Debt Capital Markets

Contributing editors
David Lopez, Adam E Fleisher and Julian Cardona

2018

GETTING THE DEAL THROUGH

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Cleary Gottlieb Steen & Hamilton LLP

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Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Debt Capital Markets*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David Lopez, Adam E Fleisher and Julian Cardona of Cleary Gottlieb Steen & Hamilton LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

Ireland

Cormac Kissane, Glenn Butt and Ronan O'Keefe
Arthur Cox

1 What types of debt securities offerings are typical, and how active is the market?

Debt securities offered in Ireland include asset-backed securities, vanilla debt securities, derivative-linked securities, government debt, covered bonds, secured and unsecured corporate bonds, high-yield bonds, loan participation notes and medium-term notes.

Issuers include the Irish government, sovereign states, financial institutions, global corporates and special purpose vehicles.

Issuers who decide to list their debt in Ireland may choose between the Main Securities Market (MSM) or the Global Exchange Market (GEM) operated by the Irish Stock Exchange (ISE). The MSM is an EU and EEA regulated market, whereas the GEM is an exchange regulated market.

Owing to access to Irish and international investors, the option of dual listing with certain international markets and what is generally considered to be an efficient listing process, the Irish debt capital markets are particularly active. According to the Central Bank of Ireland (Central Bank), at the end of 2017 the outstanding amount of debt securities issued by Irish resident entities totalled €716.6 billion.

The ISE is among the leading centres globally for listing bonds with statistics showing its debt listings growing by over 10 per cent to reach over 31,000 securities at the end of 2017. According to rankings released by the World Federation of Exchanges in early December last year, the ISE is now ranked second among global exchanges.

2 Describe the general regime for debt securities offerings.

The Irish regime comprises EU and Irish legislation and rules published by both the Central Bank and the ISE.

EU legislation
The legal framework is mainly based on EU legislation including the Prospectus Directive and EU Prospectus Regulation, the EU Market Abuse Regulation and the Market Abuse Directive on Criminal Sanctions, and the Transparency Directive.

Irish legislation
Ireland has transposed the above directives by way of the Irish Prospectus Regulation, the Irish Market Abuse Regulation and the Transparency Regulation.

The Companies Act 2014 (as amended) (the Companies Act) provides public limited companies with capacity to offer listed debt securities to the public. A private limited company cannot issue listed debt or make offers to the public. However, designated activity companies, a type of private company, have capacity to list and trade debt securities.

The Companies Act together with the Irish Prospectus, Transparency and Market Abuse Regulations also set out the criminal and civil liability regime for breaches of the prospectus, transparency and market abuse regimes.

Central Bank Rules
The Central Bank, as competent authority for the enforcement of the above legislation, has published the Prospectus Handbook, Transparency Rules and Market Abuse Rules, Guidance and Q&A, which set out procedural and administrative requirements and guidance in respect of the relevant directives and regulations.

Listing Rules
The ISE has published a comprehensive set of rules for listing a variety of debt securities on the MSM and GEM. These rules impose obligations on issuers of debt securities at the time of application for admission to trading and listing, and on an ongoing basis.

The European Securities and Markets Authority (ESMA) Guidance
ESMA, an independent EU Authority, has published guidance to help issuers and their advisers understand their disclosure requirements and other obligations under EU securities law.

3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

An issuer who intends to make an offer of securities to the public in Ireland, or apply to have those securities listed on a regulated market, including the MSM, must first prepare and publish a prospectus that is subject to prior approval by the Central Bank.

For the purposes of the Prospectus Directive, securities are 'transferable securities' as defined in the Markets in Financial Instruments Directive II (MiFID II). Public offerings of certain types of debt securities (eg, government bonds) are exempt from this requirement.

The issuer must submit the prospectus and relevant fee to the Central Bank together with any required supporting documentation, as set out in the Prospectus Handbook.

If the issuer applies to have the securities listed on the ISE, it must appoint a listing agent and submit the prospectus, application for admission to trading and the relevant fee to the ISE together with any supporting documentation required under the Listing Rules.

Once the prospectus is approved by the Central Bank, an issuer that is an Irish company registered under the Companies Act must file a copy of the approved prospectus with the Companies Registration Office (CRO) within 14 days of publication.

4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

If securities are to be offered to the public, a prospectus must be produced, unless the offer is exempt, namely the offer is made:

- to qualified investors;
- to 150 or fewer persons (other than qualified investors);
- for a total consideration of at least €100,000 per investor;
- comprising securities with a minimum denomination of €100,000; or
- for a total consideration in the EU of less than €100,000, as calculated over 12 months.

A 'public offer' is defined very broadly under the Irish Prospectus Regulation and means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities or apply to purchase or subscribe for those securities.

A new prospectus regulation, Regulation (EU) 2017/1129 (the New Prospectus Regulation) on the prospectus to be published when

securities are offered to the public or admitted to trading on a regulated market was published in the Official Journal on 30 June 2017. It will generally apply from 21 July 2019 and will be directly effective in member states. The European Commission's original proposal to remove the wholesale exemption from the requirement to publish a prospectus was not agreed, meaning that for public offers of debt securities with a minimum denomination of €100,000 the exemption from the requirement to publish a prospectus will remain. The exemption for offers addressed solely to qualified investors, and for offers addressed to fewer than 150 natural or legal persons per member state, will also remain.

In all circumstances, if securities are admitted to trading on a regulated market, including the MSM, a prospectus must be prepared and approved by the Central Bank.

The following table indicates when a prospectus is required.

Type of offer and securities	Is a prospectus required?
Exemption applies. Securities will not be listed on MSM.	No.
Exemption applies. Securities will be listed on MSM.	Yes.
Exemption applies. Securities will be listed on GEM.	No. In this instance a listing document is prepared called a listing particulars, which is subject to ISE rules.
No exemption available. Securities will be listed on MSM or GEM.	Yes.

The prospectus must comply with all EU and Irish Prospectus legislation and include information necessary to enable investors to make an informed assessment of the financial status and potential of the issuer and rights attaching to the securities.

The Prospectus Handbook provides that the prospectus may be prepared in one of the following formats:

- a single stand-alone document;
- a tripartite document (comprising a registration document, securities note and summary);
- a base prospectus and subsequent final terms; or
- a drawdown prospectus (a single stand-alone document which incorporates by reference all or part of a base prospectus).

The Prospectus Handbook also prescribes the content of a prospectus, which at a minimum must include a clear and detailed table of contents, a summary (if the minimum denomination of the securities is less than €100,000), risk factors and the information contained in the relevant annexes to the EU Prospectus Regulation. Under the New Prospectus Regulation, no summary will be required in respect of debt securities that will be traded on a regulated market (or a specific segment of a regulated market) to which only qualified investors have access or for a wholesale issue. The New Prospectus Regulation also sets out more prescriptive requirements on the length and content of the summary where one is required and also on the risk factors to be included in the prospectus.

The prospectus must also contain a responsibility statement. The issuer, offeror and person seeking admission to trading must take responsibility for the whole prospectus. Certain persons can take responsibility for specified parts. This, however, is in addition to the responsibility attaching to the issuer, offeror and person seeking admission to trading.

Disclosures required to be made in the prospectus are set out in the Prospectus Handbook and the relevant annexes to the EU Prospectus Regulation which contains helpful checklists of the minimum disclosure requirements for various types of securities.

The Central Bank may authorise the omission of certain information from a prospectus if, on receipt of an omission request from the issuer, it considers that:

- disclosure would be contrary to the public interest;
- disclosure would be seriously detrimental to the issuer, provided the omission would not be likely to mislead the public as to facts and circumstances essential for an informed assessment of the issuer and rights attached to the securities; or
- the information is of minor importance only for a specific offer or admission to trading and would not influence the assessment of the financial position and prospects of the issuer, offeror or guarantor (if any).

5 Describe the drafting process for the offering document.

The offering document for a public offer of debt securities is the prospectus. It is normally prepared by the issuer and its legal counsel although the underwriters and their counsel will review the drafts.

In determining whether to make certain disclosures, the issuer must bear in mind the requirement that the prospectus must include all information necessary to enable investors to make an informed assessment of the financial status and prospects of the issuer and any guarantor and of the rights attaching to the securities. The prospectus must include the minimum disclosure requirements contained in the relevant annexes to the EU Prospectus Regulation.

If the issuer or its advisers have doubts about the extent of the disclosures to be made, ESMA's guidance and Q&A on prospectus law may help them make judgements about the extent of the information to be supplied in the prospectus. As a member of ESMA's Board of Supervisors, the Central Bank will take this guidance into account in considering whether the issuer has complied with the EU Prospectus Regulation.

In the drafting process, the area of most debate is often the description of the risk factors. The underwriters or lead manager may often want to disclose risks more fully than the issuer. Similarly, in the description of the business or description of the issuer sections, the issuer may often want to paint a more positive picture than the underwriter or lead manager may agree with.

6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities are usually governed by a trust deed made between the issuer and trustee (a financial institution appointed to represent the interests of debt securities holders). The EU Prospectus Regulation and ESMA's Q&A guidance require an issuer to make documents referred to in the prospectus, including the trust deed, available for inspection and indicate in the prospectus where they may be inspected, by physical or electronic means.

The trust arrangement benefits the issuer and debt securities holders.

It provides flexibility for the issuer as the trustee may agree waivers and modifications without having to arrange meetings of debt securities holders to resolve and agree such waivers or modifications. In an enforcement action, the issuer would only have to defend one unified action from the trustee rather than multiple actions from individual securities holders. Also, an event of default normally only arises if the trustee forms the view that it materially prejudices the interests of the debt securities holders, and this again limits the issuer's exposure to multiple claims from individual securities holders.

On the other side, debt securities holders also benefit, for example, from the trustee's strong bargaining position as a representative of a large amount of debt. This can result in the inclusion of more protective covenants and more sophisticated monitoring of the issuer's compliance with those covenants. A unified enforcement action generally results in a more favourable outcome for a debt securities holder compared to an individual action against the issuer.

7 Does offering documentation require approval before publication? In what forms should it be available?

The prospectus must be approved by the Central Bank before it is made available to the public. The issuer must make the prospectus available to the public as soon as practicable and in any case, at a reasonable time in advance of, and at the latest at the beginning of, the offer or the admission to trading of the securities involved.

The prospectus is made available to the public in one of the following ways:

(i) by insertion in a newspaper widely circulated in Ireland;
(ii) in printed form and free of charge at the ISE's offices, or at the issuer's registered office and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
(iii) in electronic form on the issuer's website, or, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents;
(iv) in electronic form on the ISE's website; or
(v) in electronic form on the Central Bank's website.

If option (i) or (ii) is used, an electronic copy must also be made available in accordance with option (iii).

The Central Bank will publish all approved prospectuses on its website unless the issuer submits a non-publication request. Where such a request is submitted the issuer must confirm to the Central Bank that the prospectus will be published in another electronic format. The Central Bank will then publish a notice on its website with a link to the issuer's website where the prospectus has been published.

If an application for admission to trade on the GEM is made, the listing particulars must be approved by the ISE and made available to the public in one of the following ways:

(i) in a printed form to be made available, free of charge, to the public at the ISE's offices;
(ii) at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
(iii) in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents; or
(iv) in electronic form on the ISE's website.

The ISE will publish all approved listing particulars on its website unless the issuer submits a non-publication request. Where such a request is submitted the issuer must confirm to the ISE that the prospectus will be published in another electronic format. The ISE does not require a link and a notice is not published.

8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

If debt securities are offered to the public, the prospectus must be reviewed and approved by the Central Bank. If an application to admit the securities to trade on a regulated market, including the MSM, is made, a dual submission to the Central Bank and ISE is required.

The dual submission process involves the following steps:

- the issuer (or its agent) submits the initial draft prospectus and supporting documentation to the Central Bank and ISE;
- comments will be provided in three business days. With effect from 2 August 2016, the Central Bank reduced the turnaround times assigned to the review of financial supplements. Comments on financial supplements received before 5pm are now returned within one business day (ie, by close of business the following business day). Previously, the review time was three business days for financial supplements. All other supplements are subject to a three-day review on initial submission;
- the issuer submits a revised draft prospectus with replies to comments to the Central Bank and ISE;
- further comments may be provided in two business days;
- once the Central Bank and ISE are satisfied that all the relevant provisions of Irish and EU prospectus law have been fully addressed and all comments have been resolved, the prospectus can be approved;
- on the approval date, the issuer submits a final copy of the prospectus and supporting documentation to the Central Bank and ISE;
- the relevant fees should be paid in advance of approval;
- once the Central Bank approves the prospectus it will notify the issuer and ISE; and
- the ISE will then confirm its approval and the issuer's listing and admission to trading. Approval and listing can occur on a same-day basis.

The time frame for approval depends on a number of factors including the level of completeness of the initial draft prospectus, the complexity of the securities, any issues arising in relation to compliance with the provisions of Irish and EU prospectus law and the time taken by the issuer to respond to comments issued on each draft of the prospectus and the extent to which comments are adequately addressed in subsequent drafts.

9 On what grounds may the regulators refuse to approve a public offering of securities?

The Central Bank may refuse to approve a prospectus, and therefore a public offering of securities, if it does not comply with all the relevant provisions of Irish and EU prospectus law or if during the review and authorisation process all comments raised by the Central Bank have not been resolved to its satisfaction.

The ISE may refuse an application for admission to list if it considers that admission of the securities would be detrimental to the interests of investors or that the issuer has not complied with the relevant listing rules or, for securities already listed in another EEA state, if the issuer has failed to comply with the obligations to which it is subject by virtue of that listing.

10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

See question 3 for the filing requirements applicable to a public offer of debt securities.

If an offer falls within one of the exemptions listed in question 4 and an application to list the securities on the GEM is made, listing particulars must be prepared in compliance with the GEM Listing Rules, approved by the ISE and made available to the public before the application is made. Such an issuer is also subject to the provisions of its constitutional documentation and, if it is an Irish company, the Companies Act.

The only exemption applies to an offering document for unlisted debt securities falling within one of the exemptions listed in question 4, which are not subject to any registration requirements and there are no requirements for the content of the offer document.

11 Describe the public offering process for debt securities. How does the private offering process differ?

The public and private offering processes typically involve similar steps as set out below. The key difference is the publication of a prospectus approved by the Central Bank before an offer of securities is made to the public.

Roadshow

In many cases, in particular for first-time or infrequent issuers, a roadshow is conducted. On the roadshow, representatives of the issuer and underwriters or managers will meet prospective investors to assess interest in the deal, likely pricing and size of the transaction.

Documentation

The underwriter's legal counsel is normally responsible for preparing the documentation for the issuance, other than the prospectus or offering circular, which is prepared by the issuer's legal counsel. If applicable, time for the prospectus approval process described in question 8 will have to be followed and factored into the schedule.

Launch and syndication

On the launch date, the issue will be announced to the market and, if the issue is syndicated, a lead manager will send the invitation telex, which shows the price and agreed fees, to the co-managers. Acceptance is not binding but there is a generally perceived moral obligation to purchase securities once acceptance has been sent.

Listing

If the securities are to be listed on the ISE, the process described in question 8 will have to be followed and factored into the schedule.

Signing

On the signing date, a subscription agreement is signed by the issuer and underwriter or managers and listing documentation is submitted to a listing agent and delivered to the ISE. Documentation to be delivered on closing will be in agreed form on this date.

Closing

This is the final stage of the issue process and is when the securities are issued and the issuer receives the cash proceeds. On the closing date, conditions precedent to the issue, as set out in the subscription

agreement, must be satisfied including the delivery of all remaining closing documents such as the issuer's closing and corporate certificates, legal opinions, payment instructions and confirmations, the auditors' comfort letter and letters from the relevant rating agencies, if required. If the securities are to be listed, the ISE will issue a formal notice of admission to trade and list on the relevant market.

12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

The key documents that underwriters or initial purchasers require in public and private offerings of debt securities from the issuer or third parties include the following:

- offering circular summarising the issue;
- subscription agreement containing conditions precedent to the issue, interest rate, fees payable to underwriters and representations and warranties from the issuer;
- auditors' arrangement and comfort letter confirming there has been no adverse financial change since the date of the issuer's last audited accounts;
- legal opinions from the issuer's and underwriters' legal counsel as to the issuer's capacity and authority to issue the securities and the enforceability of the documents;
- trust deed pursuant to which a financial institution agrees to act as trustee of and represent all of the debt securities holders with a duty to safeguard their interests and the issuer agrees to create the securities subject to certain terms and conditions;
- agency agreement containing the terms upon which paying agents are appointed and setting out the payment mechanics;
- closing and corporate certificate of the issuer containing all required approvals and authorisations;
- payment instructions and confirmations; and
- global bonds (permanent and temporary) signed by the issuer, authenticated by its agent and delivered to the common depository for safekeeping on behalf of the clearing system.

Underwriters or initial purchasers of a public offer of securities or an offer of securities that are admitted to trade on a regulated market, including the MSM, also require a copy of the approved prospectus, supplement, final terms and the notice of admission to trade, as appropriate.

13 What are the typical fees for listing debt securities on the principal exchanges?

Depending on the type of submission made (for example, a standalone prospectus or final terms under a programme), fees for listing on the MSM may comprise a combination of all or some of the following:

- ISE document fee;
- Central Bank document fee;
- security listing and admission to trading fee;
- ISE annual fee applied at issuer level (this is €2,000, or alternatively a one-off fee of €10,000 can be paid prior to listing); and
- formal notice fee.

Again, depending on the type of submission made, fees for listing on the GEM comprise a combination of all or some of the above fees other than the Central Bank document fee (a prospectus approved by the Central Bank is not required to list on the GEM unless the securities are offered to the public).

14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The market for special debt instruments is not particularly active for Irish companies. Non-Irish companies do, however, list a large volume of such securities on the ISE.

15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

Public offerings of special debt securities are subject to the prospectus regime and so a prospectus must be approved by the Central Bank and made available to the public before a public offer or application to list on a regulated market is made.

The GEM Listing Rules apply equally to debt, convertible and derivative securities, and so the requirements for the listing particulars are the same for all such securities.

The MSM Listing Rules, however, distinguish between debt (which includes convertible and exchangeable securities) and derivative securities. An issuer seeking admission of derivative securities must satisfy certain conditions relating to the issuer itself, its audited accounts, derivative products and retail derivatives, before the ISE will accept the application. Convertible securities may be admitted to listing only if the securities into which they are convertible are already or will simultaneously become listed securities. However, the ISE may dispense with this requirement if it is satisfied that holders of the convertible securities have all the information necessary to form an opinion about the value of the underlying securities.

16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

Irish securities law generally describes equity securities as shares, transferable securities equivalent to shares and transferable securities which, if converted or if the rights conferred by them are exercised, give rise to a right to acquire shares or securities equivalent to shares.

Debt securities are usually described as bonds or other forms of transferable securitised debts except equity securities, or simply, all securities that are not equity securities.

Both debt and equity securities are subject to the prospectus (where there is a public offer or the securities are listed on a regulated market), market abuse and transparency regimes and listing rules, if the securities are listed.

Issuers of equity securities are subject to more onerous disclosure and reporting obligations under the transparency regime, for example, in relation to the notification of acquisition and disposal of major shareholdings where Ireland is the home member state.

Under the EU Market Abuse Regulation, persons discharging managerial responsibilities (PDMRs), as well as persons closely associated with them, within an issuer of debt or equity securities must notify the issuer and the Central Bank of transactions in such securities conducted on their own account. The issuer must then make the information public. The time limit for notifying the issuer and the Central Bank is three business days after the transaction, and the issuer must publish the details within the same time frame. The new regime also introduced an annual threshold of €5,000 so that PDMRs do not have to make any notification until this has been met. While competent authorities can increase this threshold to €20,000 (but must notify ESMA and justify it by reference to market conditions), Ireland has not done so. ESMA's Q&A on prospectus law refers to the confusion about the classification of convertible and exchangeable securities and provides clarity on the applicable disclosure requirements. If the new shares arising on conversion or exchange are not yet traded on a regulated market, the disclosure requirements contained in the EU Prospectus Regulation relating to shares apply, whereas if the shares are already issued and admitted to trading, the debt security disclosure requirements apply.

17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

Restrictions are typically imposed on transfers of privately offered debt securities to investors in jurisdictions where an Irish issuer would be required to withhold tax on interest payments to investors in those jurisdictions. This applies only in the case of privately held securities but not to listed securities.

In addition, issuers of privately offered debt securities should ensure that any subsequent offer of the securities remains within one of the exemptions listed in question 4 and would not require the preparation of a prospectus.

There are usually no other transfer restrictions on privately offered debt securities.

18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

The Irish Prospectus Regulation defines an issuer as 'a body corporate or other legal entity which issues or proposes to issue securities'. It is therefore irrelevant whether the issuer is Irish or not. If a body corporate is making an offer to the public in Ireland or seeking to list its securities on a regulated market, including the MSM, it must comply with the prospectus, transparency and market abuse regimes.

Any prospectus relating to the issue of securities by an Irish company must be filed with the CRO within 14 days of publication. Non-Irish issuers are not required to comply with this requirement.

19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Once an issuer's prospectus is approved by the competent authority of an EEA member state other than Ireland, it may seek to have its prospectus passported into Ireland to enable its securities to be offered in and admitted to trading in Ireland. An issuer who wishes to do so should request the competent authority of their home member state to provide the Central Bank with a certificate of approval.

20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

The underwriting arrangement for public offerings of debt securities is governed by an agreement made between the issuer and entity appointed to act as underwriter or, if the securities are offered on a syndicated basis, all of the entities forming the syndicate.

Under this agreement, the issuer agrees to issue and the underwriters agree to subscribe or procure subscribers for the debt securities at an agreed price in accordance with certain terms and conditions. The issuer will usually give representations, warranties and undertakings in relation to various matters including the nature of the securities, preparation of its accounts and compliance of the prospectus with relevant law. The underwriters will also give an undertaking to comply with any selling restrictions set out in the agreement.

Underwriters on higher quality issues are jointly and severally liable. If the issuer is not as strong, underwriters are severally liable.

There is no substantial difference in the arrangements for private offerings of debt securities save for the conditions to the offer (including prospectus and listing requirements) and representations and warranties given by the issuer.

21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters of financial instruments, including transferable securities, are regulated and supervised by the Central Bank under the European Communities (Markets in Financial Instruments) Regulations 2017 (the MiFID Regulations), which transposed MiFID II into Irish law. The MiFID Regulations impose licensing requirements and conduct of business rules on investment firms that provide investment services or conduct investment activities (including the underwriting or placing of financial instruments) on a professional basis in Ireland in relation to certain financial instruments. The licensing requirement is subject to certain exemptions.

The MiFID Regulations prohibit a person from acting, claiming or representing that they are an investment firm in Ireland without being appropriately licensed, passported or exempt. There is a safe harbour exemption available under the MiFID Regulations under which MiFID investment services (including underwriting) can be provided on a cross-border basis by:

- a non-EEA entity; or
- an unregulated EEA entity, without triggering a licence requirement (the MiFID Safe Harbour).

The MiFID Safe Harbour applies to eligible counterparties and professional clients but does not apply, for example, to services provided to retail clients in Ireland. The MiFID Safe Harbour applies in the following circumstances:

- an investment firm will not be regarded as operating in Ireland if the firm provides investment services or performs investment activities, with or without any ancillary services, to eligible counterparties or to per se professional clients without the establishment of a branch in Ireland, and:
  - the firm's head or registered office is:
    - in a third country (ie, a non-EEA jurisdiction); or
    - in a member state other than Ireland and the firm does not provide any investment services in respect of which it is required to be authorised in its home member state for the purposes of MiFID II; or
  - the firm is authorised in a member state other than Ireland, under MiFID II, but provides only investment services of a kind for which authorisation under MiFID II is not available during the provision of the investment services; and
- a third-country investment firm can only rely on the MiFID Safe Harbour if the following conditions are met:
  - the firm is subject to authorisation and supervision in the third country where the third-country firm is established and the third-country firm is authorised so that the competent authority of the third country pays due regard to any recommendations of the Financial Action Task Force (FATF) in the context of anti-money laundering and countering the financing of terrorism; and
  - cooperation arrangements that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors are in place between the Central Bank and the competent authorities where the third-country firm is established.

The Irish Department of Finance explained in its Feedback Statement on MiFID II implementation that the two limbs above are designed to cover, respectively, non-EEA firms that are regulated in their home jurisdiction and whose home jurisdiction is:

- not on the list of non-cooperative jurisdictions maintained by the FATF; and
- a signatory to the IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information.

22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

See question 23.

The issuer will usually receive the proceeds into its account on the closing date and the securities are admitted to trading on issue, namely on the closing date. Settlement normally takes place on a delivery against payment basis in the main European or US clearing systems. There is no domestic clearing system in Ireland.

23 How are public debt securities typically held and traded after an offering?

Public debt securities are typically held in bearer or registered form and almost always as a global security. The global security is signed by the issuer on closing, authenticated by the issuer's agent and delivered to a common depository for safekeeping on behalf of the clearing system. The advantage of a global security over the alternative definitive form is cost and safety. Issuing one global security avoids the cost involved in issuing an individual security to each investor. Delivering one security to a common depository avoids the possibility of fraud that could arise if an individual security was printed and issued to each investor.

24 Describe how issuers manage their outstanding debt securities.

Certain features may be built into the terms and conditions of debt securities in order to assist an issuer in managing its securities post issuance; for example, the securities may be convertible or exchangeable or they may provide for early redemption mechanics. Liability management transactions can also be entered into post-issuance, including open-market purchases, tender offers, exchange offers and consent solicitations.

In the case of an open-market purchase an issuer will enter into individual contracts with security holders in order to buy back its securities. A tender offer involves an issuer offering to purchase, for cash,

all or a specified portion of its securities. An exchange offer involves an issuer offering to exchange the securities currently in issue for new securities with different terms and conditions or, potentially, for shares. A tender offer can be coupled with a consent solicitation whereby the security holders must agree to certain amendments to the terms and conditions of the securities (eg, the inclusion of an early redemption mechanic etc) in order to accept the tender offer. How a consent solicitation may be effected will depend upon the terms and conditions of the relevant securities.

In all cases care should be taken with respect to releasing information relating to these types of transactions in case such information is deemed to be 'regulated information' for the purposes of European and Irish securities law.

25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The main reporting obligations for issuers after offering debt securities relate to inside and financial information.

The market abuse regime requires issuers to disclose inside information to the public as soon as possible. Inside information is information that is precise, not publicly available, relates to an issuer or its securities and would, if publicly available, have a significant effect on the price of the securities. The Committee of European Securities Regulators (the predecessor to ESMA) published helpful guidance and examples to assist in the determination of inside information. Price significance is determined using the reasonable investor test, namely, is a reasonable investor likely to use the information as a basis for making an investment decision? An issuer's financial condition and the performance of its business are examples of information a reasonable investor would consider. The EU Market Abuse Regulation assumes a reasonable investor's decision is based on the information already available to him. Important factors in assessing whether a reasonable investor would be likely to consider the new information include: the anticipated impact it has on the totality of the issuer's activities, how reliable the source of the information is and any other market variables likely to affect the securities. An issuer may delay disclosure in order to protect its legitimate interests provided the delay is not likely to mislead the public and the issuer is able to ensure the confidentiality of the information and follows the detailed processes set out in the implementing technical standards. An issuer may selectively disclose inside information to persons owing it a duty of confidentiality.

The transparency regime requires issuers of securities admitted to trading on a regulated market with a denomination of less than €100,000 and whose home member state is Ireland to publish annual and biannual financial information. An issuer outside the scope of this regime may still be required to disclose such information annually if its securities are listed with the ISE.

Other reporting obligations regarding non-financial and regulated information under the transparency regime include the publication of changes to the rights of debt securities holders, information to enable the exercise of their rights and notices of their meetings.

26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Issuers are exposed to the risk of civil and criminal liability under statute and common law on a number of grounds including the following.

Omissions or misleading information in the prospectus

Civil and criminal liability under the Companies Act and Irish Prospectus Regulation may attach to the following persons:

- the issuer, offeror or person who sought admission to trade on a regulated market;
- the guarantor (if any and only in respect of information relating to the guarantee); and
- anyone who accepted responsibility for the prospectus.

Civil liability does not extend to directors of the issuer (unless they voluntarily accept responsibility) or to any expert who consented to the inclusion of his or her statement in the prospectus. In contrast, civil liability may attach to directors of issuers of equity securities and to any expert whose statement was included in the prospectus. Civil liability in tort for misrepresentation may also arise against the issuer.

Omissions or misleading information in financial information disclosed under the transparency regime

Civil and criminal liability under the Companies Act and Transparency Regulation may attach to an issuer who is subject to the relevant financial reporting obligations provided the person discharging managerial responsibilities (including directors) within the issuer knew the statement was misleading, was reckless as to that fact or knew the omission was a dishonest concealment of a material fact. Again, civil liability in tort for misrepresentation may also arise against the issuer here.

Breaches of market abuse law including failure to disclose inside information, insider dealing or market manipulation

Civil and criminal liability under the Companies Act and the Irish Market Abuse Regulation may attach to the issuer and potentially a director or officer of the issuer who consented to or approved a breach of market abuse law.

27 What types of remedies are available to the investors in debt securities?

Remedies are available to investors in debt securities under statute, contract and common law.

Under the Companies Act, investors may be entitled to compensation from the issuer or guarantor (if any) for loss or damage suffered as a result of omissions or misleading information in a prospectus or for a breach of market abuse law.

Investors may also be entitled to compensation under the Transparency Regulation for loss or damage suffered as a result of omissions or misleading information in certain information disclosed under that regime.

In a claim for contractual misrepresentation, investors may be entitled to recission and damages depending on whether the misrepresentation was fraudulent, negligent or innocent.

An action at common law in tort for negligent misstatement may entitle the investor to damages.

28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

If the Central Bank suspects the issuer has breached part of the Prospectus, Market Abuse or Transparency Regulations, it may appoint an assessor to investigate the alleged breach.

In the event of an adverse assessment under the Prospectus Regulation, the possible sanctions include:

- a private or public caution or reprimand;
- a direction disqualifying the issuer from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for a certain time; and
- a penalty of up to €2.5 million.

The Transparency Regulation also provides for the above sanctions except the financial penalty in the event of an adverse assessment against an individual is the higher of €2.5 million or twice the profit arising from the breach, or in the case of a company the higher of €10 million, 5 per cent of its turnover or twice the profit arising from the breach.

In the event of an adverse assessment under the new market abuse regime, the possible sanctions are wide-ranging and include:

- a private caution or reprimand;
- a public warning that identifies the assessee and the nature of the prescribed contravention;
- a direction disqualifying the issuer from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for a certain time; and
- penalties against issuers or individuals. The penalties range from €500,000 to €5 million for a natural person and from €1 million to €15 million or 15 per cent of total annual turnover for a legal person.

If the ISE considers that an issuer has breached the Listing Rules, it may refer the matter to an ISE disciplinary committee, which may censure

the issuer, publish this censure, and suspend or cancel the listing of the issuer's securities.

If the breach is due to a failure by a director of the issuer to discharge his or her responsibilities, the disciplinary committee may censure that director and publish the censure. If the breach persists, the disciplinary committee may state publicly that it considers the retention by the director of this office is prejudicial to the interests of investors. If the director remains in office after this statement, the disciplinary committee may suspend or cancel the listing of the issuer's securities.

29 What are the main tax issues for issuers and bondholders?

Ireland operates a special tax regime for issuers of debt securities, which allows issuers to achieve a neutral tax position by using an Irish resident special purpose vehicle known as a section 110 company. Section 110 companies are entitled to take a tax deduction for their funding costs (ie, payments on debt securities), which minimise tax leakage when using section 110 companies as corporation tax will be maintained at a negligible level. Typically a section 110 entity will pay corporation tax at a rate of 25 per cent on its minimum profit amount (usually approximately €3,000) only. A tax deduction is allowed for payments of interest on profit participating debt subject to certain requirements being met. Section 110 companies are normally used for asset-backed issuances.

The main tax issue for holders of debt securities issued by an Irish section 110 company is the ability of the security holder to be paid interest free of Irish withholding tax. Ireland has a withholding tax exemption for quoted Eurobonds, as well as a series of domestic law withholding tax exemptions. Quoted Eurobonds are securities listed on a stock exchange and no withholding will arise where the quoted Eurobonds are either held in a clearing system or where payments are made through a non-Irish paying agent. Where securities are not listed, security holders can still receive interest from an Irish company where they are tax-resident in an EU member state or a country with which Ireland has a double taxation treaty. Ireland currently has over 70 double taxation treaties. Typically, securities issued by an Irish company can be structured to eliminate Irish withholding tax.

No stamp duty or similar tax is imposed in Ireland on the issue, transfer or redemption of securities issued by an Irish section 110 company.

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