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Responsibility for Information within a Prospectus for Debt Securities



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Responsibility for Information within a Prospectus for Debt Securities

An issue has arisen with regard to the drafting of responsibility statements in debt prospectuses. Recent practice has allowed “split responsibility” statements where it would appear that the issuer disclaims responsibility for certain parts of the prospectus. This practice has its roots in the regime that existed prior to the implementation of Directive 2003/71/EC (the “Prospectus Directive”) in Ireland by the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (the “2005 Act”) and the Prospectus (Directive 2003/71/EC) Regulations 2005 (the “Irish Regulations”).

However, the Prospectus Directive disallows such a carve-out. Article 6 requires that at least one of the “persons” designated therein takes responsibility for the whole of the prospectus (as confirmed in Question 47 and 48 of “*Frequently Asked Questions - Prospectuses: common positions agreed by ESMA Members*”, 13th updated version dated June 2011 (the “CESR Q&A”).

Article 6 of the Prospectus Directive states:

1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their

names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

(Italics added for emphasis)

While the Prospectus Directive permits others to assume responsibility for certain sections of the prospectus, this does not substitute for the responsibility of the issuer (or at least one of the other “persons” mentioned in Article 6.1) as supported by Question 47 of the CESR Q&A:

According to the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive (8 March 2005) “at least one of the persons mentioned in Article 6.1 must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus”.

Therefore the Directive only requires that at least one of these persons mentioned in Article 6 is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person) should be also responsible for the whole or part of the prospectus.

(Italics added for emphasis)

and Question 48 of the CESR Q&A:

As already stated in the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive and in Question 45 of the CESR Q&A, at least one of the persons mentioned in Article 6.1 of the Prospectus Directive (the issuer, the offeror, the person asking for the

admission to trading on a regulated market or the guarantor) must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus. Therefore the Directive only requires that at least one of these persons mentioned in Article 6 is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person, for instance also the guarantor) should be also responsible for the whole or part of the prospectus.

(Italics added for emphasis)

Pursuant to Regulation 31 and Schedule 1 of the Irish Regulations, which transpose Article 6 of the Prospectus Directive into Irish law, the issuer (and other persons designated in paragraph 3(2) of Schedule 1 of the Irish Regulations) must take responsibility for the whole of the prospectus.

Regulation 31(2) states:

2. For the purposes of these Regulations, *responsibility for the information given in a prospectus attaches, subject to the provisions of that Schedule, in each of the cases specified in Schedule 1 to these Regulations to persons specified in the relevant case, and references in these Regulations to responsible persons shall be construed accordingly.*

(Italics added for emphasis)

Schedule 1, Paragraph 3(2) of the Regulations states:

In a case to which this paragraph applies, *each of the following persons is, subject to the other provisions of this Schedule, responsible for the prospectus:*

- (a) the issuer of the securities;
- (b) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus;
- (c) if the case involves an offer of securities to the public, the offeror of the securities, if this is not the issuer;
- (d) if the case involves the admission to trading of securities, the person seeking admission, if this is not the issuer;
- (e) if there is a guarantor for the issue, the guarantor in relation to information in the prospectus that relates to the guarantor and the guarantee; and
- (f) each person not falling within any of the preceding provisions of this subparagraph who has authorised the contents of the prospectus.

(Italics added for emphasis)

Pursuant to the Irish Regulations, more than one person may be required to take responsibility for the whole of the prospectus. However, at very least, the issuer, offeror and the person seeking admission to trading will be responsible for the whole of the prospectus. Therefore, qualifying language limiting the issuer's responsibility will no longer be acceptable unless the issuer is wholly excluded from the offer or application for admission to trading.¹

¹ Under Paragraph 4 of Schedule 1 of the Irish Regulations, "An issuer is not responsible for a prospectus under paragraph . . . 3(2)(a) unless the issuer has made or authorised the offer of securities to the public or the application for admission to trading in relation to which the prospectus was published."

Other Parties Accepting Responsibility for Parts of the Prospectus

Paragraphs 3(2)(b) and 7(a) of Schedule 1 of the Irish Regulations allow persons to accept responsibility for specified parts of the prospectus. This, however, is in addition to the responsibility attaching to the issuer and other persons in paragraph 3(2) of Schedule 1 of the Irish Regulations. Paragraph 7 of Schedule 1 with regard to persons accepting responsibility for, or authorising, a part of the contents within a prospectus, states:

When accepting responsibility for a prospectus under -

(a) paragraph 2(2)(c) or paragraph 3(2)(b), or

(b) authorising the contents of a prospectus under paragraph 2(2)(f),

a person may state that her [sic] or she does so only in relation to specified parts of the prospectus, or only in specified respects, and in that case the person is responsible under those paragraphs:

(i) only to the extent specified; and

(ii) only if the material in question is included in (or substantially in) the form and context to which the person has agreed.

(Italics added for emphasis)

Declarations of Responsible Persons

Pursuant to Regulation 32(2) of the Irish Regulations and Commission Regulation (EC) No 809/2004 (the “Commission

Regulation”), the declaration by those responsible for the information in the prospectus should state that, having taken all reasonable care to ensure that such is the case, the information contained in the prospectus is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.

Furthermore, the declaration by those responsible for information in certain parts of the prospectus should state that, having taken all reasonable care to ensure that such is the case, the information contained in the part of the prospectus for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.

Confirmations Regarding Third Party-Sourced Information

The use of a confirmation that third party-sourced information is accurately reproduced and that, as far as the issuer is aware and is able to ascertain from the information published by that third party, no facts have been omitted which would render the reproduced information inaccurate or misleading does not obviate the responsibility of the issuer with regard to that information in the prospectus.

With regard to information disclosed about an undertaking/obligor which is not involved in an asset-backed securities issue, a confirmation that the information relating to the undertaking/obligor has been accurately reproduced from

information published by the undertaking/obligor and, so far as the issuer is aware and is able to ascertain from information published by the undertaking/obligor, no facts have been omitted which would render the reproduced information misleading does not obviate the responsibility of the issuer with regard to that information in the prospectus.

Compliance

The Central Bank, as the competent authority in Ireland, will be monitoring compliance with Article 6 of the Prospectus Directive and other applicable law.

Questions?

If you have any questions, please contact the Corporate Finance Division at:

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