

The new prospectus regime - Key changes for Luxembourg

The underlying legislative framework has been entirely changed, but the principles remain substantially the same

Executive Summary

- > The new prospectus regime is fully effective as of 21 July 2019.
- > The Prospectus Regulation replaced the Prospectus Directive and its implementing laws.
- > The new prospectus regime will change in particular the prospectus summary and the disclosure of the risk factors.
- > Issuers of equity and non-equity securities on a continuous basis may use the Universal Registration Document to have a faster access to the capital markets.
- > Qualifying issuers, mainly SMEs, will be allowed to prepare a simplified EU Growth Prospectus.
- > The lighter wholesale disclosure regime applies also to non-equity securities, regardless of their denomination, which are admitted to trading on a segment of a regulated market accessible only to qualified investors.
- > The exemption regime has been slightly changed, now allowing the offering of securities of up to EUR 8 million without a prospectus in Luxembourg (crowdfunding exemption).

The Prospectus Regulation (Regulation (EU) 2017/1129) entered into force on 20 July 2017, but became fully effective as of 21 July 2019. The Prospectus Regulation replaces entirely the regime created by the Prospectus Directive (Directive 2003/71/EC, as amended). However, the annex structure and the principles of the Prospectus Directive regime introduced with the Directive 2010/73/EU, substantially amending the original

Prospectus Directive, have not been materially changed, save for the structure of the summary and the disclosure of the risk factors.

1. New legislative framework

The existing regulatory framework of the prospectus regime has been and will be replaced as follows:

1.1 EU Level

Level one: the Prospectus Regulation replaces the Prospectus Directive. The Prospectus Regulation determines whether a prospectus is required, the exemptions' regime, the general duty of disclosure, the responsibility for the content of the prospectus, the publication, the incorporation by reference, the supplements and the advertisements. The Prospectus Regulation also introduces certain rules on the prospectus format.

Level two: the PR Regulation¹ containing rules on format, contents and annexes replaces the PD Regulation². The PR Regulation introduces additional rules on scrutiny and approval.

Regulatory technical standards ("RTS"): the Prospectus Regulation RTS³ replace the Prospectus Directive RTS⁴ and provide technical standards on key financial information in summaries, advertisements and prospectus publication.

¹ Regulation (EU) 2019/980.

² Regulation (EC) 809/2004.

³ Regulation (EU) 2019/979.

⁴ Regulation (EU) 2016/301 and Regulation (EU) 382/2018.

Level three (guidance): a new set of ESMA Q&A on the Prospectus Regulation, complementing the old ESMA prospectus Q&A, were published on 27 March 2019. The old ESMA prospectus Q&A, ESMA update of the CESR recommendations and ESMA guidelines on alternative performance measures will remain as reference for the time being.

1.2 Luxembourg level

The Luxembourg law of 10 July 2005 on prospectuses for securities, as amended, is repealed and partially replaced by the law of 16 July 2019 on prospectuses for securities. The new Luxembourg prospectus law has a more limited scope than the old one, given that it does not implement a directive but rather integrates an EU regulation.

The FAQ published by the CSSF on 12 March 2013 will apply to the new prospectus regime, until they are replaced by new FAQs. The CSSF has not disclosed when this will occur, but they have started to work on the updated FAQs already under the old prospectus regime.

On 19 July 2019 the CSSF issued the CSSF Circular 19/724 with technical specifications for the submission of documents for approval by the CSSF under the new prospectus law, together with a new entry form template. The submission procedure did not materially change.

2. The exemption from the prospectus regime

The prospectus regime will continue to be avoidable in accordance with one of the exemptions provided under the level one regulation, i.e. the new Prospectus Regulation.

Debt securities offered in a denomination of at least EUR 100,000, or for a total minimum consideration of at least EUR 100,000 per investor, or to fewer than 150 retail investors per Member State will still be exempted from the requirement to publish a prospectus.

The crowdfunding exemption, i.e. the possibility for an issuer to offer any kind of securities for a low nominal amount within a 12 month period, was reduced from a total consideration of less than EUR 1,500,000 under the Prospectus Directive to

less than EUR 1,000,000 under the Prospectus Regulation. However, each Member State may increase the threshold to up to EUR 8,000,000. Luxembourg opted to increase the crowdfunding exemption to a total consideration of less than EUR 8,000,000.

3. The new prospectus summary

The structure and content of the prospectus summary is completely changed. The table with the five blocks "A" to "E", with elements depending on the type of issuer and securities, is replaced by a standardized Q&A form.

The summary must include four sections: the introduction, the key information on the issuer, the key information on the securities and the key information on the offer. Each section shall provide for answers to standard questions. The Prospectus Regulation sets out the content requirements of each section, including standard warnings.

The length of the prospectus summary is capped at seven sides of A4-sized paper when printed, expandable for certain security offerings. The number of risk factors in the prospectus summary must be limited to fifteen.

4. The new risk factors section

The new prospectus regime regulates the risk factor disclosure substantially more. Risk factors shall be categorized, with the most material risk factors in each category being presented first. The risk factors shall also be more specific to the issuer or the securities and adequately described and corroborated by the content of the prospectus as a whole.

ESMA provided new risk factors guidelines which explain further how the CSSF should apply concepts such as "specificity", "materiality" and "categorisation".

The European Commission proposal of the Prospectus Regulation and the ESMA guidelines indicate the intention of the EU regulator to change the disclosure practice of risk factors. To what extent such practice will actually change in each Member State is to be seen.

5. The new Universal Registration Document ("URD")

The Prospectus Regulation introduces a multi-purpose shelf document which can be used for offers or admissions to trading of both equity and non-equity securities. The URD needs to be prepared in accordance with the most onerous disclosure requirements for equity offerings, irrespective of the type of issuance for which the URD is to be used. The URD is based on the model adopted in France under the Prospectus Directive regime and it should allow issuers of different types of securities to have a faster access to capital markets.

A separate security document and summary for each issue of securities is to be approved from time to time.

The difference between an URD and a base prospectus is that the base prospectus can be used only for non-equity securities while the URD can be used for debt and equity securities. Furthermore, the security document of a base prospectus is preapproved by the CSSF and can be quickly complemented with the final terms and does hence not require a separate approval while the URD still requires the separate approval of security documents for each issuance of securities.

6. The new EU Growth Prospectus

The Prospectus Regulation allows eligible issuers to prepare an EU Growth Prospectus. The EU Growth Prospectus shall have a standardized format and is intended to alleviate the administrative burden required for regular issuers.

The issuers eligible for the EU Growth Prospectus are (i) SMEs, (ii) other issuers whose securities are traded on an SME growth market with an average market capitalisation of less than EUR 500 million for the prior three years, and (iii) other issuers where an EU offer does not exceed EUR 20 million over 12 months, provided that such issuer is not traded on an MTF and had up to an average of 499 employees during the previous year.

7. The simplified regime for wholesale issuers

The old prospectus regime provided for a simplified "wholesale" regime for prospectuses related to non-equity securities which were to be admitted to trading on regulated markets, but had a denomination of at least EUR 100,000. The Prospectus Regulation extends such wholesale regime to non-equity securities with a lower denomination, provided that the securities are admitted to trading on a regulated market accessible only by qualified investors. The Luxembourg Stock Exchange already features a professional segment of the regulated market accessible only to qualified investors.

On 9 November 2018, the European Commission published a proposal to amend the Prospectus Regulation and to confer upon ESMA the role of competent authority for the approval of wholesale prospectuses. The European Commission plans for the new proposal to be in place before 2020.

8. Concluding remarks

The key provisions of the new prospectus regime are set out in an EU regulation instead of an EU directive, making them directly applicable without the need of implementing laws in each Member State.

With respect to the disclosure requirements, the Prospectus Regulation follows the path started with the 2010 reform of the Prospectus Directive, which increased the burden for issuers and contributed to a substantial decrease in prospectuses approved by national competent authorities (see table 1 of the [2017 ESMA Report on EEA prospectus activity](#)). In addition, certain requirements introduced by ESMA and the European Commission in the PR Regulation and the PR RTS seem to be more onerous than those under the current regime, e.g., the new prospectus summary, the new risk factors sections and the rules introduced by the PR Regulation on scrutiny and approval, which may result in an adjustment of the current market practice and approval procedure by the competent authorities.

On the other hand, European issuers now benefit from more exemptions and simplified regimes. SMEs have broader margins under the crowdfunding exemption and issuers other than

SMEs can take advantage of the simplified regime for wholesale prospectuses.

In any case, the focus on the new Prospectus Regulation, and its exemptions and simplified regimes, should encourage European issuers to fund themselves in the capital markets and foster harmonization and depth of the capital markets.

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