

LEGAL ALERT

**NEW RULING BY THE EUROPEAN COURT OF JUSTICE IN RELATION
TO THE PROSPECTUS REGULATION AND PROSPECTUS DIRECTIVE**

16 JULY 2014

I. INTRODUCTION

Following a request for a preliminary ruling from the Handelsgericht Wien concerning the interpretation of certain articles of the Prospectus Regulation¹ and the Prospectus Directive² on the rules of disclosure of information to be included in a base prospectus and its related final terms, the European Court of Justice issued its judgment in the case of *Timmel v Aviso Zeta AG* (Case C-359/12) on May 15, 2014. Although the ruling is not a landmark decision on the interpretation of the Prospectus Regulation and the Prospectus Directive, in particular as the Court had to assess the rules applicable before the amendments of the Directive 2010/73/EU were put in place, it is still instructive on how and where prospectus related information must be published and heralds a change of the publication policies of some stock exchanges.

II. BACKGROUND

By way of brief background to the case, Mr. Timmel, resident in Vienna, acquired from the intermediary Aviso Zeta AG, Vienna, 40,000 units of the security "Dragon FX Garant" with a denomination per unit of less than EUR 50,000 issued by Lehman Brothers Treasury Co. BV having a registered seat in Amsterdam in October 2006. The base prospectus and its supplements were approved by the Irish Financial Services Regulatory Authority in August/September 2006 and the securities were admitted to trading, amongst others, on the markets of the Frankfurt Stock Exchange and the Luxembourg Stock Exchange (the "LSE"). Mr. Timmel subsequently wished to withdraw from the subscription arguing that the information in relation to the offer had not been lawfully published. Mr Timmel claimed, for example, that certain information which was required to be published was omitted from the base prospectus and also not included in a supplement, but inserted only in the final terms, which do not require approval by the competent regulatory authority. The Handelsgericht Wien subsequently sought guidance from the European Court of Justice (the "**Court**") on the interpretation of articles 22 and 29 of the Prospectus Regulation and article 14 of the Prospectus Directive.

¹ Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, OJ L 149, 30.4.2004, p.3, (the "Prospectus Regulation").

² Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p.64, (the "Prospectus Directive").

III. COURT RULING

1. Interpretation of article 22 (2) of the Prospectus Regulation

Article 22 of the Prospectus Regulation on the minimum information to be included in a base prospectus and its related final terms provides in paragraph 1 the various information a base prospectus shall contain and in paragraph 2 an exemption therefrom allowing to “omit information items which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue”.

The referring court queried whether any information which becomes known in the intervening period between the publication of the base prospectus and the publication of a supplement, may be omitted, must be included in the supplement or included in the final terms. The Court confirmed what is the common understanding of practitioners as to which information shall be contained in a base prospectus, a supplement and the final terms:

Firstly, information known at the time of approval of the base prospectus must be published in the base prospectus.

Secondly, information which is not known at the time of approval of the base prospectus and which can only be determined at the time of the individual issue shall naturally be published in the final terms (as long as this information does not involve a significant new factor, material mistake or inaccuracy within the meaning of article 16 (1) of the Prospectus Directive); it is the genuine nature of a “base” prospectus to not yet contain the details relating to an individual issue of securities, which can only be determined shortly before the issuance.

Thirdly, information which is not known at the time of approval of the base prospectus, but which is known at the time of the publication of a supplement requires inclusion in that supplement only if it constitutes a significant new factor, material mistake or inaccuracy and is capable of affecting the assessment of the securities.

Thus, it results from the ruling that the information which is generally required under article 22 (1) of the Prospectus Regulation to be included into the base prospectus, but which was temporarily exempted under article 22 (2) of the Prospectus Regulation to be included at the time of approval (since unknown), needs not be published (once known) in the final terms, not triggering a withdrawal right for the investor, and only such information, which fulfils the criteria of article 16 (1) of the Prospectus Directive, i.e. which is so material that it is likely to turn over the investor’s decision to invest into the securities, justifies the publication of a supplement and the right of withdrawal for an investor. It is hence permissible to omit the information required under article 22 (1), but exempted under article 22 (2), which becomes only known after the approval of the base prospectus, from a supplement if that information does not fulfil the criteria of article 16 (1) of the Prospectus Directive.

The interpretation of the Court and the Advocate General is supported by issuers, offerors and practitioners alike as otherwise the investors well defined

and confined right of withdrawal would have unreasonably been extended and significantly increased risks for future capital market issuances.

2. Interpretation of article 29 (1) of the Prospectus Regulation

Article 29 (1) of the Prospectus Regulation provides, among others, that the publication of a prospectus or a base prospectus in electronic form shall be easily accessible on the website where they are made available and investors shall have the possibility of downloading and printing the prospectus or the base prospectus. The referring court asked to deliberate on whether these two requirements are fulfilled if accessing, downloading and printing require (i) registration on the website which involves an acceptance of a disclaimer and the provision of an email address, or (ii) the payment of a fee, or (iii) if free of charge access to parts of a prospectus is restricted to two documents per month.

The Court concluded that conditions, such as the obligation to register which involves entering an email address and accepting a disclaimer, restrict access to the prospectus published in electronic form and therefore infringe the “easy access” provision. The requirement to accept a disclaimer creates an inequality of arms in so far as the party holding the information can impose the disclaimer on the investor who cannot access the information unless s/he agrees to accept. A disclaimer may have the likely effect to dissuade potential investors and reduce their legal protection.

With regard to the request for a payment of fee, the Court considered article 14 (5) of the Prospectus Directive which expressly states that a prospectus must be made available to the public free of charge and concluded that the requirement to pay a fee also breached the “easy access” provision of article 29 (1) of the Prospectus Regulation. The Court noted that the EU legislature aimed to encourage the publication of prospectuses by electronic means and the above restrictions, which are not conducive to investor protection, would run counter to such an objective.

In summary, the Court concluded that the “easy access” provision contained within article 29 (1) of the Prospectus Regulation is not fulfilled where the website on which the prospectus or base prospectus is made available requires (i) registration on the website which involves an acceptance of a disclaimer and the provision of an email address, or (ii) the payment of a fee, or (iii) if free of charge access to parts of a prospectus is restricted to two documents per month.

The ruling impacts those European stock exchanges, who imposed access restrictions in the past, even if were for justified reasons, such as deterring professional data mining and forces them to grant unrestricted access to prospectus documentation. While theoretically the “easy access policy” only applies to regulated markets, we expect stock exchanges not to distinguish between the different markets they operate. In Luxembourg, the LSE published a notice on its website on the 6 June 2014 announcing that it will change its procedure to access disclosed information on its website and that all published prospectuses including supplements, final terms and documents incorporated by reference will be accessible to potential investors without any access restrictions. The new measures became effective on June 13.

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