Luxembourg's prospectus rules in line with EU

Josée Weydert of NautaDutilh Luxembourg outlines the effects of Prospective Directive implementation on offering or listing securities in Luxembourg

The new Luxembourg prospectus law was adopted on July 10 2005. It implements Directive 2003/71/EC of the European Parliament and of the Council of November 4 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive). It applies concordantly with Commission Regulation (EC) 809/2004 of April 29 2004 (the Commission Regulation), which contains the detailed information to be included in prospectuses prepared for public offerings or listings on a regulated market.

In addition, the Luxembourg Stock Exchange's new rules and regulations were adopted on June 29 2005. They contain provisions relating to the organization of the exchange, the operation and the supervision of the markets, the conditions for the admission of members to the Exchange, disciplinary measures and the right of appeal. The new rules also set out the information to be disclosed in a prospectus for listing securities on the new Euro MTF market.

The new law is the source of four new circulars issued by the Commission de Surveillance du Secteur Financier (CSSF): Circular CSSF 05/224 on the choice of the home member state for third country issuers whose securities were admitted to trading at July 1 2005; Circular CSSF 05/225 on the notion of *offer to the public of securities* and the obligation to publish a prospectus; CSSF Circular 05/226 giving a general overview of the Prospectus Law and technical specifications regarding communications to the CSSF; and Circular CSSF 05/210 relating to the information to be given in the simplified prospectus for securities that are not covered by the Prospectus Directive.

Scope of the new law and regulations

The new law sets out the rules that apply for offering securities (including classes of securities that are negotiable on the capital market (with the exception of instruments of payment and non-fungible bank savings certificates)) to the public in Luxembourg or for listing them on the Luxembourg Stock Exchange. Certain securities (money market instruments with a maturity at the issue of less than 12 months that are negotiable on the capital market, units issued by undertakings for collective investment other than of closed-end type and shares in the capital of central banks of the member states) cannot benefit from the European passport according to the Prospectus Directive, but some other securities that are normally exempt from the requirements of the Prospectus Directive (as described in articles 4.2 and 4.3 of Chapter 1 of Part II of the new law) may however opt-in the passported regime.

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In addition, the new law and regulations constitute the legal framework for the new Euro MTF market (see below).

Definition of *offer to the public*

For the first time, Luxembourg law has introduced a definition of *offer to the public*. As defined in the new law, an offer to the public consists of all kind of communication that allows, on the basis of information provided on the characteristics of the offer and the securities offered, to make an investment decision.

To trigger the requirement to publish a prospectus, the information dispatched to potential investors must contain information on the terms of the offer and the securities concerned. This means that the nature of the security and its main characteristics should be communicated to the investors, that the selling price of the security should be determined or determinable and that the investors should receive information on the procedure for acceptance and the acceptance period. On the other hand, a simple communication of information (for example, by means of an article in the press) or investment advice on a security or an issuer, without securities being offered for purchase or subscription, are not considered an offer to the public.

The elements that constitute an offer to the public must be analysed from a territorial point of view. This means that all offers made on the territory of Luxembourg, even *vis-à-vis* non-resident investors, must comply with Luxembourg law.

As specified by Circular CSSF 05/225, the admission to trading on a regulated market or on a multilateral trading system (such as the Euro MTF market), or a communication in relation to such trading, would not constitute an offer to the public.

In addition, granting options to employees to subscribe for securities is also not considered an offer to the public if these options are not negotiable on the capital markets and are exclusively linked to the employment contract.

Although each communication purporting the subscription of securities is considered an offer to the public, an offer may be addressed under certain conditions to investors without the obligation to publish a prospectus. This exemption applies to offerings to qualified investors. The new law implements the definition of qualified investors as contained in the Prospectus Directive and confirms that small and medium-sized enterprises (as defined by the Prospectus Directive) and natural persons entered in a register of persons considered as qualified investors put in place in a member state are considered qualified investors. It also applies to offers addressed to a restricted circle of less than 100 natural or legal persons in Luxembourg, or offers where the minimum denomination of the securities or theminimum subscription amount is at

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Before joining Clifford Chance, she headed up the financial markets legal group and the listing and agency group of Fortis Bank Luxembourg SA, one of Luxembourg's largest banks. Weydert is particularly well acquainted with Luxembourg's banking and legal environments.

Weydert is a law graduate (*Droit Privé*) of the University of Strasbourg (1992) and was admitted to the Luxembourg Bar in 1993. She qualified as a Luxembourg lawyer (*avocat à la Cour*) in 1997. She speaks French, English, German and Luxembourgish.

least €50,000 or where the total consideration of the offer is less than €100,000, this limit being calculated over a period of 12 months.

The new law does not exclude the resale of securities from the definition of *offer to the public*. This means that, for each resale of securities, the offeror (for example, the qualified investor that initially subscribed for the securities) must verify whether the resale would entail an offer to the public in Luxembourg.

The listing regimes applicable in Luxembourg

The passported regime

Securities that are admitted in accordance with this regime may be listed or offered to the public in another member state of the EU. From a procedural point of view, the CSSF notifies its approval of the prospectus to the competent authority of the other member state in which the securities are to be listed or to be offered to the public. On the other hand, a prospectus that has been approved by the competent authority of another member state may be listed in Luxembourg or offered to the public in Luxembourg on the basis of a notification received by the CSSF from the other EU competent authority.

According to article 4.3 of Chapter 1 of Part II of the new law, certain securities that are normally exempt from the requirements of the Prospectus Directive may opt-in the passported regime. This means that, with respect to these securities, a prospectus that complies with the Prospectus Directive can be prepared; accordingly, these securities may benefit from the passport.

The non-passported regime

Securities that are excluded from the application of the Prospectus Directive and those for which the opt-in option referred to above has not been exercised, can be listed under the non-passported regime. Securities that have been approved on the basis of a simplified prospectus and securities that are exempt from the obligation to prepare a simplified prospectus (for example, securities issued by a member state) would normally fall under this regime.

The Euro MTF market

This market has been extremely successful since its implementation in mid-July 2005 (as at December 31 2005, 719 debt issues were listed on the Euro MTF market). It is attractive to issuers and offerors who cannot comply with the requirements of the new law and the Commission Regulation.

The Euro MTF market operates under the supervision of the CSSF, but it does not figure on the list of "all regulated markets" published by the European Commission. Securities listed on the Euro MTF market do not benefit from the European passport. However, the Euro MTF market is covered by the provisions of the draft bill 5415, which will implement Directive 2003/6/EC on insider dealing and market manipulation and related directives and regulations.

Securities that are listed on the Euro MTF market are also eligible for investments made by Luxembourg undertakings for collective investments of transferable securities, established in accordance with Part I of the Luxembourg law dated March 30 1988, or the Luxembourg law dated December 20 2002 on undertakings for collective investments.

Securities listed on the regulated market (including the passported and the non-passported regime) may be transferred without major formalities to the Euro MTF market. For that purpose it is enough that the issuer addresses a letter to the Luxembourg Stock Exchange requesting the transfer.

Competent authority

For listings on the passported market and for offerings to the public, the CSSF is the sole competent authority in charge of approving the prospectus. The option reserved to the competent authority to delegate its functions, as set out under Article 21, paragraph 2 of the Prospectus Directive, has not been retained in the new law, except for the publication of the prospectuses on the Luxembourg Stock Exchange's website (see below).

With respect to securities admitted to listing on the basis of a simplified prospectus and those listed on the Euro MTF market, the Luxembourg Stock Exchange is the competent authority that approves the listing prospectus.

Protecting investors

Preparation of a prospectus supplement

Investors must be able to make their investment decision on the basis of correct information. The new law provides that every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus that is capable of affecting the assessment of the securities and that arises between the date the prospectus is approved and the date the offer is closed to the public, or the time when trading on the regulated market begins, must be described in a supplement to the prospectus. The summary and any translations must also be supplemented to take into account the new information.

Possibility to withdraw subscriptions

The new law provides for the right of investors to withdraw their agreement to purchase or subscribe for the securities if that agreement was given before the supplement was published. This withdrawal right may be exercised within at least two business days after the publication.

Information given to investors

The new law has also taken into account the situation where the distribution of securities falls under a prospectus exemption. The right of equal information has been laid down in the new law, which provides that material information given by an issuer or an offeror to certain qualified investors or special categories of investors must be disclosed equally to all qualified investors or categories of investors to whom the offer is exclusively addressed.

Marketing
Each communication promoting the subscription of securities that are listed on a regulated market or that are offered to the public must comply with certain requirements. Investors must be able to identify the advertisement as such and the publicity must make reference to the prospectus and indicate the place where the prospectus is made available. In addition, the content of the information must be consistent with the content of the prospectus and avoid any contradiction.

The CSSF is the competent authority for supervising the compliance of the advertising activity with the new law. There is, however, no obligation to submit advertisements to the CSSF for prior approval.

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Responsibility of the prospectus
The new law contains express provisions on the responsibility of the prospectus for securities that are offered to the public in Luxembourg or that are listed under the passported or the non-passported regime. The responsibility of the prospectus attaches either to the issuer, the offeror (if the securities are offered to the public), the person who requests the admission to list or the guarantor, as the case may be.

With respect to prospectuses prepared for listings on the Euro MTF market, the responsibility rests with the person who takes the responsibility of the relevant prospectus in accordance with the responsibility statement made therein.

So, pursuant to the new law and the rules, neither the directors nor the managers are responsible for the content of the prospectus unless they ask for the admission to list the securities (under the passported or the non-passported regime) or they take responsibility for the content of the prospectus (for securities listed on the Euro MTF market).

Publication and availability of prospectus
If the securities are offered to the public or admitted to listing (under the passported, the non-passported or the Euro MTF regime), the prospectus must be made available either by insertion in a widely circulated Luxembourg newspaper, in printed form at the stock exchange, the issuer and the Luxembourg paying agents or on the website of the issuer, the offeror, the paying agents or the stock exchange.

All prospectuses approved for listing in Luxembourg (under the passported, the non-passported or the Euro MTF regime) are also published on the Luxembourg Stock Exchange's website and are accessible by investors at all times. The issuer is not obliged to also publish the prospectus on its website.

The publication of a notice that specifies how the prospectus is made available is not required under Luxembourg law. This option has been reserved to the member states according to Article 14, paragraph 3 of the Prospectus Directive but has not been retained by Luxembourg.

Grandfathering
Grandfathering applies to prospectuses that have been approved before July 1 2005. This means that prospectuses admitted to listing before July 1 2005 are not submitted to the listing requirements specified in the Prospectus Directive.

The application of grandfathering is of particular interest for issuers of programmes. New securities may indeed be listed on the basis of a grandfathered programme prospectus without the obligation to comply with the Prospectus Directive. This means, for example, that a programme prospectus that was approved on June 30 2005 and that does not comply with the requirements of the Prospectus Directive may be used for listing new securities on the regulated market (but under the non-passported regime) until June 30 2006.

Grandfathered prospectuses can also be supplemented without complying with the requirements of the Prospectus Directive. However, grandfathered prospectuses may not be used for offerings to the public.

Language
The language aspect is generally not an issue in Luxembourg, as English, French, German and Luxembourgish are accepted in any case. This applies for the prospectus, but also for the summary.