

New Belgian Prospectus Law published

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Proportionate disclosure regime for small scale capital raisings and simplified regime for liability management exercises introduced.

The New Prospectus Law¹ has been published in the Belgian Official Gazette. The New Prospectus Law introduces new rules with respect to prospectus requirements and exemptions, as well as a proportionate disclosure regime for certain offers and listings.

Highlights of the new regime are:

- *for offers to the public without admission to trading on a designated MTF:* for offers up to EUR 5 million, only an information document is required; for offers above EUR 5 million, a prospectus is required;
- *for offers to the public with admission to trading on a designated MTF:* for offers up to EUR 8 million, an information document is required; for offers above EUR 8 million, a prospectus is required; and
- a *de minimis* regime applies for offers to the public without admission to trading on a designated MTF for an amount up to EUR 500,000, with a maximum investment per investor of EUR 5,000: no prospectus requirement applies and no information document is required.

The information document must comply with certain substantive requirements but is, unlike a prospectus, not subject to prior approval by the Belgian Financial Services and Markets Authority (**FSMA**). The new regime should facilitate smaller scale capital raisings and crowdfunding.

The New Prospectus Law also introduces a simplified regime for tender offers by issuers of debt instruments for instruments issued by them (i.e., their own instruments). This should simplify liability management exercises by Belgian issuers.

Scope of application of the New Prospectus Law – investment instruments

The New Prospectus Law is applicable to the public offer and admission to trading of “investment instruments”.² In this respect, the scope of application of the New Prospectus Law remains the same as the previous prospectus law. The definition of “investment instruments” also remains the same as under the previous prospectus law.³

¹ *Loi du 11 juillet 2018 relative aux offres au public d'instruments de placement et admissions d'instruments de placement à la négociation sur des marchés réglementés/Wet van 11 juli 2018 op de aanbieding van beleggingsinstrumenten* (the **New Prospectus Law**).

² Articles 3 § 1, 6, 7 and 10 New Prospectus Law.

³ Article 3 § 1 New Prospectus Law.

This means that the scope of application of the New Prospectus Law remains broader than the Prospectus Regulation⁴: while the Prospectus Regulation only applies to the offer of “securities”,⁵ the New Prospectus Law applies to a broader category of instruments, i.e. “investment instruments”. The definition of “investment instruments” includes “all types of instruments permitting to carry out a financial investment, regardless of the underlying assets”.⁶

In practice, this is important for, for example, the offer and admission of trading of certain types of real estate investments.⁷ Also, proposed investments in new types of products such as “crypto assets” should be assessed against this broad definition of “investment instruments” for the purposes of the New Prospectus Law.

Prospectus requirement under the New Prospectus Law

The main changes introduced by the New Prospectus Law relate to the thresholds for the application of the prospectus requirements.

Legal framework under the New Prospectus Regulation

The New Prospectus Regulation introduces the following new EU-wide regime:

- **Offers to the public – total consideration less than EUR 1 million**⁸ - The Prospectus Regulation shall not apply to an offer of securities to the public with a total consideration in the Union of less than EUR 1 million, which shall be calculated over a period of 12 months. Member States shall not extend the obligation to draw up a prospectus in accordance with the Prospectus Regulation to such offers of securities to the public. However, in those cases, Member States may require other disclosure requirements at national level, to the extent that such requirements do not constitute a disproportionate or unnecessary burden.
- **Offers to the public – total consideration not exceeding EUR 8 million**⁹ Member States may decide to exempt offers of securities to the public from the obligation to publish a prospectus, provided that the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8 million.

These prospectus exemptions do not apply (i) when an issuer wishes to obtain a passport for a cross-border public offer¹⁰ and (ii) for listings on a regulated market. In these cases, a prospectus will be required. Member States do not have the discretion to introduce a more flexible regime.

Belgian implementation of the Prospectus Regulation – prospectus requirement

The New Prospectus Law introduces separate regimes depending on (i) whether there is an offer to the public and (ii) whether the instruments are offered to trading on (a) a regulated market or (b) a multilateral trading facility (**MTF**) designated by royal decree.

⁴ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 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 (the **Prospectus Regulation**)

⁵ Article 1.1 of the Prospectus Regulation; “Securities” are “*transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months*” (article 2 (a) Prospectus Regulation) “transferable securities” means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

⁶ Article 3 § 1, 11° New Prospectus Law.

⁷ See articles 3 § 1, 3° and 4° New Prospectus Law.

⁸ Article 1.3 Prospectus Regulation.

⁹ Article 3.2 Prospectus Regulation.

¹⁰ Articles 3.2.a and 25 Prospectus Regulation.

More specifically, the New Prospectus Law will introduce a prospectus requirement in the following cases:¹¹

- offers of investment instruments to the public for a total consideration of more than EUR 5 million, provided that these investment instruments are not and will not be admitted to trading on an MTF designated by royal decree;
- offers of investment instruments to the public for a total consideration of more than EUR 8 million, where such investment instruments are or will be admitted to trading on an MTF designated by royal decree;
- admission to trading on a regulated market, regardless of the amount of the offer.

As under the previous prospectus law, no prospectus requirement applies for an admission to trading on an MTF, without an offer to the public of the investment instruments.

Proportionate disclosure regime and de minimis regime under the New Prospectus Law

Scope of application of the proportionate disclosure regime

Application of the proportionate disclosure regime

The New Prospectus Law introduces a proportionate disclosure regime for:

- offers of investment instruments to the public for a total consideration of EUR 5 million or less, which shall be calculated over a period of 12 months, provided that these investment instruments are not and will not be admitted to trading on an MTF designated by royal decree;¹²
- offers of investment instruments to the public for a total consideration of EUR 8 million or less, which shall be calculated over a period of 12 months, where such investment instruments are or will be admitted to trading on an MTF designated by royal decree.¹³

Under this proportionate disclosure regime, the issuer (or offeror or person requesting the admission to trading) will not be required to publish a prospectus, but instead, a short form “information document” (*note d’information/informatienota*) regarding the issuer (or offeror, or person requesting the admission), and the offer will need to be filed with the FSMA and made available to the public.¹⁴

The New Prospectus Law also allows the King to require an information document for a direct admission to trading on an MTF (or a segment of an MTF) designated by royal decree.¹⁵

No information document required under the proportionate disclosure regime

No information document is required:

- when an exemption from the prospectus requirement applies under the New Prospectus Regulation (e.g., when there is an offer to less than 150 persons other than qualified investors);¹⁶ or
- when the issuer or offer is required to make a key information document (**KID**) available under PRIIPs,¹⁷ or another information document deemed equivalent (in accordance with a royal decree that can be adopted).¹⁸

¹¹ Articles 7 and 8 New Prospectus Law.

¹² Article 10 § 1, 1° New Prospectus Law.

¹³ Article 10 § 1, 2° New Prospectus Law.

¹⁴ Article 11 New Prospectus Law.

¹⁵ Article 10 § 1, 3° New Prospectus Law.

¹⁶ Article 10 § 3, 1° New Prospectus Law.

¹⁷ Article 10 § 5, 1° New Prospectus Law.

¹⁸ Article 10 § 5, 2° New Prospectus Law.

De minimis regime: no information document and no prospectus

The prospectus disclosure regime does not apply and no information document (nor a prospectus) is required for offers to the public for a total consideration of less than EUR 500,000, which shall be calculated over a period of 12 months and insofar as the investment per investor is limited to EUR 5000 (maximum investment).¹⁹ There is no requirement to notify the FSMA in respect of offers falling under the de minimis regime.

Content of the information document under the proportionate disclosure regime

The information document (*informatienota/note d'information*) must include the most important information with respect to the issuer and the offer in accordance with a detailed and exhaustive format, and must contain a brief description of the following elements:²⁰

- a description of the main risks related to the issuer and the instruments (risks specific with respect to the offer or the admission to trading must be described);
- information regarding the issuer and the offeror of the investment instruments, including financial information (the issuer's annual accounts for the last 2 financial years);
- information about the conditions and the reasons of the offer or admission to trading; and
- information about the characteristics of the instruments issued/offered (amount, nature of the instruments).

The information document must contain the annual accounts for the issuer for the last 2 financial years.²¹ When the issuer is required to appoint a statutory auditor, the audit report must be included in the information document.²² When the issuer is not required to appoint a statutory auditor, there is a choice: either there is an independent audit by an auditor, or there is an express disclaimer and warning included in the information document that no such independent audit has been carried out.

The information document must be drafted in Dutch, French or English²³ and must in any case be drafted or translated into the language(s) used for the marketing materials.²⁴

The information document is limited to a maximum length of 15 pages.²⁵

A similar regime regarding "supplements" to the information document applies as for the regime for prospectus supplements under the Prospectus Regulation.²⁶

Publication of the information document

The information document must be published on the website of the issuer, the offeror and, as the case may be, the relevant financial intermediaries.²⁷ The information document must be made available at the latest on the first day of the offer to the public.²⁸

Regulatory supervision

Unlike a prospectus, the information document is not subject to an *a priori* review by the FSMA. There is no requirement to obtain FSMA approval prior to the publication of the information document. However, the

¹⁹ Article 10 § 3, 2° New Prospectus Law.

²⁰ Article 12 § 2 New Prospectus Law.

²¹ Article 12 § 2 New Prospectus Law.

²² Article 13 § 1 New Prospectus Law.

²³ Subject to the application of certain language legislation requirements.

²⁴ Article 14 New Prospectus Law.

²⁵ Article 12 § 3 New Prospectus Law.

²⁶ Article 15 New Prospectus Law.

²⁷ Article 17 New Prospectus Law.

²⁸ Article 17 New Prospectus Law.

FSMA has the power to engage in an *a posteriori* review and can impose administrative measures and administrative sanctions when the information document does not comply with the relevant legal requirements. The information document must contain a prominent warning for investors indicating that it has not been subject to an *a priori* review by the FSMA.

Any marketing materials with respect to an offer and/or admission to trading subject to a proportionate disclosure regime will be subject to the same type of regulatory supervision, i.e. no *a priori* review by the FSMA, but power for the FSMA to engage in an *a posteriori* review.²⁹

The information document must be filed with the FSMA at the latest simultaneously with the publication of the information document.³⁰ The FSMA issued further practical guidelines regarding the filing of the information document with the FSMA.³¹ Each supplement to an information document must also be filed with the FSMA.

Validity of the information document

The information document remains valid for a period of 12 months following the filing with the FSMA.³² If the offer is for a period of longer than 12 months, a new information document will need to be made available to the public and filed with the FSMA.

Entry into force and transitory regime

Entry into force

The provisions of the New Prospectus Law with respect to the prospectus requirements, prospectus exemptions and the information document discussed in this briefing entered into force on 21 July 2018.³³

Transitory regime

The New Prospectus Law includes the following transitory regime.

In principle, offers that were already ongoing on 21 July 2018 can continue under the regime of the previous law.³⁴

However, offers conducted under the exemptions (i) for offers of shares in certain cooperative companies and (ii) offers of securities to employees in the framework of certain employee participation plans, can only continue under the existing regime until 21 October 2018.³⁵ As from 21 October 2018, the offers will become subject to the new regime.

Amendments to the Takeover Law

Simplified regime for liability management exercises

The scope of application of the Belgian Takeover Law is broader than the European Takeover Directive. The Belgian Takeover Law is also applicable to tender offers for debt instruments.

The New Prospectus Law, combined with an implementing royal decree, will however introduce a simplified regime for tender offers made by the issuer with respect to its own instruments.³⁶ This is a welcome change that should facilitate certain liability management exercises.

Under the simplified regime, the issuer making the tender offer for its own instruments must publish a communication containing information on its identity and the conditions of the offer. Only certain provisions of

²⁹ Cf. Doc 54 3150/001, p. 38

³⁰ Article 18 New Prospectus Law

³¹ Communication FSMA_2018_11 of 20 July 2018, available at <https://www.fsma.be/en/news/filing-information-notes-law-11-july-2018>

³² Article 19 New Prospectus Law

³³ Article 104 New Prospectus Law

³⁴ Article 102 New Prospectus Law

³⁵ Article 102 and 103 § 2 New Prospectus Law

³⁶ Article 46 New Prospectus Law

the Takeover Law will be applicable to tender offers made by the issuer for its own instruments, such as, for example, the requirement to make a prior notification to the issuer, certain rules regarding the withdrawal or amendment of the tender offer, the possibility for investors to withdraw their tender acceptances, and the requirement to offer a price increase to all investors, as well as certain restrictions during and after the bid period.³⁷ Provisions such as a “response memorandum” by the board of the issuer or an extensive prospectus will not apply.

The provision of the New Prospectus Law allowing the introduction of the simplified regime will enter into force on 30 July 2018.³⁸

Mandatory bid requirement

The rules with respect to the mandatory bid requirement in respect of voting securities listed on an MTF are amended. There are two key changes: (i) the threshold for the mandatory bid is increased from 30% to 50% and (ii) a royal decree can exempt certain market segments of an MTF from the mandatory bid requirement.³⁹ These changes will enter into force 30 July 2018.⁴⁰ For the avoidance of doubt, note that these changes do not impact the rules regarding mandatory bids in respect of voting securities listed on a regulated market.

Summary table

	Admission to trading on regulated market	Offer to public without admission to trading on designated MTF	Offer to public with admission to trading on designated MTF	Direct admission to trading on designated MTF	
Up to EUR 500,000 (de minimis)	Prospectus	No disclosure requirements - max subscription per investor = EUR 5,000	Information document	Information document	
Up to EUR 5,000,000		Information document			
Up to EUR 8,000,000		Prospectus		Prospectus	
Above EUR 8,000,000					

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³⁷ Based on the draft royal decree made available during the public consultation:

https://www.fsma.be/sites/default/files/public/content/consultaties/2017/2017_implementatie_relement_prospectus_projet_loi.pdf

³⁸ Article 140 § 3 New Prospectus Law

³⁹ Article 44 New Prospectus Law

⁴⁰ Article 140 § 3 New Prospectus Law