



The prospectus regime

QUESTIONS / ANSWERS

The prospectus regime

This new version of the CSSF's questions and answers amends the former version (still available on the CSSF's website¹) with regard to legal, regulatory and other developments in the prospectus field. It should be noted that certain questions of the previous version have been left out as they are of minor importance or outdated, whereas other questions and answers have been clarified. Moreover, the questions and answers have been grouped according to themes for ease of reading.

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¹ <https://www.cssf.lu/en/Document/the-new-prospectus-regime-faq/>

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I. PRACTICAL QUESTIONS

I.1 How should the documents be filed with the CSSF?

Last update: October 2012

Circular CSSF 12/539 provides technical specifications regarding the submission of documents to the CSSF for their approval or for filing purposes, as well as the requests for advice relating to offers of securities to the public and admissions of securities to trading on a regulated market.

The circulars published by the CSSF regarding prospectuses are available on the CSSF's website (<http://www.cssf.lu/en/issuers-prospectuses/prospectus-securities/documentation/>).

I.2 How should general questions be filed with the CSSF?

Last update: October 2012

General questions can be sent via e-mail to the address prospectus.help@cssf.lu. If a filer (déposant) uses other means of communication, such as the filing of paper copies, the latter must include a computer-data storage medium (CD, DVD, USB stick). In this case, the documents are to be sent to the following postal address:

Commission de Surveillance du Secteur Financier
Securities Markets/Prospectus
L-2991 LUXEMBOURG

In this context, it should be highlighted that electronic documents must be submitted in PDF format.

I.3 What are the modalities for the transmission of a set of comments prepared by the CSSF?

Last update: October 2012

The CSSF will send its set of comments via e-mail (in PDF format) to the person(s) designated to this end in the documentation transmitted with the official filing pursuant to Article 7 of the Prospectus Law as set out in detail in Circular CSSF 12/539.

I.4 Is it possible to directly contact the CSSF for questions relating to a file?

Last update: October 2012

Yes, for a given file, the filer, the issuer or the authorised person acting on behalf of the latter, can directly contact the CSSF agents designated in the set of comments drawn up by the CSSF.

I.5 What are the fees to be paid for the approval of a prospectus?

Last update: March 2013

The grand-ducal regulation of 29 September 2012² relating to the fees to be levied by the Commission de Surveillance du Secteur Financier, lays down the lumpsum fees to be levied by the CSSF on the persons seeking the admission to trading on a regulated market³, offerors or issuers asking for approval of a prospectus within the scope of Part II and Chapter I of Part III of the Prospectus Law.

I.6 What is the procedure to request the CSSF to accept the transfer of the approval of a prospectus by the competent authority of another Member State?

Last update: October 2012

The competent authority of the Member State that wishes to transfer, under Article 13(5) of the Prospectus Directive, the approval of a prospectus to the CSSF, shall transmit a formal request to this end. In view of the arguments put forward, the CSSF will assess, on a case-by-case basis, if it accepts such transfer. It must be highlighted that, in accordance with the regulations in force, such a request shall originate from the competent authority of the Member State that seeks to delegate the approval of the prospectus and not from the issuer itself.

² <http://www.cssf.lu/en/issuers-prospectuses/prospectus-securities/documentation/>

³ In this context, a distinction is to be made between the persons asking for admission to trading on a regulated market and the above-mentioned listing agents who introduce the applications for admission in their capacity as proxies of the issuer or of the person asking for admission.

II. General questions

II.1 What is the legislative and regulatory framework as regards prospectuses?

Last update: March 2013

Documentation on prospectuses is available on the CSSF website (<http://www.cssf.lu/en/issuersprospectuses/prospectus-securities/documentation/>).

The Prospectus Law transposing the Prospectus Directive provides for three different prospectus regimes as specified in Circular CSSF 12/539.

At national level, the CSSF has published circulars that supplement the legislative framework and questions and answers in order to clarify the regulations in force.

At international level, ESMA has published an update of the CESR recommendations, as well as frequently asked questions and answers in order to enhance the common practice and positions of the national supervisory authorities under the Prospectus Directive and the Prospectus Regulation. These documents are available on ESMA's website (<http://www.esma.europa.eu/>).

II.2 Who is competent for the approval of a prospectus: the CSSF or the Société de la Bourse de Luxembourg?

Last update: October 2012

	Part II Prospectus Law	Part III Prospectus Law	Part IV Prospectus Law
Offer of securities to the public	CSSF	CSSF	NA
Admission of securities to trading on a regulated market	CSSF	Société de la Bourse de Luxembourg	NA
Admission of securities to trading on a Luxembourg market not set out in the list of regulated markets published by the European Commission ⁴	NA	NA	Société de la Bourse de Luxembourg

It should be stressed that the Société de la Bourse de Luxembourg is the competent entity for decisions with respect to the admission of securities to trading on a market and/or official listing.

II.3 How must a final date for a prospectus/supplement be set down and who is the person responsible to ensure that the information included in the prospectus/supplement is up to date on the date of its approval?

Last update: October 2012

⁴ Currently, the only Luxembourg market not on the list of regulated markets published by the European Commission is the Euro MTF, operated by the Société de la Bourse de Luxembourg. The CSSF considers the Euro MTF market as a "regulated" market (but not within the meaning of MiFID), which is operating regularly, recognised and open to the public. The securities and money market instruments traded on the Euro MTF market are eligible investments for undertakings for collective investment in transferable securities under the Luxembourg regulations relating to undertakings for collective investment.

The prospectus or the supplement must be up to date at the time of its approval. The date of a prospectus or a supplement assures the investor that until that date all the required elements were included in the prospectus or the supplement. In principle, the date of a prospectus or supplement must be the same as that of its approval, unless otherwise requested and justified by the issuer.

The person responsible for the content of the prospectus or of the supplement shall verify if this requirement is being complied with and rectify, update or complete, where applicable, the document submitted before its approval notably in order to take into account the latest developments with respect to the information included in the document concerned.

II.4 II.4. How and when should a prospectus be published?

Last update: October 2012

Pursuant to Articles 16(4) and 38(4) of the Prospectus Law, the CSSF has delegated the publication of prospectuses to the Société de la Bourse de Luxembourg, which publishes them on its website at the address <http://www.bourse.lu> for a period of at least 12 months. The publication requirement imposed on issuers in accordance with Articles 16 and 38, paragraphs 1 to 3 of the Prospectus Law, is thereby fulfilled in Luxembourg. However, this does not prevent the issuer to also use other means of publication. Furthermore, every investor has the option to receive, upon request, a free-of-charge paper copy of the prospectus. Such a request should be made to the issuer, offeror, person that asked for the admission of securities to trading on a regulated market or to the financial intermediaries placing or trading the securities concerned.

In principle, the prospectus shall be published on the very day (or on the following day) of its approval, unless otherwise requested and justified by the issuer (subject to compliance with the principle providing that a prospectus shall be published before the beginning of an offer to the public or an admission to trading).

II.5 Is it possible to withdraw a document that has already been published and approved by the CSSF from the website of the Société de la Bourse de Luxembourg?

Last update: October 2012

No. In principle it is not possible to withdraw a prospectus or a supplement (including the documents incorporated by reference) that has already been published and approved by the CSSF from the website of the Société de la Bourse de Luxembourg during the validity of these documents as laid down in the Prospectus Law.

II.6 What is the impact of the use of languages?

Last update: October 2012

The general use of languages for Part II of the Prospectus Law is explained in detail under Article 20 of the Prospectus Law.

(i) *Approval by the CSSF of a prospectus drawn up in different languages*

As regards the approval pursuant to Article 7 of the Prospectus Law, the CSSF accepts that a prospectus is drawn up in different languages, provided however that these languages are accepted by the CSSF in accordance with the Prospectus Law. A prospectus drawn up in Luxembourgish, French, German or English is acceptable in any case.

(ii) *Notification by the CSSF of a prospectus drawn up in different languages*

As regards the notification pursuant to Article 19 of the Prospectus Law of a prospectus drawn up in different languages, there are three different situations:

(i) the prospectus is drawn up in one or several languages accepted by the host Member State⁵. In such a case, the CSSF notifies the prospectus to the competent authority of the host Member State;

(ii) the whole document is drawn up in a language accepted by the host Member State, and has been, fully or partially, translated into one or several languages that are not accepted by this Member State. In such a case, the CSSF notifies the prospectus to the competent authority of the host Member State and mentions this on the approval certificate; and

(iii) the prospectus is drawn up, fully or partially, in one or several languages that are not accepted by the host Member State and is not fully available in a language accepted by the host Member State. In such a case, the CSSF does not notify the prospectus to the competent authority of the host Member State.

⁵ cf. the ESMA document entitled: "Languages accepted for the purpose of the scrutiny of the Prospectus and requirements of translation of the Summary". This document is available on ESMA's website (<http://www.esma.europa.eu/>).

II.7 What are the definition, approval time and advantages of a standardised prospectus?

Last update: October 2012

To qualify as “standardised prospectus”, a prospectus must be part of a set of prospectuses that an issuer repeatedly submits to the CSSF and must not include any substantial amendments as compared to the prospectuses of that set previously approved by the CSSF. Issuers must submit a marked-up version of the prospectus to be approved compared to the “standardised prospectus” previously approved by the CSSF. The CSSF will assess the materiality of the changes on a case-by-case basis. A base prospectus cannot be considered as a “standardised prospectus”.

In addition to a speedier approval, “standardised prospectuses” also benefit from a reduced fee.

II.8 Is it possible to incorporate future information by reference?

Last update: October 2012

As regards Part II of the **Prospectus Law**, it is impossible to incorporate future information by reference. The issuer must draw up a supplement relating to its base prospectus, every time it is of the opinion that the information concerned is to be considered as new significant events.

On the other hand, it is possible to incorporate future information by reference under the regimes of Part III and Part IV of the **Prospectus Law**. Article 36 of Part III of the **Prospectus Law** thus provides that “information may be incorporated in the simplified prospectus by reference to one or more previously, simultaneously or subsequently published documents”.

II.9 In what cases must a declaration be included for an incorporation by reference?

Last update: October 2012

Incorporation of information by reference aims at simplifying the formalities for establishing the prospectus and reducing the related costs. However, this objective should not be reached to the detriment of other interests that the prospectus is supposed to protect. Where information is incorporated by reference, a cross-reference list must be provided in order to allow investors to easily find the information concerned.

The CSSF also requires the following for an incorporation by reference:

(i) if a document is not fully incorporated by reference, the prospectus/supplement must state that the parts of that document that are not incorporated are either not relevant for the investor or covered in another part of the prospectus. (Article 28(4) of the **Prospectus Regulation**)⁶ ;

(ii) if the cross-reference list does not mention all the information that is incorporated by reference, the prospectus/supplement must specify that the information which is not included in the cross-reference list is included by reference, but that it is not required by the relevant schedules of the **Prospectus Regulation**. For instance, the CSSF accepts the following wording:

“The information incorporated by reference that is not included in the cross-reference list, is considered as additional information and is not required by the relevant schedules of the **Prospectus Regulation**”.

⁶ The issuer, offeror or person asking for admission to trading on a regulated market may incorporate information in a prospectus or base prospectus by making reference only to certain parts of a document, provided that it states that the non-incorporated parts are either not relevant for the investor, or covered elsewhere in the prospectus.

III. Questions with respect to the Prospectus Law

III.1 Is an exchange offer related to securities admitted to trading on the Euro MTF market likely to trigger an offer to the public within the meaning of Article 2(1)(1) of the Prospectus Law?

Last update: October 2012

Exchange offers related to securities admitted to trading on the Euro MTF market for new securities shall be considered as price-sensitive transactions impacting the securities concerned and must be made public in accordance with the Rules and Regulations of the Société de la Bourse de Luxembourg. The notices relating to these exchange offers could be considered as constituting offers to the public and trigger the obligation to publish a prospectus in accordance with the **Prospectus Regulation**. In this case, a distinction must be made between notices that generally aim to inform the public of an issuer's debt restructuring through an exchange offer (which are not offers to the public of new securities) and specific invitations to the public to participate in this exchange offer (which can constitute an offer to the public). While the notices on an issuer's debt restructuring can and must be published and while any other material information relating to the exchange offer must be published in accordance with the Rules and Regulations of the Société de la Bourse de Luxembourg, invitations to take part in an exchange offer may for instance be addressed to investors concerned via the clearing system (in order to avoid that these invitations are immediately considered as offer to the public, without prejudice however to the definition of an offer to the public and the conditions governing the publication of a prospectus as provided for by the **Prospectus Law** and explained in the relevant CSSF circular).

III.2 How does the CSSF interpret Article 3 of the Prospectus Law relating to the securities denominated in a currency other than euro?

Last update: October 2012

Article 3 of the **Prospectus Law** stipulates that "the issues and offers of non-equity securities denominated in a currency other than euro shall benefit from the same regime as those denominated in euro provided that the nominal value per unit of these securities is, at the date of the issue or the offer, equivalent or nearly equivalent to the amounts in euro provided for in this law". The expression "at the date of the issue or the offer" does not give a choice to the offeror, but the fulfilment of the earlier of these assumptions will be decisive in principle. The interpretation of the notion "nearly equivalent" will be appraised on a case-by-case basis at the very date of the issue or the offer.

III.3 How does the CSSF interpret the notion “public international bodies” within the meaning of Article 4(2) of the Prospectus Law?

Last update: October 2012

Article 4(2) of the **Prospectus Law** specifies that Part II does not apply, among others, to “nonequity securities issued by a Member State or by one of a Member State’s regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States.” Issuers that claim to be international public bodies, shall produce evidence thereof and confirm it, in principle, in the prospectus.

III.4 What can be considered as an “equivalent document” in the context of a merger, division or any similar restructuring operation within the meaning of Article 5(3) of the Prospectus Law?

Last update: October 2012

The question is whether, for the purposes of Article 5(3)(c)⁷ of the **Prospectus Law**, the draft terms of the merger, division or any other similar restructuring operation (within the meaning of the law of 15 August 1915 on commercial companies) can be considered as sufficient. Firstly, it should be noted that the provision 5(3)(c) only applies if the merger, division or any other similar restructuring operation is to be considered as an offer to the public of securities. If not, these transactions do not fall under the scope of the Prospectus Law. Thus, the simple notification for an ordinary meeting convened to vote on draft terms of the merger, division or any other similar restructuring operation is in principle not considered as an offer to the public.

⁷ “The obligation to publish a prospectus does not apply to offers to the public of [...] securities offered, allotted or to be allotted in connection with a merger, division or any other similar restructuring operation, provided that a document is available containing information which is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of EU legislation. ”

The document relating to the draft terms of the merger, division or any other similar restructuring operation should be considered as “equivalent” by the CSSF. It does not need to be “identical” to a prospectus. However, all the information to be included in a prospectus, pursuant to the **Prospectus Regulation**, shall also be included in the document relating to the draft terms of the merger, division or any other similar restructuring operation. The document produced pursuant to the law on Luxembourg companies cannot be considered as an “equivalent” document.

It should be noted that the documents mentioned under Article 5(3) of the **Prospectus Law** and especially those mentioned under (b) and (c)⁸, are not eligible for the European passport.

III.5 What is presently the scope of Article 21 of the Prospectus Law in relation to the approval for issuers incorporated in third countries of a prospectus that has been drawn up in accordance with the legislation of a third country?

Last update: October 2012

According to Article 21 of the Prospectus Law, if Luxembourg is the home Member State for an issuer incorporated in a third country, the CSSF may approve a prospectus for an offer to the public or for admission to trading on a regulated market, drawn up in accordance with the legislation of a third country, provided that (i) the prospectus has been drawn up in accordance with international standards set by international securities commission organisations, including the disclosure standards of the International Organisation of Securities Commissions (IOSCO), and that (ii) the required information, including information of a financial nature, is equivalent to that required under the law, and that (iii) the prospectus is drawn up in a language accepted by the CSSF.

⁸ “(b) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on takeover bids; (c) securities offered, allotted or to be allotted in connection with a merger, division or any other similar restructuring operation, provided that a document is available containing information which is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of EU legislation. ”

In this context, it is worth stressing that ESMA has published a public statement⁹ on 23 March 2011, stating that a prospectus relating to shares, which is drawn up according to Israeli laws and regulations, can constitute a valid prospectus under the Prospectus Directive, provided however that it is accompanied by a separate document containing a certain amount of information.

⁹ Statement by ESMA entitled: "ESMA statement on Israeli laws and regulations on prospectuses". This document is available on ESMA's website (<http://www.esma.europa.eu/>).

IV. Questions with respect to the Prospectus Regulation

IV.1 How shall issues of the types repackaging, fiduciary notes or loan participation agreement be classified under the Prospectus Regulation?

Last update: October 2012

Securities that are in fact only a simple “mirror” of the underlying security (such as GDRs or FDRs) are considered as “representative certificates” of the underlying securities. Where the underlying is in fact a pool of different assets, these securities shall be considered as “*asset backed securities*”. An asset pool that consists in loans among entities of the same group shall not be considered as an underlying of an “asset backed security”. In relation to fiduciary issues under the provisions of the law of 27 July 2003 relating to trusts and fiduciary contracts, the information to provide on the fiduciary is the same as that required for the issuer in the Annex to the **Prospectus Regulation** concerning representative certificates.

IV.2 How shall “tier 1” issues be classified under the Prospectus Regulation?

Last update: October 2012

For the purpose of drawing up a prospectus, the CSSF considers, in principle, “tier 1” issues (e.g. issues of the “trust preferred securities” type) as bonds instead of equity securities, subject of course to a case-by-case appraisal according to the structure of the specific issues.

IV.3 What Annexes apply for Fiduciary Notes representing a bond issue under Luxembourg law?

Last update: October 2012

The Annexes to the **Prospectus Regulation** mentioned below shall be used for a prospectus relating to fiduciary notes where, for instance, BankX issues fiduciary notes representing a loan of the company YCorp (and with a denomination per unit of at least EUR 100,000):

- Annex XIII: “securities note” to be used to describe the terms relating to fiduciary notes issued by BankX;
- Annex XIII, section 4 to be used only to describe the requirements of the underlying loan of YCorp;
- Annex IX: “registration document” applying to the description of the “underlying issuer” YCorp; and

- Annex X, section 26 for the issuer of fiduciary notes (BankX).

IV.4 What Annexes of the Prospectus Regulation are applicable to Islamic debt securities “sukuk”?

Last update: October 2012

“Sukuk” may be treated as asset backed securities pursuant to the provisions of Article 2(5) of the **Prospectus Regulation** or, subject to certain conditions, as guaranteed debt securities pursuant to Article 23(2) and Annex VI of the **Prospectus Regulation**. Indeed, provided that the payments of principal and periodic revenues under the securities are guaranteed on a contractual basis by one or more underlying entities, in other words, if the payment of principal and periodic distributions are independent from the performance of the underlying asset, the CSSF considers that the underlying entities may be described in accordance with the provisions of Annex VI of the **Prospectus Regulation**.

IV.5 Does the professional body of the statutory auditors have to be stated every time?

Last update: October 2012

As far as statutory auditors are concerned, the **Prospectus Regulation** requires, besides the name and address of the issuer’s statutory auditors, that the membership in a professional body be indicated in the prospectus. Thus, as regards Luxembourg statutory auditors, the Institut des réviseurs d’entreprises (IRE) shall be mentioned. In respect of England for instance, it is sufficient that the statutory auditors state that they are chartered accountants (as understood by the Institute of Chartered Accountants in England & Wales).

IV.6 How does the CSSF interpret the notion of “securities of the same class” used by certain schedules of the Prospectus Regulation?

Last update: October 2012

Certain Annexes of the **Prospectus Regulation** provide that “all the regulated markets or equivalent markets on which, to the knowledge of the issuer, securities of the same class of the securities to be offered or admitted to trading are already admitted to trading” shall be stated.

As regards this particular point, “same class of securities” shall be understood as meaning that only the securities of the issue described in the prospectus concerned or fungible securities with these securities, are concerned.

V. Specific questions with respect to financial information

V.1 Which accounting standards are presently considered as being equivalent to the IAS standards?

Last update: October 2012

As regards third-country issuers, the **Prospectus Regulation** refers to the national accounting standards equivalent to the international accounting standards adopted pursuant to the procedure provided for in Article 3 of **Regulation 1606**.

In this context:

- In accordance with **Regulation 1289**, the standards applicable in Japan and in the United States are to be considered as being equivalent to IFRS as from 1 January 2009.
- In accordance with **Delegated Regulation 311**, the generally accepted accounting principles of Canada, South Korea and the People's Republic of China are to be considered as being equivalent to IFRS as from 1 January 2012. Moreover, issuers of third countries are authorised to draw up their consolidated annual and semi-annual accounts in accordance with the generally accepted accounting principles of the Republic of India for the financial years starting before 1 January 2015.

V.2 Is it permitted to present the annual accounts for the last two or three financial years respectively in the same document?

Last update: October 2012

As regards the presentation of historical financial information covering the two or three last financial years, the CSSF accepts that the annual accounts (tables and annexes) for two or three different financial years be presented in the same document.

V.3 Is a guarantor automatically obliged to produce statements under IFRS?

Last update: October 2012

Pursuant to point 6.3 of Annex VI to the **Prospectus Regulation**, the guarantor shall disclose the same information on itself as if it was the issuer of the security that is the object of the guarantee. As regards companies from an EU Member State, it has to be understood that a company which is guarantor in a prospectus in relation to securities does not need to prepare its figures according to the IFRS standards only because this company is guarantor in relation to these securities. In other words, a guarantor whose securities are not admitted to trading on a regulated market is not required to prepare consolidated accounts under IFRS (except obviously if the national legislation imposes these standards). Its position as guarantor of securities offered to the public in Luxembourg or admitted to trading on a regulated market in Luxembourg does indeed not entail the independent obligation to prepare the consolidated accounts under IFRS.

V.4 Does an SPV have to provide audited historical financial information?

Last update: October 2012

In principle, an SPV (special purpose vehicle) issuing securities must include relevant audited historical financial information in the prospectus relating to these securities according to Annex VII to the **Prospectus Regulation**. SPVs issuing asset backed securities (ABS) shall draw up a prospectus based on, among other things, the aforementioned Annex VII, which expressly specifies in point 8.1. that: "Where, since the date of incorporation or establishment, an issuer has not commenced operations and no financial statements have been made up as at the date of the registration document, a statement to that effect shall be provided in the registration document."

Where the SPV has not commenced operations, it is not obliged to draw up a balance sheet (and point 8.2. of the aforementioned Annex VII on historical financial information does not apply). The commencement of the SPV's « operations » concerns its core business and shall be appraised taking into account its business purpose. Thus, for example, covering of the costs of formation is not likely to be a commencement of the SPV's operations.

Annex VII of the **Prospectus Regulation** does not consider the situation in which the SPV has commenced operations but has not yet drawn up financial statements since the date of its incorporation or establishment. In this particular case, the CSSF has adopted the “either/or” approach for the exemption referred to in point 8.1. of the aforementioned Annex VII. Thus, where the issuer has already commenced operations, but has not drawn up financial statements since the date of its incorporation or establishment, a statement clarifying that fact should be included in the prospectus.

Article 10(2) of the **Prospectus Law** provides that: “When Luxembourg is home Member State, the CSSF may authorise the omission from the prospectus of certain information provided for by law, if it considers that: [...] (c) such information is of minor importance only for a specific offer or admission to trading on a regulated market and is not such as to influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any.” It should be stressed in this context (i) that this exemption may only be granted where the issuer submits a written reasoned request and (ii) that the fact that the exemption was granted will be mentioned by the CSSF in the certificate notified to the competent authorities of the other Member States. As regards more specifically SPVs (to which Annex VII of the **Prospectus Regulation** does not apply as they do not issue asset backed securities), the latter may submit, where applicable, a reasoned request for exemption as regards their first annual accounts. The request for exemption shall contain precise arguments according to which, in their specific case (issuer’s business, nature of the securities), this information would be of minor importance (notably if the issuer has not commenced operations). If the request is duly justified, the CSSF will grant the exemption.

V.5 Can an authorisation to omit financial information for an issue guaranteed by several companies belonging to the same group (e.g. high yield bond issuers) be obtained?

Last update: October 2012

Where an issue of securities is guaranteed by several companies, Annex VI of the **Prospectus Regulation** applies in principle to each of these entities. The provisions concerned require that the guarantor discloses the same information on itself as if it was the issuer of the security that is the object of the guarantee. However, a strict application of this point would be likely to prejudice issues that benefit from more complex structural guarantees under which several subsidiaries of the same group are guarantors, in particular where these subsidiaries do not publish non-consolidated financial statements separately from the consolidated financial statements of the group to which they belong. This is notably the case for so-called high yield issues. In these constellations, it is often the group's subsidiaries which have the most significant assets that act as guarantors. As it cannot be affirmed in general that the financial statements of the subsidiaries are always of minor importance, the CSSF considers that an exemption can nevertheless be granted on a case-by-case basis in the following concrete situations:

- the guarantees concerned are unconditional and irrevocable (without prejudice to the other legal provisions applicable in the jurisdictions of these entities);
- the guarantor subsidiaries represent at least 75% of net assets or of the group's EBITDA; and
- the prospectus includes a description of the reasons explaining the omission of separate financial information for the subsidiaries concerned under the section relating to risk factors.

In these cases, and provided that an exemption request is received, the inclusion of the group's consolidated financial statements will be considered sufficient by the CSSF as historical financial information required for the group and the guarantor subsidiaries.

V.6 On which conditions do cash flow statements need to be included in a prospectus?

Last update: October 2012

As regards the requirement to include a cash flow statement in a prospectus, the **Prospectus Regulation** provides notably in its Annex IV (schedule relating to the registration document for debt and derivative securities with a denomination per unit of less than EUR 100,000) that if the historical financial information "is prepared according to national accounting standards, the financial information required under this heading must include at least: (a) balance sheet; (b) income statement; (c) cash flow statement; and (d) accounting policies and explanatory notes.

The historical annual financial information must have been independently audited or reported on as to whether or not, for the purposes of the registration document, it gives a true and fair view, in accordance with auditing standards applicable in a Member State or an equivalent standard."

In this context, the question arises as to whether an issuer, or a guarantor respectively, that is not obliged to prepare a cash flow statement pursuant to its national accounting standards (and which consequently has not prepared one), should provide such a statement, considering that solely the schedule of the **Prospectus Regulation** lays down this requirement (through the provisions on historical financial information to include in the prospectus). Another question arises concerning the audit of the cash flow statement by the auditor of the issuer (or of the guarantor).

The CSSF considers that in principle, the issuer (or the guarantor) shall prepare a cash flow statement if required so by the applicable schedule of the **Prospectus Regulation** and that this cash flow statement must have been audited or reported on by the auditor (without him being obliged to confirm that the statement gives a true and fair view)¹⁰. The prospectus should contain the statement as well as the auditor's comment.

¹⁰ The wordings that have been accepted by the CSSF in the past are for example the following : "At the request of X, the independent auditor of X has compared the amounts included in the above table not derived from the audited non-consolidated financial statements and/or unaudited non-consolidated interim financial statements and/or X accounting records with the corresponding amount in schedules and analyses prepared by X from its accounting records and found them to be in agreement after giving effect to rounding, if applicable. " or at least "The cash flow table for the financial years [●] and [●] which is based on the audited financial data of the said years and of which the method of calculation and the calculations themselves have been approved by the Issuer's auditors, can be found hereunder: (...)".

This principle is still valid, except if, by way of derogation, the issuer (or the guarantor) is able to clearly demonstrate that it is an information item that is not relevant for this particular case. Indeed, Article 23(4) of the **Prospectus Regulation** stipulates that “By way of derogation of Articles 3 to 22, in the cases where one of the information items required in one of the schedules or building blocks referred to in 4 to 20 or equivalent information is not pertinent to the issuer, to the offer or to the securities to which the prospectus relates, that information may be omitted.” It is the issuer’s (or the guarantor’s) task to provide, in the context of the approval of its prospectus, a clear explanation of the reasons justifying the application of Article 23(4) to its case. The CSSF could require that the auditor gives its view on this explanation. In principle, the issuer shall include the useful explanations in the prospectus.

It is important to remember in this context that Article 23(4) cannot be applied as a whole and automatically to certain categories of issuers or issues.

VI. Specific questions with respect to base prospectuses

VI.1 What are the rules relating to the drawing up of the base prospectus and of the final terms?

Last update: October 2012

The **Prospectus Directive** and the **Prospectus Regulation** contain a certain number of provisions relating to the drawing up and filing of the final terms under a base prospectus. Further to these more general provisions, **Delegated Regulation 486** provides technical details and defines the content of the information that may be included in the base prospectus or in the final terms.

VI.2 Can several base prospectuses be compiled in the context of “multiple issuer” programmes?

Last update: October 2012

Provided that the documents remain comprehensible and readable, the base prospectuses of the different issuers may be compiled by appending them one after the other or by segregating the different base prospectuses “by definitions” (with references inside the compiled prospectus) in a single document.

The presentation of several base prospectuses (multiple-issuer programmes or different programmes of the same issuer) in a single document is however only acceptable if a certain link exists between the companies, i.e. if they belong to a group. Issuers shall produce evidence of a link justifying the drawing up of a common prospectus in their particular case. The CSSF will appraise this justification on a case-by-case basis in the light of the prospectus regulations. Furthermore, it is understood that Luxembourg must be the home Member State of all the issuers described in the base prospectuses or that the CSSF has accepted, where applicable, a transfer of approval as referred to in the provisions of Article 7(6) of the **Prospectus Law**.

VI.3 What is the scope of a supplement in the context of a “multiple issuer” base prospectus?

Last update: October 2012

In the case of multiple-issuer programmes, the base prospectus includes information on several issuers. Where a supplement to the prospectus that only concerns one issuer of the programme must be published and where the information included in this supplement is such as to influence only the assessment of the securities issued by this particular issuer, the CSSF considers that the publication of the supplement does not affect the issues of the other issuers. As a consequence, the CSSF considers that the right to withdraw their acceptance of securities, to which investors are entitled in accordance with Article 13(2) of the Prospectus Law concerns, in the aforementioned case, only issues of the issuer to which the supplement refers.

VI.4 Can financial instruments that are not covered by the Prospectus Directive be issued under a base prospectus?

Last update: October 2012

While, under a base prospectus approved according to Part II of the **Prospectus Law**, an issuer may, in principle, issue securities that do not fall under the scope of this Part, the CSSF requires this issuer to include a comment in its base prospectus in order to clarify the scope of the approval.

(e.g.: “Under the Luxembourg Law on Prospectuses for Securities which implements the Prospectus Directive, prospectuses relating to money market instruments having a maturity at issue of less than 12 months and complying also with the definition of securities are not subject to the approval provisions of Part II of such law.”)

VI.5 Is it allowed to draw up a single base prospectus for the purpose of admission of securities to trading on the regulated market of the Société de la Bourse de Luxembourg and on the Euro MTF market?

Last update: October 2012

The CSSF does not object to a base prospectus, drawn up for the purpose of admission to trading of securities on the regulated market of the Société de la Bourse de Luxembourg, from being used for the purpose of admission to trading of securities on the Euro MTF market of the Société de la Bourse de Luxembourg.

VI.6 How do notifications of base prospectuses and filings of final terms take place in the context of a programme?

Last update: October 2012

The CSSF considers that the approval of a base prospectus by the competent authority of the home Member State (and its notification by the latter to the competent authority of another Member State) is valid for any issue of tranches under this programme covering securities listed under point (m) (ii) of Article 2(1) of the **Prospectus Directive** (and documented by “final terms” which will not be approved). Therefore, where the issuer plans to make an offer to the public or to seek admission to trading on a regulated market for a specific tranche under the programme exclusively in a Member State other than the home Member State of the programme (without specific additional action relating to this tranche in the home Member State of the programme), this other Member State does not become home Member State for the issue covered by the programme. This specific operation will be covered by the notification made on the base prospectus by the home Member State.

In this context, it should be specified that the issuer or the person authorised to act in the name of the latter is required to file a notification request for the base prospectus with the CSSF as specified in **Circular CSSF 12/539**.

If Luxembourg is the home Member State, the final terms of a base prospectus (approved by the CSSF) will not be approved by the CSSF, but only filed with the CSSF (according to the practical terms explained in point II.3.2 of **Circular CSSF 12/539**). Where the securities concerned will be offered to the public or admitted to trading on a regulated market in a Member State other than Luxembourg, the issuer must communicate the final terms to the competent authority of the host Member State where the offer to the public or admission to trading is made as soon as practicable, and, if possible, in advance of the beginning of the public offer or admission to trading.

If Luxembourg is the host Member State, the transmission of the final terms must be made according to point II.4 of **Circular CSSF 12/539**.

VI.7 What are the CSSF’s requirements as regards the denomination of a base prospectus, when the latter is also used in a third country (notably the United States)?

Last update: October 2012

Some countries (the United States for instance) require that documents be named according to a predefined terminology, e.g. the notion of “Information Memorandum”. Issuers seeking to draw up documents that are valid in the United States as well as in the European market may encounter problems as regards the denomination of the document. The CSSF understands that the market wishes that Luxembourg be flexible as regards the denomination of the different documents making up a prospectus. In principle, Luxembourg will adopt a flexible approach in this respect, but requires that the cover page clearly refer to the applicable provisions. Thus, it shall be clearly stated that the document concerned is to be considered as a “base prospectus” under the **Prospectus Law**. (e.g.: “This offering memorandum comprises a base prospectus for the purposes of Article 8(4) of the Luxembourg Law on Prospectuses for Securities”).

VI.8 How does the CSSF interpret Article 1(12) of Delegated Regulation 486?

Last update: October 2012

Article 1(12) of **Delegated Regulation 486** lays down the following for the use of languages for the final terms and the summary annexed thereto:

“[...] (a) where the summary of the base prospectus is to be translated pursuant to Article 19 of Directive 2003/71/EC, the summary of the individual issue annexed to the final terms shall be subject to the same translation requirements as the summary of the base prospectus;

(b) where the base prospectus is to be translated pursuant to Article 19 of Directive 2003/71/EC, the final terms and the summary of the individual issue annexed thereto, shall be subject to the same translation requirements as the base prospectus.

The issuer shall communicate those translations, together with the final terms, to the competent authority of the host Member State or, if there is more than one host Member State, to the competent authorities of the host Member States. ”

The CSSF considers that this provision implies that in practice the final terms and the summary annexed thereto shall fulfil the translation requirements imposed by the Member State(s) in which the offer and/or admission to trading is (are) requested.

For instance, where Luxembourg is the home Member State for the approval of a base prospectus, and the latter has been notified in several Member States, but the final terms under this base prospectus concern only an offer in a single Member State, the summary annexed to the final terms needs to fulfil only the translation requirements imposed by this Member State and not those imposed by all the Member States in which the base prospectus has been notified.

VII. Specific questions with respect to UCIs

VII.1 What is the definition of a closed-end UCI under the Prospectus Law?

Last update: October 2012

A UCI is considered to be of the closed-end type under the **Prospectus Directive** if the investor has no repurchase right. This definition is specific to the prospectus regulations and does not prejudice the definition given under the UCI regulations.

When a UCI decides, in the course of its life, to open the fund (closed within the meaning of the **Prospectus Law**) and to allow the repurchase of the securities, the CSSF could in principle, for the purpose of the **Prospectus Law**, (re)consider it as an open UCI.

VII.2 How are securitisation funds handled under the Prospectus Law?

Last update: October 2012

In this context, you may refer to the units issued by UCIs other than the closed-end type. The scope of Part II of the **Prospectus Law** is defined in Article 4 while Article 29 defines the scope of Part III. As regards Part II, the financial instruments to which Part II does not apply are listed in paragraph 2 of Article 4 of the **Prospectus Law**. This paragraph specifies in particular that the units issued by UCIs other than the closed-end type are not covered by Part II. Part III applies to the securities and other comparable securities to which Part II does not apply, notably those listed in Article 4(2) of the **Prospectus Law**, except however for the units issued by UCIs of the open-end type that are governed by the sole provisions of the Luxembourg rules and regulations concerning undertakings for collective investment. It should be noted that the exception relating to the application of Parts II and III of the **Prospectus Law** applies, in principle, only to UCIs of the open-end type that are governed by the sole provisions of the laws and regulations concerning undertakings for collective investment. Thus, the securities representing the investors' rights on a securitisation fund subject to the law of 22 March 2004 on securitisation remain in principle subject to Part II of the **Prospectus Law**.

For the sole purposes of the drawing-up of a prospectus and the choice of an Annex of the **Prospectus Regulation** applicable to the securities issued by a securitisation fund, the CSSF considers them in principle, given the inherent specificities of these structures, as non-equity securities, subject of course to a case-by-case appraisal according to the structure of the specific securitisation funds. By way of exception to the general principle, a securitisation fund with characteristics similar to those of a closed-end UCI shall use Annex XV of the **Prospectus Regulation** relating to the minimum information to include in the registration document relating to the securities issued by the undertakings for collective investment of the closed-end type. The general principle according to which the securities issued by a securitisation vehicle shall be considered as non-equity securities, is strictly limited to the securitisation funds governed by the law of 22 March 2004 on securitisation and to the sole purpose of drawing up a prospectus according to the Annexes to the **Prospectus Regulation**.

VII.3 How are specialised investment funds handled under the Prospectus Law?

Last update: October 2012

The law of 13 February 2007 relating to specialised investment funds ("**SIF Law**") states that specialised investment funds ("**SIFs**") may take the form of open-end or closed-end UCIs. Article 52(3) of the **SIF Law** provides that where a prospectus has been published in accordance with the **Prospectus Law**, there is no further obligation to establish an offering document within the meaning of the **SIF Law** (an exemption in a converse situation is not provided for by this Article).

The scope of Part II of the **Prospectus Law** (which applies to offers to the public of securities and to admissions of securities to trading on a regulated market subject to EU harmonisation and implementing the rules of the **Prospectus Directive**) is defined under Article 4 of the **Prospectus Law**, whereas Article 29 defines the scope of Part III of the **Prospectus Law** (which lays down the Luxembourg rules that apply to offers to the public (Chapter 1) and to admissions to trading on a regulated market (Chapter 2) of securities and other comparable securities which are outside the scope of the **Prospectus Directive** and providing for a simplified prospectus regime):

- As regards Part II, financial instruments not concerned by the rules applicable to the offer to the public under this Part II are listed under paragraph 2 of Article 4 of the **Prospectus Law**. This paragraph specifies in particular that the units issued by UCIs other than the closed-end type are not covered by Part II. Hence, closed-end UCIs must establish a prospectus under Part II of the **Prospectus Law**. Moreover, Article 63 of the **Prospectus Law** amended, among others, the law of 20 December 2002 relating undertakings for collective investment in order to clearly lay down that the obligation to publish a prospectus within the meaning of these laws is however not applicable to closed-end undertakings for collective investment. In this context, it should be highlighted that a closed-end UCI under the **Prospectus Law** is defined as a UCI for which investors do not have any repurchase rights relating to the units concerned. All other cases, regardless of the number and periodicity of possible repurchases, concern open-end UCIs not falling under Part II of the **Prospectus Law** (please also refer to definitions of Article 2(1)(m) and (n) of the **Prospectus Law** and Q&A VII.1.).

It may also be stressed in this context that according to Article 5(2) of the **Prospectus Law**, the obligation to publish a prospectus for an offer to the public is not applicable to certain categories of offers, in particular (a) an offer of securities addressed solely to qualified investors (as defined by the **Prospectus Law**), (b) an offer of securities addressed to fewer than 150 natural or legal persons, other than qualified investors, per Member State and (c) an offer of securities addressed to investors that acquire securities for a total consideration of at least EUR 100,000 per investor and for each separate offer. These three exemptions should mainly apply in the context of (closed-end) **SIFs** which must “reserve their securities to one or several well-informed investors” in accordance with the **SIF Law**.

It should be borne in mind that where a prospectus must be established for a closed-end **SIF** under Part II (in view of an offer to the public and/or an admission to trading on a regulated market – where none of the exemptions provided for under Articles 5(2) or 6(2) of the **Prospectus Law** applies in the case at hand), Article 52(3) of the **SIF Law** provides that where a prospectus has been published in accordance with the **Prospectus Law**, there is no further obligation to draw up an offering document within the meaning of the **SIF Law**. In practice, a prospectus drawn up under the **Prospectus Law**, allowing the admission to trading, shall be established and submitted to the approval of the CSSF in accordance with the **Prospectus Law** – without having to establish a “second prospectus”, i.e. an offering document in accordance with the **SIF Law**.

- Part III of the **Prospectus Law** applies to offers to the public and to admissions to trading on a regulated market of securities and other comparable securities not referred to in Part II, namely those indicated under Article 4(2), with the exception however of the units issued by open-end UCIs which still fall exclusively under the provisions of the Luxembourg legislation relating to undertakings for collective investment.

Indeed, Article 29 on the scope of Chapter 1 of Part III of the **Prospectus Law** provides that “Offers to the public of securities representing units issued by undertakings for collective investment other than the closed-end type shall be subject to the sole provisions set forth in the Luxembourg legislation relating to undertakings for collective investment.” Likewise, Article 45 on the scope of Chapter 2 of Part III of the **Prospectus Law** provides that “Admissions to trading of securities representing units issued by undertakings for collective investment other than the closed-end type governed by Luxembourg law, units issued by harmonised Community undertakings for collective investment in securities established in another Member State and commercialised in Luxembourg and units issued by other foreign undertakings for collective investment other than the closed-end type and offered to the public in Luxembourg shall be subject to the sole provisions set forth in the Luxembourg legislation relating to undertakings for collective investment. ”

More importantly, the wording of Article 131 of the law of 17 December 2010 relating to undertakings for collective investment reads as follows: “Luxembourg UCIs other than the closed-end type, UCITS governed by harmonised Community law and foreign UCIs in case of a public offer in Luxembourg shall be exempt from publishing a prospectus as provided for in Part III of the law on prospectuses for securities. The prospectus which such UCIs draw up in accordance with the regulatory requirements applicable to UCIs shall be valid for the purposes of an offer to the public of securities or the admission of securities to trading on a regulated market.”

Therefore, Luxembourg open-end UCIs are exempted from the obligation to publish a prospectus under the **Prospectus Law**. The CSSF considers that open-end **SIFs** should be treated in this context as other open-end type UCIs. Indeed, taking into account the terminology used by the **Prospectus Law**, the wording of Article 131 of the law of 17 December 2010 relating to undertakings for collective investment (generally referring to “the regulatory requirements applicable to UCIs”) and the **SIF Law** (which entered into force in 2007 and refers in many aspects to the aforementioned laws on UCIs) and the general legal context in this field leads to this conclusion and we consider that it clearly reflects the intention of the legislator.

In short, there are two possibilities for the admission to trading on a regulated market for UCI/FIS units:

- For a closed-end UCI/SIF (within the meaning of the **Prospectus Law**): a prospectus, whose content is defined in the **Prospectus Regulation**, must be drawn up and submitted to the approval of the CSSF under the **Prospectus Law**.
- For an open-end UCI/SIF (within the meaning of the **Prospectus Law**): the UCI/SIF offering document to be approved by the CSSF in accordance with the regulation applicable to UCIs/SIFs for the admission to trading may be used.

In both cases, the drawing up of one document is sufficient, there are no legal requirements to establish a second document.

Luxembourg, 11 October 2012

VIII. GLOSSARY

Circular CSSF 05/225:	CSSF circular of 16 December 2005 on the notion “offer to the public of securities” as defined in the law on prospectuses for securities and the “obligation to publish a prospectus” that may ensue
Circular CSSF 12/539:	CSSF circular of 6 July 2012 entitled “Technical specifications regarding the submission to the CSSF of documents under the law on prospectuses for securities and general overview of the aforementioned law”
CSSF:	Commission de Surveillance du Secteur Financier
ESMA:	European Securities and Markets Authority
Prospectus Directive:	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
Prospectus Law:	Law on prospectuses for securities of 10 July 2005 transposing Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
MiFID:	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments
Delegated Regulation 311:	Commission Delegated Regulation (EU) No 311/2012 of 21 December 2011 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC as regards elements related to prospectuses and advertisements
Delegated Regulation 486:	Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements

Prospectus Regulation:	Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements
Regulation 1289:	Commission Regulation (EU) No 1289/2008 of 12 December 2008 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council of as regards elements related to prospectuses and advertisements
Regulation 1606/2002:	Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards



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