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Briefing note August 2013

Belgium's financial markets legislation revisited

The long awaited Belgian law (the "**Law**") transposing Directive 2010/73/EU amending the Prospectus and the Transparency Directives (the "**Amending Directive**") has been published in the Belgian State Gazette on 6 August 2013.

The Law codifies the amendments to the Belgian Prospectus Law which the Belgian regulator, the FSMA, already applied in practice since 1 July 2012 for offers under the Prospectus Directive. However, the Law now also extends the new rules to offers that fall outside the scope of the Prospectus Directive.

In addition, the Belgian legislator has used this opportunity to amend various other Belgian laws regulating financial markets, including the Law on Collective Investment Undertakings and the Takeover Law.

Key issues

- Changes to the Prospectus and the Transparency Directives (finally) implemented into Belgian law
- The changes also extend to offers not harmonised by the Prospectus Directive
- Monopoly of financial intermediaries extended to certain non-public offers
- Enhanced supervisory powers of the FSMA towards financial intermediaries
- Improved consistency between the prospectus rules and the legislation on collective investment undertakings and takeover bids

This briefing note summarizes some of the most notable changes.

1. CHANGES TO THE PROSPECTUS LAW

1.1 Harmonised versus non-harmonised offers

The Prospectus Directive only applies to offers of transferable securities where the total consideration, calculated over a 12 month period, is at least EUR 5 million ("**harmonised offers**").

However, under Belgian law, the prospectus rules also apply to offers that fall outside the scope of the Prospectus Directive, such as offers of non-transferable securities or offers of transferable securities where the total consideration, calculated over a 12 month period, is less than EUR 5 million ("**non-harmonised offers**").

In other words, under Belgian law not only harmonised offers of securities to the public, but also non-harmonised public offers, generally require the publication of a prospectus, unless an exemption applies.

The changes to the Prospectus Law, although based on the changes to the Prospectus Directive with regard to harmonised offers, have also been extended by the Belgian legislator to non-harmonised offers.

1.2 Exemptions

The amendments to the exemptions from the obligation to publish a prospectus introduced by the Amending Directive have now been implemented into Belgian law for both harmonised and non-harmonised offers. Although these exemptions were already applied in practice by the FSMA for harmonised offers (unless they were more stringent for issuers), there was some uncertainty as to whether some exemptions were also available for non-harmonised offers pending transposition of the Amending Directive into Belgian law. This uncertainty has now come to an end.

The main changes are as follows:

- **Qualified investors:** the definition of qualified investors has been aligned with that of professional clients or eligible counterparties for the purposes of MiFID (as implemented in Belgium by the Royal Decree of 3 June 2007). The former opt-in regime whereby legal entities could request to be treated as qualified investors (with such investors being listed in a publicly available register of the FSMA) is therefore abolished. Instead, the opt-in regime under MiFID (whereby investors can ask their investment firm to be treated as a professional investor or eligible counterparty) will apply. The investment firms and credit institutions will therefore have to make the classification of their clients available to issuers upon request.
- **100 person exemption:** the number of people to whom securities may be offered under this exemption is increased from fewer than 100 to fewer than 150 people per EEA state.
- **EUR 50,000 denominations:** the EUR 50,000 "wholesale" threshold is increased to EUR 100,000 and, similarly, the amount of the exemption for purchasing "bundles" of securities has been increased to EUR 100,000.
- **Offers of less than 100,000 EUR:** if the total consideration under an offer is less than EUR 100,000 it will not constitute an offer of securities to the public in Belgium. This also applies to an offer of securities which is granted free of charge. The previous obligation to make available an information document in relation to any free offer, has been abolished.
- **An exemption for divisions, as well as mergers:** the exemptions from the requirement to produce a prospectus have been extended to include "divisions", as well as mergers.
- **Employee share plans:** a broader range of EEA companies (including unlisted EEA companies) can now take advantage of the employee share plan exemption. The exemption is now also available to certain non-EEA companies admitted to trading on an EEA regulated market (as was already the case) or on certain third country exchanges which the European Commission considers as "equivalent" with a regulated market within the EEA. However, the European Commission has yet to adopt the relevant "equivalence" criteria so that this (part of the) exemption is not yet available in practice. Note that the above-mentioned employee share plan exemption only applies to offers of transferable securities. For employee offers of non-transferable securities, the FSMA may still grant partial or total dispensation from the obligation to publish a prospectus, but the dispensation is not automatic. These rules have not changed.

1.3 Retail cascades

Under the new rules, no new prospectus is required on a resale or the final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or the offeror consents in writing to its use. If the issuer or offeror does not consent to such use of the prospectus, a financial intermediary could be required to publish, and be liable for, a new prospectus.

1.4 Prospectus summary

The summary of the prospectus is now required to include certain "key information" and should be short, simple, clear and easy to understand for targeted investors. Previously, civil liability for the prospectus summary only attached if the summary was misleading, inaccurate or inconsistent when read together with the other parts of the prospectus. This has been extended and liability will now also attach if the summary does not provide, when read together with the other parts of the prospectus, the key information required in order to aid investors when considering whether to invest in the issuer's securities.

1.5. Final terms

If the final terms of an offer are not included in the base prospectus, nor in a supplement, as is the case for offering programmes, the final terms are made available to investors

separately and filed with (but not approved by) the competent authority. The Law now clarifies the limited nature of information permitted to be in the final terms of an offer. The final terms may only contain information specific to the issue and which relates to the securities note and must not be used to supplement a prospectus. The summary of a base prospectus must be completed following determination of the final terms of a specific issue to ensure it contains the necessary "key information" as referred to above.

1.6. Prospectus supplements and walk-away rights

The Belgian prospectus rules already provided for walk-away rights for investors if a prospectus supplement is published. However, the Law has now clarified that these walk-away rights only apply if the new development, mistake or inaccuracy requiring a supplement has arisen prior to the final closing of the offer and the delivery of the securities. The Law also specifies that these walk-away rights only apply in the context of a prospectus produced for a public offer and will not apply in the context of a prospectus produced only for admission to trading. The walk away period is two working days, but issuers have the option to extend this period if they wish.

1.7. Monopoly of financial intermediaries extended to certain non-public offers

A change introduced by the Law which is not driven off the amendments introduced by the Amending Directive is the extension of the monopoly of financial intermediaries to certain non-public offers.

The prospectus rules already provided that intermediation activities in the context of a public offer (including the placing of the financial instruments) could only be carried out by certain regulated institutions (such as credit institutions and investment firms), but this did not apply to private placements. The requirement to use a regulated institution for any intermediation activities in the context of an offer has now been extended to certain non-public offers, such as offers of financial instruments with a denomination per unit of at least EUR 100,000 or offers requiring a total consideration of at least EUR 100,000 per investor.

Offers that are addressed solely to qualified investors or that are addressed to fewer than 150 persons (other than qualified investors), as well as offers representing a total consideration of less than EUR 100,000, remain unaffected by the new rule.

The Law has also extended the supervisory powers of the FSMA towards, amongst others, financial intermediaries. For example, the FSMA will now be entitled to require a financial intermediary to take certain measures if it considers that an offer is taking place in circumstances which are likely to mislead the public.

Note that the intermediation monopoly does not mean that issuers have a legal requirement to use a financial intermediary for the placement of their financial instruments. It only requires them to use a regulated institution should they choose to rely on a third party for any intermediation activities in the context of their offer. However, the Law clarifies that issuers remain free to do the placement themselves.

1.8. Annual information update

The requirement for listed companies to file an annual information update with the competent authority of the home member state has been abolished. This requirement was seen as redundant in view of the Transparency Directive which already requires member states to organise official mechanisms for the storage of regulated information (such as, in a Belgian context, STORI which is run by the FSMA).

2. CHANGES TO THE LAW ON COLLECTIVE INVESTMENT UNDERTAKINGS

The Law has also introduced a number of changes to the Law on Collective Investment Undertakings of 3 August 2012. This law sets out the Belgian regulatory framework applicable to collective investment undertakings ("**UCI's**"), and applies to both UCI's of the closed-end type as well as UCI's of the open-end type.

However, the rules in relation to the obligation to publish a prospectus for the public offer of units issued by a UCI are not exclusively governed by the Law on Collective Investment Undertakings. The latter only contains the prospectus rules with regard to UCI's of the open-end type, whereas the prospectus rules for UCI's of the closed-end type are still governed by the Prospectus Law.

This distinction has been maintained, but in order to improve consistency between both sets of rules, the rules on advertisements in relation to offers of closed-end UCI's, which were previously set out in the Law on Collective Investment Undertakings

(despite all other prospectus rules for such UCI's being contained in the Prospectus Law), have now been inserted in the Prospectus Law.

In addition, the legislator has brought the definition of a "public" offer under the Law on Collective Investment Undertakings in line with the amended definition of "public" offer under the Prospectus Law. This is important because the definition of "public" offer is also used to determine whether the UCI is "public" and therefore subject to regulatory requirements.

3. CHANGES TO THE TAKEOVER LAW

Finally, the Law amended the definition of a "public" takeover offer under the Belgian Takeover Law of 1 April 2007 so as to bring it in line with the definition of a "public" offer under the Belgian Prospectus Law.

A takeover offer in Belgium will therefore no longer require the publication of a prospectus if:

- it relates to securities that are held solely by qualified investors (as defined for the purposes of MiFID);
- it is addressed to fewer than 150 persons other than qualified investors; or
- it relates to securities with a denomination per unit of at least EUR 100,000.

The alignment of both definitions was important to ensure consistency between both sets of legislation, in particular in the context of an exchange offer. In such a case, there is an exemption from the obligation to publish a prospectus under the Prospectus Law provided that equivalent information is made available to investors. A prospectus required under the Takeover Law will normally qualify as equivalent information, but this requires that a takeover prospectus has to be drawn up, which in turn assumes that the takeover offer is "public".

The legislator has also clarified that the mere communication by a financial intermediary to its clients that a public takeover offer is taking place outside of Belgium with regard to the securities that the financial intermediary holds on behalf of the client does not constitute a public takeover offer in Belgium. A similar provision already existed under the Prospectus Law, but has now been introduced in the Takeover Law as well so as to ensure that Belgian residents are not excluded from participating in a takeover offer that is largely conducted abroad.

4. ENTRY INTO FORCE

The Law enters into force on 16 August 2013, but does not apply to transactions that are ongoing on the date of its entry into force.

The UCI's existing as at the date of entry into force of the Law will also retain their qualification (e.g. as "public" UCI) despite the amendments introduced by the Law.

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