

## The new Belgian Prospectus Law

### Speed read

- On 20 July 2018, the new Belgian prospectus law was published in the Belgian State Gazette. This new law abolishes the Belgian prospectus law of 16 June 2016 (as of the date that the new Prospectus Regulation will fully apply, i.e. 21 July 2019).
- The Prospectus Regulation includes a number of “legislative options” for Member States. A number of these options, in particular the possibility to introduce a *de minimis* exemption or regime for offers not exceeding EUR 8 million, have been exercised in the new prospectus law. Furthermore, the new prospectus law amends the Belgian prospectus regime for transactions that fall outside of the scope of application of the Prospectus Regulation. This regime applies to offerings and admissions to trading of investment instruments (which is a broader concept than “securities” as used in the Prospectus Regulation).
- Offerings to the public and admissions to trading of “investment instruments” will be subject to the prospectus regime under the Prospectus Regulation (subject to certain exemptions). There is therefore no longer a separate “Belgian” prospectus regime for such transactions.
- Transactions that fall under the *de minimis* regime will require the publication of an “information note”, which is a regulated investor disclosure document, but which is much lighter than the prospectus regime.

### Background

The European prospectus regime as set out in the Prospectus Directive<sup>1</sup> (as implemented in the Belgian prospectus law of 16 June 2006 (the **Old Prospectus Law**)) is being replaced by the new prospectus regime set out in the new Prospectus Regulation<sup>2</sup>. The new Belgian prospectus law of 11 July 2018<sup>3</sup> (the **New Prospectus Law**) provides for the abolishment (and replacement) of the Old Prospectus Law and amends the prospectus regime for the transactions that fall outside of the scope of application of the Prospectus Regulation.

The Old Prospectus Law included a “harmonised” prospectus regime (i.e. the implementation of the Prospectus Directive) and a “Belgian” prospectus regime, which applied to offerings of investment instruments falling outside the scope of the Prospectus Directive. As the Prospectus Directive is to be replaced by the Prospectus Regulation, which is directly applicable in the EU member states, there is no longer a need for this “harmonised” prospectus regime.

The New Prospectus Law contains certain “legislative options” that Member States may implement at their discretion under the Prospectus Regulation. The most important of these options is the “*de minimis*” regime for offerings not exceeding EUR 8 million. A number of options have not (yet) been exercised by the Belgian legislator<sup>4</sup>.

<sup>1</sup> Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

<sup>2</sup> Regulation (EU) 2017/1129 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.

<sup>3</sup> Law of 11 July 2018 on the offering of investment instruments to the public and the admission of investment instruments to the trading on a regulated market.

<sup>4</sup> Namely: (i) the option to allow the competent authority to delegate the tasks of electronic publication of approved prospectuses and related documents to third parties; and (ii) the option regarding the reporting of infringements.

Furthermore, the Belgian legislator had to re-assess and amend the “Belgian” prospectus regime in light of the new Prospectus Regulation. This eAlert will focus on certain new developments under the New Prospectus Law.

A number of provisions and requirements under the New Prospectus Law will be further specified in a Royal Decree, which has not yet been published (the **Prospectus Royal Decree**). The FSMA has indicated that as long the Prospectus Royal Decree has not entered into force, market participants should apply the draft royal decree in respect of which a consultation was organised, with regard to any information notes that would need to be published<sup>5</sup>.

This eAlert discusses the following topics:

- **Section 1:** the scope of the New Belgian Prospectus Law, *i.e.* to which types of securities does the new legal framework apply?
- **Section 2:** when does an offer of investment instruments trigger a prospectus requirement in Belgium?
- **Section 3:** the new regime on the information note.
- **Section 4:** the regime on advertisements.
- **Section 5:** a schematic overview of the prospectus obligations.
- **Section 6:** the entry into force of the various new requirements.

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# Scope of the prospectus requirements

## “SECURITIES” AND “INVESTMENT INSTRUMENTS”

In line with the Prospectus Directive, the Prospectus Regulation establishes a prospectus regime for the public offering and the admission to trading on a regulated market of “securities” only. However, the Belgian legislator chose to maintain the Old Prospectus Law’s “extended” scope under the new framework. For that reason, an offer to the public or an admission to trading on a regulated market of *investment instruments* other than securities will still trigger a prospectus requirement under the New Prospectus Law. The concept of investment instruments is much broader than securities - for example, the definition also includes a “catch-all” that covers “*any instruments that enable one to make a financial investment, regardless the underlying assets*”)

However, there are no longer two separate prospectus regimes. Any offer to the public or admission to trading on a regulated market of *investment instruments* will now fall under the same prospectus rules as an offer or admission to trading of *securities*:

- an offer to the public or an admission to trading on a regulated market of *securities* is “directly” governed by the Prospectus Regulation; and
- an offer to the public or an admission to trading on a regulated market of *investment instruments* (other than securities) falls outside of the scope of the Prospectus Regulation, but

<sup>5</sup> See FSMA Communication FSMA\_2018\_11 dated 20 July 2018 on the modalities for the filing of the information note.

the provisions of the Prospectus Regulation also apply, pursuant to Articles 7 and 8 of the New Prospectus Law.

The principle set out above is subject to various exemptions and exceptions, as further discussed below. It is important to note that a prospectus drawn up pursuant to the regime applicable to investment instruments (other than securities) will not benefit from an EEA passport.

## **EXEMPT SECURITIES AND INVESTMENT INSTRUMENTS**

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The Prospectus Regulation lists the types of *securities* that fall outside of its scope (see Article 1(2), which for example includes units in open-ended funds, non-equity securities issued by public authorities, etc.).

Article 3, §2 of the New Prospectus Law lists the types of financial instruments that do not qualify as *investment instruments*, and hence will not trigger a prospectus requirement. These include certain cash deposits, foreign currencies, precious metals, raw materials and certain life insurance products.

## **“PUBLIC OFFER” AND “OFFER TO THE PUBLIC”**

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The Old Prospectus Law used the defined term “public offer” (*openbare aanbieding/offre publique*). To align the wording of the Belgian legal framework to the wording of the Prospectus Regulation, this concept has been abandoned and replaced by the term “offer to the public” (*aanbieding aan het publiek/offre au public*). The new definition is the same as the definition in the Prospectus Regulation, namely: “a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries”.

The clarification in the Old Prospectus Law’s definition of “public offer” that the offer had to be made by a person capable of issuing or transferring the instruments, is deleted, so as to fully align the new definition to the Prospectus Regulation.

Certain offers which were previously carved out from the definition of “public offer” are now listed as transactions that do not trigger an obligation to publish a prospectus.

# **Requirement to publish a prospectus**

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## **PRINCIPLE**

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Under the Prospectus Regulation, the following transactions will in principle trigger the obligation to publish a prospectus: (i) an offer to the public of *securities*; and (ii) an admission to trading on a regulated market of *securities*.

As was already the case under the Old Prospectus Law, the New Prospectus Law extends the scope of the prospectus requirement to the following transactions: (i) an offer to the public of *investment instruments* (other than securities) and (ii) an admission to trading on a Belgian regulated market of *investment instruments* (other than securities). However, as stated above, there is no longer a “Belgian” prospectus regime for these transactions, as these fall under the prospectus regime in the Prospectus Regulation, pursuant to the New Prospectus Law.

## **DE MINIMIS EXEMPTIONS: NO PROSPECTUS REQUIREMENT FOR AN OFFER TO THE PUBLIC OF SECURITIES NOT EXCEEDING EUR 5 MILLION OR NOT EXCEEDING EUR 8 MILLION AND ADMITTED ON CERTAIN MTFs**

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In principle, all exemptions from the obligation to draw up a prospectus are set out in the Prospectus Regulation itself. However, Member States may opt for an exemption from the obligation to draw up a prospectus for offers to the public for an amount not exceeding EUR 8 million. The Belgian legislator has exercised this option, as specified below.

An offer to the public of securities in Belgium (other than those subject to the passporting regime) does not require the publication of a prospectus in the following circumstances:

- the total consideration of the offer in the EU over a twelve-month period does not exceed EUR 5 million; or
- the total consideration of the offer in the EU over a twelve-month period does not exceed EUR 8 million, *provided that* the securities are admitted to trading on an MTF designated by Royal Decree<sup>6</sup> (each a **Designated MTF**).

The same principles apply to offers of *investment instruments* that are not *securities*.

In other words, any offer to the public of securities or other investment instruments in Belgium for a total consideration exceeding EUR 8 million triggers a prospectus requirement.

If the offer is for a total consideration exceeding EUR 5 million but lower than EUR 8 million, this will also trigger a prospectus requirement *except if* the securities or other investment instruments are to be admitted on a Designated MTF. If the offer is for a total consideration of not more than EUR 5 million, no prospectus requirement is triggered. However, in these circumstances, an “information note” may be required, as further discussed in section “Information note” below.

For the avoidance of doubt, if securities or other investment instruments are to be admitted to trading on a Belgian regulated market, this will always trigger a prospectus requirement.

## **OTHER EXEMPT TRANSACTIONS**

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### Principle

The following transactions, which were previously carved out from the definition of a “public offer” under the Old Prospectus Law, are no longer addressed in the New Prospectus Law but are now merely listed as exemptions from the prospectus requirement under the Prospectus Regulation, *i.e.* the offers (i) addressed solely to qualified investors; (ii) addressed to fewer than 150 natural or legal persons other than qualified investors; (iii) for a total consideration of at least EUR 100,000 per investor; and (iv) of securities with a denomination of at least EUR 100,000.

This approach is logical, as any offer or admission to trading of investment instruments (including securities) now falls under the scope of the Prospectus Regulation (whether directly or pursuant to Article 8 of the New Prospectus Law) and must hence also be assessed against the exemptions set out therein.

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<sup>6</sup> Such MTFs are expected to be identified in the Prospectus Royal Decree, which has not yet been published.

## Instruments offered free of charge

The New Prospectus Law confirms that if investment instruments are offered free of charge, this cannot qualify as “an offer of securities to the public”. This may for example be relevant for instruments offered in the context of certain stock option plans.

## Offers for a total consideration of less than EUR 1 million

The Prospectus Regulation includes a specific exemption from the obligation to draw up a prospectus for offers for a total consideration of less than EUR 1 million. Such offers will fall under the New Prospectus Law’s regime on the information note (as they would qualify as an offer under the EUR 5 million threshold). Notwithstanding the foregoing, no information requirement (not even the publication of an information note) is required for offers for a total consideration of less than EUR 500,000, if all investors’ contributions do not exceed EUR 5,000 each.

# Information note

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## WHEN MUST AN “INFORMATION NOTE” BE PREPARED?

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An information note is required for:

- an offer to the public of securities or other investment instruments for a total consideration of less than EUR 5 million;
- an offer to the public of securities or other investment instruments for a total consideration of less than EUR 8 million *provided that* these are listed on a Designated MTF (if this is not the case, a prospectus requirement would apply); and
- a direct listing of securities or other investment instruments on a Designated MTF (without offer to the public) it being understood that exemptions may be foreseen by Royal Decree.

Exemptions to the obligation to draw up an information note apply to certain types of investment instruments (*e.g.* instruments offered by certain governmental entities or units in open-ended funds) and to certain transactions (*e.g.* instruments offered in compliance with the Prospectus Regulation or certain issuances for a total consideration not exceeding EUR 500,000). An exemption is also foreseen for transactions where a PRIIPS KIID must be published or when an equivalent document (to be designated by Royal Decree) must be published.

## WHAT MUST BE INCLUDED IN THE INFORMATION NOTE?

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The rationale for this new regime was to find a balance between enhancing the means for smaller undertakings to obtain financing and the need to adequately inform potential investors.

Generally speaking, the information note must contain information on the issuer and on the instruments that will be offered or admitted to trading. It should also set out the most important risks related to the issuer and the instruments and certain financial information.

However, the document is significantly shorter and lighter than a prospectus. For example, it cannot be longer than fifteen pages in A4 format. It may also be prepared in English, but if marketing materials will be prepared in Dutch (or French), a Dutch (or French) translation of the information note is also required. The format of the note will be specified by Royal Decree. Similar to a prospectus, it is valid for twelve months. Furthermore, a requirement to publish a supplement applies, which is similar to the rules applicable to prospectus supplements.

## MUST THE FSMA APPROVE THE INFORMATION NOTE?

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The note does not need to be approved by the FSMA, but it must be filed with the FSMA (at the latest on the day of the offer to the public or on the date of admission to trading). The FSMA will also publish all information notes on its website.

The FSMA may carry out an *a posteriori* review of the information note, and may impose administrative measures or sanctions if it considers that the note does not comply with applicable law.

## MUST THE INFORMATION NOTE BE MADE PUBLIC?

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Yes. If it is an offer to the public, it must be published on the website of the issuer or on the website of one of the institutions of the placement syndicate. If it is an admission to trading on a Designated MTF, it must be published on the website of the issuer.

# Advertisements

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## PRINCIPLE UNDER THE OLD PROSPECTUS LAW

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Under the Old Prospectus Law, any advertisements had to be submitted to the FSMA for prior approval in the following circumstances: (i) an offer to the public in Belgium of securities or other investment instruments or (ii) an admission to trading on a Belgian regulated market of securities or other investment instruments, *provided*, in each case, that a prospectus had to be drawn up.

The rules on advertisements were further specified in the so-called “transversal” Royal Decree of 25 April 2014 on the commercialisation of financial products with non-professional clients (the **Transversal Royal Decree**).

## WHEN DO ADVERTISEMENTS FALL WITHIN THE SCOPE OF THE PROSPECTUS REGULATION OR THE NEW PROSPECTUS LAW?

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The Prospectus Regulation’s rules on advertisements apply to offers to the public of *securities* and to an admission to trading of *securities* on a regulated market, provided that a prospectus must be published (if this is not the case, some rules will not apply).

The New Prospectus Law extends these rules to advertisements (and other documents<sup>7</sup>) relating to the transaction, if they relate to any of the following types of transactions:

- offers to the public of investment instruments in Belgium;
- an admission to trading of investment instruments on a Belgian regulated market; or
- an admission to trading of investment instruments on a Designated MTF,

in each case if these documents are distributed by the offeror, the issuer or an intermediary acting on their behalf.

The advertisements regime under Article 22 of the Prospectus Regulation will apply regardless of whether a *de minimis* threshold applies. In other words, these rules apply even if an offer to the public of investment instruments is for an amount lower than the EUR 5 million or the EUR 8 million threshold, for which no prospectus must be drawn up but only an information note.

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<sup>7</sup> The rules on advertisements apply to advertisements in the strict sense and to “other documents” that relate to the transaction, similar to the situation under the Old Prospectus Law. For sake of readability, in this section we will only refer to “advertisements”.

## ARE THERE EXEMPTIONS TO THE RULES ABOVE?

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Yes. The following transactions are exempt from the rules on advertisements in the New Prospectus Law:

- an offer or admission to trading of *securities* that does not require the publication of a prospectus under the Prospectus Regulation;
- an offer or admission to trading of *investment instruments* (other than securities) that do not require the publication of a prospectus (as discussed above, the prospectus regime under the Prospectus Regulation applies “indirectly” to investment instruments, pursuant to Article 8 of the New Prospectus Law);
- an offer or admission to trading for which no information note must be published; and
- an admission to trading on a regulated market or an MTF of investment instruments with a nominal value per unit of at least EUR 100,000.

However, note that the regime can be fully or partially applied to offers to the public of investment instruments that do not require the publication of a prospectus or an information note, by Royal Decree. The preparatory works to the New Prospectus Law thereby confirm that the Transversal Royal Decree continues to apply and that its scope of application remains unchanged (however, see some nuances in section “Advertisements – What will happen with the rules on the content of advertisements set out in the Transversal Royal Decree?” below).

## WHAT IS THE CONSEQUENCE OF ADVERTISEMENTS FALLING WITHIN THE SCOPE OF THE NEW PROSPECTUS LAW?

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In case a transaction falls within the scope of the advertisement regime (and does not fall under one of the exemptions listed above), the advertisements must comply with the rules on content as set out in the Prospectus Regulation (which will be further specified by ESMA).

Furthermore, if the transaction requires the publication of a prospectus, the advertisement must be submitted to the FSMA for prior approval. As was the case under the Old Prospectus Law, the FSMA has five business days to review and approve or reject an advertisement.

In case a transaction is not subject to a prospectus requirement or is only subject to a requirement to publish an information note, the advertisement must not be submitted to the FSMA for approval, before they may be used. This is logical, as the information note itself is also not subject to prior FSMA approval.

## WHAT WILL HAPPEN WITH THE RULES ON THE CONTENT OF ADVERTISEMENTS SET OUT IN THE TRANSVERSAL ROYAL DECREE?

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The Transversal Royal Decree includes a number of provisions relating to the content of advertisements (see Articles 11 through 25). Article 22 of the Prospectus Regulation also includes rules on the content of advertisements (which are to be further specified by ESMA).

The New Prospectus Law and its preparatory works clarify that as of 21 July 2019, the rules on the content of advertisements in the Transversal Royal Decree will no longer apply to *securities* (because of the direct and binding nature of the Prospectus Regulation). Furthermore, with a view to align the advertisements regime for securities and *investment instruments* (other than securities), the rules on the content of advertisements set out in the Transversal Royal Decree will also no longer apply to investment instruments other than securities as of 21 July 2019. These instruments will then also fall under the rules on advertisements in the Prospectus Regulation<sup>8</sup>.

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<sup>8</sup> See Article 101 of the New Prospectus Law and the comments relating thereto in the preparatory works to the Law.

# Overview

Size of operation	Type of operation	Offer to the public (without admission on Designated MTF)	Offer to the public (with admission on Designated MTF)	Direct Admission on Designated MTF (without offer to the public)	Admission on Euronext Brussels (with or without an offer to the public)
Up to EUR 500,000 (de minimis)		No information requirements, provided that max subscription per investor = EUR 5,000 (replaces crowdfunding / cooperatives exemptions)	Short information document	Short information document (subject to exemptions that may be foreseen by Royal Decree)	Prospectus
Up to EUR 5,000,000		Short information document			
Up to EUR 8,000,000		Prospectus	Prospectus		
Above EUR 8,000,000					

*Source: FSMA Communication 2018\_09 dated 22 June 2018 on the Implementation of the Prospectus Regulation.*

## Entry into force - miscellaneous

### **PRINCIPLE: THE NEW PROSPECTUS LAW APPLIES AS FROM 21 JULY 2019**

The Prospectus Regulation will apply as from 21 July 2019 and the Old Prospectus Law will be abolished on the same date. However, certain provisions of the Prospectus Regulation and hence the New Prospectus Law, apply before this date.

### **DE MINIMIS EXEMPTION FOR AN OFFER TO THE PUBLIC FOR A TOTAL CONSIDERATION OF LESS THAN EUR 5 MILLION OR EUR 8 MILLION AND THE RULES ON THE INFORMATION NOTE APPLY AS FROM 21 JULY 2018**

Certain provisions in the Prospectus Regulation apply as from 21 July 2018: (i) Article 1(3) of the Prospectus Regulation, which states that the Prospectus Regulation does not apply to offers of securities to the public with a total consideration of less than EUR 1 million; and (ii) Article 3(2) of the Prospectus Regulation, which contains the option to exempt offers to securities to the public from the obligation to publish a prospectus if the total consideration is less than EUR 8 million.



Consequently, as from 21 July 2018, the *de minimis* exemption for offers to the public for a total consideration of less than EUR 5 million or less than EUR 8 million (as discussed in section “Requirement to publish a prospectus – *De minimis* exemptions: no prospectus requirement for an offer to the public of securities not exceeding EUR 5 million or not exceeding EUR 8 million and admitted on certain MTFs” above) apply, as do the rules relating to the information note. In other words, an offer to the public of securities or investment instruments that falls within the scope of the *de minimis* exemption no longer triggers a prospectus requirement, but will require the publication of an information note.

Furthermore, for any transaction requiring the publication of an information note, Article 60 of the Old Prospectus Law on the obligation to submit advertisements to the FSMA for prior approval no longer applies.

## OTHER PROVISIONS

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Certain provisions will apply as from the tenth day after publication of the New Prospectus Law in the Belgian State Gazette, *i.e.* as of 30 July 2018. These principally concern topics that do not strictly relate to the implementation of the Prospectus Regulation (for example, amendments to other laws) and the new rules on public takeover bids.

## CHANGES TO OTHER LAWS

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The New Prospectus Law also amends other laws. A number of these amendments are purely technical amendments (for example, to reflect the termination of the Old Prospectus Law). Other changes are to ensure a continued “alignment” of certain concepts (for example, the Belgian law implementing UCITS and AIFMD is to be amended to reflect the new definition “offers to the public” in the Prospectus Regulation). A number of amendments are more than purely technical. The New Prospectus Law for example contemplates the implementation of the Regulation 2017/1131 on money market funds (through amendments to the AIFM Law). A comprehensive overview of these other amendments goes beyond the scope of this eAlert.

Finally, the New Prospectus Law also introduces some amendments to the Belgian law on public takeover bids, and the preparatory works state that the Royal Decree implementing this law will also be amended in the future.

## Contact information

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