

To disclaim, or not to disclaim, that is the question

ECJ issues ruling on the accessibility of electronically published prospectuses

June 2014

Last month, the Court of Justice of the European Union (ECJ) published a ruling on certain provisions of Directive 2003/71/EC on prospectuses for public offerings of securities (the **Prospectus Directive**) including those relating to the electronic publication of prospectuses and addressed the question whether certain restrictions on access to the prospectus would make such publication incompatible with the requirements of the Prospectus Directive Regulation (809/2004) (the **PD Regulation**).

The ruling in [Michael Timmel v Aviso Zeta AG](#) (Case C-359/12) casts some doubt on what constitutes a 'restriction' to making a prospectus easily accessible on a website – a method which is commonly used by issuers, financial intermediaries and competent authorities in recent times.

What are the facts?

Here is a brief summary of the key facts of the case:

- An Austrian individual, Mr. Timmel, applied to Aviso Zeta AG, to purchase securities in October 2006.
- The securities had a denomination of less than EUR 50,000 per unit and were issued by Lehman Brothers Treasury Co. BV which has its seat in Amsterdam.
- Mr. Timmel sought to withdraw from the subscription by claiming that the information relating to the offer had not been lawfully published.
- Mr Timmel stated that a Base Prospectus and three Supplements were published on 9 and 29 August and 6 and 26 September 2006 respectively. In addition, draft Final Terms were published on 19 September 2006, with the definitive version published on 4 December 2006. Mr. Timmel claimed that no lawful publication had taken place at the seat of the Luxembourg Stock Exchange (where the securities were listed) or at the office of the issuer or the financial intermediary. The various documents comprising the prospectus were only available in Vienna. Furthermore, Mr. Timmel claimed that, whilst the documents relating to the offer for sale of the securities were accessible for a certain time on the website of the Luxembourg Stock Exchange, access to the documents was subject to certain restrictions.



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- Mr. Timmel claimed that the restrictions comprised a registration process, the acceptance of a disclaimer and the payment of fees. Additionally, the website provided that parts of the documents could be accessed free of charge but access was restricted to two documents per month (but he claimed that it was necessary to download at least three documents in order to obtain all the required information).
- Mr. Timmel brought proceedings before the Commercial Court in Vienna who stayed the proceedings and referred certain questions on the interpretation of the Prospectus Directive to the ECJ for a preliminary ruling.

In this briefing, we focus on the most significant point in the ECJ's ruling, which concerns the electronic publication of prospectuses.

No restrictions to access

In its ruling, the ECJ referred to Article 29(1) of the PD Regulation which provides that electronic copies of a prospectus must be "*easily accessible when entering the website*". The ECJ ruled that this requirement is not met where:

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

Whilst UK offers do not generally charge for access to the prospectus or limit downloads of the prospectus, access to the prospectus does invariably require the acceptance of a disclaimer and, occasionally, inputting a telephone number with an EU country code.

Following the ruling by the ECJ, the Luxembourg Stock Exchange [announced](#) on 6 June 2014 that published prospectuses (including Supplements, Final Terms and documents incorporated by reference) on the Luxembourg Stock Exchange website will be accessible to potential investors without any restrictions on access from 13 June 2014.

AG opinion

The ECJ confirmed the opinion of the Advocate General who also provided that such restrictions were incompatible with the PD Regulation. Click [here](#) to read her opinion which was published in November 2013.

What impact does this ruling have on website disclaimers?

A 'click-through' disclaimer is typically used where issuers seek to comply with laws which are designed to protect inexperienced investors and to prevent the prospectus from being accessed by investors resident in certain jurisdictions, where otherwise foreign securities laws might be infringed.

The judgment, however, throws doubt on this practice, on the basis that the use of such disclaimers could present an unlawful restriction upon investors' ability to access the prospectus. In its ruling, the ECJ comments that the acceptance of a disclaimer constitutes a condition which gives rise to a '*position of inequality between the issuer or any intermediary and the potential investor which is contrary to ensuring investor protection*' – a key objective of the Prospectus Directive regime. However, this appears to conflict directly with Article 29(2) of the PD Regulation which provides that where a prospectus for an offer of securities to the public is made available on the websites of issuers and financial intermediaries, they "*shall take measures, to avoid targeting residents in Members States or third countries where the offer of securities to the public does not take place, such as the insertion of a disclaimer as to who are the addressees of the offer*". So, clearly the PD

Regulation permits the use of disclaimers on websites – but how does this fit with the ECJ's recent ruling?

Article 29(2) was not directly considered in the judgment (nor in the Advocate General's opinion) and, therefore, it appears to create an unhelpful lack of clarity as to the use of a website disclaimer. Additionally, the judgment does not comment on the nature of the disclaimer and consequently, it is not apparent whether and how the acceptance of the disclaimer imposed restrictions on investors. However, given the explicit reference to the use of website disclaimers in Article 29(2) of the PD Regulation, a common sense approach would be to interpret the ruling to mean that the ECJ does not object to the use of a disclaimer in isolation (for example, where the acceptance of a disclaimer is not in addition to an obligation to register on the website and provide an email address) but its use will be considered as a relevant factor when all restricting factors are assessed to determine whether easy access to a prospectus has been restricted.

What happens now?

The case will return to the Commercial Court in Vienna which will consider the ECJ's ruling when deciding whether Mr. Timmel has a right to withdraw from his application to subscribe for the relevant securities. Under UK law, the Prospectus Rules implement the Prospectus Directive. If the prospectus is not properly made available to the public, there is a breach of the Prospectus Rules and the FCA has statutory powers under the Financial Services and Markets Act 2000 to impose sanctions on the issuer (such as a financial penalty or public censure). Whether the investor would have a right to withdraw will depend on the facts in question, but it is likely that the Austrian court's decision will set a precedent for similar cases in member states.

Other points to note

The ECJ ruled on other points in relation to the Prospectus Directive which are less controversial but provide an interesting insight into the court's interpretation of the Prospectus Directive regime:

- The ECJ confirmed the requirement that, where information that must be contained in the Base Prospectus in accordance with Article 22(1) of the PD Regulation is to be inserted in the Final Terms, it must be clearly indicated in the Base Prospectus that this information will be included in the Final Terms. Although this reflects current market practice, it is worth noting that this case pre-dates the recent amendments to the Prospectus Directive which took effect on 1 July 2012 and which include more prescriptive requirements as to what information can be included in the Base Prospectus or Final Terms.
- Additionally, the ECJ confirmed that a Supplement must be published in the event of a significant new factor, material mistake or inaccuracy occurring after the publication of the Base Prospectus. The ECJ noted that whether or not there was such a matter which would require a Supplement to be published was for the national court to determine.
- The ECJ has clarified (following translation discrepancies) that Article 14(2)(b) of the Prospectus Directive should be interpreted as requiring printed copies of the Base Prospectus to be made available to the public both at the registered office of the issuer *and* at the offices of the financial intermediaries responsible for placing the offer. As this is consistent with the English language version, this should not necessitate much change to market practice and in any event, most issuers tend to publish their prospectuses electronically.

If you have any queries on this ruling or on any matter relating to the Prospectus Directive, please contact your usual contact or one of the listed contacts.