

Corporate M&A

New Prospectus Regulations

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Ireland implemented Directive 2010/73/EU (the Amending Directive) on 1st July 2012 by the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012. The changes made by the Amending Directive have generally been welcomed by market participants and are viewed as assisting the ability of issuers to offer and admit securities to trading in the EU. We set out below a summary of the key changes

The EU Prospectus law regime provides for a single regime throughout the EU governing the content, format, approval and publication of prospectuses. A key element of the Prospectus Directive (2003/71/EC) is a requirement for a prospectus to be published where either an offer of securities is made to the public or securities are admitted to trading on a regulated market and it also introduced an EU-wide definition of "offer to the public".

The Prospectus Directive has been amended by Directive 2010/73/EU (the "Amending Directive") and the Amending Directive also makes consequential amendments to Directive 2004/109/EC (the "Transparency Directive"). Ireland implemented the Amending Directive on 1st July 2012 by the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012 (the "Prospectus Regulations 2012").

On the whole, the changes made by the Amending Directive (as implemented by the Prospectus Regulations 2012) are welcomed by market participants and are viewed as assisting the ability of issuers to offer and admit securities to trading in the EU. We set out below a summary of the key changes.

Key Changes

Summary in Prospectus

The rules applicable to a prospectus summary are now more detailed in format and content; the summary must be drawn up in a common format to facilitate comparability of summaries for similar securities and must contain "key information" relating to the issuer and the securities to aid investors when considering whether to invest.

Minimum Denominations

Issuers of debt securities with minimum denominations of €50,000 (or equivalent in other currency) could previously issue their securities to the public without the requirement to publish a prospectus; the Prospectus Regulations 2012 amends this exemption by doubling the minimum denomination to €100,000 (or equivalent in other currency). The Prospectus Regulations 2012 also amends the minimum wholesale denominations to €100,000 for the purpose of the relevant provisions of the Transparency Directive (under the Transparency Directive, issuers of wholesale debt securities admitted to trading on an EU regulated market are exempt from the requirement to publish annual and half yearly reports).

Supplements and Withdrawal rights

Issuers are required to publish a supplement if a significant new factor, material mistake or inaccuracy with respect to the information in the prospectus arises which is capable of affecting the assessment of the securities. The Prospectus Regulations 2012 clarifies that this obligation will end on the later of the close of the offer or when trading on the regulated market begins (this removes any uncertainty and accords with the generally accepted current interpretation of this obligation).

Investors who already have agreed to purchase securities are entitled to withdraw acceptances within a specified time period and to achieve greater harmonisation; this is now set at two working days (currently Member States can set a period longer than two working days). There is also a new requirement for the supplement to state the final date of the right of withdrawal.

Additional amendments include the following:

- 100 person exemption: the exemption allowing offers to fewer than 100 non-qualified investors per Member State has been increased to fewer than 150 non-qualified investors per Member State.
- Thresholds for exempt offers: Offers with a total consideration of less than €5 million will be exempt (formerly €2.5 million) and non-equity securities issued in a continuous or repeated manner where the total consideration is less than €75 million will be exempt (formerly €50million).
- Definition of "qualified investor": this definition has been amended to align it with that of professional clients contained in Directive 2004/39/EC on markets in financial instruments (MiFID).
- Abolition of annual information update: the obligation to file a document on an annual basis containing information published or made available to the public in the preceding 12 months has been abolished.
- Final terms: the matter of how much disclosure can be contained in the Final Terms has now been clarified by providing that Final Terms should only contain information which is specific to the issuance (eg. issue price, maturity date, coupon) and should not include information to supplement the base prospectus. Consequentially any material updates to the prospectus, such as business development updates or additional risk factors, must now be included in a supplement.
- Government guarantee schemes: A prospectus where the securities are government guaranteed may omit information about the guarantor on the basis that Member States produce "abundant" publicly available information.

It is worth noting that the exemptions to the prohibition on a private company from offering its shares or debentures to the public, (as contained in section 33 of the Companies Act 1963, as amended by section 7 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006) have not been amended to take account of the Prospectus Regulations 2012, to include the increase in exempt persons, increase in thresholds and wholesale amounts, as outlined above. Consequently for the immediate term the exemptions for a private company as aforesaid will not exactly align with the relevant exemptions for the Prospectus Regulations requirements,

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