Debt Capital Markets 2021

Contributing editors
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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Debt Capital Markets*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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, Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze and Jeffrey D Hochberg of Sullivan & Cromwell LLP, for their assistance with this volume.

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Getting The Deal Through

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Ireland

Cormac Kissane, Glenn Butt, Ronan O'Keefe and Maedhbh Clancy

Arthur Cox LLP

MARKET SNAPSHOT

Market climate

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, medium-term notes and green, social and sustainable bonds.

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 Regulated Market (formerly known as the Main Securities Market) and the Global Exchange Market (GEM – operated by Euronext Dublin). The Irish Stock Exchange plc, trading as Euronext Dublin (Euronext Dublin) is a regulated market for the purposes of the EU Markets in Financial Instruments Directive II (and is, for the time being, the only regulated market in Ireland), 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 (the Central Bank), at the end of Q3 2020, the outstanding amount of debt securities issued by Irish resident entities totalled €2,010 billion.

Euronext Dublin is among the leading centres globally for listing bonds, with statistics showing its debt listings growing to reach over 41,000 securities at the end of 2019. According to the World Federation of Exchanges, Euronext Group is ranked number one among global exchanges for the number of bond issuers. A carve-out for Euronext Dublin only would place Euronext Dublin as the number one location of choice for listing debt securities.

Regulatory framework

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 Euronext Dublin.

EU legislation

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

Irish legislation

The EU Prospectus Regulation, the EU Market Abuse Regulation and the EU Securitisation Regulation all have direct effect in Ireland, but certain sanction provisions, member state discretions, competent authority designations and other local law matters are dealt with in Ireland's European Union (Prospectus) Regulations 2019, the Irish Market Abuse Regulations and the Irish Securitisation Regulations. Ireland has transposed the Directive on Criminal Sanctions for Market Abuse by way of the Irish Market Abuse Regulations and the Transparency Directive by way of the Irish Transparency Regulations.

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 Ireland's European Union (Prospectus) Regulations 2019, the Irish Market Abuse Regulations and the Irish Securitisation Regulations, also sets 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 Guidance, Q&A and the Central Bank (Investment Market Conduct) Rules (the IMC Rules), which set out procedural and administrative requirements and guidance in respect of the relevant directives and regulations. The IMC Rules consolidate the previously issued Transparency Rules, the Market Abuse Rules and the Prospectus Rules and repeal each of the previously issued rules relating to the prospectus regime.

Listing rules

Euronext Dublin has published a comprehensive set of rules for listing a variety of debt securities on the Main Securities Market (the EU and EEA regulated market) and the GEM. These rules (Rule Book 1 –Harmonised Rulebook and Rule Book II – Euronext Dublin Rulebook and the GEM Listing and Admission to Trading Rules, respectively) impose obligations on issuers of debt securities at the time of application for admission to trading and listing, and on an ongoing basis.

European Securities and Markets Authority guidance

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

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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 (ie, on the Main Securities Market), must first prepare and publish a prospectus that is subject to prior approval by the Central Bank of Ireland (the Central Bank).

For the purposes of the EU Prospectus Regulation, securities are 'transferable securities' as defined in the EU Markets in Financial Instruments Directive 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 IMC Rules.

If the issuer applies to have the securities listed on Euronext Dublin, it must appoint a listing agent and submit the prospectus, application for admission to trading and the relevant fee to Euronext Dublin, together with any supporting documentation required under the Euronext Dublin 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 within 14 days of publication.

Prospectus requirements

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, among other exemptions specified in the Prospectus Regulations:

- 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
- an offer of securities whose minimum denomination is €100,000 or higher.

Ireland's European Union (Prospectus) Regulations 2019 contain an exemption from the requirement to publish a prospectus where there is an offer of securities to the public in the State where the total consideration for the offer does not exceed €5 million (in aggregate, over a 12 month period).

A 'public offer' is defined very broadly under the EU 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.

In all circumstances, if securities are admitted to trading on a regulated market (ie, the Main Securities Market), 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 the Main Securities Market (EU/EEA regulated market)	No
Exemption applies Securities will be listed on the Main Securities Market (EU/EEA regulated market)	Yes
Exemption applies Securities will be listed on the GEM (exchange regulated market operated by Euronext Dublin)	No. In this instance a listing document is prepared called a listing particulars, which is subject to the GEM Listing and Admission to Trading Rules for Debt Securities.
No exemption available Securities will be listed on the Main Securities Market (EU/EEA regulated market) or the GEM (exchange regulated market operated by Euronext Dublin)	Yes

The prospectus must comply with all EU and Irish Prospectus legislation and include the 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 Central Bank (Investment Market Conduct) Rules 2019 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 that incorporates by reference all or part of a base prospectus).

The EU Prospectus Regulation (which is more prescriptive than the old prospectus regime in this regard) prescribes the contents of a prospectus. At a minimum, it must include a clear and detailed table of contents, a summary (unless the securities are non-equity securities that will be traded on a regulated market to which only qualified investors have access or they have a denomination of not less than €100,000), risk factors and the information contained in the relevant annexes to the EU Prospectus Regulation. Under the EU Prospectus Regulation, no summary is 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 prospectus must also contain a responsibility statement. The issuer, offeror or the 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 Regulation and the relevant annexes to Commission Delegated Regulation (EU) 2019/980, 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 on the 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).

Documentation

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 the 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 Commission Delegated Regulation (EU) 2019/980.

If the issuer or its advisers have doubts about the extent of the disclosures to be made, the guidance and Q&A on prospectus law from the European Securities and Markets Authority (ESMA) 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 the 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 those 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. This, again, limits the issuer's exposure to multiple claims from individual securities holders.

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:

- on the website of the issuer, the offeror or the person asking for admission to trading on the regulated market;
- on the website of the financial intermediaries placing or selling the securities, including paying agents; or
- in electronic form on Euronext Dublin's website.

All approved prospectuses must be made available electronically.

The Central Bank will publish a notice on its website with a link to the 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 Euronext Dublin and made available to the public in one of the following ways:

- in a printed form to be made available, free of charge, to the public at Euronext Dublin's offices;
- at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
- 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
- in electronic form on Euronext Dublin's website.

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

Authorisation

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 (ie, the Main Securities Market) is made, a dual submission to the Central Bank and Euronext Dublin 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 Euronext Dublin;
- comments will be provided in three business days. The Central Bank has reduced turnaround times assigned to the review for supplements. Comments on non-financial supplements received before 5pm are now returned within one business day (ie, by close of business the following business day). Financial-only supplements can proceed straight to approval without a review being required;
- the issuer submits a revised draft prospectus with replies to comments to the Central Bank and Euronext Dublin, and further comments may be provided in two business days;
- once the Central Bank and Euronext Dublin 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 Euronext Dublin;
- the relevant fees should be paid in advance of approval;
- once the Central Bank approves the prospectus, it will notify the listing agent and Euronext Dublin; and
- Euronext Dublin 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, 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.

Euronext Dublin may refuse an application for admission to list if it considers that:
- admission of the securities would be detrimental to the interests of investors;
- the issuer has not complied with the relevant listing rules; or
- for securities already listed in another EEA state, 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?

If securities are to be offered to the public, a prospectus must be produced, unless the offer is exempt, namely the offer is made, among other exemptions specified in the Prospectus Regulations:
- 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
- an offer of securities whose minimum denomination is €100,000 or higher.

Ireland's European Union (Prospectus) Regulations 2019 contain an exemption from the requirement to publish a prospectus where there is an offer of securities to the public in the State where the total consideration for the offer does not exceed €5 million (in aggregate, over a 12 month period).

If an offer falls within one of the above exemptions and an application to list the securities on the GEM is made, listing particulars must be prepared in compliance with the GEM Listing and Admission to Trading Rules, approved by Euronext Dublin and made available to the public before the application is made. The 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 above, which are not subject to any registration requirements, and there are no requirements for the content of the offer document.

Offering process

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. At 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 must 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 Euronext Dublin, the prospectus approval process must 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 Euronext Dublin. 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, Euronext Dublin will issue a formal notice of admission to trade and list on the relevant market.

Closing documents

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 on 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 (ie, Euronext Dublin) also require a copy of the approved prospectus, supplement, final terms and the notice of admission to trade, as appropriate.

Listing fees

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

Depending on the type of submission made (eg, a stand-alone prospectus or final terms under a programme), fees for listing on Euronext Dublin (the EU/EEA regulated market) may comprise a combination of all or some of the following:

- Euronext Dublin document fee;
- Central Bank document fee;
- security listing and admission to trading fee;
- Euronext Dublin annual fee applied at issuer level (€3,000, or alternatively a one-off fee of €13,000 can be paid prior to listing); and
- formal notice fee.

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.

KEY CONSIDERATIONS

Special debt instruments

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 Euronext Dublin.

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, so a prospectus must be approved by the Central Bank of Ireland (the Central Bank) and made available to the public before a public offer or application to list on a regulated market is made.

The Global Exchange Market (GEM) Listing and Admission to Trading Rules apply equally to debt, convertible and derivative securities, so the requirements for the listing particulars are the same for all those securities. The GEM does not distinguish between wholesale and retail transactions.

The Euronext Dublin Listing Rules, on the other hand, does 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 Euronext Dublin 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, Euronext Dublin 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.

Classification

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 that, 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 those 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 the European Securities and Markets Authority (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.

Transfer of private debt securities

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, and 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 applicable and would not require the preparation of a prospectus.

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

Cross-border issues

18 Are there special rules applicable to the 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 EU Prospectus Regulation defines an issuer as 'a legal entity which issues or proposes to issue securities'. It is, therefore, irrelevant whether the issuer is Irish. If a legal entity is making an offer to the public in Ireland or seeking to list its securities on a regulated market (ie, Euronext Dublin), 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 Companies Registration Office 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.

Underwriting

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 provide 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 except 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 the EU Markets in Financial Instruments Directive II (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. It 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 International Organization of Securities Commissions Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information.

Transaction execution

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

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 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.

Holding forms

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.

Outstanding debt securities

24 Describe how issuers manage their outstanding debt securities.

Certain features may be built into the terms and conditions of debt securities 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 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) 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.

Care should be taken in respect of releasing information relating to these types of transactions in case the information is deemed to be 'regulated information' for the purposes of European and Irish securities law.

REGULATION AND LIABILITY

Reporting obligations

25 Are there any reporting obligations that are imposed after the 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 the European Securities and Markets Authority) 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 or her. 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 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 that information annually if its securities are listed with Euronext Dublin.

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.

Liability regime

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. 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.

Remedies

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 rescission 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.

Enforcement

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

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

Prospectus regime

In the event of an adverse assessment under Ireland's European Union (Prospectus) Regulations 2019, the possible sanctions include:

- a private or public caution or reprimand;
- a direction disqualifying the assessee from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for a certain time;
- in the case of a natural person, a monetary penalty of up to €5 million; or
- in the case of a legal person, a monetary penalty of up to €20 million or up to 3 per cent of the total annual turnover.

Under the Companies Act, any person who 'authorised the issue of' a prospectus that includes an untrue statement or omits information that is required under prospectus law may be guilty of a category 2 offence, that is:

- on summary conviction to a class A fine (currently capped at €5,000) or imprisonment for a maximum term of 12 months, or both; or
- on conviction on indictment to a maximum fine of €50,000 or imprisonment for a maximum term of five years, or both.

Transparency regime

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.

Breaches of certain provisions of the Transparency Regulation constitute an offence, including knowingly or recklessly providing false or misleading information in an attempt to comply with the Transparency Regulation. A person who is guilty of such an offence is liable:

- on summary conviction to a maximum fine of €5,000 or a maximum term of imprisonment of 12 months, or both; or
- on conviction on indictment to a maximum fine of €1 million or imprisonment for a maximum term of five years, or both.

Market abuse regime

In the event of an adverse assessment under the 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.

Criminal sanctions may be imposed for serious breaches of the market abuse regime, such as insider dealing, unlawful disclosure of inside information and market manipulation and may attract maximum penalties under the Irish Market Abuse Regulations of a fine up to €500,000 or a prison term of up to three years, or both. With effect from 16 January 2017, the Irish Market Abuse Regulations were updated to stipulate what constitutes a 'serious market abuse offence' (ie, one that attracts higher sanctions (on conviction on indictment) of a fine of up to €10 million or a prison term of up to 10 years, or both), namely offences relating to insider dealing, the unlawful disclosure of inside information and market manipulation. Certain offences under those headings may also attract (for legal persons) civil sanctions of up to €15 million or 15 per cent of turnover (Irish Market Abuse Regulations).

If Euronext Dublin considers that an issuer has breached the relevant Listing Rules, it may refer the matter to its 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 owing 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.

Tax liability

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 minimises tax leakage 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.

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

In relation to Brexit, the European Commission decided to determine the legal and supervisory requirements for UK central securities depositories (CSDs) as equivalent to those in the European Union until 30 June 2021. The decision enables Euroclear UK & Ireland (EUI) (a UK-based CSD that serves Euronext Dublin) to continue to offer CSD services in respect of Irish securities after the end of the Brexit transition period on 31 December 2020. It also allows the European Securities and Markets Authority (ESMA) to begin a formal recognition process for EUI.

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Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The five Irish retail banks and eight main regulated non-bank lenders and credit servicing firms made flexible arrangements available to personal and business customers impacted by the covid-19 pandemic. Among those arrangements was industry-wide (non-legislative) payment breaks of up to six months, which constituted a 'general payment moratorium' for the purposes of the guidelines on legislative and non-legislative moratoria on loan repayments applied in light of the pandemic by the European Banking Authority (EBA). The industry-wide scheme closed on 30 September 2020, and payment breaks are now being offered by those banks and regulated lenders on a case-by-case basis.

The Central Bank of Ireland also applied various measures announced by the European Central Bank, the EBA and ESMA, including forbearance where issuers faced imminent reporting deadlines under the Transparency Directive in early 2020. It also extended the deadlines for various regulatory returns and assurance reports, provided flexibility when assessing compliance with deadlines for publishing Pillar 3 reports and considered postponements where entities encountered difficulties in meeting deadlines under risk mitigation programmes.

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