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20.04.2015

Høringsbrev - Kapitalmarkedsunion i EU

1. Innledning

Vi viser til departementets høringsbrev av 4.3.2015 vedrørende ovennevnte høring.

Det er en prioritert oppgave for Advokatforeningen å drive rettspolitisk arbeid gjennom høringsuttalelser. Advokatforeningen har derfor en rekke lovutvalg inndelt etter fagområder. I våre lovutvalg sitter advokater med særskilte kunnskaper innenfor det aktuelle fagfelt og hvert lovutvalg består av advokater med ulik erfaringsbakgrunn og kompetanse innenfor fagområdet. Arbeidet i lovutvalgene er frivillig og ulønnet.

Advokatforeningen ser det som sin oppgave å være en uavhengig høringsinstans med fokus på rettssikkerhet og på kvaliteten av den foreslåtte lovgivningen.

I saker som angår advokaters rammevilkår vil imidlertid regelendringen også bli vurdert opp mot advokatbransjens interesser. Det vil i disse tilfellene bli opplyst at vi uttaler oss som en berørt bransjeorganisasjon og ikke som et uavhengig ekspertorgan. Årsaken til at vi sonderer mellom disse rollene er at vi ønsker å opprettholde og videreutvikle den troverdighet Advokatforeningen har som et uavhengig og upolitisk ekspertorgan i lovgivningsprosessen.

I den foreliggende sak uttaler Advokatforeningen seg som ekspertorgan. Saken er forelagt lovutvalget for børs- og verdipapirandelsrett og lovutvalget for bank, finansiering og valuta.. Lovutvalget for børs- og verdipapirandelsrett består av Susanne Munch Thore (leder), Lars Knem Christie, Atle Degrè, Tore Mydske og Tone Merete Østensen. Lovutvalget for bank, finansiering og valuta består av Kjersti Tøgarad Tørsbråten (leder), Knut Bjerve, Rudi Mikal Christensen, Thorbjørn Gjerde, Peter Aall Simonsen og Siri Wennevik.

Advokatforeningen avgir følgende høringsuttalelse:

Reference is made to the Consultation Paper from the Norwegian Ministry of Finance dated 4 March 2015. This letter is a response to (i) the Green Paper on Building a Capital Markets Union

(the "CMU Green Paper") dated 18 February 2015 and (ii) the European Commission's "Consultation Document – Review of the Prospectus Directive" dated 18 February 2015 (the "Prospectus Consultation Document").

The Norwegian Bar Association (the "Association") has decided to respond to both documents on a more overall basis rather than the individual questions, as many of the questions are inter-linked and the answers will therefore to a large extent affect each other.

2. The Association has the following comments to the CMU Green Paper

Advokatforeningen er generelt positive til EU-kommisjonens Grønnbok om en kapitalmarkedsunion. Forslagene er imidlertid lite konkrete, og det er derfor ikke naturlig for Advokatforeningen å komme med konkrete innspill på dette stadiet.

Vi ønsker imidlertid å knytte en kommentar til EU-kommisjonens vurderinger knyttet til "corporate bonds", hvor EU-kommisjonen blant annet uttaler følgende:

"Despite the recent growth in corporate bond issuance, it is characterised by low levels of standardisation and price transparency. Although in recent years new electronic bond trading platforms aimed at retail investors have emerged in some Member States, a lack of standardisation may inhibit the development of bond trading venues and of a liquid secondary market. Greater standardisation of corporate debt issuances could allow for a more liquid secondary market for corporate bonds to develop. The Commission would welcome views on whether the possibility of developing a more standardised corporate debt market should be explored further, and whether this can best be achieved by a market led initiative or regulatory intervention."

Etter vår vurdering bør norske myndigheter ta avstand fra et regulatorisk initiativ med sikte på å innføre felleseuropeiske normer for utstedelse av blant annet selskapsobligasjoner. For det første kan det ikke være slik at fraværet av et likvid annenhåndsmarked for selskapsobligasjoner tyder på en markedssvikt. Den mer nærliggende forklaringen er at det ikke er et behov i markedet for å drive aktiv handel i slike gjeldsinstrumenter. For det andre bør det være rom til regelverks- og markeds konkurranse i et felleseuropeisk kapitalmarked. Den sterke veksten i det norske obligasjonsmarkedet kan tjene som et eksempel i så måte. Det norske obligasjonsmarkedet har hatt en sterk vekst de siste årene, og etter vår vurdering kan det hevdes at denne norske "suksesshistorien" nettopp skyldes fraværet av tvingende felleseuropeiske standarder for slike utstedelser (utover minimumskrav knyttet til prospekt og notering mv). Den relativt enkle - men robuste – dokumentasjonen i det norske markedet og den effektive infrastrukturen (herunder meglere/rådgivere, verdipapirregister, markeds plass og tillitsmann) har skapt et unikt kapitalmarked av europeisk betydning. Innføring av felleseuropeiske normer kan fjerne grunnlaget for den regelverks- og markeds konkurranse som la grunnlaget for dette markedet, og bør unngås.

Når det gjelder øvrige forslag i EUs grønnbok, merker Advokatforeningen seg at et mulig tiltak for å øke bankenes utlåns kapasitet er å benytte verdipapirisering. I nylig vedtatt lov om

finansforetak er eksisterende norske regler om verdipapirisering ikke videreført. Vi foreslår at det ses hen til EU's initiativ når det gjelder fastsettelse av tidspunkt for opphevelse av eksisterende regelverk på dette området.

3. The Association has the following comments to the Prospectus Consultation Document

3.1 Introduction

In the opinion of the Association, the total obligations related to the EU prospectus regime imposed by Directive 2003/71/EC dated 4 November 2003 on prospectuses with subsequent amendments and related regulations (the "Prospectus Directive") placed on issuers in the Norwegian securities market are too comprehensive and should be modified.

Apart from EMTN programs, we have not experienced many pass-porting of equity prospectuses prepared in accordance with the Prospectus Directive (an "EEA Prospectus") from or into Norway/other EEA Member States (with few exceptions within Scandinavia). Most of the cross border offerings from Norway into other EEA Member States are carried out according to exemptions from the Prospectus Directive.

The Prospectus Directive was significantly modified by the Directive 2010/73/EU, the Commission Regulation (EU) No 486/2012 and Commission Regulation (EU) No 862/2012 (collectively the "Proportionate Regime"). The Proportionate Regime imposed lesser obligations on the issuers due to higher prospectus obligation thresholds as well as fewer content requirements for certain types of issuers and offerings. The Proportionate Regime was implemented in Norway as of 1 July 2012. To the knowledge of the Association, no cases have been identified where the Proportionate Regime has proved insufficient in order to safeguard interest of the investors on a general basis.

The Association therefore believes that it should be considered to extend the Proportionate Regime and develop modifications in other areas of the Prospectus Directive, in order to reduce the total burdens laid on the issuers. Some of the matters assumed most are discussed below.

3.2 Further expansion of the Proportionate Regime

The Association believes that the Proportionate Regime should be expanded further. Such expansion can be achieved by both reducing the thresholds for the availability of the Proportionate Regime as well as by reducing the prospectus content requirements. At least for issuers already listed on a regulated market, and consequently subject to ongoing disclosure obligations (both in accordance with the EU Directive on market abuse as well as rules and regulations of the regulated market in question), it should be further recognised that relevant and updated information about the issuers and their business are already disclosed to the market on an ongoing basis. Investors in secondary market transactions will not have the benefit of an EEA Prospectus. The Proportionate Regime already exempts issuers from certain of the prospectus content requirements. However, the Association believes that further information

currently required to be included in the prospectus should be deferred to the issuer's continuous disclosure and, consequently, removed from the Prospectus Directive content requirements.

3.3 Further expansion of the 10% share capital increase prospectus exemption

Currently, the Prospectus Directive requires that any capital increase in a share class listed on a regulated market is subject to the issue of a full-blown EEA Prospectus – as if the issuer was listed on the market for the first time (unless the issuer may make use of the Proportionate Regime). The difference of available information about an issuer not being listed on a regulated market, and an issuer subject to the market abuse disclosure regime of a regulated market, is material. The rationale for an EEA Prospectus for the two different circumstances is therefore highly different.

These prospectuses are not for the benefit of the investors participating in the capital increase, as the prospectuses shall be published prior to the new shares are listed and not for the marketing of the offering. It may take months from the time of marketing of the offering and to the listing of the new shares. Regardless of any listing prospectus, the secondary market transactions shall primarily be safeguarded by the issuers' ongoing disclosure requirements.

Listing prospectuses may especially impact issuers that are listed in several markets; inside and outside of the EEA. To the extent such issuers only raise capital in markets outside the EEA (and not in the EEA market at all), the issuer still has to prepare an EEA Prospectus. The reasons for requiring an EEA Prospectus in such circumstances seem less justifiable.

There is no specific proportionate regime for the content requirements for EEA Prospectuses related to share capital increases in listed securities. Hence, all such prospectuses shall be issued in accordance with regular EEA Prospectus content requirements.

The Association therefore believes that the 10% exemption should be expanded. Such expansion could be achieved by increasing the percentage thresholds of the share capital increase, the time since an EEA Prospectus was last announced (hence the need for an "overall" update of the issuer and a convenient document to access relevant information), as well as by reducing the content requirements for the listing prospectus in these cases. The Association assumes that a significant amount of the prospectus content requirements can be fulfilled through the issuers' ongoing disclosure requirements, and consequently be exempted from the prospectus requirements in these circumstances.

3.4 The EUR 100,000 per investor exemption

The Prospectus Directive includes an exemption from public offerings if the offer is made in allotments of EUR 100,000 or more per investor. This exemption was increased by the Proportionate Regime from EUR 50,000.

There is a longstanding practice in the Norwegian market to make benefit of this exemption. The

Norwegian market is recognised amongst others for its quite few (active) larger institutional domestic investors. Hence, the increase of the threshold for this exemption from EUR 50,000 to EUR 100,000 made a significant impact on the Norwegian market. The Association had not experienced the need for increasing this threshold under the Proportionate Regime, nor under the prevailing market conditions.

Norwegian securities legislation had, prior to the implementation of the Prospectus Directive, a similar exemption (or rather a prospectus requirement threshold) of EUR 40,000 per investor.

On the basis that the aim by the Proportionate Regime was to reduce the burdens on issuers, that no unfortunate cases has surfaced since the implementation of the Proportionate Regime, that no need for increasing the threshold was identified prior to the Proportionate Regime, the former Norwegian practice with an exemption of EUR 40,000 per investor, as well as the expressed aim to further reduce the burdens of the Prospectus Directive, it should be considered to reintroduce the monetary limit of EUR 50,000 per investor.

3.5 Incorporation by reference

Both the Transparency Directive and the Market Abuse Directive oblige issuers to disclose certain types of information to the public. To avoid duplication in the prospectus, it is the Association's view that all documents published in accordance with the regulations of a regulated market place which are required to be included in the prospectus, should be permitted to be incorporated by reference (irrespective of whether the information is approved or filed with the relevant authority), i.a. competent persons' reports and similar documents.

Documents which were already published/filed should still be subject to incorporation by reference in the prospectus, however it should be sufficient to only include a reference list in the prospectus. In the Association's view, there is no need for a substantial repetition of substance of these documents in the prospectus.

3.6 Supplement prospectus

The Association believes that issuers' obligation to inform the public as soon as possible of inside information should substitute the requirement in the Prospectus Directive to publish a supplement prospectus. However, the issuers should not be allowed to postpone publication of inside information in the period of an offer.

3.7 The EU passporting mechanism of prospectuses

The Association believes, based on experience, that the notification procedure set out in Article 18, between NCAs of home and host Member States could be simplified and limited to the issuer merely stipulating in which Member States the offer should be valid, without any involvement from NCAs. Under the current regime the NCA of the home Member State is required to give the notification to the host Member State within three days of receipt of the request for passporting from the issuer. The issuer is not allowed to start the offer period in the host Member State until

the NCA of the host Member State has received the notification. This has the unwanted effect that the issuer normally will have to postpone the start of the offering period with 3-4 days to allow for the same offering period in the home and the host member states.

Vennlig hilsen

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