WHITE & CASE

Insight: Debt Capital Markets

June 2012

What does the amended Prospectus Directive regime mean for issuers of standalone wholesale debt?

The European institutions have finally completed their review of the Prospectus Directive[1] regime and have published what are likely to be the final changes market participants will need to comply with from 1 July 2012[2]. MTN and structured note programme issuers (especially those who target retail investors) will bear the brunt of the main controversial and market practice-changing amendments. They are likely to face a somewhat painful process when updating their programme documentation in accordance with the new rules on the contents of Final Terms and summaries at their next update anniversary as the market and the EU's regulators get to grips with the altered landscape. For standalone bond issuers targeting sophisticated investors with their securities, however, the impact will be less significant and this note outlines what those issuers seeking to have prospectuses approved after 1 July 2012 should look out for.

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Supplements

Let's start with some good news. If an issuer does not target "the public" with its bond issue, investors who have accepted the offer of securities will no longer have the right to withdraw their acceptance if the issuer publishes a supplement between approval of the prospectus and the *later* of closing and trading commencing. The two day (maximum) "cooling off" period will now only be applicable to "public offer" transactions. This will mean a change in the wording of subscription agreements to ensure the obligation on the issuer to supplement its prospectus is amended to reflect the new timing requirement and to remove any reference to withdrawal rights. Although not encountered much in practice, the spectre of investors withdrawing from a book after a supplement was always a worry for managers so this change is welcome in removing that risk for wholesale issues.

Website publication of prospectus

In an effort to move the securities markets into a digital age, the new rules mandate that, if an issuer has chosen to publish its prospectus in hard copy form (or (less likely) in a newspaper) it must also display the approved prospectus on its website. This may require issuers to consider building "click through" protection on their website to filter who can see the prospectus (e.g., EEA "qualified investors" only?) and/or perhaps to look at amending the warning legends on the front page of the PDF prospectus to make it clear that the publication on the website is not a vehicle for investors to participate in the offer.

1 The Prospectus Directive regime comprises Directive 2003/71/EC as amended by the amending Directive 2010/73/EU and the Prospectus Directive Regulation EC No. 809/2004 amended by the first Delegated Regulation EU No. 486/2012 and the second amending Regulation which is currently still in draft pending adoption.

2 The second amending Delegated Regulation is technically still in draft form but substantive changes are not expected on adoption by the European Parliament which is expected any day now.

Exemptions from the obligation to publish a prospectus

There have been a few changes to the exemptions from the obligation to publish a prospectus, none of which will surprise experienced issuers or their advisers as the market has already put several of these into practice ahead of the 1 July 2012 implementation deadline.

Denomination threshold between retail and wholesale up from EUR50,000 to EUR100,000

The market has already largely moved to use the EUR100,000 bond denominations in practice (due to the grandfathering provisions relating to the Transparency Directive changes which were published in December 2010). The change may be slightly annoying for banks who buy blocks of securities in order to on-sell them to multiple accounts as it gives them less flexibility to spread their holding over those accounts but there has not been huge market backlash about the change in practice.

Qualified investor definition aligned with MiFID

The definition of who is a "qualified investor" will be changed to align it with the categorisations of "eligible counterparty" and "professional client" in the Markets in Financial Instruments Directive[3] so as to make it easier for managers of securities issues to know which of their customer contacts may be targeted with wholesale securities offerings. However, the MiFID definition now tracked in the Prospectus Directive includes an ability for an investor to "opt up" or "opt down" between the various customer categories which could prove tricky to manage in practice if an investor changes its status during an offer period or if an investor has chosen a different status *vis à vis* different managers on the same deal. It is unlikely to be a common problem in practice but syndicate desks will need to be alive to this issue in the early months of implementation of the new rules to ensure the QI exemption is complied with.

Private placement exemption – 150 persons per EEA member state, up from 100

This private placement exemption is rarely used in primary market issuance due to the practical concerns which tend to arise when multiple managers are making offers on a transaction as parties want to "count" investors through the gate to make certain that the threshold is not breached and the exemption lost. However, it is often helpful in liability management exercises where securities have found their way into the hands of non- "qualified investors" in the secondary market and an exchange offer needs to be undertaken. Being able to target 150 natural persons per Member State rather than 100 may assist in these exercises at the margins.

"Overview" section in prospectus

If an issuer wants to include a section in the prospectus giving a "summary" of the deal (often called the "in the box" section), it should not call this a "summary" so as not to attract the additional liability and detailed content rules which will apply to retail issue summaries. This is not a change of practice but an official codification of what market participants already did so should not cause any waves in practice.

SME issuers or those with reduced market capitalisation

So-called "proportionate" disclosure regimes have been established for issuers who fall within the definition of an SME[4] or which have "reduced market capitalisation"[5] . This means that, if such an issuer chooses to use the optional regime it may include in its bond prospectus only one year of historical financial information (not the usual two years). One may query whether this regime will be used much in practice as investors are likely to want more than simply a year's snapshot on a company's financial health and, obviously, if the transaction is being sold into the United States pursuant to Rule 144A, investors will demand significantly more financial information than just one year's historical numbers.

EEA Sovereign issuers/guarantors

EEA sovereign issuers are exempt from the obligation to produce a Prospectus Directive compliant prospectus. The amendments now also exempt EEA state guarantors from providing disclosure about themselves in circumstances where the Member State's guarantee is not "unconditional and irrevocable" and the securities benefitting from such guarantee would otherwise be within the scope of the Directive.

Any issuer, including an EEA sovereign, who is exempt from the obligation to produce a prospectus must now include a sentence in any advertisement they issue regarding their offer of securities (e.g., in screen announcements, etc.) stating that no prospectus is required to be prepared.

3 2004/39/EC

4 "SME" means entities which, at their last annual accounts meet two of these three criteria: less than 250 employees, total balance sheet not exceeding EUR43,000,000 and annual net turnover not exceeding EUR50,000,000 (Art 2(1)(f) PD).

5 "reduced market capitalisation" means a company listed on a regulated market with average market capitalisation of less than EUR100,000,000 on the basis of end-year quotes during the last three calendar years (Art 2(1)(t) PD).

Process points

If an EU competent authority in a commonly used listing venue is currently in the process of vetting a new bond issue you are involved in, it is possible that you have experienced some delay in getting comments from your reader as they may have prioritised approval of MTN programme updates for issuers scrambling to update their documentation ahead of the 1 July 2012 deadline to preserve grandfathering under the old, less restrictive, PD regime. If you have already submitted checklists relating to the pre-1 July 2012 regime for a deal for which approval is sought after 1 July 2012, it is possible that the relevant competent authority may ask you to resubmit such checklist to reflect the format and layout of their updated checklists. For example, the UKLA has now published its new forms of checklist which are available here.

As outlined at the head of this note, the changes relating to structured note programmes (especially those with a retail component) are more far-reaching and will add time and pain to programme updates for the coming months but standalone wholesale debt issuers have come off remarkably well from the reforms in terms of unhelpful disruption to current market practices.

Jochen Artzinger-Bolten
Partner, Frankfurt
+ 49 69 29994 1201
jartzinger-bolten@whitecase.com

John Donovan
Partner and Head of Americas Capital Markets, New York
+ 1 212 819 8530
jdonovan@whitecase.com

Kvetoslav Krejci
Partner and Head of CEE Capital Markets, Prague
+ 420 2 55771 214
kkrejci@whitecase.com

Rob Mathews
Partner and Head of WEMEA Banking & Capital Markets, London
+ 44 20 7532 1429
rmathews@whitecase.com

Stuart Matty
Partner and Global Head of Capital Markets, London
+ 44 20 7532 1430
smatty@whitecase.com

Kaya Proudian
Partner, Singapore
+ 65 6347 1308
kproudian@whitecase.com

Anna-Marie Slot
Partner, Hong Kong
+ 852 2822 8752
aslot@whitecase.com

Jennifer Tellyn
Professional Support Counsel, London
+ 44 20 7532 1484
jtellyn@whitecase.com