**Liability for the prospectus – civil (non FSMA), criminal and liability of sponsors**

This element outlines the potential liability for the prospectus both civil (other than FSMA) and criminal, and also the potential liability of sponsors

**Civil liability – negligent misstatement**

Persons issuing a prospectus which contains a misstatement can be liable for negligent misstatement (a species of the tort of negligence) if a duty of care is owed to the reader, that duty is breached and the reader suffers loss as a result of the breach. Broadly, the duty exists where the issuer has a special skill or knowledge and knows or ought to know that the reader will rely for a particular purpose on that skill or knowledge. The remedy for negligent misstatement is a claim for damages for the claimant’s reasonably foreseeable loss.

If the prospectus specifically or implicitly contemplated rights being given to a subsequent purchaser, a cause of action may in theory be available to such a person.

**Civil liability – misrepresentation**

Any untrue statement of fact inducing someone to enter into a contract could form the basis of a claim for misrepresentation.

Rights of rescission may be available provided that the misrepresentation is material and as to fact, not opinion. Such rights are subject to the usual limitations on the remedy (e.g. s 2(2) Misrepresentation Act 1967 – a court may award damages in lieu of rescission, if it thinks it would be equitable to do so, having regard to the nature of the misrepresentation).

Damages may also be available. The wording of s. 2(1) Misrepresentation Act 1967 has been interpreted (in Royscot Trust v Rogerson (1991) QB 297) as meaning that damages for negligent misrepresentation are available on the same basis as for fraud. On this basis the claimant may recover all consequential loss flowing from the negligent misrepresentation with no requirement for foreseeability.

**Civil liability – breach of contract**

An investor may have a possible claim for loss of bargain ie for the value of what the securities would have been worth had the statement in the prospectus been correct.

**Civil liability – market manipulation**

The inclusion of false information in a prospectus could also constitute market manipulation under the provisions of UK MAR. Art 15 UK MAR makes it an offence to engage in or attempt to engage in market manipulation. Art 12(1) UK MAR then sets out activities which are deemed to constitute market manipulation for the purposes of UK MAR. These include the dissemination of information which is likely to secure the price of financial instruments at an abnormal or artificial level (Art 12(1)(c) UK MAR). Misleading information in a prospectus has the potential to secure an artificial price for the shares to which it relates, and so could constitute market manipulation under Art 12(1)(c) UK MAR.

Under s. 123(2) and (3) FSMA, the FCA may impose an unlimited fine or issue a public statement of censure in relation to a person who breaches UK MAR.

**Criminal Liability – Part 7 Financial Services Act ('FS Act')**

It is a criminal offence for any person to:

* make (recklessly or otherwise) a statement, promise or forecast which they know to be misleading, false or deceptive; or
* dishonestly conceal any material facts.

If they do so for the purpose of inducing (or are reckless as to whether it may induce) another person:

* to enter or offer to enter into (or to refrain from entering or offering to enter into) a relevant agreement; or
* to exercise, or refrain from exercising, any rights conferred by a relevant investment.

This could include statements in a prospectus.

The Part 7 offences extend to any conduct which creates a false or misleading impression as to the market in or price of any relevant investments.

The net of liability under Part 7 FS Act may be a wide one as, under s. 400 FSMA, if any directors or other 'controlling individuals' have consented or connived in commission of a Part 7 offence by the issuer, or such is attributable to their neglect, then they may also be liable to prosecution for that offence.

Note that recklessness does not require dishonest intent: a director could be reckless if they willfully shut their eyes to the fact that a statement was misleading or if they did not take the time to consider its accuracy.

**Criminal Liability – Fraud Act 2006**

The Fraud Act provides for a general offence of fraud which may be committed in three ways:

• Fraud by false representation;

• Fraud by failing to disclose information; and

• Fraud by abuse of position.

Section 1(3) sets out the penalties for the offence: these are imprisonment and/or a fine. The maximum custodial sentence is ten years.

Documents produced in the context of an IPO could potentially be caught by the provisions relating to false representation and failing to disclose information. This might be the case if the issuer knowingly included incorrect information in the prospectus or knowingly omitted relevant information from it. Directors may be liable for the fraud of the company if it is committed with their consent or connivance.

**Liability of the sponsor - Sponsor duties under the UKLRs**

UKLR 24 sets out in some detail the role and duties of a sponsor. Essentially, a sponsor must provide assurance to the FCA that the responsibilities of the applicant under the UKLRs have been met and guide the applicant in understanding and meeting its responsibilities under the UKLRs, under the transparency rules in the DTRs, and under the disclosure obligations in UK MAR (UKLR 24.2.1). In this context, the sponsor is subject to a duty to provide to the FCA any explanation or confirmation it reasonably requires for the purposes of ensuring that the UKLRs are being complied with by an applicant or a listed company (UKLR 24.2.2). The sponsor must also take all reasonable steps to ensure that any communication or information it provides to the FCA in carrying out the sponsor service is, to the best of its knowledge and belief, accurate and complete in all material respects and ensure that it provides the FCA with any information of which it becomes aware which materially affects the accuracy or completeness of previously provided information (UKLR 24.2.2).

A sponsor is the main point of contact with the FCA and the FCA expects to discuss all issues relating to a transaction and any draft or final documentation directly with the sponsor (UKLR 24.2.4). The sponsor remains responsible for complying with UKLR 24 even where the sponsor relies on the applicant or a third party when providing an assurance or confirmation to the FCA (UKLR 24.2.5).

The sponsor also has specific obligations to the FCA in relation to the application for admission of equity shares to the ESCC category. These obligations are set out in UKLR 24.3.2 (for a new applicant: i.e. an issuer which does not already have equity shares admitted) and UKLR 24.3.5 (for an applicant which already has equity shares admitted).

For example, for a new applicant under UKLR 24.3.2 the sponsor must be in a position to confirm that it '…has come to a reasonable opinion, after having made due and careful enquiry that:

(1) the applicant has satisfied all requirements of the listing rules relevant to an application for admission to admission;

(2) the applicant has satisfied all applicable requirements set out in the prospectus rules…..;

(3) the directors of the applicant have a reasonable basis on which to make any working capital statement to in UKLR 24.3.1R;

(4) the directors of the applicant have established procedures which enable the applicant to comply with the listing rules, the disclosure requirements and the transparency rules on an ongoing basis; and

(5) the directors of the applicant have established procedures which provide a reasonable basis for them to make proper judgements on an ongoing basis as to the financial position and prospects of the applicant and its group.

Under UKLR 24.3.3, the sponsor is required to submit to the FCA a standard document called the 'Sponsor's Declaration on an Application for Listing' on the day that the FCA is to consider the approval of the prospectus. This is the document in which the sponsor is required to give the confirmations referred to above.

**Liability of the sponsor - Section 88A FSMA - FCA right to punish breach of UKLRs**

Under s.88A FSMA, the FCA may take enforcement action against a sponsor which breaches certain UKLRs imposing requirements in relation to the provision of sponsor services or contravenes any of the restrictions attaching to its FCA approval as a sponsor. In such circumstances, the FCA is entitled, pursuant to s.88A(2), to take the following action:

* impose a financial penalty on the sponsor;
* suspend the sponsor's approval to act as a sponsor for a period of up to 12 months;
* impose limitations or restrictions on the sponsor's approval to act as a sponsor for a period of up to 12 months; and/or
* publish a statement of censure in relation to the sponsor.

**Liability of the sponsor – Section 88E FSMA – broader FCA power to punish sponsors**

In addition to its specific powers under s.88A FSMA, the FCA has a broader power under s.88E FSMA to suspend a sponsor's approval as sponsor or impose restrictions on such approval if it considers this desirable in the context of the FCA's operational objectives (which include protecting and enhancing the integrity of the UK financial system).

**Liability of the sponsor – Section 88 FSMA – cancellation of approval as sponsor**

The FCA can also effectively stop a sponsor practising by cancelling its approval as a sponsor under s.88 (4) FSMA.

**Summary**

**Liability for the prospectus – civil (non FSMA), criminal and liability of sponsors summary**

* Persons issuing a prospectus which contains a misstatement can be liable for negligent misstatement (a species of negligence).
* Any untrue statement of fact inducing someone to enter into a contract could form the basis of a claim for misrepresentation.
* An investor could also have a claim for breach of contract.
* False information in a prospectus could also breach statutory provisions relating to market manipulation.
* In addition to these civil liabilities, the inclusion of information in a prospectus known to be false / misleading can give rise to criminal penalties and/or amount to criminal fraud.
* Sponsors also face potential liability.