Hogan Lovells

Global Accountants' Liability Update

October 2021

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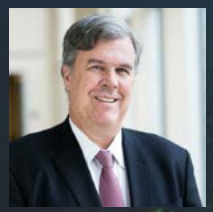
Our global team of securities and professional liability lawyers at Hogan Lovells is uniquely positioned to monitor legal developments across the globe that impact accountants' liability risk. We have experienced lawyers on five continents ready to meet the complex needs of today's largest accounting firms as they navigate the extensive rules, regulations, and case law that shape their profession. We recently identified developments of interest in The Netherlands, the United States, Hong Kong, Italy, and Spain which are summarized in the pages that follow.



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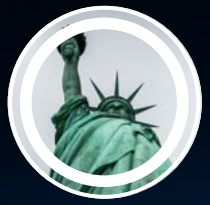

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Recent Court Decisions

The evaporation of deductible losses: Accountant's professional error, but client also to blame

Introduction and facts

A company that specialized in the design and production of optical instruments (hereafter: the Company) hired an accounting firm and a tax consultancy firm (hereinafter: the Accountants) to prepare its annual accounts between 2010 and 2016 and tax returns between 2010 and 2017. In doing so, the Accountants advised the Company to exercise the right of option to set-off losses (*keuzerecht verliesverrekening*) (hereinafter: the Right of Option).

The Right of Option was introduced in 2010 and provides that the loss carry-back (*achterwaartse verliesverrekening*) can be extended by two years, with a maximum of three years. In exchange the loss carry-forward (*voorwaartse verliesverrekening*) is reduced by three years (from nine to six years).

In the annual accounts for 2010 to 2016 and the tax returns for 2010 to 2017, the Accountants incorrectly assumed that a loss carry-forward of nine years was still possible even with the extended loss carry-back. In 2017, the Tax Authorities imposed a final corporate income tax assessment for 2015 on the Company. This assessment showed that the tax authorities were of the opinion that the remaining deductible losses from 2009 had already evaporated as of 1 January 2016. The Accountants unsuccessfully objected to this assessment.

The claim and decision of the court

The Company claimed the Accountants are (jointly and severally) liable for the damage suffered by the Company. According to the Company, the Accountants failed to comply with their obligations arising from the agreement entered into with the Company, or they breached their duty of care towards the Company.

Specifically, the Company asserted that the evaporation of the deductible losses could have been prevented if the Accountants had warned the Company in time for it to set up a sale and leaseback transaction to prevent the evaporation of the deductible losses. The Accountants countered that the Company would not have been able to set up a sale and leaseback transaction quickly enough to avoid all damages.

Not in dispute between the parties is the fact that the Accountants consistently used an incorrect loss carry-forward period of nine years. The court ruled that the Accountants did not act as a reasonably competent and reasonably acting

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professional and thus did not exercise the care of a good contractor. By virtue of these failures, the Accountants have imputably failed towards the Company to comply with the letter of engagement between the parties.

Although the court ruled that the Accountants had failed to fulfill their obligations, the court is of the opinion that the Company is also to blame. The Company should not have (blindly) relied on the Accountants, but in this case also had its own duty to pay attention and to investigate. The Company knew that in view of its difficult financial and economic situation, a different arrangement with regard to the loss set-off would be applied for the first time as of 2009. In view of this, the Company was expected to have carefully checked the first subsequent annual accounts (and to some extent the successive annual accounts) for the correct application of the Right of Option. The Right of Option is not a difficult deductible item that can only be understood by those with in-depth tax knowledge, after consulting detailed accounting documents. A large professional company such as the Company is expected to have the knowledge required to assess the application of The Right of Option, or at least to ask questions of the Accountants if it had the impression that the Right of Option had not been correctly incorporated into the annual accounts. After all, this is the kind of information on which strategic choices must be based; the necessary knowledge and skills - also of non-tax specialists - may be expected in a board of a large company.

Against this background the court ruled that the Company should not have blindly trusted the Accountants. In light of the foregoing, the court attributed half of the damage suffered to the Company.

Next steps

In order to establish the causal link between the error and the alleged damage and the amount of damages suffered, an expert opinion is ordered. An expert may now consider, among other things, whether it is likely (if possible, expressed as a percentage) that the Company could have set up a transaction in 2015 to prevent or limit the evaporation of losses as of 2016 and what benefits this would have brought the Company.

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Deloitte settles data breach class action for $4.95 million

Plaintiffs, who were residents of Illinois, Colorado, and Ohio, alleged that their personal information located on state employment agency websites was left vulnerable after the sites were hacked. The class, which was comprised of more than 237,000 individuals, specifically claimed that Deloitte did not use reasonable data security measures while designing and maintaining states' employment agency websites where people could apply for benefits from the Pandemic Unemployment Assistance Program.

The **settlement** created a $4.95 million non-revisionary settlement fund meant to compensate plaintiffs, pay attorneys' fees (1/3 of the total fund), and cover service awards for the class representatives.

Claimants will receive $20 per hour for all the time they spent dealing with the data breach, as long as they are able to adequately demonstrate that the time in question was spent doing activities related to the breach.

The court **preliminarily approved** the settlement that the parties proposed, though the judge did strike language imposing additional objection requirements on settlement class members who were represented by counsel seeking fees from non-settlement class members. The court found that such a requirement could act as a deterrent for certain class members who wanted to make an objection in good faith.

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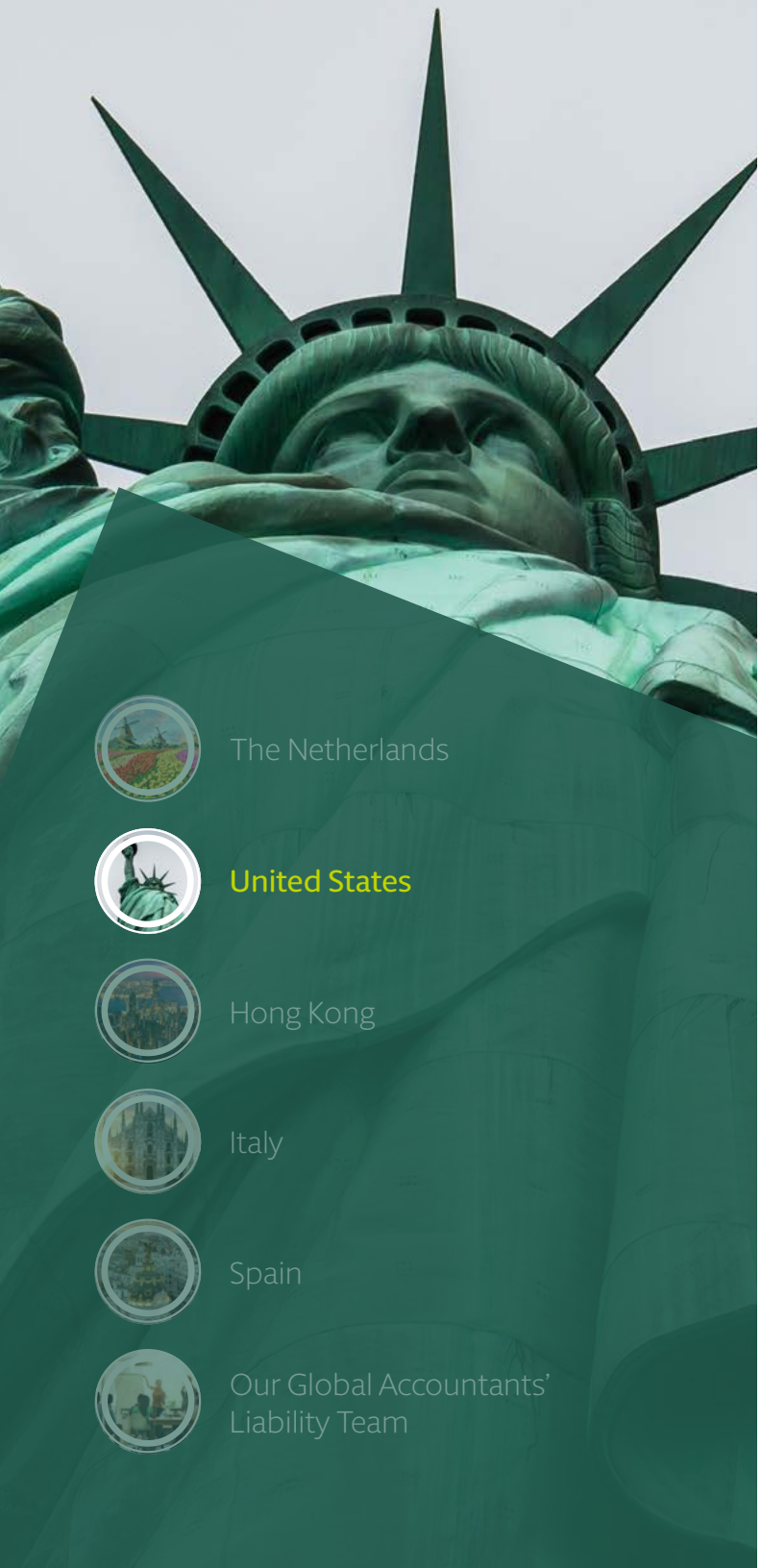

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Recent Regulatory and Enforcement Decisions

PCAOB adopts framework to determine whether it is unable to inspect foreign auditors

The PCAOB **took the first step toward** implementing the Holding Foreign Companies Accountable Act (HFCAA) by adopting PCAOB Rule 6100 on September 22, 2021. The rule creates a framework for the PCAOB to determine whether it is unable to inspect or completely investigate registered public accounting firms located in foreign jurisdictions where authorities deny or limit PCAOB access to conduct oversight activities. That determination is the first step in a process that could result in the issuers who have retained those foreign accounting firms getting delisted from U.S. exchanges. This rule will primarily impact companies in Hong Kong and China, where the Chinese government has long resisted inspections of audits.

Rule 6100 requires the PCAOB to make annual determinations as to whether, based on a position taken by one or more authorities in a foreign jurisdiction, it is unable to inspect or completely investigate registered public accounting firms that are headquartered in that jurisdiction or that have offices in that jurisdiction. In making these determinations, the Board will assess whether the foreign authority's position will impair (1) its ability to select engagements, audit areas, and potential violations to review or investigate, (2) its timely access to work papers and other relevant documents as well as relevant personnel as part of an inspection or investigation, and (3) its ability to conduct inspections and investigations consistent with its statutory mandate and applicable rules. The PCAOB is not required to attempt an investigation and get stymied in order to make this determination—it can rely on its past experience.

After the PCAOB makes its determination, it will issue a report to the Securities and Exchange Commission (SEC). If, for three consecutive years, the PCAOB determines that it cannot inspect or investigate a specific accounting firm, or all accounting firms in a specific jurisdiction, the SEC will delist the issuers using those accounting firms from U.S. exchanges. Rule 6100 will go into effect upon approval by the SEC, and then the three-year clock will start ticking for the approximately 270 Chinese companies currently trading in U.S. capital markets.

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PCAOB sanctions Deloitte Canada for quality control failures

The PCAOB announced **a settled disciplinary order that imposed sanctions on Deloitte Canada** after finding that the firm did not comply with PCAOB's audit documentation standards in connection with audits and reviews. Specifically, Deloitte Canada did not implement a quality control system that was able to provide reasonable assurance that its employees appropriately dated their preparation and review of audit documents.

As a result of Deloitte Canada's failures, the PCAOB: (1) levied a censure; (2) issued a $250,000 fine; (3) required the firm to revise its quality control policies and procedures to ensure similar problems would not happen again; and (4) required the firm to provide four hours of training to all relevant employees.

The PCAOB requires auditors to properly document when workpapers were created and reviewed. In November of 2016, Deloitte Canada removed a feature from its internal electronic work paper system that allowed users to manually select preparer and reviewer sign off dates of work product. In the new system, the current date would be automatically added whenever a preparer or reviewer signed off on a document. This caused issues because employees could override the system by changing the date in their computer, which would allow them to backdate their workpaper preparation or review without oversight. The firm knew about this loophole at the time but neglected to implement any controls measures (through trainings, written policies, etc.) to address the problem.

Firm employees backdated workpaper production or review dates in at least six issuer audits and two quarterly reviews. Furthermore, some auditors replaced sign off dates to ensure that reviews were shown to have occurred after the document was actually created.

The PCAOB made clear that Deloitte Canada's extraordinary cooperation while responding to the violations was a significant factor in the Board's decision to issue certain sanctions. Had Deloitte Canada handled the situation differently, the PCAOB would likely have levied a higher monetary penalty and issued more severe punishments. First, Deloitte Canada was extremely cooperative during the entire process. The firm self-reported the violation within 15 days of learning about the transgression, conducted its own internal investigation, and remained in close contact with the PCAOB throughout the process. Second, Deloitte Canada took steps to remediate the issue quickly by retaining an expert consultant and retraining employees. Third and finally, the firm disciplined personnel identified as involved in the misconduct.

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PCAOB sanctions KPMG Australia for quality control failures related to testing

The Public Company Accounting Oversight Board (PCAOB) issued **a settled disciplinary order** imposing sanctions against KPMG Australia for findings that KPMG Australia violated PCAOB rules and quality control standards in connection with the firm's internal training tests. The PCAOB censured the firm, imposed a $450,000 civil money penalty, and required the firm to take remedial measures. In its order, the PCAOB noted the firm's extraordinary cooperation in the matter.

The PCAOB order stated that KPMG Australia violated PCAOB rules and quality control standards from 2016 to early 2020 by failing to establish proper policies and procedures for administering and monitoring training testing. The PCAOB noted that this failure resulted in the firm's failure to identify personnel who were involved in improper answer sharing (either by providing or receiving answers) in connection with the firm's mandatory testing. The firm's mandatory testing included topics of professional independence, auditing, and accounting.

The PCAOB stated that KPMG Australia's violations included PCAOB Rule 3400T, and Quality Control Standards §§ 20.01, 20.08 20.09, 20.13 (.b-.c), 20.20 (.c-.d), 30.02 (.c-.d), and 40.02 (.b-.c). These rules include requirements that a firm "[has] a system of quality control for its accounting and auditing practices" that provides the firm with reasonable assurance that personnel "perform all professional responsibilities with integrity" and "provide the firm with reasonable assurance that . . . [w]ork is assigned to personnel having the degree of technical training and proficiency required in the circumstances."

Importantly, the PCAOB cited the firm's extraordinary cooperation in this matter. After becoming aware of testing-related misconduct in early 2020, the firm voluntarily self-reported the matter to the PCAOB within 15 days and quickly began implementing remedial policies and procedures. The firm also provided substantial assistance to the PCAOB's investigation by conducting a thorough investigation and providing the results to the PCAOB. The firm also instituted remedial measures. Finally, the firm took disciplinary action against 1,131 personnel engaged in misconduct.

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Recent Regulatory and Enforcement Decisions

FRC completes investigation on material misstatement by an auditor of a listed entity

On 12 August 2021, Hong Kong's Financial Reporting Council (FRC) adopted a report on an audit investigation based, in part, on a review of various audit working papers having been obtained under a memorandum of understanding with the People's Republic of China (PRC) signed in 2019. The investigation concerned an auditor's failure to identify a material misstatement during an audit of a client's financial statements.

The memorandum was signed in May 2019 between the FRC and the Supervision and Evaluation Bureau (SEB) of the PRC Ministry of Finance with the aim of facilitating cross-border cooperation and collaboration in respect of audit regulation. The objective of the memorandum is to enhance the quality and reliability of listed entities' audits, protect the interests of investors and the public, and strengthen both investors' confidence and public trust in financial reporting.

Under the memorandum, the FRC can make requests to the SEB for assistance in audit regulatory responsibilities in relation to inspection, investigation and discipline, such as gaining access to audit working papers of Hong Kong listed entities kept by accounting firms in the mainland. It had previously proved difficult for foreign regulators to obtain audit working papers located in the mainland as mainland authorities consider audit papers to be "state secrets."

Under Hong Kong Accounting Standard 39 (HKAS 39), an entity is required to recognize an impairment loss on available-for-sale equity investments if there is objective evidence of impairment. In this case, concerning an "available-for-sale" equity investment of a listed entity, the fair value of the investment declined by more than half over a twelve-month period. Such a significant and prolonged decline in fair value was objective evidence of impairment (impairment loss) under HKAS 39 but the entity failed to record it in its 2017 financial statements, which constituted a material misstatement.

The entity's auditor failed to identify the material misstatement and was found to have issued an inappropriate audit opinion. The auditor failed to properly apply the applicable financial reporting standard in evaluating the entity's accounting treatment of the impairment assessment of the investment, and to exercise appropriate professional judgment in evaluating what constituted an impairment loss under HKAS 39.


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The engagement quality control reviewer also failed to identify the material misstatement. Both the engagement partner and engagement quality control reviewer were found to have failed or neglected to observe, maintain or otherwise apply professional competence and due care as set out in the Code of Ethics for Professional Accountants.

All in all, it is clear that the powers of the FRC as an independent regulatory body continue to grow, despite a limited budget and concerns that it may not have enough teeth to exercise effective oversight. This year, the FRC also signed memoranda of understanding on regulatory cooperation with other regulatory authorities, including the Securities and Futures Commission (SFC) in February 2021, the Stock Exchange of Hong Kong in June 2021, and the Independent Commission Against Corruption in September 2021.

Auditors should look out for further reforms of the regulatory regime for the accounting profession in the near future, including the Financial Reporting Council (Amendment) Bill 2021 which seeks to develop the FRC into a fully-fledged independent regulatory and oversight body for the accounting profession.

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Recent Regulatory and Enforcement Decisions

New voluntary procedure for companies under financial distress and postponement of the entry into force of the new bankruptcy law

Law Decree no. 118 of 24 August 2021 (Law Decree no. 118/2021 – full text in Italian available **here**) introduced a new voluntary procedure to address situations of financial distress affecting undertakings operating in Italy. Under the procedure, an independent expert is appointed to assist the company in the preparation of a negotiation scheme with the creditors. Access to the new procedure will be available starting from 15 November 2021 through the local Chambers of Commerce.

In order to facilitate access to the procedure, Article 15 of Law Decree no. 118/2021 binds statutory auditors to promptly inform the company's directors if the company meets the preconditions to apply for this voluntary scheme. The failure to fulfil such informative duties may trigger their liability under Article 2407 of the Italian civil code, *i.e.* the provision governing general duties and responsibilities of statutory auditors under Italian law.

As provided under Article 4(2), the independent expert may also appoint an external auditor to provide assistance in the negotiation procedure.

Both the statutory auditors and the company's external auditors (if any) are required to cooperate with the independent expert and provide all required information.

Finally, Law Decree no. 118/2021 also postponed the entry into force of the new bankruptcy law to May 2022.

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Procedure for the adoption of administrative sanctions by the Ministry of Economy and Finance

With Decree no. 135 of 8 July 2021 (Decree full text in Italian available here), the Ministry of Economy and Finance (MEF) established the rules governing the procedure for the adoption of administrative sanctions in the event of breach of the duties under Article 25 of Legislative Decree no. 39 of 27 January 2010 (full text in Italian available here), applicable to auditors and auditing firms. The Decree was published in the Italian Official Journal no. 237 of 4 October 2021 and will enter into force on 19 October 2021.

In particular, administrative sanctions may be applied by the MEF in case of:

i. failure to comply with the obligation to periodically attend training courses;

ii. failure to communicate certain items to be included in the Auditors Register pursuant to Article 7 of Legislative Decree no. 39/2010, as well as data pertaining to the identification of the auditor/auditing firm and their assignments;

iii. false declarations in trainees' annual reports by their supervisors;

iv. breach of the duties of professional ethics, independence and objectivity, and auditing standards;

v. failure, incompleteness, or delay in taking the actions indicated in the report issued following a quality control pursuant to Article 20 of Legislative Decree no. 39/2010;

vi. lack of the requirements provided for under Article 14 of Legislative Decree no. 39/2010 in the audit report and in the opinions to the financial statements;

vii. lack of or inadequate adoption of an internal reporting systems.

Once the MEF has collected the elements required to assess the existence of the breach, an internal commission (Commissione Centrale per i Revisori Legali) triggers the sanctioning procedure and submits to the auditor/auditing firm a letter with the description of the alleged breach(es), and of the estimated timing for the completion of procedure. The letter shall be sent as soon as the commission is informed of the alleged breach, and in any case within 180 days therefrom (or 360 days, if the party concerned resides or is based abroad).

The auditor/auditing firm have 30 days from the receipt of the letter to provide their written observations to the charges and to ask to be heard in person.

Once the observations are acquired, the commission submits - within 120 days from the receipt of the letter by the auditor/ auditing firm - a non-binding proposal to the MEF, where it reports the reasons underlying the proposed sanction and the type and extent of the latter or, in the alternative, proposes to dismiss the proceedings. The MEF - which is not bound by the opinion of the commission – may

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then apply sanctions by means of motivated administrative order.

Possible sanctions include both monetary and non-monetary measures, as defined under Article 24 of Legislative Decree no. 39/2010. In the event that the addressees do not comply with the sanctions, the MEF orders their cancellation from the Auditors Register. Decisions can be appealed before Civil Courts within 30 days from their communication.

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New regulation increases auditors' obligation to guarantee liability judgments

The financial guarantee in Spain

Statutory auditors and audit firms are liable for any damages arising from the breach of their duties under the general rules of the Spanish Civil Code and more specifically **Article 26 of Law 22/2015 of 20 July 2015 on Account Auditing** (Audit Act).

This liability must be:

1) proportional to the economic damage that may be caused by their professional performance both to the audited entity and to a third party;

2) personally and individually enforceable, excluding the damage caused by the audited entity itself or by third parties; and

3) joint and several between the statutory auditor who has signed the audit report and the audit firm when the audit is carried out by a statutory auditor on behalf of an audit firm.

Pursuant to Article 27 of the Audit Law, when such liability is declared, auditors and audit firms are due to provide a financial guarantee in the form of a cash deposit, public debt securities, financial institution guarantee or civil liability insurance policies.

The specific requirements for such guarantees are established by **Article 65 of Royal Decree 2/2021, of 12 January**, approving the Regulations implementing Law 22/2015, of 20 July, on Account Auditing (Regulation), which, came into force on 1 July 2021, introducing numerous new provisions.

The new provisions of the Regulation increases the minimum amounts of the financial guarantee. While the previous Regulation established that in the case of natural persons, the guarantee for the first year of activity was EUR 300,000, the new Regulation raises this figure up to EUR 500,000. This amount shall be the minimum amount for subsequent years.

As for audit firms, this amount for the first year of activity is multiplied by each of the partners – whether or not they are auditors – and by each of the non-partners auditors appointed to sign audit reports on behalf of the firm. This amount shall be the minimum amount for subsequent years.

The new Regulation also provides for surety insurance in addition to the liability insurance already set out in the previous Regulation.

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What's driving this change?

Some experts believe this striking increase in the guarantee threshold is a response to recent high-profile criminal indictment of auditors, seeking millions in civil liability.

Specifically, in an 6 October 2020 judgment in the Pescanova case, BDO, one of the leading auditing firms in Spain, was convicted of "*a crime of misrepresentation of economic and financial information*" in regard to Spanish fishing company which went into receivership in 2013 after the scandal about its accounting irregularities broke out. This judgment set a historic milestone since it was the first time an auditing firm and the partner who signed the accounts were convicted in Spain.

Very recently another Spanish criminal court in a high-profile case (Abengoa), extended the investigation to include the auditing firm, Deloitte.

These recent cases underscore the risk that audit firms may face millions in damages if they fail to detect accounting fraud.

Therefore, the increase in the amount of the financial guarantees required by the new Regulation appears to be an effort to ensure that investors can be compensated by making the liability system more secure.

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