LEGAL ALERT


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I. INTRODUCTION


The Amendment Prospectus Directive amends Directive 2003/71/EC (the “Prospectus Directive”) on the prospectus to be published when securities are offered to the public or admitted to trading as well as Directive 2004/109/EC (the “Transparency Directive”) on the harmonisation of transparency requirements in relation to the information about issuers whose securities are admitted to trading on a regulated market. The Amendment Prospectus Directive aims to simplify and reduce some of the obligations that were felt to be unnecessarily onerous or complex on companies without compromising the protection of investors and the proper functioning of the securities markets in the European Union.

For the purpose of the Amendment Prospectus Directive’s implementation, the 2012 Law amends (i) the law of 10 July 2005 on prospectuses for securities (the “Prospectus Law”) and the law of 11 January 2008 on transparency requirements for issuers of securities, as amended (the “Transparency Law”).

In the context of the changes to the Prospectus Law, we draw your attention to the fact that the Commission de Surveillance du Secteur Financier (the “CSSF”) published a Circular (CSSF Circular 12/539) on July 6, 2012, which replaced, with immediate effect, the CSSF Circular 05/226 of December 16, 2005. The first part of the new circular puts the 2012 Law into a European context and explains the main amendments brought about by the 2012 Law. It further reiterates the three regimes introduced by the Prospectus Law in 2005 as well as the competences and tasks of the CSSF within this framework. The second part of the circular details the technical procedures for submitting documents to the CSSF for approval, passporting, filing or communication in the context of public offerings of securities and admission of securities to trading on a regulated market.

II. KEY CHANGES TO THE PROSPECTUS LAW

Among the most significant changes to the Prospectus Law are the following:

1. Summary of the prospectus

The 2012 Law amends the Prospectus Law provisions on the drawing up of a prospectus and the civil liability attaching to the prospectus and introduces a definition of what constitutes key information. As a consequence, article 8 of the Prospectus Law now places greater emphasis on the importance of the summary of the prospectus as a source of “key information” for retail investors when making their investment decisions. The key information must convey the essential characteristics of, and risks associated with, the issuer, any guarantor,
and the securities offered or admitted to trading on a regulated market. It must also provide the general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror and inform the investor of any rights attaching to the securities and of the risks associated with an investment in the relevant security. Furthermore, the summary must be capable of allowing a comparison to be drawn with the summaries of similar products by ensuring that information that is deemed equivalent to that contained in the summaries of similar products always appears in the same part of the summary to that of its equivalent counterpart. In addition, article 9 (2) of the Prospectus Law now provides that civil liability also attaches to any person who omits key information from the summary, the inclusion of which would aid investors when considering whether to invest. The summary must now contain a clear warning to that effect.

2. Supplements to the prospectus

Under article 13 (1) of the Prospectus Law, every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time that the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, must be mentioned in a supplement to the prospectus. The 2012 Law specified this provision by the inclusion of the terms “whichever occurs later”.

In the past, the duty to draw up a supplement to a prospectus and the right of investors to withdraw their acceptance after the publication of a supplement were closely aligned in scope. These provisions must now be looked at separately. The 2012 Law amends the investors’ two-day “walk away right”, which, up until the entry into force of the 2012 Law, was governed by Article 13 (2) of the Prospectus Law. Investors may now only exercise their “walk away right” if the prospectus, which is being supplemented, relates to an offer of securities to the public (and not to an admission to trading). This removes many deals marketed only to professionals from the ambit of withdrawal rights. In addition, the new factor, mistake or inaccuracy, necessitating the publication of a supplement, must have arisen before the final closing of the offer and delivery of the securities. The right of withdrawal must be exercised within two working days of publication of the supplement. However, the issuer or offeror may extend this two-day period. In order to improve legal certainty, the supplement must state the expiry date of the withdrawal right.

3. Placement of securities through financial intermediaries

Article 5 of the Prospectus Law principally required the publication of a new prospectus where the placement of securities was through financial intermediaries. The 2012 Law clarifies that financial intermediaries, selling securities on to investors are not required to draw up a new prospectus and may use the issuer’s prospectus provided the issuer consents in writing to such use and provided the prospectus is still valid and duly supplemented.
4. Time period for prospectus validity

The 2012 law provides that a prospectus will be valid for offers to the public or admission to trading on a regulated market for 12 months from the date of its approval and not from the date of its publication, as was the position pursuant to the former article 11 of the Prospectus Law. The reason for this change is to improve legal certainty given that the date of approval is a point in time that is considered as being more easily verified.

5. Employee share schemes

The 2012 Law facilitates offer of securities to employees. Under the Prospectus Law, the exemption to publish a prospectus for offers of securities to employees was only available to issuers with securities admitted to trading on a regulated market. The 2012 Law extends the exemption in article 5 (3) of the Prospectus Law to issuers that (i) do not have securities admitted to trading on an EU regulated market, but which either have their head office or registered office within the EU or (ii) are non-EU companies, which have securities admitted to trading on an EU regulated market or on a third country market, provided that in the latter case the market to which the relevant shares are admitted is deemed by the European Commission to be equivalent to the EU regulated markets in terms of their legal and supervisory framework.

6. Publication of prospectuses

Under the 2012 Law an issuer will be deemed to have validly published a prospectus if it is displayed on its website alone. This is slightly less onerous than the previous position under article 16 of the Prospectus Law whereby publication on an issuer’s website had to be accompanied by publication on the website of any financial intermediaries and paying agents. However, the requirement that, an issuer who chooses to publish a prospectus by use of physical means (for example in printed form) must also publish the prospectus on its website or the website of any financial intermediaries or paying agents, remains unchanged. We believe, however, that this change will have only a limited impact in practice given the CSSF publishes all prospectuses which it approves on the website of the Luxembourg Stock Exchange automatically and free of charge for a period of 12 months following approval. For this reason the publication requirement attaching to issuers is automatically fulfilled in Luxembourg.

7. EU-Passport

The 2012 Law provides that the CSSF must now also notify the issuer or the person responsible for drawing up the prospectus of a certificate of approval in addition to, and at the same time as, the competent authority of the host Member State. This change to article 19 of the Prospectus Law will provide an issuer with greater confidence and certainty as to whether and when the CSSF has effected the passporting.
8. Qualified investors

The 2012 Law has broadened the definition of “Qualified Investor” to include those persons who are classified as professional clients or eligible counterparties in accordance with Annex II to Directive 2004/39/EC (the “MiFID Directive”). For the purpose of private placements, issuers are now able to rely on the list of professional clients and eligible counterparties that has been drawn up in accordance with Annex II to the MiFID Directive.

9. Offer exemptions

Under article 5 (2) of the Prospectus Law the obligation to publish a prospectus did not apply, among others, if the offer to the public was addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors. The 2012 Law increases this number to 150. Similarly, the total consideration per investor and the minimum denomination thresholds of EUR 50,000 applied under the exemptions of article 5 (2) (c) and (d) of the Prospectus Law are raised, by referring to article 3 (2) (c) and (d) of the Prospectus Directive and delegated acts, to EUR 100,000. In the view of the legislator, the threshold of EUR 50,000 no longer reflected the distinction between retail investors and professional investors in terms of investor capacity.

10. Abolition of annual information update

The 2012 Law has abolished the obligation placed on issuers, pursuant to article 14 of the Prospectus Law, to publish an annual information statement containing all information that has been made available to the public over the previous 12 months. This obligation was seen as onerous and unnecessary in light of the disclosure requirements under the Transparency Law.

III. CHANGES TO THE TRANSPARENCY LAW

The exemption thresholds of EUR 50,000 set out in articles 7, 17 (3) and 19 (8) of the Transparency Law are raised to EUR 100,000. The adjustments are made in correspondence to the changes to the Prospectus Law. In line with the Prospectus Amendment Directive, a grandfathering provision has been included for debt securities with a denomination of at least EUR 50,000 per unit, which have already been admitted to trading on a regulated market in the EU prior to December 31, 2010.

IV. CONCLUSION

The 2012 Law implements the provisions of the Prospectus Amendment Directive directly into Luxembourg law without imposing any additional requirements or burdens on issuers. We welcome the amendments to the Prospectus Law, which we believe can be viewed as being reasonable and which is likely to improve its overall application in Europe.
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