CENTRE DE DROIT
BANCAIRE ET FINANCIER

Liability for the prospectus

A non-causal omission

Par Nicolas Béguin le 3 September 2021

Background

The case concerns five investors who subscribed to (unlisted) shares in a public limited company when it was founded or during subsequent capital increases. They consider that they were misled by inaccurate information contained in the issue prospectus on which they based their investment decision. They brought a civil action before the Commercial Court against various persons and entities who had participated in the drafting or dissemination of the disputed prospectus, claiming damages from them jointly and severally, in particular on the basis of Art. 752 a CO (applicable in this case due to the transitional regime provided for in Art. 95 para. 4 FinSA).

Ruling in a single instance, the cantonal authority found a culpable omission on the part of the defendants in connection with the preparation of the prospectus : one of them failed to report certain risks of which he was aware ; others did not bother to verify the accuracy of certain statements contained in the prospectus. However, the action was dismissed on the grounds that the investors had not demonstrated a causal link between the alleged violation and the damage suffered.

In its judgement 4A_24/2021 of 24 June 2021, the Federal Supreme Court confirmed this decision, not without recalling some interesting developments discussed below, which should remain relevant in future cases of application of Art. 69 FinSA.

Discussion

Whether based on Art. 752 aCO or Art. 69 LSFin, the prospectus liability – which now also extends to the key information document (FIB) and other similar communications concerning all financial instruments – presupposes the fulfilment of the usual conditions of the law of non-contractual liability, namely a violation, damage, a causal link and fault.

In this respect, it should be remembered that in the presence of flawed indications, the aggrieved investor has two angles of attack :

- on the one hand, they can demonstrate that the defect is so serious that they would never have subscribed to/acquired the financial instrument concerned ; in this case, the damage corresponds to the total loss suffered (i.e. the depreciation of the financial

instrument) (**Case 1**) ;
- on the other hand, he can demonstrate that the flawed information would have reduced the issue/acquisition price of the financial instrument, the defect not being serious enough to call into question the very principle of the subscription/acquisition of the financial instrument ; in this case, the damage corresponds to the hypothetical capital loss (*hypothetischer Minderwert*), namely the difference between the price actually paid and the price the investor would have paid if he had been properly informed (**Case 2**).

Thus, depending on the strategy chosen, the investor must establish that he based his investment decision on a flawed prospectus and that, had he been better informed, he would not have made this investment (Case 1) or, alternatively, that he would not have subscribed to/acquired the financial instruments in question at that price (Case 2) (ATF 132 III 715, consid. 3.2.2).

The investor bears the burden of proof, particularly with regard to the causal link (art. 8 CC). Due to the difficulty of providing the latter, case law exempts the investor from providing strict proof, with 'overwhelming likelihood' being sufficient (*Beweismass der überwiegenden Wahrscheinlichkeit* ; ATF 130 III 321, consid. 3.3.). In concrete terms, the application of this standard creates the following natural presumptions :

- if the financial instrument is acquired on the primary market, the information contained in the prospectus is presumed to have been causal in the subscription decision ;
- if the instrument is acquired on the secondary market, it is presumed that the (flawed) information contained in the prospectus was causal in the formation of the instrument's price, even if the investor has not read the prospectus (ATF 132 III 715, consid. 3.2.1) ; this presumption also reflects the *efficient-market hypothesis* (EMH).

However, the application of the balance of probabilities has no effect on the allocation of the burden of proof, which remains with the investor (ATF 132 III 715, consid. 3.2.1). The investor must therefore always meet the procedural requirements regarding the allegation of facts and means of proof.

Thus :

- if the investor is in Case 1, he must be able to explain precisely why he would not have made the disputed investment, bearing in mind that each investor has his own risk appetite ; on this point, the FSC seems to consider that the higher the expected return, the greater the risk of loss, and consequently, the more serious the defect in the prospectus must be to justify damages equal to the loss on the investment (consideration 6.8.1).
- If we are in Case 2, the determination of the damage is facilitated by a rule of evidence under federal law, namely art. 42 para. 2 CO, the damage then being determined by the judge. However, this provision does not exempt the investor from stating the bases of calculation in order to enable the judge to make a decision, in particular by alleging the elements making it possible to establish the hypothetical loss of value (ATF 144 III 155, consid. 2.3, commenté *in* cdbf.ch/1004/).

In the case in question, the claimants argued that they would never have subscribed to the shares in question if they had been provided with accurate and complete information (Case 1).

However, they did not explain why they would have refrained from investing if the prospectus had been compliant, which they could have done by demonstrating that such an investment did not correspond to their investment strategy. They limited themselves to relatively general considerations, relying in particular on the fact that certain elements had not been revealed to them, such as the existence of a reputational risk in connection with certain transactions in which the issuing company was alleged to have participated, as well as agreements detrimental to the interests of the latter. However, as the cantonal authority found – without the Federal Supreme Court criticising this assessment – when a relatively modest investment is expected to generate a multiple of the turnover, or even an initial public offering, in the short term, any reasonable investor must be aware that there is a corresponding risk of loss. Finally, as the investors did not present any allegations that would allow the basis for calculating a hypothetical capital loss to be established (Case 2), the Federal Supreme Court can only confirm the dismissal of their claims by the cantonal authority.

The judgment of the FSC reiterates that a defect in the prospectus is not enough to engage the responsibility of its author and emphasises the importance of a flawless demonstration of the causal link between the defect in question and the damage for which compensation is sought. There is no natural presumption that a person will not make an investment if they are duly informed of all the risks associated with it. In view of the strengthening of the duty of prudential information for financial service providers since the entry into force of the FinSA and the broader scope of liability incurred by the producers of financial instruments, this reminder is undoubtedly not unnecessary.
