THE INITIAL PUBLIC OFFERINGS LAW REVIEW

SECOND EDITION

Editor
David J Goldschmidt

THE LAWREVIEWS

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PREFACE

Welcome to the second edition of *The Initial Public Offerings Law Review*. This publication introduces the reader to the main stock exchanges around the globe and their related IPO regulatory environments, and provides insight into the legal and procedural IPO landscapes in 21 different jurisdictions. Each chapter gives a general overview of the IPO process in the region, addresses regulatory and exchange requirements, and presents key offering considerations.

The global IPO landscape is ever-changing. While several of the oldest stock exchanges, such as the New York Stock Exchange and London Stock Exchange, are still at the forefront of the global IPO market, the world's major stock exchanges now are scattered around the globe and many are now publicly traded companies themselves. IPOs take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market.

Virtually all markets around the globe have experienced significant volatility in recent years; however, 2017 marked a resurgence for many IPO markets. The number of 2017 IPOs and total proceeds raised were led by the Asia-Pacific exchanges, with many other regions also experiencing improvement over recent years. Despite the increase in available private capital, which has enabled issuers to remain private for longer periods of time, there is continued optimism for 2018 in terms of both global deal count and proceeds. The strong global IPO pipeline includes many well-known companies across a range of industries, and it is anticipated that these companies will seek to list on a variety of stock exchanges around the world.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different between jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, it is important that the company and its management are aware from the outset of the legal requirements as well as potential pitfalls that may impact the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply. This second edition of *The Initial Public Offerings Law Review* introduces the intricacies of taking a company public in these jurisdictions and serves as a guide for issuers and their directors and management.

David J Goldschmidt
Skadden, Arps, Slate, Meagher & Flom LLP
New York
March 2018

Chapter 1

BERMUDA

Becky Vernon and Neil Horner[1]

I INTRODUCTION

In recent years, Bermuda has become known as 'the world's risk capital'. It is now the third-largest insurance market in the world behind New York and London, and the largest offshore insurance market. The past 12 months have seen particularly strong listing activity for the Bermuda initial public offerings (IPO) market, primarily due to the number of insurance linked securities (ILS) listings and international debt listings, which remain strong following the success of 2016 and continue to ensure that Bermuda remains a market-leading capital markets jurisdiction. Figures recently published by the Bermuda Stock Exchange (BSX) confirm 103 new ILS listings in 2017 with a combined nominal value of US$11.54 billion (up from US$6.157 billion in 2016), and 55 per cent growth from 2016 in international debt listings, which were up from 116 to 180 listed securities.[2]

Both the BSX and the Bermuda Monetary Authority (BMA), the insurance regulator of Bermuda, have played an instrumental role in Bermuda's acceleration to the forefront of the world's insurance arena. The BSX was one of the first stock exchanges in the world to introduce specific listing regulations for insurance securitisation, which have been enhanced by the BMA's introduction of a new designation of insurer, the 'special purpose insurer', with its own set of streamlined regulations to speed up the process of setting up an ILS issuer in Bermuda.

This chapter aims to act as a guide to the IPO process on the BSX. It is, however, worth mentioning the significant role that Bermuda companies play in the structuring of IPOs on stock exchanges around the globe. By the third quarter of 2017, the market capitalisation of Bermuda companies listed on the New York Stock Exchange (NYSE) and Nasdaq was US$247 billion, up from US$224 billion in the third quarter of 2016. The total number of Bermuda companies listed on the NYSE and Nasdaq exchanges was 63 at the end of 2017, with significant deal activity being conducted throughout the year, raising US$2.8 billion of capital.[3]

Bermuda, as a jurisdiction for the incorporation of a listing vehicle, offers many benefits for international companies: tax neutrality, sensible and proportionate regulation, a legal system based on the English legal system (which is widely understood and trusted by the business community) and flexibility in its ability to adapt and dovetail to the requirements of onshore jurisdictions.

1 Becky Vernon is a counsel and Neil Horner is head of the corporate department at ASW Law Limited.
2 BSX 2017 Year End Review, 8 January 2018.
3 Figures published in Conyers Dill & Pearman's Bermuda Public Companies Update, November 2017.

II GOVERNING RULES

i Main stock exchanges

The BSX was established in 1971. It was initially set up to handle domestic equity trading. As a consequence of Bermuda's rapid expansion as a leading offshore financial jurisdiction, the BSX was eventually restructured to allow for both domestic and international trading. It is now the world's leading fully electronic offshore securities exchange, hosting over 750 listed issuers[4] with an aggregate market capitalisation of US$432.1 billion,[5] trading most types of debt and equity securities, collective investment vehicles, depositary receipts, insurance-related products and derivative warrants. The BSX's rapid growth since inception can be attributed to its ability to provide innovative and commercial solutions, tailored to the needs of those wanting to list and do business in the jurisdiction. A key example of this is speed to market, where the BSX is able to complete many types of listings in as little as two weeks once due diligence and key documentation has been finalised.

The BSX, recognised as a designated offshore securities market by the US Securities and Exchange Commission, is a full member of the World Federation of Exchanges and an affiliate member of the International Organization of Securities Commissions. It is located in a member nation of the Organisation of Economic Co-operation and Development and also enjoys international recognition by a number of regulatory bodies, including as:

a a registered organisation by the London Stock Exchange (LSE);
b a designated investment exchange by the UK Financial Conduct Authority;
c a recognised stock exchange by UK HM Revenue and Customs resulting in withholding tax benefits for certain types of investors;
d a recognised investment exchange and approved stock exchange by the BMA;
e an approved stock exchange by the Australian Foreign Investment Funds Taxation Rules;
f a designated stock exchange for the purposes of the Canadian Income Tax Act; and
g a member of Americas Central Securities Depositary Association in Peru.

Trading on the BSX is executed through the BSX's electronic trading, settlement and depositary X-stream trading platform licensed by Nasdaq OMX. The fully automated system is based on a central limit order book model that allows for the trading of both equity and fixed-income securities, and is designed to support the secondary market trading and settlement of sophisticated listed securities. Trade information on all listed securities is disseminated worldwide via Bloomberg and is available on the BSX website (www.bsx.com) with the aim of encouraging investor confidence through transparency and disclosure.

The BSX is now a leading market for the listing of investment funds and ILS, including catastrophe bonds, enhanced by the BMA's creation of the 'special purpose insurer' (SPI), which can be quickly set up and licensed to issue ILS. Known for its innovative approach to insurance solutions, Bermuda has become home to over 165 SPIs since 2010.[6] By the end of 2017, BSX listings of ILS reached 227 (up from 175 in the previous year), with a market capitalisation of US$25.99 billion,[7] accounting for over 75 per cent of the global market capitalisation of ILS.

4 BSX website: www.bsx.com/comp_securities.php.
5 BSX 2017 Year End Review, 8 January 2018.
6 Bermuda ILS Market Report Q3 2016 (Vol. 4, No. 3) January 2017, published by the BMA.
7 BSX 2016 Year End Review: www.bsx.com.

In addition to its appeal for funds and ILS structures, the BSX attracts early-stage growth companies who are able to take advantage of the BSX's Mezzanine Market (discussed further in Section II.ii), small to medium capitalisation companies and companies looking for an alternative to the Alternative Investment Market (AIM), Nasdaq or the LSE because they are smaller and cannot justify the higher costs of listing on those exchanges.

The BSX also has a streamlined process for facilitating secondary listings of securities that are already listed on one or more of the other recognised stock exchanges,[8] such that a secondary listing can generally be completed within a very compressed time frame. The NYSE, Nasdaq, LSE and Hong Kong Stock Exchange are popular exchanges for companies considering a dual listing with the BSX. The NYSE and BSX are both home to the holding companies of various insurance groups including Aspen, Blue Capital and XL Group, while both the LSE and BSX provide listings for the securities of Jardine Matheson, Lancashire and Mandarin Oriental (among others). Most recently, in September 2016, the Bank of NT Butterfield & Son Limited, Bermuda's largest independent bank, completed its US$287.5 million IPO on the NYSE, while retaining its listing on the BSX.

The number of international issuers listed on the BSX far outweighs the number of domestic issuers. This is not surprising given the size of the island, and the fact that Bermuda-exempted companies are considered international issuers rather than domestic issuers for the purposes of the BSX's Listing Regulations.[9]

ii Overview of listing requirements

General

The principal function of the BSX is to provide a fair, orderly and efficient market for the trading of securities issued by both domestic and international issuers. In furtherance of this objective, the requirements for listing on the BSX and the continuing obligations of issuers are set out in the BSX Listing Regulations (2002) and Practice Notes issued by the BSX (the Listing Regulations). The BSX highlights that compliance with the Listing Regulations will not in itself guarantee that an application for listing will be successful as the BSX retains a discretion over whether to accept or reject an application. Prospective issuers and their sponsors are therefore encouraged to contact the BSX as early as possible during the listing process to seek informal and confidential guidance about an applicant's suitability for listing.[10]

The conditions for listing on the BSX vary depending on the type of issuer and the type of security being listed. Section I of the Listing Regulations applies to all issuers, both domestic and international. The other Sections apply to specific types of issuers, products or securities. For example, Sections IIA, IIB and IIC apply to domestic issuers (Section IIA to main board equity securities, Section IIB to small cap stocks and Section IIC to debt securities); Sections IIIA, IIIB and IIIC apply to international issuers (Section IIIA to a main board listing of equity securities, Section IIIB to a listing of debt securities and Section IIIC to depositary receipts); and Sections IV, V and VI apply to all issuers (Section IV to investment funds (collective investment schemes), Section V to ILS and Section VI to derivative warrants). Each section has its own appendices, which explain the various product-specific standard forms, disclosure requirements and BSX listing fees.

8 A list of recognised stock exchanges can be found in Appendix 5 to Section IIIA of the Listing Regulations.

9 The difference between Bermuda-exempted companies and Bermuda-local companies is explained in Section II.iii.

10 Listing Regulations, Section I (All Issuers), paragraph 2.5.

A company can achieve a listing of its securities on the BSX through any of the following methods:[11]

a offer for subscription: an offer for subscription is an offer to the public by an issuer of securities for subscription;

b offer for sale: an offer for sale is an offer to the public by or on behalf of the holders or allottees of securities already in issue or agreed to be subscribed;

c placing: a placing is the obtaining of subscriptions for or the sale of securities by an issuer or its intermediary from or to persons selected or approved by the issuer or its intermediary, other than by way of an offer to the public;

d rights issue: a rights issue is an offer by way of rights to existing holders of listed securities that enables those holders to subscribe for further securities in proportion to their existing holdings;

e capitalisation issue: a capitalisation issue (or bonus issue) is an allotment of further securities to existing holders, credited as fully paid up out of the issuer's profits or reserves, in proportion to their existing holdings without any monetary payment;

f introduction: an introduction is the grant of a listing for existing securities that are already issued; and

g other methods: securities may also be brought to listing on the BSX by the issue of securities through:
- the exercise of options, warrants or similar rights to subscribe for or purchase securities where the grant of the rights was supported by a prospectus and was approved by the BSX;
- the exercise of options granted to or for the benefit of executives or employees of a listed issuer where the grant of options was approved by the BSX;
- a dividend reinvestment plan approved by the BSX to the issuers' securities holders; and
- such other methods as the BSX may approve from time to time.

Restricted marketing and mezzanine listings

Typically, requirements for a primary listing on the BSX are minimal compared to other exchanges. Instead, the BSX's approach is to rely on full disclosure rather than prescriptive regulations through its use of restricted marketing conditions, meaning that access to the market is limited to sophisticated investors only.

The Listing Regulations provide[12] that an international issuer seeking a primary listing on the BSX will be subject to restricted marketing conditions; in other words, its securities may only be marketed to qualified investors and may only be traded on the BSX between qualified investors, unless the proposed issuer meets certain exemption criteria. This is known as the 'Mezzanine Market' or a 'mezzanine listing' and is primarily used by growing e-commerce, high-technology and development-stage companies to enable them to list at a much earlier stage than on markets in other jurisdictions.

To qualify for a mezzanine listing it is not necessary for a company to meet the conventional IPO requirements of track record, free float or profitability. Although the Mezzanine Market is not intended to function as a highly liquid market, it does have the added advantage of the credibility that comes with listing on a globally recognised exchange

11 Listing Regulations, Section I (All Issuers), paragraphs 2.16–2.23.

12 See Regulations 4.7–4.9 of Section IIIA of, and Practice Note 13 to, the Listing Regulations.

(which is often more attractive to institutional investors than investing in non-listed securities, particularly in jurisdictions where investment in non-listed securities is restricted), and offers issuers full exposure to the international markets.

To be considered a qualified investor for the purpose of the BSX Listing Regulations, the investor must complete an investor suitability declaration in the form prescribed by the BSX and meet the BSX's minimum investment or suitability criteria as given below.

For individuals:

a a minimum investment of US$100,000;
b a minimum individual net worth (including spouse) of US$1 million; or
c a minimum annual income of US$200,000 (US$300,000 joint income with spouse).

For private corporations and partnerships:

a a minimum investment of US$100,000;
b minimum net assets of US$5 million; or
c all its equity owners or partners are qualified investors.

Certain institutions, including banks, stockbrokers, insurance companies and investment advisers, are automatically considered to be qualified investors.

As mentioned above, it is possible for an issuer to apply for an exemption from the restricted marketing conditions.[13] In order for the BSX to grant such an exemption, the issuer would need to:

a demonstrate that it is incorporated in Bermuda as an exempted company pursuant to the Companies Act 1981;
b demonstrate that at least two of its directors are resident in Bermuda;
c agree to comply with the issuer's continuing obligations set out in the Listing Regulations; and
d agree to forward to the BSX, its members and other holders of its listed securities all financial information required to be prepared and disseminated by the company as if it were a full reporting foreign issuer, pursuant to the Securities and Exchange Commission's rules in the US or an equivalent standard acceptable to the BSX.

In addition, while not stated in the Listing Regulations, the BSX Listing Committee would typically expect a company applying for an exemption from restricted marketing to have a BSX market capitalisation of not less than US$25 million.

Listings of other products and vehicles are also subject to restricted marketing between qualified investors, including ILS and investment funds.

iii Overview of law and regulations

The listing criteria and IPO process in Bermuda are governed by the Listing Regulations. In addition, any issuer incorporated in Bermuda will be subject to the Companies Act 1981 (as amended) (the Companies Act). The Companies Act provides for the incorporation of companies either as local companies or as exempted companies.

A local company is a company that carries on its principal business activities in the local economy and is subject to what is known as the '60/40' ownership rule, which requires that at

13 See Regulation 4.10 of Section IIIA of the Listing Regulations.

least 60 per cent of the voting control of the company is held by Bermudians and that a majority of the board of directors are Bermudian.[14] An exempted company, on the other hand, is a company that carries on its principal business activities outside of Bermuda (such companies are restricted from carrying on business in Bermuda)[15] and can be 100 per cent owned by non-Bermudians. For the purposes of the Listing Regulations, a domestic issuer is a local company and an international issuer includes Bermuda-exempted companies and overseas issuers. The applicable Listing Regulations vary depending on the type of issuer. It is worth noting that in order to encourage foreign direct investment into Bermuda, local companies that are listed on the BSX in certain 'prescribed industries', including telecommunications, energy, insurance, hotel operations, banking and international transport, can apply for a waiver of the 60/40 rule.

The Companies Act does not distinguish between a public company and a private company; however, certain provisions of the Companies Act apply only to companies that have their shares listed on appointed stock exchanges.[16] Further, the Companies Act does not regulate takeovers of listed companies in Bermuda and there is no takeover regulator or specific takeover code to govern such transactions. If the issuer in question is listed on a stock exchange in another jurisdiction in addition to the BSX and is subject to such regulation in that jurisdiction, then those regulations will govern, but failing that, neither the BSX nor any other government body in Bermuda would be involved in regulating takeover activity of listed Bermuda companies.

Depending on the sector in which the issuer operates, there may be specific industry regulations that apply in addition to the general requirements of the Companies Act and the Listing Regulations. Such sectoral specific regulation is outside of the scope of this chapter; however, given the prominence of ILS and investment fund listings in Bermuda, it should be noted that Bermuda insurance companies and Bermuda investment funds are regulated by the BMA and are subject to sector-specific legislation under the Insurance Act 1978 (and related regulations) and the Investment Funds Act 2006 (as amended), respectively.

Something that may not be familiar to all jurisdictions is the regulation of exchange control in Bermuda. Issues to and transfers of securities in Bermuda companies (both local and exempted) involving non-residents of Bermuda must, pursuant to the Exchange Control Act 1972 and Exchange Control Regulations 1973, receive prior approval of the BMA, except where a general permission has been granted by the BMA. In its Notice to the Public of June 2005 (as amended), the BMA granted various permissions that enable a Bermuda company to issue and transfer shares to and between non-residents without the prior approval of the BMA. One such general permission is for the issue and transfer of equity securities (i.e., voting shares) for as long as such equity securities are listed on an

14 The 60/40 rule applies unless the company has been granted a licence by the Minister of Economic Development, pursuant to Section 114B of the Companies Act, to exempt it from the requirements. In a budget statement issued by the Premier and Minister of Finance on 16 February 2018, it was announced that the 60/40 rule would be relaxed in favour of a 40/60 rule, allowing non-Bermudians to own up to 60 per cent of a domestic business.

15 An exempted company can apply for a licence pursuant to Section 129A of the Companies Act to enable it to carry on business activities in Bermuda.

16 Section 48 (listed shares to transferred in accordance with rules of the relevant exchange); Section 65(3) (listed company may maintain branch register outside of Bermuda); Section 83 (accounting records of companies listed on an appointed stock exchange); Section 87A (listed companies may send summarised financial statements); and Section 87C (listed companies to provide full financial statement).

Appointed Stock Exchange. The BSX is an Appointed Stock Exchange for this purpose and a full list of Appointed Stock Exchanges in other jurisdictions can be found on the Registrar of Companies website.[17]

III THE OFFERING PROCESS

i General overview of the IPO process

The first stage of the IPO process is for the issuer to appoint a sponsor. If the issuer is seeking a primary listing of its shares on the BSX, only a 'trading member' of the BSX may act as a sponsor. The BSX maintains an approved list of listing sponsors and trading members on its website. The sponsor is responsible for ensuring that the applicant for listing has been provided with fair and impartial advice and guidance as to the applicability of the Listing Regulations, that all of the necessary documents required to support the application for listing are lodged with the BSX and for communicating with the BSX during the listing process.[18] The sponsor must submit a declaration to the BSX before the trading of the issuer's securities commences.

Once appointed, the sponsor will vet the issuer and ensure that it meets the relevant conditions for listing set out in the Listing Regulations.

The issuer will need to prepare and issue a prospectus,[19] the contents of which will vary depending on the type of issue involved (instead of a prospectus the issuer may instead prepare an offering memorandum, offering circular, scheme particulars or equivalent). Once prepared, the prospectus is submitted for review by the BSX to ensure compliance with the Listing Regulations prior to listing. The prospectus must contain information that enables an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the company. The Listing Regulations provide guidance on the following prospectus-related matters:

a the standard form of disclaimer;
b general required information about the company, its advisers and the prospectus;
c information required about the relevant securities as well as the terms and conditions of their issue and distribution;
d information about the company's share capital;
e information about the company's investments;
f information required about any investment managers or advisers;
g financial information required about the group and its prospects;
h details required about the company's management;
i particulars about the use of proceeds of the issue and its distribution;
j information required about any material contracts; and
k details about the provision of relevant documents for inspection.

17 www.roc.gov.bm, under 'Approved Stock Exchanges'.
18 Listing Regulations, Section I (All Issuers), paragraph 2.9.
19 Section 26 of the Companies Act requires the publication of a prospectus in connection with an offer of shares to the public, separate to the prospectus requirement of the Listing Rules.

In addition to a prospectus, the company will need to submit an application for listing to the BSX. Although the precise requirements for a listing application will vary depending on the type of security being listed, the general requirements include:[20]

a a formal letter of application, signed by an officer of the company and the sponsor complying with the requirements of the Listing Regulations; and

b supporting documents, including:
- its certificate of incorporation;
- constitutional documents;
- an audit report and accounts for the past three financial years;
- a certified copy of the board (and, if required, shareholder) resolution authorising the issue and allotment of securities, the making of the application, the signing of the issuer's undertaking (see below), and approving and authorising the issue of the prospectus;
- an issuer's undertaking in the form prescribed by the Listing Regulations;
- a declaration signed by each director and proposed director in the form prescribed by the Listing Regulations;
- a copy of any temporary document of title and any definitive document of title to be used in respect of the securities to be listed;
- a certified copy of every material letter, report, statement of adjustments, valuation, contract, resolution and other documents referred to in the prospectus (including a letter from any auditor whose audit report is set out in the prospectus confirming that the auditor has given its consent to the issue of the prospectus with the audit report included); and
- such other documentation as the BSX may require.

The sponsor will prepare the cover letter and assist the issuer in gathering the necessary information for the application for listing. The Listing Regulations advise an issuer to consult with the BSX early in the process as to the suitability of an issuer for listing (and this is even more important if the issuer or the proposed offering is out of the ordinary) to ensure any issues that need to be addressed can be dealt with in advance.

In addition, the issuer must enter into an issuer's undertaking with the BSX to comply with the continuing obligations imposed by the BSX and it will need to appoint a share registrar or transfer agent in Bermuda.

The issuer will be required to pay a listing fee (and in certain circumstances a new issue levy or subsequent issue fee) calculated on the expected initial market capitalisation of securities to be listed. There is also an annual fee payable, which is calculated on the market value of the securities to be listed.

For secondary listings, the BSX relies mainly on filings already made for the primary exchange, therefore the filing requirements are much less than for a primary listing. The following documents will generally be required:

a the latest annual report and audited financials;

b corporate resolutions authorising the secondary listing;

c a formal letter of application; and

d payment of listing and sponsorship fees.

20 Listing Regulations, Section IIIA (International Issuers), Chapter 5.

The BSX undertakes to provide a response to a listing application from its Listing Committee within seven business days of the date of submission of the complete listing application. The BSX seeks to respond within two business days with comments on each draft of the prospectus. In most cases, the entire approval process can be completed within two to three weeks of the date of submission of the complete listing application. Overall, the process is likely to take a minimum of three months to complete (less for ILS and funds listings).

ii Pitfalls and considerations

Industry-specific considerations aside, one of the main considerations for an issuer has to be the restricted marketing conditions that generally apply to listings by international issuers on the BSX. The Mezzanine Market is not intended to operate as a highly liquid market, and, while it does create a mechanism for trading, such trading is restricted to qualified investors, meaning that an issuer's securities are not free trading in the usual sense. Securities listed on the BSX have therefore been described as more akin to a form of listed private equity rather than a listed security in the traditional sense that is freely tradable between both institutional and retail investors on a wide scale.

IV POST-IPO REQUIREMENTS

Once listed, an issuer must comply with the continuing obligations requirements set out in the Listing Regulations, which vary depending on the issuer and the type of security being listed. The issuer will provide an undertaking to the BSX in this regard as part of its listing application.

Generally, the continuing obligations require that the issuer keep the BSX and holders of its listed securities informed of anything related to the issuer (or the group):

a that is necessary to enable the appraisement of the financial position of the issuer;

b that is necessary to avoid the establishment of a false market in the issuer's securities; and

c that might reasonably be expected to materially affect market activity in and the value of the issuer's securities.[21]

In addition, an issuer must:[22]

a notify the BSX of its net asset value calculations and of issue and redemption prices whenever they are calculated, and of any percentage change in the next asset value of a fund;

b provide notice of annual general meetings to the BSX (concurrent with notice being sent to all members);

c send audited annual accounts to all members including a report by the directors on its operations and provide 10 copies of the accounts and the directors' report to the BSX within six months of its financial year end;

d deliver to the BSX any interim financial accounts and preliminary announcements or results;

21 Listing Regulations, Section IIIA (International Issuers), Chapter 6.

22 This list is not exhaustive – see Listing Regulations, Section IIIA (International Issuers), Chapter 6 for full post-IPO continuing obligations plus sector-specific continuing obligations, for example, for ILS, debt and fund listings.

e advise the BSX if its securities cease to be listed on another stock exchange or it is the subject of disciplinary action by another stock exchange or regulatory body;

f send to the BSX for review any drafts of proposed amendments to the relevant prospectus and any relevant announcements or advertisements;

g report any decision to declare, recommend or pay any dividend or make any other distribution to investors to the BSX for dissemination at least five business days prior to the record date for the payment of such distribution;

h make arrangements acceptable to the BSX to facilitate the efficient settlement of all trades and registration of transfers of securities;

i keep and maintain a complete file of all relevant advertising and other marketing materials, which must be produced to the BSX at any time on demand;

j adopt by board resolution and enforce an internal code of dealing for directors and executive officers that prescribes their ability to trade on the basis of unpublished price sensitive information; and

k notify the BSX of the happening of any of the specified events listed in the Listing Regulations pertaining to the relevant type of issuer.

While listed, every issuer must appoint authorised representatives or a sponsor to act at all times as the issuer's principal channel of communication with the BSX. If the issuer elects to appoint authorised representatives, rather than a sponsor, two authorised representatives must be appointed who are both members of the issuer's senior management and both must be ordinarily resident in Bermuda.[23]

V OUTLOOK AND CONCLUSION

At the time of writing the Bermuda chapter for the inaugural edition of *The Initial Public Offerings Law Review* in early 2017, it was anticipated that 2017 would be a promising year for the BSX. This proved to be the case as a result of the continued success of the ILS and catastrophe bond market, which saw an 87 per cent growth in 2016 in the nominal value of BSX-listed ILS securities.[24]

Looking forward, the BSX is working hard not only to expand the international market, but also to focus on growing domestic capital markets. In 2017, the BSX initiated the 'Own your share of Bermuda' investor programme with the aim of increasing investor awareness of what the BSX can offer and ultimately to increase trading activity on the Exchange. The BSX has indicated that it will continue to expand this programme in 2018. Insurtech, fintech and cryptocurrency are gaining increasing traction in Bermuda so we may see a new generation of entrepreneurs in this sector choosing to raise capital domestically through a BSX listing.

23 Listing Regulations, Section I (All Issuers), paragraph 2.10.

24 BSX 2017 Year End Review, 8 January 2018.

Chapter 2

CHINA

Chen Yang and Zhi Bin[1]

I INTRODUCTION

There are two primary exchanges in China, the Shanghai Stock Exchange (SHSE) and the Shenzhen Stock Exchange (SZSE). The SHSE consists of the Main Board, while the SZSE consists of the Main Board, the Small and Medium Enterprises Board (SME Board) and ChiNext (a board consisting mainly of high-technology companies).

Shares traded on the SHSE and SZSE that are settled in Chinese yuan are referred to as 'A-shares', while shares settled in foreign currency are referred to as 'B-shares'. In practice, there are few (if any) B-share initial public offerings (IPOs) in China, as the regulatory framework for B-share IPOs is incomplete.

This chapter focuses on A-shares listings. For the purposes of this chapter, 'China' excludes Hong Kong, Macau and the Taiwan region.

According to the 2016 Annual Report of the China Securities Regulatory Commission (CSRC), at the end of 2016, 1,660 companies were listed on the Main Board of the SHSE and the SZSE, 882 companies were listed on the SME Board and 570 companies were listed on ChiNext. The total market capitalisation of these listed companies was 39.34 trillion yuan, which was 68.23 per cent of China's total 2016 GDP.

The primary regulator of China's capital markets is the CSRC. The SHSE and SZSE are responsible for administering the CSRC's rules, and are empowered by the CSRC to enact rules under the CSRC's supervision.

IPO listings in China are subject to regulatory approval by the CSRC. Therefore, the approval system in China differs from the registration system in Hong Kong, the United States and other capital markets. The CSRC determines whether a prospective issuer provided accurate and adequate disclosure in accordance with listing requirements. In practice, applicants may face long waiting periods (sometimes two to three years or even more) due to administrative backlog and repeated requests for information, though waiting periods began to shorten in 2017.

II GOVERNING RULES

i Main stock exchanges

As discussed in Section I, the SHSE consists of the Main Board, while the SZSE consists of the Main Board, the SME Board and ChiNext.

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Main Board (SHSE and SZSE)

The Main Board of the SHSE primarily attracts established blue-chip companies such as state-owned enterprises. Recently, however, the Main Board of the SHSE has attracted private companies from industries other than traditional state-owned blue-chip companies.

SME Board

The SME Board targets small and medium-sized enterprises with shares in circulation of under 100 million. The listing requirements for the SME Board and the Main Board are nearly identical.

ChiNext

ChiNext was established on 30 October 2009 to support small and medium-sized enterprises, especially in the high-technology sector. Although the overall listing requirements for ChiNext are lower than the ones set forth for the Main Board and the SME Board, the CSRC generally exercises greater regulatory scrutiny, such as increasing the number of members on the issuance review committee, prolonging the sponsor's supervisory period, and imposing more rigorous delisting rules.

Presently, there are only a few Chinese companies (primarily state-owned) that are dual listed in China and an overseas exchange (usually the Hong Kong Stock Exchange). Chinese companies are not prevented from pursuing dual listings after listing on a domestic stock exchange, though this would require approval from the CSRC.

Some Chinese companies choose to list on foreign exchanges in lieu of listing on a domestic exchange, such as the Hong Kong Stock Exchange, Nasdaq and the NYSE. Among foreign-listed Chinese companies, some choose to list overseas mainly for business reasons, such as avoiding profitability threshold requirements. Others choose to list overseas owing to China's restrictions on foreign investment in certain industries. Particularly in the technology, media and telecommunications sectors, due to regulatory restrictions and practice that effectively prevents controlling foreign ownership in a Chinese operating company, some issuers adopt foreign parent entities and list abroad using the variable interest entity structure. It should be noted, however, that joint ventures involving foreign ownership in a non-restricted sector are permitted to list on China's domestic exchanges.

ii Overview of listing requirements

Presently, all listing applications are submitted to and approved by the CSRC. If an applicant engages in a business subject to regulatory oversight by specific agencies, the CSRC will require such agencies to issue a no-objection letter in respect of the applicant.

The table below sets forth the main requirements for the Main Board, SME Board and ChiNext.

IPO requirements	Main Board and SME Board	ChiNext
Issuer qualifications	A company limited by shares that is duly incorporated and validly existing in China.	A company limited by shares that is duly incorporated and validly existing in China.
Business records	At least three years of continuous operations or as otherwise approved by the State Council (where a limited liability company is converted into a company limited by shares through the conversion of the entire original book value of its net assets, the term 'continuous operation' may start from the date the limited liability company was established).	At least three years of continuous operations (where a limited liability company is converted into a company limited by shares through the conversion of the entire original book value of its net assets, the term 'continuous operation' may start from the date the limited liability company was established).
Profitability	• Annual aggregate net profit exceeding 30 million yuan in each of the past three fiscal years (note: net profit shall be calculated based on the lower net profit before and after deduction of non-regular profits or losses); • aggregate net cash flow over 50 million yuan, or aggregate revenue of over 300 million yuan, in each case for the past three fiscal years; and • no unrecovered losses at the end of the most recent accounting period.	• Annual aggregate net profit of not less than 10 million yuan for the past two years (note: net profit shall be calculated based on the lower net profit before and after deduction of non-regular profits or losses); or • annual aggregate net profit of not less than 50 million yuan in the past year.
Assets	Proportion of intangible assets (after deduction of land use aquaculture, mining and similar rights) at the end of the most recent accounting period in net assets ≤20 per cent.	Net assets at the end of most recent accounting period ≥20 million yuan and no uncovered losses.
Capital	Pre-listing capitalisation ≥30 million yuan; or post-listing capitalisation ≥50 million yuan.	Post-listing capitalisation ≥30 million yuan.
Major business	No significant changes in the past three years.	Only one major business; no significant changes in the past two years.
Directors and senior management	No significant changes in the past three years.	No significant changes in the past two years.
Actual controller	No change in the past three years (note: the definition of 'actual controller' is based on several legally prescribed factors that are applied to each individual case based on the facts and circumstances of such case).	No change in the past two years.
Internal control	• Effective internal control systems in all significant respects; and • an unreserved internal control report issued by a certified accountant	• Effective internal control systems in all significant respects, proving the issuer's operational efficiency, legality and compliance, and the accuracy of its audit report; and • an unreserved internal control report issued by a certified accountant
Competition	The issuer's business must not compete with the business of the issuer's controlling shareholder, actual controller, or other enterprises controlled by such controlling shareholder or actual controller. The definition of 'controlling shareholder' and 'actual controller' are based on several legally prescribed factors that are applied to each individual case based on the facts and circumstances of such case. While this item was officially removed in a 2015 revision of the listing rules on the condition that there is full disclosure of this item in the prospectus, in practice, the CSRC still devotes special attention to this item. Therefore, it is effectively still a listing requirement.	
Related party transactions	No unreasonable related party transactions; related party transactions must be at arm's length and must not manipulate profits.	Related party transactions must not significantly influence the issuer's independence or be unreasonable.
Fund management	Rigorous fund-management procedures; the issuer's fund is not controlled by any controlling shareholder, actual controller or other enterprises controlled by any controlling shareholder or actual controller in respect of borrowing, the use of debt as compensation, advance payments or any other similar form.	Not a listing requirement, but required to be disclosed in the prospectus.
Tax	Taxes paid in accordance with law; no heavy reliance on tax preferences.	Not a listing requirement, but required to be disclosed in the prospectus.

IPO requirements	Main Board and SME Board	ChiNext
Debt	No major credit risk; not a party to any major contingent liability such as a guarantee, litigation or arbitration that may adversely affect the issuer's continuous operation.	Not a listing requirement, but required to be disclosed in the prospectus.
Use of proceeds	Definitive plan for use of IPO proceeds; generally, IPO proceeds will be used for the principal business and investment projects (note: while this item was officially removed in a 2015 revision of the listing rules on the condition that there is full disclosure of this item in the prospectus, in practice the CSRC still devotes special attention to this item. Therefore, it is effectively still a listing requirement).	Definitive plan for use of IPO proceeds; generally, IPO proceeds will be used for the principal business but not necessarily for investment projects (note: while this item was officially removed in a 2015 revision of the listing rules of ChiNext on the condition that there is full disclosure of this item in the prospectus, in practice the CSRC still devotes special attention to this item. Therefore, it is effectively still a listing requirement).
Legal compliance	• In the past 36 months, no unauthorised direct or indirect public offering of shares or if any of the above illegal practices are still currently in existence; and • no other material non-compliance in the past 36 months.	• In the past three years no unauthorised direct or indirect public offering of shares or if any of the above illegal practices are still currently in existence; and • in the past three years, neither the issuer, its controlling shareholder nor its actual controller have committed a materially unlawful act that harms the legitimate rights and interests of investors and the public.
Other authorities' opinion	Subject to the opinions of the provincial government.	None.

Compared with the NYSE, Nasdaq and the Hong Kong Stock Exchange, Chinese stock exchanges are unique in the following respects.

a Applicant eligibility: unlike the NYSE, Nasdaq and the Hong Kong Stock Exchange, A-shares applicants have to be companies limited by shares that are incorporated in China. Therefore, foreign issuers (such as Hong Kong, United States or Cayman Islands parent companies) cannot be listed on Chinese stock exchanges. However, a joint venture incorporated in China operating in a non-restricted industry where foreign investment is permitted may list on Chinese stock exchanges.

b Financial criteria: unlike the NYSE, Nasdaq and the Hong Kong Stock Exchange, each financial listing threshold requires the issuer's net profits to be positive.

c Review process: the CSRC still uses an approval (rather than a registration) system that requires substantive review of all issuers. As a result, review times tend to be longer and susceptible to policy considerations.

d Board of supervisors requirement: A-shares listed companies are required to have a board of supervisors consisting of at least three members. Employee representative supervisors may not be less than one-third of the board of supervisors. Directors and senior management may not concurrently be supervisors. The purpose of the supervisor is to oversee the activities of the board of directors and the senior management.

e Competition: the CSRC devotes special attention to analysing potential competition between the issuer, on the one hand, and its controlling shareholder, actual controller or the enterprises controlled by the controlling shareholder or actual shareholder on the other. Generally speaking, mere disclosure of such potential competition in the prospectus will be insufficient and the absence of such competition is effectively still a listing requirement, even though this item was officially removed in the 2015 revision of the listing rules.

f Foreign investment restrictions: if the issuer conducts business in an industry where foreign investment is restricted or prohibited (according to law or in practice), then the issuer may not list in China. The CSRC will not accept indirect control arrangements such as variable interest entities, unlike the NYSE, Nasdaq and Hong Kong Stock Exchange.

g Lock-up periods: the listing rules for Chinese IPOs specifically state that the controlling shareholder or actual controller is subject to a three-year lock-up period. All other shareholders are generally subject to a one-year lock-up period. This differs from other jurisdictions where lock-up periods are primarily determined by the underwriters and not by the listing rules. The length of the lock-up period is also longer compared with Hong Kong, where controlling shareholders are only subject to a six-month lock-up period.

iii Overview of law and regulations

The listing requirements for the Main Board (SHSE and SZSE) are set forth in the Administrative Measures for Initial Public Offerings and Listings of Shares. The listing requirements for ChiNext are set forth in the Administrative Measures on Initial Public Offerings of and Listing of Shares on ChiNext. All listings must comply with the requirements set forth by the Company Law, the Securities Law, and other specific rules and requirements of the applicable exchange.

With regard to the CSRC's application of these rules, there have been the following general trends.

Accelerated review

The CSRC's review schedule accelerated, starting in the middle of November 2016. In 2017, the CSRC's issuance examination committee reviewed 488 IPO applications, a much faster pace than in previous periods.

Reduced success rate of applications

Although the CSRC has accelerated its review of prospective applications, its recent practice of only selecting high-quality applicants that meet its listing standards has reduced the overall success rate of applications.

In 2016, the CSRC's issuance examination committee reviewed 266 applications, of which 241 were successful, resulting in a pass rate of 90.6 per cent. However, in 2017, the CSRC's issuance examination committee reviewed 488 applications (83 per cent more than the previous year), of which 380 were successful, resulting in a pass rate of 77.87 per cent. In particular, from 17 October 2017 (the date when the new issuance examination committee took office) to 28 December 2017, the pass rate for IPO applications was at just 57.78 per cent, significantly lower than before.[2] On 7 November 2017, the CSRC's issuance examination committee denied five out of six applications. On 28 November 2017, the CSRC's issuance examination committee denied all three applications.

2 Prior to 17 October 2017, the issuance examination committee consisted of two different committees, one for the Main Board and the SME Board, and one for ChiNext. From 17 October 2017 onwards, these two committees were combined into one committee.

Restructuring of Chinese companies for the purposes of a Chinese listing

Chinese companies that originally had parent companies outside of China have restructured in order to list in China. One common restructuring involves the removal of offshore entities under the variable interest entity structure.

In February 2015, the CSRC approved Baofeng's IPO application in what was regarded as a landmark case, involving a variable interest entity restructuring. Since May 2015, several Chinese companies with variable interest entity structures that were formerly listed abroad have privatised and restructured for onshore re-listings through an IPO or reverse merger. In December 2017, the CSRC's mergers and acquisitions examination committee conditionally agreed to Qihoo 360's reverse merger listing on the Main Board of the SHSE. Qihoo 360's reverse merger listing was valued at over 50 billion yuan (US$7.57 billion).

The restructuring of variable interest entities for businesses that operate in a restricted or prohibited sector (according to law or in practice) involves the buyout of foreign shareholders who may not (as a result of such restrictions or prohibitions) hold equity stakes in the China-based issuer. In the context of a Chinese company that is already listed on a foreign exchange, this process requires the privatisation of the present issuer.

In light of the CSRC's accelerated review schedule and generally high valuations, some Chinese companies with offshore structures may choose to restructure in order to list in China.

Preferences for certain applicants

On 9 September 2016, the CSRC promulgated the Opinions on the Strategy for Capital Markets to Function and Serve Disadvantaged Districts. These measures provide accelerated review for enterprises located in disadvantaged districts of the country.

The eligibility requirements are as follows:

a (1) being registered and having an operating address in a designated district; and (2) having at least three years of business records and tax payments; or

b (1) being registered in a designated district; (2) having paid at least 20 million yuan in income tax in the past year; and (3) committing not to change its registered address for more than three years after its IPO.

Jiyou New Material Co, Ltd (182 days),[3] Tibet GaoZheng Explosive Co Ltd (less than 11 months) and Tibet Aim Pharm Inc (less than nine months) are three recent examples of successful listings of issuers who received accelerated review due to their location in disadvantaged districts. This accelerated review period is much shorter than the ones for ordinary applicants, who sometimes have to wait for two years or more for a final decision.

These recent success stories have prompted a few potential applicants to change their registered or operating addresses to eligible districts for the purposes of qualifying under the measures. However, it should be noted that these measures may be subject to discretionary interpretation by the authorities, requiring shareholders to carefully track regulatory developments. On 29 December 2017, the CSRC responded to the Proposal on the Extension of the CSRC's IPO Preference to Disadvantaged Districts that such preferences for applicants

3 Review period calculations in this section start on the date the issuance examination committee accepts the application and end on the date the issuance examination committee approves the application.

from the disadvantaged districts will be extended to 2025, and the Opinions on the Strategy for Capital Markets to Function and Serve Disadvantaged Districts will remain effective for a certain period.

III THE OFFERING PROCESS

i General overview of the IPO process

Listing in China involves steps that are common in other jurisdictions (due diligence, document preparation including the prospectus), as well as steps that are unique to China (pre-listing review, conversion from a limited liability company to a company limited by shares, the CSRC approval). Below is a brief overview of the IPO process in China. The time frames set forth in the chart reflect common practice. Specific time frames for individual applicants may vary from the ones set forth in the chart.

Step	Particulars	Timetable
Due diligence	The sponsor, auditors, legal advisers and other stakeholders conduct due diligence of the issuer, set IPO terms (such as the target amount to be raised), advise the issuer on the IPO process and assist the issuer in complying with IPO requirements.	T-90 days*
Restructuring	The issuer is restructured into a company limited by shares (as required under law); stakeholders prepare a restructuring plan, audit and appraise the issuer's assets, and prepare sponsor agreements and the issuer's articles of association; the issuer executes the restructuring plan and establishes relevant internal departments in accordance with listing rules.	T-45 days
Pre-filing review	The local counterpart of the CSRC conducts pre-listing guidance work.	T-15 days
Filing	The sponsor files the IPO application documents with the CSRC; once the CSRC states the application documents are complete, the CSRC decides whether to accept the filing within five business days.	T
Review and approval by the CSRC	• Acceptance of the application • Pre-disclosure • Feedback • Face-to-face meeting • Reply to the CSRC's feedback • Pre-disclosure updates • Preliminary review • Select examination of disclosures (if any) • Attend the issuance examination committee meeting • Reply to the issuance examination committee's questions or requirements (if any) • Sealing of IPO application-related documents • Post-meeting review by the issuance examination committee • Obtain official approval and issuance	
Preparation by the exchange	• Approval from the CSRC • Negotiation with traders about stock abbreviation, stock code, etc. • Submission of documents to the relevant exchange • Amendment registration with the Administration for Industry and Commerce • Listing and trading on the relevant exchange	
Offering**	• Publish the prospectus • Offline price enquiries • Offline subscriptions • Publish online announcements, online offerings • Online subscriptions • Frozen of capital commitment • Capital verification • Lottery • Release of capital commitment • Share registration	 T'-1*** T' T' T'+1 T'+2 T'+3 T'+4

Step	Particulars	Timetable
Listing****	• Publish the prospectus • Listing application • Listing review • Supplementary listing application • Approval • Notice • Announcement • Listing	 T”-1***** T”-1-T”+6 T”+6 T”+6-T”+10 T”+10 L-5-L-1 L

* T refers to the date when the CSRC accepts the IPO application. Days are calendar days.
** There is some difference between the specific time frames of the SZSE and SHSE, and this part sets forth the common practice for the SZSE as an example.
*** T’ refers to the date of online subscriptions. Days are calendar days.
**** There is some difference between the specific time frames of the SZSE and SHSE, and this part sets forth the common practice for the SZSE as an example.
***** T” refers to the date that the relevant exchange accepts the listing application. L means the listing date. Days are calendar days.

ii Pitfalls and considerations

Under the current IPO process, the CSRC will conduct a thorough, substantive review of all IPO application documents. In recent years, the CSRC has raised mainly the following issues with respect to unsuccessful applicants:

a failure to satisfy qualification requirements;
b failure to satisfy sustainable profitability requirements;
c competition involving the controlling shareholder, actual controller or other enterprises controlled by such controlling shareholder or actual controller;
d use of proceeds-related issues;
e disclosure issues;
f corporate governance issues;
g compliance issues;
h finance and accounting issues; and
i defective reports issued by advisers.

This is not an exhaustive list of reasons, and one factor may not necessarily be decisive in an application’s denial. However, they serve as a useful guide for prospective issuers.

iii Considerations for foreign issuers

As stated above, an issuer must be a company limited by shares incorporated in China. Accordingly, non-Chinese corporate bodies may not list on Chinese stock exchanges. In 2011, there were reports that the SHSE would create a board for qualified foreign issuers, while there have not been follow-up reports, specific timelines or plans in relation to such board. However, these restrictions do not prevent joint ventures with foreign ownership who do not operate in a restricted or prohibited industry from listing in China.

IV POST-IPO REQUIREMENTS

Listed companies in China are subject to continuous disclosure requirements, including regular and *ad hoc* reporting. Generally, regular reporting includes the annual report, biannual report and quarterly reports. *Ad hoc* reporting is required when listed companies encounter significant events or shareholding changes (e.g., over 5 per cent shareholding, change in shareholding of directors or senior management). Tender offer rules also apply for shareholders who acquire more than 30 per cent of the issuer's shareholding after listing.

V OUTLOOK AND CONCLUSION

The most significant change in China's domestic IPO market in 2017 was the lower success rates of applicants. We have noticed recently that the CSRC does not merely focus on an applicant's financial performance and sustainable profitability, but also will pay more attention to its internal controls and the transparency, authenticity and accuracy of its disclosures. This transition will play an important role in diversifying the types of companies listed on Chinese stock exchanges, improving the quality of listed companies, and better protecting investors, which will increase confidence in China's capital markets.

Chapter 3

FINLAND

Salla Tuominen[1]

I INTRODUCTION

Since 2012, the Finnish initial public offerings (IPO) market[2] has been developing extremely well, following what was approximately five years of stagnation.

The Helsinki Stock Exchange is operated by Nasdaq Helsinki, a company belonging to the US corporation Nasdaq, which operates 26 markets worldwide.[3] In addition to Nasdaq Helsinki, Nasdaq operates exchanges in the Nordic countries: Sweden (in Stockholm), Denmark (in Copenhagen) and Iceland (in Reykjavik). On 31 December 2017, the number of listed companies on the regulated markets of the above-mentioned Nordic exchanges totalled 661 (excluding 10 multiple listings), and the number of companies admitted to trading on the alternative marketplaces operated by Nasdaq in the Nordic region was 323.[4]

Nasdaq Helsinki companies can be listed either on the main market (the Official List), which is a regulated market, as defined by EU legislation (and implemented in national legislation), or be admitted to trading on an alternative marketplace aimed for growth companies, Nasdaq First North (First North).

As of 31 December 2017, there were 146 companies listed on Nasdaq Helsinki, of which 125 companies were listed on the Official List and 21 companies were listed on First North. In addition, there were four Swedish companies parallel-listed on Nasdaq Helsinki. In 2017, 13 companies joined Nasdaq Helsinki, which set a new record in the 2000s. Seven of these were listings on the Official List and six were admitted to trading on First North.

One recent feature has been the IPOs of game industry companies; in 2017, Next Games Corporation, Remedy Entertainment Plc and Rovio Entertainment Corporation joined Nasdaq Helsinki.

There is a long-established tradition in Finland of stock exchange trading, which dates back to 7 October 1912.

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2 In this chapter, IPO refers both to the listings of the shares on the regulated market and admitting the shares to trading on the alternative marketplace or multilateral trading facility. Listings of securities other than shares are not discussed in this chapter. Further, the listing of shares in real estate investment funds or listing of shares in the acquisition companies into which special listing requirements are applied are not discussed in this chapter.

3 www.business.nasdaq.com/discover/nasdaq-story/our-businesses (accessed on 26 January 2018).

4 Nasdaq, Inc: 'December Statistics report from the Nasdaq Nordic Exchanges', 2 January 2018.

II GOVERNING RULES

The applicable regulatory framework governing IPOs in Finland is based on EU regulations and the implementation of EU directives. The principal statute, the Finnish Securities Markets Act (746/2012), as amended (SMA), governs, *inter alia*, the listing of securities, disclosure obligations on the securities markets, takeover bids, prevention of market abuse and supervision of the securities market. In addition to national and EU legislation, there are authority-based regulations as well as rules issued by Nasdaq Helsinki.

i Main stock exchanges

As noted above, Nasdaq Helsinki operates both the Official List, which is the regulated market, and the alternative marketplace, First North.

Official List

The Official List is suited for companies that are mature and can adhere to the highest standards for reporting, transparency and accountability. The Official List is further divided into the segments of large cap, mid cap and small cap based on the companies' market cap, even though such division has no impact on listing criteria or rules applicable to the companies.[5]

First North

First North is designed for growth companies wishing to gain access to capital markets. As the applicable rules are less extensive than for the Official List, First North provides companies with room to focus on the development of their businesses. First North may be the first step into the financial market and could be used as a springboard to the Official List in the future. First North Premier is a segment within First North. It is designed for growth companies making a conscious decision to comply with higher disclosure and accounting standards than those applied to regular First North companies.

ii Overview of listing requirements

The applicable listing requirements depend on whether a company aims to have its securities listed on the Official List or admitted to trading on First North. Issuers whose shares are to be listed on the Official List have to comply with high statutory standards that are largely harmonised throughout the European Union and reflected in the listing criteria, while First North is merely regulated pursuant to the rules of Nasdaq Helsinki itself, which are less burdensome than those applied to the Official List.[6]

Official List

General listing requirements have been harmonised between the Nasdaq Nordic exchanges. The specific requirements and preconditions for a company's shares to be listed on the Official List and the required contents of the application for the listing are regulated by the Nasdaq

5 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.1.2.

6 First North is a joint Nordic offering from the Nordic Nasdaq exchanges in Helsinki, Stockholm, Copenhagen and Iceland (Nasdaq First North Nordic – Rulebook 3 January 2018).

Helsinki Ltd Rules of the Exchange (the Rules of the Exchange).[7] The listing of shares of real estate investment funds or acquisition companies into which special listing requirements are applied is not discussed in this chapter.

A listed company must meet the listing requirements continuously while being listed. However, there are certain requirements that are only applied when the company is admitted to the Official List.[8]

The listing requirements can be summarised as follows:[9]

a general requirements regarding the company and the shares: a public limited liability company form, legal competence, free transferability of the shares, shares entered into the book-entry system and all issued shares of the class must be listed;

b annual accounts published for the last three years and sufficient operational history;

c annual accounts prepared in accordance with International Financial Reporting Standards (IFRS);

d sufficient earnings capacity or sufficient working capital for 12 months, available after the first day of listing;

e sufficient shares within the same class in the possession of the public (at least 25 per cent), i.e., free float[10] and a sufficient number of shareholders;

f sufficient supply of and demand for the shares existing in order to facilitate a reliable price formation;

g expected aggregate market value of the shares of at least €1 million;

h information about how the company complies with the corporate governance code recommendations issued in its home state; and

i administration required for a listed company covering the requirements: the composition of the board of directors must sufficiently reflect the competence and experience required, the management must have sufficient competence and experience, and the company must establish and maintain adequate procedures, controls and systems to enable it to provide the market with timely, reliable, accurate and up-to-date information.

In addition, the company shall prepare and publish a prospectus (the EU prospectus) according to the EU Prospectus Regulation[11] approved by the Finnish Financial Supervisory Authority (FIN-FSA).

Listing shall be applied in writing. The Rules of the Exchange include a list of issues that the application must include and practical matters that must be taken care of.[12] A company

7 Currently valid version of the Rules of the Exchange is: Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017)' available at www.business.nasdaq.com/media/Rules_of_the_Exchange_3_Jan_2018_tcm5044-25490.pdf.

8 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.1.2.

9 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.

10 Where necessary, the company may be required to have a market maker for the shares, in order to ensure the reliable price formation.

11 Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing the Prospectus Directive.

12 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.2.2.

is also required to enter into a written agreement with Nasdaq Helsinki on trading its shares on the Official List and, in the agreement, undertake to comply with the rules and guidelines of Nasdaq Helsinki.

When seeking a dual listing on the Official List, the company must satisfy Nasdaq Helsinki that there will be sufficient liquidity in order to facilitate orderly trading and an efficient price formation process. Nasdaq Helsinki will normally recognise the listing requirements of another (in Nasdaq Helsinki's opinion) well-recognised regulated market or equivalent trading venue, if the company is subject to listing on such a market. Nasdaq Helsinki may approve the dual listing of a company with a listing with the maintainer of a regulated market and, on the basis of this, grant exemption from one or more of the general listing requirements as well as the requirements regarding the administration of the company referred to in the Rules of the Exchange. Companies with a listing on a regulated market, or equivalent, which is run by Nasdaq, Deutsche Börse, London Stock Exchange, New York Stock Exchange, Euronext, Oslo Börs, Hong Kong Exchanges and Clearing, Australian Securities Exchange, Singapore Exchange or Toronto Stock Exchange may be granted exemptions from the Rules of the Exchange. Decisions on dual listings of such companies shall be made by the managing director of Nasdaq Helsinki. Usually it is required that the company has been admitted to trading for a period of at least 12 months on that particular market.[13]

Nasdaq Helsinki may, in cases where all listing requirements are fulfilled, refuse an application for listing if it considers that the listing would be detrimental for the financial markets or investor interests.[14]

First North

The shares of a company may be added for trading to First North subject to approval of a written application. The application shall cover all shares of the same class. The requirements for admitting shares to be traded on First North are significantly less onerous than the requirements set out for the Official List. Pursuant to the Nasdaq First North Nordic – Rulebook (First North Rules)[15] the shares may be traded on First North when Nasdaq Helsinki finds that they meet First North's requirements and where Nasdaq Helsinki finds that trading in such financial instruments is of public interest.

The listing requirements can be summarised as follows:[16]

a general requirements regarding the company and the shares: free transferability of the shares,[17] shares entered into the book-entry system and cleared and settled in a manner acceptable to Nasdaq Helsinki;

13 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.7.3.

14 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.3.14.

15 Currently valid version of the Nasdaq First North Nordic – Rulebook is 3 January 2018 available at: www.business.nasdaq.com/media/Nasdaq-First-North-Rulebook-3-January-2018_tcm5044-53624.pdf.

16 Nasdaq First North Nordic – Rulebook 3 January 2018, Rule 2.2.

17 Nasdaq Helsinki may, in special circumstances, admit trading of shares, which may be acquired only subject to the company's consent, provided that the application of such clause is reasonably expected not to disturb trading (Nasdaq First North Nordic – Rulebook 3 January 2018, Rule 2.2).

b sufficient supply and demand of the shares shall exist: sufficient number of shareholders holding shares with a value of at least €500, at least 10 per cent of the share class to be traded is held by the general public;[18] and

c the share price shall, at the time of admission, be at least €0.50.

Instead of an EU prospectus required for listings on the Official List, the companies to be admitted to trading on the First North market shall prepare a 'company description' (unless the issue of shares is such that an EU prospectus is required). The requirements for the company description are provided in the First North Rules and are less extensive than requirements for an EU prospectus.

The companies that join First North are required to engage a certified adviser in connection with the approval process. A certified adviser shall provide support and guide the company through the application process, advise the company with regard to disclosures, communications and reporting duties and also ensure that the company initially and continuously complies with the First North Rules. The certified adviser shall also report any rule violations to Nasdaq Helsinki. In order to act as a certified adviser, the adviser has to sign an agreement with Nasdaq Helsinki.

Should the company decide to comply with the stricter disclosure requirements and IFRS standards, the company may apply for the separate First North Premier segment. The additional requirements for Premier segment are that the company must:[19]

a apply IFRS for accounting and financial reports and have at least one reviewed financial report (for example a quarterly report or a semi-annual report) prepared in accordance with the IFRS;

b on a continuous basis, distribute at least 25 per cent of the shares within the share class to be traded to the general public; and

c on a continuous basis, have a market value of at least €10 million.

Further, it is recommended that the company notifies how it complies with the local corporate governance recommendations issued in the country where the company is incorporated.

iii Overview of law and regulations

In Finland, the applicable national legislation for the IPOs is primarily set out in the SMA[20] and the Act on Trading in Financial Instruments (1070/2017). In addition, the regulation of the FIN-FSA provides provisions and recommendations for companies contemplating an IPO. With regard to listing on the Official List and the Rules of the Exchange, and with regard to admittance to trading on First North, the First North Rules are the main source of the exchange-based regulation. Further, regarding listing on the Official List, other rules such as Insider Guidelines of Nasdaq Helsinki and the Finnish Corporate Governance Code of the Finnish Securities Market Association (the CG Code) shall be complied with. The Insider Guidelines shall also be complied with regard to First North.

In addition to the national rules and regulations referred to above, there are several EU regulations that include legislation directly applicable in the Member States of the EU and

18 In exceptional circumstances, this requirement may be satisfied if the company retains the services of a liquidity provider.

19 Nasdaq First North Nordic – Rulebook 3 January 2018, Rule 2.1 of Appendix J.

20 See Section II.

that are relevant for an IPO on a regulated market anywhere in the EU. The most important EU regulations regarding IPOs are the provisions of the European Commission Regulation (EC) No. 1287/2006 and EU Prospectus Regulation,[21] which govern the contents of EU prospectuses. European Securities and Markets Authority's (ESMA) recommendations, guidelines, opinions and Q&As are also valuable sources of information. The obligation to publish an EU prospectus applies also to the admittance of shares on First North when the total consideration for the offer of shares in EEA is a minimum of €5 million calculated over a period of 12 months.

Further, the Transparency Directive[22] and Market Abuse Regulation[23] (MAR) govern the post-IPO transparency principles and protections against market abuse and include obligations regarding publication of inside information and managers' transactions. On a national level, these obligations arise from the SMA and the Regulation of the Ministry of Finance on the Ongoing Disclosure Obligation of an Issuer of a Security (20 December 2012/1020).[24] In addition, the provisions by the ESMA and the FIN-FSA, the applicable rules of Nasdaq Helsinki, the Guidelines for Insiders[25] and the CG Code[26] recommendations for the post-IPO stage are relevant. The MAR and Guidelines for Insiders are also applied to companies whose shares are admitted to trading on First North.

III THE OFFERING PROCESS

i General overview of the IPO process

Steps and timing

Official List

The listing process (including planning and preparing) takes approximately six months to one year. However, the process may be faster, depending on, for example, how the company has prepared its corporate governance or internal processes and if the company has already been reporting annual accounts in accordance with IFRS. The process may be divided into different phases: the preparation phase, the actual listing process and the post-IPO phase (i.e., when the company is a listed company).

The initial planning is typically started six to 12 months prior to the listing. This phase includes general mapping of the targets, choosing the advisers, entering company shares into

21 Commission Regulation (EC) No. 809/2004 of 29 April 2004. The new Prospectus Regulation (1129/2017) was published in the Official Journal of the EU on 30 June 2017. Its provisions will begin applying on a rolling basis as of 20 July 2017, with full application from 21 July 2019. The Prospectus Regulation will replace the previous Prospectus Directive 2003/71/EC. The new Prospectus Directive is a part of the capital markets union action plan. The new rules are aimed at simplifying administrative obligations related to the publication of prospectuses but in a manner that still ensures that investors are well informed. The new prospectus regime shall ensure that appropriate rules cover the full life cycle of companies from start-up until maturity as frequent issuers on regulated markets.

22 Directive 2004/109/EC of the European Parliament and of the Council as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013.

23 Commission Regulation (EU) No. 596/2014.

24 In Finnish: '*Valtiovarainministeriön asetus arvopaperin liikkeeseenlaskijan säännöllisestä tiedonantovelvollisuudesta*'.

25 A part of the regulation issued by Nasdaq Helsinki available here: www.business.nasdaq.com/media/Guidelines-for-Insiders-of-listed-companies-3-Jan-2018_tcm5044-20055.pdf.

26 www.cgfinland2.fi/wp-content/uploads/sites/6/2015/10/hallinnointikoodi-2015eng.pdf.

the book-entry system and making amendments to the company's articles of association (including but not limited to changing the company from a private limited liability company to a public limited liability company) and preparing reports in accordance with the IFRS. The equity story is also prepared.

The actual listing process typically begins three to six months prior to the listing. During this phase, the company prepares for the listing with its advisers through the following:

a a plan and schedule for the listing process is prepared;
b meetings with FIN-FSA and Nasdaq Helsinki are arranged in order to present the company's business and financial status;
c due diligence reviews are carried out;
d the prospectus, marketing material, and share sale or issue terms and conditions are drafted; and
e internal processes regarding governance, financial reporting, insider administration and investor relations are prepared, and the ticker symbol is reserved.

At the latter stage of the actual listing process, typically one to three months prior to the listing, the prospectus and terms and conditions of the share sale or issue are finalised and approved by the FIN-FSA, the company gives a presentation to the listing committee of Nasdaq Helsinki and, to finalise the listing application, the company takes part in the training sessions arranged by Nasdaq Helsinki. Also, the company may release information on its planned listing and be initially marketed.

The final stage of the listing process, which typically takes place within four months prior to the listing, includes the company's board of directors' resolution on the listing, submitting of the listing application and publishing of the prospectus and share sale or issue terms. The listing application is handled and resolved by the listing committee of Nasdaq Helsinki. The company shall, without undue delay, disclose the filing of a listing application with Nasdaq Helsinki. A company that has filed a listing application is considered equal to a listed company until the company share has been listed, the company has disclosed information about the cancellation of a listing application, or Nasdaq Helsinki has rejected the listing application and therefore such a company shall comply with the Rules of the Exchange applicable to listed companies.[27]

Further, the company shall, at the time of filing its application for listing, at the latest, have a website where the information made public in accordance with the disclosure duties and information relating to the corporate governance shall be available. In principle, the company shall also draft a communication policy to ensure the company's readiness for the communications required from a listed company. Besides the necessary steps arising out of the listing criteria and rules and regulations, investor communication may have a material significance to the success of the listing; therefore, making the company publicly known in advance is crucial for a successful listing. At the final stage of the listing process, the investor and analyst meetings are arranged.

After the necessary steps with regard to marketing and share sale or issue have been completed, including the market release issued by Nasdaq Helsinki, the company is ready to be listed and trading commences.

27 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.2.2.1.

First North

The process as regards the admittance of the shares to be traded on First North usually takes approximately one to three months in the aggregate. The length of the process depends, *inter alia*, on whether the company prepares an EU prospectus (as mentioned above) or the lighter company description in accordance with the First North Rules. The following steps are to be taken during the admittance process:

a appointment of the certified adviser and other advisers, such as a legal adviser;
b the certified adviser contacts Nasdaq Helsinki on the schedule and plan, and the ticker symbol is reserved;
c the company and the certified adviser finalise the application, investor sections of the company's website and company description (or prospectus when applicable);
d the standard industrial classification application is filed with Nasdaq Helsinki;
e the certified adviser files the application, including the attachments, with Nasdaq Helsinki, and the company notifies of the filing of the application 15 days prior to commencing the trading, at the latest;
f Nasdaq Helsinki handles the application;
g the company description (or prospectus) and the terms for the share sale or issue are published; and
h the resolution of Nasdaq Helsinki takes place.

After these steps and the share subscriptions and registrations (when applicable) are completed, the company's shares may begin being traded on First North.

Key parties, stakeholders and documentation

The key parties of a Finnish IPO generally consist of (in addition to the issuer itself and the underwriter or underwriters):

a advisers, such as financial and legal advisers;
b Nasdaq Helsinki;
c the central securities depository (Euroclear Finland);
d the FIN-FSA, when applicable;
e accountants;
f the market maker;
g the subscription venue;
h communications and investor-relations consultants;
i old and new shareholders;
j personnel; and
k the media.

The legal adviser advises the company on the legal aspects of the IPO, *inter alia*, by conducting legal due diligence of the company, assisting in the preparation of the prospectus and terms for the share sale or issue, negotiating the underwriting documentation, and assisting in preparing the company to meet the listing criteria, the company's internal documentation, and processes regarding governance, disclosure and insider administration.

The required documentation for an IPO process includes, *inter alia*:

a resolutions regarding the appointment of advisers;
b approval of the final agreements regarding the IPO process;

c resolutions on the listing, documenting:
- the corporate governance and administrative measures of the company;
- company presentations;
- the listing application;
- the prospectus or company description;
- terms of the share sale or issue;
- marketing material; and

d shareholders' resolutions on the amendments to the articles of association, when necessary, regarding:
- changing the company's legal form from a private company into a public limited liability company;
- removing the redemption or consent clauses;
- entering the company's shares into the book-entry system;
- changes in the composition of the board of directors, where necessary; and
- authorisation to the board of directors regarding a share issue.

The necessary processes shall also be taken with Euroclear Finland and Finnish Trade Register with respect to the new shares issued in the share issue.

ii Pitfalls and considerations

It is important to carefully plan the listing and listing process with a detailed timetable, and be in contact with Nasdaq Helsinki in advance.

Further, a company that has filed its listing application on the Official List with Nasdaq Helsinki is subject to the disclosure duty applicable to the listed companies. Also, between the time of publication of the prospectus and completion of the listing, any new factor that may have a significant effect on the price of the company's shares needs to be added to the prospectus. Such supplement shall be approved by the FIN-FSA and disclosed to the market.

iii Considerations for foreign issuers

In Finland, the same listing requirements for the Official List apply for foreign issuers as they do for domestic issuers. However, according to the ESMA, the generally accepted accounting principles of the United States, Canada and Japan are sufficiently comparable, and may usually be used if IFRS-formatted annual accounts are not available.

For companies seeking dual listing on Nasdaq Helsinki and that are already listed on the regulated market or an equivalent, a special process can be applied. See Section II.ii, above.

With regard to the Finnish book-entry system and registration of foreign shares that need to be taken into account in the IPO process for foreign issuers, if a company contemplating the IPO is a Swedish company, an established link exists in Euroclear Finland with regard to the registration of the foreign shares. However, if the company's domicile is anywhere other than Finland or Sweden, the possibility to list the shares or admit the shares to be traded in Nasdaq Helsinki depends on the chosen technical measure to be used with regard to registration of the foreign shares, as long as there is no direct link established between Euroclear Finland and the security depository of the domicile country of the foreign issuer. The possibilities include, for example, use of the holding company structure or use of Finnish depository receipts (FDRs). In addition, it is recommended to contact Nasdaq Helsinki in advance for guidance.

IV POST-IPO REQUIREMENTS

i General

Listed companies and companies whose shares have been admitted to trading on First North shall comply, *inter alia*, with stricter specific disclosure requirements and corporate governance obligations than for non-listed companies. The purpose of this is mainly to ensure the timely and non-discriminatory disclosure of information and protection of investors. Companies must also arrange, for example, insider administration, investor communication (including areas other than disclosure through stock exchange releases) and corporate responsibility reporting. As mentioned above in connection with the listing requirements, the companies shall continuously comply with the listing requirements and, therefore, for example, the reporting processes and risk management shall be effectively arranged.

Nasdaq Helsinki continuously monitors the rules issued by Nasdaq Helsinki to ensure compliance. Nasdaq Helsinki also monitors certified advisers of First North to ensure they fulfil their obligations according to the First North Rules.

ii Disclosure obligations

The disclosure obligations on the Official List are divided into two categories: the regular duty of disclosure and the ongoing disclosure obligation.

The regular disclosure obligations refer, in practice, to disclosure regarding companies' regular financial reporting, such as financial statement release, half-yearly and other financial reports, annual accounts and management report, the auditor's report, and a report on the administrative and control systems. Further, notices to general meetings; issues of financial instruments; changes in the board of directors, or management and auditors; share-based incentive programmes; closely related transactions; the company calendar; and substantial changes to the operations of the company shall be disclosed.

If Nasdaq Helsinki considers that special circumstances exist that result in substantial uncertainty regarding the company or the pricing of the traded financial instruments, and that additional information is required in order for Nasdaq Helsinki to be able to provide fair and orderly trading in the company's financial instruments, Nasdaq Helsinki can require the company to disclose the necessary information. Also, if the company is parallel-listed and discloses any significant information due to rules, or other disclosure requirements of another regulated market or trading venue, such information shall also be simultaneously disclosed through Nasdaq Helsinki.[28] Further, the company may publish, for example, forecast statements. The Rules of the Stock Exchange include criteria for such disclosures if they are made.

The ongoing disclosure obligation requires that the listed company, without delay, publishes insider information, which directly concerns the respective company by publishing a stock exchange release. The obligation of a listed company to publicly disclose inside information is regulated by the MAR, including its implementing measures[29] and relevant guidelines of the ESMA.[30] A company may, on its own responsibility, delay disclosure of

28 Nasdaq Helsinki Ltd 'Rules of the Exchange' 3 Jan 2018 (Unofficial translation version 21122017 added), Chapter 2.3.3.9.

29 Commission Implementing Regulation (EU) 2016/1055.

30 ESMA, MAR Guidelines, Delay in the disclosure of inside information, 20/10/2016 | ESMA/2016/1478 EN.

inside information to the public provided that all of the conditions[31] set out in the MAR are met. The decision on the delay shall be notified to the FIN-FSA when the inside information is disclosed. Further, the ongoing disclosure obligation, in addition to the insider matters, includes obligations relating to the management's transactions. Regarding insider issues, Nasdaq Helsinki has also issued insider guidelines, which must be complied with.

Companies whose securities are traded on First North must also comply with the disclosure obligations. These obligations arise out of the First North Rules and are less burdensome than the rules with regard to the companies on the Official List. Disclosure requirements of insider issues on First North are, however, similar to the rules of the Official List. Other disclosure obligations include, for example, annual reports, annual earnings figures and half-yearly reports, transactions with closely related parties, general meetings, offering of new shares, incentive programmes, changes in the management or certified adviser, and qualified auditor's reports.

iii Flagging

The flagging rules and regulations are applied to the companies on the Official List. A shareholder shall have an obligation to notify a company and the FIN-FSA of its holdings and proportion of voting rights (notification of major shareholding, flagging), when the proportion reaches or exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 90 per cent or two-thirds of the voting rights or the number of shares of the company. Upon receipt of the notification of a shareholding, the company shall, without undue delay, disclose the information in the notification of shareholding.

The flagging rules and regulations are not applied to the companies whose shares are admitted to trading on First North.

iv Corporate governance and responsibility reporting

All issuers of shares that are traded on the Official List must comply with the CG Code (or an equivalent corporate governance code applied in the home state). The CG Code is a collection of recommendations on good corporate governance. The recommendations of the CG Code supplement the obligations set forth in the legislation. The objective of the CG Code is to maintain and promote the high quality and international comparability of corporate governance practices applied by Finnish listed companies. The purpose of the CG Code is to harmonise the procedures of listed companies, and to promote openness with regard to corporate governance and remuneration.

In addition, if the company listed on the Official List is a large undertaking whose average number of employees during the financial year has exceeded 500, it has to include in its management report a statement of non-financial information.[32] The statement shall include, as a minimum, information regarding how the reporting company handles: environmental matters, social and employee-related matters, respect for human rights, and anti-corruption and bribery matters.

31 Article 17.4 of MAR and ESMA, MAR Guidelines, Delay in the disclosure of inside information, 20/10/2016 | ESMA/2016/1478 EN.

32 Accounting Act (1336/1997, as amended) Chapter 32, Sections 1 and 2.

v Insider matters

For a company that wishes to be listed on the Official List or traded on First North, it is critical that it has effective and reliable insider administration covering internal policies, and processes for maintaining insider lists, disclosure of insider issues and transactions conducted by persons discharging managerial responsibilities and closely associated with them.

vi Websites

Companies on the Official List and First North must have their own website on which information disclosed by the company on the basis of the disclosure obligations imposed on companies must be available for at least five years.

V OUTLOOK AND CONCLUSION

The Finnish IPO market has experienced a boom in recent years, following a prolonged period in the 2000s when the IPO market was practically silent. Today, small and medium-sized companies consider undertaking IPOs to expand their businesses. Further, private equity firms have now entered the Finnish IPO market and consider listing as an alternative to an exit. Currently, with IPO processes ongoing and, based on certain published aims, further IPOs in the pipeline, the market is predicted to continue this activity throughout 2018.

Chapter 4

GERMANY

Stephan Hutter and Katja Kaulamo[1]

I INTRODUCTION

The German initial public offerings (IPO) market has been developing in line with overall European market trends since the mid 1990s, experiencing a number of peaks and downturns, and being characterised by sustained market volatility as a result of the European financial market crisis in 2008 and related political challenges to the fabric of the European Union.

While there was only limited IPO activity in Germany during the first half of the 1990s, the IPO of Deutsche Telekom AG in 1996 ignited significant equity capital markets activity in Germany. This growth phase was characterised by, at that time, unprecedented and widespread interest in IPO activity across all investor segments, including retail demand, and was, to a large extent, driven by technology companies and internet start-ups. For such 'new economy' companies, Deutsche Börse AG had introduced a new market segment called 'Neuer Markt' (the New Market) on the Frankfurt Stock Exchange (FSE), which was intended to replicate in Germany many of the characteristics of the Nasdaq stock market in the United States. With the New Market introducing, for the first time in Germany, international market-type disclosure standards and transaction structures, it experienced rapid growth that led to a total of more than 400 IPOs with an aggregate transaction volume of more than €50 billion during the five-year period between 1996 and 2001. In 2002, the number of IPOs in Germany dropped significantly and, following continued market downturn, the New Market was shut down in June 2003.

While the IPO market recovered in the period from 2004 to 2007, following the closure of the New Market segment and the failure of many of the new economy start-ups listed thereon, investor sentiment in Germany changed significantly – with institutional investors becoming more risk-averse and retail demand virtually disappearing. Following the European financial crisis of 2008, the German equity capital markets were characterised by significant market volatility – in line with almost all European markets – resulting in only a small number of IPOs and an annual total offering volume of approximately €5–6 billion in recent years. Notwithstanding increasing overall stock market activity in recent years and months, it is expected that IPO activity in Germany will generally remain at levels similar to the last couple of years, with investors favouring large, liquid and already publicly traded stocks over small to medium-sized IPOs, and private equity firms exiting from their investments in dual-track processes that have historically often resulted in a trade sale. The exception to that general trend will possibly be additional spin-offs from large German corporates in connection with M&A and restructuring activities.

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During the past few years, the general development of equity markets in Germany showed significant growth – in line with the development of equity markets in several other Member States of the European Union – on the back of the continuing policy by the European Central Bank to keep interest rates at historically low levels.

II GOVERNING RULES

The applicable regulatory framework governing IPOs in Germany is mainly based on EU directives and regulations that have largely harmonised the regulatory environment in the area of listing and trading of securities in the European Union. The EU regulatory framework conforms to global standards and is similar to the regulatory environment in the US and Asian markets.

i Main stock exchanges

The FSE is the main stock exchange in Germany, and one of the world's largest trading centres for securities. With a share of more than 90 per cent of all trading in shares at all German stock exchanges, the FSE is by far the most important of Germany's seven stock exchanges.[2] The other (regional) stock exchanges are located in Berlin, Düsseldorf, Hamburg, Hannover, Munich and Stuttgart.

Deutsche Börse AG operates the FSE, an entity governed by public law. In addition to the specialist trading at the FSE (i.e., floor trading), Deutsche Börse AG operates the fully electronic trading platform Xetra®, which is one of the cash markets with the highest trading volumes in the world.[3] Of the more than 200 market participants at the FSE, roughly half are from countries other than Germany.[4] The importance of the FSE among the world's largest trading centres is underlined by the proposed merger of its operating company Deutsche Börse AG with the NYSE in 2011 and with the London Stock Exchange (LSE) in 2017 (both vetoed by the European Commission).

The FSE operates two markets: the EU regulated market (with the sub-segments Prime Standard and General Standard) and the exchange-regulated market (with the sub-segments Scale and Quotation Board), each offering different transparency levels and listing requirements.

The Prime Standard sub-segment of the regulated market offers the highest level of transparency in Germany and is aimed at large companies seeking international recognition and investors. The Prime Standard sub-segment imposes additional post-admission obligations and higher transparency requirements on the issuer, which go beyond the transparency requirements under mandatory EU or German law and fulfil the information needs of international investors (e.g., the quarterly reporting obligation). Thus, the Prime Standard sub-segment of the Frankfurt Stock Exchange's regulated market is specifically designed for companies that are capable of complying with these more stringent post-admission reporting obligations and that wish to address international investors. Further, the acceptance into the selection indices DAX, MDAX, TecDAX and SDAX is limited to issuers admitted to trading in the Prime Standard sub-segment.

2 www.deutsche-boerse.com/dbg-en/about-us/frankfurt-stock-exchange.
3 See footnote 2.
4 See footnote 2.

The General Standard sub-segment of the regulated market operates on the basis of mandatory (minimum) EU or German statutory regulation and is aimed at mid-sized or large companies seeking a cost efficient listing with lesser ongoing reporting obligations within the EU-regulated market. The General Standard is particularly suitable for companies that address national investors only and wish to opt for a cost-efficient listing on a regulated market.

In addition to the aforementioned regulated market segments, the FSE also operates an exchange-regulated market, which is called the Regulated Unofficial Market or Open Market. On the exchange-regulated market, securities may be included to trading either in the Quotation Board or in the Scale segment. The Open Market generally provides for lower listing requirements and ongoing reporting obligations as compared with the regulated market. Within the Open Market, the Scale segment is the trading segment with the higher transparency rules while the Quotation Board is a trading segment for small companies and provides for the lowest transparency standards and entails the least costs. The Scale segment is specifically designed to enhance access to capital for smaller and medium-sized enterprises (SMEs). Scale was launched on 1 March 2017, replacing the former Entry Standard segment of the exchange-regulated market, which had been established after the closing of the New Market segment in 2003.[5] Inclusion of shares to trading on Scale is dependent on the issuer fulfilling certain additional listing requirements as compared with the Quotation Board. Also, the Scale segment imposes certain additional reporting obligations on the issuer.

The Prime Standard sub-segment of the regulated market at the FSE is comparable with the Premium segment of the Main Market at the LSE. The Open Market of the FSE is comparable with the Alternative Investment Market (AIM) of the LSE.

The vast majority of issuers listed on the regulated market (Prime Standard and General Standard) of the FSE are German companies, with foreign issuers accounting for less than 10 per cent of the companies listed on the Prime Standard sub-segment.[6] In contrast, there is a very large number of foreign issuers whose shares are included into trading on the Quotation Board segment of the Open Market at the FSE, including a great number of US blue-chips. This results from the fact that any broker admitted as a participant on the Open Market can generally apply for inclusion of shares to trading on the Quotation Board segment of the Open Market without any involvement of the issuer. Hence, the shares of many foreign companies are traded on the Quotation Board of the Open Market without the issuer's involvement or knowledge thereof.

Given the large size and liquidity of the FSE, German issuers rarely pursue a dual-listing on another stock exchange in addition to the listing on the FSE.

5 As of February 2018, Scale comprised 48 companies including four newly listed companies, i.e., there were four IPOs on the new Scale segment in 2017 while the remaining number consist of companies that were already listed on the former Entry Standard and met the Scale requirements: www.deutsche-boerse-cash-market.com/dbcm-de/instrumente-statistiken/statistiken/gelistete-unternehmen.

6 As of February 2018, 90 per cent of the companies listed on the Prime Standard are German and another 8 per cent are from other European countries (2 per cent of which are from Austria or Switzerland). In the General Standard the portion of non-German issuers is bigger: 83 per cent are from Germany, 8 per cent are from other European countries and 9 per cent are from non-European countries: www.deutsche-boerse-cash-market.com/dbcm-de/instrumente-statistiken/statistiken/gelistete-unternehmen.

ii Overview of listing requirements

The requirements for a listing on any of the German stock exchanges vary largely depending on the market segment on which the securities are to be listed. Generally, securities can be listed either on the regulated market segment or on the unregulated (i.e., only exchange-regulated) market segment. On the regulated market segment, EU securities legislation (as implemented into German law) applies, and issuers listed on those markets have to comply with high statutory standards that are largely harmonised throughout the European Union while the unregulated market is merely regulated pursuant to the rules and regulations of the respective stock exchange.[7]

The admissions process for a listing of shares on the regulated market in Germany is set in motion with a written admission application, filed by the issuer together with one or more underwriters. The underwriter, as co-applicant, must be a credit institution, financial services institution or a company that performs its business activities pursuant to Section 53, paragraph 1, clause 1 or Section 53b, paragraph 1, clause 1 of the German Banking Act[8] and must be admitted for trading on a German stock exchange and fulfil certain minimum capital requirements. The admission application must be signed by the issuer and the underwriter as the listing sponsor, and be submitted to the FSE with the relevant supporting documents, including, in particular, a comprehensive set of corporate documents. Deutsche Börse AG has published an application form that contains categories of information generally required, as well as a checklist listing the documents to be submitted to the admissions office of the FSE.

Both the public offering of securities and the admission of securities to trading on an EU-regulated market require the publication of a prospectus (subject to certain exemptions). The mandatory content of a prospectus follows global standards and is set forth in the EU Prospectus Regulation.[9] Generally, a public offering in Germany as well as a listing of shares on a regulated market of a German stock exchange requires the publication of a prospectus in the German language except when the prospectus is used, in addition to the public offering of securities in Germany, for:

a a public offering of securities in another jurisdiction within the European Economic Area (EEA) (commonly referred to as 'passporting'); or
b the listing of the securities on another regulated market within the EEA.

7 The following description focuses on the requirements for a listing on the regulated market and does not provide a detailed description of the (lesser) listing requirements on the exchange-regulated market segments. For a listing on the Quotation Board sub-segment of the FSE Open Market, a respective application by an admitted broker is the only major listing requirement provided that the shares are traded on another domestic or foreign exchange-like market recognised by Deutsche Börse AG. An issuer applying for a listing on Scale must file a listing application by a supporting capital market partner (i.e., a bank or broker recognised by Deutsche Börse AG) and must, *inter alia*, have been in existence for at least two years and must generally have a free float of at least 20 per cent or 1 million free float shares. A prospectus is not required (unless there is a concurrent public offer of the shares); instead, the issuer must prepare an inclusion document containing certain information on the issuer's financial position, future prospects and the rights attaching to its securities. Overall the listing requirements for the exchange-regulated market segments (including the Scale segment) are by far not as complex and comprehensive as for the EU-regulated market segments.

8 The German Banking Act of 9 September 1998, BGBl. I p. 2776 (as amended).

9 Commission Regulation (EC) No. 809/2004 of 29 April 2004.

In either case, the German Federal Financial Supervisory Authority (BaFin)[10] permits both the summary and the prospectus body to be in the English language (provided that a German language translation of the summary is also included). While dual listings are rare, it is common practice for German issuers to conduct a public offering in another EU Member State in addition to Germany (primarily in Luxembourg) in order to be able to issue an English-language prospectus only.

In addition to the requirement to publish a prospectus, there are certain further requirements that must be fulfilled in order to qualify the issuer for a listing on a regulated market at the FSE. In general, the issuer must have an operating history of at least three years (subject to exemptions) and the issuer must have disclosed its annual financial statements for the past three fiscal years. Moreover, the issuer's estimated market value may not be less than €1.25 million, the issuing volume must be at least 10,000 shares and the issuer's shares must be spread sufficiently resulting in a free float of at least 25 per cent. However, a free float of less than 25 per cent of the shares may also be sufficient if orderly exchange trading is ensured due to both a broad diversification (generally at least 100 investors) and a significant number of issued and listed shares. In the event that an issuer seeks admission to the Prime Standard sub-segment, it will also need to appoint at least one designated sponsor for the shares.

iii Overview of law and regulations

The Prime Standard and General Standard sub-segments of the FSE are EU-regulated markets. Both the listing requirements and the post-IPO obligations for these regulated markets are set out in statutory law, deriving from EU law. In Germany, the applicable regulations are primarily set out in the German Stock Exchange Act,[11] the German Stock Exchange Listing Regulation,[12] the German Securities Prospectus Act[13] (implementing the EU Prospectus Directive)[14] and the German Securities Trading Act[15] (implementing the disclosure requirements of the EU Transparency Directive).[16] In addition, the Rules and Regulations of the FSE provide for certain additional obligations for issuers listing their shares in the Prime Standard sub-segment.

In addition to the aforementioned German statutes implementing EU directives, there are several EU regulations that contain core legislation directly applicable in Member States of the EU and are relevant for an IPO on a regulated market anywhere in the EU. The most important EU Regulations in this context are the EU Prospectus Regulation, which governs

10 BaFin is an independent federal regulator headquartered in Bonn and Frankfurt and supervised by the German Federal Ministry of Finance.

11 Stock Exchange Act of 16 July 2007, BGBl. I p. 1330 (as amended).

12 Stock Exchange Admission Regulation of 9 September 1998, BGBl. I p. 2832 (as amended).

13 Securities Prospectus Act of 22 June 2005, BGBl. I p. 1698 (as amended).

14 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003. The EU Prospectus Directive is successively being replaced by the new EU Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017) in three stages (July 2017, 2018 and 2019). The new EU Prospectus Regulation will have substituted the EU Prospectus Directive upon 21 July 2019 completely.

15 Act on Securities Trading of 9 September 1998, BGBl. I p. 2708 (as amended).

16 Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 and the German implementation of the Act Implementing the Transparency Directive Amending Directive of 20 November 2015, BGBl. I p. 2019.

the contents of prospectuses throughout the EU, and the Market Abuse Regulation[17] (MAR), which governs certain areas of the post-IPO obligations (including, in particular, publication of inside information and managers' transactions). Further, the new EU Prospectus Regulation replacing the EU Prospectus Directive in three stages (July 2017, 2018 and 2019) is aimed at facilitating easier access to the capital markets, particularly for SMEs. It provides more options, especially for SMEs, to issue securities without a prospectus at all. In addition, the new EU Prospectus Regulation also includes lighter disclosure requirements for secondary issuances of companies already listed on an EU-regulated market.

The Market Abuse Regulation, effective since 3 July 2016, aims at enhancing market integrity and investor protection in the EU. It provides for an updated European regime regarding market abuse that applies uniformly throughout the EU and addresses increased globalisation of financial markets and the emergence of a number of new trading platforms.

Under the EU Prospectus Directive, the competent authority for the prospectus approval is the regulator in the home Member State of the issuer. In the case of share offerings, the home Member State for this purpose (and hence the competent authority) is always the Member State in which the issuer has its registered seat. Therefore, the competent authority for German issuers is BaFin, while prospectuses of issuers from other EU Member States listing their shares on a German stock exchange are to be approved in their home Member States by the respective national authority. The listing and admission to trading on the FSE is, in either case, dealt with by the admissions office of the FSE. The European Securities and Markets Authority (ESMA) is not directly involved in the German IPO process, but it aims to align the cooperation between the European national regulatory authorities by, *inter alia*, issuing guidelines in relation to interpretation of European securities directives and regulations, whose guidelines are generally adopted by the European national authorities.

The Open Market segment of the FSE is not an EU-regulated market but one regulated by the FSE itself. Unlike the regulated market, which is subject to public law, the Open Market is subject to private law. The Deutsche Börse AG General Terms and Conditions for the Regulated Unofficial Market of the Frankfurt Stock Exchange[18] govern the listing of securities on the Open Market, as well the obligations resulting from such listing.

III THE OFFERING PROCESS

Once the decision to go public has been made, various work streams have to be initiated. In light of the documentary requirements, the issuer has to establish a data room in order to facilitate due diligence. The corporate structure of the issuer has to be reviewed and, if required, a change of legal form has to be prepared in order to ensure the issuer's ability to access the capital market.[19] Moreover, on the marketing side, both the underwriting banks and the issuer will develop the issuer's equity story and prepare the marketing strategy. While

17 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014.

18 www.xetra.com/blob/2309602/a0a2ed3ae82d4b43d405538a869e6cc4/data/General-Terms-Regulated-Unofficial-Market-2018-01-03.pdf.

19 The legal forms entitled to access the capital market by equity issuance are stock corporations, European companies, partnerships limited by shares or real estate investment trusts (REITs) (German REITs must be stock corporations pursuant to mandatory law).

due diligence and drafting the prospectus are paramount at the beginning of the offering process, the marketing aspects will usually speed up later in the process and a crucial challenge is to keep both work streams dealt with by different players congruent as regards content.

i General overview of the IPO process

Usually, the preparation of an IPO in Germany takes between four and six months, and can be divided into the following four phases:

a pre-preparation period (about six months prior to completion):
- initial preparation for IPO, including preparation of the implementation of any changes in the corporate structure of the issuer, if necessary, and compilation of documents for the data room;

b preparation period (about 90 days):
- appointment of advisers, determination of the deal structure, business and financial due diligence, legal due diligence, preparation of financial statements, drafting of prospectus and further legal documents;

c regulatory review period (about 40 days):
- filing of prospectus with BaFin, determining valuation, preparing roadshow presentations, pilot fishing, filing of listing application with the FSE, analyst presentation, publication of pre-deal research; and

d execution and settlement (about 10 days):
- printing of prospectus, correspondence with investors, execution of underwriting agreement, building order book, pricing, execution of pricing agreement, allocation, trading, closing.

The key parties involved in a German IPO generally follow international standards and comprise the following players:

a issuer: the company going public;

b issuer's counsel: advising the issuer on all legal aspects of the transaction, conducting legal due diligence, assisting the issuer in the preparation of the prospectus, negotiating the underwriting documentation, issuing and monitoring guidelines restricting pre-IPO publicity and issuing legal opinions and disclosure letters to the underwriters;

c issuer's auditors: verifying that the financial information in the prospectus corresponds to the audited annual accounts and issuing comfort letters to the underwriters;

d selling shareholders (if any): either exiting its investment by way of the IPO or intending to raise additional funding for the issuer while maintaining a (significant) share in it;

e selling shareholders' counsel: advising the selling shareholders (if any) on the underwriting agreement;

f underwriting banks: coordinating and managing the offering in various functions:
- global coordinators: advising the issuer and coordinating on a global basis if there are offerings on more than one market;
- bookrunners: maintaining the order book for the shares; and
- underwriters: underwriting the shares to be offered usually as part of an underwriting syndicate led by the global coordinators; and

g underwriters' counsel: advising on all legal aspects of the transaction relevant for the underwriters (e.g., underwriting agreement, research publication), conducting legal due diligence, preparing and negotiating the underwriting agreement, coordinating the admission procedure and issuing legal opinions and disclosure letters to the underwriters.

The standard documentation of German IPOs meets general international market practice. Besides the prospectus, it usually comprises an underwriting agreement, agreement among managers, pricing agreement, lock-up agreement, legal opinions, comfort letters and officers' certificates.

ii Pitfalls and considerations

Over the past couple of years, BaFin's scrutiny in reviewing prospectuses has increased, often leading to more (substantive) comments on draft prospectuses that have to be addressed by the parties involved. Given that the prospectus approval process typically includes three rounds of BaFin comments and a limited time to respond to them in light of the generally tight transaction timelines, this can become a burden on all parties involved in the process, in particular the issuer and its auditors. However, in terms of overall timing considerations, this development is generally addressed in advance by agreeing with BaFin on an individual timetable for the prospectus approval process, allowing for sufficient time between receipt of comments and resubmission of the prospectus. In order to ensure a smooth process, it is crucial that the legal advisers maintain a good working relationship with the BaFin team by discussing relevant and potentially difficult (roadblock) issues – such as the required level of completeness of the prospectus upon its first filing – in advance and addressing queries and questions from the regulator professionally and swiftly.

iii Considerations for foreign issuers

Generally, the same legal requirements apply for foreign issuers as for domestic issuers. In particular, this means that the financial statements of the (foreign) issuer to be attached to the prospectus must conform to the standards of the EU Prospectus Regulation. In other words, the financial statements must generally be in the IAS/IFRS format as adopted by the European Union. If the foreign issuer's financial statements are not prepared under this accounting standard, they can be used only if the applied accounting standard is deemed comparable to IAS/IFRS as adopted by the European Union.[20] Pursuant to the EU Prospectus Regulation, the generally accepted accounting principles of the United States, Canada, Japan, China and Korea may generally be used.

Foreign issuers seeking to list their shares in Germany should also consider well in advance whether the shares in question qualify as securities within the meaning of the German Stock Exchange Act, and are eligible for safekeeping at Clearstream as the common depository and for admission to trading on a regulated market in Germany. In this context, it is relevant to ascertain that the shares are represented by a share certificate that contains the elements of a security within the meaning of German law, in particular directly conferring shareholders' rights to the respective holders of co-ownership interests in the share certificate. Because of the different legal frameworks regarding the function and legal quality of share certificates, it has proven difficult to list shares from certain jurisdictions in Germany.

20 U Kunold in Assmann/Schlitt/von Kopp-Colomb, *WpPG/VermAnlG*, 3rd Edition, 2017, EU-ProspektVO, Anh. I, Rz. 171. The financial statements must comprise a balance sheet, an income statement, a statement showing either all changes in equity or changes in equity other than those arising from capital transactions with owners and distributions to owners, a cash flow statement and the accounting policies and explanatory notes.

IV POST-IPO REQUIREMENTS

Companies listed on EU-regulated markets are subject to a comprehensive set of post-admission obligations predominantly aiming at investor protection. The European approach to ensure investor protection in a capital market context is driven by transparency principles and protections against markets abuse (in particular, anti-fraud and insider trading). In this context, issuers must comply with ongoing reporting obligations which have been introduced on a European level by the EU Transparency Directive and the Market Abuse Regulation.

As discussed in Section II.i, above, issuers may choose between the Prime Standard and the General Standard sub-segments within the FSE regulated markets.[21] Issuers aiming to reach out to international investors usually opt for the Prime Standard, which provides for stricter disclosure obligations than the General Standard as the FSE Exchange Rules[22] impose additional disclosure obligations beyond the transparency obligations under mandatory EU law. The respective post-admission obligations on the regulated market segments can be summarised as follows:

<table>
<tr><th>Post-admission obligation</th><th>Prime Standard</th><th>General Standard</th></tr>
<tr><td rowspan="4">Financial reporting</td><td colspan="2">Annual financial report within four months of the end of a given financial year</td></tr>
<tr><td colspan="2">Half-yearly financial report within three months of the end of the reporting period</td></tr>
<tr><td>Quarterly statement within two months of the end of the reporting period</td><td>None</td></tr>
<tr><td>Financial reporting must be in English and in German (however, English is sufficient for issuers located abroad)</td><td>Financial reporting must be in English or in German</td></tr>
<tr><td>Disclosure of material events with an influence on the share price (ad hoc disclosure)</td><td colspan="2">Mandatory</td></tr>
<tr><td>Disclosure of managers' transactions</td><td colspan="2">Mandatory</td></tr>
<tr><td>Notification of voting rights by shareholders and publication thereof by the issuer</td><td colspan="2">Mandatory (3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent of voting rights)*</td></tr>
<tr><td>Analyst meeting</td><td>At least once a year, there has to be an analysts' meeting (aside from the annual press conference) in order to announce the figures from the annual accounts</td><td>None</td></tr>
<tr><td>Financial calendar</td><td>Continuous updating, publication and transmission of a financial calendar with the most important corporate action events of the issuer</td><td>None</td></tr>
<tr><td>Exchange Reporting System</td><td>All reports and documents shall be transmitted to Deutsche Börse AG via its reporting system (Exchange Reporting System)</td><td>None</td></tr>
<tr><td colspan="3">* Additional notification obligations apply to financial instruments.</td></tr>
</table>

21 While there are no ongoing reporting obligations for issuers listed on the Quotation Board of the Open Market, companies listed on the Scale of the Open Market must, *inter alia*, publish annual and half-yearly financial reports and interim management reports, conduct an information event for analysts and investors at least once a year and provide information as to changes with regard to the issuer or the traded securities (such obligations being less complex and comprehensive as the disclosure regime pursuant to the EU Transparency Directive and the MAR).

22 Exchange Rules of the Frankfurt Stock Exchange, www.xetra.com/blob/1668712/85853795037487d417e0407cef2f371c/data/2018-01-31-Exchange-Rules-for-the-Frankfurter-Wertpapierboerse.pdf.

In light of market integrity and harmonised investor protection in the EU, the MAR established, among other things, a generally applicable definition[23] of 'inside information' and a legal framework for publication of inside information (*ad hoc* disclosure) as well as rules for insider dealings and managers' transactions (directors' dealings) that now apply uniformly throughout the EU. In terms of *ad hoc* disclosure requirements, inside information must generally be disclosed without delay, subject to a permitted delay of disclosure if certain requirements are met (in particular the issuer's interest in delaying disclosure must overweigh the market's interest in immediate disclosure and confidentiality must be ensured). If an issuer decides to delay disclosure of inside information, it is required to have certain statutorily defined decision-making and record-keeping procedures in place in order to monitor the continued availability of the exemption from the requirement to publish the inside information without delay. Upon the (later) publication of the inside information, the issuer must notify the respective regulator (in Germany, BaFin) about the reasons for the delay of disclosure of inside information and explain in detail how it complied with the record-keeping obligations under MAR.

Besides these European regulatory requirements, some further obligations arise for companies upon listing pursuant to German law. Pursuant to provisions of the German Stock Corporation Act, the board of management and the supervisory board of listed companies have to state annually whether the company complies with the provisions of the German Corporate Governance Code[24] and to explain the reasons in case it does not comply with the Code ('comply or explain'). In addition, at least 30 per cent of the members of the supervisory board of listed companies that are subject to the statute of labour codetermination must be female (and at least 30 per cent male) and this board composition requirement must generally be complied with by the supervisory board as a whole. If decided by a majority vote by the members of the supervisory board, the aforementioned gender diversity requirement must be fulfilled by each of the employee representatives' side and the stockholder representatives' side of the supervisory board.

V OUTLOOK AND CONCLUSION

The legal framework for IPOs in Germany is comparable to the set of capital markets rules and regulations in other jurisdictions. As a result of established international capital markets standards, documents and markets practice, the legal and documentary path towards an IPO is very similar throughout Europe (this is also because of a large number of harmonising EU regulations), with corresponding requirements in the United States and in Asia.

There is ongoing activity in Europe to further develop and harmonise capital markets standards across all Member States, and to align European standards with other developments internationally. In this regard, the Capital Markets Union (CMU) is currently one of the flagship initiatives of the European Commission. Its central aim is to enhance economic growth in the EU by increasing the role capital markets play in the financing of the economy

23 'Inside information' is defined as 'information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments'.

24 German Corporate Governance Code as of 7 February 2017, www.dcgk.de//files/dcgk/usercontent/en/download/code/170214_Code.pdf.

and to help to integrate financial markets activity across Member States. It reflects a shift in political priorities from crisis management towards more meaningful growth of the European economy and a related reduction of unemployment levels based on stable and more liquid capital markets. The CMU is a framework programme that is also a response to decreasing bank financing activity resulting from higher capital and liquidity requirements for financial institutions, and is designed to ultimately open alternative non-bank funding channels in support of efficient capital allocation throughout the EU, leading to a broader and more efficient financial system. In 2017, the European Commission launched its mid-term review of the CMU and its establishment has been driven further by, *inter alia*, measures to harmonise personal pension products within the EU, amendments to the European venture capital funds and the European social entrepreneurship funds regulations, as well as the announcement of new tax guidance by the European Commission to facilitate transactions by cross-border investors.[25] It remains to be seen what the impact of the CMU initiative will be in the mid to long term.

Although the number of IPOs has somewhat increased since the beginning of the European financial crisis in 2008, equity capital markets activity in Germany remains characterised by investors favouring large liquid and already publicly traded stocks over small to medium-sized IPOs and private equity firms exiting from their investments in dual-track processes, which often results in a trade sale. As spin-offs and carve-outs from large German corporates have, in recent months and years, dominated the German IPO market (e.g., Lanxess, Osram, Uniper, Innogy), it is likely that such trend will continue in the future (e.g., the contemplated spin-offs of the healthcare business of Siemens and the asset-management business of Deutsche Bank). Overall, market volatility and attempts to de-risk IPO transactions through pre-IPO placements, cornerstone investments and reducing the time to market have become the 'new normal' in German capital markets, and in particular, IPO activity.

25 The progress on the CMU action plan is available at: www.ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en.

Chapter 5

HONG KONG

Christopher Betts, Antony Dapiran and Anthony Pang[1]

I INTRODUCTION

While 2017 saw Hong Kong's initial public offering (IPO) market lose its top ranking to New York in terms of total funds raised, it will primarily be remembered as the year in which privately owned enterprises overtook Chinese state-owned enterprises as the key driver of the market, with seven of the top 10 IPOs being made by private enterprises, of which four were technology-related or 'new economy' companies. Even more significantly, in December 2017, the Stock Exchange of Hong Kong Limited (HKEx) announced that it proposed to revise the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the Listing Rules) to facilitate the listings of (1) companies with dual-class share structures (or what the HKEx refers to as 'weighted voting rights (WVRs)'), (2) pre-revenue biotech companies and (3) companies with a 'centre of gravity' in China and an existing listing on certain foreign stock exchanges. These amendments to the Listing Rules, which were subsequently outlined in a consultation paper issued by the HKEx in February 2018, represent the most significant change to the Hong Kong IPO regulatory landscape since the first 'H share' IPO in 1993 (which created the framework for listing companies incorporated in China), and are expected to lead to a wave of new technology and biotech companies listing in Hong Kong.

The Securities and Futures Commission of Hong Kong (SFC) is the primary regulator for the Hong Kong securities market and is also responsible for the licensing and supervision of stock exchanges – which is currently limited to the two boards operated by the HKEx: the Main Board and the Growth Enterprises Market (GEM) board. IPOs are currently reviewed by both the SFC and the HKEx, the latter of which is broken down into the Listing Division, responsible for vetting listing applications, and the Listing Committee, which is responsible for approving (or rejecting) listing applications submitted to it by the Listing Division at the end of the vetting process.

Hong Kong adopts a substantive merits-based IPO review process with the aim of protecting retail investors by preventing problematic or risky companies from listing on the HKEx. This approach differs from other markets that have disclosure-based regimes (most notably the United States), and is driven in large part by the fact that Hong Kong law does not currently permit shareholders' class action law suits, litigation funding or contingency-based legal fees for contentious legal matters (thus significantly reducing any risk of post-IPO shareholder litigation), and also by the fact that controlling shareholders and directors of

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Hong Kong listed companies are typically not situated in Hong Kong (thus reducing the chances of any successful litigation or enforcement actions being brought against them). The high degree of retail participation in the Hong Kong market also leads regulators to take a highly protective approach to regulation.

Both the SFC and the HKEx have the power to object to a listing application – in the case of the SFC, that power is contained in subsidiary legislation to the Securities and Futures Ordinance (SFO), which states that the SFC may object to a listing if it does not believe that it is in the interest of the investing public or the public interest, and in the case of the HKEx in Rule 8.04 of the Listing Rules, which states that a listing applicant must, 'in the opinion of the [HKEx], be suitable for listing'. While there is some official guidance as to circumstances in which the HKEx may question 'suitability', the term is deliberately not defined and leaves the HKEx with significant discretion.

II GOVERNING RULES

IPOs in Hong Kong are governed by a mix of both law and rules. The relevant laws are primarily the SFO and Companies (Winding Up and Miscellaneous Provisions) Ordinance (CO), while the primary rules are the Listing Rules and their GEM board counterpart. The SFO governs offerings of securities in Hong Kong generally, while the CO contains provisions with regard to prospectuses issued in connection with securities offerings. The Listing Rules, which are regularly supplemented by the HKEx by way of Guidance Letters and Listing Decisions, set out detailed provisions regarding the application process for listing securities on the HKEx. The Listing Rules are not law but rather operate as the terms of a contract between the HKEx and each listed issuer.

i Main stock exchanges

The HKEx, which is wholly owned by Hong Kong Exchanges and Clearing Limited (itself a public company whose shares are listed on the HKEx) is the sole stock exchange operator in Hong Kong and operates both the Main Board and the GEM board. The Main Board is the principal and most important exchange in Hong Kong. While for many years Chinese state-owned enterprises have represented the majority of funds raised and the largest deals, the balance has now shifted towards privately owned enterprises. The December 2016 US$630 million IPO of Meitu, Inc initiated a wave of new economy listings in 2017, with the US$1.53 billion IPO of ZhongAn Online P&C Insurance Co Ltd, the US$1.06 billion IPO of China Literature Limited and the US$870 million IPO of Yixin Group Limited representing the three largest tech IPOs of 2017 and three of the four largest IPOs overall.

The GEM board was introduced in 1999 with a view to it being positioned as a Hong Kong equivalent to the Nasdaq, but following an extended period of muted activity its position became largely one of providing a means of listing smaller companies in often quite traditional industries whose shareholders may subsequently look to sell their companies' listed status. The shift away from its initial goals culminated in the HKEx announcing in December 2017 that it would revamp the GEM board rules to raise the qualifications for listing, remove an existing process whereby companies could transition from the GEM board to the Main Board, and impose extended post-IPO lock-up requirements on controlling shareholders. The new rules took effect in February 2018. Nevertheless, for smaller companies with limited operating histories or that are yet to generate a profit, the GEM remains a viable option.

To reduce its reliance on China-based issuers, the HKEx has actively sought to attract businesses without a dominant Hong Kong or China nexus to list in Hong Kong. Past initiatives by the HKEx have included a set of policies facilitating the listing of companies incorporated by foreign jurisdictions outside of Hong Kong and certain other recognised jurisdictions, providing for extensive relaxations of Listing Rules requirements for international companies seeking a secondary listing in Hong Kong, introducing a chapter of the Listing Rules focused on mining companies, and introducing a 'Hong Kong depository receipt' regime. Some of the listings to take advantage of these initiatives have included companies such as Fast Retailing, Prada, Glencore, Prudential and Coach (though Fast Retailing was back in early 2014). For foreign companies, the most significant potential benefit of an IPO or listing on the HKEx would be access to China-based capital, as Chinese government-controlled pension funds are not restricted from investing in Hong Kong securities (unlike securities in other markets), and China-based retail investors can also trade in HKEx listed securities through the Shanghai–Hong Kong Stock Connect and Shenzhen–Hong Kong Stock Connect programmes. The HKEx recently announced amendments to the rules regarding listings of companies with an existing listed status on a foreign exchange that will permit companies that are listed on certain reputable exchanges (including the NYSE and the LSE) to obtain a secondary listing in Hong Kong, even if they have a 'centre of gravity' in China – a move clearly designed to attract the likes of Alibaba, Baidu and JD.com to list in Hong Kong.

ii Overview of listing requirements

Objective requirements

Companies seeking to list on the HKEx must either be incorporated in one of a prescribed list of jurisdictions (namely, Hong Kong, China, Bermuda or the Cayman Islands (the recognised jurisdictions)), or a published list of other jurisdictions that the HKEx and SFC have, through a test case, accepted as having shareholder protections comparable to those under Hong Kong law and the Listing Rules (the acceptable jurisdictions). Companies incorporated outside the recognised and acceptable jurisdictions can still list on the HKEx, but must first make a submission to the HKEx and SFC comparing the shareholder protections under the laws of the jurisdiction in which it is incorporated with those of Hong Kong, and describing measures the company proposes to adopt to address any discrepancies (such as amendments to its constitutional documents).

A company applying to list on the Main Board must have a trading record of at least three full financial years and meet any one of the three following financial tests:

a 'profits test': at least HK$50 million in profits attributable to shareholders in the last three financial years (with profits of at least HK$20 million recorded in the most recent year, and aggregate profits of at least HK$30 million recorded in the two years prior);

b 'market cap/revenue test': a market cap of at least HK$4 billion at the time of listing and at least HK$500 million in revenue during the most recent audited financial year; and

c 'market cap/revenue/cash flow test': a market cap of at least HK$2 billion at the time of listing, revenue of at least HK$500 million for the most recent audited financial year and positive cash flow from operating activities of at least HK$100 million in aggregate for the three preceding financial years.

In addition, a listing applicant must have management continuity for at least three preceding financial years, which generally requires that there has been no change in the majority of its board of directors or senior management team during the three financial years track-record period. Also, there has to be a continuous ownership and control of the voting rights attaching to the shares for the latest financial year of the trading record period by the controlling shareholder or, where there is no controlling shareholder, a single largest shareholder. Under test (b) the HKEx may accept a trading record period of less than three years provided the company has been under substantially the same management for one full financial year and the management meets certain industry experience requirements.

Relaxations of the objective criteria may also be available to infrastructure, mining and other companies – though few such companies have listed in the past decade. As noted above, the HKEx is also in the process of adopting new rules to permit pre-revenue biotech companies to list. These rules are expected to require that such companies have been in operation for not less than two years, have at least one product, process or technology that has proceeded beyond the concept stage (for example, having passed Phase I stage in relation to the clinical trial of a drug regulated by relevant drug and safety authorities such as the FDA (US), CFDA (China) or EMA (Europe) and has received all the necessary regulatory approvals to proceed to Phase II, and have a market capitalisation at the time of listing of not less than HK$1.5 billion.

At the time of the listing and thereafter, a company must have at least 25 per cent of its total issued share capital held by the public. However, the HKEx may accept a lower public float percentage (between 15 per cent and 25 per cent) if a company has an expected market capitalisation at the time of the listing of over HK$10 billion. The following persons will not be regarded as members of the 'public':

a 'connected persons' of the company (see Section IV.v for a definition of 'connected persons');

b any person whose acquisition of securities has been financed directly or indirectly by a connected person; and

c any person who is accustomed to taking instructions from a connected person with regard to the acquisition, disposal, voting or other disposition of the securities held by such person.

At the time of the listing, a company must have at least 300 shareholders, and at the time of listing no more than 50 per cent of a company's shares held in public hands can be beneficially owned by the three largest public shareholders. At the time of the listing, the expected market capitalisation of a company's securities held by the public must be at least HK$50 million and the total expected market capitalisation must be at least HK$200 million.

Companies listing on the GEM board are subject to lesser objective listing standards, such as only a two-year trading record requirement, and must (from February 2018) have achieved a positive cash flow of HK$30 million during the two years prior to listing (without having necessarily achieved a profit).

Further, there are a number of corporate governance-related requirements that must be met in order to list, such as the need for a company's board of directors to be comprised of not less than one-third independent non-executive directors, subject to a minimum of three, and to establish audit, remuneration and nomination committees.

Subjective requirements

As noted above, the HKEx and SFC will conduct a substantive review of listing applicants to determine whether they are suitable for listing. The suitability rules have, through the years, been interpreted broadly to render companies with a variety of issues as being unsuitable for listing. These issues, most of which are captured in HKEx Guidance Letter: HKEx-GL68-13, include:

a concerns over the integrity and suitability of directors and shareholders;
b historical breaches of laws or regulations;
c deteriorating financial performance;
d over-reliance on a controlling shareholder;
e customer or supplier concentration;
f a lack of key licences and permits; and
g business models considered to be unsustainable by the HKEx.

The HKEx also has specific rules relating to the use of variable interest entity (VIE) structures, which are contractual arrangements used to control entities where direct legal ownership is not possible. VIE structures are often used to control domestic Chinese businesses operating in industries that are subject to foreign ownership restrictions, such as technology-related sectors. HKEx policy requires that the businesses held through VIE structures must be narrowly tailored to situations where there is a clear regulatory barrier to direct legal ownership, and the contracts underlying the VIE structure must also conform to HKEx requirements. The HKEx has used non-compliance with its policy on the use of VIE structures as the basis for determining that a company is unsuitable for listing on a number of occasions.

Due to the high level of discretion exercised by the HKEx in considering whether a company is suitable for listing, it is relatively common for companies with any concerns regarding their suitability to approach the Listing Division of the HKEx in advance of submitting a formal listing application in order to seek their preliminary views with regard to any issues of concern.

Finally, it should be noted that the HKEx has strict guidelines regulating pre-IPO investments that, in a worst case scenario, can require investment agreements to be amended and restated and lead to a 120-day delay to an IPO timetable if not complied with. It is therefore prudent for companies seeking pre-IPO investments to consult with a Hong Kong lawyer prior to an investment being made to ensure that any investment is structured appropriately. Note that the principle of 'fair and equal treatment' of shareholders under the Listing Rules will require that most special shareholder rights granted to pre-IPO investors will be required to fall away upon IPO.

Proposals regarding companies with WVRs

In February 2018, the HKEx released a draft of the proposed rules relating to the listing of companies with weighted voting rights (WVRs). There are a number of requirements that companies with WVRs will be expected to be able to meet. Among others:

a applications will be restricted to 'innovative' companies by reference to characteristics set out in a guidance letter to be issued. Currently, the HKEx has indicated that an innovative company would normally be expected to possess one or more of a number of characteristics, including its success being demonstrably attributable to the application of new technology; innovation; business model to the company's core business, which also serves to differentiate the company from existing players; and research and development, a significant contributor to expected value, constituting major activity and expense;

b companies should have an expected market capitalisation upon listing of not less than HK$10 billion, and if the market capitalisation is less than HK$40 billion, they will also need to have at least HK$1 billion in revenues in the most recent financial year;

c all WVR holders must have been materially responsible for the growth of the business, by way of their skills, knowledge or strategic direction where the value of the company is largely attributable or attached to intangible human capital;

d all WVR holders must have an active executive role within the business, and contribute to a material extent to the ongoing growth of the business;

e all WVR holders are or would assume the role of director of the issuer at the time of listing;

f the company must have received meaningful (being more than just a token investment) third-party funding from sophisticated investors (including financial institutions). Such investors will be required to retain an aggregate 50 per cent of their investment at the time of listing for a period of at least six months post IPO (subject to exceptions for *de minimis* investments by specific investors);

g after listing, issuers with WVR structures will be prohibited from increasing the proportion of weighted voting rights in issue or issue any further WVR shares (other than in the case of *pro rata* offerings to all shareholders);

h WVRs must be capped at no more than 10 times the voting power of ordinary shares;

i certain key matters must be decided on a one-share one-vote basis, including material changes to the issuer's constitutional documents, variation of rights attached to any class of shares, the appointment and removal of independent non-executive directors, the appointment and removal of auditors, and the winding-up of the company;

j the HKEx will require a mandatory corporate governance committee comprised of independent directors to ensure that the company is operated and managed for the benefit of all shareholders; the company complies with Hong Kong rules; and the issuer engages a compliance adviser on a permanent basis. Directors and senior management will also be required to undergo appropriate training on WVR and its associated risks; and

k the HKEx will place restrictions on a WVR holder's ability to transfer the weighted voting rights attached to their shares and impose a requirement that a beneficiary's WVRs fall away if he or she ceases to be a director, dies or becomes incapacitated.

The consultation period for the draft rules ends on 23 March 2018, with their adoption expected to take place within a month or two of such date. It is anticipated that the consultation process will lead to some changes to the rules from their draft form.

Procedural requirements

The Listing Rules, as supplemented by HKEx Guidance Letters, set out a number of procedural requirements that must be followed when preparing for an IPO in Hong Kong.

Companies seeking to list securities on the HKEx must appoint one or more sponsor banks for their listing not less than two months prior to the date on which they propose to submit their listing application. Sponsors must be licensed with the SFC to provide corporate finance advice, and are typically investment banks that also act as underwriters on the IPO. Multiple sponsors can be appointed, but at least one must be independent from the company by reference to a number of criteria set out in Rule 3A.07 of the Listing Rules.

The principal role of the sponsor is to guide the company through the IPO process, act as the main communication channel between the company and the regulators, and provide various confirmations to the HKEx throughout the IPO process (including that, based on their diligence performed, they are satisfied that the company is suitable for listing). For the reasons described above, and as Hong Kong's regulators have limited enforcement tools when dealing with bad corporate actors (in particular where a listing application is ultimately unsuccessful), the regulators place a very high degree of importance on the role of the sponsor, and sponsors are required (under the Listing Rules and a code of conduct issued by the SFC) to undertake a rigorous diligence exercise in respect of companies wishing to list in Hong Kong. This diligence includes visits to key business sites and interviews with key customers, suppliers and providers of finance. Companies with experience in other markets regularly find the diligence requirements of a Hong Kong IPO significantly more onerous than what they are accustomed to.

The formal phase of the listing application process begins with the filing by the sponsor or sponsors of a prescribed listing application form (the Form A1) with the Listing Division of the HKEx, accompanied by a non-refundable deposit of the initial listing fee, together with an advanced draft of the Hong Kong prospectus and other prescribed documents. A version of the draft prospectus submitted at the time of the listing application must be made available to the public via the website of the HKEx. This contrasts with other markets (most notably the United States, which has steered away from public filings pursuant to the JOBS Act). Exemptions from the public disclosure requirement are available to companies with an existing listing on an exchange outside of Hong Kong. The A1 Filing must be made not less than 25 clear business days prior to the proposed date of the Listing Hearing although, as a practical matter, the vetting process regularly results in the time between the A1 Filing and the Listing Hearing being longer than this.

Once the Listing Division has completed its review of a listing applicant, it will submit the application to the Listing Committee (an independent committee comprised of a broad range of market participants, including bankers, lawyers, accountants, investor representatives and other stakeholders) for the final determination as to whether or not the company should be permitted to list. In principle, once the approval to list is given by the Listing Committee, a company may proceed with its offering process. In practice, very few listing applications are formally rejected, with problematic applications invariably being withdrawn or lapsing before any formal decision is made by either of the regulators.

iii Overview of law and regulations

As noted above, the principal laws governing Hong Kong IPOs are the SFO and the CO. The SFO provides that offerings of securities in Hong Kong can only be made if authorised by the SFC, and prohibits investments to be advertised in Hong Kong other than by way of a prospectus. The CO sets out the principal content requirements for prospectuses issued in connection with Hong Kong IPOs (which are supplemented by further content requirements in the Listing Rules). These content requirements include (but are not limited to):

a information about the securities to be listed and the company's share capital;

b an overview of the industry (including a regulatory overview);

c general information about the company's business and assets;

d financial information about the company, including an accountant's report, usually prepared in accordance with International Financial Reporting Standards (although certain other reporting standards are acceptable);

e management discussion and analysis of financial condition;
f a description of the relationship between the company and its controlling shareholder (including any connected transactions);
g a property valuation (if the company is engaged in a property business or the book value of any of its properties represents more than 15 per cent of its total assets);
h information about the company's management, directors, securities held by the directors and directors' service contracts;
i details of shareholders holding 5 per cent or more of the share capital;
j a description of how the IPO proceeds are to be used; and
k various material contracts and other documents must be made available for public inspection.

The general disclosure standard for a Hong Kong prospectus is that it must contain such particulars and information as are necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the company, its profits and losses, and rights attaching to the securities offered.

The directors are jointly and severally liable for the accuracy of the information set out in the Hong Kong prospectus, and are required to confirm that, to the best of their knowledge and belief, after all reasonable inquiry, the Hong Kong prospectus is accurate and complete in all material respects, not misleading or deceptive, and does not omit any facts that would result in the Hong Kong prospectus being misleading. Any misstatement in, or omission from, the Hong Kong prospectus may attract civil liabilities pursuant to the CO, the SFO, tort and contract law, as well as criminal liabilities pursuant to the CO, the Theft Ordinance and the SFO.

III THE OFFERING PROCESS

i General overview of the IPO process

Most Hong Kong IPOs, or at least those raising a material level of funds, are comprised of a Hong Kong public offer (HKPO) tranche to retail investors in Hong Kong and an international placing tranche to institutional investors, often sold into the United States and to US investors outside the US, pursuant to exemptions from registration under Rule 144A and Regulation S of the US Securities Act of 1933, as amended. The international tranche is conducted by way of a book-built offering led by the company's investment banks.

The HKPO is conducted on the back of a Hong Kong prospectus (which must be issued in both English and Chinese languages) and corresponding English and Chinese application forms, which are distributed to the public through one (or more) retail banks in Hong Kong engaged by the issuer for such purposes. For the international tranche, an offering circular will be prepared that is typically comprised of the Hong Kong prospectus, surrounded by a 'wrap' containing certain summary terms, risk factors and other disclosures that are specific to US or other international investors.

Practice Note 18 of the Listing Rules (PN18) dictates that the minimum initial allocation to the HKPO must be 10 per cent of the total number of shares offered in the IPO, and that up to an additional 40 per cent of the total shares offered under the IPO must be 'clawed back' to the HKPO from the international placing tranche in the event of over-subscription by public investors under the HKPO (thus, for particularly 'hot' IPOs, the Hong Kong public may end up being allocated 50 per cent of the deal; although, for very large IPOs, it is possible to apply to the HKEx for relaxation of the PN18 requirements).

An investor can only receive shares either in the international placing or the HKPO, but not both. Alternatively, where demand under the HKPO does not meet the initial 10 per cent offered, the shortfall may be reallocated to the international placing tranche.

A pervasive feature of Hong Kong IPOs is cornerstone investors, who are either strategic or financial investors that agree in writing to subscribe for a fixed dollar amount of shares as part of the international placing tranche shortly prior to the bulk-printing of the offering documents at the IPO price (i.e., the price for the shares offered to the public in Hong Kong). Most sizeable IPOs in recent years have had a substantial (20 per cent to 50 per cent) part of their international placing tranche acquired by cornerstone investors; for example, the SoftBank Vision Fund subscribed for US$500 million of the US$1.53 billion in shares available in ZhongAn Online P&C Insurance's 2017 IPO. Appropriate disclosures are required to be made in the offering documents in relation to cornerstone investors, including a brief background summary of the investor and a short description of the terms of the cornerstone agreement. The shares subscribed to by the cornerstone investors are usually subject to a lock-up period of six months following the date of the listing.

Appendix 6 of the Listing Rules (also referred to as the Placing Guidelines) sets out certain rules and restrictions applicable to the international placing, including that:

a there should be no fewer than three shareholders for each HK$1 million of the placing, with a minimum of 100 shareholders;

b unless prior written consent from the HKEx is obtained, no allocation is permitted to 'connected clients' of the underwriters (i.e., their holding companies, shareholders holding 10 per cent or more of their voting rights, or affiliates), directors or existing shareholders of a company, or their associates or nominee companies, unless the names of the ultimate beneficiaries are disclosed; and

c each of the brokers involved in the placing must submit to the HKEx a marketing statement and placee list containing details of placees, and the names and addresses of the beneficial owners of the shares.

Under the Placing Guidelines and Listing Rule 10.04, existing shareholders are not permitted to subscribe for shares under the international placing without prior consent from the HKEx, which is only granted if the offering of shares under the IPO is undersubscribed and the offer price of the shares is fixed at the bottom end of the initial indicative price range (or the shareholders are subscribing for additional shares at IPO pursuant to pre-existing anti-dilution rights).

All Main Board IPOs will also involve an option granted to the underwriters (either by the company or a selling shareholder) enabling the underwriters to require the company to issue (or the selling shareholder to sell) additional shares representing up to 15 per cent of the number of shares initially available under the IPO for the purpose of covering over-allocations in the international placing. The purpose of this overallotment option (or 'greenshoe option') is to facilitate the underwriters making stabilisation purchases in the after-market.

It is worth noting that Hong Kong remains a market where investment banks are permitted to issue pre-deal research reports, subject to compliance with certain guidelines with regard to independence and other matters, and that it is common for underwriting banks to issue pre-deal research in advance of an IPO.

Controlling shareholders (holding 30 per cent or more of the company at the time of listing) are subject to a post-IPO lock-up set out in Listing Rule 10.07. This prohibits a controlling shareholder from disposing of any shares in the first six months following an IPO, and a controlling shareholder cannot dispose of any shares in the six months following the first six-month period to the extent that its shareholding falls below 30 per cent. The controlling shareholder can be a single person or a group of persons. Companies are also prohibited from issuing any new shares during the first six-month period, with the limited exception of any shares that may be issued pursuant to management or employee equity ownership schemes, or pursuant to the overallotment option.

ii Considerations for foreign issuers

As noted in Section II.i, one of the principal considerations for foreign issuers in selecting Hong Kong as a listing venue is the potential liquidity and valuation benefits of Hong Kong's accessibility to China-based investors, including pursuant to the Shanghai–Hong Kong Stock Connect and Shenzhen–Hong Kong Stock Connect programmes. Valuations of companies on the Shanghai and Shenzhen exchanges are typically higher than those for comparable companies on non-Chinese exchanges, and there is a perception that Hong Kong listed companies may benefit from the connection to Chinese markets in this regard, together with the added trading volume that the programmes provide.

There are a number of quirks to Hong Kong IPOs that can often challenge foreign issuers. These include:

a the need to produce a Chinese-language prospectus for which directors must accept individual personal liability;

b the SFC expectation that the content of the Hong Kong prospectus be verified, which is a process that involves a company (and its directors or management) providing written documents to evidence or support all statements in the prospectus (including documents evidencing the educational qualifications and work experience of directors or management);

c the requirement that a company register with the Companies Registry of Hong Kong (as a non-Hong Kong company), which necessitates a filing of the residential address and identification document number of each director (that is publicly available);

d the intrusive and burdensome diligence and documentary requirements;

e the relatively broad discretion exercised by the HKEx to interpret, and grant waivers from, the Listing Rules; and

f complex and detailed rules on connected transactions (see Section IV.v).

IV POST-IPO REQUIREMENTS

The Listing Rules set out a number of ongoing compliance requirements, principal among which are the following.

i Ongoing disclosures

Companies must issue announcements if there are any material developments that would reasonably be expected to impact their share price or trading volume ('inside information') as soon as is practicable. This is a legal requirement contained in the SFO, which provides for potential civil and criminal liability for any failures to disclose inside information, or a failure to disclose it promptly. The Listing Rules also set out a number of prescribed situations where announcements must be made (such as the resignation of directors, issuances of new securities, etc.). Announcements must be issued simultaneously in both English and Chinese, and posted on the websites of the company and HKEx during certain specified posting windows outside market hours.

ii Periodic reporting

Companies must issue annual and interim results announcements within three months and two months, respectively, of the end of their fiscal full and half years. Companies must also issue annual and interim reports to shareholders. Quarterly reporting is optional. Companies are also required to make monthly filings with the HKEx in relation to their share capital and any changes thereto, as well as 'next day' filings upon any new share issuances or share repurchases. Directors are prohibited from dealing in any securities of a company during the 60-day and 30-day periods prior to the issue of annual and interim results announcements, respectively.

iii Disclosure of interest filings

Directors are required to submit filings (within 10 business days of an IPO, and thereafter within three business days) detailing their interests in the share capital (including short positions and options) of a company. Subsequent filings must be made upon the occurrence of any changes. Similarly, other parties must make filings of their interest upon acquiring 5 per cent or more of the issued share capital of a company, and make subsequent filings upon the occurrence of certain changes (primarily if their interest increases or decreases through a full percentage – for example, from 5.4 per cent to 6.2 per cent).

iv Corporate governance requirements

Companies must continue to comply with various corporate governance requirements (including the board composition and committee requirements outlined above). A company secretary meeting certain qualification requirements must also be appointed.

v Notifiable and connected transactions

Transactions (including acquisitions and disposals) above certain size thresholds, or with certain 'connected' parties, are subject to announcement, shareholder approval and reporting requirements.

Broadly speaking, connected transactions are:

a transactions between a company (or any of its subsidiaries) and any of its 'connected persons' (which includes directors, CEOs or holders of 10 per cent or more voting rights of the company or any of its subsidiaries, and their respective associates); and

b certain other transactions in relation to the acquisition or disposal of an interest in a company, the subscription of shares on favourable terms, financial assistance, options and joint ventures where the counterparty is or could, as a result of the transaction, become a connected person of the company.

The purpose of the connected transactions requirements is to ensure that the interests of shareholders as a whole are taken into account by listed companies and to provide safeguards against connected persons taking advantage of their positions of influence. Connected transactions above certain thresholds require approval from disinterested shareholders in general meetings, though a variety of exemptions apply (such as exemptions for the provision of financial assistance to a listed company by a connected person, provided that it is on normal commercial terms and no security over the listed company's assets is granted in connection with the financial assistance).

V OUTLOOK AND CONCLUSION

The year 2018 promises to be a watershed for Hong Kong capital markets. The new Listing Rules relating to the listing of biotech companies and companies with WVRs are expected to be effective by June 2018 and presage a wave of biotech and new economy companies listing in Hong Kong, potentially including many of the 'unicorn' technology companies in China and elsewhere.

Chapter 6

INDIA

Bhakta Batsal Patnaik and Rachana Talati[1]

I INTRODUCTION

The Indian economy has witnessed a gradual recovery from 5.6 per cent gross domestic product (GDP) growth in 2012 to 2013, to 7.6 per cent growth in 2015 to 2016,[2] and GDP growth is forecast to reach 7.3 per cent in 2018.[3] According to the annual report published by the Securities and Exchange Board of India (SEBI) for 2016 to 2017, the amount raised through 106 initial public offerings (IPOs) in 2016 to 2017 nearly doubled by 96.4 per cent to 291.04 billion rupees as compared to 148.15 billion rupees[4] through 74 IPOs during 2015 to 2016.[5]

The companies recently listed on the stock exchanges in India were from diverse sectors such as advertising, dairy, food and beverages, entertainment, footwear, textile and insurance, as opposed to the previous trend, where only companies in certain sectors, such as banking, finance and information technology, would contemplate undertaking an IPO.

An IPO in India may comprise a fresh issuance of securities, an offer for sale of securities by the existing holders of securities or a combination of both. Further, an issuer proposing to list its securities on the stock exchanges in India may opt to list on the Main Board, the SME Exchange or the Institutional Trading Platform. The SME Exchange is a trading platform of a recognised stock exchange having nationwide terminals permitted by SEBI but does not include the Main Board. The Institutional Trading Platform is a trading platform for listing and trading of specified securities of entities that comply with the eligibility criteria laid down by SEBI. This chapter will be limited to the listing of equity shares on the Main Board as issuers predominantly opt to list on the Main Board in India.

II GOVERNING RULES

i Main stock exchanges

The two primary stock exchanges in India are BSE Limited (BSE) and the National Stock Exchange of India Limited (NSE).

1 Bhakta Batsal Patnaik is a partner and Rachana Talati is a senior associate at Trilegal.
2 International Monetary Fund – IMF Country Report No. 17154, available at www.imf.org/en/Publications/CR/Issues/2017/02/22/India-2017-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-Executive-44670, last accessed on 23 January 2018.
3 Global Economic Prospects, January 2018: Broad-Based Upturn, but for How Long?
4 US$1 = 65.22 rupees, as of 20 March 2018.
5 Securities and Exchange Board of India Annual Report 2016–17, available at www.sebi.gov.in/reports/annual-reports/aug-2017/annual-report-2016-17_35618.html, last accessed on 23 January 2018.

BSE was established in 1875, and was the first stock exchange in Asia and the fastest stock exchange in the world with a speed of six microseconds.[6] BSE provides a platform for trading in equities, currencies, debt instruments, derivatives and mutual funds, as well as trading in equities of small and medium-sized enterprises (SMEs). The SME platform targets small and medium-sized enterprises whose post-issue paid-up capital is less than or equal to 250 million rupees. The S&P SENSEX of BSE is the benchmark, market-weighted index that monitors the performance of the 30 largest, most liquid and financially sound companies across crucial sectors of the Indian economy, listed at BSE.[7]

NSE began operations in 1994 and was the fourth-largest exchange in the world by equity trading volume in 2015.[8] NSE provides a platform for trading in equity and equity linked products, including mutual funds and institutional placement programmes, and trading in derivatives and debt. The key index of NSE is NIFTY 50. It monitors the performance of stocks of 50 companies accounting for 12 sectors of the economy.[9]

It is essential for the entities that wish to list on the stock exchanges in India to conform and comply with initial listing and continued listing requirements under the uniform listing agreement, the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2009, as amended (ICDR Regulations) and the Securities and Exchange Board of India (Listing and Disclosure Requirements) Regulations, as amended (Listing Regulations).

The regulatory framework in India does not recognise the concept of dual listing. The securities laws as well as company laws in India will have to be overhauled to facilitate dual listing.

ii Overview of listing requirements

Any issuer proposing to undertake an IPO is required to comply with certain independent requirements of the relevant stock exchange on which it intends to list its equity shares as well as the eligibility requirements laid down by SEBI in the ICDR Regulations and the Listing Regulations. In addition, the issuer must also comply with the (Indian) Companies Act 2013 read along with the rules thereto, Securities Contract (Regulation) Act 1956 and Securities Contract (Regulation) Rules 1957 (SCRR), each as amended from time to time, and the foreign investment laws in India.

The minimum percentage of equity shares required to be offered to the public in an IPO by the issuer is as follows:

a at least 25 per cent of each class of equity shares must be offered to the public, if the post-IPO equity share capital of the issuer is less than or equal to 16 billion rupees;

b a percentage of equity shares equivalent to 4 billion rupees must be offered to the public, if the post-IPO equity share capital of the issuer is more than 16 billion rupees but less than or equal to 40 billion rupees; and

6 BSE – Introduction, available at www.bseindia.com/static/about/introduction.aspx?expandable=0, last accessed on 23 January 2018.

7 Asia Index Pvt Ltd, S&P BSE SENSEX, available at www.asiaindex.co.in/indices/equity/sp-bse-sensex, last accessed on 3 January 2018.

8 National Stock Exchange – About NSE, available at www.nseindia.com/global/content/about_us/about_us.htm, last accessed on 23 January 2018.

9 National Stock Exchange – Indices, available at www.nseindia.com/products/content/equities/indices/nifty_50.htm, last accessed on 23 January 2018.

c at least 10 per cent of each class of equity shares must be offered to the public, if the post-IPO equity share capital of the issuer is equal to or more than 40 billion rupees.

Requirements for undertaking an IPO

The issuer must meet certain criteria laid down by SEBI in order to undertake an IPO, including the following:

a it must have net tangible assets of at least 30 million rupees in each of the preceding three full years (of 12 months each), of which not more than 50 per cent are held in monetary assets;

b it must have a minimum average pre-tax operating profit of 150 million rupees, calculated on a restated and consolidated basis, during the three most profitable years out of the immediately preceding five years;

c it must have a net worth of at least 1 billion rupees in each of the preceding three full years (of 12 months each);

d the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size must not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;

e if it has changed its name within the last year, it must have earned at least 50 per cent of the revenue for the preceding full year from the activity indicated by the new name;

f the issuer, its promoters, promoter group, directors and persons in control of the issuer should not be debarred from accessing the capital markets by SEBI;

g the promoters, directors and persons in control of the issuer were not or are not also promoters, directors or persons in control of any other company which is debarred from accessing the capital market under any order or directions of SEBI;

h the issuer, its promoters and directors should not be categorised as wilful defaulters by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the Reserve Bank of India (RBI); and

i all existing partly paid equity shares of the issuer have either been fully paid-up or forfeited.

If the issuer does not satisfy the criteria specified in points (a) to (e) above, it may undertake an IPO wherein at least 75 per cent of the net offer to the public has to be compulsorily allotted to qualified institutional buyers, failing which, the subscription monies must be refunded and the IPO fails.

Further, in terms of the ICDR Regulations, an issuer cannot undertake an IPO if there are any outstanding convertible securities or any other rights which would entitle any person listing any option to receive equity shares.

Statutory lock-in

At least 20 per cent of the post-issue paid-up capital held by the promoters is required to be locked in for a period of three years. The remaining shareholding of the promoters and all other shareholders is subject to a one-year lock-in period. This, however, is not applicable to equity shares (1) allotted to employees under any stock option scheme prior to the IPO; and (2) held by a venture capital fund or alternative investment fund of category I or category II or a foreign venture capital investor.

If the post-issue shareholding is less than 20 per cent, alternate investment funds may contribute for the purpose of meeting the shortfall in minimum contribution as specified for the promoters, subject to a maximum of 10 per cent of the post-issue capital of the issuer.

The 20 per cent lock-in requirement is not applicable if the issuer does not have any identifiable promoters.

Rejection criteria

SEBI may also reject the draft offer document in accordance with the ICDR Regulations and Securities and Exchange Board of India (Framework for Rejection of Draft Offer Documents) Order 2012 (Rejection Order) on various grounds, such as:

a the ultimate promoters are unidentifiable;
b the purpose for which the funds are being raised is vague;
c the business model of the issuer is exaggerated, complex or misleading and the investors may be unable to assess risks associated with such business models;
d there is a sudden spurt in business before the filing of the draft offer document and replies to the clarification sought are not satisfactory; or
e outstanding litigation that is so major that the issuer's survival is dependent on the outcome of the pending litigation.

iii Overview of law and regulations

SEBI was established in 1992 in accordance with the provisions of the Securities and Exchange Board of India Act 1992, as amended. SEBI is an autonomous body established to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for connected matters.

The ICDR Regulations issued by SEBI contain detailed provisions governing the initial public offering to the public and provide detailed guidelines in relation to the:

a disclosure requirements;
b formats of the various due diligence certificates to be provided by the merchant bankers appointed for the IPO;
c eligibility requirements;
d publicity guidelines;
e method for undertaking the IPO, including the opening and closing of the issuance; and
f conditions relating to pricing in IPOs.

In addition, the Listing Regulations issued by SEBI cover principles, common obligations and continued disclosure requirements for all entities that have already been listed on any of the stock exchanges in the country. The Listing Regulations also lay down all the conditions of corporate governance to be followed by a listed entity.

When an entity is undertaking an IPO, the entity is required to comply with the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 2015 (Insider Trading Regulations) and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations), each as amended from time to time. The Insider Trading Regulations, which were notified in January 2015, have widened the scope of insider trading regulations in India by making it applicable to entities which are proposed to be listed. In terms of the Insider Trading Regulations, no issuer is permitted to communicate, provide or allow access to any unpublished price sensitive information, relating to a company whose securities are listed or proposed to be listed, or any person including other insiders except where such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations. When an investor is investing is equity shares of the issuer, it has to ensure that such an acquisition does not attract the provisions of the Takeover Regulations.

In addition, an entity is required to comply with, among others, disclosure requirements specified under the Companies Act 2013, as amended, read with the relevant rules thereunder. The entity is also required to comply with the various circulars and guidelines issued by the RBI, from time to time, in relation to the foreign investment. The transfer of shares between an Indian resident and a non-resident does not require prior approval of the relevant governmental authorities, provided that activities of the investee company are under the automatic route under the foreign direct investment policy and do not attract the provisions of the Takeover Regulations; the non-resident shareholding is within the sectoral limits under the foreign direct investment policy; and the pricing is in accordance with the guidelines prescribed by the relevant governmental authorities such as SEBI and RBI.

III THE OFFERING PROCESS

i General overview of the IPO process

An IPO process in India typically takes seven to nine months. However, the timeline may vary depending upon factors such as the complexities involved in the transaction, including restructuring of the issuer, preparation of *pro forma* financial statements in the event that the issuer has acquired or divested business in the recent past, compliance with law, receipt of all necessary regulatory approvals and other market conditions.

The key parties involved in an IPO process are as follows.

Merchant bankers

The issuer is required to appoint at least one or more merchant bankers, registered under the Securities and Exchange Board of India (Merchant Bankers) Regulations 1992, as the merchant bankers and at least one of them must be the lead merchant banker. SEBI holds the merchant bankers primarily responsible for ensuring compliance with the disclosure requirements and other rules relating to the IPO process. The issuer can file the offer documents with SEBI only through a merchant banker.

Legal counsel

The Indian legal counsel to the issuer undertakes legal due diligence, advises on the Indian laws applicable to the issuer and the IPO, and assists in drafting the non-business sections of the offer document. The merchant bankers typically appoint a separate law firm to act as their Indian legal counsel in the transaction.

The international legal counsel undertakes legal due diligence, advises on international legal and regulatory issues relating to offer, sale and distribution of shares, and assists in drafting the business-related sections of the offer document in larger transactions.

Auditors

The auditors audit and restate the issuer's financial statements for inclusion in the offer document. They verify and certify the accuracy of the financial statements presented in the offer document and also issue 'comfort letters' to the merchant bankers at various stages in the IPO process.

Registrar to the IPO

The registrar to the IPO is required to accept application forms from the investors in the IPO, process application forms and co-ordinate the process for allotment of equity shares and refund of subscription moneys where equity shares are not allotted to the investor.

Designated intermediaries

Designated intermediaries are entities that are authorised to collect the application forms from investors intending to subscribe in the IPO. The designated intermediaries include the merchant bankers, syndicate members, collecting depository participants, sub-syndicates or agents, self-certified syndicated banks, registrar and share agents, and registered brokers.

Advertising agency

An advertising agency is responsible for the publicity-related activities in relation to the IPO and also provides the necessary information to the merchant bankers to enable them to submit a compliance certificate to SEBI.

Monitoring agency

The ICDR Regulations require that if the issue size of the IPO (excluding the offer for sale) exceeds 1 billion rupees, the issuer is required to ensure that the utilisation of IPO proceeds is monitored by a public financial institution or by one of the scheduled commercial banks named in the offer document as the banker of the issuer. Such monitoring agency will be required to submit its report to the issuer in the format specified in the ICDR Regulations on a quarterly basis until 95 per cent of the proceeds of the issue have been utilised.

Brief overview of the timelines for the listing process

Below is a brief step-by-step overview of the listing process in India:

S. No.	Particulars	Timelines (due date)
1	Kick-off meeting and commencement of due diligence process.	T-120
2	The legal counsels along with the help of the issuer and the merchant bankers conduct the due diligence of the issuer and prepare the draft offer document.	T-90
3	Execution of issue agreement and registrar agreement: the issue agreement between the merchant bankers and the issuer sets out the mutual rights, obligations and liabilities relating to the IPO. It sets out, among others, the roles and responsibilities of the merchant bankers, the conditions precedent to the merchant bankers' obligations, representations and warranties from the issuer and merchant bankers, details of the indemnity provided by the issuer to the merchant bankers, and provisions for termination of the merchant bankers engagement. If the IPO has an offer for sale component, the selling shareholder is also a party to the issue agreement. The registrar agreement sets out the duties of the registrar and the responsibilities of the issuer and the registrar regarding each other.	T
4	Filing of the draft offer document (Draft Red Herring Prospectus or DRHP) with SEBI.	T
5	The DRHP filed with SEBI is made public for comment for a period of at least 21 days from the date of such filing, by hosting it on the websites of SEBI, recognised stock exchanges where specified securities are proposed to be listed, and the merchant bankers associated with the IPO.	T+21
6	Receipt of in-principle approval from the stock exchanges.	T+21/25
7	Receipt of SEBI final observations:[1] SEBI has to provide observations or changes to be made to the DRHP within 30 days from (1) the date of receipt of the DRHP; (2) the date of receipt of satisfactory reply from the merchant bankers, where SEBI has sought any clarification or additional information from them; (3) the date of receipt of clarification or information from any regulator or agency, where SEBI has sought any clarification or information from such regulator or agency; or (4) the date of receipt of a copy of the in-principle approval letter issued by the stock exchanges.	T+45

S. No.	Particulars	Timelines (due date)
8	Filing of the updated DRHP with SEBI.	T+55
9	Grant of SEBI approval for filing with the relevant Registrar of Companies (RoC).	T+57
10	Execution of the syndicate agreement, the share escrow agreement[2] and the cash escrow agreement: the syndicate agreement sets out the roles and obligations of, and the relationship between, the merchant bankers and the other banks in the underwriting syndicate. This agreement lists out the role and obligations of each syndicate member. The issuer and the selling shareholders, if any, are confirming parties to the syndicate agreement. The cash escrow agreement sets out the arrangement for collection of application or bid amount from anchor investors. This agreement is entered into amongst the issuer, the merchant bankers, the syndicate members, the escrow collection banks and the registrar (and the selling shareholders, in case of an offer for sale). This agreement also provides for the arrangement by which the funds in the escrow accounts are transferred to the refund account or the public issue account, as applicable. The share escrow agreement sets out the terms whereby the selling shareholders agree to place their respective offered shares in escrow in accordance with the terms of that agreement.	T+57
11	Filing of the Red Herring Prospectus (RHP) with the RoC.[3]	T+58
12	Grant of approval by RoC.	T+59
13	Publication of the price band advertisement.	T+60
14	Transfer of shares from the selling shareholder account to the public issue account bank.	T+62
15	Opening of the IPO.[4]	T+65
16	Closing of the IPO.[5]	T+68
17	Filing of the Prospectus with RoC.	T+69
18	Execution of the underwriting agreement: an IPO must be underwritten by merchant bankers and their respective syndicate members for which purpose the underwriting agreement is entered into by the merchant bankers, the syndicate members and the issuer, on the pricing date. Underwriting agreements for Indian IPOs contain provisions such as representations and warranties, covenants, termination provisions and indemnities. The underwriting in Indian IPOs is usually a 'soft underwriting' as primarily the issuer offers securities directly to potential investors and underwriters commit to purchase securities that remain unsubscribed after the pricing process is complete and the minimum subscription has been received.	T+70
19	Finalisation of the basis of allotment.	T+71
20	Allotment of shares to the applicants and credit of funds to the public issue account bank.	T+72
21	Application for final listing and trading approvals with the stock exchange or exchanges.	T+73
22	Commencement of listing and trading.	T+74

1 The issue may be opened within 12 months of the date of the issuance of the observations by SEBI.
2 The share escrow agreement is not required where there is no offer for sale component in the public issue.
3 The RHP filed with the RoC contains all the details except for information in relation to the issue price and underwriting commitment. This offer document can be used for the purposes of marketing.
4 A public issue shall be kept open for at least three working days but not more than 10 working days when there is a revision in price band.
5 'Working days' means all days other than second and fourth Saturday of the month, Sunday or a public holiday, on which commercial banks in Mumbai are open for business; provided however, with reference to (1) announcement of price band; (2) bid or offer period, 'working day' shall mean all days, excluding Saturdays, Sundays and public holidays, on which commercial banks in Mumbai are open for business; and (3) the time period between the bid or offer closing date and the listing of the equity shares on the stock exchanges ('working day' shall mean all trading days of the stock exchanges, excluding Sundays and bank holidays).

ASBA process

SEBI has mandated that all investors (except anchor investors) applying in an IPO are required to only use the facility 'Application Supported by Blocked Amount' (ASBA) for making payment. In the ASBA mechanism, the application money is blocked in the bank account provided in the application form until just prior to the allotment, or withdrawal or failure of the IPO, or withdrawal or rejection of the application, as the case may be. If the bid is successful, the monies are transferred from the bank account to the public offer account opened by the issuer.

ii Pitfalls and considerations

As highlighted earlier, SEBI may reject a draft offer document if it has reasonable ground to believe that, *inter alia*, the ultimate promoters are unidentifiable, the purpose for which the funds are being raised is vague or there is an outstanding litigation that is so major that the issuer's survival is dependent on the outcome of the pending litigation. Accordingly, the issuer has to ensure that it does not trigger any rejection criteria prior to the filing of the draft offer document, as issuers whose draft offer documents are rejected are not allowed to access capital markets for at least one year from the date of such rejection, and the period may be increased depending on the materiality of the omission and commission. In addition, SEBI may initiate an action against the merchant bankers or the issuer, in accordance with applicable law.

In addition, the issuer is required to provide detailed disclosures in relation to the purpose for which the funds are being raised including, among others, the schedule of implementation, deployment of funds, sourcing of financing of funds already deployed, details of all material existing or anticipated transactions in relation to utilisation of the issue proceeds or project cost with promoters, directors, key management personnel, associates and group companies of the issuer. Further, the amount for general corporate purposes cannot exceed 25 per cent of the amount raised by the issuer through issuance of specified securities. Accordingly, an issuer is not permitted to create war chests and has to provide detailed disclosures in the offer document. Additionally, an issuer is not permitted to recoup its costs from the amount raised pursuant to the IPO. If there is a variation in objects, an exit offer shall be made by the promoters or shareholders in control of an issuer to the dissenting shareholders in terms of the Companies Act 2013.

Identification of promoters has become increasingly complex in recent years due to the increase in investment by financial and strategic investors. While certain financial and strategic investors have majority shareholding and nominee directors on the board of the issuer, such investors may not be identified as promoters given the nature of the investment in the issuer, and certain other considerations such as lack of involvement in the day-to-day business activities of the issuer. Identification of promoters is subjective and has to be dealt with case by case. For example, the issuer would have to check if (1) any entity has been identified as a promoter in any licences, borrowings, material agreements such as the shareholders' agreements, regulatory or corporate filings; (2) any entity controls management or policy decisions; (3) any entity is entitled to control the decisions of the board of the issuer; or (4) any entity is entitled to appoint the majority of directors of the issuer. Once the issuer identifies the promoter, extensive disclosures about the promoter are required to be included in the offer document. This includes legal proceedings involving the promoters, and the source of funds from which the securities of the issuer were purchased. In addition, if the promoter is an individual, details such as age, educational qualifications, experience, past positions held and other directorships are required to be provided. If the promoter is a company, details such as a brief history of the promoter, names of the natural persons in control of the promoter and details of change of management of the promoter have to be provided.

Further, in terms of stock exchange requirements, no single shareholder should be accorded any special rights when the issuer is undergoing an IPO. Accordingly, all special rights granted to a permanent shareholder are required to fall away at the time of listing of equity shares in the relevant stock exchanges. This leads to a fair amount of discussion with the financial, private or strategic investors who prefer to retain a seat on the board of directors of the issuer or certain policy, operational and information covenants, if such investor continues to retain a significant shareholding after the listing of the equity shares of the issuer.

Until recently, if a selling shareholder held convertible securities and intended to offer equity shares in the IPO, the selling shareholder was required to convert all the convertible securities into equity shares prior to filing of the DRHP in order to offer such equity shares for sale in the IPO. It usually takes four to six months from the date of filing of the DRHP to list equity shares on the recognised stock exchanges. The conversion of securities prior to filing of the DRHP exposes the selling shareholders to greater risks due to lack of visibility on the pricing and the timing of the IPO for a long period of four to six months. In order to minimise the risks, on recent transactions, the market has taken the view that the convertible securities can be converted at an agreed conversion price just prior to the filing of the RHP with the relevant RoC. Accordingly, the selling shareholders propose to convert the convertible securities into equity shares only 15 to 20 working days prior to the listing of the equity shares on the recognised stock exchanges. This is expected to provide the selling shareholders more flexibility and visibility on the pricing and timelines for the completion of the IPO.

iii Considerations for foreign issuers

A foreign issuer cannot list its equity shares on the stock exchanges in India. A foreign entity can access the Indian capital markets through issuance of Indian depository receipts (IDRs). IDRs are depository receipts denominated in Indian rupees issued by a depository. A foreign issuer proposing to issue IDRs should also be listed in its home country; not be prohibited from issuing securities by any regulatory body; and have a track record of compliance with securities market regulations in its home country. There has only been one issuance of IDRs in India to date, namely, by Standard Chartered PLC.

In the event that an Indian subsidiary of a foreign entity proposes to list its equity shares, the foreign entity will be named as a promoter. In the event that the immediate holding company is a shell company and does not undertake any substantial business, the entity who has ultimate control over the Indian subsidiary will be required to be named as the promoter as well.

The overall ceiling limit for foreign portfolio investors (FPIs) is 24 per cent of the paid-up capital of the issuer and for non-resident Indians (NRIs) and overseas citizens of India (OCIs) on a repatriation basis 10 per cent of the paid-up capital of the issuer. The ceiling limit for FPIs can be raised to the statutory ceiling limits and the ceiling limit for NRIs and OCIs can be raised to 24 per cent, subject to the approval of the board of directors and the shareholders of the issuer. RBI monitors the ceiling limits on a daily basis and has an effective monitoring mechanism in place to ensure that the FPIs, NRIs and OCIs do not exceed the aggregate ceiling limit.

IV POST-IPO REQUIREMENTS

Once an entity is listed on the stock exchanges, it must comply with all the requirements of the Listing Regulations, as applicable. The Listing Regulations require the listed entity to make disclosures of any events and information to the stock exchange that is 'material' in the opinion of the board of directors of the entity; shareholding pattern of the entity; and quarterly and annual stand-alone financial results within 45 days of the end of each quarter other than the last quarter, to the stock exchanges on which the securities of the entity are listed.

All listed companies are also required to comply with other SEBI regulations, including the Insider Trading Regulations in relation to treatment of unpublished price sensitive information. According to these regulations, the board of directors of every entity whose securities are listed on a stock exchange, is required to formulate and publish on its official website, a code of practices and procedures for fair disclosure of unpublished price sensitive information that it would follow in order to adhere to each of the principles set out in these regulations, and a code of conduct to regulate, monitor and report trading by employees and other connected persons towards achieving compliance with these regulations, adopting the minimum standards set out in these regulations. The listed entity is also required to comply with the public offer requirements under the Takeover Regulations when there is a direct or indirect acquisition of control above the minimum thresholds as prescribed under the regulations.

V OUTLOOK AND CONCLUSION

Despite the relative underperformance of the Indian economy due to the disruptive impact of several structural initiatives of the government of India, such as the much-criticised demonetisation effort and the sub-optimal implementation of the much-needed goods and service tax, 2017 was perhaps a watershed year for the Indian equity capital markets.

A number of factors made 2017 a watershed year. These include:

a the unprecedented volume of IPOs and follow-on offers seen by the Indian equity capital markets;

b the increase in the average deal size, which has enabled new types of investors to participate in Indian equity capital market deals;

c the monumental increase in liquidity available with Indian mutual funds, which has seen Indian mutual funds become anchor investors in several deals and made the equity markets much less dependent on the FPIs;

d the increased participation by retail and non-institutional investors in the IPO and the secondary markets;

e appreciation of good-quality companies in the market and rejection by the market of sub-optimal stories; and

f a perceptible change in the attitude of SEBI, which has become much more facilitating and solution-oriented.

In the light of the above developments and the expected increase in the growth rates of the Indian economy, 2018 is expected to be positive for the Indian equity capital markets. We will, however, need to ensure that the significant gains of 2017 are not lost by declining standards of due diligence and by inflated valuations, which will both be obvious temptations in a year of expected growth.

Chapter 7

IRELAND

Matthew Cole and Sheena Doggett[1]

I INTRODUCTION

An officially recognised stock exchange has been in existence in Ireland since the Stock Exchange (Dublin) Act of 1799. In 1971, the Dublin and Cork exchanges merged with the Provincial Brokers Stock Exchange to form the Irish Stock Exchange (ISE), which, in turn, merged with its UK equivalent in 1973 and became the Irish constituent of the International Stock Exchange of the United Kingdom and Republic of Ireland (now the London Stock Exchange (LSE)). The ISE split from the LSE in 1995 to become an independent entity (although it continues to be possible to maintain a dual primary listing and have shares admitted to the official lists in both Dublin and London). Subject to regulatory clearance, the ISE will be acquired by Euronext in 2018. The ISE remains the competent authority for listing, although the Central Bank of Ireland (the Central Bank) has been responsible for prospectus scrutiny and approval since December 2011.

The ISE maintains three markets that admit equity securities: the Main Securities Market (MSM), the Enterprise Securities Market (ESM) and the Atlantic Securities Market (ASM).

Following a difficult period, the Irish equity markets have seen an upturn in initial public offering (IPO) activity in recent years, driven initially by IPOs of real estate investment trusts (REITs) in 2013 and 2014. Since 2013, there have been nine listings on the MSM, including three REITs and two move-ups from the ESM.[2] In the same period, there were 10 IPOs on the ESM.[3] As of March 2018, there were 29 issuers listed on the MSM and 22 on the ESM. The ASM was launched in 2015, but as of March 2018 does not have any constituent companies.

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1 Matthew Cole and Sheena Doggett are partners at A&L Goodbody.

2 Green REIT plc; Hibernia REIT plc; Irish Residential Properties REIT plc; Hostelworld Group; Permanent TSB Group Holdings plc (move-up from ESM with fundraising); Dalata Hotel Group (move-up from ESM); AIB Group plc; Cairn Homes plc (dual listing having previously obtained listing on the Main Market of the LSE); and Glenveagh Properties plc.

3 Falcon Oil and Gas Ltd; Mincon Group; GameAccount Network plc; Dalata Hotel Group; Mainstay Medical International plc; Applegreen plc; Malin Corporation plc; Draper Esprit plc; Venn Life Sciences Holdings plc; and Greencoat Renewables plc.

II GOVERNING RULES

i Main stock exchanges

MSM

The MSM is the principal trading market of the ISE and admits equity, debt instruments and investment funds. It is a 'regulated market' for the purposes of the Markets in Financial Investments Directive (MiFID),[4] and issuers are therefore required to comply with EU legislation such as the Prospectus Directive[5] and the Transparency Directive.[6]

A primary listing requires an admission of securities to trading on the MSM and admission to listing on the ISE's Official List, and by virtue of the latter the listed company becomes subject to the full requirements of the ISE's Listing Rules (the Listing Rules). An Irish company seeking a listing on the MSM must apply for a primary listing, unless the company has or intends to have an overseas primary listing on a recognised stock exchange and its primary market is in a country other than Ireland.

Like a premium segment listing on the LSE, an MSM primary listing indicates high standards of corporate governance and issuers become subject to a number of obligations that are 'super-equivalent' to the minimum standards of regulation prescribed by European legislation. These are designed to enhance investor protection and include provisions on related party and substantial transactions (which may require shareholder approval), sponsors (a sponsor must be retained for the duration of an MSM listing) and compliance with codes relating to corporate governance and directors' dealing in the issuer's securities. Many of these super-equivalent standards apply to primary and dual-primary-listed companies only. A company with a primary listing on an overseas stock exchange may apply for a secondary listing on the MSM, which will subject it to less onerous obligations.

Through an agreement reached between the ISE and the LSE in 1995, an issuer may maintain a dual primary listing and have its shares admitted to the official lists in both Dublin and London on a primary basis. The procedure to effect a dual listing is very similar to applying for a single primary listing, and the Central Bank and Financial Conduct Authority (FCA) in the United Kingdom will maintain a regular dialogue with each other throughout the process.

ESM

The ESM is an exchange-regulated (that is, it is regulated by the ISE) equity market for small to medium-sized issuers, and is a multilateral trading facility (MTF) for the purposes of MiFID. The ESM has been modelled very closely on the LSE's AIM, with reduced admission criteria, no requirement for a prior trading record and no minimum free float requirement. The one notable difference is that all ESM applicants are required to have a minimum market capitalisation of €5 million, in an attempt to prevent shell companies from undermining the credibility of the market. The ESM Rules for Companies (the ESM Rules) are complementary to the AIM Rules, allowing applicants the option of a dual listing by coordinating an IPO to achieve admission to both markets using the same timetable and admission document. Of the 22 companies listed on the ESM as of March 2018, 18 are also listed on AIM.

4 Directive 2014/65/EC & 15 May 2014.
5 Directive 2003/71/EC & 4 November 2003.
6 Directive 2004/109/EC & 15 December 2004.

An issuer with a primary listing on the MSM or ESM may be eligible to be quoted on the ISE quotient indices (the Irish equivalent of the FTSE indices), provided the listed securities are ordinary shares (or equivalent), are admitted to trading and the issuer is incorporated, or has its centre of economic interest, in either Ireland or Northern Ireland.

ASM

The ASM is also an MTF and is designed to be compatible with the Securities and Exchange Commission (SEC) requirements of companies listed on the New York Stock Exchange (NYSE) or Nasdaq. Primarily designed for companies already listed on one of these markets, issuers can avail of a dual quotation with trading in euros and US dollars.

ii Overview of listing requirements

MSM

An MSM issuer must appoint a sponsor for the duration of its listing, which must be registered with the ISE. The sponsor is the primary point of contact between the ISE and the issuer throughout the application process. The sponsor is responsible for various matters relating to the listing, including ensuring the issuer's suitability for listing prior to making any submission to the ISE.

Applicants to the MSM must comply with the Listing Rules for admission to the Official List and the ISE's Admission to Trading Rules for the admission of securities to trading. The key listing requirements under these rules for a primary or dual primary listing on the MSM include:

a that the issuer must be validly established and operating in conformity with its constitution and its securities must conform with the law of the issuer's country of incorporation, be freely transferable and fully paid;

b that the issuer should have a minimum market capitalisation of €1 million (although the ISE may make an exception if there will still be an adequate market for the shares);

c the preparation of a prospectus complying with the Prospectus (Directive 2003/71/EC) Regulations 2005 (the Prospectus Regulations) and relevant EU legislation that is reviewed and approved by the Central Bank (or passported in if the issuer's home Member State is not Ireland). The requirement for a prospectus is triggered by virtue of there being an application for transferable securities to be admitted on a regulated market, irrespective of whether there is also an offer being made of transferable securities to the public in the European Economic Area (EEA);

d the issuer must have published or filed audited consolidated accounts covering a period of at least three years, ending no more than six months before the date of the prospectus (although this condition can be modified or waived by the ISE);

e the issuer must generally:
- control the majority of its assets,
- be carrying on an independent business as its main activity; and
- possess a three-year revenue-earning record that supports at least 75 per cent of its business (100 per cent for an issuer seeking a primary listing only);

f the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months following the date of publication of its prospectus;

g the issuer's securities being eligible for electronic settlement;

h the issuer maintaining a free float in one or more EEA Member States of 25 per cent (the ISE may relax this requirement in certain circumstances); and *i* that an issuer seeking a primary listing must be able to carry on its business independently of any controlling shareholder (a person who either controls 30 per cent or more of the votes in the issuer or who has the right to appoint a majority of the board of directors), and all transactions and relationships between the issuer and any controlling shareholder must be at arm's length and on a normal commercial basis.

Most of the conditions referred to above apply equally to secondary listings, save for the requirements relating to the publication of accounts and the conditions relating to assets, business activities and working capital.

ESM

An ESM issuer is required to appoint an 'ESM Advisor' approved by the ISE (equivalent to a nominated adviser on AIM) for the duration of its listing. The role of an ESM Advisor is broadly similar to that of a sponsor on the MSM. In particular, it is responsible for assessing the appropriateness of an applicant for admission. In light of this responsibility, there are no other specific eligibility requirements that apply to companies seeking admission to the ESM, save that there must usually be a minimum market capitalisation of €5 million.

As on AIM, an admission document containing prescribed information set out in the ESM Rules (and similar in format to a prospectus) is required to be published in connection with the applicant's admission to the ESM and must be approved by the ESM Advisor. The ESM Advisor must make a declaration to the ISE that the admission document complies with the relevant requirements of the ESM Rules.

Applicants already listed for 18 months on one of 13 'designated markets'[7] can avail of a fast-track admission process, which dispenses with the requirement for an admission document but instead requires a detailed pre-admission announcement.

ASM

An ASM issuer must appoint an 'ASM Advisor' approved by the ISE for the duration of its listing. An ASM applicant must meet a number of listing requirements, of which the most important include:

a that the issuer must be seeking admission to, or be admitted to the NYSE or Nasdaq;
b a three-year revenue-earning record reflected in published or filed audited accounts;
c the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months;
d the ability of the issuer to carry on its business independently of any controlling shareholder;
e a minimum market capitalisation of US$100 million (although the ISE may make an exception if there will still be an adequate market for the securities);
f that the issuer's securities must be eligible for electronic settlement; and
g that the issuer must have a free float on admission of 15 per cent.

Applicants already listed on the NYSE or Nasdaq for 18 months are not required to publish an admission document, and can utilise a fast-track admission process (unless they are required to publish a prospectus by virtue of making an offer of transferrable securities to

7 As at March 2018, the designated markets are: MSM, ASM, Main Market of the LSE, AIM, NYSE Euronext, Deutsche Borse, NYSE, Nasdaq, Nasdaq OMX Stockholm, TMX Group, Johannesburg Stock Exchange, Australian Stock Exchange, Swiss Exchange.

the public in the EEA). Other applicants must produce an admission document, but should usually be able to incorporate by reference information contained in its SEC registration statement or filings.

iii Overview of law and regulations

The laws and regulations applicable to IPOs in Ireland are derived from EU directives and regulations, domestic statutes and implementing regulations and guidelines. The key laws and regulations are set out below.

Prospectus Regulations and Rules

The Prospectus Directive,[8] Prospectus Regulations and the Prospectus Rules issued by the Central Bank are the primary sources of prospectus law in Ireland.

The Prospectus Regulations implemented the Prospectus Directive in Ireland. They provide that a prospectus required to be published in connection with a public offer of securities or an admission to trading on the MSM must:

a contain, as a minimum, the information prescribed by the Prospectus Regulations;
b be approved by the relevant competent authority; and
c be published in accordance with the specific requirements of the Prospectus Directive.

The Central Bank's Prospectus Handbook draws together a number of sources of information relating to Irish prospectus requirements and procedures and is intended for use by issuers and their advisers. It also contains the Prospectus Rules and associated guidance, which cover the structure and content of a prospectus, the procedures for submission, review and passporting and applicable fees.

Listing Rules, Admission to Trading Rules, ESM Rules and ASM Rules

The Listing Rules, which are broadly comparable to the listing rules of the FCA in the UK, set out the detailed procedure for making an application for admission of an issuer's securities to the Official List of the ISE. They also contain requirements in relation to particular transactions effected by an issuer once listed and the continuing obligations that a listed company is required to observe. Broadly, the object of the continuing obligations is to maintain an orderly market in securities and to ensure that all users of the market have simultaneous access to the same information. The ISE's Admission to Trading Rules contain parallel rules and responsibilities in relation to a company's admission to trading on the MSM.

The ESM Rules and ASM Rules, both published by the ISE, govern the listing processes and ongoing obligations of issuers admitted to those markets.

Transparency Regulations and Rules

The Transparency (Directive 2004/109/EC) Regulations 2007 (the Transparency Regulations) implemented the Transparency Directive in Ireland. They establish minimum requirements in relation to the disclosure of periodic and ongoing information by issuers and

8 The new Prospectus Regulation (2017/1129) was published in the Official Journal on 30 June 2017 and entered into force on 20 July 2017. It repeals the Prospectus Directive with effect from 21 July 2019, save for a limited number of provisions subject to earlier repeal.

are supplemented by rules published most recently in November 2016 by the Central Bank (the Transparency Rules), which set out procedural and administrative requirements and guidance in respect of the Transparency Regulations.

The Market Abuse Regulation

The Market Abuse Regulation (MAR) came into effect in July 2016, replacing the previous rules implementing the Market Abuse Directive. It sets out a standardised EU-wide regime dealing with market abuse, market manipulation and insider dealing. It applies equally to issuers on regulated markets such as the MSM, and MTFs such as the ESM and ASM.

III THE OFFERING PROCESS

i General overview of the IPO process

Depending upon the complexity of the issuer's business and the structure of the offering, a typical MSM IPO process takes between four and five months. As an IPO on the ESM will not usually require a prospectus that must be vetted by the Central Bank, the process can be considerably shorter.

At the start of the process, the issuer (increasingly in conjunction with a financial adviser) will appoint one or more investment banks as bookrunners or underwriters (one of whom will act as sponsor or ESM Advisor). Irish lawyers (and UK and US lawyers if a dual listing is contemplated) will also be appointed together with reporting accountants, registrars and financial PR agents. The investment banks will also appoint their own set of lawyers.

The reporting accountants will carry out financial due diligence and produce a long-form report on the issuer's business, a working capital report and a 'financial position and prospects procedures' report (MSM only). At the same time, a legal due diligence process will be commenced and will form the basis of the prospectus or ESM admission document. The issuer's lawyers will verify the material statements in the prospectus or admission document.

If a prospectus is being produced, an advanced draft is submitted to the Central Bank for review. The Central Bank usually responds with comments within 10 working days (five working days or less for later submissions).

Following the diligence processes, a presentation will usually be given by the issuer to the independent analysts at the investment banks, who will subsequently publish research reports on the issuer to coincide with its 'intention to float' announcement. The issuer will then spend up to two weeks carrying out an investor roadshow, usually encompassing at least Ireland, the United Kingdom and the United States, where they will present a verified presentation to prospective institutional investors, often using a 'pathfinder prospectus' with an indicative price range as a marketing document. Simultaneously, the investment banks will be book-building on the basis of non-binding bids from investors. Recent IPOs have involved significant domestic and US 'cornerstone investors' who sign conditional subscription agreements and are named in the pathfinder prospectus.

Finally, pricing will occur, the Central Bank will approve the prospectus and it will be published (and passported into the UK in the case of a dual listing), or the ESM Advisor will approve the admission document and it will be published. For an MSM IPO, the issuer's shares will be admitted to trading and to the Official List and credited to CREST accounts. When dealing commences, the IPO is complete.

With effect from 1 July 2018, the FCA is introducing new rules in the UK that require the publication of an approved prospectus or registration document before the publication of connected research reports. This will alter the timetable of most UK Main Market IPOs by requiring earlier approval and publication of a prospectus or registration document. While not directly applicable to Ireland, these measures are likely to see changes to the timetables of MSM IPOs as many issuers pursue dual primary listings in Ireland and London.

ii Considerations for foreign issuers

Ireland has a listing regime that should be conducive to primary or secondary equity listings by non-domestic issuers. Ireland has an experienced and pragmatic regulator in the Central Bank and, as demonstrated by the creation of the ASM, the ISE is proactive in marketing Ireland as a listing venue and in creating listing products to attract overseas companies. Dublin is home to sophisticated accountancy and law firms, and domestic investment banks who offer excellent coverage for Irish listed issuers and can therefore create relatively strong liquidity. However, such listings have been rare (at present, around 80 per cent of issuers listed on Irish markets are incorporated in Ireland). This is, perhaps, unsurprising given the geographical proximity of London with its prestigious and highly liquid markets. Instead, Ireland has become better known as a debt-listing venue through the ISE's highly successful Global Exchange Market. This may change following the UK's exit from the European Union (Brexit), when the MSM will be the main English-speaking equity market still subject to European legislation and with the benefits of passporting.

IV POST-IPO REQUIREMENTS

i Introduction

An issuer with securities admitted to trading on the MSM must comply with certain continuing obligations set out in the Listing Rules. MSM companies must also comply with the Transparency Regulations and Transparency Rules and have regard to the UK Corporate Governance Code. In addition, the Admission to Trading Rules and the Prospectus Regulations contain certain continuing obligations for MSM companies. Irish companies listed on either the MSM, ESM or ASM must also have regard in general to the provisions of the Irish Companies Act 2014 (the Companies Act). The Takeover Rules and Substantial Acquisition Rules apply to takeovers of listed Irish issuers. Companies admitted to trading on the ESM must comply with continuing obligations contained in the ESM Rules, and ASM issuers are subject to the provisions of the ASM Rules on a continuing basis. The MAR applies to both regulated markets and MTFs, and as such applies to issuers on all three markets.

ii Listing Rules

The Listing Rules impose obligations on MSM-listed companies to ensure timely disclosure to the market and equality of treatment of shareholders. Sanctions for breach include the public censure of the issuer, the public or private censure of directors and the suspension or ultimately cancellation of the issuer's listing.

Where an MSM issuer undertakes transactions of a certain size, a notification to the market is required. If a proposed transaction would constitute a 'Class 1 Transaction' because it represents 25 per cent of an issuer's value under a gross assets, profits, market value or gross capital test, it will require shareholder consent. Similarly, related party transactions generally require prior shareholder approval.

iii UK Corporate Governance Code

The UK Corporate Governance Code (the Code) together with the Irish Corporate Governance Annex (which is annexed to the Listing Rules) contains corporate governance guidelines for MSM issuers. The Code sets out good practice recommendations in the spheres of board leadership, accountability, remuneration and shareholder relations.

The Listing Rules require an MSM listed issuer to include in its annual report a compliance statement in respect of the Code, and auditors must review the statement in relation to financial reporting, internal controls and audit committees.

iv Transparency and disclosure

As described in Section II.iii, above, the Transparency Regulations implemented the Transparency Directive into Irish law. The aim of the Transparency Directive was to harmonise, at EU level, requirements for the provision of financial information, notification of major shareholdings and the disclosure of corporate information to shareholders. Most material modifications to the Transparency Directive are, in fact, contained in the Transparency Rules issued by the Central Bank.

The Transparency Regulations require MSM-listed issuers to publish their annual financial report within four months of the end of the financial year, and a half-yearly financial report no later than two months after the period to which it relates, and contain detailed content requirements.

Under the Companies Act and the Transparency Rules, a shareholder must notify an Irish issuer and the Central Bank when it acquires an interest in 3 per cent or more of the issuer's share capital. Subsequent transactions that change the percentage interest by a whole number (up or down) must also be notified. In the case of non-Irish MSM issuers, the thresholds are at 5, 10, 15, 20, 25, 30, 50 and 75 per cent (being the thresholds set out in the Transparency Directive). When a shareholder ceases to have a notifiable interest, that must also be notified. The notification must be made within two trading days of the transaction or four days for non-Irish issuers. The issuer must notify the market by no later than the end of the trading day following receipt of a notification.

v Continuing obligations under the ESM Rules

The key continuing obligations for ESM issuers are as follows:

a information on new business developments must be notified to the market without delay;

b preparation of half-yearly reports and publication within three months of the period to which they relate;

c preparation of annual accounts and publication within six months of the period to which they relate;

d any documents sent to shareholders must be available on the issuer's website;

e an ESM issuer must ensure that its directors and certain relevant employees do not deal shares during a close period;

f an ESM issuer must notify the market without delay of substantial transactions (those representing 10 per cent or more of an issuer's value under a gross assets, profits, turnover, consideration or gross capital test (the ESM Class Tests)) and related party transactions representing 5 per cent or more under the ESM Class Tests;

g reverse takeovers (transactions representing 100 per cent or more under the ESM Class Tests) require shareholder approval, as do fundamental changes of business (disposals that when aggregated with disposals in the previous 12 months exceed 75 per cent under an ESM Class Test);

h directors must accept full responsibility for compliance with the ESM Rules; and
i ESM issuers must retain an ESM Advisor and ESM broker at all times.

vi Continuing obligations under the ASM Rules

Continuing obligations under the ASM Rules are designed to dovetail with SEC requirements so that an ASM listing does not create a significant extra administrative burden for an issuer. Indeed, the only significant further obligation for NYSE- or Nasdaq-listed issuers is compliance with the MAR. The key requirements under the ASM Rules are that:

a an issuer that files information with the SEC or makes a public announcement pursuant to the rules of the NYSE or Nasdaq must issue a notification to the market;
b an issuer that discloses a material transaction under SEC rules in accordance with a Form 6-K or Form 8-K or undertakes a related party transaction that is required to be disclosed under Regulation S-K of the US Securities Act of 1933, as amended, or Form 20-F of the US Securities Exchange Act of 1934, as amended, must issue a notification to the market;
c an issuer that files annual or periodic financial reports in the US must issue an announcement to the market when such accounts are filed with the SEC. If it does not file such accounts then it must prepare and publish them outside of SEC requirements;
d directors must accept full responsibility for compliance with the ASM Rules; and
e ASM issuers must retain an ASM Advisor at all times.

vii Market abuse

The MAR applies equally to MSM, ESM and ASM issuers and contains three core principles:

a a prohibition on market manipulation and unlawful disclosure of inside information;
b restrictions on dealing in securities while in possession of inside information; and
c requirements as to prompt disclosure of inside information to the market.

There are also detailed provisions around the maintenance of 'insider lists' by issuers and restrictions on dealings by directors and certain senior officers. The MAR provides for certain 'safe harbours' from these restrictions relating to share buy-back programmes, stabilisation measures and market soundings or wall-crossing.

V OUTLOOK AND CONCLUSION

As noted in Section III.ii, the Irish IPO markets are likely to be greatly affected by Brexit. What remains to be seen is whether the effect will be positive or negative. Ireland may benefit as the home to the main English-speaking listing venues remaining within the EU, and could see a trend of overseas issuers carrying out IPOs in Ireland or taking secondary listings. Depending upon the terms of Brexit, it is certainly possible that UK-incorporated, London-listed issuers will consider electing Ireland as their home Member State in order to make the Central Bank their home regulator for the purposes of the Prospectus Directive. Equally, the United Kingdom may take advantage of Brexit by discarding European legislation that some issuers might consider to be onerous (such as the MAR), therefore making London a more attractive listing venue to those issuers at the expense of Ireland and continental Europe. In any event, as a result of Brexit and combined with the acquisition of the ISE by Euronext, the next few years will be a defining period in the history of Irish equity capital markets.

Chapter 8

ISRAEL

Nitzan Sandor and Sharon Rosen[1]

I INTRODUCTION

Local trade in securities began in the 1930s, before the establishment of the state of Israel. The Tel Aviv Stock Exchange (TASE), Israel's sole stock exchange, was established in September 1953 by a number of banks and brokerages, referred to as TASE members. Following the increase in listing of securities for trade on the TASE during the 1960s, the Israeli Securities Law 1968 (the Securities Law) was enacted and the Israel Securities Authority (ISA), the primary regulator for the Israeli securities market, was established.

2017 was a strong year for the Israeli capital markets, with 17 initial public offerings (IPOs) of equity, compared to 14 equity IPOs during 2012 to 2016. For the first time since the 2008 global financial crisis, the number of new issuers listing on the TASE exceeded the number of issuers delisting, such that at the end of 2017, 458 companies had equity listed for trade on the TASE.[2]

Public offerings of debt are very common in Israel, with approximately 66 billion new Israeli shekels raised in total in traded bonds offerings during 2017. Unlike US or European bond markets that are structured as dealer-based over-the-counter markets, most Israeli corporate bonds are listed for trade on the TASE and the vast majority of the trading volume in exchange-listed bonds takes place on the exchange.

Over the past few years, the Israeli corporate bond market has become increasingly attractive to foreign issuers, with a growing trend of IPOs of debt in Israel by non-Israeli companies (primarily, US real estate companies with income-producing real estate, typically issuing the debt through subsidiaries incorporated in the British Virgin Islands), aiming to benefit from the relatively low interest rates, high liquidity, low offering costs and short 'time to market' offered by the local market. The aggregate amount of debt raised in bond issuances by non-Israeli issuers in 2017 was approximately 9.4 billion shekels, compared to approximately 850 million shekels in 2011. While US real-estate companies continue to be the primary type of foreign issuers of corporate bonds in Israel, this trend has expanded to foreign issuers from other industries, including two US business development companies.

A recent further development with regard to this trend is the dual listing on the TASE of shares of issuers whose shares are listed on certain leading global stock exchanges, enabling the issuers to benefit from the special disclosure regime that is available to dual-listed companies under the Securities Law (the Dual Listing Regime), and the public issuance

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2 '2017 Annual Review' published on the TASE website at www.tase.co.il/Heb/Statistics/AnnualReviews/Pages/annualreviews.aspx.

of debt in Israel pursuant to offering documents that are primarily based on the disclosure documents prepared under the laws of the jurisdiction of the foreign exchange, as further explained below.

IPOs in Israel are regulated by the ISA and the by-laws of the TASE.

II GOVERNING RULES

i Main stock exchanges

The TASE is the only stock exchange in Israel. The TASE attracts primarily domestic issuers, from all industries.

Trading on the TASE is carried out between the current TASE members on behalf of their customers. With physical trading floors long abolished, the TASE's electronic platform, the Tel Aviv Continuous Trading (TACT) system, handles trades for all traded financial instruments. The TASE also operates a separate electronic trading platform known as TACT Institutional, designed for trading in privately placed securities between institutional and qualified investors.

Israel is known as one of the major sources of cross-listed companies listed on Nasdaq. As of 31 December 2017, of the 458 Israeli companies whose shares were traded on the TASE, 61 companies were dual listed on the TASE and a foreign exchange, the large majority on Nasdaq.[3]

A fast track for dual listing on the TASE is available under the Dual Listing Regime for both domestic and foreign companies that have been traded for more than one year on certain US and UK exchanges (Nasdaq, the New York Stock Exchange (NYSE), the NYSE MKT (formerly AMEX) and the London Stock Exchange (LSE)), or that have a market cap on such exchanges of at least US$150 million. The listing procedure under the dual listing track involves the filing of a simple registration form, which contains certain basic details regarding the issuer and the securities being registered and incorporates by reference certain of the issuer's disclosure documents previously filed with the foreign exchange where its shares are traded. Dual-listed companies are exempt from the ongoing Israeli reporting requirements, and are required to file with the ISA and TASE the same reports and filings (in English) as they file in the jurisdiction of the non-Israeli exchange.

The TASE maintains numerous equity and bonds indices, the most significant of which is the TA-125 Index, which is considered the benchmark index for the Israeli economy. A large portion of trading on the TASE is attributed to traded-index linked financial instruments, particularly exchange-traded notes. Consequently, inclusion in a leading TASE index is highly advantageous to issuers on the TASE, as it creates instant demand for the listed securities. Recent amendments to the TASE by-laws condition the inclusion of a non-Israeli issuer in many of the TASE's indices on such issuer having a 'nexus' (as such term is defined in the TASE by-laws) to Israel.

ii Overview of listing requirements

Pursuant to the Securities Law, in order to list shares on the TASE, a company must have only one class of voting shares ('one share, one vote'), subject to certain limited exceptions that apply to dual-listed companies, based on ISA pre-rulings and Israeli case law.

3 2017 annual review published by the TASE.

The TASE maintains listing rules that permit companies offering shares to the public for the first time in Israel to list under one of three listing alternatives. Emphasising the liquidity of the securities after the IPO, the TASE requires a minimum public-float value and rate and minimum distribution of public holdings under each alternative. The three different procedures allow issuers to adopt an appropriate listing regime in view of its shareholders' equity, public float, period of activity and company valuation requirements, as summarised in the table below.

TASE listing alternatives for equity IPOs* (in NIS millions)	**Alternative 1**	**Alternative 2**	**Alternative 3**
Shareholders' equity after listing	25	35	-
Public float value	20	30	80
Period of activity	12 months	12 months	-
'Added value'** in 12 months before listing	4	-	-
Value of public float derived from the shares issued to the public	20	20	80
Value of the company's shares	-	-	200

* In addition, the TASE established rules that enable R&D companies to list their shares under more lenient terms than those set forth in the table, with an aim to attract high-tech companies in their early stages. Certain additional exemptions are available to certain types of issuers under the TASE by-laws.
** Profits before taxes plus employment expenses, depreciation and net finance expenses.

In addition, there are minimum public float rate requirements (ranging from 25 per cent to 7.5 per cent, depending on company valuation) and a requirement for a minimum distribution of public holdings (of at least 100 public holders, each holding shares worth at least 16,000 shekels).

Listing rules for a series of corporate bonds require companies to have, upon listing, shareholders' equity ranging from 16 million shekels to 24 million shekels; however, certain listing alternatives provide an exemption from this requirement. In addition, the value of the issued bonds must exceed 35 million shekels and there is a minimum distribution requirement of 35 holders, each holding bonds worth at least 200,000 shekels.

TASE listing rules establish a lock-up period that applies to shares held by pre-IPO shareholders of all newly listed companies (of 18 months for major shareholders and nine months for other shareholders, except that commencing three months post listing, 2.5 per cent and 12.5 per cent of the pre-IPO shares may be sold monthly by such shareholders, respectively), other than sales in a public sale offer, and commencing six months after the listing date, sales in off-market transactions provided that the buyer undertakes to subject the shares to the remaining lock-up period.

The cost of listing on the TASE is based on the size of the IPO (0.02 per cent of the proceeds for shares and 0.01 per cent of the proceeds for bonds), plus a fixed processing fee of several thousand shekels. In addition, a processing fee is required to be paid to the ISA of 0.03 per cent of the IPO proceeds, plus a fixed fee of several thousand shekels (25 per cent of the fees paid to the ISA are returned if the IPO is not consummated).

iii Overview of law and regulations

The Securities Law and regulations promulgated thereunder regulate the offering of securities in Israel, and the post-IPO reporting and compliance requirements. The Securities Regulations (Details, Structure and Form of Prospectus and Draft Prospectus) 1969 (the Prospectus Regulations), set forth the disclosure requirements applicable to a prospectus, which is the primary document used for the offering of securities to the public in Israel, and the Securities Regulations (Offer of Securities to the Public) 2007 (the Offering Regulations), regulate the methods for offering securities to the public in Israel.

The Israeli Companies Law 1999 (the Companies Law) and regulations promulgated thereunder regulate the corporate and governance requirements that apply to Israeli private and public companies (including foreign companies listed on the TASE, with the exception of foreign companies dual listed on exchanges eligible for the Dual Listing Regime). The Companies Law is generally based on US and English corporate law; however, as the large majority of Israeli public companies have a controlling shareholder, holding 50 per cent or more of the shares, many of the Israeli corporate governance rules are aimed at mitigating agency problems related to potential conflict of interest between the controlling shareholder and minority shareholders.

The ISA was established under the Securities Law, with the primary function to protect the interests of the public investing in securities. The ISA has the responsibility (among others) to review prospectuses in public offerings and approve them for public filing, and to oversee public company compliance during and following the IPO. The ISA also oversees the fair and proper operation of the TASE, and licenses and regulates underwriters and distributors. Additional functions of the ISA include the regulation of mutual funds, investment advisers and trading platforms. The ISA has investigative powers with regard to violations of the laws under its supervision, including the authority to conduct criminal investigations, as well as administrative enforcement powers. The supervision regime under the Securities Law is predominantly disclosure-based and the ISA generally does not examine the quality of the company or the securities offered.

As Israeli institutional investors are typically the major investors in Israeli IPOs, in debt IPOs the legal and commercial terms of corporate bonds are greatly influenced by the investment rules that apply to such investors, which include (among others) requirements for special approval procedures for investment in corporate bonds that do not contain certain covenants and limitations on the issuer, as set forth in the applicable regulations and guidelines and in the policies of such investors.

III THE OFFERING PROCESS

i General overview of the IPO process

While the large majority of IPOs in Israel are structured as primary offerings (i.e., investment in the issuer against the issuance of securities), several recent offerings included a secondary offering (i.e., the sale of securities by existing shareholders).

Key players

The key players involved in the public offering process include the issuer's internal team, outside legal advisers, auditors, offering managers (underwriters and distributors), underwriter counsel (typically only in underwritten IPOs) and appraisers, if the issuer's financial statements are based on material appraisals.

The Securities Law distinguishes between underwritten and non-underwritten offerings. In an underwritten public offering, in addition to advising on the pricing and participating in the marketing of the offering, underwriters commit to the effectuation of the offering by undertaking to buy the securities to the extent that they are not purchased by the public, and they also sign the prospectus, thereby assuming liability under the Securities Law for disclosure included in the prospectus. Conversely, the distributors' role is limited to the marketing and distribution of the securities, without assuming any liability for disclosure in the prospectus. The large majority of underwriters and distributors licensed in Israel are Israeli underwriters, although several international investment banks are registered as underwriters in Israel. In an underwritten IPO, the consortium of underwriters typically retain a separate counsel and accounting firm and conduct independent legal and financial due diligence, whereas in most IPOs that are not underwritten, distributors do not conduct due diligence or require opinions of counsel and reliance letters (with the exception of certain offerings by non-Israeli issuers, where it is customary for distributors to sign the prospectus and conduct due diligence). The majority of debt and equity IPOs in Israel are not underwritten.

Offering documents

The primary offering document in an Israeli IPO is the prospectus, which is prepared in the Hebrew language in accordance with the Prospectus Regulations, and typically includes the following information:

a details of the offering and a description of the securities offered and the underwriting agreement;
b a detailed description of the issuer's business;
c risk factors;
d major shareholders;
e use of proceeds;
f certain corporate governance matters and related-party transactions;
g financial statements, which are typically prepared in accordance with International Financial Reporting Standards (IFRS), although non-Israeli issuers may prepare financial statements in accordance with US GAAP or international accounting standards as adopted by the European Union;
h material appraisals, if information in the financial statements is based on such appraisals;
i rating reports in a debt offering that is rated by a recognised rating agency;
j board discussion and analysis (which is substantially similar to management's discussion and analysis in a US offering);
k management certifications on the adequacy of internal controls over financial reporting; and
l an opinion of counsel in a standard form, relating to the authority to offer the securities and the due appointment of the issuer's directors.

Typically, an IPO prospectus is structured as a 'prospectus subject to completion', which includes the anticipated amount and price of the offered securities, and may be supplemented prior to the public offering by a 'supplemental notice' filed not later than 75 days after the publication of the prospectus and at least five trading hours prior to the closing of the offering. The supplementary notice includes the final amount and price of the offered securities (subject to certain limitations on the scope of changes that may be made to the amount and price in the supplementary notice).

An Israeli IPO prospectus may also serve as a 'shelf prospectus', allowing the issuer to issue additional securities to the public in a relatively short and straightforward process during a period of 24 months after the IPO (which may be extended by an additional 12 months), provided that the issuer, its officers and controlling shareholder meet certain conditions, primarily relating to the absence of violations of disclosure laws.

If the issuer is eligible to list under the Dual Listing Regime (i.e., its securities are listed on Nasdaq, NYSE, MKT or LSE (Main Market)), subject to the approval of the ISA, it may prepare a prospectus comprised of an offering document prepared in the English language in accordance with the securities laws applicable to it (e.g., in accordance with the requirements of Form S-1 or S-3 for a US domestic issuer, Form F-1 or F-3 for a foreign private issuer, Form N-2 for closed-end management investment companies) and an Israeli 'wrapper', which primarily includes details of the offering and a description of the offered securities. In 2017, certain US listed companies, including (among others) US business development companies and a real estate investment trust, relied on this exemption to offer debt securities and preferred shares only in Israel, using offering documents that were mainly based on disclosures prepared in accordance with US securities laws.

In debt offerings, the offering documents would also include the indenture entered into between the indenture trustee (typically a local trust company) and the issuer. The Securities Law sets forth certain mandatory provisions that apply to the indenture, such as certain mandatory events of default, duties of the trustee and others provisions.

Offering process

An IPO in Israel typically takes three to five months, depending on (among other things) the complexity of the issuer's operations, the issuer's readiness for an IPO and market conditions.

After a preparation period of internal reorganisation, engagement of advisers, preliminary discussions on pricing and the IPO structure, due diligence, drafting of the prospectus and preparation of the financial statements, the first draft of the prospectus is approved by the company's board of directors, signed, and filed with the ISA and the TASE. Drafts of the prospectus may be filed confidentially, although marketing may only begin after the public filing of a draft prospectus or a prospectus.

The ISA review of the prospectus typically includes the review by accounting and legal reviewers. It is common for the review process to include at least one in-person meeting with the ISA staff at the ISA's offices. The TASE's review process is generally more technical, and is designed to ensure compliance with the TASE by-laws and listing requirements. During the review process, several additional drafts of the prospectus are typically filed with the ISA and the TASE. If the company has publicly filed a draft prospectus during the process, it is required to publicly file any subsequent draft simultaneously with its filing with the ISA and TASE. Once a near final prospectus is ready, the ISA's prospectus committee reviews and approves the prospectus. Subject to the committee's approval, the ISA chairperson then issues a permit to publish the final prospectus, which is subsequently publicly filed.

The marketing of the offering typically commences before the final prospectus is filed, following the publication of the first public draft of the prospectus. The marketing stage usually includes an investor roadshow and negotiations with investors on the terms of the offering, and in debt offerings, on the legal and commercial terms of the bonds.

The Securities Law provides that securities offered to the public under a prospectus must be sold at an equal price for all buyers, with the exception of reasonable early commitment fees and distribution fees.

IPOs in Israel may be effected in one of two methods.

Uniform offering

Almost all offerings of securities in Israel are made through a uniform offering, which is essentially a 'Dutch auction' that is open to all investors (including retail investors) on equal terms and does not involve a book-building process. It is prohibited to state a maximum price (or minimum interest rate) for the securities offered, although the ISA has recently proposed to amend the Securities Law to cancel this prohibition.

In order to enhance the likelihood of a successful offering, the issuer typically obtains early commitments from 'classified investors' (primarily, certain types of institutional investors as well as entities with shareholders' equity exceeding 50 million shekels) to place bids at the public auction in specified amounts and prices, in return for an early commitment fee (a discount on the purchase price). Early commitments are also provided through an auction open to classified investors. Up to 85 per cent to 95 per cent of the amount offered to the public can be secured through early commitments, depending on the size of the offering.

After the classified investor auction and before the public auction, the company files a supplementary notice (or the final prospectus, as applicable), detailing the final offered amount of securities and minimum price of the securities offered, as well as the early commitments obtained by the issuer.

Bids at the public auction are placed through TASE members. Classified investors that provided an early commitment are given precedence in allocation over bids made by the public for the same price, unless the offering is more than five times oversubscribed.

Two types of overallotment options are available to the issuer in a uniform offering, exercisable within one business day following the closing of the offering: the issuer may issue up to an additional 15 per cent of the offered amount to classified investors who provided early commitments, and, if the offering was oversubscribed, the issuer may issue up to an additional 15 per cent of the offered amount to all investors who bought securities in the offering.

Non-uniform offering

In a non-uniform offering, the allocation of securities among investors is made by the underwriter and the issuer, which may conduct a book-building process. A non-uniform offering is not open to the public (although it may be combined with a tranche of up to 30 per cent of the offered amount which may be offered to the public through a uniform offering), and only certain types of institutional investors may participate in such offering. In addition, an underwriter must underwrite at least 25 per cent of the offering, sign the prospectus and assume liability for the disclosure included in the prospectus, although the ISA has recently proposed to abolish the requirement for underwriting in non-uniform offerings.

The limitation on the types of investors who may participate in the offering and the underwriting requirement, coupled with the fact that the Israeli market is accustomed to the Dutch auction uniform offering method, make the non-uniform offering method significantly less popular in Israel and it is rarely used.

In a non-uniform offering, the issuer may grant the underwriter or underwriters an overallotment option to purchase up to an additional 15 per cent of the amount offered, during the period of 30 days from the closing of the IPO, in order to sell the securities or cover a short position taken in connection with the offering.

ii Pitfalls and considerations

Among the matters to consider before commencing an IPO process in Israel are the following.

Potential liability and the importance of conducting a comprehensive due diligence review as part of the process

Pursuant to the Securities Law, a prospectus must contain all information that may be material for a reasonable investor, and shall not contain any 'misleading information'. The offeror (the issuer or selling shareholder), the directors, chief executive officer and controlling shareholder of the issuer and the underwriter or underwriters – if the offer is underwritten – bear criminal, administrative and civil liability for misleading information included in the prospectus, including the failure to disclose material information. The liability also extends to experts who provided an opinion or report that was included in the prospectus (typically, audit reports, appraisals and opinions of counsel) with regard to a misleading item contained in such opinion or report. The Securities Law sets forth certain defences against liability, including the 'due diligence defence', which is available to persons who have taken all adequate measures in order to ensure that the disclosure does not include any misleading information and believed in good faith that no such misleading information was included; however, Israeli case law has narrowly interpreted this defence. In underwritten IPOs, the common practice is for the underwriter to receive comfort letters and negative assurance letters from the issuer's external counsel and officers; however, it is not common practice for the issuer to obtain such letters in IPOs that are not underwritten (which is the majority of Israeli IPOs in recent years).

Marketing restrictions

It is important to adhere to the publicity guidelines, as the ISA has in the past halted IPOs that did not follow the legal restrictions on marketing. Generally, the offer of securities to the public in Israel is permitted only based on a publicly filed draft or final prospectus. This general rule has been interpreted to apply to a wide range of communications, including advertisements, media interviews and investor presentations, and issuers must be mindful of the fact that all such communications during a 'quiet period' commencing one month prior to the publication of the prospectus may be deemed to violate the rule. Although the ISA has recently established guidelines permitting 'test the water' exercises with certain types of classified investors before the public filing of a draft prospectus, interaction with such investors must cease at least 15 days prior to the filing of the draft prospectus and all material information provided to such investors must be included in the prospectus. It is common practice to publicly file investor presentations to avoid the risk of material information not being included in the prospectus.

Future application of Israeli corporate governance rules

Israeli companies with publicly traded equity or debt securities are subject to a relatively onerous corporate governance regime, which requires special approval processes for related-party transactions, including the requirement for the approval of the audit committee, board of directors and the majority of the minority shareholders for certain transactions with the controlling shareholder or in which the controlling shareholder may have a conflict of interest. In addition, a company with publicly held securities must appoint at least two 'external directors' who are not affiliated with the company or its controlling shareholder (subject to limited exceptions). The compensation of directors and offices of a public company is also subject to certain limitations and approval requirements under the Companies Law.

Stabilisation

Although local regulation permits stabilisation activities under certain conditions, in light of the nature of the offering structure in Israel, post-IPO stabilisation is not common practice, and there are no recent precedents for such stabilisation activities. The Securities Law and the Securities Regulations (Stabilisation) 2012 set forth strict limitations on post-IPO stabilisation activities, mainly consisting of a requirement that any transaction for the purchase on the TASE of offered securities during the 30-day period following the public offering be made by one designated pricing underwriter, and that the identity of the seller is not known to the stabilising underwriter, as well as limitations on the transaction prices and disclosure obligations relating to the stabilisation activities.

iii Considerations for foreign issuers

Historically, foreign companies typically listed on the TASE in connection with the acquisition (or contemplated acquisition) of an Israeli company listed on the TASE (such as Perrigo's listing on the TASE in 2005 and Mylan's listing on the TASE in 2015). However, in recent years, there has been an increase in the number of foreign-listed companies as a result of the recent trend of debt IPOs in Israel by US companies and the listing of the bonds for trading on the TASE.

Substantially the same listing requirements and procedures that apply to the listing of securities on the TASE by Israeli issuers apply to listings by non-Israeli companies. In addition, a non-Israeli issuer is required to provide to the TASE an opinion of foreign counsel confirming that, under the laws of the issuer's country of organisation and, if applicable, under the rules of the foreign exchange in which the issuer's securities are traded, the issuer may issue securities to the public in Israel in the manner contemplated in the prospectus and the securities are freely tradable on the TASE. Before the listing of a foreign issuer, the TASE may also seek to regulate certain issues related to withholding tax on dividends and interest (to the extent applicable).

One important consideration for non-Israeli issuers is the future application of Israeli corporate law to the issuer. Although the Companies Law primarily applies only to companies organised under the laws of the State of Israel, the Securities Law applies certain corporate governance provisions of the Companies Law to non-Israeli companies that offer their shares or debt to the public in Israel. Such provisions include (among others) limitations on related-party transactions and transactions with a controlling shareholder and requirements relating to the composition of the board of directors, audit committee and compensation committee, including a requirement to appoint 'external directors,' the fiduciary duties of directors, restrictions on distributions, and tender offer rules. The ISA is authorised to exempt a foreign issuer from the application of all or part of the provisions of the Companies Law, if it determines that the home country laws provide sufficient protection for investors. In addition, foreign issuers listed under the Dual Listing Regime are exempt from the application of the Companies Law.

The structure of the prospectus for offers by non-Israeli issuers that are not listed under the Dual Listing Regime is generally the same as those of Israeli issuers, and the prospectus must be prepared in Hebrew, subject to certain exceptions. In addition, the ISA typically requires the issuer to include a comparison between Israeli corporate law and the corporate law of the issuer's jurisdiction of incorporation.

Issuers listed under the Dual Listing Regime benefit from various exemptions relating to the structure, format and content of the prospectus and, subject to the approval of the ISA, publish a prospectus comprised of an offering document prepared in the English language in accordance with the foreign securities law and an Israeli 'wrapper', which mainly includes details of the offering and a description of the securities being offered.

IV POST-IPO REQUIREMENTS

Following the IPO, listed companies are subject to ongoing reporting and disclosure obligations, including, among others:

a an annual report consisting of a comprehensive description of the issuer's business and certain corporate governance matters, audited annual financial statements and management discussion and analysis;

b quarterly reports consisting of material updates to the annual report accompanied by reviewed quarterly financial statements and management discussion and analysis. Certain issuers that are deemed 'small corporations' with no traded debt securities may exempt themselves from the quarterly reports requirement and only file semi-annual reports;

c reports relating to the occurrence of certain events set forth in the relevant Israeli securities regulations, such as changes in management, adoption of certain resolutions by the issuer's corporate organs, changes in the holdings of major shareholders; and

d immediate reports upon the occurrence of material or extraordinary events.

The ongoing reporting requirements apply to both Israeli and foreign issuers, except that, as previously discussed, companies subject to the Dual Listing Regime are exempt from the large majority of the Israeli reporting requirements, provided that they are required to file with the ISA the same reports and filings (in English) as they file in the jurisdiction of the foreign exchange on which they are also traded.

Following the IPO and listing on the TASE, the issuer is subject to general provisions of the Securities Law, such as the prohibition on insider trading and market manipulation, in addition to many of the Israeli corporate governance rules, subject to certain exceptions, as described above.

V OUTLOOK AND CONCLUSION

2017 was a very good year for the Israeli IPO market, with a sharp increase in the number and volume of equity IPOs and a continued increase in debt IPOs, particularly by non-Israeli issuers. The increasing interest by foreign issuers and investors has led to the emergence of various innovative structures of initial offerings of securities on the TASE, such as the first internationally marketed IPO conducted as a non-uniform offering, which combined a public offering of shares and debt in Israel with an international offering to exempt investors worldwide in reliance on Rule 144A and Regulation S promulgated under the US Securities Act of 1933; the first offering in Israel of preferred shares by a US REIT traded on Nasdaq; and various debt offerings in Israel by US real estate companies and business development companies.

This trend is expected to continue and expand during 2018, with the anticipated introduction of certain amendments to the Securities Law and related regulations currently contemplated by the ISA, including (among others) the recognition of the Toronto Stock Exchange (TSX), Mainboard, Primary Listing, the Stock Exchange of Hong Kong Limited, Mainboard (HKEX), Primary Listing, and the Singapore Exchange Mainboard (SGX), Primary Listing, as eligible exchanges for the Dual Listing Regime, as well as certain changes to the Offering Regulations abolishing the requirement for an underwriting in non-uniform offers and the prohibition on setting a maximum price in uniform offerings.

Chapter 9

ITALY

Enrico Giordano and Federico Amoroso[1]

I INTRODUCTION

The Italian initial public offerings (IPO) market experienced its first successful season during the 1990s, in large part thanks to the privatisation of state-owned industrial and financial companies such as ENI, ENEL, Finmeccanica, Autostrade, IMI, INPS, INA and Credito Italiano.

A second wave of IPOs characterised the market in the 2000s, as a number of internet companies, public utilities, oil companies and fashion brands decided to go public.

The global financial crisis affecting capital markets, starting in 2007, and the ensuing economic downturn suffered at the national level, especially during 2011 and 2012, resulted in a significant reduction in the number of IPOs launched on the Italian market until 2013, which marked the beginning of a slow but steady recovery, in the wake of a new privatisation pipeline announced by the Italian government.

In fact, the aggregate capital raised through Italian IPOs totalled approximately €1.4 billion in 2013,[2] €2.9 billion in 2014,[3] €5.7 billion in 2015,[4] €1.4 billion in 2016[5] and €5.4 billion in 2017.[6]

In the context of a general upwards trend, it is worth noting that, while the 2015 figures were undeniably boosted by the privatisation of the state-owned mail services company Poste Italiane (which by itself amounted to approximately €3.2 billion), the significant reduction seen in 2016 has been mainly due to the higher volatility on the equity financial markets, in part stemming from several key worldwide events (most notably, Brexit and the US presidential election) as well as from distress in the Italian banking system and a prolonged state of internal political uncertainty. The year 2017, however, has seen a significant recovery of the Italian IPO market, led by the IPO of the Italian tyre manufacturer Pirelli, which amounted to approximately €2.6 billion and represented the largest IPO in Europe during 2017.

As of 29 December 2017, the Italian primary IPO venues (Online Stock Market (MTA) and AIM Italia (AIM)) included 336 listed companies, with an aggregate market capitalisation totalling approximately €644.3 billion (37.8 per cent of GDP), with an increase of 22.7 per cent as compared to the aggregate market capitalisation registered at the end of 2016.[7]

1 Enrico Giordano is a partner and Federico Amoroso is a senior associate at Chiomenti.
2 Press release published by the Italian Stock Exchange on 30 December 2013.
3 Press release published by the Italian Stock Exchange on 30 December 2014.
4 Press release published by the Italian Stock Exchange on 30 December 2015.
5 Press release published by the Italian Stock Exchange on 30 December 2016.
6 Press release published by the Italian Stock Exchange on 29 December 2017.
7 Id.

The Italian Securities and Exchange Commission (CONSOB) is an independent public supervisory authority that regulates financial markets and listed companies, and is responsible for authorising the publication of prospectuses in the context of IPOs.

Borsa Italiana SpA (Borsa Italiana), which belongs to the London Stock Exchange Group, is a private company that organises and manages the Italian Stock Exchange and is responsible for establishing the relevant admission requirements.

II GOVERNING RULES

The governing rules are as follows:

a Legislative Decree No. 58 of 24 February 1998, as subsequently amended and supplemented (the Italian Financial Act) (in particular, Articles 94 to 101);[8]

b CONSOB Regulation No. 11971 of 14 May 1999, as subsequently amended and supplemented (the CONSOB Issuers Regulation) (in particular, Articles 3 to 13);[9]

c the Italian Stock Exchange Regulation (in particular, Articles 2.1.1 to 2.2.3), together with its Implementing Instructions (in particular, Titles IA.1 and IA.2);[10]

d Commission Regulation (EC) No. 809/2004 of 29 April 2004 (the EU Prospectus Regulation) and relevant Annexes (in particular, Annexes I, III and XXII);[11] and

e the Self-Regulation Corporate Governance Code approved by Borsa Italiana in July 2015 (the Corporate Governance Code), which sets forth the principles, guidelines and recommendations listed companies should abide by in the establishment and maintenance of their corporate governance structure.[12]

i Main stock exchanges

Borsa Italiana currently organises and manages several trading venues catering to various types of issuers and investors.

Regulated markets

The main regulated markets of the Italian Stock Exchange specifically aimed at IPOs are the MTA and the Market for Investment Vehicles (MIV).

The MTA is a regulated market for shares, convertible bonds, warrants and options rights.

The shares listed on the MTA can be classified as blue-chip, star or standard, depending upon the size of the relevant issuer as well as the specific respective admission requirements to be met.

8 An English translation of the Italian Financial Act is available on CONSOB's website: www.consob.it.

9 An English translation of the CONSOB Issuers Regulation is available on CONSOB's website: www.consob.it.

10 An English translation of the Italian Stock Exchange Regulation and its Implementing Instructions is available on Borsa Italiana's website: www.borsaitaliana.it.

11 The English version of the EU Prospectus Regulation is available on www.eur-lex.europa.eu.

12 An English translation of the Corporate Governance Code is available on Borsa Italiana's website: www.borsaitaliana.it.

In particular, the MTA is composed of three different segments:

a the blue-chip segment, dedicated to companies with capitalisation exceeding €1 billion;

b the STAR segment, dedicated to medium enterprises with capitalisation between €40 million and €1 billion, which, in order to remain listed on such segment and benefit from its advantages, undertake to comply with stringent requirements in terms of liquidity, transparency and corporate governance; and

c the Standard segment, dedicated to all other companies with capitalisation ranging between €40 million and €1 billion.

The MIV is a regulated market reserved for a specific type of issuers such as, *inter alia*, investment companies and real estate investment companies, private equity funds, closed-end real estate funds and special purpose acquisition companies (SPACs).

Multilateral trading facilities

The main multilateral trading facilities of the Italian Stock Exchange are the AIM and the Global Equity Market (GEM).

The AIM is a multilateral trading facility dedicated to Italian small and medium enterprises with high growth potential.

GEM is a multilateral trading facility dedicated to the trading of shares of non-Italian issuers already traded on other regulated markets in EU Member States or in other Organisation for Economic Co-operation and Development member countries, which can be admitted without being required to publish a prospectus.

ii Overview of listing requirements

The Italian Stock Exchange Regulation provides for different sets of listing requirements depending upon the exchange the relevant company is applying to.

MTA

In order to be eligible for the admission to listing, an issuer must be duly incorporated pursuant to the relevant laws of its country of incorporation and conduct business operations capable of generating revenues directly or through its subsidiaries, and in conditions of management autonomy.

Companies applying for admission to listing on the MTA are required to comply with the following requirements:

a expected minimum capitalisation of €40 million (and, with regard to the STAR segment, lower than €1 billion);

b at least three years of establishment prior to the relevant application;

c preparation of financial statements – also on a consolidated basis – in accordance with International Accounting Standards or International Financial Reporting Standards as consistently applied in the European Union and reviewed by external auditors for the past three financial years;

d adoption of a management control system and a three-year business plan;

e implementation of a corporate governance structure complying with the specific rules set forth in the Italian Financial Act and the recommendations contained in the Corporate Governance Code; and *f* minimum free float of 25 per cent (provided that the Italian Stock Exchange may grant the admission to listing even with a lower free float as long as a regular market functioning is ensured) or, with regard to the STAR segment, 35 per cent.

The listing requirements on the MTA do not differ significantly from those applicable to the Main Market of the London Stock Exchange (even though, in the United Kingdom, the shares must have an expected minimum aggregate value equal to only £700,000, provided that the UKLA may admit securities of lower aggregate value if it is satisfied there will be an adequate market for such shares).

On the other hand, the listing rules of the main US exchanges such as Nasdaq and the New York Stock Exchange provide for more stringent liquidity requirements as well as for the satisfaction of at least one of certain financial standards, respectively based on earnings, capitalisation on cash flow, capitalisation on revenues or assets on equity over a given time span prior to the admission to listing.

AIM

The Italian Stock Exchange Regulation does not provide for any minimum or maximum capitalisation thresholds in relation to companies listing on the AIM. Moreover, the AIM rules do not mandate any minimum duration or the adoption of any specific corporate structure.

The only requirement expressly provided for companies listing on the AIM is represented by a minimum free float of 10 per cent (to be divided among at least five professional investors or 10 investors, including two professional investors).

A pivotal element of the listing on the AIM is the appointment of the nominated adviser (Nomad), an investment bank or financial intermediary required to assist the relevant issuer during both the admission process and the entire time the company continues to be listed.

During the preliminary stage of an IPO on the AIM, the Nomad evaluates the potential appreciation of the company by the investors and, on the basis of such appraisal, advises the company on the actual feasibility of a listing process.

Following the admission to the AIM, the Nomad carries out an ongoing tutoring activity by supporting the relevant issuer as long as it remains on the market and ensuring its compliance with the market rules and requirements.

The procedure for admission to the AIM is flexible and based only on an admission document and audited financial statements for one financial year.

The admission document contains general information on the company's business, management and shareholders and its key financial information, but does not present the level of detail or the degree of complexity of a prospectus.

iii Overview of law and regulations

With specific reference to IPOs, the Italian Financial Act contains the general provisions governing the offering of financial instruments to the public and, in particular, sets forth general principles and rules concerning:

a the preparation and contents of the prospectus;
b the prospectus liability regime;
c the validity of the prospectus;
d CONSOB's powers in relation to the envisaged offering;
e the exemptions from the obligation to publish a prospectus; and
f the advertising activities related to the envisaged offering.

The CONSOB Issuers Regulation is designed to implement the Italian Financial Act's aforementioned general rules and, therefore, governs at a detailed level the authorisation process of the prospectus before CONSOB.

The EU Prospectus Regulation sets forth in detail:

a the format and the minimum information requirements to be included in the prospectus;
b the ways in which certain information may be incorporated by reference in the prospectus;
c the methods of publishing the prospectus; and
d the methods of disseminating advertisements in respect thereof.

The Italian Stock Exchange Regulation (together with its Implementing Instructions) includes, *inter alia*, all the provisions concerning:

a the admission requirements and procedure;
b the roles and tasks of the sponsor and the specialist;
c the suspension or revocation of listing; and
d the participation of market operators.

CONSOB constitutes the central supervisory authority in the context of the IPO process and pursues the twofold objective of protecting the investors while, in the meantime, ensuring the efficiency, transparency and development of the domestic capital markets.

In the context of an IPO, CONSOB reviews the prospectus and authorises its publication.

Pursuant to Article 94, paragraph 1 of the Italian Financial Act, anyone intending to carry out a public offering for sale or subscription of securities is required to publish a prospectus before carrying out such offer. The publication of the prospectus is subject to CONSOB's prior approval.

CONSOB is therefore required to verify the completeness of the prospectus and to ensure that all of the information contained therein is consistent and comprehensible. The prospectus must contain – in a manner that is easy to analyse and understand – all the information necessary for prospective investors to make an informed assessment of the relevant issuer, the securities being offered and the relevant rights attached thereto.

CONSOB generally monitors the compliance of the entire IPO process with the Italian legal and regulatory framework, and has enforcement and sanctioning powers in the event of any breaches.

III THE OFFERING PROCESS

i General overview of the IPO process

Expected time frame

The IPO process generally covers a time span of approximately three to six months.

The introductory phase of an IPO entails activities such as corporate restructurings (where necessary), as well as the definition of the business plan and the implementation of international accounting standards in the preparation of the financial statements. Moreover, during such stage, the relevant issuer should select and appoint its financial and legal advisers and the underwriters, set up a data room for the due diligence activities to be carried out by its legal advisers and the underwriters, and start a preliminary dialogue with CONSOB and the Italian Stock Exchange.

The duration of such first stage depends upon a number of factors, including the initial corporate structure of the issuer and the need to create a sufficiently strong equity story prior to commencing the actual IPO process.

During the second stage of the IPO, the relevant issuer drafts, together with its legal advisers and subject to review by the underwriters, the prospectus and, should the IPO entail an international offering, the international offering circular.

Such stage generally takes about two months and ends with the formal filing of the prospectus with the Italian Stock Exchange. The practice of making an informal filing of the prospectus in advance has become increasingly common, as it enables the issuer to adjust the document in accordance with the regulator's preliminary indications prior to the formal commencement of the approval and admission process.

Following the formal filing of the prospectus, CONSOB may declare it to be incomplete within 10 business days; the issuer or offeror must then supplement or complete the documentation within 10 business days following the receipt of CONSOB's requests.

Once the documentation has been completed, a maximum term of 70 business days will begin to run, during which CONSOB may request additional information if reasonable.

Despite the rather long regulatory terms (as the approval process may take up to 95 calendar days from filing), in practice, shorter terms may be agreed with CONSOB, subject to all the documentation being prepared in a complete and accurate manner, and the issuer or offeror's promptness in providing the additional information the regulator may request.

As a general estimate, the approval process may take six to 10 weeks from the formal filing of the prospectus.

Once the authorisation to publish the prospectus has been obtained, the issuer generally executes the underwriting agreement concerning the retail tranche of the offering, which commences the following week on the basis of a previously approved price range.

In tandem, the issuer starts its roadshow activities and the institutional underwriters engage in the book-building activities, which will result in the determination of the final price of the shares (by taking into account, among other things, the quality and quantity of the orders received from institutional investors and the quantity of orders received from retail investors) and the execution of the institutional underwriting agreement.

Trading generally starts in the week following the closing of the institutional placement.

The actual placement and admission process then takes approximately three weeks.

Main players

Global coordinators constitute the first tier of the underwriting syndicate of the IPO and are selected by the issuer to act as coordinators for public and institutional offerings.

In such capacity, in addition to their commitment to purchase or subscribe for a predetermined quantity of the shares being offered, they:

a generally oversee the IPO process;

b coordinate the underwriting syndicate;

c advise the company on, among other things, the offering strategy, timing and business preparation and compliance with exchange listing requirements;

d provide the company with information on market conditions and their impact on the offering on an ongoing basis; and

e estimate demand for the company's shares.

The issuer generally selects from among the global coordinators one bank or intermediary to act as stabilisation agent, engaged to carry out stabilisation activities, such as the exercise of the overallotment or greenshoe options, in order to mitigate the underpricing risk following the admission to listing.

Moreover, as far as the retail tranche of the relevant offering is concerned, one global coordinator is also appointed to act as party in charge of the placement, which may be held liable for any material false information or omissions contained in the prospectus unless it proves to have adopted a certain standard of diligence and care in the review of such document.

Bookrunners represent the second tier of the underwriting syndicate. In such capacity, they:

a undertake to purchase or subscribe for a given amount of the shares;

b market the IPO to institutional investors; and

c carry out research on the issuer through their independent research departments.

The sponsor is a financial intermediary who supports the issuer in connection with its admission to listing on the MTA and in its relationship with the Italian Stock Exchange during the entire IPO process.

In particular, upon submission to the Italian Stock Exchange of the application for the admission to listing on the MTA, the sponsor is required:

a to disclose any relationship (credit, shareholding, etc.) existing between the group of the issuer and its material shareholders and the sponsor's group;

b to confirm that the Italian Stock Exchange has been provided with all the data and information gathered while performing its activities;

c to declare that the managing and supervisory bodies of the issuer have been adequately informed as to the duties and obligations arising from listed company status;

d to confirm the adoption by the issuer of a management control system consistent with the one described in the relevant memorandum; and

e to release a specific statement concerning the provisional data, estimates and forecasts included in the business plan filed with the Italian Stock Exchange upon submission of the application.

The sponsor also carries out post-listing activities, such as the publication of at least two financial analyses on the relevant issuer per year, as well as further analyses upon the occurrence of extraordinary corporate events, and the organisation of meetings between the issuer and the financial community at least twice a year.

The specialist is a financial intermediary with market making functions that undertakes to support the liquidity of one or more equity securities.

The appointment of a specialist is mandatory for companies seeking admission to listing on the STAR segment of the MTA and on the AIM.

The role of the company's legal advisers in an IPO is to provide guidance on the legal aspects of the offering such as legal structuring and timing; compliance with securities and corporate laws; and obtainment of governmental approvals.

Moreover, lawyers assist in coordinating the due diligence activities and draft the offering documentation as well as negotiating the underwriting agreements drafted by the underwriters' counsel.

Legal advisers are also involved in the preparation of other documents, including, without limitation, publicity memoranda, research report guidelines, listing applications, legal opinions, etc.

The external auditors support the issuer throughout the entire IPO process.

The typical documents prepared by independent auditors in an IPO include, among other things:

a reports on the issuer's financial statements;
b an opinion on the reasonableness of the basic assumptions made, the correct application of the methods used and the appropriateness of the accounting policies adopted in the preparation of *pro forma* data;
c a report on the procedures followed by the issuer in preparing its business plan;
d a report on the estimates and forecasts included in the prospectus; and
e various comfort letters addressed to the sponsor and the underwriters.

Documentation required

The prospectus must be drawn up in accordance with the schemes annexed to the EU Prospectus Regulation and is composed of three different parts:

a the registration document, which contains all the information on the issuer;
b the note on the financial instruments, which contains all the information on the shares, the offerors and the placement agents; and
c the summary note, which contains the main information on the transaction that is most relevant for the investor in non-technical language.

In order to reduce overall processing times, an issuer may decide to separately file such sections, thereby obtaining separate authorisations.

In addition to the prospectus, an issuer is obliged to file a number of additional documents with CONSOB and the Italian Stock Exchange, including:

a a copy of its current by-laws, accompanied by a copy of the by-laws to enter into force upon admission to listing;
b the corporate resolutions related to the issuance of the shares and the application for the admission to listing;
c the auditors' report on the latest financial statements;
d a memorandum describing the management control system; and
e a three-year business plan.

Upon occurrence of a new event or detection of a material error or inaccuracy during the period lapsing between the publication of the prospectus and the final closing of the offering, the relevant issuer will be obliged to publish a supplement to the prospectus, subject to CONSOB's prior authorisation.

The approval process for a supplement to the prospectus is designed to allow for prompt publication thereof and lasts for up to seven business days.

Upon publication of a supplement to the prospectus, any investor who has already agreed to purchase or subscribe for the shares being offered may exercise a withdrawal right within the following two business days.

An international offering circular (IOC) is the document used by the underwriters for purposes of the international institutional placement of the shares.

Its contents must be consistent with the information contained in the prospectus, but the IOC is not subject to any specific approval by CONSOB or the Italian Stock Exchange.

The main contractual documents to be entered into in an IPO are represented by the engagement letter of the global coordinators, the retail underwriting agreement, the institutional underwriting agreement and the sponsorship agreement.

ii Pitfalls and considerations

A company going public should carefully consider:

a the engagement of first-tier advisers and underwriters, as planning, preparation and deep knowledge of the market are key factors for the success of an IPO;

b the ongoing compliance monitoring of the IPO process in order to avoid any sanctions (including any delays or suspension of the offering) and the consequential reputational harm; and

c any information to be disclosed in the prospectus, including risk factors and forward-looking statements, as the offerors (companies and selling shareholders) are subject to a strict prospectus liability regime, pursuant to which they are liable for losses suffered by an investor who has relied on the truthfulness and completeness of the information if such information turns out not to have been truthful or complete, subject to the burden of proof of having adopted 'all diligence' to ensure that the information was true and consistent with facts.

iii Considerations for foreign issuers

The Italian legal and regulatory framework does not provide for a different procedure or for specific rules applicable to foreign issuers seeking admission on the Italian Stock Exchange.

However, the Italian Stock Exchange Regulation requires foreign issuers incorporated in non-EU countries to prove the absence of any hindrances to their substantial compliance with the Italian Stock Exchange Regulation, its Implementing Instructions or any other laws and regulations applicable to them in respect of the information to be made available to the public, CONSOB and the Italian Stock Exchange.

Moreover, foreign issuers in general are required to give evidence as to the absence of any hindrances to the exercise of all the rights attached to the securities to be listed.

IV POST-IPO REQUIREMENTS

Listed companies are subject to a comprehensive and broad array of post-listing obligations and requirements in terms of disclosure, reporting and corporate governance.

i Disclosure obligations and requirements

A company that applies for the admission to listing is required to adopt specific procedures for the internal treatment and the external disclosure of documents and information concerning its business, with a specific focus on price-sensitive information.

The legal regime concerning treatment and disclosure of price-sensitive information has recently tightened due to the entry into force of Regulation (EU) No. 596/2014 of 16 April 2014 (the Market Abuse Regulation (MAR)), which has introduced stricter requirements in order to prevent market manipulation conducts.

Moreover, listed issuers are subject to specific rules in relation to, among other things:

a the disclosure of transactions involving its shares, any financial instruments linked thereto and, following the implementation of the MAR, any of its listed debt financial instruments carried out by persons having access to price-sensitive information such as directors, statutory auditors or key officers;
b the disclosure of related-party transactions;
c the disclosure of material shareholdings and any changes thereto;
d drawing up, maintaining and updating an insiders list; and
e financial reporting.

ii Corporate governance requirements

The Corporate Governance Code sets out for listed companies high corporate governance standards in line with international best practices.

The Italian Financial Act sets out the 'comply or explain' principle, requiring listed companies to disclose information about their compliance with the Corporate Governance Code in an annual formal report on corporate governance.

The Corporate Governance Code recommends that the entire board of directors be entrusted with the primary responsibility for determining and pursuing the strategic targets of the company, as well as:

a the examination and approval of the strategic, operational and financial plans of the company;
b the evaluation of the general performance of the company;
c the resolutions on material transactions; and
d the periodic evaluation of the performance of the board and its committees.

In light of the above, directors are designated as either: (1) executive, namely, those vested with management powers; or (2) non-executive, whose role is to enhance the board's discussion and to provide an independent unbiased opinion on the proposed resolutions, particularly those where the respective interests of executive directors and shareholders may not be aligned, such as executive director remuneration and the internal control and risk management systems.

Although independence of judgment is required of all directors, certain board members must meet specific independence requirements set out in the applicable laws and regulations, and recommended by the Corporate Governance Code.

The Corporate Governance Code recommends the division of key management competences, particularly those of the chairman and CEO. Where these two offices are held by the same person, the Code recommends the appointment of a 'lead independent director' to act as the representative of non-executive and independent directors within the board.

The general meeting appoints the board through a slate election system. At least one director must be appointed from the minority slate that obtained the highest number of votes and the relevant director must be free of any direct or indirect link with the shareholders who filed or voted in favour of the slate that obtained the majority of votes.

Gender balance must be on a ratio of at least 1:3 (either way).

Further, the applicable laws and regulations, and the Corporate Governance Code require that there be a minimum number of independent directors on the board.

The Corporate Governance Code also requires the board of directors to establish internal committees, consisting mostly of independent directors (except in special cases):

a the control and risk committee, which supports the analysis and decisions of the board of directors relating to internal control and risk management, and the approval of periodical financial reports;

b the remuneration committee, which submits proposals or opinions to the board of directors concerning the remuneration of executive directors and for the periodic assessment of the adequacy, the overall consistency and the actual implementation of the remuneration policy for directors and key managers of the company; and

c the appointments committee, which formulates opinions and recommendations to the board regarding the board's size, composition and professional skills, and submits specific proposals if the company approves the adoption of an executive director succession plan.

It should be noted that the functions of the appointment committee and the remuneration committee may be joined under one single committee.

Committee members are elected from among the members of the board of directors. As a general rule, internal committees have exclusively advisory and propositional duties, as any resolution concerning the matters falling within their respective competences should in any case be adopted by the board of directors.

The board of statutory auditors is entrusted with supervisory duties over:

a the compliance of the management of the company with general law and the by-laws;

b the observance of principles of good management;

c the adequacy of the company's organisational structure as well as the adequacy and effectiveness of the internal control and risk management system; and

d the actual implementation of corporate governance rules as provided by the Corporate Governance Code.

The Board of Statutory Auditors is composed of three or five statutory auditors, appointed by means of a slate voting system. The chairman of the board must be a member elected from the slate filed by the minority shareholders and must be free of any direct or indirect link with the shareholders who filed or voted in favour of the slate that obtained the majority of the votes. Again, gender balance must be on a ratio of at least 1:3 (either way).

Statutory auditors must meet certain stringent professionalism, independence and integrity requirements.

V OUTLOOK AND CONCLUSION

Following the upwards trend in 2017, the outlook on the IPO market for 2018 also seems highly positive, as a significant number of IPOs are currently ongoing or have otherwise already been formally announced.

Even though IPOs have partially lost their original industrial fundraising purpose, and the current low-rates environment companies may still find it more convenient to seek financing through debt capital markets or the banking system, at the same time, IPOs have kept their appeal as an attractive exit strategy for private equity investors eager to maximise the return on their original investment.

SPACs should also become more commonly accepted as an alternative instrument to pursue listing objectives, with benefits in terms of both transaction timing and costs.

Moreover, the tax regime applicable to investments in equities under the individual savings plans should represent an additional incentive for companies to go public, as retail investors now benefit from reduced tax rates on their investments in equity portfolios.

Finally, it should also be taken into consideration that a number of successful, family-run small and medium enterprises, which still represent the core of the Italian economic system, may evaluate an IPO process in light of a newly found confidence in the stock market. This is due to factors such as, *inter alia*, succession issues in key management and executive roles, undercapitalisation, fundraising for internationalisation and business expansion plans, and a renewal of fragmented shareholders' bases.

Such renaissance of the Italian IPO market is expected to involve all key national industries, with specific focus on the transports, fashion, luxury, and food and beverage sectors, which are subject to high demand from international institutional investors, as last witnessed by the recent €2 billion offer launched by Global Infrastructure Partners on the entire share capital of Italy's private train operator Italo NTV.

Chapter 10

LUXEMBOURG

Frank Mausen and Paul Péporté[1]

I INTRODUCTION

Key international players consider Luxembourg to be one of the most attractive business centres in the world. With approximately 139 registered banking institutions, a successful investment fund industry with approximately 4,100 funds managing net assets of approximately €4,135 billion and a dynamic insurance sector, Luxembourg offers a full range of diversified and innovative financial services.

The main advantages of Luxembourg include its:

a continued affirmation of an AAA rating for long-term and short-term sovereign credit;
b sound public finances;
c rapid regulatory process;
d business-friendly attitude of the authorities;
e large network of double taxation treaties;
f efficient immigration procedures;
g recognition as an innovative hub for fintech; and
h state-of-the-art company laws.

To maintain the attractiveness of Luxembourg in a context where the regulatory framework becomes increasingly harmonised, there are clear signals that the Luxembourg authorities want to differentiate themselves from their foreign counterparts with regard to quality of service, responsiveness and approachability.

The above are all factors to consider when selecting the optimal location in which an initial public offering (IPO) vehicle should be established. Given the benefits offered, Luxembourg is increasingly the jurisdiction of choice for initiating IPO transactions.

II GOVERNING RULES

i Main stock exchanges

The Luxembourg Stock Exchange (LuxSE) operates two markets: an EU regulated market named Bourse de Luxembourg (BDL) and an exchange-regulated market named Euro MTF, which does not qualify as a regulated market within the meaning of Directive 2014/65/EU, but as a multilateral trading facility (MTF) within the meaning of such Directive. In addition, from 12 January 2018 the LuxSE offers the possibility for issuers to have securities admitted

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on its official list without being admitted to trading on any market through the creation of a dedicated section of the LuxSE's official list, namely the LuxSE Securities Official List (the LuxSE SOL).

Issuers whose shares have been admitted to trading on the BDL are subject to European directives applicable to financial instruments, including Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, as amended (the Prospectus Directive). Note that Regulation 2017/1129/EU of the European Parliament and of the Council of 14 June 2017 (the Prospectus Regulation), which officially became effective on 20 July 2017, will gradually replace the Prospectus Directive, its implementation being spread over three years, and will only enter fully into force in July 2019. The Prospectus Regulation, which entered into force in July 2017, also provides for an exemption from the obligation to publish a prospectus for the admission to trading on a regulated market of 'securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market' (Article 5 (a)).

Thanks to the European passport provided under said Directive, a prospectus may be used for admission to trading on a regulated market in another European Economic Area (EEA) country without further review or the imposition of further disclosure requirements (save for summary translations, where applicable) by the relevant authority of that EEA country, thereby minimising regulatory arbitrage and offering a single market framework. Prospectuses for the public offering of equity securities within the EEA or admission to trading on a regulated market within the EEA (including the BDL) issued by issuers incorporated in Luxembourg will need to be approved by the Luxembourg competent authority, the Commission for the Supervision of the Financial Sector (CSSF) and, where applicable, subsequently passported into the relevant host Member States in which an admission to trading on a regulated market or a public offering takes place.

The Euro MTF has been a fast-growing market since its creation in 2005. It was created by the LuxSE to provide issuers with an alternative to the EU-regulated market. The LuxSE is responsible for the review and approval of prospectuses for admission to trading on the Euro MTF. The Euro MTF is not an EU-regulated market and is therefore outside the scope of the EU's Prospectus Directive and Transparency Directive, hence the reporting and transparency requirements are less stringent. It is therefore suitable for those not interested in the European passport but who want a European admission to trading.

As of December 2017,[2] some 35,703 securities were admitted to trading on both markets, 60 per cent of which were admitted to trading on the BDL and 40 per cent of which were admitted to trading on the Euro MTF, which makes the Euro MTF the largest MTF in Europe. These numbers include 14,700 bonds and 15,644 structured investments.

Investment funds form another important segment with more than 6,500 separate instruments listed.[3]

With more than 140 listed global depositary receipts (GDRs), the LuxSE is the first exchange in Europe in GDRs and ranks second worldwide for the listing of GDRs.[4] Worldwide, 9 per cent of IPO capital raised via depositary receipts in 2011 was from

2 Figures kindly provided by the LuxSE, December 2017.

3 The LuxSE and Deloitte, 'The Luxembourg Stock Exchange: The preferred funds listing destination', p. 4.

4 Figures kindly provided by the LuxSE, December 2017.

depositary receipts listed on the LuxSE.[5] In terms of origin of the underlying equity issuers for these depositary receipts, India ranks first with more than 60 GDRs (42 per cent of GDRs listed on the LuxSE),[6] followed by Taiwan (37 per cent).

GDRs have been present on the LuxSE for some time – the first listing of a GDR took place in 1990.[7] GDRs provide the relevant underlying company with access to international capital markets. Emerging countries looking for international investors see the GDR as a unique solution in terms of flexibility and market exposure.[8]

As far as the equity market is concerned, the LuxSE has more than 30 domestic issuers with equity listed on one of the LuxSE's markets. The trading activity overall is, however, rather limited.

Among such domestic issuers, an increasing number of Luxembourg IPO vehicles serve as holding companies for operational groups operating in other countries (especially Germany). The reasons for using a Luxembourg IPO vehicle (rather than a German vehicle) are diverse – often private equity houses that intend to float one of their investments have already used Luxembourg vehicles to structure their investment and one of the existing top companies is then converted into an IPO vehicle. In other circumstances, Luxembourg vehicles are preferred to other vehicles for corporate governance reasons (increased flexibility of Luxembourg company law compared to other jurisdictions), and issuers are also keen on dealing with the CSSF to have their prospectuses approved rather than another authority (bearing in mind that the CSSF is one of the most popular competent authorities under the Prospectus Directive with more than 1,600 documents approved yearly).[9]

A number of foreign issuers also have their equity listed on the LuxSE. These companies are usually dual-listed, with their equity also being listed on another regulated market within the EEA. For instance, there are a number of German corporates with listings on one or more regulated markets in Germany that also have their shares admitted to trading on the LuxSE's BDL – the dual listing then permits issuers to have more flexibility in terms of language for the underlying listing prospectus and to draw up the prospectus in the English language, rather than in German, which is often considered an important marketing tool in connection with such equity capital market transactions.

ii Overview of listing requirements

Admission to trading and admission to official list

A distinction should be made between the requirements for an admission to trading of shares in an issuer to the regulated market of the LuxSE (BDL) and the Euro MTF. While a prospectus is required in both cases, the underlying regulatory regime differs significantly.

For admission to trading on the Euro MTF, the competent entity for prospectus approval will be the LuxSE. In contrast, for admission to the regulated market of the LuxSE, a prospectus drawn up in accordance with the requirements of the Prospectus Directive is required (the disclosure requirements regarding equity issuers are generally perceived to be more demanding than those for the Euro MTF, which are set by the rules and regulations of

5 The LuxSE and Deloitte, 'The Luxembourg Stock Exchange: Your premium listing destination', p. 5.
6 Figures kindly provided by the LuxSE, December 2017.
7 Deloitte.
8 The LuxSE and Deloitte, 'The Luxembourg Stock Exchange: Your premium listing destination', p. 11.
9 CSSF website: www.cssf.lu/en. In 2017, 1,622 documents (comprising prospectuses and supplements) were approved by the CSSF.

the LuxSE).[10] Such Prospectus Directive compliant prospectus is approved by the CSSF if the issuer is a Luxembourg company (and for third-country issuers if certain conditions are met), while an issuer incorporated in an EEA country other than Luxembourg would have the prospectus approved in its jurisdiction of incorporation (being the home Member State in that case) and then passported into Luxembourg via the EU passport for an admission to trading on the BDL.

In principle, admission to listing on the LuxSE's official list goes hand in hand with the admission to trading on one of the LuxSE's markets.[11] On request of the issuer or the person seeking the admission to trading, the securities specified in an application form may, however, not be admitted to the official list.[12] As an exception to the above, it is now possible, subject to the conditions set out in the LuxSE's 'Rulebook – Securities Official List' (the SOL Rulebook) to have securities admitted to listing on the LuxSE SOL without such securities being admitted to trading on the LuxSE regulated market or Euro MTF.

Applicable listing requirements

The requirements for listing securities, which apply equally to securities on the BDL and the Euro MTF, where they are also listed on the official list are set out in the Grand-Ducal Regulation of 13 July 2007 relating to the holding of an official list for financial instruments, as amended (the Listing Regulation). The requirements are outlined below.

The requirements for listing securities on the LuxSE SOL (next to the application for listings itself, which includes the need to provide an 'information notice') are set out in the SOL Rulebook and are substantially identical to those highlighted below.

Compliance with applicable law[13]

The issuer must conform to the corporate laws and regulations to which it is subject, and its articles.

Minimum number of investors[14]

A sufficient distribution of shares (or units) to the public of one or more Member States must be achieved at the latest at the time of the admission to the official list. A sufficient distribution is deemed to have been achieved either when the relevant shares and units have been distributed to the public up to at least 25 per cent of the subscribed capital represented

10 Annexes I and III of European Commission Regulation 809/2004, dated 29 April 2004, implementing the Prospectus Directive, as amended, among others, by the Commission Delegated Regulation (EU) 311/2012 and the Commission Delegated Regulation (EU) 486/2012 (together, Regulation 809/2004) comprise the disclosure requirements regarding the issuer and the relevant shares that will need to be provided for such a prospectus. Additional Annexes of the said regulation apply (Annex II for *pro forma* financials, where applicable, and Annex XX for the summary).

11 According to the rules and regulations of the LuxSE, an application for admission to trading on one of the securities markets operated by the LuxSE is also deemed to be an application for admission to the official list (Chapter 7, Article 701.1 of the rules and regulations of the LuxSE).

12 Note that the opposite scenario (admission to official list without admission to trading) is now also possible. Article 701.2 of the rules and regulations of the LuxSE specify that an application for admission to the official list without an application for admission to trading on one of the securities markets opened by the LuxSE is possible subject to conditions set out in the SOL Rulebook.

13 Article 6 of the Listing Regulation and Article 5.3.1.2 of the SOL Rulebook.

14 Article 13 of the Listing Regulation.

by this category of shares and units, or when, due to the high number of shares and units of a same category and the extent of their distribution to the public, proper operation of the market is assured with a lower percentage.

This condition does not apply when the securities are to be distributed through the BDL or the Euro MTF, although in that case, the admission to the official list may only be granted if the LuxSE believes that sufficient distribution through the regulated market will take place within a short time frame. The Listing Regulation also specifies that where the shares and units are admitted to the official list of one or more third countries, the LuxSE may, by derogation, provide for their admission to the official list of the LuxSE when sufficient distribution to the public has been achieved in the third country or countries where they are listed.

A certain level of discretion is left with the LuxSE to assess whether sufficient distribution is deemed achieved. In order to enable the LuxSE to form a view, the relevant issuer or person seeking admission will need to respond to a questionnaire issued by the LuxSE in which the issuer will specify its expectations regarding distribution. There is no minimum number of investors *per se*, and the LuxSE will analyse the overall context. The holding by a single investor, even if accompanied by a limited number of 'strawmen investors' each holding an insignificant portion of the overall equity is considered as not being sufficient. However, a distribution of the shares among a limited number of investors each holding a reasonable stake in the company would usually be satisfactory to the LuxSE, though, as mentioned, there is some discretion on the part of the LuxSE in this respect.

Article 5.3.1.7 of the SOL Rulebook provides that there are no free float conditions for shares and units admitted to LuxSE SOL.

Minimum market value of share issuer[15]

The minimum share capital, at the time of listing, must be of at least €1 million, unless the LuxSE is otherwise satisfied that there will be an adequate market for the shares concerned.[16]

Negotiability of securities[17]

The shares and units must be freely transferable. Selling restrictions or lock-ups (for instance, post-IPO management lock-ups) is, however, accepted.

Number of securities concerned[18]

The admission application must, in principle, concern all shares and units of the same category issued. The only exception to this rule (which does not apply to the LuxSE SOL) relates to large blocks of shares that are designed to maintain control of the company, or that are not tradable during a determined period in accordance with agreements, provided that the public is informed of these situations and that there is no risk of such situations causing any prejudice to the holders of the shares for which admission to the official list is being applied.

15 Article 7 of the Listing Regulation and Article 5.3.1.2 of the SOL Rulebook.

16 Also, the condition does not apply for admission to the official list of a further block of shares and units of the same category as those already admitted.

17 Article 11 of the Listing Regulation and Article 5.3.1.6 of the SOL Rulebook.

18 Article 14 of the Listing Regulation and Article 5.3.1.9 of the SOL Rulebook.

Minimum prior existence[19]

The issuer must have published or filed, in accordance with national law, its annual accounts for the three financial years preceding the application for listing. A derogation is possible[20] and, if obtained, the LuxSE imposes additional post-listing obligations on such issuer via the requirement for publication of quarterly reports over a certain period of time post listing.[21]

iii Overview of law and regulations

Public offer and admission to trading

Public offer

According to the act dated 10 July 2005 on prospectuses for securities, as amended (the Prospectus Act 2005), no offer of transferable securities may be made to the public in Luxembourg without the prior publication of a prospectus approved by the CSSF or a competent foreign authority.[22]

Depending on the type of offer and the securities offered, different regimes under the Prospectus Act 2005 apply. Part II of the Prospectus Act 2005 implements the provisions of the Prospectus Directive into Luxembourg law, whereas Part III, Chapter 1 of the Prospectus Act 2005 applies to simplified prospectuses, which must be published for public offers of securities not covered by Part II. The main difference between the two regimes is that only public offers made under Part II can benefit from the European passport for securities. Part III, Chapter 1 is used for public offers in Luxembourg only.

Generally, a prospectus or a simplified prospectus must contain all the information that enables prospective investors to make an informed assessment of the contemplated investment. The contents and format of a Part II prospectus are determined by Regulation 809/2004. Part III prospectuses are either drafted on the basis of Regulation 809/2004 or on the basis of the rules and regulations of the LuxSE.

Part II of the Prospectus Act 2005 provides for exemptions from the obligation to publish a prospectus for certain offers.[23] The obligation to publish a prospectus does not apply to offers to the public of certain types of securities (such as, under certain conditions, securities offered or allotted (or to be allotted) to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking).

Admission to trading

The admission to trading of securities requires the prior publication of a prospectus in accordance with the Prospectus Act 2005. The regime applicable for admission to trading varies, to a great extent, according to the market on which the admission to trading is sought.

19 Article 8 of the Listing Regulation and Article 5.3.1.3 of the SOL Rulebook.

20 The derogation must be desirable in the interest of the company or the investors and subject to the LuxSE being satisfied that the investors have the necessary information available to be able to make a well-founded opinion on the company and the shares.

21 Article 704 of the rules and regulations of the LuxSE.

22 Which is then passported into Luxembourg in accordance with the Prospectus Directive.

23 For instance, insofar as offers of shares and units are concerned, offers addressed solely to qualified investors, offers of securities addressed to fewer than 150 natural or legal persons other than qualified investors per Member State and offers of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor.

Issuers can either request an admission to trading on the regulated market of the LuxSE or the Euro MTF market. Depending on the type of securities for which an admission to trading on the regulated market is sought, Part II or Chapter 2 of Part III of the Prospectus Act 2005 is applicable. As has been seen, only prospectuses approved under Part II can benefit from the European passport. The competent authority for the approval of a Part II listing prospectus is the CSSF, whereas the LuxSE governs the approval of simplified prospectuses under Chapter 2 of Part III of the Prospectus Act 2005.

As previously mentioned, the Prospectus Regulation now provides for an exemption from the obligation to publish a prospectus for the admission to trading on a regulated market of 'securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market' (Article 5 (a)). This exemption is part of the provisions of the Prospectus Regulation that entered into force in July 2017.

Market abuse

Since 3 July 2016, Regulation (EU) No. 596/2014 on market abuse (the Market Abuse Regulation) applies across the EU, thereby introducing a new market abuse regime. Compared to its predecessor, Directive 2003/6/EC on market abuse, the Market Abuse Regulation has an expanded scope as it directly applies to financial instruments on a wider range of trading venues including multilateral trading facilities such as the Euro MTF. This means that issuers with shares on the Euro MTF will also need to comply with the ongoing obligations stemming from the Market Abuse Regulation (which was not the case under the previous Luxembourg regime).

The Market Abuse Regulation prohibits insider dealing and market manipulation (though a number of safe harbours, which are relevant for IPOs, such as the safe harbour for stabilisation transactions, are also provided) and imposes a number of continuing obligations on issuers with equity admitted to trading on a regulated market or an MTF.

The Market Abuse Regulation does not apply in respect of securities only listed on SOL.

Corporate and governance aspects

Where the IPO is made through a Luxembourg incorporated issuer, the flexible corporate framework is often a driver for selecting the home jurisdiction of the IPO vehicle.

Potential IPO vehicles – corporate form

The most common form for structuring an IPO via a Luxembourg issuer is the Luxembourg public limited liability company (SA). An alternative is the Luxembourg partnership limited by shares with a double shareholder (general partner and limited partner) structure (SCA). In contrast to an SA, control of the SCA may be so structured that it does not necessarily depend on shareholdings.[24] This is the case if a holder of unlimited shares is appointed manager and cannot be removed without its consent. There must be at least one shareholder with unlimited liability, who will carry out the management of the SCA.[25] Typically only the limited partner shares would be offered to investors or admitted to trading.

24 However, it is possible for an SA to issue non-voting shares. See below.

25 Holders of unlimited shares in an SCA are often limited liability companies, in order to grant protection.

Bearer shares versus dematerialised shares and shares in registered form

Historically, IPOs through Luxembourg companies have been structured via issuance of shares in global bearer form: one or more global share certificates were issued by the company that represented the entire issuance of new shares, which were subsequently lodged with a depositary for entry into the relevant clearing systems. The Luxembourg Act, dated 28 July 2014, on the immobilisation of bearer shares and units (the Immobilisation Act 2014) has been a game changer in this regard. The law imposes the appointment of a Luxembourg depositary that meets the requirements of the Immobilisation Act 2014, with whom all bearer shares must be deposited.[26] For a large number of (recent) IPOs, the appointment of such a Luxembourg depositary has become problematic – the deposit of the global bearer share for the relevant IPO is usually made with a depositary that is linked to the relevant clearing system of the relevant market on which the shares are to be traded, which (as mentioned previously) is often outside of Luxembourg (e.g., where listing of the shares takes place in Germany, there is usually a deposit in Germany for a clearing in Germany).

Therefore, most issuers are now structuring their Luxembourg IPOs through the issuance of dematerialised shares governed by the Luxembourg Act, dated 6 April 2013, on dematerialised securities (the Dematerialisation Act 2013). According to the Dematerialisation Act 2013, the shares must be registered in the issuance account for the Luxembourg issuer's shares of the same class held with a 'liquidation body',[27] which must be a securities settlement system. Typically, LuxCSD SA, a securities settlement system created in 2010 and jointly owned by the Luxembourg Central Bank and Clearstream International, is appointed as the liquidation body for such Luxembourg issuer IPOs. A Luxembourg principal agent is typically appointed as the 'LuxCSD principal agent', who liaises with LuxCSD.

The single issuance account held with the liquidation body in which the dematerialised shares are recorded indicates the identification elements of these dematerialised shares, the quantity issued and any subsequent changes. In accordance with the Dematerialisation Act 2013, dematerialised shares are only represented by a record in a securities account. Ownership in the shares is established by such inscription in a securities account.

Shares in registered form can also be issued by a Luxembourg company. According to Luxembourg company law, the issuer must hold at its registered office a register in which the holders of shares are registered. In case of shares cleared through clearing systems, the relevant clearing system (or person acting for the account of such clearing system) is entered into the register.

In addition to these existing requirements, on 6 December 2017, Bill No. 7217, which will implement the provisions of the Fourth EU Anti-Money Laundering Directive (Directive (EU) 2015/489 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) into Luxembourg law, was published and provides for the creation of a

26 There is, however, Luxembourg legal literature providing that the Immobilisation Act 2014 does not, in fact, apply to shares in global bearer form (as these are considered not to have the actual characteristics of definitive bearer shares).

27 The Dematerialisation Act 2013 provides that, as an alternative to a 'liquidation body', a 'central account keeper' can be appointed. However, such central account keeper can only be appointed in respect of unlisted securities.

register of beneficial owners of Luxembourg legal entities. This would apply to Luxembourg companies whose shares are admitted to trading (although there will be exceptions as well, for instance for companies whose shares are admitted to trading on a regulated market).

Flexible corporate law: non-voting shares, nominal value and authorised capital

Both the SAs and SCAs may issue non-voting shares. According to the Luxembourg Act, dated 10 August 1915, on commercial companies, as amended (the Companies Act 1915), which has been amended to provide further flexibility for the issuance of non-voting shares by SAs,[28] the maximum number of non-voting shares is to be determined by the general shareholders' meeting and the financial rights attached to the non-voting shares on a distribution (dividend, repayment or liquidation) are determined in the articles of association of the Luxembourg issuer. Non-voting shares retain voting rights in relation to any resolutions:

a that may result in an amendment to the rights attached to the non-voting shares;
b on the reduction of the share capital; or
c on the early dissolution of the company.

The holders of non-voting shares are entitled to receive all convening notices and reports sent to the other shareholders.

Luxembourg law allows the issuance of shares with or without nominal value. There is no maximum or minimum nominal value and it is possible to issue various share classes with a different nominal value and proportionate voting rights.

The articles of incorporation of the IPO vehicle can provide 'authorised capital', which is limited to five years but can be renewed. There is no restriction on the size of such authorised capital (versus the actual share capital, etc.).

Beneficiary shares

The Companies Act 1915 provides for the possibility to issue beneficiary shares, which are of a *sui generis* nature and are, strictly legally speaking, neither outright equity nor outright debt. According to Article 430-1 of the Companies Act 1915: 'Shares representing or not the corporate capital and designated by the present law as "beneficiary shares or securities" can be created. The articles of association shall specify the rights attached thereto.'

While the rules applicable to shares are determined in detail in the Companies Act 1915, beneficiary shares are not otherwise regulated by the Companies Act 1915. This leaves room for flexibility in terms of structuring. The articles of the relevant Luxembourg issuer can thus provide any allocation of, for instance, the economic rights in respect of such instruments and also permits flexibility for the organisation of voting power.

Corporate governance

Luxembourg company law permits both one-tier (board of directors) or two-tier systems (management board and supervisory board) for SAs. This flexibility allows adaptation to local market needs; for example, IPOs through Luxembourg holding companies that are to be admitted to trading on a German regulated market would tend to make use of the two-tier system, which is more common in the German market. In a single-tier structure, the board of directors is vested with the broadest powers to conduct the SA's business and to represent

28 Prior to these amendments, the total number of non-voting shares in an SA was limited to 50 per cent.

it, with the exception of those powers expressly reserved by the Companies Act 1915 or the articles to the general shareholders meeting. The same principle applies to the management board in a dual structure, except that such management board powers are also subject to the powers expressly reserved to the supervisory board. The supervisory board supervises the management board and, where applicable, grants authorisations to the management board. It cannot, however, interfere in the management of the SA. Members of the management board cannot simultaneously be members of the supervisory board.

In an SCA, the managers are vested with the broadest powers to conduct the SCA's business and to represent it, with the exception of those powers expressly reserved by the Companies Act 1915 or the articles of association to the general shareholders' meeting.

The Ten Principles of Corporate Governance issued by the LuxSE

The Ten Principles of Corporate Governance issued by the LuxSE (fourth edition-revised version of December 2017) (the Ten Principles) generally apply to all companies incorporated in Luxembourg where their shares are listed on a regulated market operated by the LuxSE, namely the BDL. The Ten Principles comprise three types of rules: the compulsory principles themselves ('comply'), the recommendations ('comply or explain') and the lines of conduct, which are indicative only and not compulsory.

The Ten Principles may also be used as a reference framework for other companies, for example, in respect of any company incorporated in Luxembourg, or outside Luxembourg, or any company incorporated in Luxembourg that has asked for its shares to be admitted to a foreign regulated market. However, the Ten Principles are not mandatory under those circumstances.

III THE OFFERING PROCESS

i General overview of the IPO process

Offering process

An IPO is typically organised as a public offering of shares to retail investors in one or more public offer jurisdictions and institutional investors located in such public offer jurisdictions or elsewhere.

The offer process is launched after approval and publication of the public offer prospectus. Typically, the maximum number of shares to be offered and the price range (or a maximum price) are set forth in such prospectus, with the actual number of shares allotted to investors and the final offer price being published at the end of the offering process,[29] once pricing and allotment has been completed at the end of the book-building process (whose aim it is to evaluate the size and price sensitivity of demand from investors).

Typically, an IPO will provide for the issuance of new shares to investors ('primary') and the offer for sale of existing shares (held by one or more selling shareholders agreeing to participate in the IPO) to investors ('secondary'). IPOs with solely a primary issuance are possible as well and would be favoured if the intention was for the company to obtain a

29 According to Article 10 of the Prospectus Act 2005, this information can be published by way of a final price notice where the criteria or the conditions in accordance with which the final amount of securities and the maximum price are disclosed in the prospectus. Otherwise, a supplement to the prospectus is required, which triggers withdrawal rights for investors who have already provided their acceptance for a purchase.

maximum of fresh monies to invest. A large secondary would be foreseen where one or more selling shareholders (typically a private equity fund) would like to start taking profits from their investment and start divesting.

For marketing purposes, the issuer, and the relevant financial institution or institutions appointed by the issuer will advertise the offering through investor road shows, newspaper advertisements, *ad hoc* meetings and discussions with investors, etc. Advertisements in relation to the IPO must meet certain standards according to the Prospectus Act 2005 – they must be clearly recognisable as such, must state that a prospectus has been or will be published and where investors are or will be able to obtain it. The information in the advertisement shall not be inaccurate or misleading and must be consistent with the information contained in the prospectus.

Prior to the publication of the public offer prospectus, no communication may be made by any party that would trigger public offering requirements (as the prospectus would need to be approved and published prior to such action).[30] Where certain potential investors are approached (on a confidential basis) prior to any announcement of the transaction in order to gauge the interest of such potential investors, the provisions regarding 'market soundings' set out in the Market Abuse Regulation need to be taken into consideration (the requirement for the market participant to obtain the consent of the person receiving the market sounding to receive inside information, etc.).

The application for admission to trading in Luxembourg is officially submitted to the relevant exchange during the offering process (although the exchange will, in practice, have been approached informally beforehand). According to the rules and regulations of the LuxSE, the decision for admission takes place within a time frame of a maximum of one month of the receipt of the request. In practice, approvals are obtained within shorter time frames. Also, the LuxSE's role is very limited in the case of an admission to trading on the regulated market of the LuxSE, since the prospectus is vetted by the CSSF or another relevant competent authority and the LuxSE does not interfere in this regard.

Time frame

The overall time frame required for an IPO is dependent on a large number of factors. This makes it difficult to predict the exact time required for a specific transaction. Initial due diligence within the issuer's group (in order to enable appropriate prospectus disclosure) is often started long in advance of the entire process. The prospectus drafting process (including the setting up of physical drafting sessions involving all relevant parties) is generally a time-consuming exercise as all parties need to be comfortable with its content.

For the review of the prospectus by the CSSF (if competent), the Prospectus Act 2005 gives the CSSF up to 20 working days to provide comments.[31] In practice, the CSSF reverts with preliminary comments within only a few working days and the detailed set of comments is usually available in less than 20 working days. Subsequent reviews are quicker and the CSSF can be approached beforehand to discuss a bespoke timetable for a specific transaction.

30 According to the Prospectus Act 2005, an 'offer of securities to the public' means a communication to persons in any form and by any means presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities.

31 Article 7 of the Prospectus Act 2005. This 20-working-day period becomes 10 working days in cases where the relevant issuer has already made a public offering or admission to trading on a regulated market in the past.

Where the prospectus is approved by the LuxSE (for an admission to trading on the Euro MTF), the review time is generally quicker: the LuxSE has indicated that it will make sure it can revert with comments within three working days.

The length of the public offer process itself can be fixed as deemed appropriate by the relevant financial institutions. In the case of an IPO of a class of shares that is to be admitted to trading for the first time, the prospectus must be available for at least six working days before the end of the offer.[32]

Parties involved

Typically, an issuer contemplating an IPO is advised by a financial institution, who would in most situations assume the role of lead manager, bookrunner or arranger in connection with the IPO.

Legal advisers are in charge of the drafting of the prospectus and the underwriting or placement agreement to be entered into with the relevant financial institution appointed, and they advise on the corporate steps to be taken throughout the entire process. They also coordinate between all participants and usually liaise with the competent authority for handling the prospectus approval process and the listing application. Typically, each party (issuer and accompanying bank) would appoint separate counsel.

Listing agents can be appointed to handle coordination with the competent authority and the LuxSE. Any person (lawyer, etc.) can act as listing agent.

A paying agent is appointed in view of lodging the shares with the relevant clearing system. As we have seen, such agent would act as LuxCSD principal agent if clearing is made via LuxCSD. Note that a clearing is not compulsory in case of an admission to LuxSE SOL only.

Auditors need to review the financials referred to in the prospectus and give assurance that they are comfortable with these inclusions (typically, a comfort letter is issued).

Required documentation

As outlined above, a prospectus is required for a public offering or admission to trading of shares. Responsibility for the prospectus lies with the issuer, the offeror or the person asking for admission to trading on a regulated market. The responsible persons must be clearly identified in the prospectus. In Luxembourg, there is no rule or case law according to which prospectus liability would, in the case of a pure secondary offering, have to be shifted entirely to the selling shareholders.

An underwriting agreement or placement agreement is generally entered into with the financial institutions assisting the issuer in the IPOs and relevant selling shareholders (if applicable). These agreements are normally drafted according to international market standards and comprise a detailed set of representations and warranties to be given by the issuer and the selling shareholders.

In view of guiding the transaction parties regarding the type of information on the project that can be discussed outside the working group, which remains confidential, a thorough set of 'publicity guidelines' is usually set up at the beginning of the process. These guidelines also contain the appropriate disclaimers for any communication prior to the launch of the IPO, as well as during the IPO. 'Research report guidelines' are often established in view of specifying the interaction with persons establishing reports on the company.

32 Article 16 of the Prospectus Act 2005.

ii Pitfalls and considerations

Compared to those targeting the Euro MTF, issuers willing to access the regulated market of the LuxSE will (assuming such admission to trading and listing is not associated with any public offer) face higher regulatory hurdles. IPOs involving an admission to trading on the regulated market are therefore more time-intensive and complex. Among the initial challenges, the prospectus approval process is certainly one of the biggest. Equity prospectuses need to follow the most demanding annexes in Regulation 809/2004 (in particular Annex I), and for a number of issuers, specifically those that have undergone a restructuring or made significant acquisitions, additional hurdles often lie with the complex financial history of the underlying group and requirements to draw up *pro forma* financial statements to satisfy the requirements of Annex II of Regulation 809/2004.[33] Further, certain 'specialist issuers' (active in the real estate market or in the minerals sector or start-ups) may face additional hurdles owing to additional information required at European level (such as the need to have specialist reports, etc.).[34]

The recent guidelines of the European Securities and Markets Authority (ESMA) on 'alternative performance measures',[35] which aim at creating further transparency and usefulness of 'alternative performance measures' referred to in prospectuses and improving the comparability, reliability and comprehensibility of alternative performance measures, are often seen by issuers as additional challenges for prospectus approval.

Further, the introduction of the LuxSE SOL will now allow registration of securities solely on the official list without admission of these securities to trading on any of the markets operated by the LuxSE. This is intended to allow issuers to have their securities appear on a widely recognised official list, without the application of a number of capital markets-related EU and national laws that solely focus on securities being admitted to trading. The ongoing disclosure obligations imposed by the SOL Rulebook are limited to certain events affecting the securities and the issuer. These rules are not new, as they have been taken from Chapter 9 of the rules and regulations of the LuxSE. It is, however, important to note that none of the information covered in these rules must be made public; such information must only be communicated to the LuxSE. The only publication obligation relating to securities admitted to the LuxSE SOL relates to the right of the LuxSE to request an issuer to issue a press release that contains the announcement of a suspension or withdrawal of securities from the LuxSE SOL. Such suspension or withdrawal must be formally requested by the issuer, but can also be requested by the LuxSE at its own initiative. Note that, as mentioned previously, a clearing is not compulsory in the case of an admission to the LuxSE SOL only.

iii Considerations for foreign issuers

Foreign issuers are, *prima facie*, subject to substantially the same requirements as Luxembourg issuers. Among the challenges to be faced are the requirements regarding financial statements for such foreign issuers, especially those stemming from a country outside the EEA. While at the level of the regulated market, European legislation will dictate International Financial

33 Article 4a of Regulation 809/2004 sets out the additional requirements that apply where the issuer has a complex financial history or has made a significant financial commitment. Article 5 of Regulation 809/2004 and Annex II set out the requirements regarding *pro forma* financials.

34 European Securities and Markets Authority update of the CESR recommendations of 23 March 2011 (ESMA/2011/81).

35 ESMA Guidelines on Alternative Performance Measures (Ref. ESMA/2015/1415).

Reporting Standards (IFRS) (as adopted by the EU) or deemed equivalent standards, the Euro MTF is more flexible in this regard. Third-country Generally Accepted Accounting Principles (GAAP) are generally accepted, subject, where applicable, to the drawing up of statements of main differences between the relevant third-country GAAP and IFRS.

IV POST-IPO REQUIREMENTS

Upon admission of the shares to either the regulated market of the LuxSE or the Euro MTF market of the LuxSE, a number of ongoing disclosure and notification requirements apply.[36] Since the Euro MTF is not a regulated market subject to relevant EU directives, the ongoing obligations will be driven by Luxembourg rules and will be less rigorous than those applicable to the regulated market. However, the Market Abuse Regulation has an extended scope of application comprising, since June 2016, of MTFs, including the Euro MTF. Given that there is no admission to trading on any market or trading venue, the Market Abuse Regulation does not extend to securities listed solely on the LuxSE SOL.

i LuxSE regulated market

Briefly, an issuer whose shares are admitted to trading on the regulated market of the LuxSE will, where Luxembourg is the elected home Member State,[37] be subject to the requirements under the act dated 11 January 2008 on transparency requirements for issuers of securities, as amended (the Transparency Act 2008) implementing Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended (the Transparency Directive). These requirements comprise the need to publish annual and half-yearly financials meeting the requirements of the Transparency Act 2008 (this includes the drafting up of consolidated financials in accordance with EU IFRS), the publication by an issuer of large holding disclosures received from shareholders in the event relevant thresholds have been crossed (5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 per cent, 50 per cent and 67 per cent of the total voting rights), and the publishing of the total number of voting rights and capital to allow shareholders to make relevant notifications to the issuer (and the CSSF).

Such issuers will also be subject to the ongoing requirements set forth in the Market Abuse Regulation, including the requirement to publish 'inside information' that directly relates to the issuer and to its financial instruments, the need to hold and update insider lists, and to make disclosures in connection with the managers' transactions in the securities of the issuer, etc.

The rules and regulations of the LuxSE also impose certain duties on an issuer with shares admitted on the LuxSE's regulated market, though these are duties to communicate certain information (certain securities events, such as the change of the paying agent or the payment of dividends, etc.), as opposed to requirements to publish information. The LuxSE enjoys quite broad powers in that it may ask issuers to communicate to the LuxSE

36 Certain obligations start applying even earlier, such as the obligations stemming from the Market Abuse Regulation.

37 For EEA issuers, the home Member State will be the country of the registered seat of the issuer. In other words, only Luxembourg issuers would have Luxembourg as their home Member State. For non-EEA issuers, different rules apply.

all information that the LuxSE deems useful for the protection of investors or for the due and proper operation of the market. The LuxSE may even request the publication of relevant information and, if the issuer does not comply with the request, proceed itself with the publication at the issuer's cost.[38]

ii Euro MTF

For issuers whose shares are admitted to trading on the Euro MTF market, the provisions of the Transparency Act 2008 and Transparency Directive will not apply. Instead, such issuers are subject to the continuing disclosure obligations set forth in the rules and regulations of the LuxSE (in addition to the communication requirements towards the LuxSE already mentioned above for the regulated market, which also apply here). According to these supplemental rules, an issuer with shares on the Euro MTF must make available to the public the latest audited annual accounts (drawn up in accordance with national legislation – IFRS are not compulsory). Half-yearly financials are required only if relevant national legislation requires the publication thereof. Amendments of rights attached to the shares, and any communications to holders regarding allotment and payment of dividends, new share issuers, etc., must be published. Large holding disclosure also applies (10 per cent, 20 per cent, 33 per cent, 50 per cent and 67 per cent of the voting rights), although a publication by the issuer is only required where the latter has been made aware of any crossing.[39]

Since June 2016, the ongoing obligations for issuers under the Market Abuse Regulation are also applicable to issuers on the Euro MTF. Accordingly, the obligations described above for the regulated market also apply to the Euro MTF.

iii SOL

For issuers whose shares are admitted to listing on the LuxSE SOL, the SOL Rulebook provides for limited ongoing disclosure requirements. The SOL Rulebook only provides for disclosure obligations in relation either to events that are likely to affect the securities, or to information when the issuer deems it necessary to 'facilitate the due and proper operation of LuxSE SOL' and contains a list of examples of such events. As the Market Abuse Regulation will not be applicable to those issuers, there will not be any specific ongoing disclosure obligations in this respect. As mentioned previously, it is, however, important to note that none of the information covered in these rules must be made public. Such information must only be communicated to the LuxSE. The only publication obligation relating to securities admitted to the LuxSE SOL relates to the right of the LuxSE to request an issuer to issue a press release that contains the announcement of a suspension or withdrawal of securities from the LuxSE SOL. Such suspension or withdrawal must be formally requested by the issuer, but can also be requested by the LuxSE on its own initiative.

V OUTLOOK AND CONCLUSION

We continue to live in challenging times. The financial crisis has morphed from an economic recession into a public-finances crisis and, although there are signs of recovery on the horizon

38 Article 908 in Chapter 9, Part I of the rules and regulations of the LuxSE.

39 There is no requirement for the Euro MTF (that is similar to the Transparency Act 2008, for shares on a regulated market) to disclose to the issuer (and the CSSF) any crossing of large holding thresholds.

for an increasing number of countries, the global economy remains fragile for various reasons (including the political instability in the Middle East and the slowdown of the economies of the BRIC and Next Eleven countries).

International bodies such as the International Monetary Fund, the Financial Action Task Force, the Organisation for Economic Co-operation and Development and the European authorities want to set aside the competitive distortions that result from a regulatory playing field that is not level, and try to eradicate weaknesses in regulation and supervision that might adversely affect the stability of the international financial systems, by moving towards a single rule book.

The financial sector plays a key role in Luxembourg's economy, and the Luxembourg authorities strive to find the right balance between increased supervision and the need for sufficient room to manoeuvre to allow the financial sector to breathe and to develop.

For instance, the Luxembourg Ministry of Finance has relaunched the High Committee for the financial sector to create an institutionalised platform for the exchange of information between key stakeholders of the financial markets and the government, with a view to ensuring that Luxembourg stays at the forefront of economic and financial developments. Several working groups have been set up by the High Committee for the financial sector to modernise Luxembourg's legal framework to respond to the needs of the markets and their players.

The recent changes in Luxembourg company law reinforce the current legal framework and will further increase Luxembourg's attractiveness as the IPO jurisdiction of choice for an increasing number of companies. Established market practice has been embedded in law (thus strengthening legal certainty), and a series of new mechanisms and instruments have been introduced to respond to the demands of a more complex economic environment with a view to increasing the flexibility of Luxembourg company law.

All these changes should contribute to attracting even more interest in Luxembourg as an IPO jurisdiction.

Chapter 11

PORTUGAL

Carlos Costa Andrade and Ana Sá Couto[1]

I INTRODUCTION

As a result of the slump in the Portuguese economy during the 2007–2008 global economic crisis, the equity capital markets in Portugal have practically come to a halt.

Since its record high in 2007, the main local stock index (the PSI-20) has lost about two-thirds of its value. This free fall may be mainly attributed to the exodus of foreign investors, the freezing of the initial public offers (IPO) market, with practically no activity between the end of 2009 and late 2013, and the loss in value of traded companies, which, nonetheless, was not sufficient to attract a significant number of takeover offers from abroad. In addition, a number of Portuguese companies initiated delisting procedures in 2017, mostly as a result of the changes introduced to their shareholding structures during the economic crisis. All these factors seriously limited the amount of capital at the disposal of Portuguese companies.

Notwithstanding the above, there has been some recent momentum as a new market appears to be opening up for small and medium-sized enterprises (SMEs). In recent years, a few Portuguese SMEs have requested their listing on both regulated markets and other trading venues. Although some of them opted to list abroad, it is encouraging to see that, as recently as December 2017, companies have been confident enough to request their admission to trading on the alternative stock exchanges in Portugal.

This is a movement that the Portuguese Securities Markets Commission (CMVM) and Euronext Lisbon (the local platform of the Euronext Group) will likely incentivise and explore, in an attempt to take advantage of the fact that Lisbon is gaining a reputation as a key hub for start-up companies in Europe.

With regard to the impact of the Markets in Financial Instruments Directive (MiFID II)[2] on the Portuguese rules governing IPOs, the final version of the Portuguese implementing act is yet to be approved. Therefore, where relevant, the following considerations are based on the provisions of the Draft Implementing Act.

1 Carlos Costa Andrade is a partner and Ana Sá Couto is a counsel at Uría Menéndez – Proença de Carvalho.

2 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

II GOVERNING RULES

i Main stock exchanges

Pursuant to MiFID II, Portuguese law sets out the following organised structures for the trading of financial instruments:

a regulated markets;
b multilateral trading facilities (MTFs);
c organised trading facilities (OTFs); and
d systematic internalisers.

There are currently three regulated markets operating in Portugal, but only one is a stock exchange: Euronext Lisbon (formerly known as 'Eurolist by Euronext Lisbon'), the official stock quotations market managed by Euronext Lisbon–Sociedade Gestora de Mercados Regulamentados, SA.

As regards MTFs, there are two main trading platforms currently operating in Portugal, both of which are managed by Euronext Lisbon: Euronext Access (formerly known as 'EasyNext Lisbon') and its special compartment Access+, and Euronext Growth (formerly known as 'Alternext'). While shares may be admitted to trading in each of them, Euronext Access is mainly used to list bonds and structured financial instruments (warrants, certificates, etc.), Euronext Access+ compartment is intended to be a gateway for both start-ups and SMEs, and Euronext Growth is the one market truly intended to serve as an alternative for SMEs to list their shares. Euronext has expressed its intention to register Euronext Growth as an SME growth market under MiFID II's provisions.

With a few exceptions, the stock exchanges operating in Portugal have so far only attracted domestic issuers. Among them, and taking the PSI-20 as a reference, the most important industries present in Euronext Lisbon are banking (e.g., Banco Comercial Português and Banco BPI), utilities (e.g., Galp Energia, EDP, REN and EDP Renováveis) and retail (e.g., Jerónimo Martins and Sonae).

Historically, some foreign issuers have listed their shares in Portugal, but usually only under a dual listing structure, also maintaining their shares trading on the official stock exchange of their respective home countries. This is currently the case with Banco Santander. It was also the case with other Spanish companies such as Banco Popular, Sacyr Vallehermoso and Europac, all of which requested their delisting from the Portuguese stock exchange at some point over the past decade. All of these (Spanish) companies used the dual listing as a means to promote their presence and investment in the Portuguese market in their respective sectors.

One of the most significant IPOs in Portugal over the past decade related to the single foreign issuer solely listed in Portugal: EDP Renováveis, the renewable energy company that was spun-off from EDP in 2008.

The following sections of this chapter focus on the listing of shares on regulated markets in Portugal and the obligations imposed on the issuers of such securities, with a particular emphasis on Euronext Lisbon, the official quotations market in Portugal. In light of the evolving market for SMEs in Portugal, references to Euronext Growth will also be made when appropriate.

ii Overview of listing requirements

In order to be listed on a regulated market, securities must comply with regard to terms and form, the requirements of their governing law and be issued in accordance with the law governing the issuer.

The listing of securities on a regulated market operating in Portugal requires the approval of the CMVM, as well as the respective market operator (Euronext Lisbon–Sociedade Gestora de Mercados Regulamentados, SA). Further, the issuer is required to comply with all of the following conditions:

a it must be incorporated and validly existing in accordance with its governing law;
b it must show that it has an adequate financial and economic situation with regard to the nature of the securities to be listed and to the market on which listing is sought;
c it must have carried out its business activity for at least three years;
d it must have published, under applicable law, its annual accounts for the three years prior to the year in which it has applied for listing;
e it must ensure that securities (shares) of the same category have identical rights under the issuer's by-laws and applicable legislation; and
f it must ensure that the securities (shares) are freely transferable and negotiable.

If the issuer has resulted from a merger or demerger, the requirements referred to in (c) and (d) above are considered fulfilled if they are satisfied by one of the merged companies or the demerger company, as applicable. Further, the CMVM may waive requirements (c) and (d) if it finds that it is advisable in light of the interests of the issuer and investors, and the requirement referred to in (b), on its own, allows investors to make a clear assessment on the issuer and the securities.

In addition, Euronext Lisbon regulations require that adequate clearing and settlement systems be available in respect of transactions in the shares.

Portuguese law sets forth certain additional eligibility criteria for the listing of shares on Euronext Lisbon with regard to issue size, minimum public float and expected share appreciation.

a Minimum public float: shares may only be admitted to trading if there is an 'adequate level of public dissemination' by the date on which listing commences. An adequate level of public dissemination is deemed to exist if the number of publicly held shares corresponds to at least 25 per cent of the issuer's subscribed share capital represented by such class of shares, or if, due to the high number of shares of the same class and the large number of publicly held shares, a regular functioning of the market in the shares is ensured even though the percentage of the shares that is publicly held is lower than 25 per cent. In this latter case, according to Euronext Lisbon's regulations, such percentage may not be lower than 5 per cent and must correspond to at least €5 million, based on the relevant subscription price.
b Market capitalisation: the expected market value of the shares to be listed must be at least €1 million or, if market capitalisation cannot be determined, the company's shareholders' equity, based on the results of the last financial year, must be at least €1 million. This requirement does not apply to the admission to trading of shares of the same class as shares that are already listed.

Foreign issuers intending to list shares on a regulated market operating in Portugal are subject to additional requirements (see Section III.iii).

The application for listing is submitted to the regulated market's management entity, together with documents necessary to show compliance with the listing requirements. In particular, prior to listing securities on a regulated market, the issuer must, as a general principle, publish a prospectus (as further commented on in Section II.iii, below).

As a general rule, the application is submitted by the relevant issuer. Foreign issuers must submit their listing application through the financial intermediary that they must appoint for liaison with the market (see below).

Additionally, shares may be admitted to trading at the request of the holders of at least 10 per cent of stock of the same class provided that the relevant issuer is already a publicly traded company (i.e., a *sociedade aberta*) under Portuguese law. Generically speaking, this will be the case when the company was either incorporated through an IPO in Portugal or has already been admitted to trading its shares, or other securities that may be converted into shares, on a regulated market operating in Portugal.

Finally, when submitting an application for admission to trading on a regulated market, the issuer must appoint a representative with appropriate powers for liaising with the market and the CMVM.

In light of the above, it appears that the requirements for admission to trading on a regulated market in Portugal are closer to those applicable in the United Kingdom, in particular to the admission to trading on the Main Market of the London Stock Exchange, than those applicable in the United States to Nasdaq and the NYSE.[3] In fact, not only the procedural rules but also the public float and market capitalisation requirements are identical in the United Kingdom and Portugal. Conversely, both Nasdaq and the NYSE require issuers to meet certain financial and distribution standards that appear to be more strict.

By comparison, the listing requirements applicable to the trading of shares in Euronext Growth are even more simple and flexible. While the procedural and documentation requirements are not very different from those applicable to the listing on Euronext Lisbon, the admission to trading on this MTF may be requested provided that shares representing at least €2.5 million are placed with a minimum number of three investors (which must not be related parties to the issuer), through either a public offering or a private placement of the shares. Direct admission of securities previously admitted to trading on eligible markets is also possible.

Accordingly, the issuer requesting the admission to trading of shares on Euronext Growth may benefit from the possibility of not having to prepare and register a prospectus with the CMVM.

iii Overview of law and regulations

The Portuguese Securities Code (PSC), enacted by Decree-Law No. 486/99 of 13 November 1999, is the key piece of legislation in Portuguese securities law.

3 Sources: for the United Kingdom, the Financial Services and Markets Act 2000 and the official public guide available at www.londonstockexchange.com/home/guide-to-listing.pdf, and for the stock exchanges in the United States of America the official public guides available at www.listingcenter.nasdaq.com/assets/continuedguide.pdf.

Over the past 18 years, the PSC has been shaped by the local incorporation of several European Union Directives, the most important of which are:

a the Prospectus Directive,[4] which is the most important with regard to IPOs as it regulates the obligation to prepare and register a prospectus with the local regulator (the CMVM), and the contents and liability for such prospectus. The Prospectus Directive will be repealed and replaced by the Prospectus Regulation[5] in July 2019;
b the Transparency Directive,[6] setting out the obligation to disclose information with regard to publicly traded companies;
c MiFID II and MiFIR,[7] governing the existence and functioning of regulated markets, MTFs, OTFs and, in general, the conduct of the agents (namely, financial intermediaries) participating in these markets;
d the Market Abuse Regulation (MAR),[8] imposing limits on insider dealing and market manipulation (regulating, for instance, the use of stabilisation measures in IPOs and other public offerings); and
e the Takeover Directive,[9] governing matters related to takeovers of publicly traded companies, including mandatory takeovers.

The legal regime set out in the PSC is supplemented by several other pieces of legislation and further developed in the regulations and instructions issued by the CMVM, pursuant to its regulatory powers, and in the rules adopted by entities with self-regulatory capacity, in particular the management entities of securities markets and securities depositary and settlement systems, such as Euronext Lisbon and Interbolsa – Sociedade Gestora de Sistemas de Liquidação e de Sistemas Centralizados de Valores Mobiliários, SA (Interbolsa).

In addition to these rules and regulations, the CMVM's recommendations and opinions are also considered by market participants as guidance for the application and clarification of applicable laws, although they do not have a binding effect.

The CMVM also maintains an information disclosure system that is available to the public on its website,[10] which includes, *inter alia*, decisions of interest to the public and other information notified to the CMVM or approved by it, such as disclosure by regulated entities of inside information and qualifying holdings and accounts filed with the CMVM.

Further, all securities listed on a regulated market in Portugal must be registered with the Portuguese centralised securities depositary system (CVM) managed by Interbolsa, even when they are originally registered with a foreign depository and settlement system. Consequently, Interbolsa plays a major role in Portugal in the offering of shares, in particular IPOs.

Considering all of the above, there are three main sets of legal rules that issuers, shareholders and financial intermediaries involved in preparing and launching an IPO in Portugal must take into special account:

4 Directive 2003/71/EC of the European Parliament and the Council of 4 November 2003, as amended.
5 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017.
6 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004, as amended.
7 Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014, as amended.
8 Regulation (EU) No. 596/2014 of the European Parliament and the Council of 16 April 2014, as amended.
9 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, as amended.
10 www.cmvm.pt.

a the framework governing the prospectus: except in specific cases, such as when the offer is limited to qualified investors[11] or is otherwise carried out through a private placement, the listing of a company will always require the registration of a prospectus with the CMVM. Also, it is important to be aware of the rules on advertisement during public offerings, where all marketing materials require the prior approval of the CMVM;

b the rules of conduct applicable to the financial intermediaries involved in this process, stemming from MiFID II and MiFIR but also from the MAR; and

c the regulations (including practical guidelines) applicable to the registration and settlement of the issuance with the CVM, which is important in order to develop a close collaboration with Interbolsa.

III THE OFFERING PROCESS

i General overview of the IPO process

The procedure for an IPO on the Portuguese regulated market follows the framework and practice applicable within the European Union, particularly owing to the common requirements in terms of preparation, regulatory approval and disclosure of an offer prospectus, under the terms already described in Section II, above.

Parties

The main parties within the IPO process are as follows:

a the issuer and respective members of the board of directors and supervisory board;

b shareholders of the issuer (if there is a sale of shares or any undertakings of the shareholders under the offer, such as lock-up commitments);

c the financial intermediary or intermediaries, appointed to assist the issuer, place or underwrite the securities in the retail offer. The appointment of a financial intermediary for assistance and placing is mandatory, unless the issuer is a financial intermediary authorised to perform this activity;

d financial intermediaries who place or underwrite the shares under the institutional offer;

e auditors of the issuer; and

f local and international legal counsel to the entities referred to in (a) and (b) on one side, and (c) and (d) on the other side.

Timeline

Concerning the timeline, an IPO procedure may last between 45 and 65 days from first starting to draft the prospectus until the shares start trading; the upper part of this range applies when the IPO is performed totally or partially as a share capital increase, and a general meeting needs to be called for approval thereof.

Documentation

As mentioned above, the main piece of documentation within the IPO is the prospectus, which shall be drafted in accordance with the provisions of the PSC implementing the Prospectus Directive.

11 As defined under the Prospectus Directive.

According to the PSC, the public offer may only start after a prospectus has been approved by the CMVM.

The application for the approval of the prospectus must be submitted to the CMVM together with the following key documents within the IPO:

a a copy of the resolutions authorising the issuance and offer of securities passed by the issuer's[12] competent bodies, and any required management decisions;
b a copy of the issuer's by-laws;[13]
c a current certificate of company registration of the issuer;[14]
d a copy of the management reports and accounts, the opinions of the supervisory corporate bodies and the legal certification of the issuer's accounts for the periods required under Commission Regulation (EC) No. 809/2004 of 29 April;
e a report or statement from a chartered accountant or a chartered accountancy firm;
f the identification code or codes of the securities covered by the approval request;
g a copy of the agreement with the financial intermediary assisting in the transaction;
h a copy of the placement or underwriting agreement and the placement or underwriting consortium agreement concerning the retail offer, if applicable;
i a copy of the market making agreement, stabilisation contract and overallotment facility (greenshoe option) concerning the retail offer, if applicable;[15]
j the draft prospectus; and
k the *pro forma* financial information, if required.[16]

ii Pitfalls and considerations

Shareholders pre-emption rights in IPOs with share capital increase

When the IPO of a company incorporated in Portugal comprises a share capital increase in cash, it should be noted that pre-emption rights for the subscription of new securities are granted in law to current shareholders, *pro rata* to their existing holdings.

Pre-emption rights can be limited or excluded by a separate resolution at the general shareholders' meeting that approves the share capital increase, provided that the limitation or exclusion is duly grounded and is in the best interest of the issuer. This separate resolution shall be approved, alongside the resolution approving the share capital increase, by a qualified majority of two-thirds of the issued votes, either on first or second call, unless on a second call at least half of the share capital is present or represented, in which case the corresponding resolutions may be passed by a simple majority of votes.

In the event that the board of directors proposes to limit or exclude pre-emption rights for the purpose of the IPO, the board must submit a written report to the general shareholders' meeting, stating:

a the reasons behind such a proposal;
b the means of allotting new shares;
c the conditions under which the shares are to be paid up;

12 Or seller's competent bodies, in case of sale of shares pursuant to the IPO.
13 And of the seller, in case of sale of shares pursuant to the IPO.
14 And of the seller, in case of sale of shares pursuant to the IPO.
15 Clauses on market making, stabilisation and overallotment facility (greenshoe) may be included in the underwriting agreement referred to in (h).
16 Generally, *pro forma* financial information is required in case of a significant change in the situation of an issuer due to a particular transaction, with the exception of situations where merger accounting is required.

d the issue price; and
e the criteria used to determine this price.

Shareholders must be allowed to access this report for 15 days prior to the date of the general shareholders' meeting approving the share capital increase.

Pricing issues

One of the matters that commonly raises more issues in an IPO is the mechanism to determine the final offer price.

Pursuant to the PSC, the prospectus may not include the final price and quantity of securities offered, provided that:

a the prospectus includes the criteria or conditions according to which the offer price and the number of offered shares will be determined or, concerning price, the maximum price is included in the prospectus; or
b the acceptance of acquisition or subscription of the shares may be withdrawn in no fewer than two business days after the final offer price being disclosed.

Regarding (a), the final price only needs to be announced after the offer is closed. In this case, there is no period during which investors may withdraw their acceptance.

In this regard, in Portugal it is common to issue a prospectus containing a price range (i.e., a maximum price) and then market with a view to book building. The final price is determined after gauging valuations from the different institutional investors that were sounded during the roadshow. This was the procedure adopted in the IPOs of CTT Correios de Portugal in December 2013 and of Espírito Santo Saúde (currently Luz Saúde) in February 2014.

Regarding (b), the final price shall be announced through the issue of a pricing announcement, and acquisitions and subscriptions of securities in the offer may be withdrawn for a period of no fewer than two business days after the final offer price being disclosed.

iii Considerations for foreign issuers

First, public offer and listing prospectuses exclusively prepared in Portugal must be drawn up in a language accepted by the CMVM, which in practice is Portuguese. If, however, the public offer and listing prospectuses are prepared in one or more Member States other than Portugal, for which the CMVM is the competent authority, they may be drawn up in the language of choice of the issuer, provided that such language is accepted by that Member State's competent authorities, or is a language customary in international finance. In practice, the CMVM only considers English as such.

Second, except where securities are admitted to trading on a regulated market situated or operating in an EU Member State, the CMVM may ask the issuer to submit a legal opinion attesting the satisfaction of the general eligibility criteria concerning the shares and the valid existence of the issuer in accordance with its governing law.

Third, foreign issuers must appoint a financial intermediary for liaising with the market where the securities will be admitted to trading, which must be a credit institution authorised to carry out its activity in Portugal and a member of the CVM. Such financial intermediary is responsible for, among others, submitting the listing application and ensuring compliance with the listing procedures, liaising with the relevant local entities on behalf of the issuer, providing the exercise of the economic rights inherent in the listed securities as well as the information that it is required to provide by law.

In addition, where the shares to be listed are registered with a foreign depository and settlement system, the financial intermediary is responsible for ensuring that such shares are also registered in individual accounts opened with participants in the foreign settlement system, in permanent coordination with such foreign participant.

Finally, foreign issuers will also be subject to the post-IPO requirements described in Section IV, below.

IV POST-IPO REQUIREMENTS

A company that has its shares subject to an IPO and admitted to trading in Portugal must fulfil certain post-IPO disclosure obligations, some of which are given below.

i Disclosure of inside information

The concept of inside information is set forth in Article 7(1)(a) of the MAR. Under the MAR, inside information means information of a precise nature that has not been made public, relating directly or indirectly, to one or more issuers of financial instruments[17] or to one or more financial instruments that, if made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of the related derivative financial instruments.

Article 17 of the MAR prescribes, moreover, that an issuer shall inform the public as soon as possible of inside information that directly concerns the issuer.

ii Disclosure of qualified shareholders communicated thereto by the relevant holders

Article 16 of the PSC, which implemented Chapter III of the Transparency Directive in Portugal, imposes obligations on holders of voting rights and issuers to make notifications regarding the percentage of voting rights held in the issuer once specified thresholds are exceeded. The notification requirement is triggered by having control over the exercise of voting rights attached to shares, rather than merely by the holding of interests in shares themselves.

Upon triggering notification requirements, the holder shall notify the issuer and the CMVM of such event as soon as possible but in any event no later than four trading days after acknowledging the relevant event (such acknowledgment being presumed to take place two trading days after the transaction date). The issuer is subsequently obliged to disclose such information to the public as soon as possible but no later than three trading days after receiving the notification from the relevant holder.

17 The definition comprises: (1) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made; (2) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made; (3) financial instruments traded on an organised trading facility; and (4) financial instruments not covered by any of the previous items, the price or value of which depends on, or has an effect on, the price or value of a financial instrument referred to in the previous items, including, but not limited to, credit default swaps and contracts for difference.

iii Disclosure of transactions performed by persons discharging managerial responsibilities

Pursuant to Article 19(1) of the MAR, persons discharging managerial responsibilities, as well as persons closely associated with them, shall notify the issuer and the CMVM of every transaction conducted on their own account relating to the shares or debt instruments of that issuer, or to derivatives or other financial instruments linked thereto, provided than an aggregate threshold of €5,000 for the financial year has been exceeded.[18] Such notification shall be made promptly and no later than three business days after the date of the transaction. The issuer shall ensure that the information above is made public promptly through the CMVM website.

iv Periodic financial reporting: annual, semi-annual and quarterly financial reports

Pursuant to Article 245 et seq. of the PSC, which implemented Chapter II of the Transparency Directive in Portugal, the following items shall be available to the public within four months of the close of the financial year:

a the management report, the annual accounts, the audit report and other accounting documents required by law or regulation;
b the report of an external auditor; and
c statements of responsibility from the persons responsible within the issuer, whose names and positions are to be clearly indicated.

Issuers of shares must also publish, as part of their annual management report, information on the corporate governance structure and practices.

Such issuers must also disclose, within two months of the end of the first six months of their financial year, the following documentation with regard to their activity for such period:

a a condensed set of financial statements, containing at least:
- a balance sheet; and
- a condensed profit and loss account, and explanatory notes on such accounts prepared in accordance with the same accounting principles used in the preparation of the annual financial reports;

b an interim management report, including, at a minimum, an indication of significant events that have occurred during such period and their impact on the condensed set of financial statements, together with a description of the principal risks and uncertainties for the remaining six months on the financial year; and
c statements of responsibility from the persons responsible within the issuer, whose names and positions are to be clearly indicated.

Finally, with the exception of credit institutions and financial companies with their shares admitted to trading in Portugal, other issuers are not required to report quarterly financial information. However, in that case they must do so for at least two years counting from their first quarterly disclosure.

18 Threshold defined in Article 19(8) of the Market Abuse Regulation, although the CMVM may increase the threshold up to €20,000, under the terms set forth in Article 19(9) of the Market Abuse Regulation.

v Transactions in own shares

Portuguese issuers of shares admitted to trading on a regulated market in Portugal must, within three business days of the date of the relevant transaction:

a notify the CMVM of such transactions; and

b publicly disclose:
  - the final position resulting from the relevant transaction reaching, exceeding or falling below 1 per cent of the share capital or any multiples thereof; and
  - all acquisitions and disposals, regardless of the respective net balance, executed in the same stock market session, reaching or exceeding 5 per cent of the trade volume negotiated during such stock market session.

These disclosure obligations also arise for a parent company with regard to transactions in its securities by a controlled company.

However, the disclosure obligations described in (b) above do not apply to transactions in an issuer's own securities that are made in execution of liquidity provider agreements entered into in accordance with the accepted market practice as stated by the CMVM. Such transactions must nevertheless be disclosed to the CMVM at the end of each quarter.

V OUTLOOK AND CONCLUSION

When studying the national environment for IPOs, one mainly looks into the applicable legal framework and the market practices in terms of offer structures.

Concerning this legal framework, Portuguese law has benefited from the harmonised EU legislation on information disclosure, by means of the Prospectus Directive, the Transparency Directive and the MAR, thereby providing enhanced comfort to issuers and investors in the Portuguese capital markets.

On the other hand, the fact that there were only two IPOs on the regulated market in Portugal since 2008 – although there were many secondary public offers – implies a lack of precedents in comparison with mature markets in continental Europe such as Germany or France.

In spite of the above, the clear legal framework and a sophisticated regulator have created the means for Portugal to welcome an increase in the volume of IPOs, both for blue-chips (on regulated markets) and SMEs (on alternative exchanges tailored thereto). Innovative solutions, such as the SME growth market provided by the MiFID II regulatory package, may certainly boost this expected trend and contribute to making capital markets a real alternative to traditional bank financing in Portugal. MiFID II's Draft Implementing Act is expected to enter into force in the second quarter of 2018.

Chapter 12

RUSSIA

Alexey Kiyashko and Alexander Kovriga[1]

I INTRODUCTION

The history of the modern Russian initial public offering (IPO) market dates back to 1996, when VimpelCom, a major Russian telecommunications company, conducted an IPO on the New York Stock Exchange (NYSE) – the first such transaction for a post-Soviet Russian company. Russian IPOs remained relatively rare throughout the late 1990s and early 2000s: from 1996 to 2004, only 12 Russian issuers went public.[2] The Russian IPO market really took off in 2005 and continued to grow through the end of 2007. By some estimates, a total of 74 Russian companies floated on various exchanges during that three-year period.[3] With the onset of the global recession in 2008, however, the Russian market became sluggish, consistent with the global trends. While there was a minor spike in 2010, IPO activity has been gradually decreasing since then, coming to a near halt in 2014 (which only saw a single offering) owing to the turbulent geopolitical climate. There was some activity in the domestic IPO market in 2015–2016 and an uptick of public offerings and 'accelerated book-build' transactions in 2017, with offerings by companies such as Detsky Mir, Polyus Gold and En+ Group (whose November 2017 IPO became the first IPO by a Russian business with a listing on the London Stock Exchange (LSE) since early 2014).

The NYSE was the listing venue of choice for most Russian issuers until the early 2000s, when that role was taken over by the LSE, not least as a result of the enactment of the Sarbanes–Oxley Act in the United States in 2002, which substantially increased the burdens of being a public company in the United States. To this day, the LSE remains the most popular listing venue among foreign exchanges for Russian issuances, with a significant number of companies being dual-listed in London and Moscow. However, the NYSE and Nasdaq continued to attract issuers in the Russian IT and high-technology sector (e.g., Yandex, Qiwi, Luxoft and CTC). Other foreign exchanges where Russian businesses have listed their equity include the Hong Kong Stock Exchange, the Frankfurt Stock Exchange, the Oslo Stock Exchange and several others.

Because of differences between Russian corporate and securities law and the legal and regulatory framework for securities offerings in the United States, United Kingdom and other major financial centres, as well as logistical and settlement issues associated with holding and trading Russian shares, shares of Russia-incorporated issuers have never been offered on foreign exchanges directly, but rather in the form of either American depositary receipts or

1 Alexey Kiyashko is a partner and Alexander Kovriga is an associate at Skadden, Arps, Slate, Meagher & Flom LLP.
2 As reported by RBC.
3 An overview of Russian IPOs: 2005 to 2014, by PWC, available at: www.pwc.ru/en/capital-markets/publications/assets/a4_brochure_ipos_eng_print.pdf.

global depositary receipts. In this case, a depository bank would hold the underlying Russian shares in custody and issue its own securities (depositary receipts) representing interest in those shares that would be listed on a foreign stock exchange.

The first domestic IPO in Russia was carried out in 2002 by RBC Information Systems, a media and IT company with a dual listing on the Russian Trading System (RTS) Stock Exchange and the Moscow Interbank Currency Exchange (MICEX), both leading Russian exchanges then located in Moscow. Dual listings on RTS and MICEX became a staple for domestic IPOs of Russian issuers going forward until the landmark merger of the two exchanges in 2011, as a result of which the Moscow Exchange (MOEX) was created.

Despite a low number of transactions in recent years, the Russian IPO market is now well developed, with over 100 publicly traded companies (including foreign-domiciled companies with predominantly Russian operations). Each of the bulge-bracket investment banks has a significant presence in Russia, competing against a number of strong local commercial banks with investment banking divisions.

Since 2013, the Russian Central Bank (CBR) has been the principal regulator of financial markets in Russia. The CBR is responsible for, among other things, promulgating and enforcing regulations, licensing and oversight of securities market professionals, registering securities issuances and overseeing the issuers' compliance with their ongoing obligations.

II GOVERNING RULES

The fundamental legislative framework for IPOs in Russia is comprised of the Securities Markets Law,[4] the Insider Trading and Market Manipulation Law,[5] the Investor Rights Law,[6] the Joint-Stock Companies Law,[7] and numerous rules and regulations promulgated thereunder by the CBR (and its predecessors, the Federal Securities Commission and the Federal Service for Financial Markets). The most important regulations for IPOs include the Securities Issuance Standards,[8] the Disclosure Regulation,[9] the Public Trade Admission Regulation[10] and the Foreign Offerings Regulation.[11] The Listing Rules of MOEX, a leading Russian exchange that is the preferred listing venue for Russian issuers, are also an important part of the regulatory framework for Russian IPOs.

4 Federal Law No. 39-FZ on Securities Market, dated 22 April 1996 (as amended).

5 Federal Law No. 224-FZ on Counteracting the Illegitimate Use of Insider Information and Market Manipulation and on Amendments to Certain Laws of the Russian Federation, dated 27 July 2010 (as amended).

6 Federal Law No. 46-FZ on Protecting Investors' Rights and Lawful Interests in the Securities Market, dated 5 March 1999 (as amended).

7 Federal Law No. 208-FZ on Joint Stock Companies, dated 26 December 1995 (as amended).

8 CBR Regulation No. 428-P on the Standards of Securities Issuance, the Procedure for the State Registration of an Issue (Additional Issue) of Serial Securities, State Registration of Reports on the Results of an Issue (Additional Issue) of Serial Securities and Registration of Prospectuses, dated 11 August 2014 (as amended).

9 CBR Regulation No. 454-P on the Disclosure of Information by Issuers of Securities, dated 30 December 2014 (as amended).

10 CBR Regulation No. 534-P on Admission of Securities to Organised Trading, dated 24 February 2016 (as amended).

11 CBR Regulation No. 436-P on Procedures for Granting Permission by the CBR for Placement and/or Circulation of Securities of Russian Issuers Outside of the Russian Federation, dated 13 October 2014 (as amended).

Although Russia does not formally recognise judicial precedent as a source of law, as a matter of practice, decisions of upper courts have a significant and often decisive impact on lower courts' practice. This particularly concerns decisions by the Russian Supreme Court and its predecessor, the Supreme Arbitrazh Court. However, specifically with regard to capital markets legislation, there is a dearth of court precedents that would have particular significance for the overall legal and regulatory framework. Shareholder litigation is not nearly as widespread in Russia as it is in the United States and some other jurisdictions. There are a number of contributing factors, including:

a a fairly limited number of public companies in Russia with a dispersed shareholder base. It is very typical in Russia for even major large-cap companies to be controlled by one single shareholder or several significant investors;

b the widespread use of offshore holding structures whereby the ultimate shareholders own stock in a foreign company (typically incorporated in a low-tax jurisdiction such as Cyprus, the British Virgin Islands, the Cayman Islands, Luxembourg and the Netherlands), which in turn wholly owns Russian operating subsidiaries. Accordingly, non-Russian courts would have jurisdiction over shareholder actions with regard to such companies. The popularity of offshore listings discussed above also has a similar effect; and

c perhaps most importantly, limited availability of class action lawsuits. Although legally available since July 2009, Russian class action litigation is still at a relatively nascent state, and can only be brought in very limited circumstances.[12]

In a testament to the lack of securities actions, a search of public court records that we conducted reveals that in the 20 years of existence of the Securities Markets Law, which established the legal framework for listed companies' disclosure obligations, only eight cases based on a public company's disclosure have been brought before Russia's highest court. None of these cases was a shareholder action. Instead, all of them were disputes regarding administrative fines imposed by the securities markets regulator for formal non-compliance with the disclosure requirements. Similarly, there is a very thin body of court precedents relating to insider trading and market manipulation cases, although both concepts are recognised in Russian law.

The Russian legislature and the CBR have been particularly focused over the past several years on promoting domestic listings over the foreign offerings. In 2003, even before the Russian IPO market really took off, foreign public offerings by Russian issuers were made subject to regulatory clearance by the Russian securities market regulator. The number of shares that a Russia-incorporated issuer could offer outside Russia (whether directly or through the issuance of depositary receipts representing shares) was limited to a certain percentage of the share capital. In addition, any such foreign offering was conditioned on obtaining a domestic listing and offering securities in the Russian public market as well. Such limitations have increased over time. In 2009, the Russian securities market regulator lowered the number of

12 See, for example, Resolution of the Ninth Court of Appeals No. 09П-22376/2010, dated 29 September 2010 (blocking an attempted bondholder class action based on the fact that each bondholder purportedly had its own independent relationship with the issuer and was not part of one and the same 'legal relationship' with its fellow bondholders) and Resolution of the Presidium of the Supreme Arbitrazh Court No. 7628/12, dated 9 October 2012 (blocking an action by a group of investment funds based on similarly formalistic criteria).

shares that a Russian issuer could offer on a foreign exchange in any given offering to 50 per cent of the total number of shares sold in such offering, and the total number of shares that could be floated abroad to 25 per cent, 15 per cent or 5 per cent of the issuer's share capital depending on the level of listing obtained by the issuer on a Russian stock exchange (or 25 per cent regardless of the level of listing if the issuer of depositary receipts representing the Russian shares was incorporated in a jurisdiction with which the Russian regulator had entered into a cooperation agreement). The number of such jurisdictions was limited, which for a period of time gave certain depositaries a competitive advantage. Additionally, Russian strategic enterprises, licensed to develop certain types of subsoil reserves,[13] were in each case subject to the total cap on the number of shares they could float outside Russia equal to 5 per cent of their share capital regardless of the level of listing in the domestic market, unless special permission has been obtained from the Government Commission for Strategic Investments to increase that cap to 25 per cent for a particular issuer.

In response to these limitations and in view of other considerations (including tax), many Russian businesses went through the pre-IPO restructuring to incorporate foreign holding companies as listing vehicles. Offerings conducted by such foreign companies were not subject to the limitations described above. Although the Russian securities market regulators have always frowned upon such transactions, no regulatory measures were taken to prohibit or restrict such offering structures. It was widely accepted in the marketplace that the clearance regime for foreign public offerings by Russia-incorporated issuers was excessively restrictive and inefficient. Since 2011, there have been talks of relaxing these requirements and, in fact, a draft regulation was made public that would abolish the 25 per cent, 15 per cent or 5 per cent restriction for all Russian companies other than strategic enterprises, with a further limitation of 5 per cent for strategic subsoil users. That draft, however, was never enacted and in April 2015 the new Foreign Offerings Regulation came into effect. Currently, the general cap for the total number of shares that any Russian issuer could offer outside Russia is set at 25 per cent of the aggregate number of outstanding and newly issued shares of the same category.

There has also been a significant effort made to establish an infrastructure for foreign issuers to list their securities in Russia so that foreign holding companies of Russian assets publicly traded on foreign exchanges can easily access the domestic capital markets. There was also an attempt to attract Russian businesses back to the Russian exchanges through the creation of Russian Depositary Receipts, but this has generally failed (only one issuer utilised this instrument in Russia).

In late 2012, the Securities Markets Law was amended with a view to facilitating the process of directly listing foreign securities on a Russian stock exchange as long as such securities have already been listed on a qualifying foreign exchange. These new rules established an issuer-friendly procedure and proved quite popular with the issuers, with numerous Russian issuers adding a secondary Moscow listing to their primary London or New York listings. These amendments afforded a number of Russian businesses listed outside Russia an opportunity to access the Russian retail investor base, with an added advantage of potentially becoming eligible for inclusion in certain Russian trading indices. Qiwi, a Nasdaq-listed, Cyprus-incorporated holding company of a Russian payments services

13 In each case as established under the Federal Law No. 57-FZ on the Procedure for Making Foreign Investments in Enterprises Having Strategic Importance for State Defence and Security, dated 29 April 2008 (as amended).

business, was the first foreign issuer to make use of the 2012 amendments, and Lenta, an LSE-listed, British Virgin Islands-incorporated owner of a major Russian retail chain, was the first to list in Moscow in parallel with an offering on a foreign exchange. These rules were subsequently fine-tuned and made even more advantageous for the issuers, as the need to have the disclosure documents translated into Russian for the purposes of the listing (which used to be the most burdensome of the requirements) was removed. Besides this, the listing procedure was amended to allow for completely simultaneous listings on Russian and foreign stock exchanges. Under the current legislation and the MOEX Listing Rules, all it takes for a foreign issuer with equity listed on an eligible foreign exchange to have the same equity admitted to trading on MOEX is to file a simple admission package with the exchange itself. No vetting or other regulatory clearance is required in this case, and there are no requirements that the issuer needs to comply with beyond those imposed by the jurisdiction of an eligible foreign exchange. The list of such exchanges is very broad, although only the issuers listed on certain major exchanges are eligible for Level 1 listing on MOEX.

i Main exchanges

MOEX is the largest exchange in Russia by a wide margin, and the only one that regularly hosts IPOs. MOEX ranks among the world's top 20 exchanges by total capitalisation of shares traded, and also among the 10 largest exchange platforms for bonds and derivatives trading. Securities of over 700 issuers were admitted to trading on the equity and bond markets of MOEX as of the end of 2016. Its RTS and MICEX indices are the major benchmarks for the Russian stock market, and are widely used by portfolio managers to develop investment strategies.[14] MOEX was created in 2011 through the merger of the Moscow exchanges, RTS and MICEX. It went public in February 2013 and is traded on its own trading platform under the stock symbol 'MOEX'.

MOEX has undergone substantial transformation over the past several years. Until recently, the Moscow listing was mostly viewed either as secondary to the London listing (as the latter typically provided more liquidity and trading volumes), or as an option for smaller companies that were not ready to tap international capital markets. As discussed in more detail above, the Russian securities market regulator and MOEX (and its predecessors before it was created in 2011) have undertaken a significant effort to create a new securities settlement infrastructure and generally increase the attractiveness of the local market for investors and issuers (both domestic and foreign). That effort has generally paid off, as evidenced by the fact that all but one of the Russian businesses that went public in 2015–2017 floated exclusively on MOEX and did not seek a listing outside Russia. This is a notable departure from the prevailing trends of the previous two decades, although a smaller appetite for Russian equities from foreign investors as a result of macroeconomic and geopolitical concerns has also played a role in increasing the attractiveness of the Russian domestic market. Below are some of the most significant reforms (in addition to the creation of infrastructure for foreign securities listings described in more detail above):

a the introduction of a fully functional central securities depository and central counterparty (the National Securities Depositary (NSD) and the National Clearing Center (NCC), both subsidiaries of MOEX);

14 As reported by MOEX, http://moex.com/s348.

b Russian equities and corporate bonds becoming fully eligible and available for settlement via Euroclear and Clearstream through their direct links to the NSD. According to the NSD, its central securities depositary status makes it compliant with the requirements towards an 'eligible securities depository' under Rule 17f-7 of the US Securities and Exchange Commission (SEC) promulgated under the Investment Company Act of 1940, which provides that registered investment companies may maintain their foreign assets with NSD;

c the transfer of the equity market to the T+2 settlement cycle with partial prefunding in accordance with the best practices used by leading foreign exchanges and clearing houses;

d the introduction of a new closing auction process in 2013, with a new price-determining algorithm that corresponds with international best practice for setting closing prices; and

e the introduction of a new methodology for setting tick sizes, which are now determined not only by a stock price, but also by its liquidity, with the aim of narrowing the bid-ask spreads and aggregating liquidity at the best price level.[15]

MOEX has become the preferred listing venue for Russian issuers. Although it has a modern and robust infrastructure in place for foreign companies to list their equity, almost all foreign issuers listed on MOEX are foreign holding companies of businesses with predominantly Russian assets. As a notable example of a different practice, shares of the Bank of Astana, a Kazakhstan-based commercial bank with no presence in Russia, were admitted to trading on MOEX at the end of 2017.

ii Overview of listing requirements

MOEX offers three listing segments (referred to as Levels 1, 2 and 3).[16] Level 3 comprises the 'off-quotation list' securities, which are technically considered 'admitted to public trading' but not 'listed'. As a general rule, only Level 1-listed shares are eligible for the portfolios of Russian non-state pension funds that provide mandatory pension insurance, which often account for a sizeable portion of investor demand in Russian IPOs.

The listing requirements of MOEX are generally not onerous compared to other major stock exchanges. Of note are the quantitative requirements regarding free float and corporate existence, which are set forth below (for illustrative purposes, with regard to ordinary shares only):

a corporate existence:
- Level 1 listing: three years; and
- Level 2 listing: one year; and

b free float:
- Level 1 listing: 3 billion roubles, while at the same time comprising at least 10 per cent of the total issued ordinary shares (or a larger percentage, based on a formula, for companies with a market capitalisation equal to or less than 60 billion roubles; and
- Level 2 listing: 1 billion roubles, while at the same time comprising at least 10 per cent of the total issued ordinary shares (other than with regard to certain high-growth tech companies).

15 Id.

16 The latest version of the Listing Rules of MOEX at the time of writing was registered by the CBR on 14 July 2017 and entered into force on 17 July 2017.

There are no income, assets, stockholder equity or similar tests under the Public Trade Admission Regulation or the MOEX Listing Rules, in contrast to the NYSE and Nasdaq.

Both Level 1 and Level 2 listings contemplate certain corporate governance requirements, which are in line with those that are typically required or are commonly expected on major international stock exchanges, including:

a independent non-executive directors (INEDs) on the issuer's board (it should be noted that independence under the MOEX Listing Rules is determined primarily by bright-line tests rather than the board's discretion, unlike in the United States, although a board decision may override them if vetted by MOEX):
- Level 1 listing: at least three INEDs (who simultaneously comprise at least 20 per cent of the board); and
- Level 2 listing: at least two INEDs;

b an audit committee that, as a general rule, should consist entirely of INEDs for both Level 1 and Level 2 listings;

c for a Level 1 listing, an additional compensation committee that, as a general rule, should consist entirely of INEDs, and a nomination committee with an INED majority;

d a board-approved formal dividend policy for both Level 1 and Level 2 listings;

e a formalised corporate secretary function for both Level 1 and Level 2 listings; and

f a formalised internal audit function and board-approved formal internal audit policy for both Level 1 and Level 2 listings.

Level 3 listing requirements are fairly basic. As long as a Securities Markets Law-compliant prospectus has been registered by the CBR and certain additional technical requirements have been complied with, in general, any security would be eligible. There are no requirements as to the track record, market capitalisation, free float or corporate governance. Nevertheless, Level 3 securities can be offered to the public, including retail investors.

Russian public companies are required to report under the International Financial Reporting Standards (IFRS). Level 1 listing requires disclosure of IFRS financial statements with regard to the past three financial years, while Level 2 listing only requires one year of IFRS financial statements. There is no equivalent requirement for a Level 3 listing. Nevertheless, the Securities Markets Law and the Disclosure Regulations require that a prospectus contain IFRS financial statements covering a three-year period regardless of the listing level (unless the issuer has been in existence for less than three years).

iii Overview of governmental rules and regulations

The Securities Markets Law regulates, among other things, the status and operations of professional securities market participants, such as brokers and dealers, securities issuance procedures, disclosure requirements and the rights of the securities markets regulator. The Insider Trading and Market Manipulation Law sets forth certain obligations of issuers and market participants with the aim of preventing market disruptions and, perhaps most importantly for IPOs, provides a safe harbour for stabilisation transactions. The Investor Rights Law provides for various investor protections, notably with regard to the marketing of securities and, importantly, prohibits any agreements with investors limiting rights available to them under law, thus making the practice of the 'big boy letters' generally unenforceable under Russian law. The Joint-Stock Companies Law governs the corporate affairs of joint-stock companies (the only type of legal entity in Russia that can list its equity), including the powers and procedures of the shareholder meetings and other governing bodies, mergers and acquisitions, dividends and other corporate matters. The Securities Issuance Standards set forth the procedural aspects of the securities issuance process. The Disclosure Regulations establish the rules governing public disclosure of Russian companies, both as part of the offering process and on an ongoing basis. The Public Trade Admission Regulation establishes the basic listing requirements that stock exchanges build upon and implement in their own listing rules.

III THE OFFERING PROCESS

The Russian IPO market generally follows international best practices, with the LSE in particular serving as a benchmark. Russian offerings, even those exclusively involving a Moscow listing, typically draw substantial demand from foreign investors, including those from the United States. Consequently, a significant portion of market participants on the advisory side, including investment banks, law firms and accounting firms, are local branches or subsidiaries of global firms. Owing to these factors, the offering process generally follows the same basic steps as any IPO in any other mature European market.

A company that has made the decision to go public would typically, as a first step, engage one or more investment banks. In small-cap deals, this can often be independent Russian brokerage houses. However, large- and mid-cap deals would typically be underwritten by one or more of the 'bulge bracket' international investment banks or investment banking divisions of one or more of the major Russian commercial banks.

It is common practice for both the issuer and the banks to be represented by outside legal counsel. Major US and UK firms are well represented in the Russian market and, unlike in certain jurisdictions, typically have full Russian law capabilities. A number of strong local competitors have also emerged, although offerings to international investors continue to be handled by foreign law firms. Each of the 'big four' accounting firms also has a strong local presence.

Due diligence is typically carried out to match international standards, and is generally within the same scope as US SEC-registered deals, unless the transaction is purely Moscow-listed and no international investment banks are involved.

IPO documentation typically includes the following:

a in foreign-listed deals, a prospectus prepared in accordance with applicable law of the listing venue, for example, the EU Prospectus Directive or the US Securities Act of 1933. Often, in purely Moscow-listed deals, an international prospectus (typically, a Prospectus Directive lookalike, i.e., an offering memorandum prepared generally to Prospectus Directive standards) is also prepared, although in such cases it is used for marketing purposes and is not a liability document;

b in Moscow-listed deals, a Russian Securities Markets Law-compliant prospectus that is a key admission document from the Russian law standpoint;

c an underwriting agreement governed by foreign law (typically, English law) if the deal involves a foreign listing or a foreign underwriter;

d a brokerage agreement (the Russian equivalent of an underwriting agreement) and a market-making agreement with a licensed Russian brokerage house if the deal involves a Moscow listing; and

e legal and tax opinions, and auditor comfort letters that generally follow the same standards in foreign-listed and major Moscow-listed deals.

i General overview of the IPO process

The timeline of a Russian IPO can vary significantly. It is generally recommended to budget for at least three to four months, although it can be less if the deal does not involve a primary share offering (i.e., an offering of newly issued shares as opposed to a secondary offering of existing shares by one or more shareholders) or a foreign listing. The latter process tends to take more time than purely Moscow-listed deals.

In order for a company incorporated in Russia to list its equity, it has to be incorporated in the form of, or transformed into, a public joint-stock company (the other entity types that are commonly used for business entities in Russia are non-public joint-stock companies and limited liability companies). Such transformation requires approval by the company's equity holders by either a qualified 75 per cent majority (if such company has previously been a non-public joint-stock company) or a unanimous vote (if such company has previously been a limited liability company). Further, the decision to have the company's shares listed on a stock exchange, as a general rule, requires approval by the company's board of directors and a majority vote of its shareholders, unless the company's charter (the main organisational document for a Russian company) vests such power in the board alone. The shareholders who vote against a decision to list or abstain from voting may tender their shares to the company at the market price, which shall be not less than the average-weighted price of the shares for the six months preceding the respective shareholders' decision.

In the event that the deal involves a primary offering by a Russia-incorporated issuer, it would also include the following steps:

a approval by the shareholders or by the board of directors of a decision to increase the company's share capital and to issue shares;

b approval by the board of directors and registration by the CBR of a share issuance decision and, as a general rule, a Russian Securities Markets Law-compliant prospectus (both in the form prescribed by the CBR); and

c registration of a share issuance report by, or submission of a share issuance notification to, the CBR (both in the form prescribed by the CBR).

In secondary-only transactions, none of these steps is required other than the registration of a prospectus by the CBR. Starting from 2013, amendments to the Securities Markets Law have enabled issuers to pre-clear prospectuses with the CBR. However, unlike in the United States, draft versions of the prospectus or any correspondence between the regulator and the issuer never become public.

Under the Securities Markets Law and the Investor Rights Law, only securities that have been admitted to public circulation can be advertised or marketed to the general public. Such admission entails either registration of a Securities Markets Law-compliant prospectus with regard to such securities by the CBR or the decision of a stock exchange to list the securities in the absence of such prospectus (which is available with regard to securities of foreign issuers listed on a qualifying foreign stock exchange, as described above). Prior to such admission, securities can only be advertised or marketed to persons that are considered 'qualified investors' under Russian law.

In November 2017, amendments to the Securities Markets Law and Joint-Stock Companies Law (Draft Amendments) were submitted to the Russian parliament, which is scheduled to consider the draft in 2018. These amendments are intended to simplify the public offering and disclosure process. For example, they intend to:

a eliminate some of the currently required corporate approval formalities (in particular, approval of a share issuance decision and a share issuance report by the company's board or shareholders);

b relieve the issuers from the obligation to submit the share issuance notification to the CBR following completion of the offering (this notification would be filed by the shareholder registrar or the central securities depository);

c exempt several additional types of offerings from the prospectus registration requirements (in particular, any offering made to existing shareholders, any offering where the proceeds are less than 1 billion roubles and any offering where the minimum contribution by an investor is 1.4 million roubles);

d permit the CBR to introduce different types of requirements to prospectus disclosure for companies depending on, among others, the types of securities being offered, the type of an issuer's principal business activities (including for small and medium-sized enterprises) and the number of securities offerings conducted by an issuer for a preceding year;

e introduce abridged prospectuses in certain instances; and

f allow electronic submissions of the securities issuance documentation.

ii Pitfalls and considerations

Several years ago, some of the Russian securities law provisions were ill-suited for an IPO process (e.g., prohibition of conditional trading, unavailability of prospectus pre-clearance and shelf registrations, and ability of the regulator to invalidate an offering post closing). Recently, the Russian IPO-related legislation was significantly revamped and brought in line with international best practices. By 2013, the Russian regulators eliminated most of the obstacles, making the IPO process in Russia relatively straightforward and consistent with the settlement process in foreign jurisdictions that are popular as listing venues with Russian issuers. Of all the issues mentioned above, currently only the prohibition of conditional trading remains in place, as shares in a Russian company in a public offering followed by the filing of a share issuance notification can only be transferred upon full payment thereof (i.e., once they have been placed with and paid for by the first purchasers). However, as a result of the MOEX efforts, the Securities Markets Law was amended in 2015 to allow conditional trading of eligible foreign securities (such as global depositary receipts issued in respect of Russian shares) in a similar fashion as is done on the LSE, subject to disclosure of the summary of an international prospectus in respect of such securities on a Russian exchange's website.

Unlike in the United States (e.g., under Delaware or New York law), pursuant to the Joint Stock Companies Law (the JSC Law) all shareholders of a public joint-stock company have statutory pre-emptive rights to subscribe to the company's shares proposed to be issued to the general public. Further, unlike in the UK and most other common law jurisdictions, such pre-emptive rights cannot be waived in a company's constitutional documents. Owing to the fact that most Russian companies are closely held, this has historically had more of an impact on the lead-in time required to prepare a deal rather than on allocations. It is permissible, however, to launch the pre-emptive rights' exercise period during the pre-marketing stage of the transaction before the offer price is disclosed, and the period itself was substantially shortened to streamline the process.

Another oft-cited peculiarity of the JSC Law is the requirement to have certain related-party transactions approved by a majority of all disinterested shareholders (but not only those participating in a shareholder meeting). This would often capture underwriting agreements if a majority shareholder is involved as seller in an offering. In a transaction where some or all of the major shareholders would be selling, disinterested shareholders would often exclusively comprise passive holders of minority stakes who would be difficult to even assemble for a meeting. As such, this requirement often presented significant challenges to the IPO timetable or had to be structured around it. Starting from 1 January 2017, transactions entered into in connection with the placement of primary shares (that would presumably include underwriting agreements to which a majority selling shareholder is a party) are exempted from this corporate approval regime. Transactions entered into in connection with the public offering of secondary shares are not exempt.

Further, the JSC Law provides that 'major' transactions (e.g., transactions that involve or may potentially involve an acquisition or disposal of property worth over 50 per cent of a company's asset value under Russian accounting standards) are subject to approval by a 75 per cent majority of all shareholders present at the meeting (it being noted that a meeting is only quorate if holders of more than 50 per cent of voting shares are in attendance). Similarly, this would often capture potential payments by the issuer under a standard indemnity typically provided to the underwriters pursuant to an underwriting agreement. Since major shareholders are not legally prevented from voting, their approval would generally be enough to carry a vote. However, the major transactions approval regime used to present a different challenge as the shareholders who voted against such resolution or did not participate in the voting have a statutory right to tender their shares to the company at the price determined by a company's board on the basis of the market value. Again, transactions entered into in connection with the placement or offering of shares, or the provision of services related thereto (which would presumably include underwriting agreements), have been exempted from this corporate approval regime starting from 1 January 2017 (with regard to 'major' transactions, this exemption relates to offerings of both primary and secondary shares).

iii Considerations for foreign issuers

To the extent that a foreign issuer's securities have not been listed on an eligible foreign stock exchange, their admission to public trading is generally subject to the same requirements as those applicable to domestic issuers. Further, in the absence of such eligible foreign listing, only issuers incorporated in certain jurisdictions can access the Russian public market. Such jurisdictions include the Member States of the Organisation for Economic Co-operation and Development, the Financial Action Task Force on Money Laundering, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, and the Eurasian Economic Space. Securities that have been listed on an eligible foreign exchange benefit from a very lax listing regime, as described in more detail above. Securities of foreign issuers that satisfy neither requirement may generally only be marketed to persons that are considered 'qualified investors' under Russian law.

In July 2014, there were a number of changes to the Securities Markets Law and other laws that regulate the procedures for listing in Russia of foreign securities already listed outside Russia. These amendments further relaxed the requirements for the listing of securities by

Russian stock exchanges without the consent of the issuing company. In particular, the July 2014 amendments relieved the issuers from certain Russian reporting and disclosure obligations by shifting the burden of compliance onto the relevant Russian exchange.

IV POST-IPO REQUIREMENTS

Disclosure obligations of public companies are governed by the Securities Markets Law and the Disclosure Regulation. While disclosure made by Russian public companies is extensive, it is also significantly more formalistic than that of companies in the United States and other Western jurisdictions, often based on a 'form over substance' approach (another aspect of the Russian securities regulations that the Draft Amendments seek to address). In addition to a prospectus registered in connection with an IPO, Russian issuers' ongoing mandatory public disclosure includes quarterly reports on a form that is substantially similar to a Securities Markets Law-compliant prospectus, statements of certain material facts, and annual and six-month IFRS consolidated financial statements. Russian public companies are also required to publicly disclose their organisational documents (including charters and internal regulations) and comprehensive lists of their affiliates.

In addition, under the Insider Trading and Market Manipulation Law, an issuer is required to adopt and maintain a list of the types of information pertaining to such issuer that are considered insider information. This list must contain all items classified as insider information set forth in an exhaustive list of the types of insider information adopted under the Insider Trading and Market Manipulation Law. In contrast to insider trading laws in many other jurisdictions, the concept of 'insider information' under Russian law is not open-ended and is limited to such exhaustive list. Similarly, whether or not a person is deemed an insider is based on a bright-line test that, notably, does not include persons that became aware of such insider information by mere chance. Listed companies are required to maintain and disclose to the Russian stock exchanges where they are listed the lists of their 'insiders' (including, among other things, top management, certain employees, advisers and brokers).

Generally, the burden and cost of being a public company in Russia are significantly lower than in the United States and, to a lesser degree, the United Kingdom.

V OUTLOOK AND CONCLUSION

There has been an uptick in Russian IPO deal activity over the past 12 months (although the number of transactions remains significantly diminished as a result of geopolitical factors). As discussed in more detail above, the Russian regulators and MOEX, as a leading Russian exchange, have made significant progress in substantially revamping outdated regulations to streamline the offering and disclosure process and bring the securities market infrastructure in line with best international practice. A state-of-the-art legal and regulatory framework has been put in place to accommodate and promote IPO transactions in the Russian market. The trend of conducting Russian IPOs exclusively involving a Moscow listing is expected to continue, especially for small and medium-sized companies, and in connection with privatisation transactions. Large-cap Russian companies will continue looking for opportunities to raise capital in international markets. As the market conditions improve, we expect to see more public offerings and 'accelerated book-build' transactions by Russian companies in the coming months.

Chapter 13

SINGAPORE

Siddhartha Sivaramakrishnan, Jin Kong, Ban Leong Oo and Sandra Tsao[1]

I INTRODUCTION

The Singapore Exchange (SGX) is a regional capital markets hub, with a significant number of listings by foreign, primarily Asian, issuers. The Monetary Authority of Singapore (MAS) regulates the offering of shares to the public in Singapore, while the day-to-day regulation of the market along with administration of the listing rules is undertaken by the SGX itself. Issuers seeking a primary listing can choose between the more regulated Mainboard, or Catalist, which does not have any quantitative requirements and is more suitable for newer or smaller companies. The SGX Mainboard listing rules allow for transfers from Catalist to the Mainboard once the Catalist-listed issuer meets the eligibility requirements.

In 2017, initial public offerings (IPOs) in Singapore raised more than double the amount of proceeds in 2016, mainly in technology, construction, healthcare and real estate investment trusts (REITs).[2] There was also an increase in the number of IPOs by Singapore-based companies from 21 in 2016 to 31 in 2017, raising a total of US$4.2 billion (a 52.7 per cent increase).[3] IPOs accounted for 60.9 per cent of the total equity raised in Singapore.[4] The largest IPO on the Mainboard in 2017 was a homegrown telecommunications company, raising US$1.7 billion of proceeds.[5] Applications for listings have declined over the past couple of years,[6] and the strengthening of other South East Asian stock exchanges has had an impact on the number of South East Asian companies choosing the SGX over their domestic exchanges.[7] Also, the SGX is expected to face more intense competition from the Hong Kong Stock Exchange, as the number of Singapore-based companies listed on the Hong Kong Stock Exchange has more than doubled in the past year from six in 2016 to 13 in 2017. The SGX is currently considering proposals to widen issuer and investor participation in the market.

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2 www.straitstimes.com/business/companies-markets/spore-ipos-raise-double-the-funds-secured-last-year, accessed on 17 January 2018.

3 www.straitstimes.com/business/companies-markets/spore-firms-ipos-boost-equity-capital-markets, accessed on 17 January 2018.

4 Ibid.

5 Ibid.

6 www.sgx.com/wps/portal/sgxweb/home/regulation/consult_pub/reg_statistics, accessed on 17 January 2018.

7 Mergermarket and Merrill Corporation, 'Southeast Asia M&A: Trends shaping the region', Issue 2, 14 December 2016.

This chapter will cover the listing rules of the SGX, the offering process and continuing obligations following a successful IPO. The main focus will be on Mainboard equity listings. but some of the key differences between Mainboard and Catalist will be highlighted.

II GOVERNING RULES

i Main stock exchanges

Within the SGX, issuers can opt to list on either the Mainboard or Catalist. While the Mainboard caters for large well-established issuers, Catalist provides a market for smaller or less well-known issuers who would likely struggle with the entry and listing requirements imposed for listing on the Mainboard. In recent years, new listings on Catalist have outnumbered those on the Mainboard.[8]

The SGX is a particularly international stock exchange, with approximately 40 per cent of listed companies coming from outside Singapore as of the end of 2017. This figure is substantially higher than the percentage of foreign companies listed on both the Hong Kong Stock Exchange and the Tokyo Stock Exchange.[9] In particular, the SGX is popular with Chinese, Hong Kong and other South East Asian companies looking for a listing.[10] In terms of sectors, the SGX is popular with companies in the industrial (30 per cent), consumer (21 per cent) and financial (17 per cent) sectors.[11] It is also popular with real estate companies, being the second-largest market for REITs in Asia.[12] The SGX's attraction for REITs within Asia stems from its early development of a market for REITs, being second only to Japan, as well as efforts by the Singapore government to introduce a favourable regulatory framework for these real estate vehicles.[13]

ii Overview of listing requirements

Issuers seeking a listing of equity securities on the SGX must comply with either the Mainboard listing rules (the Mainboard Rules) or the Catalist listing rules (the Catalist Rules) as applicable, each forming a rulebook administered by the SGX. The Mainboard Rules impose a number of requirements on issuers and this section provides a non-exhaustive overview of requirements imposed on issuers seeking a primary listing on the Mainboard.

Shareholding spread and distribution

In respect of the spread of shareholdings, the proportion of shares that must be in public hands at the time of listing, and the distribution requirements, depend on the market capitalisation of the issuer and the offer size as follows in the table below.[14]

8 Data from the Mergermarket IPO database, accessed on 17 January 2018.
9 www.sgx.com/wps/portal/sgxweb/home/listings/why_sgx, accessed on 17 January 2018.
10 Ibid.
11 Ibid.
12 Ibid.
13 Joseph T L Ooi, Graeme Newell, Tien-Foo Sing, 'The Growth of REIT Markets in Asia', *Journal of Real Estate Literature*, Issue14(2), January 2006.
14 Rule 210(1)(a), Mainboard Rules.

Public float			Distribution	
Market capitalisation (S$ million: M)	**Proportion of post-invitation share capital in public hands**	**Number of shareholders**	**Total offer size (S$ million: O)**	**Distribution**
M<300	25 per cent	500	O<75	At least 40 per cent of the invitation shares or S$15 million, whichever is lower, must be distributed to investors that are each allotted not more than 0.8 per cent of the invitation shares or S$300,000 worth of shares, whichever is lower
300≤M<400	20 per cent	500	75≤O<120	At least 20 per cent of the invitation shares must be distributed to investors, each allotted not more than 0.4 per cent of the invitation shares
400≤M<1,000	15 per cent	500	O≥120	No requirement applicable
M≥1,000	12 per cent	500		The shareholdings of an applicant and his or her associates must be aggregated and treated as one single holder; preferential allotments made pursuant to Rule 234 must be excluded

There is a requirement for a minimum of 500 shareholders, which has implications for the structuring of the IPO, as discussed further below.

Shareholding and distribution requirements do not apply to issuers seeking a secondary listing; however, such issuer is still required to have at least 500 shareholders worldwide following the listing, or, where the SGX and the issuer's home exchange do not have an established framework and arrangement to facilitate the movement of shares between the jurisdictions, the issuer should have at least 500 shareholders in Singapore or 1,000 worldwide.[15]

Quantitative criteria

Issuers must also satisfy one of the following requirements:

a having a minimum consolidated pre-tax profit (based on full-year consolidated audited accounts) of at least S$30 million for the latest financial year and an operating track record of at least three years;

b having been profitable in the past financial year (pre-tax profit based on the latest full-year consolidated audited accounts), with an operating track record of at least three years and a market capitalisation of not less than S$150 million based on the issue price and post-invitation issued share capital; or

c having operating revenue (actual or *pro forma*) in the latest completed financial year and a market capitalisation of not less than S$300 million, based on the issue price and post-invitation issued share capital. REITs and business trusts that have met the S$300 million market capitalisation test but do not have historical financial information may apply under this rule if they are able to demonstrate that they will generate operating revenue immediately upon listing.[16]

15 Rule 210(1)(b), Mainboard Rules.

16 Rule 210(2), Mainboard Rules.

In respect of the first two profitability tests, the issuer must have been engaged in substantially the same business and have been under substantially the same management throughout the period for which the three years' operating track record applies.[17]

Group's financial position and management

As regards the issuer group's financial position, the group must be in a healthy financial position, with a positive cash flow from operating activities.[18] All debts that are owed to the group by its directors, substantial shareholders, and companies controlled by the directors and substantial shareholders must be settled prior to listing.[19] Directors and executive officers must have appropriate experience and expertise to manage the group's business, which must be disclosed via a statement or in the prospectus prior to listing.[20]

Specific requirements for certain types of companies

Life sciences companies, mineral, oil and gas companies, and property investment or development companies have further specific rules that must be complied with for listing on the Mainboard.[21]

Catalist requirements

Listings on Catalist must be primary listings.[22] Issuers are not required to satisfy any quantitative entry criteria. Rather, it is a sponsor-led process. The sponsor is typically an investment bank or other finance company and has been approved by the SGX to provide sponsor services. An issuer will normally be admitted to listing on Catalist upon receipt of conforming documents from the sponsor.[23] It is the sponsor's responsibility to determine whether an issuer is suitable to list on Catalist.

Issuers listing on Catalist must still meet certain other requirements. For example, 15 per cent of the shares must be in public hands at the time of listing and there must be at least 200 public shareholders.[24] In addition, unlike companies listing on the Mainboard, both the directors and the sponsor must be able to state that, in their reasonable opinion, the working capital available to the issuer is sufficient for present requirements and for at least 12 months after listing.[25]

iii Overview of law and regulations

The primary regulatory authority for the offering of shares to the public in Singapore is the MAS.

The MAS administers the legislation governing the offering of shares and units in Singapore, which consists of the Securities and Futures Act, Chapter 289 of Singapore (SFA) along with its ancillary regulations, including Securities and Futures (Offers of Investments)

17 Rule 210(3)(a), Mainboard Rules.
18 Rule 210(4)(a), Mainboard Rules.
19 Rule 406(6)(a), Catalist Rules and Rule 210(4)(b), Mainboard Rules.
20 Rule 210(5), Mainboard Rules.
21 Rules 210(8), 210(9) and 222, Mainboard Rules.
22 Rule 402(1), Catalist Rules.
23 Rule 402, Catalist Rules.
24 Rule 406(1), Catalist Rules.
25 Rules 407(2) and (3), Catalist Rules.

(Shares and Debentures) Regulations 2005, Securities and Futures (Offers of Investments) (Business Trusts) (No. 2) Regulations 2005, and Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 (collectively, the Regulations).

The SFA governs requirements for a prospectus such as the contents and sets out the liability that attaches to such document.

III THE OFFERING PROCESS

i General overview of the IPO process

Structuring considerations

IPOs in Singapore can be structured as public offerings or placings, and shares offered can be either new shares or existing shares. As placings typically result in a smaller shareholder base compared to a public offer, Mainboard listings are often undertaken by way of combination of a public offer with a placing in order to meet the shareholding and distribution requirements. IPOs are usually underwritten, and if they are not, the issuer must consult with the SGX as early as possible.[26]

Pursuant to an amendment to the Mainboard Rules, effective on 2 May 2017, there is a new requirement that an offering of securities for subscription or sale must include a public subscription tranche.[27] The issuer should ensure that a minimum of 5 per cent of the number of the securities offered for subscription or sale, or S$50 million in value, whichever is lower, is allocated to the public subscription tranche.[28] Where this threshold has not been met at the closing of the offering, the issuer may then reallocate the securities that are not subscribed or sold in the public subscription tranche to the placement tranche.[29]

Process and timeline for Mainboard listing

The table below highlights the milestones and key steps for listing on the Mainboard. While the timeline will vary depending on the complexity of the IPO and the issuer's own internal procedures and processes, a straightforward IPO can be completed within four to five months.

Milestone	Key steps	Timeline
Pre-listing preparation	• Appointment of advisers: the primary adviser is the issue manager, who acts as the sponsor for the issuer's listing and must confirm to the SGX that the issuer satisfies the admission requirements.* Legal advisers, auditors and experts (if the intention is to include expert reports as part of the prospectus) will also be appointed • Due diligence and structuring work • Preparation of listing documents, including Sections (A) and (B) of the Listing Admissions Pack (LAP)	Dependent on the issuer's processes Two months+

26 Rule 239, Mainboard Rules.

27 Rule 230, Mainboard Rules.

28 Rule 233A(1), Mainboard Rules.

29 Rule 233A(2), Mainboard Rules.

Milestone	Key steps	Timeline
Submission to SGX and MAS pre-lodgement review	**First stage** Submit Section (A) of the LAP to the SGX – this should contain general information on the applicant, highlight any key issues for the SGX to consider and is submitted by the issuer manager. As part of its review, the SGX may ask questions. Upon completion of its preliminary review and if key issues have in the assessment of the SGX been satisfactorily resolved, the SGX will inform the issuer manager that the application can proceed to the second stage	Two to four weeks
	Second stage • Submit Section (B) of the LAP to the SGX with the full listing application and preliminary prospectus** • Submit preliminary prospectus to the MAS for pre-lodgement review. The MAS will assess if any amendments may need to be made prior to its publication on the MAS's Offers and Prospectuses Electronic Repository and Access (OPERA) website • If the SGX approves the application, it will issue the eligibility-to-list letter (ETL), which is valid for three months***	Four weeks****
Lodgement and public exposure	• Lodge prospectus with the MAS during validity period of the ETL • Prospectus available for public comment on OPERA	Two weeks
Registration and listing	• The MAS will register the prospectus • The offer can be launched and must be open for at least two market days***** • Trading commences	One to two weeks

* Rule 246(4), the Mainboard Rules
** www.sgx.com/wps/portal/sgxweb/home/listings/getting_started/listing_process, accessed on 19 January 2017
*** Rule 243(2), the Mainboard Rules
**** SGX has indicated that the review period once a completed application has been received should be 4 weeks. www.sgx.com/wps/portal/sgxweb/home/listings/getting_started/listing_process, accessed on 19 January 2017
***** Rule 242, the Mainboard Rules

Documents required

As indicated above, prospectus is the primary document produced for an IPO. The prospectus is required to contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of particular matters including:

a the rights and liabilities attaching to the securities;

b assets liabilities, profits and losses, financial position, and performance and prospects of the issuer; and

c assets liabilities, profits and losses, financial position and performance, and prospects of the underlying entity if controlled by the offeror or its related parties.[30]

It must contain matters prescribed in the regulations including details of the issuers' share capital and substantial shareholders, business operation and risk factors, among others. It must also comply with certain contents requirements in Chapter 6 of the Mainboard Rules. Criminal and civil liability can attach to several categories of person if there is a false or misleading statement in the prospectus, or if there is an omission of any required information.

Other documents that must be prepared include audited financial statements, an auditor's audit report, an underwriting agreement where the IPO is underwritten, and ancillary documents, such as the constitution of the issuer and any necessary approvals.

30 Sections 243(1) and 243(3) SFA.

Listing by way of introduction

It is worth noting that certain companies may be able to list on the Mainboard by way of introduction without any offer of its shares, provided that it complies with the relevant shareholding spread requirements.[31] One way in which this may be useful is for companies listed on another stock exchange, looking for a secondary listing, and the Mainboard Rules list this as a circumstance in which an introduction may be appropriate.[32] The issuer will have to produce an introductory document rather than a prospectus.[33] While the content requirements are largely the same, the introductory document will not attract prospectus liability under the SFA and will not be reviewed by MAS.

Process for listing on Catalist

For companies listing on Catalist, the process is sponsor-led, as mentioned above. The primary differences are that an offer document is prepared rather than a prospectus, which will be submitted by the sponsor after submission of a pre-admission notification.[34] The offer document will be lodged with the SGX acting as agent for the MAS, who will also be responsible for registering such document in accordance with the SFA. The SGX decides whether the applicant can proceed with lodgement of the offer document on the basis of the preliminary offer document.

ii Pitfalls and considerations

In considering listing on the SGX, potential issuers will need to consider the potential pitfalls and considerations in pursuing a listing in general. These issues are not unique to the SGX.

Pre-IPO costs

Pursuing a listing can be a costly exercise, from fees to be paid to professionals such as issue managers, auditors, lawyers and experts, to placing and underwriting fees to be paid to the placing agents and underwriters. These fees are typically recouped from the funds raised in the IPO or from exiting shareholders. However, should the listing exercise be delayed or aborted for any reason, these costs may need to be absorbed by the issuer.

Ongoing fees and costs

Post listing, the issuer will need to pay annual listing fees to the SGX. Other costs would include the holding of public annual general meetings and the payment of directors' fees to independent directors.

Ongoing compliance obligations and approval requirements

Listed companies are required to comply with the listing rules as well as the SFA on an ongoing basis. Depending on its activities, these may include filings to be made with the SGX and the MAS, announcements to be made to its shareholders or, in the case of transactions that require approval of its shareholders, the calling of extraordinary general meetings (EGMs)

31 Rule 235, Mainboard Rules.
32 Rule 236, Mainboard Rules.
33 Rule 238, Mainboard Rules.
34 Appendix 4F, Catalist Rules.

and the preparation and publication of circulars prior to such EGMs. Such obligations may also require either dedicated compliance and investor relations personnel or substantial time from the issuer's management.

Decrease in autonomy of founder shareholders

A significant number of companies are listed by founder shareholders who have grown the company from inception. While one of the benefits of listing is access to a larger pool of capital that would allow the issuer to spur its growth and expansion, founder shareholders who continue to play executive roles in the issuer would need to adjust to the decrease in autonomy and increased accountability towards independent shareholders. Certain mandatory shareholder or board approvals in the decision-making process may also be perceived to reduce the ability of the issuer to be opportunistic and nimble.

iii Considerations for foreign issuers

The IPO process is generally no different for foreign issuers than domestic issuers. However, there are some specific considerations that foreign issuers should take into account when assessing whether to list on the SGX.

Foreign issuers should consider whether they need to restructure their board when listing on the SGX due to the requirement that an SGX Mainboard-listed company must have at least two independent directors resident in Singapore.[35]

Foreign issuers seeking a primary listing on either the Mainboard or Catalist should consider whether they may need to use different accounting standards to those they currently use. Financial statements and future periodic financial reports must be prepared in accordance with Singapore Financial Reporting Standards (SFRS), International Financial Reporting Standards (IFRS) or US Generally Accepted Accounting Principles (US GAAP).[36] For foreign issuers only seeking a secondary listing on the Mainboard, financial statements and future periodic reports need to be reconciled to SFRS, IFRS or US GAAP.[37]

IV POST-IPO REQUIREMENTS

Companies listed on the SGX are subject to continuing obligations under either the Mainboard Rules or the Catalist Rules. The main areas are set out below.

i Disclosure obligations

Chapter 7 of the Mainboard Rules sets out the main continuing obligations for companies listed on the Mainboard, including several obligations regarding the disclosure of information. An issuer must announce any information known to it concerning it or any of its subsidiaries or associated companies, which:

a is necessary to avoid the establishment of a false market in the issuer's securities; or
b would be likely to materially affect the price or value of its securities.[38]

35 Rule 221, Mainboard Rules.
36 Rule 415, Catalist Rules, Rule 220(1), Mainboard Rules.
37 Rule 220(2), Mainboard Rules.
38 Rule 703(1), Mainboard Rules.

There are exemptions, including when the information is a trade secret or concerns an incomplete proposal or negotiation, provided that the information is confidential and a reasonable person would not expect the information to be disclosed.[39] Issuers must observe the Corporate Disclosure Policy, Appendix 7.1 to the Mainboard Rules, which includes further requirements, such as a requirement to promptly clarify or confirm any rumours that are likely to have, or have had, an effect on the price of its securities and that have not been substantiated by the issuer.[40]

In addition, there are several specific disclosure obligations concerning, for example, appointment and cessation of key persons such as directors, chief executive officers, etc.; acquisitions and sales subject to certain thresholds; and general meetings, among others.[41] A recent addition to the disclosure requirements, which was introduced in March 2017, requires listed companies to announce any sale, transfer, cancellation or use of subsidiary holdings.[42]

ii Reporting obligations and annual general meetings

In terms of periodic reporting, issuers must announce financial statements for the full financial year immediately after the figures are available and no later than 60 days after the relevant financial period.[43] Depending on its market capitalisation, an issuer may also have to announce its quarterly results for the first three-quarters of the financial year, in which case it must do so no later than 45 days following the end of the relevant quarter.[44]

Annual general meetings must be held no later than four months after the end of the issuer's financial year, with the annual report to be circulated 14 days prior to the annual general meeting.[45] Listed companies are also required to prepare a sustainability report to be issued no later than five months after the end of the financial year, either as a separate report or part of the annual report.[46] The report must describe the sustainability practices with reference to several factors, including material environmental, social and governance factors and targets.[47]

iii Free float requirement

As regards the free float, an issuer must ensure that at least 10 per cent of the total number of issued shares, excluding treasury shares, preference shares and convertible equity securities, in a class listed on the SGX, remain in public hands at all times. Trading may be suspended by the SGX if the percentage falls below 10 per cent.[48]

iv Transactions with interested persons

Chapter 9 of the Mainboard Rules governs transactions with interested persons. In the case of a company, 'interested person' means a director, chief executive officer or controlling

39 Rule 703(3), Mainboard Rules.
40 Rule 703(4)(a), Mainboard Rules and Appendix 7.1, Mainboard Rules.
41 Rule 704, Mainboard Rules.
42 Rule 704(28A), Mainboard Rules.
43 Rule 705(1), Mainboard Rules.
44 Rule 705(2), Mainboard Rules.
45 Rules 707(1) and (2), Mainboard Rules.
46 Rule 711A, Mainboard Rules.
47 Rule 711B, Mainboard Rules.
48 Rules 723 and 724, Mainboard Rules.

shareholder of the issuer, or any associate of such person. 'Transaction' includes the provision or receipt of services, issuance or subscription of securities and the provision or receipt of financial assistance, among other things, irrespective of whether it is in the ordinary course of business.[49] There are also some exceptions to the classification,[50] and the amendments to the Mainboard Rules of March 2017 have expanded the scope of these exemptions. For instance, the provision of insurance coverage and indemnities for directors as well as chief executive officers are not considered as interested person transactions.[51]

An issuer must immediately announce any transaction with interested persons of a value equal to, or more than, 3 per cent of the group's latest audited net tangible assets.[52] Further, an announcement must be made if the aggregate value of all transactions entered into with the same interested person during the same financial year hits the same 3 per cent threshold.[53] Shareholder approval is required for any transaction with an interested person that has a value equal to, or more than, 5 per cent of the group's latest audited net tangible assets, whether alone or aggregated with other transactions in the same financial year.[54] These rules exclude transactions that are below S$100,000.[55] Certain transactions are excluded from this regime.

v Announcements regarding acquisitions and realisations of assets

Immediate announcements are also required under Chapter 10 of the Mainboard Rules in relation to acquisitions and realisations of assets by an issuer or a subsidiary that is not listed on the SGX or another approved exchange.[56] The threshold for making such an announcement is when the value of the transaction exceeds 5 per cent of any of the relative figures, to be calculated by reference to specific rules in Rules 1003 to 1007.[57] Further conditions are imposed on major transactions, where the relative figures exceed 20 per cent, and reverse takeovers, where the relative figures exceed 100 per cent.[58]

vi Corporate governance

The Mainboard Rules give effect to the Code of Corporate Governance, which operates on a 'comply or explain' basis.

vii Issuers with secondary listings

An issuer with a secondary listing on the Mainboard does not have to comply with the majority of continuing obligations, provided it maintains its primary listing on its home

49 Rule 904, Mainboard Rules.
50 Rule 915, Mainboard Rules.
51 Rule 915(9), Mainboard Rules.
52 Rule 905(1), Mainboard Rules.
53 Rule 905(2), Mainboard Rules.
54 Rule 906(1), Mainboard Rules.
55 Rules 905(3) and 906(2), Mainboard Rules.
56 Rule 1002, Mainboard Rules.
57 Rule 1010, Mainboard Rules.
58 Part VII and Part VIII of Chapter 10, Mainboard Rules.

exchange and complies with the applicable listing rules of the home exchange.[59] It must release all information and documents in English to the SGX at the same time as they are released to the home exchange.[60]

viii Continuing obligations for issuers listed on Catalist

The Catalist Rules contain broadly the same continuing obligations for companies listed on Catalist, noting that certain thresholds differ. For example, in respect of transactions that must be disclosed, a transaction is classed as a major transaction if any of the relative figures exceed 75 per cent but are less than 100 per cent for an acquisition, or exceed 50 per cent for a disposal.[61]

In addition, it is important to note that a company listed on Catalist must maintain a sponsor at all times.[62] An issuer will be suspended if it does not have a sponsor undertaking continuing activities for it, until the sponsor takes on the activity, and can be removed from Catalist if it does not have a sponsor for more than three continuous months.[63]

V OUTLOOK AND CONCLUSION

Recent developments demonstrate that the SGX is keen to ensure it continues to attract foreign issuers and remains a regional IPO hub. In a bid to make itself more attractive to companies considering where to list their shares, the SGX is currently considering whether to allow companies with a dual-class share structure to list on it.

In July 2017, the SGX announced that companies with a dual-class share structure that are primary-listed in 'developed' markets (as classified by FTSE and MSCI) are permitted to seek a secondary listing on the SGX, subject to the listing review process and fulfilment of the suitability criteria.[64] However, it remains to be seen whether the SGX will adopt a primary dual-class share listing framework.

In addition, the SGX has recently imposed a minimum retail allocation threshold of 5 per cent for the IPOs on the Mainboard.[65] Having a public tranche meets the objective of increasing retail participation in a 'public' securities offering.

Overall, the SGX remains a popular stock exchange for Asian companies looking for a listing. As other stock exchanges in the region become more popular, the SGX is working hard to stay abreast of the competition.[66] Singapore's political and economic stability, and its status as a regional financial centre, should continue to work in its favour and continue to entice companies to the SGX.

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59 Rule 751, Mainboard Rules.

60 Rule 217(1), Mainboard Rules.

61 Rule 1014(1), Catalist Rules.

62 Rule 746(1), Catalist Rules.

63 Rules 746(4) and (5), Catalist Rules.

64 http://infopub.sgx.com/Apps?A=COW_CorpAnnouncement_Content&B=AnnouncementToday&F=794JA6LZ35VFIZTJ&H=061148532c22392567b832d509e3679bac44947309576cfdcbfbf33d11d40007, 28 July 2017, accessed on 17 January 2018.

65 www.sgx.com/wps/wcm/connect/b9f773a8-d2b0-4920-8466-6bf021df5332/SGX+Listing+Advisory+Committee+Report+FY2016.pdf?MOD=AJPERES&CACHEID=b9f773a8-d2b0-4920-8466-6bf021df5332, accessed on 17 January 2018.

66 Mergermarket and Merrill Corporation, 'Southeast Asia M&A: Trends shaping the region', Issue 2, 14 December 2016.

Chapter 14

SPAIN

Alfonso Ventoso and Marta Rubio[1]

I INTRODUCTION

The process of going public in Spain has experienced major changes since the early 2000s – getting closer to the European Union's economic and monetary integration and, more recently, moving towards the creation of a Capital Markets Union. During this process, Spain has transposed EU law in a timely manner, achieving full harmonisation of its domestic framework and a competitive position among its European peers.

In this context, and as part of Spain's own efforts to promote market efficiency while ensuring investors' protection, Spanish stock exchanges have gained wider international recognition. In 2014 and 2015, with the European economy gradually recovering after the financial crisis of 2008, Spain enjoyed strong initial public offering (IPO) activity, with 14 companies going public and raising aggregate proceeds of €13.1 billion.[2] However, the domestic political impasse of 2016, with two (and nearly three) general elections, along with international developments including the US elections and Brexit, took their toll: some IPO candidates cautiously delayed their debut, and Spanish listing activity declined in terms of both number of deals (three IPOs and one listing) and proceeds raised (€1.4 billion).[3] The year 2017 set off to a good start with four IPOs raising €3.4 billion in the first half of the year, but the political uncertainty surrounding Catalonia thwarted the trend and the year ended with only one additional IPO raising €667 million.[4]

II GOVERNING RULES

i Main stock exchanges

The Spanish stock exchanges are the Madrid, Barcelona, Bilbao and Valencia Stock Exchanges. These four stock exchanges were created as independent secondary markets in 1831, 1915, 1890 and 1980, respectively. Since 1989, the four stock exchanges have been electronically interconnected in real time through an automated quotation system and constitute a single secondary market.

The stock exchanges are the sole regulated market in Spain for equity securities.[5] They are intended for relatively large companies with a minimum capitalisation of €6 million and a

1 Alfonso Ventoso is a partner and Marta Rubio is an associate at Uría Menéndez.
2 www.bolsasymercados.es/ing/Studies-Research/Statistics.
3 Idem.
4 Idem.
5 Article 4, paragraph (21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May on markets in financial instruments defines 'regulated market' as a multilateral system operated

minimum free float of around 25 per cent of the company's share capital. In December 2017, 134 companies were listed on the Spanish stock exchanges. Total market capitalisation at that time was approximately €1.14 trillion, €396 billion of which was foreign equity.[6]

Two multilateral trading facilities[7] also operate in Spain: the Alternative Equity Market (MAB) and Latibex. In contrast to regulated markets, multilateral trading facilities can be freely created and their management company can be a market regulator, an investment firm or a special purpose entity.[8]

The MAB was established in 2006 to grant small companies access to capital markets through a less burdensome framework. It is divided into five segments addressed to distinct types of companies:

- *a* growth companies;
- *b* real estate investment trusts (REITs), which, since December 2016, includes a sub-group for developing REITs;
- *c* open-ended investment schemes;
- *d* venture capital firms; and
- *e* hedge funds.

This market is growing rapidly, having reached historical maximum levels in December 2017, with an aggregate market capitalisation of €42 billion and 42 listed companies in the growth segment.[9]

Latibex, an international market for Latin-American securities, was created in 1999 to channel European investment towards Latin America. It enjoyed its golden age during the early 2000s, but has gradually declined ever since. In December 2017, securities of only 20 issuers were traded on the platform.

Given the MAB's relatively small size and tailor-made regulations, and Latibex's current decline, this chapter focuses on the regulatory framework and process of IPOs in the Spanish stock exchanges.

ii Overview of listing requirements

As a general rule, Spanish legislation establishes the principle of freedom to issue and offer securities in Spain, and to design the placement procedure without prior administrative

or managed by a market operator that brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system, and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules or systems, and which is authorised and functions regularly and in accordance with Title III of the referred Directive.

6 www.bolsasymercados.es/ing/Studies-Research/Statistics.

7 Article 4, paragraph (22) of Directive 2014/65/EU defines 'multilateral trading facility' as a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial interests – in the system and in accordance with its non-discretionary rules – in a way that results in a contract in accordance with Title II of the referred Directive.

8 Juan Carlos Machuca, 'Spain. International Securities Law and Regulation' in Dennis Campbell (general editor), *International Securities Law and Regulation*, third edition. Huntington, NY: Juris Publishing, 2014.

9 www.bolsasymercados.es/ing/Studies-Research/Statistics.

approval. Nevertheless, the admission of securities to trading on the Spanish stock exchanges is subject to verification of eligibility requirements of both the issuer and the relevant securities, as well as specific information requirements.

Regarding eligibility requirements, the issuer must be a public limited company – or an equivalent legal form for foreign issuers – validly incorporated and existing in accordance with the laws of the country in which it is domiciled. Further, the issuer's securities that are admitted to trading must grant the same rights to all holders who are in the same position.

Securities for which admission to trading is requested must meet the requirements of the legal framework to which they are subject, and must be represented in book-entry form and be freely transferable. Moreover, application for admission to listing must cover all securities of the same class and, as indicated, a minimum volume of €6 million and a minimum distribution of the securities among the public are required.

Finally, admission to trading on the Spanish stock exchanges is conditional upon submitting documentation to the corresponding regulatory bodies evidencing compliance with the legal framework applicable to the issuer and the securities, the issuer's audited financial statements and a public offering or listing prospectus.

The authority that verifies the fulfilment of the above requirements in a Spanish listing is the Spanish National Securities Market Commission (CNMV), in its capacity as the supervisor of the Spanish primary and secondary securities markets.

iii Overview of law and regulations

The main regulations governing public offerings and listings in Spain are the consolidated text of the Securities Markets Act (approved by Royal Legislative Decree 4/2015 of 23 October) and Royal Decree 1310/2005 of 4 November on listings, public offerings and the prospectus required for such purposes (RD 1310/2005), both of which implement Directive 2003/71/EC of the European Parliament and of the Council of 4 November (the Prospectus Directive) and Directive 2001/34/EC of the European Parliament and of the Council of 28 May on the admission of securities to official stock exchange listing and on information to be published on those securities. Moreover, Commission Regulation (EC) No. 809/2004 of 29 April implementing the Prospectus Directive (the Prospectus Regulation) and its delegated regulations are directly applicable in Spain.

These regulations should be construed in light of EU Level 3 materials[10] issued from time to time by the European Securities and Markets Authority (ESMA) and its predecessor, the Committee of European Securities Regulators (namely, the recommendations for the consistent implementation of the Prospectus Regulation[11] and the Q&A on prospectuses).[12] Nevertheless, in 2015, on the path towards the Capital Markets Union, the European Commission proposed a new regulatory framework uniformly applicable throughout the

10 In 2001, the EU launched the 'Lamfalussy process', a regulatory approach that established four levels in the legislative procedure: Level 1 consists of framework legislation setting out the core principles adopted by a co-decision of the European Parliament and the Council; Level 2 consists of implementing measures adopted by the European Commission; Level 3 involves cooperation among national supervisory bodies; and, at Level 4, the Commission enforces the timely and correct transposition of EU legislation into domestic law (see Communication from the Commission of 20 November 2007 entitled 'Review of the Lamfalussy process – Strengthening supervisory convergence').

11 www.esma.europa.eu/sites/default/files/library/2015/11/11_81.pdf.

12 www.esma.europa.eu/press-news/esma-news/esma-updates-qa-prospectus-directive.

EU. The proposed framework has been drafted in the form of a new prospectus regulation that would be directly applicable without requiring domestic legislation and should ensure a consistent approach across the EU. The regulation seeks to ensure investor protection and market efficiency while enhancing the single market for capital. Specifically, it intends to both harmonise the disclosure regime when securities are offered or admitted to trading and reduce regulatory complexity and administrative burdens of those processes. The draft prospectus regulation was approved on 20 December 2016 by the Permanent Representatives Committee on behalf of the Council, and adopted by the European Parliament and the Council in July 2017 (Regulation (EU) 2017/1129 of 17 June on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market). It will fully repeal the Prospectus Directive with effect from 21 July 2019.[13]

On a separate note, the governing bodies of the stock exchanges have their own internal regulations, which consist of circulars (general decisions and regulations on trading and other primary functions of the stock exchange) and operating instructions (decisions and rules of a specific nature to organise the activities of each department and market members).

Likewise, the Spanish central securities depository (Iberclear) is also subject to its own internal rules and a specific regulatory framework on the clearance, settlement and registry of transactions carried out on Spanish markets. This framework was adapted to EU regulations[14] and Iberclear has implemented a reform of its systems to migrate to TARGET2-Securities, a pan-European settlement platform implemented in the Eurosystem to provide harmonised and borderless core securities settlement services throughout Europe.

III THE OFFERING PROCESS

i General overview of the IPO process

An IPO represents a critical milestone in a company's life. A company going public must not only ensure that it satisfies listing eligibility criteria, but also prepare to meet its concomitant obligations as a listed company.

At the most initial stages, a company contemplating an IPO typically retains an array of advisers to assist on the preparation and execution of the transaction from commercial, legal and accounting perspectives.[15]

First, the company must retain one or, more frequently, multiple investment banks to receive commercial advice on the IPO's design and execution, to market the company's stock and, ultimately, to underwrite the offering. Before contacting potential investors, underwriters and their own advisers will carry out a broad due diligence review of the company to identify

13 Regulation (EU) 2017/1129 of 17 June entered into force on 20 July 2017 and will be effective as from 21 July 2019 except for various exemptions to the obligation to draft a prospectus, which are applicable since the Regulation's entry into force, and rules relating to offerings exempt from the obligation to be documented with a prospectus due to their small size, which will be applicable from 21 July 2018.

14 In particular, Royal Decree 878/2015 of 2 October adapted Spain's clearance, settlement and recording system to Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July on improving securities settlement in the European Union and on central securities depositories.

15 Javier Redonet del Campo, 'Equity' in Raj Panasar and Philip Boeckman (editors) *European Securities Law*, 2nd edition. Oxford: Oxford University Press, 2014, pp. 79–116.

any material information that requires public disclosure. In fact, achieving proper disclosure – and thus minimal asymmetries in information – protects both the company and the underwriters from future claims by investors.

Second, the company must retain legal counsel (domestic and, if necessary, international) to participate in the IPO process by:

a helping the company meet listing eligibility requirements;
b drafting all necessary documentation, including corporate documents and resolutions, the prospectus and other regulatory applications;
c liaising with the CNMV, the stock exchanges and other authorities;
d assisting the company in negotiations with the underwriters;
e contributing to the due diligence review; and
f providing legal opinions to the underwriters on various legal aspects of the transaction.

As indicated, the underwriters must also retain legal counsel mainly to conduct the company's due diligence review, draft the underwriting agreement, assist in the preparation of marketing materials and provide legal opinions to the underwriters.

Third, the company's auditors will need to audit the company's financial statements for the preceding three fiscal years[16] and ensure compliance with accounting rules. The company may also request that the auditors audit or review interim financial statements, if any, and other special financial information such as *pro forma* information or financial forecasts or estimates (in this case, with the scope and limitations established in the Prospectus Regulation). Lastly, the auditors will issue comfort letters for the underwriters confirming that the prospectus accurately reflects the company's financial information and that, to their knowledge, no material change has occurred from the date of the most recently audited or reviewed financial statements.

Moreover, a number of recent IPOs in Spain involved the support of independent financial advisers who assisted the companies throughout the process, alleviating the inevitably demanding workload in such deals.

Towards the end of the preparation phase, a company going public typically engages other specialists such as an agent bank to settle the transaction, a public relations agency to assist with press releases, a financial printer to print and distribute the prospectus or offering memorandum and a roadshow consultant.

The process and timeline of an IPO will vary significantly depending on the IPO candidate's corporate structure, financial history and sophistication, although it will rarely last less than four months.

From a legal perspective, the main, most laborious task is drafting the required prospectus, which must be approved by the CNMV before the securities can be admitted to trading on the Spanish stock exchanges.

Prospectuses are divided into three sections: a share registration document disclosing material information about the issuer such as its business, financial situation, organisational structure, management and shareholders; a securities note describing the offered securities and the placement procedure; and a summary of both other sections.[17] Accordingly, its drafting

16 Pursuant to Article 12.2 of RD 1310/2005, the CNMV may accept that financial statements cover a shorter period provided that investors are supplied with the necessary information to make an informed decision on the issuer and the securities.

17 See Annexes I, III and XXII to the Prospectus Regulation.

requires the active involvement of all parties, naturally starting with the company but also with the underwriters (mainly to advise on the presentation of the company's business and strategy and the sector in which it operates), the auditors (to verify that financial information is accurately disclosed) and the legal advisers (to draft legal sections and provide general advice on the entire document). Even more, the prospectus is prepared in close collaboration with the CNMV, which reviews interim drafts until the document satisfies, at its discretion, all regulatory requirements.[18] Only then will the prospectus be approved and registered with the CNMV and ready for distribution to the public.

Prospectuses of international IPOs have traditionally been accompanied by an international memorandum to market the company's stock among foreign investors. Since 2014, there has been an increasing trend towards preparing a single document in English, compliant with the Prospectus Regulation and drafted in an international format. This alternative eliminates any potential inconsistencies or discrepancies between both documents and normally reduces the deal's workload. However, not all deals are suitable for a single document process. The decision should be made on a case-by-case basis in view of the issuer's features and, particularly, the complexity of its financial history.

It is worth highlighting that even in IPOs solely addressed to qualified investors[19] (which would not qualify as public offerings,[20] and are exempt from publishing an offering prospectus), it is market practice in Spain that prospectuses are registered with the CNMV before the underwriters begin building the book of investors. As these prospectuses later serve as the required listing prospectuses,[21] such early registration provides a great degree of certainty to the process in terms of timing and symmetry of information between the marketing materials and the prospectus.

Upon completion of the book-building period, which typically takes 10 days to two weeks, the company and the underwriters determine the IPO's final price[22] based on investors' interest, execute the underwriting agreement and allocate the shares among final investors. Within 36 to 48 hours of confirmation of the shares' final allocation (the date of which is considered the transaction date) and delivery of settlement details, shares are admitted to listing by the CNMV and the Spanish stock exchanges. In IPOs, shares typically start trading on the Spanish stock exchanges a couple of hours following admission by the CNMV and the offering is settled within two days of the transaction date.

ii Pitfalls and considerations

During the first stages of the IPO process, the company and its advisers must design the transaction and, potentially, adapt the issuer's corporate structure to the envisaged deal. A variety of issues must be considered at this stage.

First, the IPO may consist of either a primary or secondary offering. In a primary offering, the company going public offers newly issued shares and receives the proceeds

18 Article 24 of RD 1310/2005 establishes a 10-working-day period for the CNMV to approve the prospectus (or 20 working days if no securities of the issuer have previously been offered to the public or admitted to trading on a regulated market). However, this period restarts each time the CNMV reasonably requests supplementary information.

19 As defined in Article 2.1 of the Prospectus Directive and Article 39 of RD 1310/2005.

20 Article 38.1 of RD 1310/2005.

21 Article 13 of RD 1310/2005.

22 The prospectus only includes a non-binding price range of the shares.

whereas, in a secondary offering, existing shares are offered by one or multiple selling shareholders who wish to reduce their stake in – if not exit – the company (or potentially by the issuer if treasury shares are offered). Combined transactions in which the company and shareholders share the offer proceeds are also common in Spanish markets.

The company must also outline, with the underwriters' advice, the scope of business that may appeal potential investors and reorganise its corporate structure accordingly. In doing so, the impact on the deal's schedule should be assessed.

Likewise, the company must choose its target investors. The offering may be addressed solely to qualified investors (institutional offering), the general public (retail offering) or both. The ultimate choice should be made taking into account that institutional offerings are typically more flexible and require a lower level of disclosure whereas retail offerings provide a wider pool of funds (although they tend to be more closely scrutinised). Moreover, institutional offerings may include a family and friends tranche addressed to up to 150 investors, which allows the issuer to benefit from the flexibility of institutional offerings while enlarging the target public.[23]

Another significant factor when designing an IPO is its territorial scope, as international transactions must meet additional obligations. Apart from any requirements arising from dual or multiple listings (which are less common in the Spanish market), any international deal is subject to the extraterritoriality of US securities law. In fact, the US Securities Act of 1933 requires that any offering of securities – whether or not apparently related to the United States – be registered with the US supervisor except under various exemptions, two of which are highlighted here. First, a deal may be exempt from registration under Regulation S if it is an 'offshore transaction' and no direct selling efforts are made in the United States by either the company, its shareholders, the underwriters or their respective affiliates. Second, a deal may be exempt from registration under Rule 144A of the Securities Act of 1933 if it is addressed exclusively to qualified institutional buyers, as defined therein.[24] The nature of extraterritoriality makes it necessary to engage US legal advisers in any international IPO.

From a contractual perspective, a company going public must determine whether it must obtain waivers from third parties, or amend or terminate its contracts with related parties, shareholders, partners or others in view of its imminent listing.[25] In general, the company should ensure that any related-party transaction is properly documented, carried out at arm's length and made public. As for shareholders' agreements, any agreement restricting the free transferability of the company's shares or regulating shareholders' voting rights must be disclosed to the CNMV when the company becomes public.[26] Further, any concerted action among shareholders should be performed prior to the IPO to avoid the obligation to launch a mandatory tender offer for the company's entire share capital.[27]

On a separate note, a company contemplating an IPO must comply with various rules concerning publicity on the transaction. In short, any information on the transaction that is disclosed orally or in writing for advertising or other purposes must be consistent with

23 Such option was first implemented in Spain in 2017.

24 Michael Willisch, 'Rule 144A and Regulation S. An introduction for Spanish Companies' in *Revista de derecho del mercado de valores* 188-4113, 2008, pp. 457–470.

25 See Section IV, below.

26 Article 531 of the consolidated text of the Companies Act, approved by Royal Legislative Decree 1/2010 of 2 July (the Spanish Companies Act).

27 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and Royal Decree 1066/2007 of 27 July on the rules applicable to tender offer for securities.

the information contained in the prospectus[28] (which, in turn, must include all information necessary to allow investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer and the rights attached to the securities underlying the IPO).[29] This principle enables the company to control the information on which investors will base their investment decision, thereby mitigating the risk of future claims by investors. Thus, any marketing materials – usually prepared by the underwriters – must be thoroughly reviewed from this perspective.

This issue has become especially controversial since 2016, when a new EU regulation developing the concept of consistency entered into force.[30] In particular, it prevents disclosure of 'alternative performance measures' concerning the issuer unless they are included in the prospectus. Alternative performance measures are financial measures on performance, financial position or cash flows that are not prepared under the applicable financial reporting standards. The new rule applies to measures as widespread as earnings before interest, tax, depreciation and amortisation. Coupled with ESMA guidelines on the disclosure of alternative performance measures in the prospectus[31] and the CNMV's efforts to observe them, it may restrict the way in which the company – and more probably the bankers – wish to present the company's financial situation.

iii Considerations for foreign issuers

The Prospectus Directive created a cross-border passport mechanism that validates any prospectus approved in a given Member State (the 'home' Member State) throughout the EU, subject only to the condition that the home Member State certifies the approval of the prospectus to any host Member State and the ESMA in accordance with the Prospectus Directive. The host Member State normally requests the translation of the prospectus into a language accepted by it or a language customarily used in the sphere of international finance. The summary of the prospectus will be translated into the official language of the host Member State.[32]

This expeditious process has proven highly beneficial for companies undertaking dual or multiple listings in regulated EU markets. The new prospectus regulation, mentioned in Section II.iii, above, seeks to strengthen this mechanism in order to ultimately ensure the effective functioning of the Capital Markets Union.

Conversely, an IPO of a company incorporated in a country outside the EU that identifies Spain as the home Member State requires the CNMV's approval. In this case, the

28 Article 15.4 of the Prospectus Directive and Article 12 of Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing the Prospectus Directive (Delegated Regulation (EU) 2016/301).

29 Article 5 of the Prospectus Directive and Article 16 of RD 1310/2005.

30 Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing the Prospectus Directive with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending the Prospectus Regulation.

31 ESMA Guidelines on Alternative Performance Measures, which were most recently updated on 5 October 2015, recommend, among other things, presenting these measures in a clear, comprehensible way and with less prominence or emphasis than measures directly stemming from financial statements; reconciling them with the financial statements; explaining their relevance and reliability; and providing comparisons for the corresponding previous years.

32 www.esma.europa.eu/sites/default/files/library/2015/11/2014-esma-342_languages_accepted_for_the_purpose_of_the_scrutiny_of_the_prospectus.pdf.

prospectus may be drawn up in accordance with the legislation of that country if it complies with international standards and imposes information requirements equivalent to those in the Prospectus Regulation.[33]

IV POST-IPO REQUIREMENTS

Spanish law imposes additional obligations on public companies to ensure adequate levels of transparency, accountability and good governance, the majority of which are based on EU regulations. The following is a non-exhaustive summary of the main obligations of Spanish companies with shares listed on a regulated market (and, eventually, of all listed companies having identified Spain as their home Member State).

In terms of corporate governance, Spanish companies with shares listed on a regulated market are subject to various special provisions concerning their shares, general shareholders' meetings and management.[34] For instance, they must establish a corporate website and approve specific internal regulations, including regulations on general shareholders' meetings and the board of directors and an internal code of conduct in the securities markets. These companies are mandatorily managed by a board of directors, the composition and functioning of which is subject to specific rules, and they are required to create an audit committee and an appointments and remunerations committee.

With regard to disclosure requirements, Spanish companies with shares listed on a regulated market must periodically approve and publish an array of documentation on their corporate websites as well as on that of the CNMV:[35]

a audited annual financial statements, half-year financial statements (which may be voluntarily audited or reviewed by the company's auditor) and quarterly financial statements;[36]

b an annual corporate governance report detailing the structure of the company's governing system and how it functions in practice;[37] and

c an annual report on directors' remuneration describing remuneration received (or to be received) by directors in connection with their position or for fulfilling their executive duties, as well as policy on the remuneration of directors.

From a market-abuse perspective,[38] companies with shares traded on the Spanish stock exchanges must disclose, as soon as possible, all inside information[39] directly pertaining to

33 Article 20 of the Prospectus Directive and Article 31 of RD 1310/2005.

34 Title XIV, 'Public listed companies', of the Spanish Companies Act.

35 See Directive 2004/109/EC of 15 December on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Royal Decree 1362/2007 of 19 October on transparency requirements.

36 In each case, individual and, if applicable, consolidated financial statements.

37 Among others, the annual corporate governance report must include a list of all related-party transactions carried out with the company's shareholders, directors and senior managers or within the company's group during the relevant period.

38 See Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April on market abuse and its implementing regulations.

39 Inside information is information of a precise nature that is not public and that directly or indirectly relates to the company or financial instruments issued by it and that, if it were made public, would be likely to have a significant effect on the prices of the instruments issued by the company.

the company. Inside information is typically disclosed by notifying the CNMV and posting the information on the company's website. However, disclosure of inside information may be delayed if immediate disclosure is likely to prejudice the issuer's legitimate interests, the delay is not likely to mislead the public and the company is able to ensure the information's confidentiality. Moreover, these companies may not operate on the basis of inside information (which also applies to treasury-stock transactions), and they must disclose any acquisition of treasury shares exceeding, in aggregate, 1 per cent of the company's voting rights.

Shareholders and directors of companies having identified Spain as the home Member State are also subject to various disclosure obligations, which primarily relate to their stake in the company's share capital, net short positions and remuneration systems.

V OUTLOOK AND CONCLUSION

Looking forward, the outlook is rather optimistic. Increasingly improving macroeconomic conditions are fuelling Spanish listing activity in spite of political distress surrounding the Catalonian process and Brexit. Several companies have already announced their intention to apply for admission to trading on the Spanish stock exchanges this year and the number of IPOs and proceeds raised are expected to improve in 2018 compared to 2017[40] as several companies have already announced their intention to apply for admission to trading on the Spanish stock exchanges this year.

In the medium term, the implementation of the envisaged measures under the Capital Markets Union should simplify and reduce the costs of the IPO process in Spain – and throughout the EU – and ease small companies' access to alternative sources of funding.

40 EY Global IPO Trends: Q4 2017.

Chapter 15

SWITZERLAND

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I INTRODUCTION

With its modern financial market infrastructure and competitive regulatory framework, Switzerland offers issuers and investors alike an attractive capital markets environment. Issuers listing on exchanges in Switzerland stem from a range of industries, including the financial, retail, industrial and pharmaceutical industries. Generally, domestic companies tend to list in Switzerland; however, foreign companies also consider either a primary or secondary listing in Switzerland to gain better access to international institutional investors. In addition, the Swiss market has strong representation from certain industries that may attract foreign peer companies, especially with regard to the pharmaceutical, biotech and financial services industries.

II GOVERNING RULES

i Main stock exchanges

SIX Swiss Exchange (SIX) operates the principal equity exchange in Switzerland, with 252 companies listed as of 31 December 2017 (of which 215 were Swiss-domiciled issuers). As of 31 December 2017, the market capitalisation of all SIX-listed shares of issuers domiciled in Switzerland and Liechtenstein was approximately 1.6 trillion Swiss francs. The only other equity exchange in Switzerland is BX Berne eXchange (BX). BX is much smaller than SIX and mainly targets small and medium-sized Swiss enterprises. As of 31 December 2017, 18 companies were listed on BX.

ii Overview of listing requirements

Issuers seeking to list their shares on a stock exchange in Switzerland must comply with the applicable exchange listing rules. The SIX Listing Rules, for example, are largely modelled on the EU Prospectus Directive, though they are less extensive and more flexible. The SIX Listing Rules and various additional rules issued by SIX set out the main steps a company has to undertake for a listing of its shares. In particular, the SIX Listing Rules require that a listing application be submitted and a prospectus be approved and published prior to the shares being admitted to trading on SIX. The SIX prospectus review and approval process takes 20 trading days. Generally, the SIX approval process for prospectuses is less onerous than in most EU jurisdictions and the United States. For example, the review by SIX is typically limited to

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a scheme rule check, and amended drafts of the listing prospectus can be filed within the SIX 20-trading-day review period without adversely affecting the offering's timeline. In practice, the approval process is structured so that SIX approval is obtained before printing of the prospectus and the start of the offering period.

The issuance or placement of equity securities (as opposed to their listing) does not currently require registration with or authorisation by any regulatory body in Switzerland. However, pursuant to the new proposed prospectus regime under the draft Financial Services Act (FIDLEG), any prospectus for a public offering would need to be approved by a competent authority (see Section V).

Listing application

Either the issuer or an SIX-recognised representative prepares and submits the listing application to SIX. The listing application must contain a short description of the equity securities to be listed as well as a request for the planned first trading day. Generally, the following documentation must be submitted to SIX, together with the duly signed listing application:

a the listing prospectus (described in greater detail in Section II.ii, 'Prospectus');

b an official notice pursuant to Articles 40a and 40b of the SIX Listing Rules (if required). An official notice is required:
- if the listing prospectus is not provided in full to potential investors in order to advise investors where the listing prospectus can be obtained;
- to set out any material changes made to the information contained in the listing prospectus between the date of its publication and the listing date; or
- to advise of any supplements to the listing prospectus;

c a copy of a current extract from the commercial register of the issuer;

d a copy of the valid articles of association of the issuer;

e evidence that the auditors of the issuer fulfil the requirements of auditors for public companies;

f an original of the duly signed declaration by the lead manager that the free float of relevant equity securities is sufficient;

g if necessary, an original of the duly signed declaration by the issuer that any printed share certificates will comply with the SIX printing regulations. In the case of book-entry securities, the issuer must submit an explanation of how the holders of such securities may obtain proof of their holding; and

h a duly signed declaration by the issuer in accordance with Article 45 of the SIX Listing Rules stating, among others, that its responsible bodies are in agreement with the listing and there has been no material deterioration in the issuer's assets and liabilities, financial position, profits and losses, and business prospects since the listing prospectus was published.

Regulatory standards

In preparing the listing application on SIX, issuers must indicate which regulatory standard they are applying to and demonstrate their satisfaction of the corresponding requirements. The following main regulatory standards are available for listings on SIX:

a The International Reporting Standard. This is aimed at international investors. It has the most comprehensive transparency requirements and requires the application of International Financial Reporting Standards (IFRS), US Generally Accepted Accounting Principles (US GAAP) or another internationally recognised accounting standard.

b The Swiss Reporting Standard. This is aimed at domestic investors. Issuers may apply Swiss GAAP FER (the generally accepted accounting principles applied in Switzerland), with the other listing requirements remaining consistent with the International Reporting Standard.

c The Standard for Investment Companies. This is for the listing of equity securities issued by investment companies (i.e., companies that solely invest in collective investment schemes and that do not perform any other commercial activity).

d The Standard for Real Estate Companies. This is for the listing of equity securities issued by a real estate company (i.e., companies generate at least two-thirds of their revenue from real estate-related activities).

Minimum equity capital requirements

Pursuant to the regulatory standards, an issuer's consolidated equity capital, as reported on its consolidated balance sheet as of the first day of trading, must amount to at least 2.5 million Swiss francs for all the standards listed above.

Financial track record

Pursuant to the regulatory standards, an issuer must:

a have existed as a company for at least three years; and

b have produced audited annual financial statements for three full financial years preceding the listing application.

The three-year rule does not apply to companies that are listed under the Standard for Investment Companies or the Standard for Real Estate Companies; however, companies with shorter financial history may benefit from exemptions granted by the SIX Regulatory Board (if necessary) where:

a it appears in the interests of the issuer or of the investors, namely in cases where the listed entity:
- is the result of a corporate reorganisation such as a merger, spin-off or other transaction in which a pre-existing company or portions thereof are continuing as commercial entities; or
- has not yet been able to present financial statements for the prescribed period of time, but nonetheless wishes to access the capital markets in order to finance its strategy for growth ('young companies'); and

b the SIX Regulatory Board has a guarantee that investors are adequately informed to form a qualified opinion on the issuer and the admitted securities.

Where exemptions are granted, issuers must either comply with stricter transparency requirements, such as quarterly reporting until annual accounts for three complete financial years are available (in connection with young companies) or provide additional financial information, such as *pro forma* financials (in the case of listed entities resulting from corporate reorganisation).[2]

2 For further details, see the SIX Directive on Exemptions regarding Duration of Existence of the Issuer, available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/

Minimum free float

At least 20 per cent of all of the issuer's outstanding securities of the same category must be publicly owned with capitalisation of at least 25 million Swiss francs. The definition of free float for purposes of the SIX Listing Rules is set out in the Directive on the Distribution of Equity Securities.[3]

Prospectus

In connection with initial public offerings (IPOs), issuers are currently required to publish a prospectus pursuant to both Swiss corporate law (the Swiss Code of Obligations of 30 March 1911 (CO)) and the SIX Listing Rules. The requirements of these two regimes are discussed in greater detail below. However, it should be noted that the new proposed prospectus regime under FIDLEG includes certain requirements regarding the content of prospectuses, which will need to be reviewed and approved by a competent authority with regard to its completeness, coherence and comprehensibility. It is expected that SIX will be mandated to act as the competent authority to approve prospectuses. See Section V.

Issuance or offering prospectus

Article 652a CO requires an offering prospectus when new shares are offered to the public in Switzerland. The offering prospectus must include information on:

a the content of the existing entry in the commercial register, with the exception of details relating to the persons authorised to represent the company;
b the existing amount and composition of the share capital, including the number, nominal value and type of shares, and the preferential rights attaching to specific share classes;
c the provisions of the articles of association relating to any authorised or conditional capital increase;
d the number of dividend rights certificates and the nature of the associated rights;
e the most recent annual accounts and consolidated accounts with audit report and, if more than six months have elapsed since the accounting cut-off date, the interim accounts;
f the dividends distributed in the past five years or since the company was established; and
g the resolution concerning the issue of new shares.

The offering prospectus must be made available to investors, but is not currently subject to any filing or approval requirements with any Swiss regulator. However, pursuant to the proposed Swiss financial market reforms under FIDLEG, any prospectus for a public offering will need to be reviewed and approved by a competent authority (see Section V). Nevertheless, a breach of the CO prospectus requirements may, in any event, lead to prospectus liability claims.

The question of whether a prospectus complies with the CO prospectus requirements is also relevant for non-Swiss issuers offering shares to the public in Switzerland without listing shares on SIX. Typically, additional disclosure items, to the extent required, will be included in a Swiss wrapper or in the prospectus.

directives/06_02-DTR_en.pdf, and the SIX Directive on the Presentation of a Complex Financial History in the Listing Prospectus, available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf.

3 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_03-DDES_en.pdf.

Listing prospectus

The SIX Listing Rules require that the prospectus be approved and published prior to the shares being admitted to trading on SIX. Often, Swiss issuers that list shares on SIX prepare a prospectus that complies with both the SIX Listing Rules and the CO prospectus requirements: an 'offering and listing prospectus'.

In essence, the listing prospectus must provide sufficient information for competent investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, as well as of the rights attached to the equity securities. In addition, specific mention must be made of any special risks. An issuer of equity securities on SIX must prepare a listing prospectus that contains information prescribed in Scheme A.[4] Separate schemes are available for the listing of equity securities of investment companies (Scheme B) and real estate companies (Scheme C).

Generally, the following information is included in listing prospectuses:

a a summary;

b general information about the issuer, such as its name, registered office, legal form and purpose;

c information on the securities offered, including the rights attached to such securities and on the offering;

d risk factors;

e use of proceeds;

f dividends and other distributions;

g capitalisation;

h information on the business activities of the issuer, its turnover, assets and investments;

i information on the board of directors and the management of the issuer as well as its auditors;

j shares, share capital and voting rights;

k significant shareholders (for issuers domiciled in Switzerland and this information must be provided in accordance with Article 120 of the Financial Markets Infrastructure Act of 19 June 2015 (FMIA));

l offering restrictions;

m taxation;

n audited annual consolidated financial statements for the past three full financial years prepared in accordance with the applicable financial reporting standard and, if the balance sheet in the last audited annual financial statements is more than nine months old on the date on which the listing prospectus is to be published, additional interim financial statements; and

o persons responsible for the content of the listing prospectus.

In addition, an industry overview and market trends section, as well as a management discussion and analysis of financial condition and results of operation section, are typically included in the listing prospectus, but are not technically required. Finally, information contained in previously or simultaneously published documents can be incorporated by reference into the listing prospectus.

In terms of companies applying for the listing of their equity securities on the International Reporting Standard of SIX, financial statements need to be prepared in

4 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/schemes/04_03-SCHA_en.pdf.

accordance with IFRS or US GAAP. If a company applies for listing on the Swiss Reporting Standard, the preparation of its financial statements must be in accordance with Swiss GAAP FER or the standard according to the Banking Act. Swiss GAAP FER is comparable with IFRS or US GAAP, but is more principle-based and gives a true and fair view of the net assets, financial position and operational results. A working capital statement is required under IFRS and US GAAP as well as under Swiss GAAP FER and the standard according to the Banking Act (for a more detailed discussion regarding SIX regulatory standards, see Section II.ii, 'Regulatory standards').

In addition, if an issuer's financial history is rather complex, SIX may require additional financial disclosure, such as *pro forma* financials as further described in the SIX Directive on the Presentation of a Complex Financial History in the Listing Prospectus.[5] In light of this, it is highly recommended to approach SIX in advance to discuss any nuances or complexity to an issuer's financial statements.

Issuers that are not incorporated in Switzerland may also apply the accounting standards of their home country (i.e., 'home country standard'), provided that these standards are recognised by the SIX Regulatory Board. Currently, the only additional standard recognised by the SIX Regulatory Board for the listing of equity securities by foreign issuers is IFRS EU.

iii Overview of law and regulations

Switzerland is not a member of the EU or the EEA. Accordingly, the EU Prospectus Directive and other EU regulations relating to IPOs are not applicable to IPOs conducted in Switzerland. In Switzerland, various regulatory and self-regulatory bodies are involved in the rule-making and enforcement of such rules in connection with IPOs and equity securities markets and exchanges pursuant to authority vested in them from Swiss legislations. Below is an overview of the applicable legislative framework followed by summaries of the main regulatory and self-regulatory authorities mandated with the implementation, supervision and enforcement of such legislations.

Legislative framework

Generally, the current legislative framework with regard to IPOs and equity securities markets and exchanges in Switzerland consists of the following:

a the CO;[6]
b the FMIA;[7]
c the Financial Market Infrastructure Ordinance of 25 November 2015;[8] and
d additional ordinances issued by Swiss Financial Market Supervisory Authority (FINMA).

5 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf.
6 Unofficial English translation at www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf.
7 Unofficial English translation at www.admin.ch/opc/en/classified-compilation/20141779/index.html.
8 Unofficial English translation at www.admin.ch/opc/en/classified-compilation/20152105/index.html.

Supervisory bodies

FINMA

The main financial market regulatory body in Switzerland is FINMA. FINMA delegates certain aspects of the regulation of the Swiss financial markets to a number of private or semi-private self-regulatory bodies that it licenses and supervises. For example, SIX Group Ltd is mandated with the issuance, monitoring and enforcement of regulations related to SIX.

The regulations governing Switzerland's financial market are currently undergoing significant revisions, including certain changes to the supervisory role and competencies of FINMA and the other regulatory bodies responsible for overseeing the Swiss financial markets. Pursuant to these reforms, FINMA will retain its broad mandate and continue to operate alongside the other regulatory bodies. However, following the full implementation of the FMIA, the proposed FIDLEG and the proposed Financial Institutions Act (FINIG), FINMA will also become the competent supervisory authority for ensuring compliance with these new pieces of legislation. In addition, FINMA will be granted new enforcement tools under the FINIG and there will be increased cooperation and exchanges of information between FINMA and other Swiss and foreign supervisory, regulatory, governmental and judicial authorities (see Section V).

The SIX Regulatory Board

One of the most important self-regulatory bodies under FINMA's supervision with regard to equity markets and exchanges in Switzerland is the SIX Regulatory Board.[9] It is responsible for issuing, supervising and enforcing rules and directives applicable to SIX issuers and participants, such as the SIX Rule Book, the SIX Listing Rules and various participant directives. It should be noted that the issuance or placement of equity securities (as opposed to their listing) does not currently require registration with or authorisation by FINMA or any other regulatory body. However, pursuant to the new proposed prospectus regime under FIDLEG, any prospectus for a public offering would need to be approved by a competent authority, which is anticipated to be SIX (see Section V).

The SIX Exchange Regulation

The SIX Exchange Regulation, an independent and autonomous entity within SIX Group Ltd,[10] regulates and monitors participants and issuers listed on the SIX. In particular, it carries out tasks prescribed under Swiss legislation and under the rules and regulations issued by the SIX Regulatory Board, and monitors compliance with these regulations. The SIX Exchange Regulation is, subject to the relevant rules, permitted to prescribe sanctions or submit sanction proposals, as well as inform the chairman of the board of directors of SIX Group Ltd, the supervisory authorities and, where appropriate, the competent public prosecuting authorities of suspected violations of the law or other wrongdoing by market participants.

9 www.six-exchange-regulation.com/en/home/profile/regulatory-board.html.

10 www.six-exchange-regulation.com/en/home/profile/six-exchange-regulation.html.

The SIX Disclosure Office

The SIX Disclosure Office supervises and oversees the compliance with such disclosure of qualified shareholdings, including disclosure of shareholdings in connection with IPOs, receiving notifications of changes in shareholdings, granting exemptions or relief from certain reporting obligations and delivering decisions on whether a reporting obligation exists.[11]

III THE OFFERING PROCESS

i General overview of the IPO process

The timetable of an equity offering depends on both the type and the size of the offering. In addition, certain offerings may require a greater amount of preparation on the part of the issuer, particularly with regard to corporate governance and structure, and accounting and reporting requirements. Nevertheless, IPOs in Switzerland generally take between four and six months and an indicative IPO can generally be organised into the following five phases.

The IPO planning and preparation phase

During the IPO planning and preparation phase, there are likely to be many workstreams operating in parallel, which may overlap. During this phase, these workstreams generally address the following tasks:

a discussing and developing the issuer's strategy, business plan, equity story (i.e., investment case) and offering structure;
b establishing a timetable and holding kick-off meetings;
c selecting the responsible team, both internally at the issuer and externally, including the underwriters, bookrunners and any other managers (i.e., the banking syndicate) and legal and financial advisers;
d making any necessary changes in respect of the company's corporate structure to meet legal or operational requirements (the length of this phase depends on the required restructurings (if any) and the issuer's focus);
e considering matters concerning capital, financial and accounting or tax structures; and
f beginning due diligence exercises (which includes business, financial and legal due diligence; due diligence exercises continue throughout the process).

The drafting phase

During the drafting phase, the issuer and its other advisers:

a draft the prospectus and other key legal documents;
b develop marketing and presentation materials, such as analyst and pilot fishing investor presentations;
c engage with the issuer's auditors regarding presentation of financial information in the prospectus and delivery of comfort letters; and
d attend courtesy meetings at SIX to discuss the contemplated offering structure and content of the prospectus.

11 www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board.html.

The negotiating and investor education phase

During the negotiating and investor education phase, the IPO workstreams generally address the following tasks:

a shareholders' resolutions in respect of the offering and capital increase (if applicable);
b the negotiation of underwriting agreement and any sub-underwriting agreements (if applicable);
c delivery of the analyst presentation and review of research reports;
d preparation of the SIX listing application;
e submission of the listing application together with the preliminary listing prospectus and any additional required documents;
f a draft of roadshow presentation and other materials for analysts, press and investors;
g the response to SIX comments (if applicable);
h preparation of interim financial statements into offering documents and update analysts (if applicable); and
i issuing a press release regarding the issuer's intention to float, followed by the publication of analysts' research reports.

During this period, issuers typically receive approval by SIX for the listing of equity securities.

The pre-trading and marketing phase

During the period from approximately two weeks prior to the first day of trading, the IPO workstreams generally address the following tasks:

a approval of the prospectus and underwriting agreement by the board of directors of the issuer;
b final price discussions with the board of directors of the issuer and setting of a price range;
c execution of the underwriting agreement; and
d beginning the offer period, publishing the prospectus, starting the price-fixing process (e.g., the book-building process) and beginning roadshow presentations.

Approximately one to two trading days prior to the first day of trading, the IPO workstreams generally address the following tasks:

a subscription and payment of the nominal value of the equity securities to be offered;
b registration of the capital increase in the commercial register of the issuer (if applicable);
c establishing the final offer price and execute the pricing agreement to the underwriting agreement and pricing supplement to the offering and listing prospectus (if applicable); and
d the allocation of shares to investors.

The first trading day and aftermarket phase

Following the first trading day, the IPO workstreams generally address the following tasks:

a stabilisation of the shares along with the disclosure of stabilisation measures (within five trading days);
b settlement and payment of net proceeds (usually within two trading days of the first trading day); and
c exercising of the overallotment option (30 calendar days after first trading day) and disclosure of exercise of the overallotment option (within five trading days of the exercise).

ii Considerations for foreign issuers

Foreign issuers of equity securities are subject to certain additional listing requirements as set out in the SIX Directive on the Listing of Foreign Companies.[12] However, generally speaking, these additional requirements are not very onerous and in practice they do not pose particular issues. A particularly attractive aspect of listing in Switzerland is that currently no government agencies are involved in the listing process, which results in a much faster and flexible process. In some respects, SIX views itself as a market participant rather than exclusively being a supervisor, and this generally results in more accessibility and flexibility. In addition, the Swiss market has strong representation from certain industries that may attract foreign peer companies, especially with regard to the pharmaceutical, biotech and financial services industries.

It is worth noting that, subject to certain conditions, Swiss law allows Swiss companies to prepare their accounts and to report in a foreign currency. Hence, if an EU or US company decides to list in Switzerland it can either list the shares of the foreign entity on SIX or change its domicile to Switzerland by setting up a new Swiss holding company and listing the shares of the new holding company on SIX. In either scenario, the issuer can continue to report in euros or US dollars. In addition, SIX also permits trading of equity securities in euros or US dollars. Notably, a change of domicile route is most often taken for tax or regulatory purposes.

Overview

As a general matter, the SIX Listing Rules and their implementing provisions apply equally to issuers that do not have their registered office in Switzerland and intend to list their equity securities on SIX. In addition to these provisions, there are specific requirements that apply only with regard to foreign issuers as set out in the SIX Directive on the Listing of Foreign Companies.[13]

In particular, a foreign issuer whose equity securities are not listed on another exchange recognised by the SIX Regulatory Board may only submit an application for a primary listing. For a primary listing, the foreign issuer must demonstrate that it has not been refused listing in its home country pursuant to investor protection legislations. This requirement is usually satisfied by an opinion delivered from an independent law firm or a relevant extract from the decision issued by the competent authority in the issuer's home country in connection with the registration process in question.

A foreign issuer whose equity securities are listed on another exchange recognised by the SIX Regulatory Board may, however, choose between a primary and a secondary listing on SIX. The same applies if a company is planning on listing simultaneously on another primary exchange and on SIX (a 'dual listing'). In principle, exchanges that are members of the Federation of European Securities Exchange and the World Federation of Exchanges are recognised by the SIX Regulatory Board as having equivalent listing provisions.

In connection with the listing prospectus, foreign issuers must describe those publications in which announcements required by an issuer under the issuer's home country company law will appear. Further, the foreign issuer must recognise the Swiss courts as having jurisdiction over claims arising out of or in connection with the listing on the SIX. In addition, the SIX Regulatory Board reserves the right to modify the listing procedure as

12 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf.

13 Ibid.

appropriate if, under the foreign issuer's home country's company law, the time at which the equity securities are legally created is not the same as that under Swiss law (i.e., by entry in the commercial register).

In addition to IFRS and US GAAP, foreign issuers who wish to list their shares on SIX according to the International Reporting Standard may also apply their Home Country Standard, provided that these standards are recognised by the SIX Regulatory Board. Presently, the only additional standard recognised by the SIX Regulatory Board for such purpose is IFRS EU.

Secondary listing requirements

In connection with secondary listings, the applicable issuer requirements are deemed fulfilled if the equity securities are listed on a recognised exchange with equivalent listing provisions. This requirement is usually fulfilled with an opinion from counsel in the respective jurisdiction regarding the sufficiency of investor protection rules in such jurisdiction. Further, if an issuer submits an application for the listing of equity securities to SIX within six months of the same equity securities having been listed on the primary exchange, the SIX Regulatory Board will recognise the listing prospectus prepared in connection with the listing on the primary exchange as approved by the competent body for that exchange, provided that certain technical information (e.g., security number, paying agent, settling agent and trading currency) is added for the Swiss market.

However, if the listing on the SIX occurs more than six months after the listing on the primary exchange, the issuer must submit a short-form prospectus that contains most of the information on the equity securities required by prospectus Scheme A as well as a description of the issuer and a 'no material change clause'. The short-form prospectus must contain a reference to the secondary listing and to the trading currency on the SIX. The short-form prospectus must also contain the audited annual consolidated financial statements for the past three full financial years and, if the balance sheet in the last audited financial statements is more than nine months old on the date on which the short-form listing prospectus is to be published, additional interim financial statements. The annual and any interim financial statements must be prepared in accordance with the financial reporting standards of the primary exchange and be submitted to the SIX Exchange Regulation.

The free float is considered adequate for a secondary listing if the capitalisation of the shares circulating in Switzerland is at least 10 million Swiss francs or if the applicant can otherwise demonstrate that there is a genuine market for the equity securities concerned.

IV POST-IPO REQUIREMENTS

The SIX Listing Rules and the various additional rules, in particular the Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes,[14] set out the requirements for maintaining a listing on SIX, with a focus on periodic financial reporting, general reporting and disclosure obligations. An issuer of equity securities must comply with the following continuing obligations, among others, to maintain a listing on SIX:

14 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_20-DRRO_en.pdf.

a timely disclosure of any price-sensitive facts (*ad hoc* publicity) (SIX Directive on Ad Hoc Publicity);[15]
b publication of the annual report comprising the audited annual financial statements, in accordance with the applicable financial reporting standard and the corresponding audit report;
c publication of semi-annual financial statements;
d at the beginning of each financial year, publication of a corporate calendar covering at least the current financial year, which must be kept up to date;
e notification of any change in the rights attached to the listed equity securities, in good time before the entry into force of that change;
f regular reporting concerning information on the issuer, such as:
  - change of name of the issuer;
  - change of registered office;
  - change of auditors;
  - change of balance sheet date (closing of accounts for financial year);
  - dividend payments;
  - changes to the issuer's capital structure (e.g., a capital increase through creation of conditional or authorised capital and a capital decrease); and
  - in respect of primary-listed foreign issuers, free float and shareholder structure;

g information on annual and extraordinary general meetings of shareholders;
h timely disclosure of transactions in the company's equity securities by members of the board of directors and senior management (regardless of the transaction value);
i publication of information relating to corporate governance (SIX Directive on Information relating to Corporate Governance);[16]
j payment of the annual listing fees; and
k disclosure of qualified shareholdings (the thresholds are 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 per cent, 50 per cent or 67 per cent) (Article 120 FMIA).

V OUTLOOK AND CONCLUSION

The Swiss financial market regulatory framework is currently undergoing fundamental and comprehensive reforms. The main purposes of these reforms are to harmonise Swiss regulations with existing and new EU regulations, and to ensure access of Swiss financial institutions to the European market by fulfilling the equivalence requirements under Directive 2014/65/EU on markets in financial instruments.

These new financial market regulations are predominately set out in the:

a FMIA, which came into force on 1 January 2016;
b proposed FIDLEG; and
c proposed FINIG.

15 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_17-DAH_en.pdf.

16 Available at www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_16-DCG_en.pdf.

The FMIA is of particular relevance in the context of equity capital markets in Switzerland, as it primarily regulates financial market infrastructure, disclosure of shareholdings, insider trading, market manipulation and public takeover offers. In addition, the current draft of FIDLEG includes proposals for, among others:

a a new prospectus regime for public offerings of securities in Switzerland;
b the codification of private placement exemptions; and
c revisions of the prospectus liability regime.

The Swiss Federal Council finalised and adopted the drafts of FIDLEG and FINIG on 4 November 2015 and submitted them to the Swiss parliament. The drafts of FIDLEG and FINIG are currently being debated by the Swiss parliament, and it is expected that FIDLEG and FINIG will enter into force in 2019 at the earliest. It is also anticipated that there will be a transition period in relation to full compliance with the final legislation.

i Proposed new prospectus regime

To establish a level playing field with internationally comparative prospectus disclosure standards, the Swiss Federal Council's draft of the FIDLEG sets out, among others, content and prior approval requirements for all public offering prospectuses. These requirements are substantially modelled on the EU Prospectus Directive. Currently, only stock exchange listing prospectuses must be approved before the first day of trading, and only in respect of equity securities.

Under the new legislation, subject to certain exemptions (such as eligible debt offerings), all prospectuses will need to be reviewed and approved by a competent authority with regard to completeness, coherence and comprehensibility before the publication of the offering or the admission to trading on a Swiss trading platform. Additionally, first-time issuers will be required to submit their prospectus for approval at least 20 calendar days before the publication of the offering or the admission to trading on a Swiss trading platform. It is expected that SIX will be given the mandate to act as competent authority to approve prospectuses. In addition, in the context of IPOs, the approved prospectus will also need to be published at least six business days before the end of the offering period, therefore implementing a new minimum statutory requirement for the duration of IPOs.

ii Codification of private placement exemptions and exemptions from the duty to publish a prospectus

There are currently no express private placement safe harbours for share offerings under Swiss law. The draft of FIDLEG includes express exemptions from the duty to publish a prospectus, which are largely consistent with the exemptions under the current EU Prospectus Directive and existing SIX regulations. The list of exempt transactions includes, among others, offerings limited to investors classified as professional clients and offerings addressed to fewer than 500 investors classified as retail clients. Regarding private placements that do not require a prospectus, FIDLEG further provides that offerees must, however, be able to take note of the essential information within the framework of the offer.

iii Proposed revisions of the prospectus liability regime

FIDLEG also includes proposed changes to the current prospectus liability regime. While the current regime will largely remain intact, it was initially proposed that defendants will need to show that they did not act intentionally or negligently in order to avoid prospectus liability, rather than the burden of proof being borne by the claimants. However, following review by the National Council, this shift in the burden of proof has been removed, and will now be subject to further debate within the Swiss parliament. Separately, the draft of FIDLEG introduces administrative criminal liability in the case of intentional violation of Swiss prospectus rules, and limitations of liability in connection with required summaries and forward-looking statements included in prospectuses.

Chapter 16

THAILAND

Patcharaporn Pootranon, Nattaya Tantirangsi and Trin Ratanachand[1]

I INTRODUCTION

i IPO market, activities and trends

Thailand's initial public offering (IPO) market reflects an uptrend, with the number of newly listed companies having doubled over the period of 2016 to 2017.[2] In 2016, the Stock Exchange of Thailand (SET) and the market for alternative investment (mai) were reported as the most liquid market in the Association of Southeast Asian Nations (ASEAN) for the fifth consecutive year.[3] The Securities and Exchange Commission (SEC) and the SET also continue to adjust their mechanisms to accommodate current market climates in order to create a more start-up-friendly environment for fundraising.

Thailand's recent IPO activities include the SET's adjusted focus in 2018 to attract additional industries, including digital and medical industries, in accordance with the government's recent policy; the SEC's regulations on equity crowdfunding through an online funding portal; and the SEC's current public hearing on an initial coin offering to attract tech start-ups and social enterprises by including 'investment participation' as a new type of security, aiming to ease entrepreneurs' access to funds. Fundraising through an initial coin offering is initially planned to be undertaken through the offer of digital tokens to limited types of investors, namely institutional investors, venture capital funds, private equity funds, ultra-high net worth investors and retail investors (with capped amounts of investment).

ii Main regulatory bodies, exchanges and agency

Thailand's IPO process is governed by the Securities and Exchange Act BE 2535 (1992) (the Securities and Exchange Act), which provides for the establishment of the SEC and empowers it to govern the public offering of securities, including corporate governance of issuing companies. The SEC's organisation extends to the Capital Market Supervisory Board and the Office of the SEC, a regulatory body established by the Securities and Exchange Act, which supervises, among others, public offerings and business takeovers. Primary responsibility for the regulation of new securities issues is vested upon the SEC. The SET is responsible for listing application approvals once the SEC's requirements for an IPO have been met. The SEC's recent developments include public share offerings in Thailand by foreign issuers.

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2 11 new companies were listed in 2016 and 22 new companies in 2017: www.set.or.th/en/market/market_statistics.html, accessed on 13 January 2018.

3 SET Annual Report 2016.

The Securities and Exchange Act established the SET, which is the principal stock exchange in Thailand, and the mai. The SET and mai are different platforms that aim to attract different kinds of companies and fundraisers in terms of size, types of business and variety of investment products. Further, according to the SET's recent regulations on primary and secondary listings, admission to listing on the SET is now available for foreign companies. The SET is responsible for, among other things, processing all listing applications, ensuring that disclosure requirements for listed companies are fulfilled, and monitoring all trading activities in connection with listed securities.

The Thailand Securities Depository Company Limited (TSD) acts as a securities depository dividend paying agent, transfer agent and registrar for Thai-listed companies. The TSD also provides depository services to, among others, securities companies, commercial banks and finance companies.

II GOVERNING RULES

i General overview

Initial public offering by domestic companies

In addition to the Securities and Exchange Act, a domestic IPO is mainly regulated by the Notification of the Capital Market Supervisory Board No. TorChor 39/2559 Re: Application for and approval of offer for sale of newly issued shares. In Thailand, only public limited companies or juristic persons established under special-purpose legislation can offer shares to the public. The issuers, therefore, must also comply with other specific laws that they are subject to; for example, public companies established under the Public Limited Companies Act BE 2535 (1992) (PLCA) must comply with the PLCA, which governs the corporate matters and relationships between the issuing company, its directors, executives and shareholders.

A domestic IPO requires an approval from the Office of the SEC and requires that the filing of the registration statement and draft prospectus be submitted to the Office of the SEC and become effective before the commencement of the offering. An issuing company is legally required to appoint a financial adviser on the SEC-approved list to collaborate in preparing the application for approval and the filing of the registration statement and a draft prospectus. As for the solicitation, advising and offering of the securities, the issuing company is required to appoint an underwriter who must comply with selling restrictions under the relevant regulations issued under the Securities and Exchange Act. In respect of the offering, the SEC aims to protect investors by granting an approval based on certain criteria. Mainly, the shareholders' rights must be protected and they must be treated fairly. The board of directors and executives must be under a competent check-and-balance system, where a clear and fair structure must be in place, without any conflict of interest between the issuing company and its directors, executives or major shareholders (otherwise, there shall be a valid mechanism to cope with any conflict of interest). Further, disclosure must be sufficient; in particular, financial statements must be prepared in accordance with applicable accounting standards.

Share offering, in certain cases, is exempted from approval by the Office of the SEC and from filing of the registration statement and draft prospectus to the Office of the SEC. For example, issuing a rights offering to the shareholders of the issuing company proportionate to their current shareholdings, or private placement (PP) of shares to no more than 50 persons in a 12-month period; any person with an aggregate value not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation; or an institutional investor.[4] The SEC, however, has toughened the issuance of PP shares of a listed company by imposing an approval process prior to the sales of PP shares. Deemed approval for PP shares issued by a listed company is granted only in the case that the PP shares are offered at market value (a discount of no more than 10 per cent may be granted, subject to the discretion of the board of directors considering that it is in the best interest of the company and its shareholders as a whole).

Listing

While the SEC assumes the primary role in the approval process for an IPO, the SET continues to operate the stock exchange and is responsible for listing application approvals once the SEC's IPO requirements have been met. Admission to listing on the SET and mai is regulated by the Regulation of the Stock Exchange of Thailand Re: Listing of ordinary shares or preferred shares as listed securities BE 2558 (2015) and the Regulation of the Stock Exchange of Thailand Re: Listing of securities, disclosure of information and delisting of securities in the 'Market for Alternative Investment' BE 2560 (2017), respectively. Key listing requirements can be found under Section II.iii.

Another key role of the SET is to regulate the ongoing disclosure of the issuing companies. Examples of ongoing disclosure obligations include the disclosure of the issuing company's financial statement and a disclosure of any occurrences that affect, or will affect, the securities holders' right or investment decision, or the change in the issuing company's securities price.

Share offering by foreign companies

The Office of the SEC provides the option for foreign companies to offer their shares to investors in Thailand and be traded on the SET, subject to the Office of the SEC's approval and filing of a registration statement in the prescribed form and a prospectus with the Office of the SEC that must become effective prior to commencement of the offering. The main regulations for a foreign company to comply with are divided into (1) the Capital Market Supervisory Board's announcement No. TorChor 3/2558 for a foreign company not having its shares listed on any foreign exchange (primary offering) and (2) the Capital Market Supervisory Board's announcement No. TorChor 14/2558 on rules on offering of securities issued by a foreign company that has or will have its shares listed on one or more foreign exchanges (secondary offering).

Requirements for share offering by foreign companies

Foreign companies eligible to launch equity offerings under the regulations must comply with the prescribed approval criteria, disclosure standards and other relevant rules in a similar manner to those applicable to Thai companies, such as shareholder protection, prevention of conflict of interest and adequate information disclosure. Additionally, foreign companies must comply with the following requirements, among others, which are divided into two categories.

4 As defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. KorChor 17/2551 on the definition of the issuing and offering of securities regulation.

Primary offering requirements

A foreign company not having its shares listed on any foreign exchange shall comply with Capital Market Supervisory Board announcement No. TorChor 3/2558; requirements are more similar to those applied to a Thai company (compared to secondary offering, as detailed below), such as requirements on directors and the chief financial officer (CFO):

a the laws and regulations of the home jurisdiction provide for equivalent measures in relation to corporate management and significant aspects of shareholders' protection, compared to the laws and regulations applicable to Thai companies. Otherwise, the foreign company shall be able to show that it has managed to have a mechanism equivalent to Thai laws and regulations on such matters;

b the foreign company shall have at least two directors that are Thai nationals, having residence in Thailand, and one of which must hold a position as a qualified audit committee member;

c there shall be three qualified independent directors, or at least one-third of the total number of the foreign company's directors, whichever is greater, and at least three qualified audit committee members;

d the CFO shall be qualified in accordance with the announcement (e.g., he or she has been appointed as a CFO for at least one year prior to filing the application for approval); and

e the auditor must be on the SEC-approved list.

Secondary offering requirements

A foreign company that has or will have its shares listed on one or more foreign exchanges shall comply with Capital Market Supervisory Board announcement No. TorChor 14/2558, which mainly defers to home regulatory requirements of such company, but requires that the company provides the Office of the SEC with a regulatory mapping, as follows:

a the registration statement shall provide the Office of the SEC with a regulatory mapping that compares the applicable laws and regulations between the home jurisdiction and Thailand (applicable to public companies) on corporate management and significant aspects of shareholders' protection measures;

b equity offerings can lawfully be implemented in the foreign company's home jurisdiction; and

c the auditor must be on the SEC-approved list.

Issuing companies from CLMV countries (Cambodia, Laos, Myanmar and Vietnam) may be subject to certain exemptions for both primary and secondary offerings.

Certain exemptions apply for obtaining approval from, and filing a registration statement in, the prescribed form and a prospectus with the Office of the SEC, among others, when the offering of such shares is made to: no more than 50 persons in a 12-month period; any person with an aggregate value not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation; or an institutional investor.[5]

5 As defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. KorChor 17/2551 on the definition of the issuing and offering of securities regulation.

The primary and secondary listing requirements

The listing of shares in primary and secondary offerings must comply with the SET's specific requirements on primary and secondary listings.[6]

Companies seeking primary or secondary listing in Thailand must qualify as a 'foreign company' according to the relevant regulations of the Capital Market Supervisory Board.[7] Both primary and secondary listing requirements are stipulated in the Regulation of the SET Re: Listing of ordinary shares or preferred shares as listed securities BE 2558 (2015). Certain shared requirements for both types of listings are the threshold of the paid-up capital (at least 300 million baht), operating track records and financial status. Qualifications for the listing of domestic and foreign companies are significantly similar, except that there is no minimum par value requirement for a company seeking secondary listing on the SET.

Currently, primary and secondary listings are not available on the mai.

ii Main stock exchanges

SET

The SET is the national and principal stock exchange of Thailand with securities companies as its members. The SET's main responsibilities are to process all listing applications, to ensure that disclosure requirements for listed companies are fulfilled and to monitor all trading activities in connection with listed securities.

The SET aims to attract large companies and is an exchange for greater varieties (compared to the mai) of investment products, such as shares, warrants, investment units (i.e., real estate investment trusts), infrastructure funds, infrastructure trusts and property funds. In terms of shares, the SET's listing requirements are tailored to three types of businesses, namely general business, basic utilities business and holding company.

Companies listed on the SET are largely divided into eight main industries, such as property and construction, services, resources, consumer products, and agribusiness. Currently, the industries with the largest investment value are resources, the service industry and the financial industry.[8] In 2018, due to current government policies, the SET also aims to attract a wider range of industries, for example, the automotive technology, digital and fintech industries.

mai

The mai, also established by the Securities and Exchange Act, officially commenced operations on 21 June 1999. It aims to attract medium-sized enterprises due to its less stringent requirements, especially in terms of the qualifications of the applicant compared to those required to be listed on the SET (e.g., 50 million baht in paid-up capital and the free float requirement of only 300 shareholders). As a result, it creates new fundraising opportunities for start-ups and innovative businesses with high potential growth, and provides them with

6 Regulation of the Stock Exchange of Thailand Re: Listing of ordinary shares or preferred shares as listed securities BE 2558 (2015).

7 Capital Market Supervisory Board announcement No. TorChor 14/2558 and the Capital Market Supervisory Board's announcement No. TorChor 3/2558.

8 www.settrade.com/C13_MarketSummary.jsp?detail=INDUSTRY (last accessed on 14 January 2018).

a greater range of investment alternatives. The mai also helps attract venture capitalists to investing in start-ups due to the more liquid market for start-ups' shares, which this alternative exchange creates.

Additional detailed requirements are set out under Section II.iii, below.

Domestic issuers on foreign exchanges

It is not common for domestic issuers to pursue dual listings on foreign exchanges, although there have been a few. It is, however, more common that domestic issuers pursue combined offerings consisting of domestic offering of shares through domestic underwriters and a concurrent international offering through international bookrunners, only in jurisdictions where and in the manners that such offering of shares is not prohibited.

iii Overview of listing requirements

General listing requirements

The listing requirements for both the SET and mai focus on two main aspects, namely the qualifications of the shares and the qualifications of the issuing company, with detailed rules on operational and financial thresholds along with other quantitative benchmarks.

Key listing requirements

Qualifications of shares

The share qualifications for the SET and mai are similar, as shown below.

a the par value per share is at least 0.5 baht and fully paid;
b the shares are registered shares (as opposed to bearer shares); and
c there is no share-transfer restriction, unless imposed by law and identified in the company's articles of association.

It must be noted that SET listing requirements differ if the issuing company operates an infrastructure business or is a holding company.

Qualifications of the issuer

The major differences between the listing requirements of the SET and mai are the requirements on the issuer's qualifications in terms of size, as set out below.

SET

a Paid-up capital: at least 300 million baht (ordinary shares only).
b Free-float: at least 1,000 minority shareholders, holding at least 25 per cent of the issuing company's paid-up capital (or 20 per cent, if the paid-up capital (ordinary shares only) is at least 3,000 million baht).
c Operating track record: compliance with either one of the 'net profit' or 'market capitalisation' requirements.
d Others: one-year continued operation by the same majority directors and executives prior to the submission of the listing application, absence of conflict of interest and having an internal control system as required by the Capital Market Supervisory Board.

mai

a Paid-up capital: at least 50 million baht (ordinary shares only).
b Free-float: at least 300 minority shareholders, holding at least 25 per cent of the issuing company's paid-up capital (or 20 per cent, if the paid-up capital (ordinary shares only) is at least 3,000 million baht).
c Operating track record: compliance with either one of the 'net profit' or 'market capitalisation' requirements (less stringent than the SET's).
d Others: one-year continued operation by the same majority directors and executives prior to the submission of the listing application, absence of conflict of interest and having internal control system as required by the Capital Market Supervisory Board.

The mai's listing requirements differ if the issuing company is a holding company.

Main differences from leading global exchanges

The decision to make an international offering of shares is influenced by a combination of factors, depending on the issuing company's specific needs. Those factors may include costs in connection with the pre-IPO, offering, listing and post-listing processes, ongoing disclosure obligations, continued listing standards, delisting rules and competition against other listed companies.

Listing fees in Thailand could be perceived as relatively low compared to other global exchanges, such as the Nasdaq Global Select Market and the Nasdaq Global Market. Listing fees in Thailand comprise an application submission fee (50,000 baht) and an entry fee (up to 3 million baht), while entry fees for the Nasdaq Global Select Market and the Nasdaq Global Market are based upon the aggregate of outstanding shares at the time of the initial listing (e.g., for over 100 million shares, the entry fees will be US$225,000, including US$25,000 application fee).[9]

Unlike the London Stock Exchange (LSE), a company listed on the SET (or mai) will generally comply with the same standards. The LSE's main market, however, provides for two types of listing standards, namely 'standard listing' and 'premium listing'. A company can choose to comply with the premium-listing standard that is 'over and above' that of standard listing to gain more of the investors' trust because of the additional investor protections adhered to such standard.

As for the New York Stock Exchange (NYSE), the exchange has broad discretion in listing a company. Though the quantitative initial listing standards are met, it does not necessarily mean that the company will be approved for listing. The NYSE may deny listing or apply additional, more-stringent criteria.[10] The SET's discretion to refuse a listing application is set out in its listing rules, for example, when the shares of the issuing company would be admitted to listing, this would be in conflict with the government policy or would affect the credibility of Thailand's capital market as a whole.

9 Nasdaq, Initial Listing Guide (December 2017) available on https://listingcenter.nasdaq.com/assets/initialguide.pdf (last accessed on 13 January 2018).

10 NYSE, Initial Listing Standards available on www.nyse.com/publicdocs/nyse/listing/NYSE_Initial_Listing_Standards_Summary.pdf (last accessed on 12 January 2018).

iv Overview of law and regulations

As stated earlier, the main legislation that governs the IPO process is the Securities and Exchange Act, which established the SEC primarily to govern the share offering to the public and the SET for the operation of the exchanges, including the admission to listing of shares and other eligible securities.

Recent developments

A recent significant development in the Securities and Exchange Act is the introduction of civil sanctions for offences in connection with unfair securities trade; for example, offences in relation to insider trading; presenting false statements; concealing material facts that should otherwise be disclosed; or letting another person use his or her securities or bank account for the payment of securities trading to conceal the identity of the account user to commit an unfair act (the person using such person is subject to this offence as well), including the fiduciary duty of directors. For example, insider-trading provisions have been amended to be more stringent and easier to sanction. These criminal offences will now be captured without the claimant having to go through the traditional criminal procedure where proof must meet the 'beyond reasonable doubt' standard; instead, the civil sanction will be upon the discretion of the Thai SEC if sufficient evidence is presented. Civil sanctions vary depending on the type of offence, for example, payment of compensation or suspension from trading securities on the SET or a bar from serving as director or executive in a listed company or securities company, as the case may be.

Another significant development is the possibility of class action proceedings under the Civil Procedure Code from 4 December 2015 onwards. This new law effectively allows for individuals (especially those who do not have the means to bring a claim by themselves or those whose damages would not be worth the time, cost and effort to pursue the case independently) to join as part of the same 'class' to commence legal proceedings and receive shared compensation. The Civil Procedure Code defines 'class' as a group of persons having identical rights arising from common issues of fact and law as well as possessing identical characteristics that are specific to the class, even if there is variation in the types of damage suffered by each person. Any person suffering damage arising from activities in relation to the Securities and Exchange Act can bring a class action to court. Possible class action claims in relation to the Securities and Exchange Act can be claims relating to information disclosed in the prospectus at the IPO stage or from ongoing disclosure as a listed company, for example, disclosure of annual financial status. Since its promulgation, however, no class actions in connection with the Securities and Exchange Act have been brought to court.

III THE OFFERING PROCESS

i General overview of the IPO process

An IPO process normally takes approximately one to two years until its completion (i.e., the listing on the SET). The company shall begin to review and evaluate its management, internal control system, the preparation of its financial statements and its shareholding structure. A company normally engages a financial adviser, an auditor and a (securities) law firm at the outset of the IPO process to obtain a due diligence report and recommendations for any necessary changes, in order to properly position the company for the IPO and to set out necessary action plans.

Public offering of shares in Thailand requires an approval from the Office of the SEC, and requires the filing of the registration statement and draft prospectus to the Office of the SEC to become effective prior to the commencement of the offering. The application for the Office of the SEC approval shall be filed with supporting documents prescribed by the Office of the SEC, including the latest fiscal and quarterly financial statements (audited by an auditor on the SEC-approved list) and the audit committee's opinion regarding the sufficiency of the company's internal control system. The Office of the SEC may take up to 165 days to consider the application.

The registration statement and draft prospectus must be prepared in the form prescribed by the Capital Market Supervisory Board and the Office of the SEC, respectively. They shall contain, among others, the details of the issuing company (such as business operation, management, corporate governance policies, financial status and operational results), and details of the offering of shares (such as information relating to the shares, rationale of the fixing of the share price, including share subscription and allocation methods). The draft registration statement filed is subject to the Office of the SEC's comments. The issuing company together with its counsels will respond to those comments by filing a new version of the registration statement in which the comments have been addressed. The registration statement and draft prospectus will become effective 45 days after the date on which the Office of the SEC accepted the registration statement and draft prospectus.

Players in the offering process

Financial adviser

A financial adviser is legally required to collaborate with the issuing company in the making and submission of the registration statement and draft prospectus to the Office of the SEC, and to certify that the issuing company has complied with the laws and regulations relevant to the offering of shares. A financial adviser is normally engaged at the very initial stage of the preparation process in order to guide and ensure that the issuing company is aware of the relevant laws and regulations, adopts good corporate governance practices and operates for the best interest of its shareholders. An issuing company shall also engage a financial adviser to prepare the listing application to be submitted to the SET (either for the listing on the SET or the mai).

Auditors

A team of auditors helps to review and improve the internal audit system. Emphasis is placed on the preparation of the quarterly and fiscal financial statements in order to meet the standards set out by the SEC and the SET, which are significantly higher than those required of non-listed companies. At the beginning of the preparation stage, the company may engage auditors from the SEC-approved list to review and audit its financial statement and to help prepare the company to be well equipped to comply with such standards.

Lawyers

The role of lawyers begins at the very beginning of the offering process. Legal due diligence will be conducted to focus on any restrictions on IPOs set out in material contracts that the company has entered into and the lawyers suggest any necessary actions to work through them. The lawyers will look through the issuing company's and its group's shareholding structures and suggest appropriate restructuring plans, if necessary. The lawyers are involved throughout the offering preparation process to ensure completeness and compliance with the relevant laws and regulations, including the drafting of the registration statement and prospectus. For listing of shares, a legal opinion is required to verify that there are no share-transfer restrictions for the shares to be listed and that there is no pending litigation that would affect the transferability of the shares.

Underwriter

Solicitation, advising, offering and allocation of shares to the public must be made through an underwriter. An underwriter, or a lead underwriter together with several co-underwriters, are normally engaged after the registration statement is filed to the SEC. Such underwriters must comply with selling restrictions under relevant regulations issued under the Securities and Exchange Act.

ii Pitfalls and considerations

Pitfalls that issuing companies normally encounter fall within the realm of the SEC's areas of focus in an IPO case, as follows.

Shareholders' protection

The shareholding structures of the issuing company, its subsidiary and associated company shall clearly reflect the control and interest of the shareholders.

The directors, executives and major shareholders do not have any conflict with the best interests of the issuing company, unless the issuing company is able to present that there is a mechanism to ensure the best interests of the issuing company and its shareholders as a whole are protected.

Financial statements

The latest fiscal and quarterly financial statements prior to the submission of the application shall:

a meet the standards set out by the Capital Market Supervisory Board;
b be reviewed or audited by an auditor in the SEC-approved list;
c not be noted by the auditor in the manners prescribed by the Capital Market Supervisory Board, for example when such financial statements are not in compliance with the applicable accounting standards.

Good corporate governance (including internal controls)

Qualifications of the board of directors must comply with the rules set out by the Capital Market Supervisory Board, for example, the number and qualifications of independent directors and audit committee members.

The structure and management of the board of directors has an adequate check-and-balance system.

For listing to be approved, the issuing company must ensure that the requirements concerning the shares and the company itself are met. For share offering and allocation, a competent underwriter must be engaged.

Issuing companies having enquiries regarding the IPO and listing may seek early consultation from the SEC and SET to avoid any possible pitfalls.

iii Considerations for foreign issuers

The considerations for foreign issuers listing in Thailand are as follows:

a a foreign issuing company shall obtain approval from the Office of the SEC and file its registration statement (in the prescribed form) and draft prospectus with the Office of the SEC, which shall become effective prior to the listing of its shares on the SET;

b a foreign issuer shall consider that it will be under additional onerous disclosure obligations and that a disclosure shall be made at a carefully selected and proper timing in the two or more countries it is listed;

c for primary listing, the foreign company shall ensure that the laws and regulations of its home jurisdiction provide for equivalent measures in relation to corporate management and significant aspects of shareholders' protection, compared to the laws and regulations applicable to Thai companies;

d for secondary listing, the foreign company shall prepare a regulatory mapping, which compares the applicable laws and regulations between the home jurisdiction and Thailand on corporate management and significant aspects of shareholders' protection measures; and

e a foreign issuer will be subject to penalties applied to Thai nationals in case any offence occurs or is deemed to have occurred in Thailand.

To date, there has been no foreign company listed on the SET (primary or secondary); therefore, the first foreign issuers may enjoy special attention from analysts and investors, as well as gain publicity and enhance the foreign issuers' international presence.

IV POST-IPO REQUIREMENTS

i Disclosure

A listed company must comply with the ongoing disclosure requirements, for example., periodic disclosure, such as fiscal and quarterly financial statements and annual reports, and episodic disclosure, such as when the issuing company or its subsidiary acquires or disposes of assets of significant value.

ii Continued listing requirements

Continued listing requirements include the maintenance of the qualifications of the issuing company's shares, directors, executives, good corporate governance, internal control system, auditor and no conflict-of-interest status. Non-compliance may lead to the shares being delisted.

iii Other compliance

This includes other legal requirements for a listed company, such as holding of an annual general meeting of shareholders, according to both the Securities and Exchange Act and the PLCA, or compliance with the rules concerning capital increase or private placement of newly issued shares.

V OUTLOOK AND CONCLUSION

Thailand is continuously developing its exchanges, which are vital mechanisms for the country's growing economy and sustainable development. The SET focuses on developing investor-protection mechanisms and, as a result, it plays a role in creating a robust market. Thailand's deal-making cycle is predicted to peak in 2019 in terms of size, with the value of mergers, acquisitions and IPOs forecast to climb over the next two years.

Chapter 17

TURKEY

Ömer Çollak, Ökkeş Şahan and Nazlı Tönük Çapan[1]

I INTRODUCTION

In the past few years, there has been a slowdown in initial public offering (IPO) activity in Turkey and until recently, few companies were considering going public in the Turkish equity market. In light of this, the Capital Markets Board of Turkey (CMB) and Borsa Istanbul introduced certain regulatory changes with the aim of easing public offerings and boosting capital market activity in Turkey.

To this end, in 2017, the CMB published a major change regarding sales periods and allocations percentages in order to attract Turkish companies to go public in Turkey rather than considering foreign exchanges. In parallel with the CMB's initiative, Borsa Istanbul also introduced certain amendments to the listing principles in the Borsa Istanbul Listing Directive (the Listing Directive) with a view to asserting Borsa Istanbul as a viable option for IPOs in the minds of Turkish companies.

Following the new legislative amendments with regard to incentivising Turkish companies to go public in Borsa Istanbul, Turkish capital markets participants expect to see a robust year ahead in 2018, with high IPO activity in the market and opportunities to deepen the capital markets in Turkey.

II GOVERNING RULES

The CMB, Borsa Istanbul, Central Registry Agency (MKK) and Istanbul Clearing, Settlement and Takasbank are the main rule-making and enforcing authorities on IPOs in Turkey. The main legislation applicable to companies considering going public in Turkey is the:

a Capital Markets Law No. 6362;
b Communiqué on Shares No. VII-128.1;
c Communiqué on Prospectus and Issuance Document No. II-5.1;
d Communiqué on Sales of Capital Market Instruments No. II-5.2;
e Communiqué on Material Events No. II-15.1;
f Communiqué on Corporate Governance No. II-17.1;
g Listing Directive; and
h relevant directives, general letters and announcements of Takasbank and the MKK.

1 Ömer Çollak is a partner, Ökkeş Şahan is a counsel and Nazlı Tönük Çapan is an associate at Paksoy.

i Main stock exchanges

Borsa Istanbul is the sole exchange entity in Turkey in the form of a joint stock company, bringing together all the exchanges operating in Turkey (i.e., former Istanbul Stock Exchange, Istanbul Gold Exchange and the Derivatives Exchange of Turkey). Borsa Istanbul mainly consists of four markets, namely, the Equity Market, the Debt Securities Market, the Derivatives Market, and the Precious Metals and Diamond Markets.

The publicly held companies from various sectors are traded in Equity Market of Borsa Istanbul and trading in the Equity Market is carried out in the following sub-markets:

a the Star Market, on which the shares of large companies with a market value of free-float shares of at least 100 million lira and other companies listed on BIST-100 index are traded;

b the Collective Investment Products and Structured Products Market, on which the shares of securities investment companies, real estate investment companies, venture capital investment companies, warrants issued by intermediary institutions and exchange-traded funds are traded;

c the Main Market, on which the shares of mid-sized companies with a market value of free-float shares between 25 million lira and 100 million lira are traded;

d the Emerging Companies Market, on which the shares of emerging companies with a market value of free-float shares of less than 25 million lira are traded;

e the Pre-Market Trading Platform, on which the shares of certain companies determined by the CMB pursuant to its Decision No. 17/519, dated 3 June 2011, have been admitted to trading;

f the Watch List Companies Market, on which the shares of companies under special surveillance and investigation due to extraordinary situations with regard to transactions on Borsa Istanbul, insufficient compliance with disclosure requirements or other events that may necessitate a temporary or permanent suspension of the trading are traded; and

g the Equity Market for Qualified Investors, where the shares of companies are:
- issued for direct sale to CMB-qualified investors without being publicly offered; and
- traded only between CMB-qualified investors.

In addition to these seven market segments, an Official Auction Market may be opened when necessary, allowing the trading of stocks by courts, executive offices and other official entities in a separate market.

There is one other market, namely the Primary Market, on which the shares in companies being publicly offered and listed for the first time on Borsa Istanbul, and any additional shares offered following rights offerings of companies listed on Borsa Istanbul, are traded. In addition to these markets, there are two different transaction structures that are conducted on the Equity Market. Block trades of listed stocks are conducted as specifically regulated wholesale transactions and pre-emption rights during rights issues (granting the right to subscribe for newly issued shares) are traded separately as pre-emption right transactions.

As of the end of 2016, there are 405 companies in total traded in the Equity Market, of which 118 companies are in the BIST Stars Market and 171 companies are in BIST Main. Generally, domestic companies tend to list their shares at home. Overseas companies do not tend to list in the Turkish market.

ii Overview of listing requirements

The issuer shall prepare a prospectus used for domestic offering, submit it to the CMB for approval and also apply to Borsa Istanbul to get the offered shares listed. The major requirements for launching an IPO and getting the offered shares listed are as follows:

a the company's articles of association must be amended to comply with the CMB rules and regulations;

b there must be nothing that restricts the transfer or trading of the equity securities to be traded on Borsa Istanbul or prevents shareholders from exercising their rights; and

c the issuer's share capital must:
- be fully paid in;
- except for the funds specifically permitted by law, have been free from any revaluation funds or similar funds in the two years preceding the application for the public offering; and
- regarding the total amount of non-trade related party receivables, not exceed 20 per cent of the issuer's total receivables and 10 per cent of its total assets.

The issuer must pay to the CMB a fee that is equal to the sum of 0.1 per cent of the difference between the nominal value of the offering shares and their offering price, and 0.2 per cent of the nominal value of any shares that are not being publicly offered.

The Listing Directive regulates the listing and trading of securities through a public offering, through a private placement without a public offering, and to qualified investors. Under the CMB, only joint-stock companies can become public companies and list their shares on Borsa Istanbul. To list and trade securities on Borsa Istanbul, a company must have been incorporated for at least two years in accordance with the relevant CMB regulations.

The company must meet all the conditions of the group of the market to which it belongs and the groups are generally determined by the value of the shares offered to the public.

Star Market Group 1

Under Star Market Group 1, the following rules apply:

a the market value of shares offered to the public must be at least 250 million lira;

b total market value of the company must be at least 1 billion lira;

c profit must have been earned in the past two years;

d the minimum ratio of publicly offered shares to paid-in capital must be 5 per cent; and

e the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 3:4.

Star Market Group 2

Under Star Market Group 2, the following rules apply:

a the market value of shares offered to the public must be at least 100 million lira;

b the total market value of the company must be at least 400 million lira;

c profit must have been earned in the past two years;

d the minimum ratio of publicly offered shares to paid-in capital must be 10 per cent; and

e the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1:1.

Main Market Group 1

Under Main Market Group 1, the following rules apply:

a the market value of shares offered to the public must be at least 50 million lira;
b there is no total market value requirement;
c profit must have been earned in the past two years;
d the minimum ratio of publicly offered shares to paid-in capital must be 15 per cent; and
e the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1:1.

Main Market Group 2

Under Main Market Group 2, the following rules apply:

a the market value of shares offered to the public must be at least 25 million lira;
b there is no total market value requirement;
c profit must have been earned in the past two years;
d the minimum ratio of publicly offered shares to paid-in capital must be 25 per cent; and
e the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 5:4.

The Listing Directive

Under the Listing Directive, the following requirements also apply:

a two years must have elapsed since the company's establishment (this, however, is not applied for holding companies that have been established in less than two years but own a minimum of 51 per cent in shares of a company that has been established for more than two years);
b the exchange management must have had the corporation's financial structure examined and accepted its ability to continue as a going concern;
c the company must have obtained confirmation from Borsa Istanbul that its financial structure is sufficient for its operations;
d the shares must not contain any clauses prohibiting the shareholders to use their rights;
e the articles of association of the company must not contain any clauses restraining the transfer or the circulation of the shares;
f the company's articles of association must include nothing to restrict the transfer or trading of the securities to be traded on Borsa Istanbul or prevent shareholders from exercising their rights;
g there must be no major legal disputes that may affect the production and operation of the company;
h there must be an independent legal report confirming that the establishment and the operation are in compliance with the relevant laws;
i there must be no material legal disputes that could adversely affect production or other commercial activities;
j the company must not have:
  - suspended its operations for more than three months during the past two years, except for the causes accepted by the exchange management;
  - applied for liquidation or concordat (a concordat is a formal project regarding the liquidation of debts, prepared and presented by the debtor to the court for its approval, under which the debtor is released from his debts once the partial payments are completely made); and

- taken part in any other similar activity specified by the Borsa Istanbul board without the board's permission;

k the company's securities must comply with Borsa Istanbul's criteria on current and potential trading volumes; and

l the company's legal status in terms of its establishment, activities and shares must comply with the applicable law.

If an application is to be filed for an initial listing of shares, such listing application shall be made for the whole amount of capital of the relevant company.

iii Overview of law and regulations

The main regulations governing IPOs in Turkey are the Listing Directive, the Communiqué on Shares No. VII-128.1 and the Communiqué on Sales of Capital Market Instruments No. II-5.2, as mentioned above. With the purpose of attracting Turkish companies to listing in Borsa Istanbul, the CMB eased local allocation requirements for IPOs in Borsa Istanbul by amending its Communiqué on Sales of Capital Market Instruments No. II-5.2 in parallel with Borsa Istanbul's approach on easing IPOs in Borsa Istanbul through an amendment to the Listing Directive.

To this end, on 1 December 2017, the CMB published its amendments to the Communiqué on Sales of Capital Market Instruments No. II-5.2 regarding sales periods and the allocation percentages of capital market instruments being offered to the public. The legally required percentage, designated for allocation of the nominal value of shares in a public offering to domestic investors, has now changed to 20 per cent (10 per cent for domestic institutional investors and 10 per cent for domestic individual investors), unlike the provisions in-effect prior to this amendment, where issuers had to allocate at least 30 per cent of the nominal value of the shares to domestic investors (20 per cent for domestic institutional investors and 10 per cent for domestic individual investors). The CMB is also authorised to decrease such allocation percentages to zero or increase them by taking into consideration the market price of shares to be offered, market conditions and the issuer's request on similar grounds.

In addition to the amendment on allocations, the CMB paves the way for revising the offering price downwards through a public disclosure announcement without requiring any prospectus amendment. If the offering price is to be revised prior to initiating the sales or book-building period, the public offering may start on the second day at the earliest following the date of such public disclosure. If the offering price is to be revised within the sales or book-building period, at least two business days shall be added to the respective public offering period.

Prior to the CMB's amendments mentioned above, the Listing Directive was also amended on 31 July 2017. Before the amendment, the issuing entity had to have an equity to capital ratio of greater than 3:4 for listing in Star Market Group 1 and 1:1 for listing in Star Market Group 2. Following the amendment, companies that have not earned profit in the past two years and meet the shareholders' equity to capital ratio can still be listed in the Star Market of Borsa Istanbul. In order to satisfy the foregoing, companies recorded operating profits in the preceding financial year and relevant interim period, and with shareholders' equity-to-capital ratio greater than 50:50, will be eligible for listing in Borsa Istanbul's Star Market. Such eligibility criteria are only applicable where there is issuance of new shares, other requirements of listing in the Star Market of Borsa Istanbul are met and the board of Borsa Istanbul approves the listing application of the relevant company.

III THE OFFERING PROCESS

The issuer must prepare a prospectus used for a domestic offering and submit it to the CMB for approval of the primary listing of its shares. Additionally, the following steps are expected to be initially conducted by the company that is considering going public:

a organisation of an internal working group;
b due diligence work for the IPO;
c selection of an intermediary institution and execution of a market advisory agreement;
d selection of an independent auditor and preparation of financial statements;
e articles of association amendment;
f pricing;
g preparation of the prospectus;
h simultaneous application to the CMB and Borsa Istanbul;
i approval of the CMB; and
j commencement of trading on the relevant market of Borsa Istanbul upon its approval.

As pointed out in the above steps, the company whose shares are offered to the public shall complete the offering process with the assistance of an internal working group and external advisers. An internal working group must be set up within the company to carry out the required IPO process. In general, finance and public relations divisions, and other relevant mid-level managers of the company are included in the internal working group.

In order to complete the full IPO process in a diligent, professional and adequate manner, professional external advisers shall also be appointed. In practice, the main external advisers are as follows:

a an intermediary institution shall be appointed by the company whose shares will be offered to the public and there shall be an agreement with the intermediary institution. There may also be a consortium (for example, in a relatively large IPO) rather than a single intermediary institution to take advantage of the syndicated efforts of several brokerage firms;
b an independent auditor shall prepare the financial statements of the company whose shares are offered to the public in accordance with capital markets regulations. These statements must be audited by an independent audit firm selected from the CMB's authorised list. The company must sign an audit contract with the selected audit firm;
c a financial adviser who generally advises on the timetable, structuring, valuation, price determination and so on shall also be appointed by the company whose shares are offered to the public;
d a research analyst is adequate for publishing research on the company;
e legal advisers shall be appointed in order to handle the legal aspects of the full IPO process (e.g., preparing the CMB application documents in line with the CMB and Borsa Istanbul regulations, carrying out legal due diligence, and negotiating the agreements between the company and external advisers); and
f public relations advisers are crucial for attracting as many investors as possible. Public relations advisers publish marketing materials and press releases that explain the company's core business activities.

i General overview of the IPO process

The IPO process may be structured in three ways: offer of existing shares (shareholders' sale as shareholders sell their shares through a public offering and the company does not receive any cash but the shareholders generate income); offer of shares resulting from a capital increase (by fully or partially restricting the pre-emptive rights of existing shareholders on newly issued shares on which the company obtains financial gain); and combination of an offer of existing shares and capital increase.

For primary listing of the company, as referred to previously, the prospectus and other documents required under the capital markets legislation shall be submitted to the CMB for obtaining its approval. The CMB will approve the prospectus if the information given is found to be complete according to CMB standards and regulations. Further, the CMB generally requests additional documents or information from the company whose shares will be offered to the public. In this case, the company shall be informed in writing or electronically within 10 business days of the date of application by the CMB, and accordingly required to complete the deficiency. Once the prospectus is approved by the CMB, it shall be published on the issuer's website within 15 business days of the date of receipt, as well as on the Public Disclosure Platform.

Although each deal is different, an indicative timetable for an IPO is set out below, where 'T' signifies the first day of trading on Borsa Istanbul.

T minus 6 months to T minus 3 months	Preparation for the IPO: • the company's articles of association must be amended to comply with the CMB; • requirements for public companies must be considered; • advisers must be appointed; • eligibility for an IPO and listing is discussed; and • due diligence is started. After the preparation period, prospectus drafting commences
T minus 3 months	First submission of the prospectus to the CMB
T minus 2 months to T minus 1 month	First draft reports circulated and announcement of intention to float made
T minus 5 weeks	Connected brokers' research is published and the research blackout period starts
T minus 4 weeks	Borsa Istanbul approval of listing is received and the price range is set. The Turkish underwriting agreement is signed and the final valuation report is submitted to the CMB. Updated prospectus with price range (subject to approval by the CMB) is made available on the issuer's and domestic underwriter's websites. There is a management briefing to syndicate sales. The management roadshow starts
T minus 3 weeks	Submission of final documents to the CMB. End of the period for informing investors of the IPO
T minus 2 weeks	Prospectus approved by the CMB. International book building starts and announcement of sales
T minus 9 days	Domestic book building starts
T minus 6 days	The pricing decision is made. Domestic and international book building ends
T minus 4 days	If requested, the distribution list is sent to the CMB. Offer price and allocations announced. New shares are created and shares can be sold or transferred
T minus 1 day	Settlement and publication of final IOC
T	First day of trading and start of price stabilisation (if any)

ii Pitfalls and considerations

The main considerations in the IPO for companies are generally the costs and fees attributed to such process. Accordingly, the usual costs and fees for conducting an IPO and their percentage of the total amount of such costs and fees are as follows:

a brokerage and IPO consultancy fees (71 per cent);

b independent audit fees (5 per cent);

c legal consultancy fees (9 per cent);
d CMB fees (4 per cent);
e CSD (MKK) fees (1 per cent);
f Borsa Istanbul listing fees (2 per cent); and
g other fees (advertisement, promotion, other consultancy services, etc.) (8 per cent).

Based on the Borsa Istanbul reports, the aggregate amount of the fees and costs generally corresponds to the 4 per cent of the total offering proceeds of the issuer for the issuances launched in the main equity market.

iii Considerations for foreign issuers

Requirements for the listing of shares of foreign-based institutions that are operating abroad are the same as for the Turkish companies. There is no requirement for ministerial approval for the initial listing of foreign capital market instruments. In addition, there is no requirement for the foreign company to be listed in its home country. However, the CMB may ask for additional requirements or waive some of the conditions.

Foreign issuers must apply to the Borsa Istanbul with the information and documents indicated in the Listing Directive for the listing of securities. There are special discounts relating to Borsa Istanbul Listing Fees applicable to foreign issuers.

IV POST-IPO REQUIREMENTS

There are continuous disclosure requirements attributed to the public companies as per applicable capital markets legislation in relation to financial statements and material events.

i Disclosure requirements relating to financial statements

Pursuant to Communiqué No. II-14.1 on the Principles Regarding Financial Reporting in Capital Markets and the Communiqué on Public Disclosure Platform No. 128.6, financial statements must be presented quarterly in accordance with Turkish Financial Reporting Standards (TFRS):

a annual results: audited year-end consolidated financial statements and reports prepared in accordance with TFRS must be published on the Public Disclosure Platform within a period of 70 days following the end of the accounting period (if companies are not required to submit consolidated financial statements, the period is 60 days following the end of the accounting period);
b the second quarter: interim condensed consolidated six-month financial statements must be published on the Public Disclosure Platform within 50 days of the end of the accounting period (if companies are not required to submit consolidated financial statements, the period is 40 days following the end of the accounting period); and
c the first and third quarter: audited first quarter and third quarter consolidated financial statements must be published on the Public Disclosure Platform within 40 days of the end of the accounting period (if companies are not required to submit consolidated financial statements, the period is extended to 30 days following the end of the accounting period). If the first and third quarter financial statements are independently audited, then such financial statements must be published on the Public Disclosure Platform within 40 days and 50 days, respectively, for companies preparing unconsolidated and consolidated financial statements.

Pursuant to the CMB's Disclosure Communiqué No. II-15.1 (the Disclosure Communiqué), companies may make public disclosures relating to future forecasts through a decision of the board of directors or the written consent of the persons authorised by the board of directors. Companies may disclose their future forecasts to the public at most four times in a year by either making public disclosures on the Public Disclosure Platform or making relevant explanations under activity reports. If there is a material change within the scope of future forecasts, disclosure of the material change is required. Pursuant to our disclosure policy, we can disclose our future forecasts.

ii Disclosure of material events

Disclosure of material events by public companies is primarily regulated by the Disclosure Communiqué, and the CMB makes a distinction between 'inside information' and 'continuous information'. Rather than identifying each material event requiring disclosure in the Disclosure Communiqué, the CMB leaves specific disclosure decisions regarding inside information to the companies' individual discretion on a case-by-case basis. In the event of the existence of any news or rumours relating to the issuer disclosed for the first time through media institutions or by other means of communication that is likely to affect the value or price of the issuer's shares, capital markets instruments or investors' investment decisions, issuers are obliged to make disclosures on the accuracy and adequacy of such news or rumours. Interpretations, analyses, assessments and predictions made on the issuer company based on the issuer's public disclosures do not fall within the scope of this principle.

iii Inside information

The Disclosure Communiqué defines 'inside information' as any information or event not disclosed to the public that may impact investors' investment decisions or is likely to affect the value or price of the shares, or relevant capital markets instruments of the issuer. If any inside information comes to the attention of any persons who hold, directly or indirectly, 10 per cent or more of the share capital or the voting rights of the issuer company; or who, regardless of such threshold, hold privileged shares that give their holders the right to nominate or elect members to the board of directors of such issuer (and that the issuer is not itself aware of), such persons must make a public disclosure regarding such inside information. Public companies may suspend the disclosure of inside information by taking full responsibility for any non-disclosure to protect its legitimate interests, provided that such suspension does not mislead investors; the company is able to keep any related inside information confidential; and the board of directors resolves on the necessary precautions to protect the interests of the issuer and not to mislead investors, or an officer authorised by the board of directors approves such precautions in writing.

Once the suspension conditions are eliminated, the issuer company must disclose the inside information on the Public Disclosure Platform, including disclosing the suspension decision and the reasons for the suspension. Inside information must be publicly disclosed if it cannot be kept confidential.

iv Continuous information

The following changes in share ownership or management control in a company must be publicly disclosed under the Disclosure Communiqué by the persons conducting the relevant transactions:

a a person or persons acting together becoming direct or indirect holders of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 per cent, 50 per cent, 67 per cent or 95 per cent of the issued share capital or voting rights of a public company in Turkey are required to disclose such acquisitions on the Public Disclosure Platform and, thereafter, to disclose on the Public Disclosure Platform their transactions in the shares or voting rights of such company, when the total number of the shares or voting rights they hold falls below or exceeds such thresholds;

b the founding shareholder and the shareholders are required to disclose on the Public Disclosure Platform any direct or indirect acquisition of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 per cent, 50 per cent, 67 per cent or 95 per cent of the issued share capital or voting rights of the company by investment funds belonging to a founding shareholder as well as its transactions in the shares or voting rights of the company, when the total number of the shares or voting rights that it holds falls below such thresholds;

c persons with managerial responsibility in a public company, persons with close relations to any such persons or the majority shareholder in a public company are required to disclose their transactions relating to the shares, or other capital markets instruments of such company, as of the date when the aggregate value of the transactions performed by such persons reaches 280,000 lira (individually or together) in one year; and

d companies are required to make necessary updates within two business days' of any changes relating to the general information that the company disclosed on the Public Disclosure Platform. The Central Registry Agency is responsible for updating the shareholding list, setting forth a public company's natural person and legal entity shareholders who hold directly 5 per cent or more of the shares or voting rights of such public company.

Any changes in rights attached to different classes of shares in public companies must be disclosed on the Public Disclosure Platform and changes relating to the voting rights must be notified to the Central Registry Agency.

V OUTLOOK AND CONCLUSION

IPO activity in Turkey has been negatively affected in recent years due to the economic slowdown triggered by the global financial crisis. During 2016, only two companies were offered to the public and 343 million lira was provided, while in 2017, only three companies successfully completed the public offering process.

In contrast with the recent slowdown in Turkish IPOs, capital markets experts predict that the remarkable initiatives taken by the CMB and Borsa Istanbul will encourage Turkish companies to go public in Borsa Istanbul instead of foreign stock exchanges. If this is the case, these legislative changes will contribute to the growth of Turkish IPOs in 2018 and the Turkish IPO market will not fall short of expectations.

Chapter 18

UNITED KINGDOM

Danny Tricot and Adam M Howard[1]

I INTRODUCTION

The London Stock Exchange (LSE) has a long history that is intertwined with the development of industry and finance within the United Kingdom. The commercial revolution of the seventeenth century and the resulting proliferation of joint-stock companies[2] led to the creation of 'the Stock Exchange Coffee-house' in 1773.[3] Nearly 250 years later, the LSE has become one of the largest stock exchanges in the world, comprising 2,038 companies with a market value of nearly £4.2 trillion.[4] It is also the most international, with companies from over 65 countries admitted to trading.[5] The LSE attracts companies from a diverse range of sectors, from investment and finance, to oil and gas, to retail.

Since 1999, the UK regulatory environment has been extensively shaped by the European Union's Financial Services Action Plan, a harmonisation movement with the aim of integrating financial services within the European Union. EU directives throughout the early twenty-first century imposed minimum regulatory requirements, resulting in a split of the Main Market of the LSE into the standard and premium segments. Standard listings comply with EU harmonised minimum standards, while premium listings comply with higher, UK-specific standards, designating the premium segment the 'gold standard' of LSE listings. In addition, the LSE has various smaller markets for specialist and emerging growth companies.

Applicants to the Main Market must apply first to the Financial Conduct Authority (FCA), acting through the UK Listing Authority (UKLA), for admission of securities to the Official List,[6] and secondly, to the LSE itself for admission of securities to trading. This two-part process is often collectively referred to as 'listing' or 'floating'. The FCA is the primary regulator in the UK, determining the criteria governing listing and publishing rules and regulations for listed companies.

As the LSE is a key international stock exchange, initial public offerings (IPO) activity in the UK is dictated by international as well as national economic and political factors. IPO

1 Danny Tricot is a partner and Adam M Howard is a senior associate at Skadden, Arps, Slate, Meagher & Flom (UK) LLP.
2 CF Smith, 'The Early History of the London Stock Exchange', *The American Economic Review*, Vol. 19, No. 2, 1929, pp. 206–216.
3 FW Hirst, *Stock Exchange: A Short Study of Investment and Speculation*, New York, H Holt and Co. Print, 1911, pp. 46–47.
4 As at 31 December 2017: London Stock Exchange: Companies and Securities. Available at: www.londonstockexchange.com/statistics/companies-and-issuers/companies-and-issuers.htm.
5 Ibid.
6 A list of securities maintained by the FCA under Part 6 of the Financial Services and Markets Act 2000.

activity in 2017 has recovered somewhat from a slowdown in 2016 caused by uncertainty surrounding the UK electorate's decision to leave the EU and the US presidential election result, although the continuing ambiguity surrounding the UK's objectives in its trade negotiations with the EU has resulted in volumes failing to recover to the levels seen in previous years.[7]

II GOVERNING RULES

i Main stock exchanges

The Main Market of the LSE is the UK's flagship market. A variety of instruments can be listed on the standard segment of the Main Market, including depositary receipts, debt securities and securitised derivatives, whereas the premium segment of the Main Market accepts only equity securities. The Main Market is designated a 'regulated market' by the Markets in Financial Instruments Directive,[8] placing it within the EU regulatory sphere and thereby requiring issuers to comply with EU law such as the Transparency Directive[9] and the Prospectus Directive (PD).[10] Securities are admitted to the Official List by the FCA. The requirements imposed on Main Market issuers, particularly in the premium segment, are more onerous compared to the LSE's smaller markets. However, this is counterbalanced by benefits such as greater liquidity, increased public profile (particularly due to published analyst research) and the ability to attract capital more easily due to the international community's confidence in the market.

For companies seeking a lighter regulatory regime, there are two key options. The first is AIM (formerly the Alternative Investment Market), a sub-market of the LSE designed for smaller, emerging companies without a trading history, looking to raise capital or be acquired by larger companies. Such companies include, among others, start-up companies in the technology sector and exploration companies in the oil and gas sector. It is exchange-regulated, meaning that it is the LSE that primarily oversees its activities, and shares admitted to trading are not eligible for admission to the Official List. As a result of lower admission requirements and less onerous continuing obligations, being admitted to AIM offers comparative cost and management time savings. The second option is the UK's newest market, the High Growth Segment (HGS), constituting a launch pad for the European Economic Area (EEA) – incorporated companies with long-term aspirations to join the premium segment of the Main Market but that are not yet capable of fulfilling its more onerous listing requirements. As with AIM, shares on the HGS are not eligible for admission to the Official List; however, the HGS is a regulated market.

The LSE also offers specialist markets, such as the Specialist Fund Segment, which is open to highly specialised investment funds looking to attract capital investment from experienced institutional investors and professionals.

7 EY, EY Global IPO Trends: Q4 2017,EYGM Limited 2017, p. 27. Available at: http://www.ey.com/Publication/vwLUAssets/ey-global-ipo-trends-q4-2017/$FILE/ey-global-ipo-trends-q4-2017.pdf.

8 Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

9 Directive 2004/109/EC of 15 December 2004 on harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

10 Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

The Financial Times Stock Exchange (FTSE) share indices act as an important instrument for gauging the worth of premium-listed companies. The FTSE 100 indeces the share price of the largest 100 companies by market capitalisation on the LSE; the FTSE 250 indeces the largest 250 companies. Inclusion in the FTSE indices has significant corollary benefits, including global media exposure and investment through tracker and benchmark funds.

In October 2017, following a consultation on the structure, efficiency and effectiveness of the UK market, in particular the division between standard and premium listings, the FCA released a feedback statement summarising responses received to its suggestion that standard listings are not sufficiently utilised or valued by issuers and investors, particularly those from overseas.[11] Concluding that further debate is needed to achieve consensus on any changes to standard listings, the FCA indicated that it may consult further in 2018 on raising the requirements for a standard listing in order to enhance the reputation of this listing segment.[12] In addition, following the close of a consultation in October 2017, a proposal to create a new premium listing category for sovereign controlled companies is expected to be published in 2018.[13] The FCA believes that this new category would result in a greater number of such companies achieving a premium listing and ensure that investors continue to benefit from the high standards required of premium listed companies, such as the requirement for a sponsor to be appointed.[14] Companies with listings in this category would benefit from important exemptions from the related party and controlling shareholder rules in relation to their controlling sovereign shareholder, and this listing category would also be the first premium listing category to which companies can seek to list their equity in the form of depositary receipts.[15]

ii Overview of listing requirements

Applicants to the Main Market must comply with the FCA's Listing Rules (LRs) for admission to the Official List and the LSE's own Admission and Disclosure Standards for admission of securities to trading.

First, applicants to the premium segment of the Main Market must have sufficient legal status. The applicant must be duly incorporated, validly established and operate in conformity with its constitution, and have shares that are freely transferable, fully paid, free from any liens or restrictions on the right of transfer, duly authorised by the applicant's constitution and that conform with the law of the applicant's place of incorporation.[16] The application must relate to the whole class of shares[17] and the shares must be eligible for electronic settlement.[18]

Second, and more commercially, the applicant must have a market value of at least £700,000[19] and 25 per cent of shares in public hands in one or more EEA states (the 'free-float'

11 FCA Feedback Statement to DP 17/2 Review of the Effectivness of Primary Markets: The UK Primary Markets Landscape, October 2017, p. 3. Available at: www.fca.org.uk/publication/feedback/fs17-03.pdf.

12 Ibid, p. 10.

13 FCA Consultation Paper. Proposal to create a new premium listing category for sovereign controlled companies (CP17/21), p. 4. Available at: www.fca.org.uk/publication/consultation/cp17-21.pdf.

14 Ibid, p. 3.

15 Ibid, p. 6.

16 LR2.2.1–2.2.4R.

17 LR2.2.9R(1).

18 LSE Admission and Disclosure Standards, 3 July 2016, Section 2, Part 1, paragraph 2.7.

19 LR2.2.8R(1).

requirement),[20] to ensure sufficient liquidity in the market. The 25 per cent threshold may be modified by the FCA in certain limited circumstances if it considers the market will operate properly with a lower free float, in view of the large number of shares of the same class and the extent of their distribution to the public.[21]

Third, in terms of financial information, the applicant must have published or filed historical financial information that covers at least 75 per cent of its business over the past three years, have a balance sheet date that is not more than six months before the date of the prospectus published in connection with the IPO, include the consolidated accounts for the applicant and all of its subsidiary undertakings, and be audited without modification.[22] The applicant must also satisfy the FCA that it and its subsidiary undertakings have sufficient working capital available for the next 12 months.[23] This is fulfilled by inclusion of an unqualified working capital statement in the prospectus, which is supported by a private working capital report prepared by the applicant's reporting accountant.[24]

Fourth, the applicant must produce and publish a prospectus,[25] the key legal document providing details of the applicant and its shares, in compliance with the FCA's Prospectus Rules (PRs) and the relevant EU legislation. The prospectus must be approved by the FCA or relevant competent authority of an applicant's home Member State (if not the UK).[26] The requirement to produce a prospectus is triggered when an application is made for transferable securities to be admitted to trading on a regulated market, or when an offer of transferable securities is made to the public in the EEA.[27] An offer to the public will not require the preparation of a prospectus where the offer is extended only to a limited number of investors or only to certain categories of sophisticated investors.[28] Nevertheless, in the context of an IPO, even if the offer is limited in this way, a prospectus would still be required as a result of the application to list on a regulated market.

A prospectus must contain all information necessary to enable investors to make an informed assessment of the assets, liabilities, financial position, profits, losses and prospects of the applicant and the rights attaching to the applicant's transferable securities.[29] The PRs set out prescriptive requirements as to format, structure and content, utilising 'building blocks' found in the PD and the Prospectus Regulation's annexes to specify the necessary inclusions for different types of applicant and security.[30] Key contents include a summary, risk factors, business overview, historical financial information and an operating and financial review (comprising a detailed analysis of changes in the financial condition and results of operations

20 LR6.14.1R. LR6.14.3R outlines when shares are not in public hands, for example, if held directly or indirectly by a director of the applicant, a person connected to a director, the trustees of any employees' share scheme or persons acting in concert who have any interest in 5 per cent or more the shares of the relevant class.

21 LR6.14.5G.

22 LR6.2.1R.

23 LR6.7.1R.

24 Along with the sponsor's declaration to the FCA.

25 PD Article 3(1).

26 LR2.2.10R(2) and PR3.1.7.

27 Section 85(1)-(2) FSMA.

28 Section 86(1) FSMA.

29 Section 87A(2) FSMA and PR3.1.2AR.

30 PR2.3.1 and PR Appendix 3, Ch II PD, Articles 3–23 and Annexes Prospectus Regulation.

of the applicant). These requirements will be extensively reformed in July 2019 by the new EU Prospectus Regulation, with new 'building blocks' and amendments to the structure of the summary and risk factors among the changes.[31]

Lastly, the production of a prospectus triggers an obligation to appoint a sponsor.[32] A sponsor must assure the FCA that the applicant has met its LR obligations, as well as provide guidance to the applicant on the listing process and serve as the main contact point between the applicant and the FCA.[33]

Applicants to the standard segment of the LSE must comply with many of the same requirements. Key differences in the listing process include there being no obligation to appoint a sponsor[34] and flexibility to provide shorter audited historical financial information if the applicant has not been in existence for three years.[35]

AIM-quoted companies must comply with a discrete set of AIM rules, an important component of which is the requirement to appoint a nominated adviser (Nomad) who assesses the suitability of the company for admission,[36] alleviating the need to lay down prescriptive requirements regarding free float or market capitalisation. An AIM admission document must be submitted to the LSE.[37] Certain sections of the PRs are incorporated into the AIM Rules and are thereby applicable to the admission document, determining its contents.[38] However, unlike prospectuses, the FCA does not approve admission documents.

The separation of the LRs and AIM Rules means that there is no fast track to moving from AIM to the Main Market; AIM companies must follow the same application process as a new applicant with no existing listing. In contrast, the HGS rules overlap with those imposed on Main Market applicants, bolstering its role as a stepping stone to a Main Market listing.

The FCA acknowledges that some companies' operations, due to their specialist nature, are not compatible with the prescriptive requirements of the listing regime. Carve-outs, alternative and additional obligations are thereby provided for mineral, scientific research, property, start-up and shipping companies. For example, although mining companies applying for a premium listing are granted an exemption from the three-year historical financial information obligation if they have been operating for a shorter period,[39] they are expected to produce a mineral expert's report to be included in the prospectus.[40] Recommendations published by the European Securities and Markets Authority (ESMA),[41]

31 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

32 LR8.2.1R.

33 LR8.3.1-8.3.2R.

34 LR8 applies only to applicants for a premium listing.

35 PR Appendix 3.1.1 and PD Regulation Annex I, paragraph 20.1.

36 AIM Rule 1.

37 AIM Rule 5.

38 In particular, PR Appendix 3 / Prospectus Regulation Annex I, II and III.

39 LR6.10.1R.

40 ESMA update of the CESR recommendations: the consistent implementation of Commission Regulation (EC) No. 809/2004 implementing the Prospectus Directive, ESMA/2013/319, 20 March 2013, paragraph 133.

41 See Section II.iii, below.

an independent European supervisory body, outline the increased disclosure requirements imposed on specialist companies, as well as the mode of preparation and content of any expert reports.[42]

The technical aspects of the LRs are continually under review to ensure they remain appropriate and clear. For example, in January 2018, the FCA implemented clarifications to the LRs applicable to premium listings and introduced new rules exempting specialist property companies from the requirement to show three years of historical revenue generation, instead allowing these companies to demonstrate their track record through the performance of their underlying assets.[43]

iii Overview of law and regulations

The law and regulations applicable to UK IPOs comprise a patchwork of domestic statutes, EU legislation, FCA-issued rules (set out in the FCA Handbook) and guidelines published by institutional bodies and investor groups. The Financial Services and Markets Act 2000 (FSMA) delivers the legal architecture that enables the FCA and Prudential Regulation Authority to collectively regulate the financial services industry, including the IPO market.[44] The FCA's role is to ensure markets operate effectively so that consumers are treated fairly.[45] When overseeing the admission and listing process, the FCA acts through the UKLA, the UK's securities regulator.

Specifically from an IPO perspective, the FSMA lays down when a prospectus is required, its high-level disclosure requirements and the civil liability and applicable sanctions for those responsible for the prospectus.[46] In addition, the FSMA regulates financial promotions,[47] which are generally prohibited in the UK unless they are made or approved by a person who is authorised or otherwise exempt.

The FCA Handbook is often a practitioner's first port of call, as it sets out the day-to-day mechanics of listing and trading on the LSE. The LRs outline the requirements for listing shares and the continuing obligations imposed on issuers post-admission. The Disclosure Guidance and Transparency Rules (DTRs) relate to dissemination and control of information by issuers, in particular the notification of transactions in the issuer's listed securities by persons discharging managerial responsibilities (PDMRs) and major shareholders. The PRs outline when a prospectus is required and the applicable content requirements, as well as imposing broader restrictions on advertisements relating to an offer or an admission to trading. The PRs implement the EU Prospectus Directive and incorporate parts of the EU Prospectus Regulation.[48]

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42 ESMA update of the CESR recommendations: the consistent implementation of Commission Regulation (EC) No. 809/2004 implementing the Prospectus Directive, ESMA/2013/319, 20 March 2013, paragraphs 128–145.

43 Listing Rules Sourcebook and Fees Manual (Redesignation and Miscellaneous Amendments) Instrument 2017. Available at www.handbook.fca.org.uk/instrument/2017/FCA_2017_62.pdf.
UKLA Technical Note: Property companies, Ref: UKLA/TN/426.1 January 2018, p. 1. Available at: www.fca.org.uk/publication/ukla/tn-426-1.pdf.

44 FSMA Explanatory Notes, Summary. Available at: www.legislation.gov.uk/ukpga/2000/8/notes/division/2.

45 FCA, About the FCA, 22 August 2017. Available at: www.fca.org.uk/about/the-fca.

46 Sections 87A and 90 FSMA.

47 Defined as an invitation or inducement to engage in an investment activity by Section 21(1) FSMA.

48 Commission Regulation 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

The EU Market Abuse Regulation (MAR) is the most important development in recent years, coming into effect on 3 July 2016 and replacing the Market Abuse Directive.[49] The scope of the EU's market abuse regime has been expanded by the new regulation, which introduced more prescriptive requirements to keep insider lists, new rules on permissible actions when carrying out market sounding (gauging prospective investor interest) and extended disclosure requirements applicable to PDMRs. The MAR also outlines offences of insider dealing, market manipulation and the unlawful disclosure of inside information, which go hand in hand with the criminal misleading statement and fraud offences under statutes such as the Financial Services Act 2012 and the Fraud Act 2006.[50]

ESMA issues recommendations and Q&A guidelines that supplement EU legislation. The FCA, acting through the UKLA, also issues non-legally binding technical notes to assist issuers in interpreting the FCA Handbook.

Other legal regulations include the AIM Rules for Companies, issued by the LSE to regulate AIM, and the UK Corporate Governance Code, issued by the Financial Reporting Council, which lays down principles of good governance and best practice. Foreign issuers should also consider additional local law requirements and any requisite approvals.

III THE OFFERING PROCESS

i General overview of the IPO process

The UK IPO process generally takes 16 to 20 weeks, although this can vary considerably depending on an applicant's readiness for listing, the size and complexity of the offering and prevailing market and regulatory conditions. The pre-IPO planning stage involves assessing the applicant's business, its growth trajectory and its suitability for an IPO, along with any internal reorganisation necessary to ensure it can function effectively as a listed company.

At the outset, advisers are appointed, including lawyers, reporting accountants, financial advisers and financial PR agents as well as investment banks to undertake the roles of sponsor (in the case of a premium listing), underwriter and bookrunner. For a premium listing, the sponsor, in addition to ensuring compliance with the LRs and acting as a contact point for the UKLA,[51] will often take on the role of global coordinator, project managing the IPO and advising the applicant on the structure and timetable of the offering. The sponsor must be chosen from a list of those approved by the FCA. It is worth noting that the roles of the investment banks are often duplicated and overlap, resulting in, for example, multiple global coordinators, sponsors and underwriters. In early 2018, the FCA published new rules prohibiting clauses in investment bank engagement letters that oblige clients to use other services, such as M&A advisory services, provided by the bank for a set period of time

49 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/ EC

50 Sections 89–92 (Part 7) Financial Services Act 2012 and Sections 1–3 Fraud Act 2006.

51 For further details, see Section II.ii, above.

following their IPO.[52] This change is designed to protect smaller clients from feeling pressure to reward their corporate broker with future primary market work even though they would be better off using an alternative supplier.[53]

At the kick-off meeting, all involved parties are familiarised with the proposed transaction and timetable. Management and business due diligence, financial modelling, valuation and capital structure discussions, drafting of the prospectus and preparation of financial information will all be commenced.

The due diligence process is critical in order to ensure that the information contained in the prospectus is accurate and complete in all material respects. A first draft of the prospectus will be submitted confidentially to the UKLA for review once the draft is substantially complete.[54] The UKLA then has 10 working days to respond (five working days for each subsequent submission). The UKLA's response and comments are also confidential. Review by the UKLA is a key determinant of the IPO timetable, as it can take approximately eight weeks. In conjunction with drafting the prospectus, the lawyers will also verify it by substantiating or fact-checking all of the material statements contained therein.

Concurrently, the accountants will carry out financial due diligence in order to produce supporting reports. The long-form report is a detailed confidential report analysing the issuer's entire business, while the working capital report focuses on the sufficiency of the issuer's working capital for the next 12 to 18 months. Both are used for private comfort to reassure directors and the investment banks as to the viability of the issuer post IPO. The long-form report facilitates analysis of the issuer's historical financial information in the prospectus, while the working capital report forms the basis of the working capital statement. Finally, the accountants prepare a Financial Position and Prospects Procedures report (FPPP), which determines whether the reporting procedures the issuer has in place enable the directors to make appropriate judgements on the financial position and prospects of the issuer going forward. This FPPP report also helps the issuer to confirm that it will be able to satisfy the Listing Principles within Chapter 7 of the LRs, one of which requires issuers to have adequate procedures, systems and controls in place before listing.[55]

Once all material due diligence has been completed, there will be a presentation to research analysts employed by the bookrunner, enabling them to prepare research reports. When the issuer is ready to publicly announce its intention to float, the analysts will publish their research reports. This commences a two-week 'investor education' phase, during which time the market is briefed about the issuer and the upcoming IPO by the analysts and their sales colleagues. Institutional investors' reaction to the offer will be fed back to the issuer and used to determine the price range within which the offer can be marketed. This stage of the process will be reformed in July 2018 by new FCA rules on the availability of information in the IPO marketing process.[56]

The issuer itself will subsequently undertake a marketing campaign, labelled a 'roadshow', typically consisting of two weeks of intensive meetings with prospective

52 FCA Policy Statement: Investment and corporate banking: prohibition of restrictive contractual clauses (PS 17/13), June 2017, p. 3. Available at: www.fca.org.uk/publication/policy/ps17-13.pdf.

53 Ibid, p. 6.

54 UKLA Procedural Note: Review and approval of documents, Ref: UKLA/PN/903.3, March 2017, p. 3. Available at: www.fca.org.uk/publication/ukla/pn-903-3.pdf.

55 LR7.2.1R.

56 As explained in Section III.ii, above.

institutional investors. Senior management of the issuer will present the investment case and answer questions about the issuer and the IPO. A 'pathfinder prospectus', a near-final version of the prospectus omitting the final price, is used as a key marketing document. While the roadshows are ongoing, the bookrunner will gauge market appetite for the listing by 'building a book' of revocable bids from investors, which is used to determine the final price and size of the offer.

Shares are allocated according to the orders investors place with the bookrunner. The market risk in the period between pricing and payment for the shares (typically three business days) is partially offset by entry into an underwriting agreement. An underwriter or syndicate of underwriters (usually the same investment bank or banks as the bookrunners) undertakes to subscribe for or purchase any shares not taken up or paid for by investors. The underwriting agreement will be conditional on admission of the securities to the Official List and to trading on the LSE.

Once the shares have been allocated, 'grey market' or 'when issued' trading can occur. Shares are traded prior to, but conditional on, admission to the Official List. If admission does not occur, the trades must be unwound.

The final steps in the IPO process are pricing and formal approval of the prospectus by the UKLA, allowing the prospectus to be published. At least 48 hours before the intended admission of the shares to trading, a formal application is submitted to the UKLA and the LSE.[57] The UKLA and the LSE will publicly announce approval of the application, at which point shares are credited to CREST accounts (the UK's electronic securities depositary and settlement system), unconditional dealings commence and the IPO is complete.

ii Pitfalls and considerations

A key area of contention in the UK market is the availability of information throughout the IPO process to potential investors, prompting the FCA to publish a policy statement in October 2017.[58] Under the current process, after the publication of research reports by analysts, a 'blackout' period is imposed for approximately two weeks, during which time no further new information on the issuer is given to investors. The blackout period aims to separate publication of the research reports and the pathfinder prospectus, thereby reducing the risk of an investor claiming that his or her investment decision was based on the research report rather than on the issuer's prospectus. However, the concern is that, as the process is currently configured, investors do not gain access to information in the issuer's prospectus until late in the IPO timeline, meaning that they have insufficient time to undertake a thorough analysis. Moreover, all published analyst research is connected, in the sense that it is carried out by analysts who work at the same investment banks as those advising the issuer on the IPO itself, raising the risk of bias in their research with no opportunity for corroboration through unconnected research. In order to restore the primacy of the prospectus, the FCA has published a series of new rules to come into effect in July 2018.[59] The aim of the new regime is to open analyst presentations to unconnected analysts, to reduce the potential for bias in analyst research and to ensure that an approved prospectus is published before any connected analyst research is released. To achieve this, the new rules require that any issuer

57 LR3.4.4R and LSE Admission and Disclosure Standards, 8 May 2017, Schedule 1, Part B, paragraph 2.1.

58 FCA Policy Statement: Reforming the availability of the information in the UK equity IPO process (PS17/23), October 2017. Available at: www.fca.org.uk/publication/policy/ps17-23.pdf.

59 Ibid, p. 6.

considering an IPO on the Main Market ensures that a prospectus or registration document is published and unconnected analysts have access to the issuer's management before any connected research is released.[60] There will also be enhanced guidance in force clarifying that research analysts should not be involved in interactions with an issuer's management or corporate finance advisers until the analyst's firm has accepted a mandate to carry out underwriting or placing services for the issuer and the firm's position in any syndicate is contractually agreed.[61]

A common practice on IPOs is for the issuer to engage early on in the IPO execution process with a select and limited number of investors on a confidential basis with a view to establishing whether there is likely to be sufficient investor appetite for the IPO. This is commonly known as 'pilot-fishing'. Regardless of the fact that the official IPO process has not yet begun, issuers must be careful not to contravene restrictions on financial promotions[62] and to ensure that all information communicated is accurate and not misleading and consistent with what will be disclosed in the prospectus in due course. Moreover, throughout the process, issuers should be aware of far-reaching US securities laws,[63] which can require offers to be registered with the Securities and Exchange Commission despite the fact that no US public offering is contemplated. In order to be exempt, issuers should ensure that there are no 'directed selling efforts' in the United States that could reasonably be expected to have the effect of conditioning the market for the securities in the US.[64]

In general, issuers should be cautious about issuing profit forecasts prior to and throughout the IPO process. Generally, issuers disclose historical financial information, rather than profit forecasts, to potential investors to allow them to make an informed assessment of the issuer. Issuers are able to ensure such information is complete, accurate and not misleading. The projected future performance of the issuer, on the other hand, is much more difficult to verify and its inclusion would constitute a significant risk for the issuer, considering the wide scope of legal responsibility for a prospectus (including all of the issuers' directors at the time of publication)[65] and the potentially serious civil and criminal liabilities that arise if incorrect information is included in it. If an issuer has publicly made a profit forecast or estimate that is still outstanding at the time of publication of the prospectus, it is required to be included in the prospectus along with a statement explaining whether or not it is still considered valid.[66] Any forecast included in the prospectus must comply with prescriptive requirements as to its compilation, including a statement of the assumptions used, and must be reported on by the issuer's accountants.[67] ESMA is currently consulting on removing the requirement for an accountant's report covering outstanding profit forecasts due to concerns around the usefulness and additional costs of preparing the reports.[68] ESMA

60 Ibid, p. 3.
61 Ibid, p. 25.
62 Under Section 21 FSMA.
63 US Securities Act 1933.
64 Under Regulation S – Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933.
65 PR5.5.3R.
66 PR Appendix 3, Annex 1, paragraph 13.4.
67 PR Appendix 3, Annex 1, paragraphs 13.1–13.2.
68 ESMA Consultation Paper: Draft technical advice on the format and content of the prospectus, pp. 35–37. Available at: www.esma.europa.eu/sites/default/files/library/esma31-62-532_cp_format_and_content_of_the_prospectus.pdf.

has also recognised that under the current regime, some issuers with published long-term forecasts have been prevented from issuing a prospectus as accountancy firms are generally unable to report on long-term forecasts.[69]

Between the time of publication of the prospectus and completion of the IPO, it is important to note that if a significant new factor, material mistake or inaccuracy relating to the information contained in the prospectus arises, there is an obligation to produce a supplementary prospectus.[70] 'Significant' means significant for the purposes of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and the rights attaching to the shares to be issued.[71] Examples of triggering events include discovery of a material inaccuracy in the financial information included in the prospectus or the occurrence of an event that will materially impair the issuer's future prospects (such as the loss of a key customer or destruction of a major plant or facility).

There are also a number of specific requirements under the listing regime that are challenging for issuers with certain characteristics. First, an applicant to the premium segment of the Main Market must demonstrate that it will be carrying on an independent business as its main activity.[72] For issuers with a controlling shareholder (someone who holds 30 per cent or more of the voting power either individually or in concert with other persons),[73] supplementary obligations are imposed to ensure that independence is achieved. The issuer must enter into a relationship agreement with its controlling shareholder, including specific terms to ensure that any transactions with its controlling shareholder are conducted at arm's length.[74] The sanction for non-compliance with the relationship agreement is that all transactions with the controlling shareholder will be subject to prior independent shareholders' approval, regardless of their size.[75] An issuer with a controlling shareholder must also make provision in its constitution for the election and re-election of independent directors to be approved by separate resolutions of both the shareholders as a whole and the independent shareholders.[76]

Second, issuers that have grown by acquisition may not be able to comply with the requirement to produce historical financial information that represents at least 75 per cent of the issuer's business over the past three years.[77] The LRs and the PRs anticipate this and allow issuers with 'complex financial histories' to produce separate historical financial information relating to entities that have been acquired (or entities that will be acquired shortly), in addition to historical financial information relating only to the issuer.[78] The starting point is that any additional information should be in the same form and prepared on the same basis as the issuer's historical financial information. However, the FCA has discretion to modify these requirements, in view of factors such as the nature and range of the information already in the prospectus and the economic substance of any relevant acquisitions or disposals.[79] *Pro forma*

69 Ibid.
70 Section 87G FSMA.
71 Sections 87G(4) and 87A(2) FSMA.
72 LR6.4.1R.
73 LR Appendix 1.
74 LR6.1.4BR and LR6.1.4DR.
75 LR11.1.1AR–11.1.ER.
76 LR6.9.1R(2) and LR9.2.2ER.
77 LR6.2.1R.
78 LR6.2.3, PR2.3.1, which incorporates Article 4A of the Prospectus Regulation and Article 5(1) PD.
79 PR2.3.1, which incorporates Article 4A Prospectus Regulation.

financial information may also be required to illustrate the impact of recent transactions on the issuer's financial position.[80] The purpose of these rules is to ensure that investors are presented with financial information that is sufficiently representative of the full group being listed and on which they can base their investment decision.[81]

A final point to note is the restriction, known as a 'lock-up', that the underwriters will impose on the issuer's major shareholders and members of senior management, preventing them from selling any shares they may hold in the issuer for a period of six to 12 months following completion of the IPO. The lock-ups are intended to assure new investors that the issuer's major shareholders and members of senior management are confident of the business and have no intention of divesting their interest in the business in the short term following the IPO.

iii Considerations for foreign issuers

The size and prestige of the LSE attracts companies from all around the world. Dual listings are possible; however, compliance with foreign listing requirements will only result in a dispensation from certain UK listing and disclosure requirements if the European Commission has decided that the relevant foreign country imposes equivalent requirements on companies listed there, meaning the issuer may have to comply with two regulatory regimes.

While UK incorporated issuers that are listed solely in the UK will be considered for the FTSE UK indices, the eligibility of non-UK incorporated companies, and UK incorporated issuers that are also listed in another jurisdiction, will be determined by factors such as the location of its headquarters and company meetings, the composition of its shareholder base and the perception of investors.[82] Further, non-UK incorporated issuers must have a free float of not less than 50 per cent and must publicly acknowledge adherence to the principles of the Corporate Governance Code (as far as is practicable) to be included in the FTSE indices.[83]

To be eligible for an LSE Main Market listing, shares must be eligible for CREST, the UK's electronic settlement system.[84] Only shares issued by issuers incorporated in the UK, Ireland, Jersey, Guernsey or Isle of Man can be traded through CREST. Issuers incorporated in other jurisdictions will instead need to arrange for depository interests in respect of their shares to be issued, which can in turn be settled in the CREST system.

The procedure for the approval of prospectuses differs depending on the issuer's country of incorporation. Within the EEA, the Prospectus Directive provides that the regulator in the issuer's Member State of incorporation should approve the prospectus,[85] which is then passported into the UK. For non-EEA incorporated issuers, a prospectus produced in accordance with the laws of the non-EEA country can be submitted to the FCA once certain additions are made to ensure the incorporated disclosures are equivalent to those

80 Prospectus Regulation Annex I, paragraph 20.2 and Annex II.

81 LR6.3.2G.

82 FTSE UK Index Series Ground Rules v13.1, November 2017, paragraph 5. Available at: www.ftse.com/products/downloads/FTSE_UK_Index_Series.pdf.

83 Ibid, paragraph 5.1.3.

84 LSE Admission and Disclosure Standards 8 May 2017, Section 2, Part 1, paragraph 2.7.

85 PD Article 13.

required under the PRs and FSMA.[86] ESMA assesses the relevant regulatory framework in certain non-EEA countries and issues guidelines on the additional information that must be included in the prospectus to satisfy EEA standards.[87]

There are two key further points to note in relation to foreign issuers and the listing regime. First, historical financial information included in the prospectus must be prepared in accordance with EU-endorsed International Financial Reporting Standards or with the issuer's national accounting standards as long as these have been accepted as equivalent.[88] The Generally Accepted Accounting Principles of the US, Japan, China, Canada and South Korea have so far been granted equivalence status.[89] Second, the free-float requirement demands 25 per cent of shares be held in public hands in one or more EEA states at the time of admission.[90] The FCA may consider shares of the same class held outside the EEA to be in public hands provided that the issuer's shares are listed in the country in which they are held.[91]

Finally, where the LRs refer to UK legislation, the foreign issuer must comply with it so far as information available to it enables it to do so and compliance is not contrary to the law in its country of incorporation.[92]

IV POST-IPO REQUIREMENTS

The obligations imposed on a Main Market-listed issuer post IPO can be broadly broken down into four categories: reporting, disclosure, corporate governance and transaction restrictions. In addition, issuers must adhere to the spirit of the listing and premium listing principles, if applicable.[93]

First, the issuer must publish annual accounts no later than four months after the end of the financial year, and half-yearly financial reports no later than three months after the end of the financial period.[94] Under the DTRs and MAR, an issuer must also draw up and maintain insider lists, to be provided to the FCA on request.[95]

Second, the issuer must comply with numerous disclosure obligations. The DTRs incorporate the obligation imposed by MAR to inform the public as soon as possible of 'inside information' that directly concerns the issuer.[96] 'Inside information' is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and that, if it were made public,

86 See ESMA Opinion: Framework for the assessment of third country prospectuses under Article 20 of the Prospectus Directive, ESMA/2013/317, 20 March 2013.

87 See, for example, ESMA statement on Israeli laws and regulations on prospectuses, ESMA/2011/37, 23 March 2011. Available at: www.esma.europa.eu/sites/default/files/library/2015/11/11_37.pdf.

88 LR6.2.4R(1) which refers to paragraph 20.1, Annex I of Prospectus Regulation, which refers to the procedure set down in Article 3 Regulation (EC) No 1606/2002 on the application of international accounting standards.

89 UKLA Procedural Note: Public offer prospectus – drafting and approval, Ref: UKLA/PN/094.3, March 2017, p. 4. Available at: www.fca.org.uk/publication/ukla/pn-904-3.pdf.

90 LR6.14.1R-6.14.3R.

91 LR6.14.2R(1).

92 LR1.4.2R.

93 Chapter 7 LR.

94 DTR4.1.3R and 4.2.2R.

95 DTR2.8 and Article 18 MAR.

96 Article 17(1) MAR.

would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[97] Further, under the DTRs a shareholder must notify the issuer and the FCA of the percentage of voting rights he or she holds if, as a result of an acquisition or disposal of shares, the percentage of those voting rights reaches, exceeds or falls below 3 per cent and each 1 per cent threshold above 3 per cent up to 100 per cent.[98] The issuer must then give details of such notification to the market by the end of the next trading day. These thresholds are modified to 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent and 75 per cent in the case of non-UK incorporated issuers.[99]

Third, premium-listed issuers will be expected to adhere to the principles of good governance and best practice outlined in the Corporate Governance Code. The Corporate Governance Code applies on a 'comply or explain' basis,[100] meaning issuers have to state in their annual financial reports how they have applied the Corporate Governance Code or explain why they have not complied with its provisions. In practice, the market expects compliance in full by premium-listed issuers. Standard-listed issuers, although technically only required to respect the EU minimum standards incorporated in the DTRs,[101] may also come under pressure from shareholders to follow the best practice norms outlined in the Corporate Governance Code.

The Corporate Governance Code outlines two key requirements as to the board of directors: a majority (including the chairman) must be independent non-executive directors and there must be a clear division of responsibility between the chairman and chief executive officer.[102] Moreover, it mandates the establishment of an audit committee (of at least three independent non-executive directors excluding the chairman)[103] and nomination committee (the majority of which should be independent non-executive directors),[104] and recommends the establishment of a remuneration committee (of at least three independent non-executive directors).[105] Issuers should also take into account non-legal guidelines by bodies that represent institutional investors (e.g., the Pensions and Lifetime Savings Association).

Fourth, there are a number of restrictions on the transactions that an issuer and its management can carry out. PDMRs[106] are restricted by MAR from carrying out transactions relating to shares or debt instruments of the issuer during a 'closed period'.[107] A closed period is the period of 30 calendar days before the announcement of an interim financial report or a year-end report, which the issuer is obliged to make public according to national law or the

97 Article 7 MAR.
98 DTR5.1.2R.
99 Ibid.
100 LR9.8.6R(6) and 9.8.7R.
101 The DTRs incorporate the Statutory Audit Directive (Directive 2014/56/EU on statutory audits of annual accounts and consolidated accounts) and the Company Reporting Directive (Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups).
102 Corporate Governance Code A.2.
103 Corporate Governance Code C.3.1.
104 Corporate Governance Code B.2.1.
105 Corporate Governance Code D.2.1.
106 Defined as a director or senior executive who has regular access to inside information relating to the company and the power to take managerial decisions affecting the company's future developments and business prospects.
107 Article 19 MAR.

rules of the trading venue where the shares are admitted to trading.[108] This prevents PDMRs from trading on the basis of inside information not yet available to the market. Moreover, transactions conducted by a PDMR or a person closely associated[109] to them relating to shares, debt instruments or derivatives of the issuer must be notified to the issuer and FCA promptly, and no later than three business days after the transaction.[110] The issuer must then notify the market within the same time frame.[111] Although MAR sets down a *de minimis* threshold (€5,000 or more in a calendar year)[112] that must be crossed before the notification obligation is triggered; in practice, most UK-listed issuers require PDMRs to notify all transactions regardless of size.

If an issuer wishes to raise more capital through further equity issues, it must have regard to pre-emption rights contained in the LRs (for premium-listed companies), and the Companies Act 2006 (for all UK incorporated companies).[113] Pre-emption rights require that any new shares proposed to be issued are first offered to existing shareholders to subscribe or purchase in proportion to their existing holdings. These rights can be disapplied by a shareholders' special resolution (involving approval by 75 per cent of shareholders voting at a general meeting).[114] A Statement of Principles[115] published by the Pre-Emption Group (a body set up to provide issuers and investors with guidance in this area) outlines the acceptable size and duration of disapplication and, although not technically binding, is, in practice, followed by UK-listed issuers.

There are a number of additional restrictions imposed post IPO on transactions carried out by premium-listed issuers. When an issuer enters into a transaction outside the ordinary course of business, four percentage ratios or 'class tests' must be applied to determine the size of the transaction compared to the issuer (based on assets, profits, consideration and capital).[116] Class 1 transactions (i.e., where at least one percentage ratio equals 25 per cent or more)[117] and reverse takeovers (i.e., where at least one percentage ratio equals 100 per cent or more, or which in substance results in a fundamental change in the business or board or voting control of the issuer)[118] require an explanatory circular to be sent to shareholders and prior shareholder approval to be obtained.[119] Class 2 transactions (i.e., where at least

108 Article 11 MAR.

109 Defined in Article 3(1)(26) MAR to include the PDMR's spouse, dependent child or legal person, trust or partnership directly or directly controlled by such a person.

110 Article 19(2) MAR.

111 Article 19(3) MAR.

112 Article 19(8) MAR.

113 Section 561 Companies Act 2006 and LR9.3.11R.

114 Sections 570 and 571 CA 2006. In the case of a foreign company, the disapplication must be authorised by shareholders in an equivalent manner in accordance with the law of its country of incorporation under LR9.3.12R(4).

115 Pre-Emption Group: Disapplying Pre-Emption Rights: A Statement of Principles, 2015. Available at: www.pre-emptiongroup.org.uk/getmedia/655a6ec5-fecc-47e4-80a0-7aea04433421/Revised-PEG-Statement-of-Principles-2015.pdf.aspx.

116 The metrics for calculating such ratios are: gross assets of the target divided by gross assets of the issuer; profits attributable to the transaction divided by profits of the issuer; consideration divided by aggregate market value of all the ordinary shares of the issuer; and gross capital of the target divided by gross capital of the issuer.

117 LR10.2.2R(1).

118 LR5.6.4R.

119 LR10.5.1R and 5.6.3R.

one percentage ratio equals 5 per cent or more)[120] require public announcement as soon as possible after entering into the binding arrangement.[121] Reverse takeovers by special purpose vehicles (or shell companies) may trigger suspension of trading in the issuer's securities, unless there is adequate public information in the market about the proposed transaction,[122] and reverse takeovers by any issuer will normally lead to cancellation of the issuer's listing.[123] In effect, the enlarged issuer will need to reapply for admission, satisfying the initial eligibility requirements as a new applicant. In early 2018, the FCA implemented new rules seeking to enhance the effectiveness of the restrictions on transactions by premium-listed issuers, including an exception allowing issuers to ignore an anomalous profits test percentage ratio of 25 per cent or more if all other percentage ratios are less than 5 per cent.[124]

An issuer wishing to enter into a transaction with a related party (such as a substantial shareholder or a director) that crosses a certain percentage threshold (5 per cent, calculated on the basis of the class tests outlined above), must publicly announce the transaction, send an explanatory shareholder circular and obtain the approval of its shareholders.[125] Premium-listed issuers must also appoint a sponsor if they undertake certain specified transactions under the LRs,[126] especially if interactions with the FCA are required. Finally, premium-listed issuers must obtain shareholder approval to transfer between listing categories and cancel their listing.[127]

Less onerous obligations apply to AIM-quoted companies. For example, substantial and related party transactions meeting certain thresholds prompt a simple disclosure obligation rather than shareholder approval,[128] and the deadlines for publishing accounts are extended.[129] However, a Nomad, initially appointed for the AIM admission process, must be retained at all times to assist AIM companies in meeting their continuing obligations.[130]

V OUTLOOK AND CONCLUSION

The LSE is a cornerstone of London's role as a leading international financial hub, with a trusted regulatory framework that is respected around the world. A key area of reform in the coming years is the new Prospectus Regulation, the majority of which enters into force in July 2019.[131] The Regulation introduces a number of notable changes, including the simplification of the disclosure regime for secondary issuances and the introduction of a new EU Growth prospectus to encourage small and growing companies to admit their securities to trading.[132] Brexit may alter the LSE's position within the European Capital Markets, with uncertainty

120 LR10.2.2R(2).
121 LR10.4.1R.
122 LR5.6.8G.
123 LR5.6.19G.
124 LR 10 Annex 1.12R.
125 LR11.1.7R.
126 LR8.2.1R.
127 LR5.2.5R and 5.4A.4R.
128 AIM Rules 12–13.
129 AIM Rules 18–19.
130 AIM Rule 1.
131 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
132 Articles 14 and 15 New Prospectus Regulation.

surrounding the status of the UK's right to passport its financial services into the EU as the inevitably protracted process of negotiating the UK's exit begins. Given the fusion of EU and UK legislation that currently regulates the IPO process, absolute divergence is unlikely, leaving the door open for the EU principle of 'equivalence' to take centre stage in granting the UK market access. In 2017, the FCA showed a strong focus on the accessibility of UK markets for overseas issuers, publishing a discussion paper regarding the relevance of the division between standard and premium listings and querying whether a new international listing segment should be introduced.[133] However, plans for this new listing segment are currently on hold following the feedback received by the FCA, which highlighted how holding company structures could be used to circumvent any differing standards.[134] Other developments are also currently under consideration, such as the proposal to create a new premium listing category for sovereign controlled companies.[135] These frequent consultations, alongside the more frequent technical changes, highlight the FCA's willingness to consider reforming the market framework to ensure the LSE maintains its global reputation.

133 FCA Discussion Paper. Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape (DP17/2). Available at: www.fca.org.uk/publication/discussion/dp17-02.pdf.

134 FCA Feedback Statement to DP17/2. Review of the Effectiveness of Primary Markets: the UK Primary Markets Landscape. (FS17/3), p. 8. Available at: www.fca.org.uk/publication/feedback/fs17-03.pdf.

135 FCA Consultation Paper. Proposal to create a new premium listing category for sovereign controlled companies (CP17/21). Available at: www.fca.org.uk/publication/consultation/cp17-21.pdf.

Chapter 19

UNITED STATES

David J Goldschmidt[1]

I INTRODUCTION

A long-time leader in the initial public offering (IPO) arena, the United States is home to the two largest stock exchanges by market capitalisation in the world, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq). Since the establishment of the first US exchange, the US offering process and regulatory landscape have changed dramatically, with the modern US IPO market regulated by both federal statutes and agencies, as well as the rules of the exchange on which a company is listed. Foremost among the governing statutes are the Securities Act of 1933, as amended (the Securities Act), which regulates offerings, and the Securities Exchange Act of 1934, as amended (the Exchange Act), which provides for market regulation once a company is public.

More recent regulation that has contributed to the evolution of the IPO market has come through the Sarbanes–Oxley Act of 2002 (SOX), the Jumpstart Our Business Startups Act of 2012 (the JOBS Act) and the Fixing America's Surface Transportation Act in 2015 (the FAST Act), which, despite its name, made additional changes to the IPO landscape. Several additional legislative changes were proposed in 2017 through the Financial CHOICE Act of 2017 and the Encouraging Public Offerings Act of 2017; however, it is unclear what form these measures will take if they are passed. The duty of administering, amending and interpreting the federal securities laws is the responsibility of the US Securities and Exchange Commission (SEC), the agency that, among other things, reviews IPO registration statements and ensures regulatory compliance both during the IPO process and once companies are public.

Not dissimilar to other markets around the globe, the US IPO market has experienced significant volatility over the past decade. However, the 2017 market showed significant improvement over 2016, with 166 deals compared to 103 in 2016 (in contrast to 152 IPOs in 2015, 277 in 2014, 217 in 2013 and 138 in 2012).[2] Notably, 2017 saw the continued resurgence of the special purpose acquisition company (SPAC), with 29 SPAC IPOs in 2017 compared to 14 in 2016.[3] There was also a significant return of Chinese issuers to the US market. Healthcare and financial services sectors led the number of 2017 IPO issuances, followed by technology issuers.

An important factor affecting the current IPO market flow is the increased availability of private capital. This has allowed issuers to remain private longer by enabling them to access capital outside of the public market. Additionally, other strategies can provide companies (and

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their venture capital and private equity backers) with alternative exit avenues, such as being acquired by a publicly traded SPAC. Notwithstanding this, there is significant optimism about 2018, with many 'unicorns' and other companies across many sectors in the pipeline.

The decision to 'go public' requires careful consideration by a company and its management. Issuers must be mindful that the US public company disclosure system may result in reduced confidentiality for the company and its management. Moreover, additional liability arises for the issuer, its directors and its management from being public in the US. Further, the expense of complying with public company reporting obligations should not be minimised. Despite these factors, going public in the US is an exciting (and often long-anticipated) event for any company. The resulting liquidity for existing investors, as well as the visibility and prestige that comes from listing on US exchanges, is very attractive for many domestic and foreign companies.

Unless there is a compelling business reason, domestic issuers generally list in the United States rather than pursuing a primary (or dual) listing in another country. Foreign issuers, called foreign private issuers (FPIs),[4] often opt to list solely in the United States as well. Some foreign companies already listed on an exchange in their home country also choose to list in the United States. For these companies, a US listing can provide several benefits, including increased visibility (which results in an expanded market for new products and services), an ability to use the US listing as currency for acquisitions and the creation of a more diverse investor base (which increases liquidity in the company's shares).

II GOVERNING RULES

i Main stock exchanges

The primary stock exchanges in the United States are the NYSE and Nasdaq. While each operate with their own independent standards for initial listing and continued listing compliance, many of these requirements are substantially similar across the two exchanges.

The creation of the NYSE can be traced to the signing of the Buttonwood Agreement in May 1792.[5] Also known as the 'Big Board', the NYSE is the largest stock exchange by market capitalisation in the world. Nasdaq, on the other hand, is a significantly younger exchange, having commenced operations in 1971. Nasdaq is known as the world's first electronic stock market. Unlike the NYSE, whose historic trading floor and official 'ringing of the bell' each day for opening and closing of trading hours is legendary, Nasdaq exists purely as an electronic platform with no physical trading space.

4 Rule 405 of the Securities Act defines an FPI as: 'any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) Any of the following: (A) The majority of the executive officers or directors are United States citizens or residents; (B) More than 50 percent of the assets of the issuer are located in the United States; or (C) The business of the issuer is administered principally in the United States.' The determination date for FPI status in connection with an IPO is a date within 30 days before the filing of the initial registration statement.

5 So-called because 24 stockbrokers signed the agreement under a buttonwood tree on Wall Street. Library of Congress, 'History of the New York Stock Exchange', available at www.loc.gov/rr/business/hottopic/stock_market.html (last visited 22 January 2018).

Both the NYSE and Nasdaq welcome domestic and foreign issuers as well as dual listings. Historically, Nasdaq was viewed as the 'go-to' exchange for technology companies, with the NYSE operating as the primary exchange for 'brick-and-mortar' issuers. However, this has changed in recent years, with companies from all industries listing on both exchanges.

ii Overview of listing requirements

The NYSE and Nasdaq each maintain standards for initial listing and continued listing on their respective markets. The standards include financial thresholds and other quantitative benchmarks as well as requirements relating to corporate governance.

Over the years, the quantitative listing requirements for the NYSE and Nasdaq have become increasingly similar, such that the requirements themselves generally are not determinative of which exchange a company will select. Meeting the quantitative listing requirements is rarely a deciding factor for exchange selection. Similarly, the corporate governance requirements are substantially similar, due in large part to SOX, which considerably changed the governance requirements for US public companies. Even if a company meets all of the listing standards, each exchange reserves the right to deny listing to any company.

A US company seeking to list on the NYSE must meet minimum distribution and size criteria, which include, among others, at least 400 round lot shareholders, a post-IPO market value of publicly held shares of US$40 million and a stock price of at least $4. The company also must meet one of the exchange's two financial criteria: the earnings test or global market capitalisation test. For IPO companies, the NYSE will accept the underwriters' representation that the offering will satisfy certain of the requirements once the IPO is consummated.[6]

A non-US company may qualify to list on the NYSE in one of two ways – under the standards for domestic issuers or under the alternate listing standards for FPIs. The FPI-specific listing standards are designed to attract major foreign companies with an existing, substantial market for the company's shares in its home jurisdiction. For example, under the minimum distribution and size criteria, the round lot shareholder requirement is 5,000 (versus 400 under the domestic standard), the market value of publicly held shares must be at least $100 million, or $60 million for companies qualifying under the affiliated company test (versus $40 million under the domestic standard) and 2.5 million shares are required to be publicly held (versus 1.1 million under the domestic standard). To qualify under the alternate listing standards for FPIs, the company also must meet one of the financial tests: the earnings test or one of the valuation or revenue tests (or qualify under the affiliated company test).

As a general matter, both the NYSE and Nasdaq permit an FPI to follow the governance rules of its home jurisdiction, subject to certain exceptions.

Nasdaq has three separate market tiers, the Nasdaq Global Select Market, the Nasdaq Global Market and the Nasdaq Capital Market. Similar to the NYSE, Nasdaq has liquidity requirements, including number of round lot holders, number of publicly held shares and market value of publicly held shares, as well as financial standards. For example, companies seeking to list on the Nasdaq Global Select Market must qualify under one of four tests: earnings, capitalisation with cash flow, capitalisation with revenue or assets with equity. To demonstrate the similarities between the requirements of Nasdaq and the NYSE, a company seeking to list on the Nasdaq Global Select Market would need 450 round lot holders (400

6 There are alternative standards in certain instances, including for real estate investment trusts with less than three years of operating history and special purpose acquisition companies.

for NYSE), 1.25 million publicly held shares (1.1 million for NYSE) and a market value of publicly held shares of $45 million ($40 million for NYSE). The quantitative requirements for listing on the Nasdaq Global Market and the Nasdaq Capital Market become increasingly less demanding; however, the corporate governance requirements are the same across all three Nasdaq tiers.

The cost of listing on the NYSE and Nasdaq varies somewhat in approach. The NYSE calculates fees based on the exact number of shares listed, subject to a minimum and maximum fee, whereas Nasdaq bases its fee on a share range. For example, to list on the Nasdaq Global Select Market and the Nasdaq Global market, the cost for listing up to 30 million shares is $125,000, including a $25,000 application fee; listing 30 million to 50 million shares is $150,000, including a $25,000 application fee; listing 50 million to 100 million shares is $200,000, including a $25,000 application fee; and listing more than 100 million shares is $225,000, including a $25,000 application fee. On the NYSE, fees for an IPO are $0.004 per share, plus a $25,000 application fee and a $50,000 special one-time fee, with a minimum of $150,000 and maximum of $295,000, which includes the special one-time fee of $50,000.

iii Overview of law and regulations

IPOs in the United States are governed by federal rules and regulations with oversight by the SEC. The main rules and regulations are contained in the Securities Act and the Exchange Act.

By way of background, the Securities Act was passed in response to the 1929 US stock market crash. It was designed to prevent fraud and misrepresentation in connection with public securities offerings by requiring that investors receive adequate and accurate information in order to make their investment decisions. The system is disclosure-based, meaning that a judgement is not made by the SEC on the quality of the IPO company or the securities being offered. Market regulation, on the other hand, comes through the Exchange Act, which, among other things, created the SEC. The Exchange Act requires periodic reporting by companies with registered securities (i.e., generally companies that have made a Securities Act registered public offering; companies with a security registered on a national exchange; or companies with total assets exceeding $10 million and a class of equity security held of record by more than 2,000 persons or 500 persons who are not accredited investors).[7] Over the years, the SEC has sought to harmonise the Securities Act and the Exchange Act, by providing for integrated disclosure between Securities Act and Exchange Act forms.

Arguably, the next most significant piece of legislation was in 2002 with the passing of SOX, which came in response to significant US accounting scandals. The main goals of SOX were to strengthen financial disclosures, deter fraud and heighten corporate responsibility and accountability through various measures, including through increased executive liability. While not monumentally influential on the actual IPO process, SOX did have a tremendous effect on the governance requirements for companies post IPO.

The most recent significant changes came with the passing of the JOBS Act in April 2012. The JOBS Act created a new category of issuers called emerging growth companies (EGCs), which generally are companies with less than $1.07 billion in annual gross revenues in their most recently completed fiscal year. EGCs are entirely exempt from certain, or subject to reduced, regulatory requirements for a limited period of time. The benefits afforded to EGCs pursuant to the JOBS Act include allowing EGCs to provide reduced financial

7 Slightly different numerical standards apply to banks, savings and loan holding companies or bank holding companies.

information in SEC filings, including in IPO registration statements; permitting EGCs to submit draft registration statements confidentially to the SEC for review prior to making them publicly available; providing for the ability of EGCs to 'test-the-waters'[8] with potential qualified investors to determine investor appetite in the offering; relaxing restrictions on securities analyst communications and carving out other areas for reduced compliance (or exceptions) for EGCs. The benefits provided for under the JOBS Act for EGCs were further modified by the FAST Act in December 2015. In June 2017, the SEC announced that it would expand the confidential IPO registration statement review process to include all issuers, not just EGCs. Several additional legislative changes were proposed in 2017 through the Financial CHOICE Act of 2017 and the Encouraging Public Offerings Act of 2017 which, if ultimately passed, also would extend certain EGC benefits to other types of issuers, including the ability to 'test the waters'.

Also integral to the IPO process is the Financial Industry Regulatory Authority (FINRA), an independent non-governmental agency that aims to provide investor protection through the regulation of broker-dealers. During the IPO process, the underwriters must file information with FINRA in connection with the initial submission of the registration statement to the SEC and every amendment thereafter.

III THE OFFERING PROCESS

i General overview of the IPO process

A typical US IPO takes approximately 16 to 20 weeks, assuming that no significant issues arise that delay or complicate the process. Adequate planning and preparation are crucial to the IPO process as delays are often caused by disclosure or financial statement issues that could have been addressed in the early offering stages. The IPO process can be divided into four distinct phases:

a preparation and analysis (known as the pre-filing phase);

b filing and SEC review (the phase between filing the registration statement with the SEC and responding to, and clearing comments from, the SEC);

c marketing the IPO; and

d the pricing and closing of the offering.

The IPO team, also known as the 'working group', consists of several key parties including the company, company counsel, the underwriters, underwriters' counsel and the company's accountants. The roles of each are described in more detail below.

During the pre-filing phase, even before the first meeting of the full working group, a company works with its outside counsel to prepare for the IPO. Preparatory tasks include reviewing the company's current corporate and capital structure, as well as analysing its organisational documents (such as its charter and by-laws) to ensure that the company is best-positioned for life as a public company. In-house and outside counsel also will examine the company's existing corporate governance structure and begin to address any changes that may be needed prior to the IPO. In many instances, a company's private governance practices are not suitable for a public company and changes are often required for SOX

8 Through 'testing-the-waters' activities, an issuer or someone authorised to act on its behalf may make oral or written communications with certain qualified potential investors prior to or after the filing of the registration statement.

compliance, including the creation of new board committees. Additionally, committee charters and other corporate policies may need to be drafted or modified. The underwriters will provide guidance on the governance structure from the perspective of marketing the deal and may suggest additional corporate changes for marketing reasons. During this phase of the IPO process, a company also may need to prepare new equity compensation plans and employment agreements (or amend current ones) and address other general corporate housekeeping matters. The company's in-house finance team and outside auditors should begin preparing the financial statements that will be required in the registration statement. It is important that the company's auditors are involved early in the IPO process as accounting issues are a common source of SEC comments and potential delay. Also at this time, companies should begin to seek any required approvals for the IPO and begin to develop a plan for public reporting after the IPO.

Preparation of the registration statement typically begins with an initial organisational meeting attended by the full working group, followed by drafts of the registration statement being circulated among the group. The registration statement describes the company and its business; provides risk factors regarding the company, its business and the offering; and includes financial and other information including the use of proceeds from the offering, company capitalisation, management's discussion and analysis (MD&A) of the company's financial condition and results of operation, and certain relationships and related party transactions. For domestic companies, the registration statement generally is filed with the SEC under cover of a Form S-1 (or Form S-11 in the case of a real estate investment trust), while FPIs generally use a Form F-1. Contained within the registration statement is the prospectus, which is the stand-alone document provided to investors. The exhibits to the registration statement, which are delineated in the applicable form, as well as other information, such as the expenses of the offering and certain undertakings by the company, are not circulated to prospective investors as part of the prospectus and can be found in filings with the SEC. Filings with the SEC generally are made available to the public at: www.sec.gov. At a certain point in the drafting phase, the registration statement is sent to the financial printer, which will then run any changes to the document on its system and ultimately file the document with the SEC through an electronic system known as EDGAR (Electronic Data Gathering, Analysis and Retrieval).

Concurrent with the drafting of the registration statement, legal due diligence is conducted by the company's counsel and underwriters' counsel. During legal due diligence, counsel examines various books, records and agreements as well as other material documents of the company to ensure that the registration statement is accurate and not misleading. As will be explained further below, due diligence provides a defence against liability for claims of false and misleading statements under Section 11 and Section 12 of the Securities Act. It also provides counsel with a basis for delivering certain legal opinions to the underwriters at the closing of the offering. Business due diligence is also conducted by the underwriters to ensure that the company's business and operations are as it purports them to be.

Also at this time, the underwriting agreement, comfort letter and other transactional documentation are negotiated. The underwriting agreement is the main contract that binds the underwriters and the company for the sale of the securities. Through the underwriting agreement, the securities are purchased by the underwriters from the company and are then resold to the public by the underwriters. The agreement contains the pricing terms, various representations and warranties and provides for indemnities and closing conditions. While negotiation of the underwriting agreement begins early in the IPO process, it is not actually signed until near the end of the IPO process when the offering is priced. The comfort letter is delivered by the company's auditors to address the accuracy of the financial data included in the prospectus. All financial data in the prospectus should be supported or confirmed as part of the underwriters' due diligence. Any factual information in the prospectus that is not 'comforted' by the auditors must be backed up by the company.

Before filing the registration statement with the SEC, the company's board of directors (and potentially the company's shareholders) will approve the filing and other corporate activities associated with the offering. Additionally, the stock exchange will be determined and the exchange listing process will begin.

After the registration statement is filed with the SEC, it typically takes up to 30 days to receive SEC comments. During the period between filing the registration statement and receiving the first round of SEC comments, preparation continues to position the issuer for life as a public company. This includes continuing to establish certain corporate governance policies and practices, writing charters and required governance documentation, and continuing to advance the stock exchange listing application.

When comments are received from the SEC they arrive in the form of a letter. The company, underwriters, counsel and accountants respond by filing an amendment to the registration statement to address the SEC comments. The company also writes a response letter to the SEC. Typically, there are several rounds of back and forth between the company and the SEC before it will allow the registration statement to 'go effective'. During this time, FINRA also reviews the underwriting arrangements.

During the marketing phase, the underwriters and the company conduct a 'roadshow', which is typically a two- to three-week period of investor meetings across the US, and often in Europe and other jurisdictions. Prior to the roadshow, the deal team will print red herrings or 'reds', which are glossy copies of the preliminary prospectus. These will be handed out during the investor meetings. The books are called 'reds' due to the red banner that appears at the top of the preliminary prospectus, stating that the information is not complete and may be changed and that the document is not an offer to sell the securities. Over the course of the roadshow, the underwriters will collect non-binding indications of interest from potential investors. The roadshow is separate from any 'testing-the-waters' activities that already may have been conducted by or on behalf of an eligible issuer.

When the roadshow is complete, the underwriters will look to price the deal based on the demand for the securities. As securities only may be sold once the registration statement is declared effective by the SEC, clearance from the SEC and FINRA must be obtained by this time to enable the registration statement to be declared effective by the SEC and for pricing to take place. At the time of pricing, the company and the underwriters agree on the final price of the securities and execute the underwriting agreement. After pricing, the underwriters confirm sales and allocate shares. The securities begin to trade the day after pricing. Following pricing, the company files the final prospectus with the SEC. The final prospectus includes the determined sale price of the stock, the underwriters' compensation and the amount of proceeds the company will receive from the offering.

The offering typically closes on a T+2 schedule (meaning two business days after pricing). At closing, various executed documents are exchanged between the company and the underwriters, including legal opinions, the comfort letter, lock-up agreements (which 'lock up' certain existing shareholders from selling their shares for a certain period (typically 180 days)) and other closing certificates.

As described above, the working group acts in concert to ensure that each of the IPO stages progress as seamlessly as possible. A company's internal team is crucial to the IPO process. The company ensures that the offering documents accurately describe the business, and the risks relating to the offering and the company, among other disclosures. Further, the company's internal finance team is critical in preparing the financial statements and other financial disclosure along with assistance from the company's outside auditors. Management of the company also needs to be available for drafting sessions, diligence calls and participation in the roadshow. While the company is the key component of the IPO team, the other players have essential roles to ensure the success of the offering.

Company counsel guides the issuer through the offering process, from preparatory structuring through the closing of the offering. Company counsel assists with drafting the required registration statement disclosure, negotiates agreements and other offering documentation, and assists the company in complying with applicable securities laws.

The underwriters design the marketing effort, set the company's valuation, lead the roadshow and assist the company in describing its business in a compelling way. They arrange investor meetings and control the book-building process. They also participate in certain aftermarket trading activities.

Underwriters' counsel assists the issuer through the offering process. They prepare the initial draft of the underwriting agreement, contribute to drafting other documents and negotiate agreements with company counsel. They advise the underwriters on FINRA compliance (including making the required filings with FINRA) and other issues, such as research reports, trading restrictions and any permitted 'testing-the-waters' activities.

The company's auditors are important in drafting the MD&A section of the prospectus. The auditors assist the company with its required financial statements and deliver the comfort letter. They also assist the other members of the working group in responding to any financial or accounting comments from the SEC.

There are also several other key players in the IPO process, including the financial printer, which prints the preliminary and final prospectuses and files the registration statement with the SEC; the transfer agent; and market maker or specialist. The company may also enlist the services of an IPO consultant, a compensation consultant or a public relations firm.

ii Pitfalls and considerations

Navigating the IPO process can be difficult, and without careful planning, there are many potential pitfalls that could affect the offering. Several of the key considerations in the IPO process come early in the planning stages when the company is preparing to become a public company.

One of the first crucial steps is to review existing agreements to identify any consents or approvals that may be required for the IPO to occur. Companies should also examine their current corporate structure and capitalisation early in the process to ensure that they correctly align with public company operations and the contemplated offering. For example, a company may need to increase the number of authorised shares or wish to authorise blank check preferred stock prior to the offering. Companies should also consider public company defensive measures such as creating a classified board and limiting the ability of shareholders to call meetings or act by written consent.

Companies must also spend significant time preparing their post-IPO governance structure. Existing policies, charters and other governance-related documents should be reviewed to determine any necessary changes that may be required to comply with public company governance requirements. Often, additional policies, charters and structural changes are required as well. Note that, as a general matter, FPIs may follow the governance requirements of their home jurisdictions instead of the requirements for domestic issuers, subject to certain exemptions and requirements.

Stock options can also prove to be a sticky issue in the IPO process. For grants up to two years before an IPO, a company should be prepared for the SEC to ask for valuation support. Because of this, it is important for a company to obtain independent valuations for options to avoid cheap stock accounting charges.

Companies must review all related party transactions prior to filing the registration statement to determine which, if any, must be disclosed. In addition, companies may wish to unwind certain transactions prior to the IPO for optical, legal or other reasons. Further, any loans to executive officers and directors must be unwound prior to the first filing of the registration statement.

Early in the planning stages, a company should work with its counsel to determine what financial statements will be required in the registration statement as well as begin to address any related MD&A issues. Generally, companies are required to include in the IPO registration statement three years of income statements, two years of balance sheet information and five years of selected financial statements. EGCs, however, are only required to include two years of audited financial statements and two years of selected financial statements in their IPO registration statement. Mergers and acquisitions activity may trigger additional required financial statements such as *pro formas* and target financial statements depending on the significance and timing of the mergers and acquisitions activity. Financial statement preparedness often drives (and delays) the timing of an offering. In addition, companies also should be mindful of SEC 'hot buttons'. In recent years, these have included revenue recognition, cheap stock, segment reporting and loss contingencies.

Foreign issuers in particular need to be aware of any reconciliation that may be required with respect to any non-GAAP or certain non-International Financial Reporting Standards (IFRS) financial statements. If financial statements are not prepared in accordance with US GAAP or English-language IFRS as issued by the International Accounting Standards Board (IASB), the financial statements must be reconciled to US GAAP.

Issuers must be extremely careful of what is known as 'gun jumping'. As a general matter, there are certain restrictions on communications when a company is contemplating or conducting a securities offering that are intended to prevent a company from conditioning the market for the offering. The communications covered by the 'gun jumping' restrictions are extensive and include press releases, social media activity and interviews, among other forms of communications. When a company violates these rules, this is gun jumping. The SEC may deem an action as gun jumping even if it was purely accidental. Therefore, companies must be mindful of the rules from the outset, even before the registration statement is filed. The consequences for gun jumping can be significant. In the event that the SEC determines that gun jumping has occurred, it may impose a cooling-off period, during which the company must delay the offering. Gun jumping may also trigger sanctions, fines or rescission rights.

Aside from the technical legal considerations, it is crucial that a company be prepared to access market windows. This means being vigilant during the planning stages to ensure that the company is best-positioned to move forward at the appropriate time when market windows are 'open'. The company's underwriters will be able to advise on the most advantageous time to launch the offering.

It should not be minimised that becoming a public company exposes the issuer and other offering participants to liability under the US securities laws. In particular, Section 11 of the Securities Act states that if any part of an effective registration statement: 'contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition such person knew of such untruth or omission) may sue' every person who signed the registration statement, as well as every underwriter, expert, and current and future member of the board of directors named in the registration statement, among others.

While a due diligence defence is available to underwriters, experts and directors, it is not available to the company. The company is 'strictly liable' under Section 11 of the Securities Act, subject to a limited exception if the company can prove the purchaser of the securities knew of the untruth. Additional liability is imposed by Section 12(a)(2) of the Securities Act on any person who offers or sells a security by means of a prospectus or oral communication that contains a material misstatement or omission.

iii Considerations for foreign issuers

While many of the procedural elements involved in a US IPO by a domestic issuer are essentially the same as those for an FPI, FPIs are provided with significant relief in several areas. These measures are designed to encourage FPIs to go public in the United States.

In the registration process, FPIs typically utilise Form F-1 to register with the SEC instead of Form S-1 (the form for domestic issuers). Form F-1 contains reduced disclosure requirements compared to Form S-1.[9] Notable differences in Form F-1 include, among others, compensation disclosure. Unlike domestic companies, FPIs are able to disclose more limited compensation information, particularly as it relates to individual compensation, compared to domestic issuers, unless the information is publicly disclosed elsewhere by the FPI. Notwithstanding the accommodations, however, the underwriters may encourage the issuer to provide disclosure akin to what is required for a domestic issuer for marketing purposes.

FPIs also have flexibility with their financial statement presentation. They may prepare and file their financial statements in accordance with US GAAP, IFRS or local GAAP. FPIs that utilise the English-language version of IFRS as issued by the IASB need not provide a reconciliation to US GAAP. However, if non-IASB IFRS or local GAAP is used, generally reconciliations to US GAAP must be included. In addition, FPIs have different 'staleness' dates (the date after which financial information may not be used) from domestic issuers.

As a structural matter, instead of directly offering stock to the public, FPIs may choose to offer securities in the United States through the use of American Depositary Receipts (ADRs). ADRs are stand-alone securities (separate from the stock of the FPI) that represent a certain number of shares of the FPI. The underlying shares are held with a depositary that contracts with the issuer. In many instances, investors find ADRs more attractive than holding shares directly in a foreign corporation as ADRs may result in favourable currency conversions on dividends and other cash distributions.

9 Historically, certain FPIs were permitted to file their registration statements confidentially with the SEC. While this ability remains in place, the changes in 2017 that enable all issuers to file confidentially make this 'benefit' significantly less relevant.

Once the company is public, unlike a domestic issuer, an FPI is not required to file quarterly reports on Form 10-Q, annual reports on Form 10-K or periodic reports on Form 8-K. Instead, an FPI files annual reports on Form 20-F[10] within four months of the company's fiscal year end and must furnish to the SEC on Form 6-K information that it:

a makes or is required to make public in the jurisdiction where it is domiciled, or in which it is incorporated or organised;

b files or is required to file with a stock exchange on which its securities are traded, if made public by that exchange; or

c distributes or is required to distribute to its security holders.[11]

Pursuant to the rules of the stock exchanges, FPIs are required to file semi-annual unaudited financial information under cover of Form 6-K.

Post IPO, FPIs also enjoy the benefit of being exempt from the US proxy rules that generally require proxy solicitation in connection with shareholder meetings. They also need not comply with the rules for presenting shareholder proposals. Further, FPIs are exempt from filing insider trading reports under Section 16 of the Exchange Act, as well as from the short-swing profit rules, which generally prohibit a company insider from profiting from company stock that is bought and sold within a six-month period. Additional regulations from which FPIs are exempt include Regulation FD, which prohibits the selective disclosure of material, non-public information; Regulation G, which addresses the use of non-GAAP financial measures; and Regulation BTR, which covers trading during pension fund blackout periods.

Both the NYSE and Nasdaq provide accommodations to FPIs in the corporate governance arena. To utilise these exemptions, an FPI must disclose in its annual report on Form 20-F how the company's governance practices differ from those required for a domestic company under the rules of the applicable exchange.

IV POST-IPO REQUIREMENTS

Once a company becomes public, there are several ongoing governance and reporting requirements with which the company must comply. These requirements are considerably different for domestic issuers than for FPIs, which are provided relief from compliance in many instances as discussed above.

Domestic companies are required to file annual, quarterly and periodic reports with the SEC. The due date for these filings is based on the company's filer status as either a large accelerated filer, accelerated filer or non-accelerated filer. Among other requirements, large accelerated filers are companies that have a public float of $700 million or more, whereas accelerated filers have a public float of more than $75 million but less than $700 million. For a newly public company, regardless of its filer status, the annual report on Form 10-K is due 90 days after the company's fiscal year end. This is shortened to 75 days for an accelerated filer and 60 days for a large accelerated filer for subsequent Form 10-K filings. Quarterly reports on Form 10-Q are due 40 days after the company's fiscal quarter end for large accelerated filers and accelerated filers, and 45 days for all other filers. Periodic reports on Form 8-K are

10 Certain Canadian FPIs are able to file annual reports on Form 40-F, which has significantly reduced disclosure requirements compared to a Form 10-K or Form 20-F.

11 Form 6-K.

typically due within four business days of the triggering event for all types of filers. There are various activities that trigger the need to file (or furnish) a Form 8-K, including entering into or terminating a material agreement, consummating a significant acquisition or the departure of a director or executive officer. Form 8-K is also used to satisfy necessary disclosure under Regulation FD, which generally prohibits disclosure of material information by domestic issuers to certain people without disclosing it to the public as well. As previously discussed, FPIs generally file annual reports on Form 20-F and other reports under cover of Form 6-K.

Post IPO, domestic companies must also file proxy statements, which are due 120 days after the company's fiscal year end if certain information in the Form 10-K incorporates by reference information from the proxy statement (as is typically the case) and that must comply with the detailed US proxy rules. Domestic companies are also required to hold annual meetings, for which significant advance preparation is required.

The company's board of directors and the committees of the board must hold regular meetings. Directors and certain officers of the company, among others, must also file reports relating to their shareholdings and be mindful of the rules regarding trading by insiders. In addition, various annual certifications are required to be delivered to the exchange on which the company is listed.

One of the more onerous requirements for many companies is compliance with what is known as SOX 404, which addresses a company's internal control over financial reporting. A company's (1) management must report on the company's internal control over financial reporting and (2) an auditor is required to attest to the assessment of management.

This is not required in a company's IPO registration statement nor in the first annual report following its IPO. However, in the second annual report, the above part (1) is required and part (2) may be required depending on a company's filer status or other special designation.

V OUTLOOK AND CONCLUSION

There is significant optimism surrounding the US IPO market for 2018. As noted, 2017 witnessed several proposed and implemented changes to the IPO landscape, and additional action is expected in 2018. Further, there are indications that the newly appointed SEC chairman, Jay Clayton, is focused on easing regulatory burdens and encouraging US IPOs, by both domestic companies and FPIs. Several key factors will affect the market, including US tax reform issues, federal reserve activity and the impact of future presidential actions. Regardless of any uncertainty that may exist, it is expected that the US IPO market will remain at the forefront of the global IPO arena.

Appendix 1

ABOUT THE AUTHORS

FEDERICO AMOROSO

Chiomenti

Federico Amoroso joined the firm in 2012 and is a senior associate in the capital markets department of the firm.

Prior to joining the firm, he worked in London from 2004 to 2007 and in Milan from 2011 to 2012. He also worked in the legal departments of two major international investments banks.

Federico represents Italian and international issuers and investment banks in a wide variety of public and private finance transactions. He has worked on major Italian and foreign privatisation transactions and has significant experience in the areas of initial public offerings, other public and private equity and equity-hybrid securities offerings, as well as debt offerings. He also advises Italian and international clients with regard to corporate and securities law matters, as well as debt, tender offers, exchange offers and other restructuring transactions involving listed companies.

Federico graduated in law from the University of Rome in 2003 and has an LLM from Columbia Law School, New York (2008). He was admitted to the Italian Bar in 2006, and was admitted to the New York Bar in 2012.

He is a member of the Rome Bar and the New York Bar, and his languages are Italian and English.

CARLOS COSTA ANDRADE

Uría Menéndez

Carlos Costa Andrade has been a partner in the Lisbon office of Uría Menéndez since 2005. Between 1996 and 1999, he was in-house counsel (issuers and market division) at NYSE Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados, SA. Since 2012, he has divided his practice between Uría Menéndez's Lisbon and London offices.

His practice includes capital markets, M&A and corporate governance.

Alongside his work as a lawyer, Carlos Costa Andrade holds several management positions and is currently a member of the Equity and Fixed Income Committee of BM&F BOVESPA and secretary to the General Assembly of OPEX.

Carlos is among the most highly regarded banking and finance and capital markets lawyers according to *Chambers Global Portugal*, *IFLR 1000 Portugal* and *The Legal 500*.

CHRISTOPHER BETTS

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Christopher Betts is a capital markets partner in the Hong Kong office of Skadden, Arps, Slate, Meagher & Flom. Mr Betts has been named a leading lawyer for capital markets work in Hong Kong and China by *Chambers Global*, *Chambers Asia* and *IFLR1000*. He also was named one of *Law360*'s 2015 'rising stars' under 40 for capital markets. Mr Betts speaks fluent Mandarin. His work has been repeatedly recognised for its innovation, including by the *Financial Times* in its 'Asia Pacific Innovative Lawyer' reports.

ZHI BIN

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Mr Zhi specialises in Chinese and non-Chinese listings, restructuring and reorganisation, mergers and acquisitions, venture capital and private equity and foreign direct investment. He applies his knowledge of and experience with Chinese industry policy to assist clients in capital operations, financial planning, investment and project management. His clients include large state-owned enterprises and commercial banks, multinational corporations, and leading high-growth enterprises. His practice covers a wide range of industrial sectors such as banking, insurance, infrastructure, construction, mining, energy, healthcare, biotechnology and pharmaceuticals.

THOMAS M BRÖNNIMANN

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Thomas Brönnimann is a partner and member of the NKF banking and finance team. His practice focuses on capital markets and private and public M&A transactions.

Mr Brönnimann advises banks, issuers and institutional investors in IPOs, rights offerings, convertible bonds, block trades and other capital market transactions. In addition, he assists listed companies on corporate and regulatory matters and represents clients before the SIX.

His M&A experience includes private and public transactions such as public tender offers, and extends to mergers, joint ventures and reorganisation of private and listed entities. He represents clients before the Swiss Takeover Board.

From 2007 to 2009, Mr Brönnimann was the legal counsel of a Swiss-based, privately owned investment company responsible for the company's private and public M&A activities in Switzerland and abroad.

MATTHEW COLE

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Matthew Cole is a partner in the capital markets group of A&L Goodbody in Dublin. He has an extensive track record advising issuers and underwriters on equity capital markets transactions, both in Ireland and in London, where he practised for many years. His experience encompasses IPOs, rights issues and equity placings on the MSM and ESM in Ireland as well as the Main Market of the LSE and AIM. Mr Cole is listed in *The Legal 500*, which describes him as 'a key name' and an 'equity capital markets expert'. *Chambers Global* notes he is 'particularly sought after by corporate issuers and financial institutions for advice on IPOs'.

ÖMER ÇOLLAK

Paksoy

Ömer Çollak is the partner heading the capital markets practice at Paksoy with a specific focus on equity, debt and equity-linked transactions representing the underwriters and issuers in initial public offerings, debt offerings, Islamic finance transactions and private placements.

Mr Çollak also acts in regulatory capital issuances under Basel III, and represents clients in structured finance transactions, including but not limited to securitisations. He further has significant experience in listed company mergers and acquisitions in addition to various high-ticket cross-border mergers and acquisitions in varying sectors, including financial institutions and retail, acting for private equity firms and strategic investors.

Prior to joining to Paksoy, Mr Çollak worked as a foreign associate at a US firm in California, where he acted for biotech and high-tech multinational clients.

Mr Çollak is a graduate of Marmara University School of Law, and holds an LLM degree from Golden Gate University School of Law, San Francisco. He is admitted to the Istanbul Bar and is a member of the American Bar Association and International Bar Association.

ANA SÁ COUTO

Uría Menéndez

Ana Sá Couto joined Uría Menéndez in 2002 and was appointed counsel in January 2010. She is a member of the capital markets practice group. Between 1997 and 2002, she carried out activities for another Portuguese law firm.

She focuses her practice on capital markets, mergers and acquisitions, commercial and corporate law, corporate governance, banking and financial law.

She has participated in several major transactions connected to listed companies and issuers of various types of securities, especially privatisations, OPAs, OPVs, IPOs, ABOs, offer and admission to trading of different types of financial instruments (including structured products), collective investment schemes and venture capital, constitution and regular monitoring of different types of credit institutions and financial intermediaries.

Ana has been singled out by *Chambers Global* and *Chambers Europe* for her work on capital markets in Portugal, as well as other relevant directories.

ANTONY DAPIRAN

Skadden, Arps, Slate, Meagher & Flom LLP

Antony Dapiran is of counsel at Skadden, Arps, Slate, Meagher & Flom, based in the Hong Kong office. Prior to joining Skadden, Mr Dapiran was a partner at a leading New York-based law firm. Over a 20-year career in Hong Kong and China, Mr Dapiran has advised on many of the largest and most complex Hong Kong capital markets transactions. He has been named as a leading lawyer in numerous legal industry publications including *IFLR1000*, *Chambers* and *Guide to the World's Leading Capital Markets Lawyers*. Mr Dapiran is qualified to practise law in Hong Kong and England and Wales, and speaks fluent Mandarin.

SHEENA DOGGETT

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Sheena Doggett is a partner in the corporate department of A&L Goodbody. She is head of the firm's corporate team in London and splits her time between Dublin and London. She has been involved in many of the most important transactions in Ireland in recent years, and her key areas of expertise include corporate finance, public mergers and acquisitions, private equity transactions, share incentives and corporate governance. Ms Doggett is listed in *Who's Who Legal* and *Chambers Europe*, which noted that 'clients praise her "unrelenting pursuit of solutions to a problem"'.

ENRICO GIORDANO

Chiomenti

Enrico Giordano joined the firm in 1992 and became a partner in 2003.

Enrico has held a number of positions in firm management, including head of capital markets, member of the remuneration committee, member of the business development committee and member of the European network steering committee.

Enrico represents Italian and international issuers and investment banks in a wide variety of public and private finance transactions. He has worked on major Italian and foreign privatisation transactions and has significant experience in IPOs, other public and private equity and equity-hybrid securities offerings, as well as debt offerings. He also advises Italian and international clients with regard to corporate and securities law matters, as well as debt, tender offers, exchange offers and other restructuring.

He graduated in law from the University of Rome in 1989 and has a PhD in private comparative law from the University of Macerata in 1991. He was admitted to the Italian Bar in 1992, and admitted to practise before the Italian Supreme Court in 2015. He is a member of the Rome Bar, and his languages are Italian and English.

DAVID J GOLDSCHMIDT

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David J Goldschmidt represents US and international issuers and investment banks in a variety of financing matters, including public offerings and private placements of debt and equity securities, and international securities offerings. He also counsels US and international clients on an ongoing basis, including advising on corporate governance, SEC filings and disclosure issues. He has extensive experience advising issuers and underwriters on offerings by high-technology and communications companies. Mr Goldschmidt is also very active in representing and advising real estate investment trusts in connection with capital market transactions, including many initial public offerings and general corporate matters, as well as representing issuers and investment banks in connection with private and public securities offerings by Israeli companies. He is also involved in developing new financial products. Mr Goldschmidt serves on Skadden's Policy Committee. He was named *Who's Who Legal* 2016 Capital Markets Lawyer of the Year and has repeatedly been selected for inclusion in *Chambers USA*, *Chambers Global*, *The Legal 500 US*, *The Best Lawyers in America*, *IFLR1000*, *Who's Who Legal, Euromoney* and in Legal Media Group's *Guide to the World's Leading Banking, Finance and Transactional Attorneys*.

NEIL HORNER

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Neil is head of the corporate department and a director of ASW Law Limited. He has worked extensively in transactions involving the insurance industry since he arrived in Bermuda in 2003, including high-profile start-ups and IPO work, acquisitions and disposals and changes of domicile to Bermuda. His practice also has a focus on convergence between insurance and funds structures, particularly in the ILS space. He writes extensively and contributed the chapters on Bermuda insurance regulation and segregated account companies to the 4th edition of O'Neill & Woloniecki's *The Law of Reinsurance*.

ADAM M HOWARD

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Adam M Howard focuses on international capital markets and public M&A transactions. He has advised both issuers and underwriters in connection with offerings of equity and debt securities and listings in London and on various international exchanges. In 2016, Mr Howard was named by *Financial News* as one of their 40 Under 40 Rising Stars in Legal Services. In 2015, Mr Howard received The M&A Advisor's European Emerging Leaders Award, which recognises industry professionals who have reached a significant level of success and made notable contributions to their industry and community.

STEPHAN HUTTER

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Dr Stephan Hutter is a partner in Skadden's Frankfurt office, where he focuses on international capital markets transactions, cross-border corporate transactions and bank financings. He has a broad range of experience in initial public offerings, capital increases and high-yield debt financings involving international securities offerings of German, Austrian and Swiss companies, including dual listings and private placements of shares, and debt securities in the United States. For more than a decade, Dr Hutter has been named by industry surveys as a market-leading German and European capital markets practitioner for equity and debt transactions, and has spoken and published on international securities laws transactions and issues.

KATJA KAULAMO

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Dr Katja Kaulamo is a partner in the corporate group in Skadden's Frankfurt office, where she advises on a wide range of international corporate and capital markets transactions. Dr Kaulamo has extensive experience in capital markets transactions representing issuers, underwriters and selling shareholders in connection with initial public offerings, capital increases, rights offerings, block trades and offerings of convertible and hybrid capital instruments, as well as investment grade and high-yield debt. Her practice also includes capital markets-related regulatory advice, corporate governance and other corporate matters. Dr Kaulamo is cited as a leading capital markets lawyer in *Chambers Global*, *Chambers Europe*, *The Legal 500*, *IFLR1000* and *JUVE* (Germany).

ALEXEY KIYASHKO

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Alexey Kiyashko has practised law in Skadden's Moscow, New York and Paris offices. Co-head of Skadden's Moscow office, Mr Kiyashko rejoined the Moscow office in February 2002 after working as counsel at the European Bank for Reconstruction and Development in London. He focuses on international M&A and corporate finance transactions, and has been repeatedly ranked as a leading individual in *Chambers Global*, *Chambers Europe* and *The Legal 500* 'EMEA'. Mr Kiyashko was a member of the Moscow Exchange's Committee on Primary Equity Markets, a committee advising the Moscow Exchange and the Russian securities market regulator on how to improve the legislative and regulatory framework for the equity capital markets in Russia.

JIN KONG

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Jin joined Herbert Smith Freehills' US team as an associate in 2009 and focuses on a variety of capital market-related transactions, including IPOs, bond offerings and private placements. She has exclusive experience in advising US securities as per of capital market transaction and has acted on some of the most significant capital market issues by Asian and Australian companies. Jin received her bachelor of law degree from East China University of Political Science and Law, and her masters of law degree and Juris Doctor degree from the University of Illinois College of Law.

Jin is admitted to practise as an attorney in New York. Jin also worked as a PRC attorney in Shanghai, where she advised on a variety of PRC corporate and taxation-related issues.

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Alexander Kovriga is a member of Skadden's corporate practice and has experience in a variety of corporate finance, M&A and joint venture transactions in Russia. Mr Kovriga's recent corporate finance experience includes advising Russia-based companies on a wide range of transactions, including IPOs and secondary offerings, public and private placements, as well as offerings of American Depositary Shares and Global Depositary Receipts. Mr Kovriga previously practised in Skadden's New York office, where he focused on mergers and acquisitions and private equity matters.

BAN LEONG OO

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Ban Leong is the managing director and founder of Prolegis LLC. His experience covers a varied range of corporate and commercial work, particularly cross-border acquisitions, joint ventures and strategic investments, acting for local and multinational corporations as well as governmental instrumentalities. Ban is both Singapore and English qualified.

Ban Leong has been recommended in key industry publications in the 'international firm' category as a leading lawyer, including *IFLR1000*, *The Legal 500* and *Chambers Global*. He authored The Practical Law Company's series *Cross-Border: Acquisitions for Singapore* for both the 2009 and 2011 editions.

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Frank specialises in securities laws and capital markets regulation, including stock exchange listings. His clients include banks as well as corporate, institutional, supranational and sovereign issuers, which he advises on debt and equity transactions and structured finance transactions including securitisation, structured products, covered bonds, IPOs, placements and buy-backs of securities, exchange offers, listing applications and ongoing obligations deriving from such listings. He has 15 years of experience in these areas.

Frank regularly holds conferences on securitisation and other capital markets topics in Luxembourg and abroad. He is a member of the securitisation working group of the Association of the Luxembourg Fund Industry and the securitisation working group and the securities committee of the Luxembourg Bankers' association. Frank is also a member of the Islamic Finance working group of Luxembourg for Finance (Luxembourg's agency for the development of the Luxembourg financial centre) and has recently joined the securitisation working group of the HCPF (an advisory committee set up by the Luxembourg Ministry of Finance aiming to modernise Luxembourg's financial sector legislation).

ANTHONY PANG

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Anthony Pang is an Asia Pacific counsel in the Hong Kong office of Skadden, Arps, Slate, Meagher & Flom. Mr Pang advises clients on a wide range of corporate matters, including corporate finance transactions, initial public offerings, mergers and acquisition, private equity investments, compliance and Hong Kong regulatory matters. Mr Pang is qualified in Hong Kong, State of New York and England and Wales. He speaks fluent English, Cantonese and Mandarin.

BHAKTA BATSAL PATNAIK

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Bhakta Batsal Patnaik is a partner at Trilegal and heads the capital markets practice.

He has extensive experience in equity capital markets, and has advised borrowers and lenders in structured finance transactions and debt issuances. He has also been actively involved with infrastructure investment trust and real estate investment trust listings. Bhakta has advised issuers and major investment banks on a broad range of domestic and international transactions, including offerings and private placements of convertible and exchangeable bonds, equity securities including ordinary shares and units of real estate investment trusts and business trusts, leveraged notes and equity upside notes and block trades in India, Singapore, Indonesia, Thailand and Malaysia. He has also been involved in restructuring of debt and equity linked instruments. He was involved in the drafting of the REIT and InvIT Regulations in India based on his Singapore experience.

Bhakta is recognised as a 'Leading Lawyer' for Capital Markets in India by several publications including *Chambers Global*, *Chambers Asia-Pacific* and *Asia Law*.

Prior to joining Trilegal, he was a partner with S&R Associates for five years, and has worked with Linklaters for five years, and Amarchand Mangaldas for three years.

Bhakta is an alumnus of National Law School of India University, Bangalore. He is a member of the Bar Council of Delhi, India, and is registered as a solicitor in England and Wales.

PAUL PÉPORTÉ

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Paul specialises in securities law and capital markets regulation, including stock exchange listings. He advises clients on the full spectrum of debt and equity transactions, including securitisation, structured products, covered bonds, IPOs, placements and buy-backs of securities, exchange offers, listing applications, and ongoing obligations deriving from such listings. He also previously worked in the credit and rate markets department at JPMorgan in London before joining Allen & Overy. He regularly holds conferences on various capital markets-related topics in Luxembourg and abroad. Paul is a member of the Commercial Banking Cluster (with a focus on Luxembourg covered bond banks) at the Luxembourg Bankers' association, the ABBL. He also recently joined the ABBL working group on KIID & PRIIPs, which will focus on the forthcoming entry into force of the EU Regulation on key information documents for packaged retail and insurance-based investment products. Paul is also a member of the group of experts of the association of Luxembourg insurers and reinsurers, focusing on the application of EMIR to Luxembourg life insurance companies.

PATCHARAPORN POOTRANON

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Patcharaporn Pootranon is a partner in the capital markets practice group at Weerawong, Chinnavat & Partners Ltd, with substantial experience in securities markets, M&A and tax-related laws, as well as experience in laws and regulations in relation to Thailand's Securities and Exchange Commission and the Stock Exchange of Thailand.

She has served clients in various industries in IPO deals, share acquisitions and corporate restructuring, such as Credit Suisse (Singapore) Limited in a prominent share acquisition in Thailand, and TPI Polene Power Public Company Limited in the spin-off and offering of shares under Thailand's Securities and Exchange Commission regulations, international offering under Regulation S of the US Securities Act, and listing of its shares on the Stock Exchange of Thailand.

TRIN RATANACHAND

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Trin Ratanachand is an associate in the capital markets practice group at Weerawong, Chinnavat & Partners Ltd. He advises clients in equity and debt market transactions. His recent experience includes representation of Siam Commercial Bank Public Company Limited, an underwriter in the offering of trust units of Strategic Hospitality Extendable Freehold and Leasehold Real Estate Investment Trust, which is the first Thai real estate investment trust to invest in foreign real estate such as hotels in Vietnam and Indonesia, and representation of Origin Property Public Company Limited (ORI), an emerging real estate developer, in the acquisition of all shares in Proud Residence Co Ltd, a move that expanded ORI's business into luxury condominium industry.

SHARON ROSEN

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Sharon Rosen is a partner in FBC's Corporate and Securities Department and leads the firm's US capital markets practice. Ms Rosen's practice primarily focuses on international capital markets, private and public M&A transactions, with an emphasis on cross-border transactions, and general corporate advice. Ms Rosen provides ongoing corporate and securities law advice to Israeli companies publicly traded in the United States. Prior to joining FBC in 2011, Ms Rosen was a member of the Corporate and Securities Department of a prominent law firm in New York and a member of its Israeli Practice Group (2004–2011). Ms Rosen is a member of the Israel Bar and the New York State Bar.

MARTA RUBIO

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Marta Rubio joined Uría Menéndez in September 2014.

Her practice focuses on capital markets law, with experience in initial public offerings and issues and offers of shares and bonds (including convertible bonds). She has also taken part in various tender offers and M&A transactions as well as in restructuring transactions involving private companies.

Marta regularly advises companies on corporate law and good governance matters and regulatory issues concerning securities law.

ÖKKEŞ ŞAHAN

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Ökkeş Şahan is a counsel at Paksoy, specialising in securities law, capital market transactions, corporate governance and public company law. He practises in capital markets, acting for issuers and underwriters in equity-linked instruments in international public offerings, eurobond offerings and private placements.

Prior to joining Paksoy, Mr Şahan worked for almost 15 years at the Capital Markets Board of Turkey as legal counsel.

Mr Şahan is a graduate of Ankara University School of Law, and holds an LLM degree from the University of California, Davis. He is a member of the Istanbul Bar and holds the following licences: capital market activities (advanced level), derivative instruments, real estate appraiser, credit rating specialist, corporate governance rating specialist and independent auditing in capital markets.

NITZAN SANDOR

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Nitzan Sandor is a partner in the corporate and securities department. Her practice concentrates on capital markets and M&A. Ms Sandor represents major Israeli public companies and dual-listed corporations on securities laws matters and has represented issuers in several of Israel's largest securities offerings. Ms Sandor advises on cross-border capital markets and corporate transactions, and also advises clients in connection with regulatory reforms in the corporate and securities laws and in the regulation of investment companies. *Chambers Global* has described Ms Sandor as having 'very good market knowledge' and the 'ability to bring together international and local considerations'. Ms Sandor is listed in *The Legal 500* and has been listed as a 'leading lawyer' by *IFLR 1000* and 'up and coming' by *Chambers Global*.

SIDDHARTHA SIVARAMAKRISHNAN

Herbert Smith Freehills LLP

Siddhartha is a US securities partner and leads the firm's US capital markets practice in Singapore. He has extensive experience representing investment bank underwriters, issuers and vendors in a wide range of US and international equity and debt capital markets transactions. These include numerous primary and secondary offerings under Rule 144A and Regulation S, US private placements and SEC-registered offerings. Siddhartha also advises on equity-linked and depositary receipt offerings, investment grade, high-yield and sovereign debt offerings and structured financings.

Siddhartha's practice focuses on the Asia-Pacific markets, particularly India, South East Asia and Australia. His sector experience includes financial institutions, telecommunications and media, real estate, consumer and retail, energy and commodities.

RACHANA TALATI

Trilegal

Rachana Talati is a senior associate in the capital markets team.

She has advised domestic and international clients on their investments in India, including offerings and private placements of equity securities. Her role has involved conducting due diligence, drafting, reviewing and negotiation of transaction documents and liaising with various regulatory authorities. She has advised in a variety of capital markets transactions including initial public offerings, qualified institutional placements, preferential issues, rights issues, block trades and issuance of depositary receipts. She also has experience in private equity and has advised clients on investments in various sectors including airline catering and cement.

Prior to joining Trilegal, she worked with Cyril Amarchand Mangaldas and Amarchand & Mangaldas Suresh A Shroff & Co for four years.

Rachana is an alumnus of West Bengal National University of Juridical Sciences, Kolkata. She is a member of the Bar Council of Maharashtra & Goa, India.

NATTAYA TANTIRANGSI

Weerawong, Chinnavat & Partners Ltd

Nattaya Tantirangsi is an associate in the capital markets practice group at Weerawong, Chinnavat & Partners Ltd. Nattaya advises clients on capital markets, corporate laws and M&A. Nattaya assisted Krung Thai Asset Management Public Company Limited for their asset sales from property funds under its management to the group companies of Asset World Company Limited, where the value of the assets sold was approximately 125.58 billion baht (approximately US$3.77 billion). This deal involved a tender offer of the investment units, which was an innovative approach for property-fund unit-holders in Thailand.

Nattaya also represented Do Day Dream Public Company Limited in its IPO on the Stock Exchange of Thailand, a deal valued at 4,028 million baht (approximately US$123 million), and Symphony Communications Public Company Limited in the sale of 46.84 per cent of its shares to TIME dotCom International Sdn Bhd, a wholly owned subsidiary of TIME dotCom Berha.

NAZLI TÖNÜK ÇAPAN

Paksoy

Nazlı Tönük Çapan is an associate specialising in capital markets, banking and finance, mergers and acquisitions, and corporate law.

Her capital markets experience has a specific focus on issuance of capital market instruments, investment funds, registration and de-registration of foreign investment funds, custody and clearing arrangements, structuring of foreign financial institutions in Turkey, and capital markets transactions.

Ms Tönük Çapan is also experienced in financial sector private mergers and acquisitions, particularly in IT and energy sectors, takeovers, loan and credit facilities and other general corporate work.

Ms Tönük Çapan is a graduate of Marmara University School of Law, and holds an LLM degree from University of Montréal, International Business Law.

DANNY TRICOT

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Danny Tricot heads Skadden's European capital markets practice and is based in the London office. His work includes acting for issuers and underwriters on a broad range of equity and debt transactions. Mr Tricot has advised on initial public offerings, rights offerings and private placings. He has been involved in equity listings in London and on various international exchanges. Most of the offerings that he has worked on have included a Rule 144A component. He has worked across several European jurisdictions, and also in growth markets, with extensive experience in the Middle East, Africa and Russia.

Chambers UK has described Mr Tricot as 'an incredibly hard-working lawyer' who displays 'a balance of commerciality and technical brilliance'. He is also listed in *Chambers Europe*, *Chambers Global*, *The Legal 500* and *IFLR1000*. He was named as one of only three lawyers in *Financial News*' Top 100 Rising Stars 2007, and in 2016 he was featured in *Financial News*' Hall of Fame. Mr Tricot's work has been repeatedly recognised for its quality and innovation in various international awards, including several commendations in the *Financial Times*' 'Innovative Lawyers' reports.

SANDRA TSAO

Prolegis LLC

Sandra has significant experience in a broad spectrum of commercial and corporate finance work including equity capital markets transactions, private equity investments, private and public company mergers and acquisitions, joint ventures, corporate restructuring and general corporate advisory work.

Sandra is admitted to practise law in both England and Wales and in Singapore. Sandra was noted as one of Singapore's leading corporate and M&A lawyers in *Chambers Global* 2006.

SALLA TUOMINEN

DLA Piper

Salla Tuominen is a senior counsel at the corporate practice group of DLA Piper in Finland. Her practice includes capital markets, public takeovers and other domestic and cross-border M&A transactions involving both public and private corporations. She is also experienced in advising on and negotiating venture capital and private equity transactions. Further, she has in-depth knowledge of corporate governance and compliance. Her capital markets related experience encompasses listing projects, rights issues, public takeovers and advising, among others, in insider administration, disclosure obligations and public company corporate governance related issues. Salla also has experience of a wide variety of banking and finance work and financial regulatory issues.

Salla Tuominen acts as the corporate secretary in Finnish media and advertising company Zeeland Family Plc, listed on Nasdaq First North marketplace operated by Nasdaq Helsinki.

CHRISTINA DEL VECCHIO

Niederer Kraft & Frey Ltd

Christina Del Vecchio is a capital markets and finance counsel at Niederer Kraft & Frey. Her practice focuses on capital markets, corporate finance and general securities regulation. Ms Del Vecchio has experience representing investment banks, investors and international companies in a range of debt and equity transactions including initial public offerings, rights offerings, exchange offers and other liability management transactions, asset-backed securities, high-yield bonds and equity-linked debt securities.

ALFONSO VENTOSO

Uría Menéndez

Alfonso Ventoso joined Uría Menéndez in September 2002 and has been a partner since 2013. Prior to this, he amassed experience in real estate law and litigation, and worked in London in the insolvency department of a UK firm.

From January to July 2009, he was seconded to Davis Polk & Wardwell in New York, where he was assigned to the capital markets practice group as part of the firm's Foreign Temporary Associates Programme.

Alfonso's practice is focused mainly on equity capital markets (including listings and de-listings, public offerings and block trades), and on providing general advice to investment firms, banks and listed companies on the regulatory aspects relating to securities markets and corporate governance.

In addition, Alfonso advises on M&A transactions, spin-offs, takeover bids and the sale and acquisition of private companies.

BECKY VERNON

ASW Law Limited

Becky is counsel in the corporate department of ASW. Becky joined ASW in June 2013 from London-based law firm Stephenson Harwood LLP where she practised as a senior associate in the corporate finance team. Becky advises local and international corporate and financial clients on public and private M&A, debt and equity financings, IPOs, regulatory matters, corporate insurance and reinsurance transactions and company formations and licensing. Becky's corporate experience also includes advising clients on the corporate aspects of insolvency and restructuring matters.

PHILIPPE A WEBER

Niederer Kraft & Frey Ltd

Mr Weber, managing partner at NKF, specialises in large and complex domestic and cross-border M&A (including corporate reorganisations), capital markets and bank financing transactions, with a particular focus on listed entities and other large enterprises.

He regularly advises clients on all aspects of takeover and securities law and represents clients in proceedings before SIX and the Swiss Takeover Board. He is a recognised representative for listings on SIX and was a member of the SIX expert committee for the most recent general revision of the SIX Listing Rules.

He has devoted a substantial amount of time to advising banks, issuers and sophisticated investors (including private equity and sovereign wealth funds) in high-profile capital markets transactions. Recent instructions include IPOs, SIX listings, rights offerings, PIPE transactions, high-yield bonds and innovative hybrid financing deals.

Mr Weber is distinguished as a leading banking and finance, capital markets and corporate and M&A lawyer by *Chambers*, *IFLR 1000* and *The Legal 500*. He is the co-editor of *CapLaw*, the Swiss Capital Markets Law newsletter. He has authored an award-winning PhD study in international law and various publications on Swiss corporate and securities law. He regularly lectures on such issues at professional conferences.

CHEN YANG

Han Kun Law Offices

Ms Chen's practice focuses on capital markets, mergers and acquisitions and venture capital and private equity. She has helped clients establish company structures, conduct due diligence investigations and draft related legal documents. Ms Chen has represented many Chinese and international clients in a wide variety of cross-border transactions in different industries such as TMT, education, real estate and energy.

Appendix 2

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