

ALLEN & OVERY

The new prospectus regime in Luxembourg

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A new Luxembourg act dated 16 July 2019 on prospectuses for securities and implementing the Prospectus Regulation (the New Prospectus Act) was published in the Luxembourg Official Gazette on 18 July 2019. The New Prospectus Act repeals the Luxembourg act dated 10 July 2005 on prospectuses for securities, as amended (the Old Prospectus Act) and, together with the Prospectus Regulation, which is directly applicable across the EU, will create new prospectus regimes in Luxembourg. The New Prospectus Act will come into force on 21 July 2019.

Background

On 21 July 2019, the European prospectus regime set up by the Prospectus Directive¹ (transposed into Luxembourg law by the Old Prospectus Act) will be replaced entirely by the new prospectus regime introduced by the Prospectus Regulation². To reflect this major change, the New Prospectus Act repeals the Old Prospectus Act, implements certain legislative measures that Member States may adopt at their discretion under the Prospectus Regulation, and re-sets rules for a lighter national prospectus regime for those transactions that fall outside the scope of the Prospectus Regulation.

The new prospectus regime will apply to prospectuses approved on or after 21 July 2019. Prospectuses (or base prospectuses) approved under the Old Prospectus Act prior to 21 July 2019 will continue to be governed by the old regime until the earlier of the expiration of (i) their validity period or (ii) 12 months from 21 July 2019.

The Prospectus Regulation regime in a nutshell

The Prospectus Regulation establishes the new prospectus regime for the securities offered to the public or admitted to trading on a regulated market (previously subject to, as far as Luxembourg is concerned, the provisions of Part II of the Old Prospectus Act). The key changes brought by the new regime regarding non-equity securities are set out below:

- The application of the prospectus disclosure regime for wholesale non-equity securities has been extended to include both non-equity securities with a minimum denomination of EUR100,000 and non-equity securities (regardless of their denomination) which are admitted to trading on a qualified investor only segment of a regulated market.
- The requirements relating to the disclosure of risk factors in prospectuses have been overhauled and there are now ESMA guidelines³ for competent authorities to apply when reviewing the risk factor sections of prospectuses.
- Summaries in retail prospectuses have a new format set out in the Prospectus Regulation. The maximum length has been reduced to seven sides of A4 paper.
- Changes have been made, at both a general and specific level, to the disclosure requirements in relation to prospectuses including: requirements for new warnings and mandated statements to be set out in the prospectus; a requirement that a prospectus must include hyperlinks to documents incorporated by reference; the re-ordering and deletion of some of the disclosure annexes; and changes to the disclosure items in individual annexes.

¹ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, and amending Directive 2001/34/EC.

² Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

³ The European Securities and Markets Authority (ESMA) Guidelines on risk factors under the Prospectus Regulation dated 29 March 2019 (ESMA31-62-1217).

- There are some changes to the rules applicable to supplements to prospectuses, but note that these will not apply to supplements to grandfathered prospectuses.
- The Prospectus Regulation regime introduces a set of specific criteria for a competent authority to consider when scrutinising and approving prospectuses. A competent authority must satisfy itself that the prospectus meets all standards of completeness, comprehensibility and consistency.
- In accordance with the revised publication requirements an issuer has to ensure its prospectus is published on a dedicated section of a website and will remain publicly available in electronic form for at least ten years after publication.
- Whilst the rules on advertisements have remained broadly the same as those under the Prospectus Directive, some changes which may result in adjustments to the current market practice. There is no grandfathering for an advertisement published on or after 21 July 2019, even if it relates to an issue under a grandfathered prospectus.
- A new simplified disclosure regime for “secondary issuances” is introduced.

Detailed information about those changes and about the requirements of the new Prospectus Regulation regime can be found online – on our [Prospectus Spotlight website](#) (registration required) or on our dedicated [Prospectus Regulation microsite](#) (publicly available).

The New Prospectus Act

Opting-in for EUR 8 million threshold exempting public offers

In principle, all exemptions from the obligation to draw up a prospectus under the Prospectus Regulation are provided for in the Prospectus Regulation itself. However, Member States may opt for an exemption from the obligation to draw up a prospectus for offers to the public of an amount not exceeding EUR8 million⁴. The Luxembourg legislator has exercised such option by adopting the maximum amount allowed as the threshold. However, prior notification of the exempted transactions to the Luxembourg competent authority, the *Commission de Surveillance du Secteur Financier* (CSSF), is required. In addition, for public offers below EUR8 million but equal to or higher than EUR5 million⁵, the New Prospectus Act requires publication of an information note⁶.

Revamping of the “lighter” national prospectus regime

As was already the case under the Old Prospectus Act, the New Prospectus Act sets out the national prospectus regime for public offers or admissions to trading on a regulated market in Luxembourg that are not covered by the Prospectus Regulation (hereinafter referred to as the national prospectus regime). For these transactions, publication of a “lighter prospectus” (*prospectus allégé*) is required. The new national prospectus regime does not substantially deviate from the previous one; the changes merely aim to simplify and align the previous national prospectus regime with the regime under the Prospectus Regulation.

The main changes introduced in Part III of the New Prospectus Act are as follows:

- Introduction of the same EUR8 million threshold exempting public offers from the requirement to publish a lighter prospectus as the threshold for prospectuses introduced by the Prospectus Regulation. This exemption is

⁴ Total consideration of each offer in the EU in a monetary amount calculated over a period of 12 months.

⁵ Total consideration of each offer in the EU in a monetary amount calculated over a period of 12 months.

⁶ The New Prospectus Act sets out minimum content requirements for the information note (information on issuer, guarantor (if applicable), securities, offer (if applicable) or admission to trading (if applicable)). The information note needs to be published following the rules for the publication of the lighter prospectus. No prior approval by the CSSF is required.

also subject to preparation of an information note⁷ for public offers which reach or exceed EUR5 million⁸ and prior notification to the CSSF.

- The exemption from the requirement to publish the lighter prospectus in the context of employee-share schemes is now made available also to employers outside the EU. This is another alignment with the modifications introduced by the Prospectus Regulation.
- For public offers and/or admission to trading of non-equity securities issued by public international bodies of which one or more Member States are members, no prospectus is required. This newly introduced exemption is subject to preparation of an information note⁹.
- An information note¹⁰ is now also required for public offers and/or admission to trading of non-equity securities issued by the Luxembourg State and the municipalities of the country (“*communes*”) or by any other Member State.
- It is possible to prepare a lighter prospectus on a voluntary basis (i.e., in cases where a public offer or admission to trading is exempt from the obligation to publish a lighter prospectus), which also follows the regime under the Prospectus Regulation.
- A new solution is available in situations where the final offer price cannot be included in the final lighter prospectus. In such cases, the simplified prospectus may include an indication of the valuation method and its explanation.

Sanctions

The Luxembourg legislator did not exercise the legislative option to include additional administrative sanctions or a higher level of pecuniary sanctions for breach of the obligations under the Prospectus Regulation. Nevertheless, the level of pecuniary sanctions has substantially increased when compared to the previous regime under the Old Prospectus Law.

⁷ The New Prospectus Act sets out minimum content requirements for the information note (information on issuer, guarantor (if applicable), securities, offer (if applicable) or admission to trading (if applicable)). The information note needs to be published following the rules for the publication of the lighter prospectus. No prior approval by the CSSF is required.

⁸ Total consideration of each offer in the EU in a monetary amount calculated over a period of 12 months.

⁹ See footnote 6 above.

¹⁰ See footnote 6 above.

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