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## New transparency measures strengthening investor protection.

Directive No 2013/50/EU of the European Parliament and of the Council of 22 October 2013 (the “**Directive**”) has been implemented into Luxembourg law by a law adopted on 21 April 2016 by the Luxembourg parliament (the “**Law**”). The Law amends the law of 11 January 2008 on transparency requirements for issuers of securities (the “**Transparency Law**”) (**Part I**) and the law of 10 July 2005 in relation to the prospectus of securities (the “**Prospectus Law**”) (**Part II**).

Whilst guaranteeing and enhancing transparency and investor protection by introducing further disclosure requirements for issuers in the extractive or logging of primary forest industries and for holders of major holdings, the aim of the Directive is also to reduce the administrative burden imposed on notably small and medium-sized issuers so as to facilitate their access to capital markets within the European Union.

### 1. Part I: Amendment to the Transparency Law

#### 1.1 Definition of issuer and choice of home Member State

- The new definition of “*issuer*” covers legal entities governed by private or public law. It is also extended to cover natural persons (as already available in some Member States).

The new definition of “*issuer*” also clarifies that in connection with depositary receipts, the issuer for the purpose of the Law is the issuer of the underlying represented securities whether admitted or not to trading on a regulated market.

- To correct issues in the crucial determination of the home Member State, the following rules now apply:
  - > a third country issuer whose securities are admitted to trading on EEA regulated markets and have a denomination of less than EUR 1,000 can choose among the EU Member States where such securities are admitted to trading on a regulated market.
  - > EU issuers of debt securities admitted to trading on a regulated market and having a denomination equal or higher than EUR 1,000 can choose between the EU Member State where it has its registered office

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and, as the case may be, one of the EU Member States where the debt securities are admitted to trading on a regulated market.

> The choice is unique and exclusive and remains valid for 3 years.

However, when the securities are no longer admitted to trading on the regulated market of the home Member State, but the issuer has securities admitted to trading on a regulated market in (an) other EU Member State(s), the issuer may choose a new home Member State, being one of the Member States where the issuer's securities remain admitted to trading or, as the case may be, the Member State of its registered office.

> The choice of the home Member State has to be filed, stored and published in compliance with the Transparency Law. In addition, the issuer has to communicate its choice to the competent authority of (i) the EU Member State where it has its registered office, (ii) the home Member State (if different from the Member State where it has its registered office) and (iii) the host Member State(s)<sup>12</sup>.

> One major change is that in case of failure to disclose and communicate the choice of the home Member State within the 3 months after the first admission to trading on a regulated market, the home Member State will be the Member State where the securities are admitted to trading on a regulated market.

When securities are traded on regulated markets in several EU Member States, each of these EU Member States will be qualified as home Member State of the issuer.

Since this change entails substantial administrative burdens, it encourages issuers to promptly decide and make a choice for its home Member State among all potential home Member States.

## 1.2 Less cumbersome disclosure requirements

- The obligation to publish quarterly financial reports and interim management statements for issuers of shares is abolished. This change does however not impact the obligation to publish, file and store as soon as possible any inside information within the meaning of article 7 of Regulation (EU) no 596/2014.
- The annual financial report has to remain available to the public for a period of 10 years after its publication instead of 5 years previously. The obligation of disclosure within 4 months after the end of each financial year remains unchanged.
- The timing for filing, storage and publication of the semi-annual financial report has been extended from 2 months to 3 months. The

<sup>1</sup> Standard form for the notification of home Member State is now available at <http://www.cssf.lu/en/supervision/securities-markets/transparency/forms/>

<sup>2</sup> If Luxembourg has already been chosen by the issuer and that choice has been filed, published and stored in compliance with the Transparency Law, no further action is needed in Luxembourg.

semi-annual financial reports has to be available for a period of 10 years instead of 5 years previously.

- The obligation to file, store and publish any new loans issues and guarantees attached to them is repealed.
- The obligation to file the draft amendments to the articles of incorporation with the Commission de Surveillance du Secteur Financier (the “**CSSF**”) is repealed as well.

## 1.3 Filing, storage and publication

- Filing, storage and publication obligations remain the same. However, the Directive requires issuers listed on regulated markets to prepare their annual financial reports in a European Single Electronic Format (ESEF) from 1st January 2020 onwards with the objective of making the submission easier for issuers and facilitating accessibility, analysis and comparability for investors and regulators.
- In parallel, ESMA is developing **technical standards** regarding the access to regulated information and the establishment of a European Electronic Access Point (EEAP) which has to be established by 1 January 2018 and will provide a single point of access at the EU level to regulated information stored with an Officially Appointed Mechanism (OAM) in a Member State.

## 1.4 Exemptions

- The list of entities exempted from the obligation to publish annual and semi-annual financial reports is extended to the European Financial Stability Facility (EFSF), as well as other mechanisms designed to safeguard the financial stability of the European Monetary Union by providing temporarily financial assistance to EU Member States in the Eurozone.
- The exemption which applies to issuers of debt instruments having debt securities with a denomination per unit of at least EUR 100,000 (or its equivalent in another country) admitted to trading on a regulated market remains applicable.
- The existing exemption for issuers of debt instruments admitted to trading before 31 December 2010 and having a denomination of at least EUR 50.000 (or its equivalent in another country) also remains applicable.

## 1.5 Disclosure of payments to governments in the extractive or logging of primary forests industries

- For transparency and anti-corruption purposes and to encompass third country issuers not falling within the ambit of Directive 2013/34/EU, all issuers having chosen Luxembourg as home Member State and active in the extractive or logging of primary forest

industries<sup>3</sup>, must prepare annually a report on payments made to governments in compliance with Chapter 10 of Directive 2013/34/EU. The report has to be disclosed within 6 months after the end of the financial year and has to be available to the public for a period of 10 years. Payments made to governments have to be reported at a consolidated level.

This requirement applies to accounting year starting 1 January 2016 or during the 2016 calendar year.

#### 1.6 Notification of acquisition or disposal of major holdings

- **New exemption:** no notification requirement applies to voting rights attached to shares acquired for stabilisation purposes in accordance with Commission Regulation (EC) N° 2273/2003 of 22 December 2003, provided that voting rights attached to those shares are not exercised or otherwise used to intervene in the management of the issuer.
- **New disclosure requirements:** To avoid disguised stock acquisitions, the notification requirement under article 8 of the Transparency Law is extended to financial instruments with similar economic effect to holding shares and entitlements to acquire shares. A new paragraph (1) in Article 12 (*Specific financial instruments*) of the Transparency Law is created and encompasses now:
  - (i) financial instruments that on maturity give the holder, under a formal agreement, either the unconditional right to acquire, or the discretion as to his right to acquire, shares to which voting rights are attached, and that are already issued of an issuer whose shares are admitted to trading on a regulated market;
  - (ii) financial instruments not covered above but which reference shares covered above and with economic effects similar to financial instruments covered above, whether or not they confer a right to a physical settlement.

The notification has to include a breakdown by type of financial instruments, distinguishing financial instruments giving right to physical settlement and financial instruments giving right to cash settlement. To the extent they satisfy any of the conditions set out in (i) or (ii) the following is to be considered as 'financial instruments'-

- > transferable securities
- > options
- > futures
- > swaps

<sup>3</sup> As defined in article 41(1) and (2) of Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

> forward rate agreements

> contracts for differences

> any other contracts or agreements with similar economic effects which may be settled physically or in cash.

- The number of voting rights is to be calculated by reference to the full notional amount of shares underlying the financial instrument except where the financial instrument provides exclusively for a cash settlement, in which case the number of voting rights is to be calculated on a “delta-adjusted” basis, by multiplying the notional amount of underlying shares by the delta of the instrument. For this purpose, the holder has to aggregate and notify all financial instruments relating to the same underlying issuer. Only long positions are to be taken into account for the calculation of voting rights. Long positions shall not be netted with short positions relating to the same underlying issuer.

**Commission Delegated Regulation (EU) 2015/761 of 17 December 2014** deals with certain regulatory technical standards on major holdings and notably specifies the method of calculating the number of voting rights in case of financial instruments that reference a basket of shares or an index and the methods for determining delta for the purposes of calculating voting rights relating to financial instruments which provide exclusively for a cash settlement.

- Aggregation

A new article 12bis is created implementing article 13a of Directive 2004/109/EC, as amended and aiming at harmonising the regime for notification of major holdings of voting rights.

Notification is also required once the thresholds provided for in article 8 are either reached upwards or downwards further to the aggregation of voting rights under (i) article 8 and 9 and (ii) article 12. The notification shall include a breakdown of the number of voting rights attached to shares held in accordance with article 8 and 9 and voting rights relating to financial instruments within the meaning of article 12 of the Transparency Law.

#### 1.7 More stringent enforcement regime and sanctions

- The Law introduces substantial changes to the enforcement regime which take the form of more powers allocated to the CSSF and higher administrative fines : (i) for legal persons: up to €10,000,000 or 5% of the total annual turnover or up twice the amount of the profit gained or losses avoided because of the breach (if it can be determined) and (ii) for natural persons: up to €2,000,000 or up twice the amount of the profit gained or losses avoided because of the breach (if it can be determined). Administrative sanctions may apply as well to the directors or any other member of a management body of a legal person.

The CSSF will publish any decisions on its website relating to sanctions imposed (including at least the nature of the breach and identity of the natural/legal person liable) together with any recourse/action brought before courts

## 2. Part II: Amendments to the Prospectus Law

The changes to the Prospectus Law are minor:

- Definition of home Member State for third country issuers

For all issuers of debt securities incorporated in a third country not falling within the provisions of art. 2 paragraph 1, h) ii) of the Prospectus Law (any issuers “*of non-equity securities whose denomination per unit amounts to at least EUR 1,000, and [...] of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount*”), the home Member State shall be the Member State where the securities are intended to be offered to the public for the first time or where the first application for admission to trading on a regulated market is made subject to the subsequent election by issuers incorporated in a third country in the following circumstances:

> where the home Member State was not determined by their choice;  
or

> when securities are no longer admitted to trading on a regulated market in its home Member State but instead are admitted to trading in one or more other Member States, such new home Member State as the issuer may choose from amongst the Member States where its securities are admitted to trading on a regulated market.

- Implementation of article 1 of the Directive 2014/51/EU

Article 8 (4) paragraph 3 is amended to reflect the new requirement for the CSSF to communicate final terms to ESMA.

CSSF Circular 12/539 on the technical specifications regarding the submission to the CSSF of documents under the Prospectus Law and the general overview of the aforementioned law, has been amended by CSSF [Circular 15/632](#)<sup>4</sup> to reflect the above mentioned change.

It is expected that the legislative process will be completed and the Law published in the Luxembourg official gazette in the coming days.

<sup>4</sup> Circular 12/539 has been further amended by [Circular 16/635](#) taking into account the changes introduced by Commission delegated regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004.

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