



European Securities Law Update: PD3 & Irish Prospectus Regulations

Autumn 2018

In our latest European Securities Law Update we provide a high-level insight into the [Prospectus \(Directive 2003/71/EC\)\(Amendment\) Regulations 2018 \(S.I. No. 317 of 2018\)](#) (the “Amending Regulations”) which were signed into law in August 2018, ushering the second phase of changes under the [Prospectus Regulation \(Regulation \(EU\) 2017/1129\)](#) (“PD3”) into Irish law (see our previous update [here](#)).

Background

PD3 itself replaced and repealed EU Directive 2003/71/EC (the “Prospectus Directive”) and forms part of the EU’s Capital Markets Union initiative, which aims to ensure investor protection and market efficiency, while enhancing the internal market for capital.

The Amending Regulations update the existing Irish legal framework set out in the Prospectus (Directive 2003/71/EC) Regulations 2005 ([S.I. No. 324 of 2005](#)) (the “Irish Prospectus Regulations”) to reflect the directly effective provisions of PD3 that came into force on 21 July 2018, following the first phase provisions that became directly effective on 20 July 2017. The remaining provisions will come into effect on 21 July 2019.

Amendments

The following changes have been made to the Irish Prospectus Regulations:

Changes to Public Offer Trigger - effective from 21 July 2018

(1) *Exempted Offers - total consideration in EU threshold reduced to €1,000,000*

An offer of securities to the public with a total consideration in the EU of less than €1,000,000 will be exempt from the PD3 regime. The total consideration for the offer must be aggregated with the consideration for all other offers of securities of the same type by that issuer over a period of 12 months. This is down from the previous €5,000,000 financial threshold.

Summary of Changes to Existing Irish Prospectus Regime

- » An offer of securities to the public with a total consideration in the EU of less than €1,000,000 will be exempt from the PD3 regime (reduced from previous €5,000,000 threshold).
- » A public offer of securities with a total consideration in the EU of less than €5,000,000 (calculated over a period of 12 months) is excluded from the requirement to publish a prospectus. Threshold increased from €100,000.
- » The cap for the existing exemption in relation to the admission to trading of fungible securities has been increased to 20% (up from 10%). The exemption has been also extended to the admission of ‘securities’ i.e. now including bonds and debt (previously this related to shares only).
- » A cap of 20% has been set on the exemption for shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market. Previously there was no cap on this exemption.
- » A new exemption from the obligation to publish a prospectus has been included in respect of securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority in the exercise of powers under the BRRD.

Under PD3 Member States are permitted to impose other disclosure requirements in respect of offers below €1,000,000, although none have been imposed in Ireland.

(2) Excluded Offers - total consideration in EU threshold increased to €5,000,000

A public offer of securities with a total consideration in the EU of less than €5,000,000 (calculated over a period of 12 months) is excluded from the requirement to publish a prospectus. This threshold was €100,000 under the previous regime.

PD3 granted discretion to the Member States to increase this threshold to an amount up to €8,000,000. Ireland has elected to set the threshold at €5,000,000 and therefore issuers involved in cross-border offerings will need to be mindful of the potential for mismatch in these discretionary thresholds. The ability to passport such offers to other EU jurisdictions will not be available to issuers of these excluded offers. The other exclusions from the obligation to publish a prospectus remain unchanged.

The result of these amendments is that there remains no requirement for Irish issuers to publish a prospectus in respect of a public offer of securities in the EU with a total consideration of less than €5,000,000 i.e. there is no practical change to the existing regime.

The Companies Act 2014 (the "2014 Act") deals with offers of securities to the public and prohibits certain types of Irish companies (LTDs and DACs) from making any offer to the public of shares, debentures or other securities, except in certain specified circumstances.

These specified circumstances initially mirrored the exclusions from the obligation to publish a prospectus set out in the Irish Prospectus Regulations but have not been updated in light of the Amending Regulations. The result is that an LTD / DAC cannot make an offer of securities to the public unless the total consideration in the EU is less than €100,000 (calculated over a period of 12 months). The practical consequence of this mismatch is that an LTD / DAC may be prohibited by domestic company law from making an offer of securities to the public, even though there is no requirement for it to publish a prospectus in line with PD3.

As such, Irish market participants will need to be comfortable that, where an issuer is not incorporated as a PLC, it can avail of one of the other exemptions under Section 68(3) of the 2014 Act allowing a public offer of securities by an LTD or a DAC (e.g. the offer should be to qualified investors only, to less than 150 persons, addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, or in units of at least €100,000).

Changes to the Trading Trigger - effective from 20 July 2017

The Amending Regulations also take account of the directly effective provisions of PD3 that came into effect from 20 July 2017, and belatedly bring domestic law into line with those provisions. Changes have been made to two of the exemptions from the obligation to publish a prospectus and a new exemption has been added:

(1) Fungible Securities - cap increased to 20% and now applies to securities

The cap for exemption in relation to the admission to trading of fungible securities has been increased to 20% (up from 10%). In line with PD3, the exemption has also been extended to the admission of 'securities' i.e. now including bonds and debt (previously this related to shares only).

An issuance of new securities of the same class will not require a prospectus provided that the new securities represent less than 20% of the number of securities already admitted to trading on the same regulated market, calculated over a period of 12 months.

(2) Convertible Securities - cap set at 20%

Subject to limited exceptions, shares of the same class resulting from the conversion or exchange of other securities or from the exercise of rights conferred by other securities ("convertible securities") will be exempted provided that those shares represent less than 20% (calculated over a 12 month period) of the number of shares of the same class already admitted to trading on the same regulated market. There was no cap on this exemption previously.

(3) BRRD Exemption

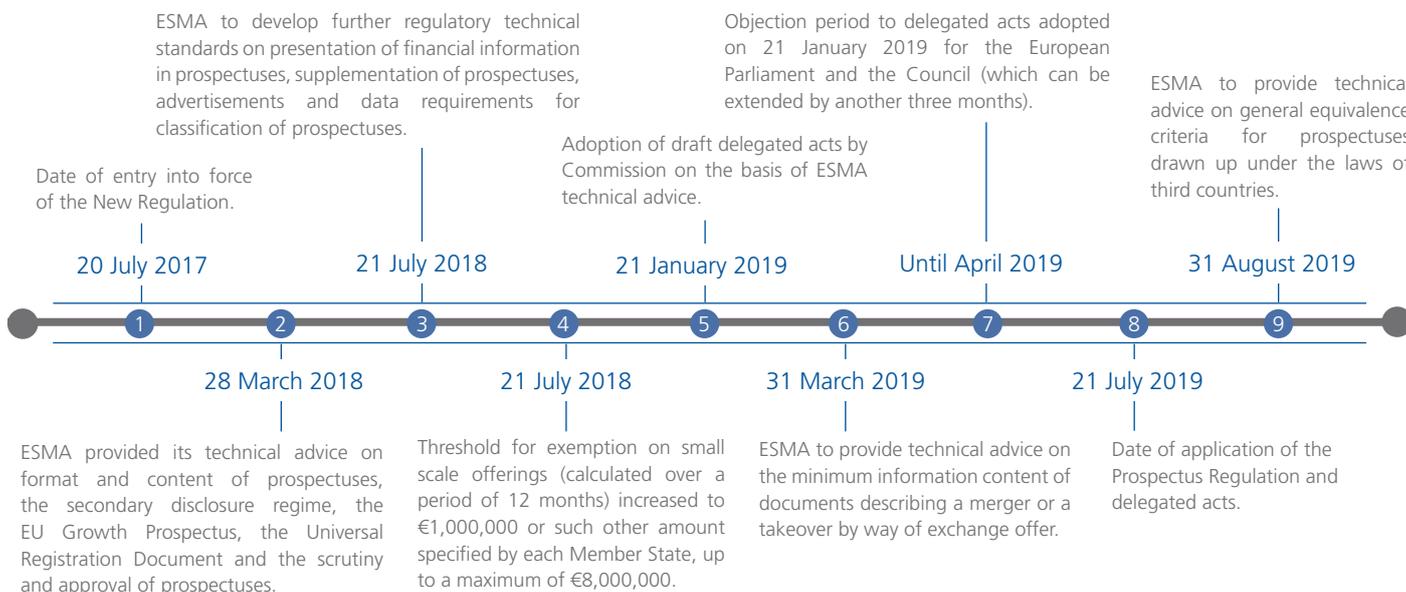
A new exemption has been created in respect of securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority in the exercise of powers under the [Bank Resolution and Recovery Directive](#) (the "BRRD").

Next steps

The final phase of measures under PD3 will become effective in July 2019, including the fast track approval process for frequent issuers and simplified disclosure requirements for follow-on issuances. The European Commission has requested that ESMA provide technical advice on Level 2 and Level 3 measures to supplement certain elements of PD3. The first of these delegated acts are to be provided to the Commission within 13 months of its request (made in June 2018) and will deal with several matters including the format of the prospectus, base prospectus and final terms, the reduced information required under the simplified disclosure regime, the content and format of the EU growth prospectus and the procedure for approval of the prospectus.



Key Dates



Contacts

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