumer, in financial market terms the private investor. This is not restricted to the average private investor, but also encompasses the more experienced, qualified investor as long as he is not acting for purposes relating to his trade, business, craft or profession.

The second question is which parties in an IPO can be held liable under these unfair commercial practices rules. The application of this set of rules depends upon whether the party qualifies as

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<sup>45</sup> Cf. Section 6:194 (1) DCC: 'A person who **makes public** or causes to be made public information regarding goods or services which he, or the person for whom he acts, offers in the conduct of a profession or business, acts unlawfully if this information is misleading.' Application of Section 6:194 DCC requires that the defendant makes public the information. In its *ABN Amro/Co-op* judgment, the Dutch Supreme Court (*Hoge Raad der Nederlanden, HR*) ruled as follows (HR 2 December 1994, *ABN Amro/Co-op AG, Nederlandse Jurisprudentie* 246, 1996): 'It is clear from the parliamentary papers with respect to the introduction of Section 1416a DCC (the predecessor of Section 6:194 DCC) that the notion of 'making public' in this article has a wide meaning. The act does not assume an exhaustive rule in the sense that if some publication was made the republication of the same information cannot be qualified as making public. The person who makes public a text which has been composed by him, containing information which has previously been made public, also makes public the latter information in the sense of Section 1416a DCC. This will not be different in a case like the one at hand by the meaning given in the legal system to annual accounts of companies and the notes attached to it.' (Consideration 4.1) Notice that publication of the information is not a requirement in MAD. The claimant could have brought forward in the proceedings that the court had a duty to interpret the DCC in accordance with European legislation, *i.e.* that the court had to disregard this requirement.

<sup>46</sup> *Parliamentary Papers* II 2007 / 2008, 30 928, No 8, p. 5.

<sup>47</sup> In *ABN Amro / Co-op*, the Dutch Supreme Court upheld the ruling of the Amsterdam Court of Appeal on the basis that the lead manager qualifies as a person who himself, in whole in part, has determined or has caused to be determined the content and presentation of the information in the prospectus. 'The parliamentary papers with respect to the introduction of Sections 1416a DCC and 1416b DCC (the predecessors of Sections 6:194 DCC and 6:195 DCC, respectively) as quoted by the Advocate General demonstrate that the person who makes public a text which has been composed by him, by his choice with respect to the information to be included, is a person who himself, in whole or in part, has determined or has caused to be determined the content and presentation of that information in the sense of section 1416b DCC, regardless whether the information included in the text originates from others. This will however be different if the person who makes public the text has stated unequivocally that certain statements in the text published were not made by him and that he cannot guarantee their correctness.' (Consideration 4.3)

trader. Principally this will be the issuer who is obliged to publish or to make public a prospectus.<sup>48</sup> The prospectus is an invitation to make an offer (an invitation to the investors to subscribe for the securities to be issued or listed) with respect to the securities to be issued / listed. It can be argued that the publication and distribution of a prospectus is a commercial communication including advertising that is directly connected with the promotion, sale or supply of a product<sup>49</sup> to consumers.

For the same reasons the lead manager qualifies as a trader who performs a commercial practice. The other members of the syndicate will also qualify as trader who commits a commercial activity if they distribute the prospectus through their network of regional offices.<sup>50</sup> In practice it is most likely that the lead manager, sometimes together with the other members of the issuing syndicate, distributes the prospectus on the order of the issuing company.<sup>51</sup>

If shareholders get a listing on the stock exchange and subsequently sell their securities simultaneously with the issue of securities, these shareholders are likely to qualify as a trader. These shareholders offer their securities to the public on the basis of the issuer's allegedly misleading prospectus.<sup>52</sup>

In principle, neither the board of directors collectively nor the individual directors of the issuing company, in their capacity as such, qualify as a trader. The general rule is that their acts are attributed to the company. However, under certain circumstances, directors can be held personally liable for a misleading prospectus. The executive and non-executive directors who know that misleading information is adopted in the prospectus but who do nothing to prevent this from adoption can be held liable on the basis of the general tort provision of section 6:162 DCC.<sup>53</sup>

Notice that the claimant does not enjoy the advantages of the *legi speciali*.

The accountant who on the order of the lead manager conducts a due diligence investigation and allows the insertion of his 'letter of comfort' in the prospectus, cannot be regarded as trader who commits a commercial practice.<sup>54</sup> Even though he is a natural or legal person who is acting for purposes relating to his trade, business, craft or profession, it cannot be argued that his activities are **directly** connected with the promotion, sale or supply of the securities on offer.<sup>55</sup>

Finally the purchase of securities qualifies as a transactional decision. It is important to note that not only the purchase itself, but also the terms and conditions on the basis of which the securities

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<sup>48</sup> Section 5:2 FMSA.

<sup>49</sup> Securities are property rights and therefore qualify as 'goods' in the sense of Section 3:1 DCC. Therefore securities are deemed to be a product in the sense of the unfair commercial practices rules.

<sup>50</sup> Cf. the ruling of the Amsterdam Court of Appeal in *Stichting Via.claim/Fortis* with respect to the person who makes public in the sense of Section 6:194 DCC. Amsterdam Court of Appeal 7 October 2008 *Stichting Via.claim/Fortis, Jurisprudentie Ondernemingsrecht* 12, 2008, consideration 4.8. As well as Pijls' commentary on this judgment in *Tijdschrift voor Ondernemingsrecht* 17, 2008) p. 636.

<sup>51</sup> Notice that publication and distribution of advertising and marketing with respect to the securities on offer by the issuer and the members of the issuing syndicate constitute a commercial practice. (Cf. Sections 5:20 (1) and (2) FMSA) If the publication and distribution of a prospectus, which has to be an unbiased informative document, constitutes a commercial practice, the advertising and marketing activities are necessarily commercial practices.

<sup>52</sup> G. van Solinge, 'Doorbraak van prospectusaansprakelijkheid', in: *A-T-D Opstellen aangeboden aan Prof. Mr P. van Schilfgaarde*, (Deventer: Kluwer, 2000), 426.

<sup>53</sup> A.G. Maris and S.A. Boele, 'Prospectusaansprakelijkheid', *Tijdschrift voor Venootschap, Vereniging en Stichting* 6, 1994 p. 145; Van Solinge (2000), p. 424.

<sup>54</sup> For an overview with respect to the liability of the accountant in an IPO process on the basis of Section 6:162 DCC see: R.E. de Rooy, 'Accountant en prospectusaansprakelijkheid', in *Een bewezen bestaansrecht, Lustrumbundel Vereniging voor Effectenrecht, Serie vanwege het van der Heijden Instituut te Nijmegen deel 71*, (Deventer: Kluwer, 2002), 329-342.

<sup>55</sup> Section 6:193a(1)(d) DCC.

are acquired qualify as a transactional decision in the sense of the unfair commercial practices rules.

### 15.6.3 Information published and distributed outside the prospectus

In this subparagraph we will answer the question of whether the publication and distribution of information outside the prospectus qualifies as a commercial practice separately (and / or together with the prospectus) as a commercial practice. When securities are to be admitted to listing, the prospectus is not the only source of information<sup>56</sup> on which consumers can base their transactional decisions. Many statements are made with respect to the issuer, its commercial activities and the (potential) value of the securities that will be listed. One could possibly think of advertising and marketing statements in road shows, advertising brochures, presentations and their hand-outs. Furthermore information with respect to the issuer and its securities is published in the obligatory summary of the prospectus.<sup>57</sup> The FMSA also provides the option of incorporation by reference.<sup>58</sup> For example reference could be made to annual accounts instead of direct copying into the prospectus itself.<sup>59</sup>

In order to answer the question we think that a distinction must be made between information that is directly connected with the securities on offer on the one hand, and information that is not directly connected with the securities on the other hand. The former undoubtedly qualifies as commercial practice and the publication and distribution of this information is subject to the protective unfair commercial practices rules. The summary of the prospectus as well as the documents incorporated in the prospectus by reference to them contain information that is directly connected with the securities.

The question has to be answered in future court rulings whether the publication and distribution of information with respect to the issuer and its commercial activities in the time span<sup>60</sup> around the IPO is directly connected to the securities. On the one hand one could argue that the information is not directly connected to the securities on offer and therefore one of the required elements for application of the unfair commercial practices rules is not fulfilled. On the other hand the court has to bear in mind the protective nature of these rules and the fact that the average investor will base his transactional decision on all information available before the IPO when he makes a decision with respect to information published and distributed regarding the IPO. If the information provided outside the prospectus were not subject to the unfair commercial practices rules<sup>61</sup>, the issuer, lead manager and / or other members of the syndicate would be able to publish or distribute information

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<sup>56</sup> Information as mentioned in Section 5:20 FMSA.

<sup>57</sup> Section 5:14 FMSA.

<sup>58</sup> Section 5:17 FMSA.

<sup>59</sup> Cf. *ABN Amro / Co-op* where the information published in the annual accounts was repeated in the prospectus. See footnote 44.

<sup>60</sup> Advocate General Mok in his Conclusion to *Philips/VEB* defended a lenient application of the 'temporal aspect' (paragraph 5.3.4). The doctrine defended by Mok that information with respect to securities to be issued in the time span of the IPO are subject to the misleading advertising rules was supported by Advocate General Timmerman in his Conclusion to the World Online judgment. (Paragraph 4.7.3.2) LJN: BH2162, Hoge Raad, CP 07/11104.

<sup>61</sup> Notice that Section 5:20 FMSA requires that the information with respect to the offer of securities to the public provided in advertising and marketing activities is not incorrect nor misleading and must be consistent with the information contained in the prospectus. Cf. Article 15(3) Prospectus Directive 2003

outside the prospectus without the private law sanctions provided by these rules.<sup>62</sup> Future court decisions will provide more guidance to this issue.

It is important for the publication and distribution of information by the issuer not in the context of an IPO, to note that the Dutch Supreme Court in its *Philips/VEB* judgment annulled the judgment of the 's-Hertogenbosch Court of Appeal on the basis that misleading statements published in a press release by a listed company about its expected results do not qualify as information regarding goods or services which the listed company offers or as information regarding the issue of securities. Therefore the misleading advertising rule of Sections 6:194 and 195 DCC are not applicable to these claims.<sup>63</sup> The unfair commercial practices rules are also not applicable to these statements because the information is not connected with the promotion, sale or supply of the securities on offer either.

The question may arise whether the information published and distributed outside the prospectus qualifies on its own as commercial practice without taking the information in the prospectus into account. This question is irrelevant with respect to the application of the double reversal of the burden of proof. Section 6:193j DCC is in any case applicable to this kind of information whether it qualifies on its own or together with the prospectus as commercial practice. However, the question is relevant for the question which information standard to apply when judging the statements. The summary, brochure and presentation of a prospectus can never be as complete as the prospectus itself; therefore Section 6:193d(4) FMSA states that the promotional activities (handouts, presentations etc) could be subject to a lower standard of care because the question whether material (*essentieel*) information is omitted should be answered by taking into account the factual context, the limits of the medium used to communicate and also the measures taken to present the information by other means to the consumer. However, the issuer and / or lead manager should not be allowed to profit from ambiguity created by correct information in the prospectus and incorrect information in the brochure, summary, documents incorporated in the prospectus by reference.<sup>64</sup> For this reason, if the information not included in the prospectus, taking regard of the information in the prospectus<sup>65</sup>, is misleading, the issuer and / or lead manager are liable for the losses as a result of this misleading publication and distribution.

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<sup>62</sup> Notice that investors could always claim on the basis of the general tort provision of Section 6:162 DCC if the information is misleading and therefore unlawful. However, the investor would not enjoy the advantages of the *lex specialis*. See paragraph 15.5.2.

<sup>63</sup> Paragraph 3.5. The investor has to claim on the basis of Section 6:162 DCC (paragraph 3.8). HR 7 November 1997 *Philips/VEB*, *Nederlandse Jurisprudentie* 28, 1998. It is unclear how to interpret the judgment of the Rotterdam District Court that ruled with respect to the applicability of the unfair commercial practice rules *Jurisprudentie Ondernemingsrecht* No 233, 2009.

<sup>64</sup> Notice Article 6(2) Prospectus Directive 2003: 'Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person **solely** on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.' Therefore civil liability claims can be made on the basis of a joint reading of the summary and the prospectus if the interpretation of the joint reading is misleading.

<sup>65</sup> The issuer and / or lead manager are liable solely on the basis of the summary if the description of a risk in the summary is crucially different from the description in the other parts of the prospectus: the summary is false and / or inconsistent. The issuer and / or lead manager can also be liable solely on the basis of the summary if the description of a risk in the summary is missing or insufficiently clarified even though this risk is described in another part of the prospectus. In that case the joint reading of the prospectus and the summary has to be misleading. J.P. Franx, 'Prospectusaansprakelijkheid en de nieuwe Europese Prospectusrichtlijn', *Tijdschrift voor Ondernemingsrecht* 7, 2004 p. 262.

Before we turn to the materiality requirements, we conclude that traders can be held liable not only for information in the prospectus but also for information in the brochure, summary, presentations and documents incorporated by reference.

#### 15.6.4 When is a commercial practice unfair?

The following sections are important to answer the question whether the information is qualified as misleading: Sections 6:193c, 193d, 193e and 193f DCC. We will now discuss the potentially important provisions for prospectus liability claims.

Information can be held misleading if it is either false<sup>66</sup> or incomplete ('misleading omission').

According to Section 6:193c (1) NCC a commercial practice is misleading when the information provided is factually incorrect or when the information is presented in such a manner that the average consumer is misled or could be misled even though the information might factually be correct and the average consumer makes a transactional decision he would not have made otherwise. Subsequently Sections 6:193c (1) (a) up to and including (g) NCC contain a non-limitative enumeration of cases that could give rise to a commercial practice. Furthermore a commercial practice is misleading if there is a misleading omission.<sup>67</sup> According to Section 6:193d(2) DCC, a misleading omission is every commercial practice whereby material information is missing that the average consumer needs, according to the context, in order to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.<sup>68</sup> Section 6:193e(c) DCC<sup>69</sup> prescribes that in case of an invitation to purchase, the price inclusive of taxes or the manner in which the price is calculated, are regarded as material by law. The consequence is that if the prospectus does not contain any provision with respect to the price or its calculation mechanism, the commission of a tort is established. Furthermore the public law provision of Section 5:18 FMSA, which is the implementation in Netherlands legislation of Article 8 of the Prospectus Directive, also requires that the prospectus either contains the final offer price and the amount of the securities to be issued or the criteria and / or the conditions in accordance with which the aforementioned elements will be determined or, in case of price, the maximum price. As a consequence the application of the information requirement in Article 8 of the Prospectus Directive is indirectly ensured by Section 6:193e (c) DCC.

Article 7(5) of the Unfair Commercial Practices Directive contains the provision that information requirements established by Community law in relation to commercial communication including advertising or marketing shall be regarded as material. A non-exhaustive list of these information requirements is contained in annex II of the Directive. In this Annex, an explicit reference is made to the information requirements laid down in Articles 5, 7 and 8 of the Prospectus Directive. As a consequence, an omission of this information in the prospectus is to be regarded as material information. The provisions of Articles 5, 7 and 8 of the Prospectus Directive are implemented in

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<sup>66</sup> Section 6:193c DCC.

<sup>67</sup> Section 6:193d (1) NCC

<sup>68</sup> Section 6:193d(4) DCC: in the judgment whether information has been omitted misleadingly account has to be taken of the factual context, the limitations of the communication medium and any measures taken by the trader to make the information available to consumers by other means.

<sup>69</sup> Implementation in the DCC of Article 7(4) UCPD

the FMSA in Sections 5:13 to 5:16 and Section 5:18. However the reference in Section 6:193f (f) DCC to information requirements constituting 'material information' in the sense that omission of this information qualifies as 'misleading'<sup>70</sup> is incomplete because it only refers to the information requirements as enacted in Section 5:13 FMSA.<sup>71</sup> Notice the uniqueness of this kind of reference in the DCC to public law provisions.<sup>72</sup> Even though the omission by the Netherlands legislator has to be disregarded by the courts, because of the duty to interpret the Netherlands legislation in conformity with the European legislation, it would have been more proper if the reference in section 6:193f(f) DCC were complete.

Section 6:193e(e) DCC prescribes that in the event of an invitation to purchase, the right of revocation (*herroeping*) or cancellation (*annulering*) if applicable, are regarded as material by law. Section 5:23 (6) NFSA states that the person who has concluded a sales contract or made an offer to conclude such a contract with respect to securities on offer, has a right to annul the contract or revoke his offer within two working days after the publication of a document supplementary to the prospectus. The consequence is that if this supplementary document does not contain information with respect to this right of annulment or revocation the commission of a tort is established. Notice that Sections 6:193e and 193f DCC do not have the causation requirement of Section 6:193b (2) DCC that the commercial practice materially distorts or is likely to materially distort the capability of the average consumer to take an informed decision with respect to the transaction that causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise. A simple violation of these information duties regarded as material by law would qualify as commission of a misleading commercial practice. However, a logical interpretation of these legal provisions requires the same causation requirement to be fulfilled in order to qualify as a misleading commercial practice.<sup>73</sup> Sections 6:193e and 193f DCC merely provide an enumeration of information duties regarded by law as material information.

#### 15.6.5 Burden of proof

Paragraphs 1 and 2 of Section 6:193j DCC prescribe a double reversal of proof. If the investor claims on the basis of sections 6:193b up to and including 193i DCC that the trader performs a misleading commercial practice, the commission of a tort is given unless the trader / defendant proves the material correctness and completeness of the information provided by him to the consumer.<sup>74</sup> The court has to take account of all circumstances of the case and to take account of the legitimate interests of the trader and every other counterparty in the proceedings when applying this reversal of proof rule.<sup>75</sup> Furthermore according to Section 6:193j(2) DCC the trader is

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<sup>70</sup> Section 6:193d (2) DCC

<sup>71</sup> Notice that Section 5:13 FMSA contains an open norm with respect to the content requirements of the prospectus. Furthermore, it refers to the very detailed provisions of Prospectus Regulation 2004. Consequently, the omission of a single item prescribed in these provisions qualifies as misleading information and therefore theoretically the commission of a tort is established.

<sup>72</sup> The reference in Section 6:193f DCC to sections 4:20, 4:73 and 5:13 FMSA has the consequence that the double reversal of proof rule in Section 6:193j DCC is also applicable when the investor based his claim on violation of one of these provisions in the FMSA. The Unfair Commercial Practices Act has considerably improved the procedural position of the investor with respect to the information duties laid down in the FMSA.

<sup>73</sup> P.G.F.A. Geerts and E.R. Vollebregt, *Oneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame*, (Deventer: Kluwer, 2009).

<sup>74</sup> Section 6:193j(1) DCC

<sup>75</sup> Section 6:193j(1) DCC last part of the sentence.

liable for the losses caused by his act / omission if the trader committed a tort, unless he claims and proves that he cannot be held accountable for the tort committed or that the tort committed is not due to his fault.

Notice that the burden of proof rule laid down in Section 6:193j (1) DCC is applicable to the material correctness and completeness of the information provided by the trader. Section 6:195(1) DCC however states that the burden of proof rule is only applicable to a person who himself, in whole or in part, has determined or has caused to be determined the content and presentation of the information. In the aforementioned *ABN Amro/Co-op* judgment, the question arose among other things whether the lead manager qualifies as a person who himself, in whole or in part, has determined or has caused to be determined the content and presentation of the entire prospectus.

The Dutch Supreme Court ruled that:

‘[T]he person who makes public a text composed by himself, (...) by his choice with respect to the information included in the text, has determined himself, in whole or in part, the content and presentation of the information included in the text in the sense of Section 1416b DCC (the former section 6:195 DCC) even though some information emanates from one or more other persons.’<sup>76</sup>

The Dutch Supreme Court continues that:

‘[T]his (...) may be different if the person who makes public the information makes a unequivocal statement in the text that specific information in the published text are not emanating from him and that he cannot guarantee the correctness of the statements emanating from one or more other persons.’

As a result of this ruling, the lead manager is in principle subject to the special burden of proof rule laid down in Section 6:195(1) DCC and Section 6:195(2) DCC for the entire prospectus. This particular condition is absent in Section 6:193j DCC because it does not state that the burden of proof rule is only applicable with respect to the material correctness or completeness of the information whose content and presentation was determined by the trader. Therefore it seems no longer relevant under the unfair commercial practices rules whether the lead manager qualifies as the person who has determined the content and presentation of the information. We cannot be sure that the same line of argument holds for the aforementioned consideration where the Dutch Supreme Court seems<sup>77</sup> to rule that the lead manager could prevent the application of the burden of proof rule by inserting an explicit warning statement. On the one hand one could argue that the information in the prospectus that the warning statement refers to is not provided by the lead manager in the sense of section 6:193j(1) DCC. If one takes into account the conditions for

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<sup>76</sup> Consideration 4.3.

<sup>77</sup> Notice that the Dutch Supreme Court does not state explicitly that this rule applies to the application of the double reversal of proof. It is however unlikely that this rule applies to something else (for example the question of whether the lead manager committed a tort or whether it is due to his fault that this tort was committed), as the rule is formulated in the consideration about the burden of proof rule.



application of this burden of proof rule<sup>78</sup> one could argue that due to the warning statement the lead manager is not subject to the burden of proof with respect to the correctness and completeness of the information referred to in the warning statement. On the other hand one could defend the position that the lead manager did indeed provide, in the sense of Section 6:193j(1) DCC, all the information included in the prospectus. After all, the lead manager made the entire prospectus available to the public. Therefore the lead manager also provided the information referred to in the warning statement and therefore the warning statement has no legal effect.

The other members of the syndicate qualify as a trader that provided information to the consumer if they distribute the prospectus through their network of regional offices. If that is the case, the other members of the syndicate are subject to the reversal of proof rule laid down in Section 6:193j(1) DCC. For this reason, the legal position of the other members of the syndicate in prospectus liability claims has deteriorated in comparison to the misleading advertising rules. These members are not likely to qualify as a person who himself, in whole or in part, has determined or has caused to be determined the content and presentation of the prospectus because the content and presentation of the prospectus are determined by the issuer and the lead manager. Therefore the other members of the syndicate are not subject to the double reversal of proof rules of section 6:195 DCC.

In order to benefit from these reversals of proof, the claimant needs to make a motivated claim that the information provided is false and / or insufficient; and that this information is misleading as a consequence of its falseness and / or insufficiency.<sup>79</sup> Notice that the qualification that the material information is false or insufficient is factual; the qualification that this information is misleading is partially juridical and partially factual<sup>80</sup>. If the claimant has made a sufficiently motivated claim, the onus of proof with respect to the accuracy (fairness and sufficiency) of the information rests with the defendant / trader. There is a possibility that the court will rule immediately - the defendant could make this defence - that the information to be assessed does not contain the facts claimed and / or that the alleged falseness and / or incompleteness does not cause any misleading. In that case the court will immediately pursue dismissal of the case. However if the claimant makes a sufficiently motivated claim and the defendant does not produce the necessary evidence to prove the accuracy of the information, the court will have to rule whether the information is misleading. Besides the abovementioned difference in procedural position of the members of the syndicate on the basis of Section 6:193j (1) DCC (compared to Section 6:195 (1) DCC), there is also a difference in the procedural positions on the basis of Section 6:193j (2) DCC (compared to Section 6:195 (2) DCC).<sup>81</sup> The fact is that the application of the reversal of the burden of proof with respect

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<sup>78</sup> Notice the conditions for application of this reversal of proof rule ('all circumstances of the case'; 'taking account of the legitimate interests of the trader and every other counterparty in the proceedings').

<sup>79</sup> According to the Netherlands Minister of Justice at this stage of the proceedings the claimant does not have to make plausible that an unfair commercial practice was committed by the trader. Parliamentary Papers I 2007 / 2008, 30 928, No E, p. 2 (Detailed Memorandum of Reply) Even though the claimant does not have to make the commission of an unfair commercial practice plausible, he has to claim in our opinion that the information provided was false and / or insufficient to such a degree that it has to be qualified as misleading.

<sup>80</sup> Notice that the courts will be under a stricter obligation to provide reasons for their judgments on terms that are factual as well as juridical (*motiveringsplicht*) than in case the term merely contains a factual element.

<sup>81</sup> As mentioned before there is a possibility that the warning statement prevents the application of the burden of proof rule laid down in Section 6:193j (1) DCC. In that case the investor has to prove that the information provided is false and incomplete. If the investor does not succeed in his provision of evidence, then the commission of a tort is not established and the burden of proof rule laid down in Section 6:193j (2) DCC is not applicable. However, if the

to the accountability of the tortfeasor as laid down in Section 6:193j (2) DCC does not require that the defendant has determined in part or in whole the content and the presentation of the information. This article simply states that the trader that committed a tort bears the burden to prove that he cannot be held accountable for the tort committed. For that reason the procedural position of the lead manager has deteriorated in relation to Section 6:195 (2) DCC. After all the lead manager cannot prevent application of the burden of proof rule of Section 6:193 (2) DCC by inserting an explicit warning statement in the prospectus that some information is not provided by him because the provision of information by the defendant is no longer required for the application of Section 6:193 (2) DCC. The reason is that the insertion of the warning statement does not undo the commission of a tort by the lead manager if it is established that the information provided is misleading. Concluding the warning statement does not prevent the application of the burden of proof rule laid down in Section 6:193 (2) DCC. The lead manager has to prove that he cannot be held accountable for the misleading nature of the information. Notice that this deterioration in procedural position has no necessary consequences with respect to the substantive position. After all the lead manager is in a position to argue that the alleged misleading nature of the information is not due to his fault when he had no influence at all on the content of the information and when he communicated this fact to the investors by insertion of an explicit warning statement. For the same reasons the procedural position of the other members of the syndicate has been deteriorated in the application of Section 6:193j (2) DCC in relation to Section 6:195 (2) DCC. After all, the member of the syndicate bears the burden to prove that he cannot be held accountable for the misleading nature of the information distributed by him. As already mentioned the other members were not considered to be person who in whole or in part have determined the content and the presentation of the information, therefore the burden of proof rule laid down in Section 6:195 (2) DCC was not applicable to them. Notice that this deterioration in procedural position has no necessary consequences with respect to the substantive position. The member of the syndicate who had or could have no influence at all on the composition of the prospectus is capable to argue that the alleged misleading nature of the prospectus is not due to his fault.

## **15.7 The element ‘misleading’**

### **15.7.1 Double standards**

As already mentioned in paragraph 15.3, the information contained in the prospectus has to conform to a double standard and is subject to a double enforcement mechanism.

On the one hand, the private law duty to inform the investor fairly, honestly and accurately and not to make misleading statements is not laid down in a special provision of the DCC for investors.<sup>82</sup>

However, this duty can be derived from the general tort law rule laid down in section 6:162(1) DCC and the application of the *lex specialis* rules laid down in Sections 6:193a up to and including 193j DCC. These rules are applicable to consumers including investors.

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investor succeeds in providing the necessary evidence, the commission of a tort is established and the burden of proof rule laid down in Section 6:193j (2) DCC is applicable.

<sup>82</sup> Cf. Section 44 German Stock Exchange Act (*Börsengesetz*).

On the other hand the FMSA and the Prospectus Regulation 2004 determine which information must be mentioned in the prospectus. Section 5:13 FMSA<sup>83</sup> is the public law equivalent of the private law misleading norm. The public enforcement of the content requirements of the prospectus is first of all achieved by the mandatory approval of the prospectus before publication and distribution thereof by a competent authority of a Member State. In the Netherlands the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten, AFM*), is the authority competent to perform this test. In principle, the test does not encompass more than a tick-off checklist with respect to subjects, format and signatures. The AFM is not well equipped to test the private law correctness or fairness of the statements made in the prospectus. Furthermore it is not the AFM's duty to investigate whether the issuer committed a tort to third parties.<sup>84</sup> However the AFM has on the basis of Section 1:80 FMSA the competence to impose a fine (*bestuurlijke boete*) on the issuer who is under a duty to publish a prospectus if the prospectus violates the public law information duties laid down in Prospectus Regulation 2004 even after the AFM has given its approval with respect to the prospectus.<sup>85</sup> Besides the aforementioned competence to impose a fine, the adoption of the Unfair Commercial Practices Act introduced Section 8.8 in the Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*). This Section states that the trader has to comply with the unfair commercial practices rules laid down in the DCC.<sup>86</sup> The AFM is competent<sup>87</sup> to impose a fine or to impose an order for incremental penalty payments (*last onder dwangsom*) if the trader violates the unfair commercial practices rules.<sup>88</sup> The consequence of this competence is that the AFM can use public law sanctions against any issuer including those that are exempted on the basis of Sections 5:3 or 5:4 FMSA from the duty to publish a prospectus.<sup>89</sup> It is still unclear how the public law sanction competences created by Section 1:80 FMSA and Section 8:8 of the Consumer Protection Enforcement Act are related.<sup>90</sup>

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<sup>83</sup> Section 5:13 FMSA: '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 liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities, in particular the information as mentioned in, the annexes included, Section 3 until 23 of the Prospectus Regulation 2004. This information shall be presented in an easily analysable and comprehensible form.' Section 5:13 FMSA is the implementation of Section 5 Prospectus Directive.

<sup>84</sup> Section 1:25 (2) FMSA: 'Under this Act, the Authority for the Financial Markets shall be required to exercise the supervision of conduct of the financial markets and to decide on the admission of financial enterprises to those markets.'

<sup>85</sup> Notice that the annex to Section 1:80 FMSA does not contain a reference to section 5:13 FMSA.

<sup>86</sup> Notice that Section 6:193f(f) DCC refers to Section 5:13 FMSA. This suggests that the AFM can impose a fine or an order for incremental penalty payments for a breach of Section 5:13 FMSA even though it is not included in the annex to Section 1:80 FMSA.

<sup>87</sup> An intra-Community infringement is not a requirement even though Article 3:1 CPEA refers to the AFM as competent authority for intra-Community infringements of the unfair commercial practices. *Frielink* in his commentary in *Jurisprudentie Ondernemingsrecht* 195, 2009 notes correctly that the legislator in the legislative proposal First Act amending the FMSA (*Wijzigingswet Wft 1*) wants to extend the scope of application of Sections 3.3 and 3.4 CPEA to 'national' infringements but astonishingly not the scope of Section 3.1.

<sup>88</sup> Section 3.4(4) CPEA

<sup>89</sup> Furthermore the Unfair Commercial Practices Act introduced a new provision (Section 3:305d(1) DCC) on the basis of which the AFM can request The Hague Court of Appeal to order the person who commits a violation in the sense of Section 1:1(k) of the CPEA to stop this violation. Section 1:1(k) CPEA states that a violation is an infringement (Section 1:1(f) CPEA: 'any act or omission contrary to the laws that protect consumers' interests, as defined in the Annexes to his act, that harms, or is likely to harm, the collective interests of consumers.') or an intra-Community infringement (Section 1:1(g) CPEA refers for a definition of an intra-Community infringement to Section 3(b) of the Regulation on consumer protection cooperation.). Section 3.3(1) of the Consumer Protection Enforcement Act states that the AFM can among other things request on the basis of Section 3:305d DCC if there is an intra-Community infringement of the misleading advertising rules laid down in Sections 6:194 and 6:195 DCC and the intra-Community infringement is related to a financial service or a financial activity. A financial service or financial activity is a financial service in the sense of Section 1:1 FMSA or an offer of securities to the public or an admission of securities on a regulated market situated in the Netherlands in the sense of Section 5:2 FMSA. Section 3.4(4) CPEA does not allow

On the one hand compliance with the FMSA standard does not disculpate in the case of a private enforcement action. On the other hand, a violation of the FMSA provisions is not automatically a violation of the private law norm. Violation of these public law provisions is not necessarily sufficient to qualify as misleading. However, the judge confronted with a private law prospectus liability claim will take account of the public law provisions with respect to the content requirements of the prospectus, if at least one of the litigating parties submits this claim.<sup>91</sup>

#### 15.7.2 Private law misleading norm

A trader needs to have in mind the expected audience he addresses when he determines his standard with respect to the information he is going to provide this audience. Generally speaking if the trader addresses his information to more qualified persons the misleading norm could be lower.<sup>92</sup> The issuer, lead manager and other members of the syndicate need to have in mind the 'reference person' (*maatman*) when he determines the standard of care on the occasion that they provide information in the prospectus or outside the prospectus. The court performs an objective test: the reference person is a juridical fiction; his qualities are determined by objective elements. In its *TMF/De Boer* judgment the Amsterdam Court of Appeal ruled that the prospectus was not misleading towards the claiming investors because of their specific experience.<sup>93</sup> The Dutch Supreme Court annulled this ruling on the basis that the Court of Appeal in its answer to the question whether the brochure was misleading in the sense of Section 6:194 DCC should have started from the presumed expectations of the average consumer<sup>94</sup> who is reasonably well-informed and reasonably observant and circumspect and to which the brochure was addressed or the consumer who was reached by the brochure. The circumstance that the claimants had business experience should be of no relevance in the answer to the aforementioned question because the Court of Appeal had not established that the particular group of persons to whom the brochure was addressed or to those it has reached exclusively consisted of persons with business experience.<sup>95</sup> It follows then from the *TMF/De Boer* case and the Dutch Supreme Court judgment in the *World Online*-case<sup>96</sup> that the reference person to which the issuer and the lead

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the AFM to request the The Hague Court of Appeal on the basis of Section 3:305d(3) DCC to order the trader who violates the unfair commercial practices rules of the DCC to rectify the misleading information.

<sup>90</sup> Notice that the Unfair Commercial Practices Act introduced a new provision (Section 3:305d(3) DCC) on the basis of which foundations or associations with full legal capacity whose articles state that it seeks the protection of similar interest of other persons can request The Hague Court of Appeal to order the person who commits an unfair commercial practice to rectify the information.

<sup>91</sup> In *Boterenbrood/Mees Pierson* the Dutch Supreme Court makes use of the public law rules with respect to the content requirement of the prospectus in its judgment whether the private placement memorandum (or prospectus) is misleading. The public law provisions have to be considered as the reasonable information standards for investors at that time. HR 8 May 1998, *Boterenbrood/Mees Pierson*, *Nederlandse Jurisprudentie* 888, 1998 (Consideration 3.9).

<sup>92</sup> However if the publisher or distributor of the prospectus would like to make use of this lower standard, he has to make sure that the prospectus is specifically addressed to one predetermined group of investors with specific knowledge and / or experience. Moreover the trader has to make sure that the prospectus is beyond the reach of investors who do not belong to this predetermined group. The *TMF/De Boer* judgment shows that this lower standard will not be applied leniently by the courts.

<sup>93</sup> Consideration 2.11 Amsterdam Court of Appeal 15 December 2005 *De Boer/TMF*, *JOR* 2006/50.

<sup>94</sup> In *Boterenbrood/Mees Pierson*, the Amsterdam District Court applied the concept of 'common investor' (*doorsnee belegger*); however, the Amsterdam Court of Appeal applied the concept of 'educated investor' (*slimme belegger*) even though the District Court's judgment on this point of law was not disputed. On these grounds the DSC could not uphold the Amsterdam Court of Appeal's application of this concept (Consideration 3.4).

<sup>95</sup> Consideration 4.2 HR 30 May 2008, *TMF/De Boer* with commentary from Pijls and Vletter -van Dort, *Tijdschrift voor Ondernemingsrecht* 9, 2008 p. 104.

<sup>96</sup> *VEB and Stichting VEB-Actie WOL v World Online International, ABN Amro Bank and Goldman Sachs International*, 27 November 2009, 07/11104, BH2162, consideration 4.10.3-4.10.4.

manager have to conform their standard of care is the average investor that is expected to be reasonably well informed and reasonably observant and circumspect. From now on when we mention the average investor we refer to this concept of reference person.

This concept of reference person seems to suggest that the information duty to consumers has become less strict; the average consumer is expected to be reasonably well informed and reasonably observant and circumspect. The background of this seemingly less strict objective test with respect to the reference person can be found in the ECJ *Gut Springenheide*<sup>97</sup> case. The ECJ ruled that when assessing the misleading nature of a statement the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect.<sup>98</sup>

For the purpose of establishing an internal market with free movement of goods and services, a well informed and reasonably observant and circumspect consumer is necessary. If this were not the case national private law (with respect to consumer protection) could possibly have the effect of creating a barrier to trade<sup>99</sup> on goods and services produced and delivered in conformity with foreign law standards. If the application of these national private law rules could have the effect of creating a barrier to trade and subsequently hinder the establishment of an effective European internal market, application of these rules infringes upon the four basic free movement rights.<sup>100</sup> In practice, however, national courts allow themselves the freedom to apply this standard leniently.<sup>101</sup>

### 15.7.3 Relationship between the misleading element and the other elements of liability in tort

The norm to establish the misleading nature of the prospectus contains a causation factor: a prospectus is misleading<sup>102</sup> if the falseness and / or incompleteness of the prospectus is such that (one can reasonably expect that) the average consumer would not have acquired the securities at all or at a lower price if he were aware of the falseness and / or incompleteness. Even though the misleading element contains a causation factor, a group of investors can claim collectively that the prospectus published and distributed by the issuer and / or the lead manager is misleading. The reason is that the court when deciding whether the information published and distributed among a group of investors qualifies as misleading, has to assess the actual behaviour of the publisher and

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<sup>97</sup> Case C-210/96, *Gut Springenheide* [1998] ECR I-4657, NJ 2000/374.

<sup>98</sup> Consideration 37.

<sup>99</sup> Cf. Article 28/29 TEC: 'measures having equivalent effect'. 'All trading rules enacted by a Member State which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions, Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 835, Paragraph 5. This case law was affirmed in *Cassis de Dijon*, Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649: if the national court has to decide whether the indistinctly applicable national rule that infringes upon the TEC free movement rights 'may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the defence of the consumer' [paragraph 8 of *Cassis de Dijon*], the court has to apply the 'rule of reason' test. The national rule has to satisfy a mandatory requirement, e.g. consumer protection, the rule has to be able to achieve the stated goal, and the restriction on free movement of goods has to be proportionate to the stated goal.

<sup>100</sup> Cf. Article 30 TEC does not provide for an exception justified for the purpose of consumer protection for the free movement of goods.

<sup>101</sup> C.C. van Dam, 'De gemiddelde Euroconsument – een pluriform fenomeen', *SEW Tijdschrift voor Europees en economisch recht* 1 (2009).

<sup>102</sup> Notice that by literal interpretation of the word 'misleading', i.e. to lead someone into something wrong, the causation element becomes clearer.

/ or distributor of the prospectus with respect to the standard owed to the fictional reference person representing the group of investors.<sup>103</sup>

The test applied by the court is abstract and theoretical. This abstractness is the result of a fiction - substantiated by the circumstances of the case – which the court has to take into account in its decision of whether the prospectus could have evoked a wrong impression to the fictional average investor of the prospectus' target group taking into account the fictional average investor's knowledge and / or experience. In principle it is irrelevant to this decision whether every individual member of this group had taken note of the contents of the prospectus or whether every individual member of this group was actually misled by it.<sup>104</sup> In determining the misleading nature of a prospectus the specific knowledge and / or experience of the individual members in comparison to the average investor are also not a relevant factor.

In general we can remark that the following facts and circumstances may guide the court in its concrete application of the abovementioned causation norm. In order to be qualified as misleading, the false or incomplete information needs to be related to an aspect of the product or service on offer that is of crucial importance for the recipient's interpretation of the statement.<sup>105</sup> In general the court has to take into account the complete statement. However the court may rule that the average investor attaches more significance to certain aspects of the statement. Moreover a prospectus can be qualified as misleading if the information with respect to a crucial aspect is spread out in the prospectus whereas the reader is only able to understand the crucial aspect if the information is interconnected. The same reasoning can be applied if the reader needs to make several cognitive steps to understand the correct meaning of the information.<sup>106</sup>

If the court rules that the prospectus was misleading, the commission of a tort is established. The causation factor in the question whether a tort was committed must be distinguished from the causation requirement between the tort committed and the losses occurred.<sup>107</sup> If the investors hold

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<sup>103</sup> World Online judgment, consideration 4.8.1: 'Even though the answer to the question whether or to what extent every single investor has been actually misled by the acclaimed tortious conduct depends amongst others on the circumstances in which that single investor was at the time he took his investment decision, the collective action claim in this case (i.e World Online) is appropriate for bundling claims of individual investors. In this collective procedure the judgment is restricted to whether behaviour of World Online and the Banks (ABN Amro and Goldman Sachs) at the IPO was tortious. When answering this question one can abstract from the specific circumstances on part of the investors. These circumstances are just relevant when answering questions of for example (amount of ) damages, causality and own fault.'

<sup>104</sup> World Online judgment, consideration 4.8.1: 'To the extent that the tortiousness of the behaviour by World Online and the Banks were based on the publication of misleading information, the question is not whether nor to what extent (certain) investors have been actually misled, but it is about the question whether World Online and the Banks should have abstained from publication of this information as a result of its misleading nature. A different point of view would unacceptably restrict the application of Art. 3:305a DCC.'

<sup>105</sup> M. Blom, *Prospectusaansprakelijkheid van de lead manager* (Deventer: Kluwer, 1996), 89.

<sup>106</sup> S.M.E. Hirdes and D.F. Lunsingh Scheurleer, 'De misleide maatmens, Misleiding ex Art. 6:194 BW', *Tijdschrift Ondernemingsrecht* 2008, p. 252.

<sup>107</sup> World Online judgment, consideration 4.10.4: 'In order to qualify the published information as misleading, and as therefore tortious, it is not required that the investor actually took notice of the published information or actually was influenced by the information published. It is merely required that the falseness or incompleteness of the published information was sufficiently of material importance that it could have misled the 'reference-investor' Therefore it is about whether the

the issuer and / or the lead manager liable for the losses suffered as a result of the misleading publication and distribution, they have to claim (in the event of a challenge, to prove) the causation between the losses and the tort committed individually. In this case the court may have to take into account not only the behaviour of the publisher and / or distributor but also the behaviour of the individual investors. We discuss this causation requirement in paragraph 15.9.

## 15.8 Fault

If the court establishes that the prospectus is misleading, the tort has to be accountable to the defendant in order to hold the latter liable.<sup>108</sup> A tortfeasor is liable for the commission of a tort if it is due to his fault or due to a cause for which he is accountable by law or pursuant to generally accepted principles.<sup>109</sup> In accordance with Section 6:193j DCC, a trader can only avoid liability if he claims and proves that the tort committed is not due to his fault or that he can be held accountable for the tort on any other grounds.

In order to clarify the system we need to distinguish between the tort committed by an act or omission breaching a rule of unwritten law pertaining to proper social conduct, *i.e.* a violation of a duty of care<sup>110</sup> and the tort committed by an unfair commercial practice, *i.e.* a violation of the *lex specialis* duty not to publish and / or distribute misleading information.<sup>111</sup> The issuer, lead manager and other members of the syndicate owe a special duty of care (*bijzondere zorgplicht*) towards the investors as a rule of unwritten law pertaining to proper social conduct. In this paragraph we limit the discussion to the commission of an unfair commercial practice because it is difficult to imagine a case in which the issuer and / or lead manager violated his special duty of care towards investors which was not due to his fault.

The lead manager has a private law duty to conduct a due diligence investigation involving a check on the completeness and correctness of the contents of the prospectus.<sup>112</sup> In most IPOs on Euronext Amsterdam, a bank is the issuer's sponsor. The element of fault with respect to the bank's behaviour is likely to be easily accepted in court because of their crucial role in society.<sup>113</sup> In the *ABN Amro/Co-op* case the Dutch Supreme Court upheld the ruling of the Amsterdam Court of Appeal that the bank cannot escape liability by claiming that there was no fault on its part because the duty to check the information in the prospectus provided by the issuer does not encompass the duty to check information that has already been subject to control by an independent expert, in this case an accountant.<sup>114</sup>

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published information as such has a misleading character. If that is the case, the issuer must because of the misleading character of the information abstain from publication, and it acts tortiously if it nonetheless publishes this information. Not until the establishment of the extent of the liability towards an individual investor, it will be dealt with whether and, if so, to what extent this investor was actually misled by the published information in his investment decision and as a consequence of that has suffered damages.'

<sup>108</sup> Section 6:162(1) DCC

<sup>109</sup> Section 6:162(3) DCC.

<sup>110</sup> Section 6:162(2) DCC.

<sup>111</sup> Section 6:193b(3)(a) DCC.

<sup>112</sup> Paragraph 4.4 of the Dutch Supreme Court judgment in *ABN Amro/Co op*.

<sup>113</sup> Consideration 4.7.4.1 of the Conclusion by AG Timmerman in *WorldOnline*.

<sup>114</sup> Paragraph 4.4.

The extent of the duty to perform the due diligence test is currently determined by the general principles of a duty of care owed to third parties, reasonableness, internal market customs and the reciprocal reasonable expectations of the parties.

In case the other members of the syndicate distribute the prospectus it is possible that they are liable towards the investor as well. Their possible liability depends on the circumstances of the case. In case of a misleading prospectus the other members of the syndicate can claim that even though the prospectus may have been misleading towards the average investor the misleading nature of the prospectus was not due to their fault or not accountable to them because of the minor role they had in the IPO process. The actual assignment of tasks within the syndicate and the communication of this assignment to the (potential) investors in the prospectus will be one of the relevant circumstances.<sup>115</sup> If that claim is accepted, the requirement of fault could explain the probable differences in liability between the lead manager and the other members of the syndicate.

## **15.9 Causation and damages**

### **15.9.1 Introduction**

If the aforementioned hurdles with respect to liability are taken, the amount of damages to be awarded to the claimants depends on the presence of causation between the publication and distribution of a misleading prospectus and the acclaimed losses of the investors. Unlike the causation element in the misleading norm, the pure causation question is of an individual nature, which means that this question has to be answered in view of the facts and circumstances of the individual investor.

The prevailing doctrine with respect to causation distinguishes two steps: at first the *condicio sine qua non* element and subsequently attribution (*toerekening*). The *condicio sine qua non* element means that it has to be plausible that if the litigated act or omission on which the liability is acclaimed had not taken place, the claimant would not have suffered his losses. In principle, the claimant has to demonstrate in court the *condicio sine qua non* element.<sup>116</sup> When the *condicio sine qua non* element is established, the subsequent question is whether the attribution requirement of Section 6:98 DCC has been fulfilled: the losses need to be closely connected to the events on which the liability is based to such an extent that the losses can reasonably be attributed to the defendant. First the defendant needs to argue that the losses are so loosely connected to the events on which the liability is based to such an extent that the attribution of all the losses is unreasonable.<sup>117</sup> We use the term 'to argue' instead of 'to prove' deliberately in order to

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<sup>115</sup> Paragraph 4.7.4.14 of the Conclusion AG Timmerman in WorldOnline. Notice that Timmerman does not mention in his enumeration of relevant circumstances the issue of communication of the assignment of tasks to the (potential) investors.

<sup>116</sup> World Online judgment, consideration 4.11.1: 'The Articles 6:194-195 leave unaffected the application of the ordinary rules with respect to the duty to claim and burden of proof with respect to the question whether the losses are in such a connection to the misleading statement that it can be attributed to the person who published the misleading information. In principle the investor has the duty to claim and bears the burden of proof with respect to the *condicio sine qua non*-connection.'

<sup>117</sup> For further information: Asser-Hartkamp-Sieburgh No 6-II 2009, No 76 and No 82 and Dutch Supreme Court 2 October 1998, *Nederlandse Jurisprudentie* 831, 1998, consideration 3.10 and the paragraphs 3.30-3.36 of the Conclusion of Advocate General Spier to this judgment. More about this judgment in Asser, *Bewijslastverdeling*, Deventer: Kluwer 2004, No 182.



demonstrate clearly that the question whether the losses can be attributed to the defendant is in principle a question of law and not a question of fact. Therefore the courts decision with respect to attribution is primarily based on juridical standards. As a consequence there is in principle no need to produce evidence. However the defendant may bear the burden of proof for alleged facts used in the defendant's argument. Notice that the two steps *condicio sine qua non* and attribution are related in such a way that if the alleged losses incurred by the claimant are connected *condicio sine qua non* to the violated norm, the attribution-criterion of Section 6:98 DCC may in principle serve as a restriction to the defendant's liability. As one can imagine many harmful effects are connected *condicio sine qua non* to the violated norm, the defendant should be held only liable for the losses which are reasonably attributable on the basis of the standards of Section 6:98 DCC to him.

#### 15.9.2 Two actionable claims

The establishment of causation with respect to prospectus liability claims is controversial in the literature. The recurrent question is whether the establishment of causation requires the claimant to have actually read the misleading prospectus such that he directly relied upon the misleading information. It has been argued that it is sufficient for the claimant to have indirectly relied on the misleading prospectus. These authors defend the position that the establishment of causation does not require that the individual investor by his own reading has relied on the misleading prospectus. The individual investor must have acted upon a positive market sentiment caused by the misleading prospectus.<sup>118</sup> Some authors do not so leniently establish causation; the minimum requirement is that the individual investor must have been influenced by the misleading prospectus (for example by intermediation of an investment advisor) when he purchased the securities.<sup>119</sup> In our opinion the aforementioned points of view in this respect pay too little attention to the specific question of causation. 'The causation' does not exist. Causation will only be substantiated in relation to a specific basis on which you claim.<sup>120</sup> In other words, the basis of the claim determines the perspective with respect to causation. So irrespective of the fact whether one defends the lenient or strict approach, we have to distinguish between the factual grounds on which the claimant makes his claim.<sup>121</sup> In our opinion two factual bases of claims<sup>122</sup> can be distinguished.<sup>123</sup> We will discuss these claims in the following subparagraphs.

#### 15.9.3 First claim

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<sup>118</sup> Cf. Blom 1996, p. 153-154; Den Boogert in M.W. den Boogert & S.E. Eisma, *Leerboek Effectenrecht*, Nijmegen: Ars Aequi Libri 2002, p. 190; A.G. Maris & S.A. Boele 1994, p. 146; Timmerman, 'De aansprakelijkheid van de syndicaatsleider voor een misleidend prospectus', in: J.R. Schaafsma e.a.(red.), *Ontwikkelingen in het effectenverkeersrecht*, Deventer: Kluwer 1996, p. 81 and somewhat reticent B.J. de Jong, 'Class action made difficult', *Ondernemingsrecht* 14, 2007, p. 517.

<sup>119</sup> Cf. Jansen, Jansen, Schreuder & Verhagen, *Prospectusaansprakelijkheid*, Amsterdam: NIBE-SVV 2003, p. 90-92

<sup>120</sup> Cf. Section 24 Netherlands Civil Procedure Act

<sup>121</sup> An illustrative example of a basis of a claim that determines the perspective with respect to causation: Netherlands Supreme Court 30 May 2008, *Jurisprudentie Ondernemingsrecht* 209, 2008 (De Boer c.s./TMF Financial Services B.V.).

<sup>122</sup> Pijls (as co-author) has explained the two bases of claims in the commentary to the judgment referred to in the previous footnote, *Ondernemingsrecht* 2008, p. 364-368.

In the first factual basis the investors claim that they acquired the securities for a price that is too high as a result of the positive market sentiment caused by the misleading prospectus. These investors claim primarily an amount of damages that is equal to the amount they allegedly paid too much. We doubt whether these investors are supposed to have relied directly or indirectly upon the misleading prospectus or upon the market sentiment caused by the misleading prospectus.<sup>124</sup> In fact these investors do not allege that they incurred losses because they relied upon the misleading prospectus or upon the positive market sentiment caused by the misleading prospectus. Instead these investors claim that they acquired the securities for a price that is too high as a result of the positive market sentiment caused by the misleading prospectus.<sup>125</sup> Strictly speaking these investors do not base their claim on the fact that they were misled by the prospectus. They claim that they acquired the securities against an impure price.<sup>126</sup> In other words they alleged that they relied on the integrity of the quoted market price and claim that their reliance has been damaged. We consider the aforementioned causation norms discussed in literature with respect to these claims too strict. When the court establishes that the misleading prospectus indeed caused an introduction price that was too high, the causation element in the sense of *condicio sine qua non* is given. In fact these investors would have acquired their securities at a lower price if the prospectus had not been misleading. The circumstances that the investors acquired their securities without reading the prospectus or without consultation by an investment adviser is irrelevant. Also in the probably theoretical case that the investors did not at all rely on the positive market sentiment caused by the misleading prospectus – they were indifferent with respect to this sentiment – these investors still incurred losses by acquisition of their securities at a price that was too high. However one could argue that the circumstance that the investor acquired his securities without reading the prospectus disrupts the already established causal link. In that case the argument is that the losses did not occur as a result of the distribution of the misleading prospectus but as a result of the own acquisition by the investor.<sup>127</sup> Besides the fact that this defence will probably not be accepted by the court<sup>128</sup> we need to make sure what kind of defence is used in this case. It is not a claimant's argument that is relevant to the judgment with respect to the *condicio sine qua non* element. Instead it is an argument brought forward by the defendant that has to be regarded with respect to the question of whether the losses are attributable to the defendant. As a consequence the defendant has to argue on the basis of Section 6:98 DCC (and to prove the alleged facts used in the defendant's argument!) that the causation element is interrupted as a result of the fact that the investor did not directly rely on the prospectus. However, it is clear that the investor needs to demonstrate that misleading prospectus indeed caused the unjustified positive market sentiment. Not because they claim on the basis that they based their

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<sup>123</sup> In his comments about causation with respect to securities traded on a secondary market De Jong distinguishes two categories of investors (See: De Jong 2007, p. 515).

<sup>124</sup> Cf. paragraph 20-21 of The Hague Court of Appeal judgment in the reference procedure after annulment in the insolvency case of DAF, The Hague Court of Appeal, 29 June 2004, *Jurisprudentie Ondernemingsrecht* 298, 2004.

<sup>125</sup> World Online judgment, consideration 4.11.1: 'The effect (on the transactional decision by the investor of the misleading information) can also occur indirectly because the investor relied on advice or on the opinion of the market which in turn were created by the misleading statement.'

<sup>126</sup> Cf. the Aeilkema/Veenkoloniale Bank judgment, HR 11 December 1931, *Nederlandse Jurisprudentie* 161, 1932. We emphasise that this case was not about prospectus liability. For that reason we have to qualify the meaning of this judgment for the primary market.

<sup>127</sup> In the literature this phenomenon is referred to as 'interruption of causation by intervening human action' (*doorbreking van het causaal verband door tussenkomend menselijk handelen*).

<sup>128</sup> Cf. HR 11 December 1931, *NJ* 1931/161 (Aeilkema/Veenkoloniale Bank).

acquisition on the positive market sentiment, but because they claim on the basis that this positive market sentiment resulted in an artificially stimulated securities price.

#### 15.9.4 Second claim

In the second factual basis, the investors claim that they relied directly or indirectly on the misleading prospectus. These investors will allege that indeed they were misled by the misleading prospectus. They would not have acquired their securities if the prospectus had not been misleading. They are dissatisfied with their investment as such and they would have invested the full amount of their investment in a different investment project. There is another perspective with respect to causation (and therefore with respect to damages) applicable to these investors than to the investors that claim on the aforementioned basis. We clarify the difference between these bases for claims and the difference in perspective with respect to causation and damages by two examples. We emphasise that the examples are theoretical. In practice the (procedural aspects of the) causation question involve(s) much more complexity.<sup>129</sup> The examples are selected to illustrate the substantive questions with respect to causation.

Example 1. Suppose an investor acquired the securities at EUR 100 at the moment of introduction to listing while the true value of the securities is EUR 70. The misleading prospectus artificially stimulated the introduction price by EUR 30. Some time after the introduction the misleading nature is revealed and as a consequence the securities price falls from EUR 100 to EUR 50.<sup>130</sup> Suppose one has established that the reduction in securities price loss of EUR 50 is caused for EUR 30 by the misleading prospectus and the remaining EUR 20 is caused by the general negative market sentiment.<sup>131</sup> If subsequently the investor brings a claim against the publisher or distributor of the prospectus on the basis that he acquired the securities at a price that is too high, the losses incurred by him that are connected *condicio sine qua non* to the misleading prospectus are EUR 30.

If the investor brings a claim against the publisher or distributor of the prospectus on the basis that he was misled by the prospectus, then the amount of losses incurred that are connected *condicio sine qua non* to the misleading prospectus are more than EUR 30. The reason is that the latter claim is based on the fact that the investor would not have taken this investment decision if the prospectus had not been misleading. In other words he was brought in a less favourable financial position as a result of the misleading prospectus. If we assume that the investor's financial position without the violation of the norm had been EUR 100<sup>132</sup>, the losses connected *condicio sine qua non* to the misleading

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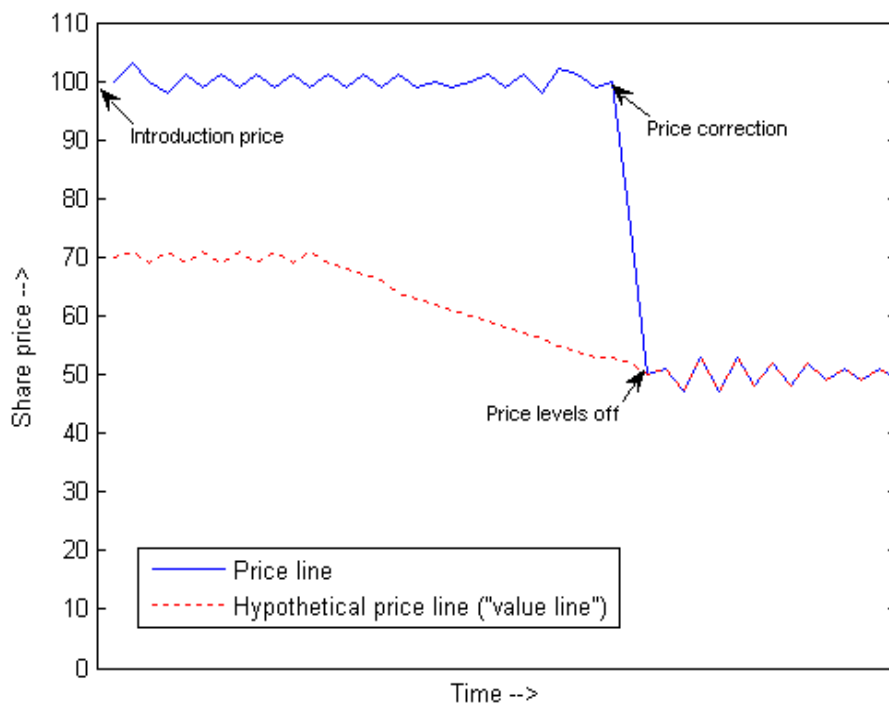
<sup>129</sup> With respect to the relevant procedural aspects of the first basis of claim we refer to paragraph 5 in 'Het causaliteitsvereiste bij prospectusaansprakelijkheid' van Pijls in *Tijdschrift voor Ondernemingsrecht* 4 (2009), p. 183-192. See also the thorough studies of B.J. de Jong: 'Schadeberekening bij securities class actions', *Ondernemingsrecht* 6, 2007 and 'Class action made difficult', *Ondernemingsrecht* 14, 2007.

<sup>130</sup> We disregard any possible panic reaction.

<sup>131</sup> Any such division of the loss due to the fall in the securities price will in practice encounter difficulties with respect to questions of evidence.

<sup>132</sup> Be aware that the investor has to make plausible that he would not have incurred losses with his alternative investment project. The investor could comply with this order to produce evidence by demonstrating that in the past he conducted a stable and defensive investment policy. We will come back to these questions of evidence.

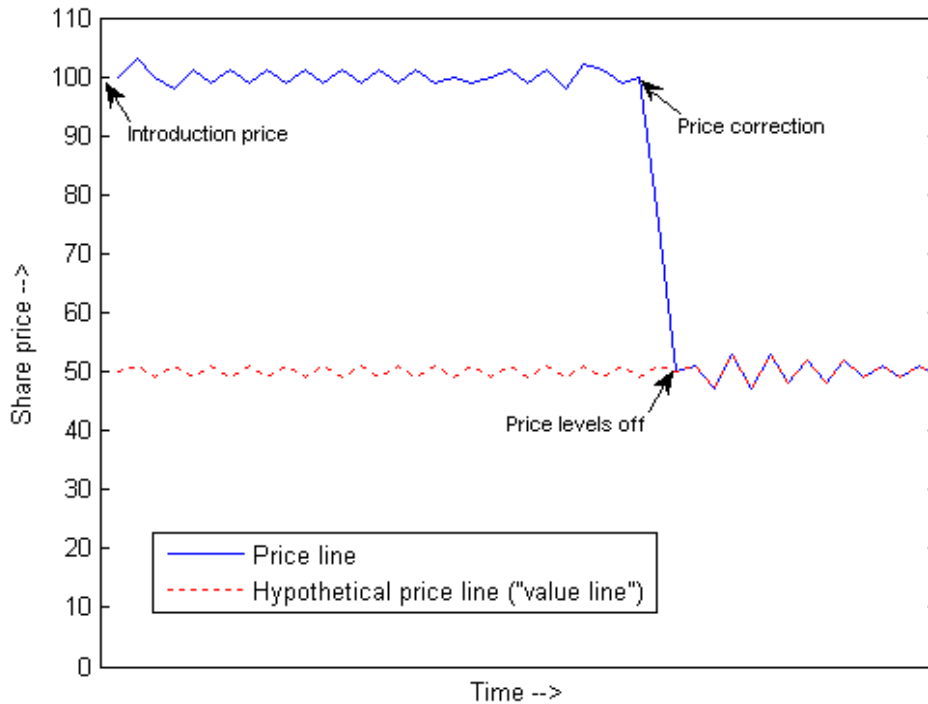
prospectus are EUR 50 (100 – 50). It is a different question whether it is reasonable to make the publisher or distributor of the prospectus accountable for the full EUR 50. However this question is not about the *condicio sine qua non* but about the attribution of the losses. It is up to the publisher or distributor to make this argument on the basis of Section 6:98 DCC. He could amongst others make the defence that it is unreasonable to make the liability and subsequently the amount of damages payable dependent on the unforeseeable market sentiments in the period under dispute. See figure 1 below for an illustration.



**Figure 1**

**Example 2.** Suppose that in the preceding example the true value of the securities is just EUR 50. The misleading prospectus artificially stimulated the introduction price by EUR 50 such that the fall in the securities price of EUR 50 is entirely explained by the misleading prospectus. Furthermore suppose that it is established that the investor could have made a return of 10 per cent on an alternative investment project. If the investor claims on the basis that he acquired the securities at a price that is too high, then he would have invested EUR 50 in an alternative investment project with a return of EUR 5. The losses that are connected *condicio sine qua non* to the misleading prospectus are calculated by comparing the actual financial position of the investor, EUR 50, with the hypothetical financial position that the investor would have been in if he had not been misled by the prospectus, EUR 105. As a consequence his losses are EUR 55 (105 – 50). However, if the investor claims on the basis that he in the absence of the misleading prospectus would not have acquired the securities at all, then he would have invested

EUR 100 in the alternative investment project with 10 per cent return. The return would have been EUR 10. If we compare the financial positions the result is that the losses are connected *condicio sine qua non* to the misleading prospectus is EUR 60 (110 – 50). See figure 2 below for an illustration.



**Figure 2**

### 15.9.5 Three possibilities to substantiate the second claim

The investors that base their claim on the fact that they relied on the misleading prospectus, *i.e.* they allege that the misleading prospectus was connected *condicio sine qua non* to their investment decision, can substantiate their claim in different ways. We will discuss three of these possible claims. At first the investors can base their claim on the fact that they themselves actually read the prospectus and that they actually based their investment decision on the prospectus. On this basis the investors claim to have directly relied on the prospectus.<sup>133</sup>

Secondly the investors can base their claim on the fact that they made their investment decision after consultation with an investment adviser.<sup>134</sup> In that case the investors do not allege that they themselves took notice of the misleading prospectus but that the investment adviser took notice of the prospectus on their behalf. In this line of argument, the reliance on the prospectus by the

<sup>133</sup> We refer in this matter to the basis of the bondholders' claim in *ABN/Co op*: 'The Association (...) the opinion that the (...) publications of the prospectuses were misleading, and as a consequence the Bank (...) has committed a tort with respect to these bondholders, who relied on the contents of the prospectus when they acquired the bonds.' (Italics *TMCA* and *ACWP*), Amsterdam Court of Appeal 27 Mei 1993, *Nederlandse Jurisprudentie* 682, 1993, consideration 5.1 first sentence.

<sup>134</sup> The advisor is in most cases the investment company (*beleggingsonderneming*), in the sense of the FMSA, which the investor needs in order to participate by intermediation in the securities trading.

investment adviser has to count as a reliance on the misleading information by the investors. As a result the adviser will take the place of the investor with respect to the need to provide evidence for the claim of the investor that he was indirectly misled by the prospectus. In order to establish the *condicio sine qua non* element, the court has to establish whether the adviser was actually or reasonably allowed to be misled by the prospectus. The latter requires a separate test whether the prospectus was misleading by taking into account the knowledge and experience of a professional investor.

Finally investors can base their claim on the fact that they based their acquisition on the positive market sentiment caused by the misleading prospectus. The misleading prospectus is connected *condicio sine qua non* to their acquisition not because they themselves read the prospectus, but for the reason that they relied upon the market to read it instead. Consequently they based their decision on the positive (misleading) sentiment developed in the market. We have to emphasise that it is not sufficient to demonstrate the positive market sentiment caused by the misleading prospectus. In order to prove the *condicio sine qua non* connection the investors need to demonstrate that they based their decision to acquire the securities on the (misleading) positive market sentiment.

If we assume that the investors in all the abovementioned cases can prove their claim that they were misled, the establishment of causation depends on the defence of the defendant. One has to take into account that the defendant in the last two cases could make the following logical defence: because the investors did not themselves take directly notice of the prospectus the losses incurred are so weakly connected to the event on which the liability is based, *i.e.* the distribution of a misleading prospectus, that they can no longer reasonably be attributed to the defendant. In other words the indirect reliance on the prospectus has interrupted the causal link. The question whether this defence can be accepted is a matter of attribution<sup>135</sup> and it has to be judged in accordance with the standards of section 6:98 DCC. Except for a defence based on attribution, there is also a possible defence with respect to the *condicio sine qua non*.<sup>136</sup> After all, for the investors who were directly or indirectly misled by the prospectus there is a possibility that they would have incurred a loss even if the prospectus had not been misleading. These losses would have been incurred if one had invested in an alternative investment project of which the securities price would also have been affected by the same negative market sentiment. The publisher's or distributor's defence could be that the investors would have incurred the losses as a result of the fall in the securities price anyway.<sup>137</sup> Even though we do not have any dogmatic objection against the acceptance of this kind of defence, there is a difficulty with respect to the division of the burden of proof. Which party bears the burden of proof with respect to the claim that in the hypothetical situation in which the investor had not invested in the securities under dispute, the investor would have incurred the same losses due to the fall in the securities price of the alternative investment project. Does the investor have to prove that in the absence of the misleading prospectus he would not have invested in another loss making investment project? Or does the publisher or distributor have to

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<sup>135</sup> We mean the attribution of losses in the sense of section 6:98 DCC and not the author's accountability for his behaviour in the sense of Section 6:162(3) DCC or section 6:195(2) DCC last sentence.

<sup>136</sup> This defence can also be applied with respect to the question of whether losses exist at all.

<sup>137</sup> If the defence is applied with respect to the absence of losses, the formulation will be the following: 'the losses due to the fall in the securities price would have been incurred anyway and therefore there are no legally relevant losses.'

prove that the investor would also have incurred losses on the alternative investments in any case?

In accordance with the principle rule of Section 150 of the Dutch Code of Civil Procedure the investor has to prove the *condicio sine qua non* connection and the losses incurred. We do not have any reason to change this rule with respect to the abovementioned defence. Therefore the investor has to prove that in the hypothetical situation without misleading prospectus he would not have invested in another investment project that was also subject to a fall in its securities price. However one could argue that the requirements with respect to this evidence should not be too strict. The first reason is that the investor would be in a very difficult position to prove how he would have profitably invested in a hypothetical situation. It is impossible to establish with complete certainty these kinds of hypothetical facts. Secondly it is rather undesirable to render it difficult for the investor to refute the claim that he would have made a loss making investment decision even without the misleading prospectus. It is no different from stating that the investor was unable to have made an investment decision that avoided the general market sentiment. For these reasons this defence may not be accepted too leniently.

In its decision about this defence, the court has to consider primarily the past investment experience of the individual investor. If the investor has a track record of high-risk investments or if the track record shows that he follows movements in the general securities market, the publisher's or distributor's defence is more acceptable. The other circumstances of the case will determine whether it is likely that the investor was not inclined to follow the market trend this time. If the investor can demonstrate that he has a risk-averse investment profile<sup>138</sup> and / or that in the past he saved all his money in a savings deposit account instead of investing in securities, the claimant has sufficiently refuted the defendant's argument, taking into account the lenient assessment of the evidence we argued for.

#### 15.9.6 Own fault doctrine

With respect to the second claim, that the investor would not have acquired the securities if he had known that the prospectus was misleading, the defendant can theoretically make use of the 'own fault' doctrine. The defendant has to make a motivated claim that certain circumstances contributing to the losses are attributable to the claimant.<sup>139</sup> It is due to his own fault that the individual with his specific knowledge and / or experience wrongly interpreted the information contained in the prospectus. However, this defence will not easily be recognised in court with respect to securities issued on a regulated market.<sup>140</sup> With respect to the first claim where the investor bases his claim on the fact that as a result of the misleading prospectus he acquired the securities at a too high price, it is improbable that the defendant can rely on this doctrine because

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<sup>138</sup> The evidence is not necessarily produced by demonstrating the past investment profile. If the investor can in some way demonstrate that in general he has a risk-averse profile, then in the circumstance of the case this demonstration could comply with the order to produce evidence. For example, the investor may demonstrate that he is usually covered for all kinds of risk not necessarily investment related. In our opinion this personal quality could show the risk averseness of this particular person.

<sup>139</sup> Section 6:101 DCC

<sup>140</sup> Otherwise, in *TMF/De Boer* where the securities were issued by private placement, the court accepted the own fault doctrine as defence. Investors should not base their investment decision on a simple brochure.

the claimant does not claim that he read the prospectus. The claim is that he relied on the correct price formation in the market. In this contribution we do not discuss the claimant's duty to limit the losses.

#### 15.9.7 European perspective towards causation requirement

When considering the hurdle of causation<sup>141</sup> in a prospectus liability claim, the court has to bear in mind that the European Union legal system upheld by the European Court of Justice requires that national remedies must secure the effectiveness of rights awarded to private parties by European legislation.<sup>142</sup> Particularly in the context of directives whose provisions expressly require the availability of adequate judicial remedies.<sup>143</sup> Even though the European Court of Justice continues to highlight the importance of national procedural responsibility and autonomy, its case law shows that in certain cases the scope of this national autonomy can be restricted if the Directive requires an effective judicial remedy.<sup>144</sup> Although in the case of a prospectus liability claim the causation requirement will probably not be regarded as undermining the Unfair Commercial Practices Directive, the national court has however to take into account the principle that European legislation must be given its due effect when the court applies the (national) procedural rules and rules of evidence with respect to causation. After all, the Unfair Commercial Practices Directive demands adequate and effective means to combat unfair commercial practices in order to enforce compliance with the provisions of the directive in the interest of consumers.<sup>145</sup> Even though the requirements imposed by the European Union legal system on the availability of national remedies may depend on the nature of the right at stake and on the kind of community measure which has been breached, the upper limit of national autonomy is reached when the exercise of the rights conferred upon consumers by the Unfair Commercial Practices Directive is made excessively difficult.<sup>146</sup>

#### 15.10 Disclaimers

Disclaimers in the prospectus are not effective.<sup>147</sup> In a non-contractual legal relationship where the parties to this legal relationship are *ex-ante* unknown, it is strange to exonerate oneself from

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<sup>141</sup> World Online judgment, consideration 4.11.1: 'The problems with respect to the burden of proof with respect to the condition sine qua non-connection could render the investor protection purpose of the (old and new) prospectus directives (Directive 84/450/EEC and Directive 2003/71/EC) illusory. One has to take notice that the Directive (2003/71/EC) does in fact not harmonise the issuer's liability for misleading information in the prospectus, however, the new prospectus directive imposes a duty on the Member States to ensure that their national legal provisions on civil liability apply to those persons responsible for the information given in a prospectus. (Art. 6(2) of Directive 2003/71/EC). This duty encompasses the obligation that effective legal protection must be given (to the investors) in accordance with the national law.'

<sup>142</sup> P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials* (Oxford: OUP, 4<sup>th</sup> ed.), 313 and Asser-Hartkamp 3-1 2008, No 78 up to and including No 90.

<sup>143</sup> Cf. article 11 and 12 UCPD.

<sup>144</sup> Craig and De Burca (2008), p. 313.

<sup>145</sup> Article 11 UCPD.

<sup>146</sup> Craig and De Burca (2008), p. 321.

<sup>147</sup> L. Timmerman, 'De aansprakelijkheid van de syndicaatsleider voor een misleidend prospectus', in *Ontwikkelingen in het effectenverkeersrecht*, ed. J.R. Schaafsma *et al.* (Deventer: Kluwer, 1996), 65-85; Timmerman and Lennarts (2005), p. 793-795.



possible claims in the future. All legal protection awarded by tort law would be rendered ineffective. However, in the *ABN Amro/Co-op* case the Dutch Supreme Court suggested that a lead manager does not himself, in whole or in part, determine or has caused to be determined the content and presentation of the information for which he used a disclaimer in the form of a specific warning in the prospectus that he did not perform a due diligence investigation with respect to the indicated part of the prospectus that was written by another expert.<sup>148</sup> If the defendant did not himself, in whole or in part, determine or cause to be determined the content and presentation of the information, the double reversal of proof rule in Section 6:195 DCC is not applicable.<sup>149</sup> However, application of the double reversal of proof in Section 6:193j DCC does not require that the defendant determined the content and presentation. Therefore it is uncertain whether the defendant can prevent application of this rule by inserting a warning statement as mentioned before; we refer to our discussion in paragraph 6.5.

### 15.11 Private international law and prospectus liability claims

The Brussels I regulation on jurisdiction in civil and commercial matters<sup>150</sup> determines which court has jurisdiction with respect to prospectus liability claims against a (legal) domiciled in a Member State. In this contribution we do not reflect upon the effects of this regulation on the collective action proceedings and the recognition of the declaratory judgment. We discuss which court has jurisdiction with respect to the individual investor's claim. Furthermore, we determine the law applicable to prospectus liability claims brought before a court in the EU.

In general (legal) persons domiciled in a Member State can be sued in the courts of that Member State.<sup>151</sup> Moreover Article 5 (3) states that the court of the place where the harmful event occurred has jurisdiction in matters relating to tort. In *Bier v. Mines de Potasse d'Alsace*<sup>152</sup>, the European Court of Justice ruled that if the place where the damage occurred is not identical to the place where the event giving rise to liability in tort occurred, the 'place where the harmful event occurred' is to be understood as encompassing both the place where the event giving rise to liability in tort occurred and the place where the damage occurred.<sup>153</sup> The European Court of Justice ruled that the consequence of this interpretation is that the defendant may be sued, at the option of the plaintiff, either in the courts of the place where the damage occurred or in the courts of the place where the event which gives rise to and is at the origin of that damage, occurred.<sup>154</sup> In later cases the European Court of Justice restricted the scope of its *Bier*-judgment by restricting the place

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<sup>148</sup> Consideration 4.3

<sup>149</sup> Literal interpretation of this judgment seems to suggest that the lead manager can still be held liable on the basis of Art. 6:162 NCC. *Bertrams* defends the position that the disclaimer has the effect that the lead manager has no due diligence duty to investigate those parts mentioned in the disclaimer. However the lead manager can still be held liable if the lead manager violates his 'normal' duty of care because he either had knowledge of the misleading nature of the parts exempted from liability or he had concrete and serious indications that the parts provided by third parties are misleading. R.I.V.F. Bertrams, 'Disclaimers in verband met prospectusaansprakelijkheid', in *De opkomst van een rechtsgebied, Lustrumbundel Vereniging voor Effectenrecht*, ed. R.I.V.F. Bertrams et al. (Deventer: Kluwer, 1997), 9-10.

<sup>150</sup> Council Regulation (EC) No 44/2001 of the European Parliament and of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12, 16.1.2001, p. 1 – 23.

<sup>151</sup> Art. 2 (1)

<sup>152</sup> Case 21/76, *Bier* [1976] ECR 1735; *Nederlandse Jurisprudentie* 494, 1977.

<sup>153</sup> Paragraph 24.

<sup>154</sup> Paragraph 25.

where the damage occurred to the place where the *direct* damage occurred. In *Kronhofer*<sup>155</sup> the European Court of Justice ruled with respect to the question of jurisdiction that the place where the direct damage occurred in case of a financial loss on an investment is the place where the investor holds his investment account.<sup>156</sup>

From 11 January 2009 the Rome II regulation<sup>157</sup> determines which law is applicable to claims arising from non-contractual obligations brought before a Member State's court. The general or default rule in the Rome II regulation is the *lex loci damni*, the law of the place where the direct damage occurs is applicable to all claims arising from non-contractual obligations.<sup>158</sup> The prospectus liability obligation is not exempted from the scope of application. Therefore the issuer and / or lead manager's liability is determined by the law of the place where the direct damage to the investor occurred. With respect to prospectus liability claims the place where the financial loss was sustained by the investor is likely to become the relevant connecting factor.

Provided that recital 7 requires that the substantive scope and the provisions of the Rome II Regulation should be consistent with the Brussels I Regulation, the case-law of the ECJ with respect to article 5 (3) of the Brussels Convention, the predecessor of the Brussels I Regulation, may serve as guidance. For this reason the aforementioned *Kronhofer*-case becomes relevant. The result of application of this ruling is that the law applicable to prospectus liability claims is likely to be the law of the place where the investor holds his investment account. The consequence is that the issuer and / or lead manager is confronted with a potentially wide scope of laws applicable to the investors' prospectus liability claims since investors in the same securities (issued by one issuer) may very well hold investment accounts in different countries.<sup>159</sup>

## 15.12 Concluding remarks

Concluding, the archetypical structure of the legal proceedings of a prospectus liability claim of a consumer against the issuer and / or lead manager after an IPO will be as follows: first investors request the court in a collective action to declare the prospectus misleading; secondly the investors will have to seek monetary compensation in individual proceedings. In these proceedings the elements of causation are crucial. The public law obligation to publish a prospectus is required by the Prospectus Directive 2003. Furthermore the Unfair Commercial Practices Directive determines the private law relationship between the issuer and the consumer. The (draft) prospectus is an important instrument to determine the introduction price of the securities in the pre-listing market. In this contribution we restrict ourselves to the discussion of prospectus liability on the basis of the commission of a tort. Any liability in tort claim requires the following elements: commission of a tort;

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<sup>155</sup> Case C-168/02, *Kronhofer* [2004] ECR I-6009; *Nederlandse Jurisprudentie* 335, 2006.

<sup>156</sup> Paragraph 17. See: P. Vlas in his commentary to *Kronhofer*, *Nederlandse Jurisprudentie* 335, 2006.

<sup>157</sup> 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) [2007] OJ L 199, p. 40-49.

<sup>158</sup> Recital 16, 17 and article 4 (1) Rome II regulation.

<sup>159</sup> For an amendment proposal of the Rome II regulation to introduce for liability claims against the issuer and/or lead manager on the basis of the provision of misleading information the *lex loci delicti*, i.e. the place of initial publication of the prospectus on which the investors relied when making their investment decision see: T.M.C. Arons, "All roads lead to Rome": beware of the consequences! The law applicable to prospectus liability claims under the Rome II regulation.", *Nederlands Internationaal Privaatrecht* 4, 2008.

accountability; loss and causation. The advantages of the *lex specialis* provisions that constitute the unfair commercial practices are the double reversal of proof rule laid down in Section 6:193j DCC, the protective nature of the Directives belonging to the consumer *acquis* and the national court's obligation to interpret the national implementation in conformity with the purpose of the Directive.

Information can be held misleading if it is either false or incomplete ('misleading omission'). A commercial practice is misleading when the information provided is factually incorrect or when the information is presented in such a manner that the average consumer is misled or could be misled even though the information might factually be correct and the average consumer makes a transactional decision he would not have made otherwise. Furthermore a commercial practice is misleading if there is a misleading omission. A misleading omission is every commercial practice whereby material information is missing that the average consumer needs, according to the context, in order to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. A trader is any natural or legal person who is acting for purposes relating to his trade or profession. In an IPO process the issuer, lead manager and the other members of the syndicate that distribute the prospectus via their network of offices qualify as trader. For that reason they are subject to the unfair commercial practices rules. The information published with respect to the issuer and its commercial activities in the time span around the IPO are directly connected to the securities. As a consequence this information is subject to the unfair commercial rules unlike the company's information that is not published in the time span around the IPO, e.g. a press release about the company's expected results.

Article 6:193j states that if the investor claims on the basis of Sections 6:193b up to and including 6:193i DCC that the trader conducts a misleading commercial practice the commission of a tort is given unless the trader proves the material correctness and completeness of the information by him to the consumer. According to Article 6:193j (2) DCC trader is liable for the losses caused by his act / omission if the trader committed a tort unless he claims and proves that he cannot be held accountable for the tort committed or that the tort committed is not due to his fault. Notice that the application of these reversal of proof rules do no longer require the defendant himself, in whole or in part, has determined or has caused to be determined the content and the presentation of the prospectus. We cannot be certain of the continuing legal relevance of the disclaimer added by the lead manager with respect to the application of the double reversal of proof rules.

If the prospectus is declared misleading by the court, the misleading nature of the prospectus contains a causation element, *i.e.* the average investor took a transactional decision he would not have taken if the information in the prospectus had been correct and complete. The due diligence duty makes it possible for the lead manager to claim that he cannot be held accountable for the prospectus or that the publication and distribution thereof is not due to his fault. This claim is not easily accepted. The other members of the syndicate may however be more successful in this claim depending on their role in the IPO process and the communication towards the investors of their particular role.

The recurrent question is whether the establishment of causation requires the claimant to have actually read the misleading prospectus such that he directly relied upon the misleading

information. In this contribution we discussed that the answer to this question depends on the basis of the investor's claim: acquisition of the securities that is too high as a result of the misleading prospectus or (in)direct reliance by the investor on the contents of the misleading prospectus.

With respect to the private international law aspect of prospectus liability claim it is very likely that the issuer and / or lead manager may be sued in many different countries and with numerous laws applicable if the IPO reaches out to investors in different countries.