

EXEMPTIONS FROM THE PROSPECTUS OBLIGATION

In a decision of 31 March 2014, the Danish FSA made a statement on whether a particular offering of securities was exempt from the obligation to prepare a prospectus based on the number of persons to whom the offering was directed as well as the minimum amount each investor was obliged to subscribe for. In its decision, the Danish FSA expresses that none of these exemptions apply to the specific offering and consequently, the action resulted in a police report against the issuer in question for failure to comply with the prospectus obligation.

The Decision of the Danish FSA

The decision is being addressed in the context of the Danish FSA's annual inspection of an investment services company in October 2013 which was mainly concerned with the provision of investment projects on behalf of the company that had offered shares in this concrete case. Following the annual inspection, the Danish FSA carried out a separate investigation of the company's offering which did not include the preparation of a prospectus.

The investigation resulted in the Danish FSA's decision to report the company to the police on 31 March 2014 for violating the Danish Securities Act, Section 23(1), no. 2 as the company had failed to prepare a prospectus in connection with an offering of shares to the public.

The Danish FSA found that the offering was not exempt from the prospectus obligation since (1) the individual condition in terms of value per investor of omitting the preparation of the prospectus was not met, and (2) the offering was not directed towards such a limited group of persons that the offering could be exempt from the prospectus obligation. The Danish FSA's assessment of the case will be discussed in more detail below.

The Rules on the Prospectus Obligation

Pursuant to the Danish Securities Act, issuers may not offer securities to the public before an approved prospectus for the securities in question has been published.

However, "Little Prospectus Order" and the "Great Prospectus Order" provide different exemptions from this starting point. For example, there is no obligation to draft a prospectus for a public offering in cases where each investor must acquire securities for at least EUR 100,000 in order to invest in connection with an offering. At the time of the offering of the specific case, the minimum limit amounted to EUR 50,000.

Similarly, there is no obligation to prepare a prospectus if the offering is directed to fewer than 150 natural or legal persons per member state of the EU or per country with which the EU has entered into an agreement for the financial area that are not "qualified investors". At the time of the offering in the specific case, the minimum limit amounted to 100 natural or legal persons.

Exemption in Case of Minimum Investment Requirement

The tender documents made it clear that there was a requirement of a minimum subscription per investor in excess of the previous requirement of EUR 50,000. The company found that the offering was exempt from the prospectus requirement under the previous rules.

After reviewing the subscription agreements and the registers of shareholders etc., the Danish FSA, however, assessed that the offering was not subject to the exemption from the prospectus obligation which applied at the time. The basis of the Danish FSA's assessment was that five of the investors have subscribed for less than the minimum subscription of DKK 400,000. As a consequence, it was the Danish FSA's assessment that in fact there had not been a minimum subscription of DKK 400,000 per investor. Thus, the offering did not fall within the exemption.

Exemption in Case of Offering to a limited Number of Persons

After the Danish FSA had assessed that the minimum limit of investment was not fulfilled regarding the said five persons, the Danish FSA carried out an investigation of whether the offering was included in the exemption, according to which there is no obligation to prepare a prospectus for offerings to a limited number of persons, see the above.

The Danish FSA was of the opinion that even though the five investors who had subscribed for less than the minimum subscription of DKK 400,000 were below the limit of 100 people (now 150 people), the exemption from the prospectus requirement did not apply. This is because in reality, the offering was directed to the public, thereby targeting a number of people over the specified limit. The crucial element of the exemption from the prospectus obligation is not the signatory number of investors, but the group of people that the offer is directed to.

Our View

The decision of the Danish FSA illustrates the importance of the minimum investment set out in the Prospectus Order actually being observed by all investors in the event that a prospectus is omitted with reference to this exemption. Even a departure from the rule by individual investors will result in the exemption being rendered invalid.

The decision also shows how an offering directed to an indefinite group is not normally considered to be directed to a limited number of persons, regardless of whether the actual number of investors falls

significantly below the limit set out in the Prospectus Order. It is consequently essential to ensure that the offering is defined properly if there is an intention to employ the exemption.

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Contact



Dan Moalem, Partner
Tel. +45 33 77 90 10
Mob. +45 30 37 96 10
Email dmo@mwblaw.dk



Henning Hedegaard Thomsen, Senior Associate
Tel. +45 33 77 90 18
Mob. +45 30 37 96 18
Email hht@mwblaw.dk



Alexandar K. Bruun, Junior Associate
Tel. +45 33 77 90 45
Mob. +45 30 37 96 45
Email abr@mwblaw.dk