



NEW RULES ON PUBLIC OFFERINGS AND ON TAKEOVER BIDS – THE LAW OF 11 JULY 2018 AND THE ROYAL DECREE OF 23 SEPTEMBER 2018

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1. Introduction

The public offer of investment instruments and their admission to trading on a regulated market used to be governed by the law of 16 June 2006 implementing the Directive 2003/71/EC of 4 November 2003 (the “**Law of 2006**”).

While mandatory disclosure of information is vital to protect investors and constitutes a necessary step towards completion of the so-called ‘EU Capital Markets Union’¹, the rules laid down in the Directive 2003/71/EC led to divergent approaches across Europe and resulted in significant impediments to cross-border offers of securities, multiple listings on regulated markets and to EU consumer protection rules.

Therefore, the EU legislator repealed the Directive 2003/71/EC and adopted the Regulation 2017/1129 of the European Parliament and of the Council dated 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the “**Prospectus Regulation**”). The Prospectus Regulation imposes obligations having a direct effect on persons involved in the offering or listing of securities.

As a result, only a few provisions contained in the Prospectus Regulation required implementation in the Member States’ legal system. The questions relating to the prospectus exemption, the approval process and the international cooperation are, for instance, addressed directly in the Prospectus Regulation.

That being said, the **New Prospectus Law**² modifies certain key elements relating to the public offerings of investment securities (such as the thresholds imposing the issue of a prospectus) while keeping unchanged certain aspects which were covered by the Law of 2006, falling out of the Prospectus Regulation’s scope (**Section 2**).

The New Prospectus Law also introduces certain amendments to the Belgian law relating to takeover bids (**Section 3**).

Finally, the New Prospectus Law implements the Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds and makes various amendments to the Belgian financial legislation. These amendments are not commented in this news.

The New Prospectus Law contained a large delegation to the King, notably to specify the MTF

¹ As set out in the EU Commission communication of 30 September 2015, the building of the ‘Capital Markets Union’ aims at helping businesses tap into more diverse sources of financing from across Europe. It also seeks to make markets work more efficiently and offer investors additional opportunities

to put their money to work and therefore enhance growth and jobs creation in the European Union.

² The Law of 11 July 2018 on public offers of investment instruments and admission to trading of investment instruments on a regulated market - Belgian Official Journal 20.07.2018. See the Communication of the FSMA dated 22.06.2018.

which would benefit from a specific regime in case of public offerings.

This has been done by the Royal Decree of 23 September 2018 on the publication of a prospectus in case of a public offer or admission to trading on an MTF and containing various financial provisions³ (the “**Royal Decree**”) which specifies that the concerned MTF are (i) Alternext (Euronext Growth) and (ii) Marché Libre (Euronext Access).

2. Implementation of the Prospectus Regulation with respect to public offerings

a. Scope of the regime

In line with the Directive 2003/71/EC, the Prospectus Regulation only applies to public offers and admission to trading on regulated markets of moveable securities.

The Law of 2006 had, however, a broader scope. Indeed, it did not refer to the concept of “security” but of “investment instrument”, which is much broader. This approach is maintained in the New Prospectus Law which makes no changes to the definition of “investment instrument”.

Therefore, the New Prospectus Law shall also apply to public offers and admission to trading of investment instruments other than moveable securities. Public offers of new instruments such as cryptocurrency will thus notably be subject to the New Prospectus Law.

b. Thresholds for the application of the prospectus requirement

As allowed by the Prospectus Regulation⁴, the New Prospectus Law implements three separate regimes for the application of the prospectus requirement, depending on whether or not the investment instruments are admitted (or will be admitted) on a regulated market or on the abovementioned MTF.

The obligation to issue a prospectus applies to:

- 1) public offerings of investment instruments that are not admitted to trading on the two MTF designated by the Royal Decree, the aggregate amount of which exceeds EUR 5 million calculated over a period of 12 months;
- 2) for public offerings of investment instruments admitted or to be admitted to trading on the two MTF designated by the Royal Decree the aggregate amount of which exceeds EUR 8 million⁵ calculated over a period of 12 months.
- 3) admission to trading on a regulated market, regardless of the amount relating thereto.

As in the previous regime, the admission on an MTF without a public offer of investment instruments does not give rise to the application of the prospectus requirement.

c. Regime for offers below the thresholds

1) Principles

The New Prospectus Law requires the preparation of an information document which is not a prospectus:

- for public offers for an amount of less than or equal to EUR 5 million over a twelve-month period; and

- for public offers for an amount of less than or equal to EUR 8 million over a twelve-month period provided that the investment instruments are admitted or to be admitted to trading on the two MTF designated by the Royal Decree.

This information document regime also applies – subject to certain exceptions – for the admission of investment instruments on such MTF.

2) Exceptions

The New Prospectus Law provides for a ‘*de minimis*’ regime for public offers the amount of which is less than or equal to EUR 500,000

admitted or not on an MTF is justified in view of the specific rules that apply in the event of admission to an MTF. In addition, the thresholds of EUR 5 million and EUR 8 million are also those chosen in Netherlands and France. Therefore, the proposed regime allows, in the opinion of the Government, a “level playing field” vis-a-vis neighboring countries.

³ Belgian Official Journal 05.10.2018.

⁴ Article 3, §2. which gave to the Member States the flexibility to fix the threshold(s) requiring the issue of a prospectus between EUR 1 million and 8 million.

⁵ The preparatory works of the New Prospectus Law specify that the distinction between investment instruments that are

calculated over a period of 12 months and specifies that the maximum consideration per investor is capped at EUR 5,000⁶. These public offers do not require the publication of a specific document (*i.e.* prospectus or information document) nor a notification to the FSMA.

The obligation to draw up an information document for public offers for an amount of less than or equal to respectively EUR 5 million or EUR 8 million does not apply either:

- to public offers for investment instruments, other than moveable securities, which qualify as forward agreements and do not require any investment at the time of their conclusion;
- if the issuer or the offeror is already required to provide investors with a key information document under the PRIIPs Regulation (« Packaged Retail and Insurance-based Investment Products ») or another information document considered equivalent by royal decree;
- when the issuer or the offeror voluntarily draws up a prospectus;
- to public offers for which the Prospectus Regulation provides for prospectus exemption, *i.e.* for example, an offer to less than 150 persons other than qualified investors or an offer of securities addressed solely to qualified investors⁷.

The exemptions provided for by the Law of 2006 for (i) offers of shares in cooperative companies, (ii) offers of securities to employees under incentive plans and (iii) crowdfunding offers have been repealed in the New Prospectus Law. As a result, these offers will now give rise to the obligation to draw up an information document, unless they fall within the scope of the '*de minimis*' rule.

3) Content of the information document

The information document, which only contains significant information for the investor, is a much more concise document than the prospectus (maximum 15 pages). This new regime aims to

facilitate access to financing for small enterprises while providing sufficient information to investors.

The information document contains a brief description of the following:

- the key risks of the issuer and the offered investment instruments, specific to the offer or the admission to trading concerned;
- information regarding the issuer and the offeror of the investment instruments, including the issuer's annual accounts for the last two financial years;
- information regarding the conditions and the reasons for the offer or admission to trading of the investment instruments;
- information regarding the characteristics of the investment instruments offered or to be admitted.

The schema according to which the information document must be written and the contents thereof are specified in the Annex I (for the public offer) and Annex II (for the admission on an MTF) of the Royal Decree.

The information document must be deposited with the FSMA at the latest at the time it is made available to the public. It is therefore not subject to prior approval of the FSMA, contrary to the prospectus. The FSMA may control *a posteriori* the contents of the information document and take administrative measures or sanctions if it appears that the information document does not meet the requirements provided for by or under the law.

3. Amendments to the takeover bids and squeeze-out regulations

The New Prospectus Law and the Royal Decree have also implemented certain amendments to the law of 1 April 2007 on takeover bids (the "**Takeover Law**") and the Royal Decree of 27 April 2007 on takeover bids (the "**Takeover Royal Decree**"). In accordance with the rationale of the Prospectus Regulation, these amendments aim to facilitate access to capital markets for small and medium enterprises.

⁶ According to the Law of 2006 the prospectus requirement did not apply to public offers of investment instruments the amount of which was less than EUR 300,000 calculated over a period of

12 months and provided that the maximum consideration per investor was capped at EUR 1,000 (Article 18, j).

⁷ See articles 1 §§ 1 and 4 of the Prospectus Regulation and 10 § 2 and 3, 1° of the New Prospectus Law.

The main amendments can be summarised as follow:

- For companies whose securities are exclusively admitted to trading on Euronext Growth and Euronext Access, the threshold at which a mandatory offer must be launched is raised from 30% to 50%.
- The obligation to publish a prospectus has been removed for takeover bids for debt securities launched by the issuer of such securities. This obligation has been replaced by the obligation to publish a press release approved by the FSMA and the other rules applicable to such type of takeover bids have also been softened.
- The Takeover Law currently assimilates to advertising documents the “other documents and opinion relating to a public offer”. As a consequence, the FSMA has to approve this type of documents even if they have no advertising purpose (for example social documents of a company). This assimilation is deleted, so that the prior approval by the FSMA of “other documents and opinion relating to a public offer” is no longer applicable in the event of a takeover bid.
- The provisions relating to the publication of the prospectus and the incorporation of documents by reference are aligned with the regime provided for in the Prospectus Regulation.
- The definition of “credit institution” and “stockbroking firm” have been widened to cover entities governed by the law of a Member State of the European Economic Area, and no longer only those established in Belgium.
- The reporting rules to the FSMA applicable during the bid period have been eased (for example, the reporting obligation regarding (i) securities lending and (ii) persons who hold voting securities in the offeror have been deleted).
- The Royal Decree has also entirely updated and amended the squeeze-out Royal Decree in order to take into account the case law regarding squeeze-outs since 2007. The main purpose of these amendments is to ensure that the offered price does not infringe the interests of the securities

holders and to grant the FSMA the power to control the conditions in which the transaction takes place.

Furthermore, the rules in the Takeover Royal Decree that govern the takeover bids issued by an offeror that controls the target company have been harmonised with the amendments made to the corresponding provisions of the squeeze-out Royal Decree.

4. Entry into force and transitory regime

The New Prospectus Law provides for an entry into force in successive phases:

- a first category of provisions has entered into force 10 days after the publication of the New Prospectus Law, i.e. as from **30 July 2018**. In particular, this category includes the amendments to the Takeover bids legislation;
- the provisions relating to the new thresholds for the application of the prospectus requirement and the information document regime are into force since **21 July 2018**. The ongoing offers on that date remain however governed by the previous regime. An exception regime is however provided for offers of shares in cooperative companies and offers of securities to employees under incentive plans: if such offers are pending on 21 July 2018, they however fall under the new rules as from 21 October 2018;
- the other provisions, which constitute the implementation of the Prospectus Regulation, will enter into force on **21 July 2019**.

The Royal Decree entered into force on **15 October 2018**. Ongoing offers on that date remain subject to the previous regime.

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