



Communication CBFA_2010_28 of 20/12/2010

Public offers and admission to trading of bonds on a regulated market and establishment of an accelerated procedure for approving prospectuses

Scope:

The accelerated procedure applies to the review and approval of prospectuses for public offers and/or admissions to a regulated market of "plain vanilla" bonds offered by issuers whose shares or bonds have been listed for at least three years and where the periodic information is subject to a posteriori supervision by the CBFA, provided these issuers have not raised any particular problems during the past three years.

Summary/Objectives:

The CBFA decided to establish a procedure allowing for a rapid approval of prospectuses for bond issues of a plain vanilla type and, more generally, to clarify the rules applicable as regards the approval of a prospectus and the procedure for a public offer of bonds.

Dear Madam,
Dear Sir,

1. Introduction

The CBFA has decided to establish a procedure allowing for a rapid approval of prospectuses for bond issues of a "plain vanilla" type¹ and, more generally, to clarify the rules applicable as regards the approval of a prospectus and the procedure for a public offer of bonds.

The CBFA is of the opinion that it is sound practice to offer an accelerated procedure for reviewing and approving a prospectus, enabling the CBFA to decide - within five working days of the receipt of a draft prospectus - either to approve the prospectus or to proceed to a more detailed review. It is expected that for simple products such as "plain vanilla" bonds, and for issuers who have a positive track record, decisions can, save for exceptional cases, be made to approve the prospectus within five working days.

2. Obligation to publish a prospectus

Every public offer and every admission of bonds to a regulated market requires the publication of a prospectus.

¹ These concern ordinary fixed-rate (including zero coupon bonds) or variable-rate bonds.

The regime that applies to public offers and to admissions to trading on a regulated market in investment instruments is regulated by the Law of 16 June 2006 on public offers of investment instruments and admission of investment instruments to trading on regulated markets (hereafter "the Prospectus Law").

Pursuant to Article 3, § 1 of the Prospectus Law, a "public offer" means a "communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the investment instruments to be offered, so as to enable an investor to decide to purchase or subscribe to these investment instruments, and which is made by or on behalf of the person who is in a position to issue or transfer these investment instruments".

3. Publication deadlines for the prospectus

The prospectus must be made available to the public at least three working days before the end of the offer, and in any event at the latest on the day of its opening, in order to allow the public to familiarise itself with the offer before taking a decision to invest.

In order to fulfil the obligation referred to above, it may be useful to note that Article 27, § 1, of the Prospectus Law allows for a prospectus to be published that does not contain the price of the offer, provided it indicates the maximum price or the criteria/conditions on the basis of which the price will be determined. The definitive price must in that case be submitted to the CBFA and published in accordance with the procedures set out for the publication of the prospectus.

4. Contents of the prospectus

The prospectus may, depending on the issuer's choice, take the form of a single document or three separate documents, namely the summary, the note on transferable securities and the registration document.

The information to be included in the prospectus is determined by Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC, hereafter "the Prospectus Regulation".

The list of information is contained in Annexes IV (registration document) and V (securities note) of the Prospectus Regulation.

Generally speaking, the schedule for a prospectus to be published for a public offer and/or admission to the bond market is less complex than that of a prospectus for a public offer and/or admission of shares. The key element for the investor, at any rate, is the capacity of the issuer to repay the loan at its maturity.

Thus, for example, the securities note does not have to contain a working capital statement.

Similarly, the information to be included in the part of the prospectus that corresponds to the registration document is much more limited than the information required for a public offer and/or admission of shares: the historical financial information that must be included in the prospectus covers only the last two financial years, and there is no requirement to draw up pro forma financial information in the event of a significant change in the size of the group; neither is there an obligation to include an operating and financial review ("OFR" or "MD&A").

The historical financial information must have been certified by the auditor. In the event of an application for admission of bonds to a regulated market, the above-mentioned information must also be drawn up under IFRS.

Where the issuer already has shares or bonds admitted to trading on a regulated market, the historical financial information will already have been submitted to the CBFA. In that case, the issuer may include this financial information by incorporating a reference into its prospectus (See Art. 30 of the Prospectus Law).

5. Competent authority

The prospectus must be submitted for approval to the CBFA or the competent authority of another Member State of the European Economic Area prior to its publication.

For bonds with a nominal unit value less than EUR 1000, the competent authority shall be that of the Member State where the issuer has its registered office.

6. Scope of the approval of the prospectus by the CBFA

The Prospectus Directive defines, in Article 2.1. q), the approval of the prospectus as "the positive act at the outcome of the scrutiny by the home Member State's competent authority, for the purpose of determining whether the prospectus is complete, if the information it contains is consistent and if it is comprehensible".

The Belgian legislators specify, moreover, that approval of the prospectus does not contain any judgement as to the advisability and intrinsic merits of the operation or the situation of the one performing it.

The CBFA must therefore verify whether the prospectus is complete in terms of the prospectus schedules annexed to the Prospectus Regulation, and whether the information appearing therein is consistent and comprehensible. It should, however, be remembered that the CBFA does not take the place of the issuer, and that responsibility for the contents of the prospectus rests, therefore, on the issuer and/or the persons mentioned in the prospectus as being responsible.

7. Procedure for the review and approval of the prospectus by the CBFA

7.1. Normal procedure

Article 3.2 of the Prospectus Law describes the applicable procedure for obtaining the CBFA's approval of the prospectus.

In the event of a classic bond issue, the dossier to be submitted to the CBFA must contain essentially the draft prospectus as well as a concordance table between the prospectus and the schedules annexed to the European Regulation in cases where the information is not provided in the order set out in the schedules.

As regards the procedure to follow for submitting the dossier, please see Circular CBFA_2008_28 of 16 December 2008 on the procedure for the submission and handling of dossiers relating to public offers.

If the CBFA deems that the prospectus is incomplete or if additional information is necessary, it must inform the issuer of this within 10 working days of the receipt of the dossier.

In the 10 working days starting from the submission of a dossier that requires no further comment on the part of the CBFA, the latter shall inform the issuer of its decision to approve it.

7.2. Accelerated procedure

By way of derogation from point 7.1., for plain bonds and for issuers with a positive track record, the CBFA considers that it is sound practice to decide within a period of five working days from the receipt of a draft prospectus, either to approve the prospectus or to proceed to a normal review.

In other words, this procedure concerns prospectuses for which the CBFA does not expect, in light of the issuer's history and the nature of the operation, to have any questions or at least any substantial questions on the prospectus.

Eligibility criteria for the accelerated procedure

The accelerated procedure is open to issuers:

- whose shares or bonds have been listed for at least three years and where the periodic information is subject to a posteriori supervision by the CBFA;
- who have responded satisfactorily to any remarks made by the CBFA over the past three years in the course of exercising its competence to supervise financial information;
- whose auditor has not, over the past three years, issued a declaration of abstention and has not refused to certify the accounts or expressed reservations or remarks as to the going concern. This applies equally to the (limited) review of the interim financial statements;
- that have confirmed in writing to the CBFA that they currently meet all their obligations to their creditors²;
- and whose net assets have not fallen below one half of the company's capital as a result of a loss sustained (Art. 633 Code on Companies).

Description of the review procedure

The CBFA shall inform eligible issuers, within five working days of receiving the dossier, of its decision either to approve the prospectus or to proceed to a normal procedure (see 7.1.). If the dossier should present any difficulties, the accelerated procedure will not apply.

The issuer must, when submitting its dossier, request to be considered for the accelerated procedure and to demonstrate that it fulfils the eligibility criteria to do so (in particular, it must confirm in writing to the CBFA that it currently fulfils all its obligations to its creditors).

As regards the composition of the dossier and the procedure to follow for submitting it, please see point 7.1. above.

With respect to the contents of the prospectus, issuers wishing to be considered for the accelerated procedure are invited to use the existing periodic and occasional information as much as possible, either by incorporating it by reference in the prospectus, or by using a registration document already approved by the CBFA.

8. Validity period of the prospectus

A prospectus remains valid for twelve months after its publication (Article 35 of the Prospectus Law).

The prospectus must be brought up to date until the definitive closure of the offer or, as the case may be, the admission to trading on a regulated market. Therefore a supplement must be published if there should be any significant new fact or error or a substantial inaccuracy concerning the information contained in the prospectus.

The supplement must be submitted for approval to the CBFA and must be published in at least the same manner as the initial prospectus (Article 34 of the Prospectus Law).

9. Advertisements

All advertisements, as defined in Article 11 of the Prospectus Law, and other documents and announcements relating to a public offer of bonds or to an admission of bonds to trading on a regulated market must be submitted for approval to the CBFA before publication (Article 60 of the Prospectus Law).

² Issuers that do not comply with their covenants with their lenders cannot use the accelerated procedure.

Given the general nature of the rules appearing in the Prospectus Law, and in particular as regards the requirement that advertisements not be misleading (see Article 58 of the Prospectus Law), the CBFA deemed it useful to issue a certain number of recommendations that it judges will facilitate compliance.

Please consult in this regard Communication CBFA_2009_11 of 5 March 2009, which contains the recommendations of the CBFA regarding advertisements and other documents and announcements relating to an operation referred to in Title VI of the law of 16 June 2006 on public offers of investment instruments and admission of investment instruments to trading on regulated markets.

Sincerely yours,

The Chairman,

Jean-Paul SERVAIS