

# Prospectuses and publication: CJEU interprets PD regime in *Timmel* case

Court judgments discussing the "Prospectus Directive regime" are rare. Last week, though, the highest EU court gave a ruling on prospectus content and publication. The ruling in *Michael Timmel v Aviso Zeta AG (C-359/12)* may lead to refinement of capital markets practices – notably, prospectus publication.

Prospectuses relating to securities are usually published electronically. But the websites on which publication takes place often place restrictions on public access. They might, for example, require anyone wishing to access the prospectus to register in order to download a copy or restrict the number of times that a copy can be downloaded. In the light of *Timmel*, these restrictions may have to be removed.

## The case

The judgment given by the Court of Justice of the European Union (CJEU) on 15 May 2014 followed a referral by an Austrian court (*Handelsgericht Wien*) in July 2012. The Austrian court sought interpretation of certain provisions of Directive 2003/71/EC of prospectuses for public offerings of securities (the PD) and PD Regulation 809/2004 (the PD Regulation) in connection with the *Timmel* case, which related to termination of a contract to purchase securities. That case will now revert to the Austrian court for it to decide, applying the CJEU's rulings on interpretation.

## The facts

Given that the outcome of the *Timmel* case is yet to be determined, this briefing will not dwell on the facts. Suffice to say that:

- It relates to an agreement, in October 2006, when Mr Timmel, an Austrian individual, applied to Aviso Zeta AG to purchase securities;
- The securities had a denomination of less than Euro 50,000 and were issued off a Base Prospectus;
- The notes ('Dragon FX Garant') were issued by Lehman Brothers Treasury Co. BV, a Dutch issuer;
- The dispute concerns two key areas: prospectus content and lawful publication.

The content in question was split between a Base Prospectus, various Supplements and Final Terms. The timeline for the various documents is useful background to the questions referred to the CJEU. On the facts submitted:

- 30 October 2006 – Mr Timmel agreed to purchase notes;
- 9 August 2006 – date of the Base Prospectus;

## Key issues

- Impediments to website access may breach electronic publication requirements
- Issuers who rely on such routes for publication should consider additional means
- Printed copy prospectuses must be available in two locations, at both the issuer's **and** agent's offices
- Where a Base Prospectus omits information it must be completed by publication of Final Terms completing missing information
- Information which is "significant" should be included in a Supplement, not Final Terms

- 29 August, 6 and 26 September 2006 – Supplements to the Base Prospectus;
- 19 September and 4 December 2006 – Final Terms (draft, then final).

One contention was that there had been no publication of key terms (including the ISIN, currency and

information on the performance of the underlying product) because, it was argued, they should have been included in the Supplements to the Base Prospectus, rather than Final Terms. Another contention was that restricted electronic access to documents meant that they had not been published.

### The referral

The Austrian court asked the CJEU for a ruling on the meaning of the PD and PD Regulation. The particular questions which the CJEU was asked can be summarised as:

- **Supplements:** Does Article 22(2) require that new information identified after the publication of a Base Prospectus should go into a Supplement rather than Final Terms?
- **Base Prospectuses and Final Terms:** If Final Terms completing the missing information are not published, are the content requirements in Article 22(1) of the PD Regulation met by a Base Prospectus which omits information?
- **Electronic publication:** Does the imposition of access restrictions and formalities on websites contravene "easily accessible" requirements in Article 29(1) of the PD Regulation?
- **Translation discrepancies:** Should Article 14(2)(b) of the PD say "and" or "or"? This affects whether a printed prospectus must be made available in two locations as opposed to one location.

As the facts related to October 2006, the legislation in question pre-dates any of the recent so-called "PD2" amendments to the Prospectus Directive or PD Regulation which, mostly, took effect on 1 July 2012.

This does not materially affect the analysis, however, in terms of relevance to practitioners, other than a minor technical point below in relation to the information permitted in Final Terms (see below).

### The ruling

The CJEU gave a ruling on each of these four areas. In many places the judgment cross-referred to the opinion on the case issued by Advocate General Sharpston on 26 November 2013. The judgment also mentions that observations were submitted to the CJEU on behalf of the Belgian, Czech, Portuguese and Netherlands governments and, additionally, by the European Commission.

Of the four points determined by the CJEU, items 2 and 3 in the ruling (Base Prospectuses and Final Terms and Electronic publication) are of most interest. They are therefore dealt with first in this briefing.

#### Electronic publication – Article 29(1)

This is the most contentious point – but it should also be the easiest point to address going forward. The ruling states that Article 29(1) of the PD Regulation, which requires electronic copies of a prospectus to be "*easily accessible when entering the website*", is not met if there are impediments to access. Impediments include restricting access to prospectuses, requiring the payment of fees and requiring registration, acceptance of disclaimers and provisions of e-mail addresses. Notably, this will, for example, be the case where a prospectus is published on the Luxembourg Stock Exchange (which was where documents were made available in the *Timmel* case). In 2006, the Luxembourg Stock Exchange had registration and

access restrictions relating to prospectuses. As at the date of writing, these Luxembourg Stock Exchange requirements are still in place, but we expect increased pressure for that exchange – and any competent authority or stock exchange websites with similar requirements – to remove any such remaining impediments.

Where does the ruling leave disclaimers and/or "click-throughs" on issuer websites (such as those relating to investment experience or nationality)? The question is not beyond doubt. However, our preliminary view is that the CJEU's ruling affects three distinct groups of restrictions:

- where there is an obligation to register on that website, entailing acceptance of a disclaimer and the obligation to provide an email address,
- where a charge is made for that electronic access or
- where consultation of parts of the prospectus free of charge is restricted to two documents per month.

On that basis, we do not think a disclaimer, on its own (absent a requirement also to register and to provide an e-mail address) should be problematic.

Moreover, Article 29(2) of the PD Regulation allows disclaimers: "*...If a prospectus or base prospectus ... is made available on the web-sites..., these shall take measures, to avoid targeting residents in Members States or third countries where the offer of securities to the public does not take place, such as the insertion of a disclaimer as to who are the addressees of the offer...*".

### Base Prospectuses and Final Terms – Article 22(1)

Can a Base Prospectus meet the content requirements of Article 22(1) where it omits information (such as the securities note information required by Annex V of the PD Regulation) where Final Terms are not published? The CJEU's conclusion is "no". However, it is clear that subsequent publication of Final Terms will fulfil this requirement, so long as they contain the necessary information. It is also important for the Base Prospectus to indicate clearly which information will be contained in Final Terms.

Again, this is not a surprising view: practitioners expect that the missing information in a Base Prospectus will need to be "supplemented" (this is the word used by the CJEU) by Final Terms containing the details relevant to the particular issue for the purpose of the offer.

As an aside, though, there is one point worth emphasising. The CJEU ruling makes specific reference to the fact that, in order for the Article 22(1) prospectus publication requirements to be satisfied, Final Terms must contain the information required by Article 22(4) of the PD Regulation. This reference is noteworthy: Article 22(4) was not mentioned in the Advocate General's opinion from November 2013, which guided the court. What does Article 22(4) of the PD Regulation say? As mentioned, the case facts pre-date "PD2" changes. Article 22(4) of the PD Regulation at the relevant time in question (2006) stated that Final Terms "... shall only include the information items from the securities note schedules according to which the base prospectus is drawn up".

Accordingly, whilst, none of the statements or analysis by the CJEU on this point is surprising, the fact that the CJEU is emphasising that, in order to comply with the PD Regulation content requirements, Final Terms "*shall only include*" the information from "*the relevant securities note schedules*" serves as a stark reminder of the risks of including extraneous information in Final Terms. (Nowadays, post-"PD2", Article 22(4) of the PD Regulation is even more stringent and now includes references to information delineated as "Category B" and "C" in Annex XX of the PD Regulation.)

### Supplements – Article 22(2)

The ruling on Article 22(2) of the PD Regulation and Supplements is not contentious. It follows the general principle that "significant" information which arises after publication of the Base Prospectus should be included in a Supplement, as opposed to Final Terms.

However, the CJEU did not elaborate on the meaning of "significant" but, instead, stated that it will be for the national court to determine whether, in this particular case, such new information was significant or not. Accordingly, there is no useful guidance on what is deemed "significant". (For completeness, in a "PD2" context, Commission Delegated Regulation (EU) No 382/2014 of 7 March 2014, which came into force in May 2014, now lists some "minimum situations" when a Supplement will be required, although the Regulation also states that it is not possible to identify all situations, as this may depend on the issuer and securities involved.)

### Translation discrepancy – Article 14(2)(b)

Much can hinge on whether an "and" or an "or" is included in drafting. In the case of Article 14(2)(b) of the PD, a discrepancy had crept into different language versions during translation.

Which version is the correct interpretation? For those who typically refer to an English language version of the PD, there is good news. The CJEU simply affirmed the "status quo", determining that Article 14(2)(b), relating to publication of the prospectus should contain an "and". This reflects the existing English language version: "... *in a printed form .... at the registered office of the issuer **and** at the offices of the financial intermediaries placing or selling the securities...*". For any language versions which currently have the word "or" (such as the German language version, referenced in the judgment), however, there may be a resulting change of practice. As fewer issuers tend to opt for physical copies on display as a means of publication – as opposed to electronic publication – this element of the ruling should not prove too onerous for affected issuers.

### Practical implications

The most immediate likely impact of the ruling will be in relation to website access to prospectuses. Any issuer who currently only publishes prospectuses on a website which includes restrictions similar to those mentioned in the judgment should consider additional publication routes. We expect that any regulated markets, exchanges or competent authorities with website access restrictions are likely to come under considerable pressure to remove those restrictions.

Other points discussed in the case – such as the split between a Base Prospectus and Final Terms and what is "significant" information – are less likely to have a direct impact on current practice. They do, however, serve as useful reminders of the strict "Prospectus Directive regime" disclosure requirements, even before the most recent legislative changes. They also illustrate the on-going tension, inherent in the "Prospectus Directive regime", between facilitating issuer access to capital and protecting investors through disclosure.

#### **Links**

##### **CJEU judgment, 15 May 2014:**

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0359&from=EN>

##### **Advocate General Sharpston's opinion, 26 November 2013:**

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=144946&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=753463>

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