# Initial Public Offerings

*Contributing editors*
**Joshua Ford Bonnie and Kevin P Kennedy**

2018

GETTING THE DEAL THROUGH

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*Contributing editors*

**Joshua Ford Bonnie and Kevin P Kennedy**

**Simpson Thacher & Bartlett LLP**

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Third edition

**Getting the Deal Through** is delighted to publish the third edition of *Initial Public Offerings*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Malta, the Netherlands and New Zealand.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joshua Ford Bonnie and Kevin P Kennedy of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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# Global overview

**Joshua Ford Bonnie and Kevin P Kennedy**
**Simpson Thacher & Bartlett LLP**

According to a study by Ernst & Young LLP, 2016 saw US$132.5 billion in IPO proceeds raised globally in 1,055 transactions, a decrease from 2015 of 33 per cent and 16 per cent, respectively. There were also fewer mega-deals – only 21 transactions with IPO proceeds greater than US$1.0 billion occurred in 2016, compared with 35 in the prior year. Notwithstanding the prior disappointing year, 2017 has got off to a healthy start with the most active first quarter since 2007, with 369 IPOs raising US$33.7 billion in global IPO proceeds, a year-over-year increase of 92 per cent and 146 per cent, respectively.

In the United States, 2016 continued a two-year decline compared to the banner year in 2014 when US IPO activity was the highest since 2000. According to Ernst & Young LLP, 112 companies conducted IPOs on US exchanges during 2016, including 21 non-US companies. IPOs in the United States represented 16 per cent of global IPO activity in 2016, as measured by gross IPO proceeds raised, down slightly from 17 per cent in 2015.

According to Ernst & Young LLP, Asia led the global IPO market with 638 IPOs, or 60 per cent, conducted during 2016 resulting in US$71.5 billion, or 54 per cent, of global IPO proceeds, including the first, third and fourth highest grossing deals of 2016: Postal Savings Bank of China Co Ltd (US$7.9 billion) in Hong Kong, JR Kyushu Railway Company (US$4.0 billion) in Japan and Samsung Biologics Co Ltd (US$2.0 billion) in South Korea. In Asia, 115 companies were newly listed on the Hong Kong Stock Exchange in 2016. On the Chinese mainland, after a period of uncertainty in 2015 when the Chinese IPO market was open for only seven months, 212 companies conducted IPOs during 2016. The Japanese exchanges hosted 87 IPOs that raised US$9.3 billion, down in both deal volume and IPO proceeds from 2015. The Australian IPO market in 2016 saw slightly more deal volume than 2015 but IPO proceeds were flat.

Despite a late-year rally, IPO activity in Europe declined in 2016 compared to 2015. According to Ernst & Young LLP, Europe came second in IPO activity during 2016, representing 24 per cent of global IPO proceeds. In London, there were 55 IPOs on the London Stock Exchange in 2016, raising US$7.2 billion in IPO proceeds. In Amsterdam, 2016 saw a 63 per cent decline in IPO activity based on IPO proceeds, according to Baker McKenzie. In Germany, while the Frankfurt Stock Exchange hosted the second largest IPO of 2016, Innogy SE (US$5.2 billion), overall IPO activity was down (seven companies completed IPOs on the regulated market of the Frankfurt Stock Exchange) compared to the very successful year in 2015, according to Ernst & Young LLP. IPO activity in India, on the other hand, saw the biggest gains of any region during 2016, with 83 IPOs raising US$3.8 billion, representing a year over year increase of 38 and 79 per cent, according to Ernst & Young LLP.

In Latin America, IPO activity remained muted during 2016, with only four IPOs completed in all of Latin America, according to Baker McKenzie. A number of countries in the region are, however, implementing regulatory reforms that could bolster future new issuances.

The editors are pleased to be associated with some of the finest legal counsel in each of the countries covered in this volume and hope that you find the chapters relevant and useful.

# Australia

**John Williamson-Noble and Tim Gordon**
**Gilbert + Tobin**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

In 2016, there were 96 IPOs with a total market capitalisation of A$13.6 billion and more than A$3 billion in capital raised. Although the total number of IPOs decreased by only 1 per cent compared to 2015, total market capitalisation decreased by 23 per cent on the previous year. The biggest listing for 2016 was Reliance Worldwide Corporation, a US-based, but majority Australia-owned, manufacturer of plumbing and water flow supplies. The IPO market is expected to rebound from a quieter 2016 that saw an absence of billion-dollar IPOs. The IPO market in 2017 is also likely to benefit from those IPOs deferred in 2016, and a return to a stronger private equity-backed deal flow.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Issuers are typically domestic entities that are issuing securities for the purpose of financing their operations. Australian companies tend to list on the Australian Securities Exchange (ASX), but may also list overseas. This is called cross-listing, and issuers will typically cross-list for the purposes of business expansion, access to greater pools of capital and increased public exposure.

Overseas companies are eligible to list on the ASX, and are subject to admission requirements specific to foreign issuers (see questions 14 and 15).

### 3 What are the primary exchanges for IPOs? How do they differ?

The ASX is Australia's primary securities exchange for IPOs. The ASX has the highest profile and volume of capital in Australia. There are a number of additional securities exchanges including the National Stock Exchange of Australia (NSX), the Sydney Stock Exchange (SSX, formerly the Asia Pacific Exchange) and Chi-X Australia.

The NSX is a stock exchange that caters for small to medium-sized entities. The market cap of the NSX is approximately A$2 billion. Chi-X Australia launched an alternative trading platform in October 2011. The Asia Pacific Exchange began operating in late 2013, with its first listings in March 2014. In November 2015, the Asia Pacific Exchange changed its name to the SSX.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

In order to gain and maintain a listing on the ASX, a company must comply with ASX's Listing Rules (the Listing Rules). The obligations imposed by the Listing Rules are additional to the company's obligations to comply with the Corporations Act 2001 (Cth) (the Corporations Act). The ASX has absolute discretion in determining whether a listing application is accepted or rejected.

The securities laws of Australia (the Corporations Act and the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act)) recognise the importance of compliance with the Listing Rules, Operating Rules, ASIC/ASX Market Integrity Rules, Clear Operating Rules and Settlement Operating Rules (together, the Rules), and the Australian Securities and Investment Commission (ASIC) monitors compliance with these rules. The Corporations Act requires that the Rules be observed and empowers certain persons to apply to a court to seek orders enforcing the Rules.

The continuous disclosure regime established under the Listing Rules is a key obligation of companies listed on the ASX. Once listed, a company must notify the ASX immediately of any information that a reasonable person may expect to have a material effect on the price or value of the company's securities (subject to certain limited exemptions).

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

A company seeking general admission must satisfy certain criteria before it can be listed on the ASX. This involves:

- satisfying a profits or assets test;
- submitting a successful application to the ASX for permission for quotation of all securities in the main class of the company's securities (generally ordinary shares);
- providing a constitution that is consistent with the Listing Rules as well as the law governing corporations in the jurisdiction of the company's incorporation or registration;
- adopting an appropriate structure and operations having regard to the Listing Rules;
- complying with the Listing Rules;
- appointing directors of good reputation and character, to be satisfied by obtaining criminal history, personal insolvency searches and statutory declarations to that effect;
- issuing a prospectus that is lodged with ASIC;
- having an issue price per share of at least A$0.20;
- meeting the 'minimum shareholding spread' requirement – the fewest permitted shareholders being 300, each holding a parcel of shares with a value of at least A$2,000 and with 50 per cent or more holders of the main class of shares not classifying as 'related parties' of the company; and
- disclosing in the prospectus if the company will not comply with the ASX Corporate Governance Council's best practice recommendations.

### 6 What information must be made available to prospective investors and how must it be presented?

The company must issue a prospectus (or, with the ASX's agreement, an information memorandum if the company is undertaking a compliance listing without raising capital) before it can be listed on the ASX.

When an offer of new securities is made to Australian retail investors, a prospectus must accompany the issue.

The Corporations Act has both general and specific disclosure requirements. The general requirement is that a prospectus must contain all the information in relation to the company that investors and their professional advisers would reasonably require to make an informed assessment of (broadly) the rights and liabilities attaching to the securities offered; and the assets and liabilities, financial position and performance, profits and losses and prospects of the company, to the extent to which it is reasonable for investors and their professional

advisers to expect to find that information in the prospectus. Disclosure will only need to be made if the company, its directors and proposed directors (if any), underwriters or advisers (including people named in the prospectus) actually know the information or (in the circumstances) ought reasonably to have obtained the information by making enquiries. The prospectus must be worded and presented in a clear, concise and effective manner (ASIC Regulatory Guide 228 sets out ASIC's view on how issuers can satisfy this requirement).

Prospectuses must be lodged with ASIC; however, it is not mandatory for ASIC to pre-vet a prospectus. The company may distribute a prospectus immediately after lodgement, but must not accept an application for issue or transfer of securities offered under the disclosure document until seven days after lodgement (or for up to 14 days, if extended by ASIC). This is known as the 'exposure period'.

A prospectus (or other disclosure document) may be required for secondary sales of previously issued securities in some circumstances. The 'on-sale' provisions contained in the Corporations Act (which impose this disclosure requirement) are intended to prevent companies or sellers from avoiding the prospectus requirements by issuing or selling their shares to sophisticated and professional investors only (who do not ordinarily require a disclosure document), only for those purchasers to 'on-sell' those shares to retail investors.

### 7 What restrictions on publicity and marketing apply during the IPO process?

Marketing to retail investors is not permitted before lodging the prospectus with ASIC, and there are restrictive provisions in the Corporations Act that constrain pre-prospectus advertising more generally.

Certain types of marketing to institutional and other sophisticated investors is permitted before lodgement of the prospectus.

This marketing may include the following:

**Research reports**

Affiliates of the lead manager or underwriter or other members of the underwriting syndicate may publish research reports about the company. These reports may be circulated to institutional investors on a stringently monitored basis before the offering. They are intended to provide information about the company and its business and must not refer to the IPO.

**Pre-marketing**

Sales people of the lead manager or underwriter may contact a number of institutional investors to familiarise themselves with market perception of the company, to generate investor interest and identify concerns that will need to be addressed by the management roadshow.

**Roadshows**

The lead manager or underwriter can organise a series of meetings with institutional investors to ascertain the level of investor demand for the IPO.

**General public**

The publicity campaign to investors can begin once the prospectus is lodged, subject to certain restrictions. Generally speaking, mass media advertising is rare, other than in larger IPOs that include an offer to the general public. More frequently, retail investors are solicited by brokers from their retail distribution networks.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Under its listing agreement with the ASX, each entity admitted to the ASX official list is contractually bound to comply with the Listing Rules, which is given the force of law under the Corporations Act.

If the ASX finds that a listed entity has breached the Listing Rules, the ASX can require the entity to take corrective action. The type of corrective action required by the ASX will depend on the nature of the breach. For example, if it is a disclosure breach, the ASX may require the entity to make a corrective announcement to the market. If it is a failure to obtain security holder approval for acquiring a substantial asset from, or disposing of a substantial asset to, a person in a position of influence, the ASX may require the entity to cancel the transaction unless security holder approval is obtained.

It should be noted that the Listing Rules are not law, as such, and the ASX cannot fine or impose any other criminal or civil penalties on a listed entity for breaching the Listing Rules. If a listed entity refuses to comply with its obligations under the Listing Rules, the ASX's ultimate sanction is to suspend trading in its securities or, in an extreme case, to terminate its listing. This is not a sanction that the ASX exercises lightly, since it can have a significant impact on investors, by taking away their ability to buy or sell securities in the entity on the ASX.

Usually the threat of suspension or termination will be enough to make a listed entity cooperate with the ASX. However, if a listed entity refuses to cooperate, aside from suspension or termination, the ASX's only remedy will be to take legal action against the entity to require it to comply with its obligations under the Listing Rules.

If the ASX suspects that a listed entity has committed a significant contravention of the Listing Rules, or that a listed entity or other person (such as a director, secretary or other officer of a listed entity) has committed a significant contravention of the Corporations Act, it is required to give a notice to ASIC with details of the contravention. The purpose of the notice is so that ASIC can then consider whether it wishes to take criminal or other regulatory action in relation to the breach.

The ASX's sanctions are limited in that it cannot conduct searches, seize evidence or examine people in the way that ASIC and other government regulators can. Its ability to investigate is limited to its power under the Listing Rules to request information from a listed entity mentioned above.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

Generally, a reasonably simple IPO can be completed in three to four months under the following indicative timetable.

In the first week, an IPO advisory team and due diligence committee (DDC) is appointed, corporate restructuring steps are considered and discussions are commenced to determine initial pricing and capital structure. Where the company is registered as a proprietary company, steps for conversion to a public company are commenced.

In the second week, the due diligence process, which includes the first DDC meeting, usually commences. Where required, applications are made to ASIC and the ASX for modifications of the Corporations Act or waivers of the Listing Rules. Work to prepare the prospectus financials is commenced.

Between weeks three and eight, the due-diligence process continues. Independent directors are appointed and any employee incentive schemes, dividend reinvestment plans or set dividend policies are determined. In addition, presentations are given to research analysts and research reports are prepared. The prospectus is finalised and verified, and due-diligence sign-offs are obtained.

In week nine, further pricing discussions are held. The board must also approve the pathfinder prospectus for distribution to sophisticated investors and the underwriting agreement, and the institutional roadshow will commence.

In week 12, the institutional bookbuild is conducted and the underwriting agreement is signed. The prospectus is lodged with ASIC and the listing application is lodged with the ASX. After the ASIC exposure period, the retail offer commences.

In week 17, the funds are available to the company, which will then issue the shares.

### 10 What are the usual costs and fees for conducting an IPO?

The costs of conducting an IPO include the appointment of advisers and experts such as lawyers, corporate advisers, underwriters and accountants. Other fees include the ASX, legal, accounting, experts, registry and printing fees, and vary depending on the size and complexity of the company and its business and the extent of pre-IPO restructuring work required. Larger IPOs can involve fees well in excess of A$1 million.

The ASX charges various fees, including:

**'In principle' decisions fee**

If there is an aspect of the application on which the company requests the formal advice of the ASX before submitting the application (such as an unusual structure or requirement for significant waivers), a minimum fee of A$5,000 must be paid to the ASX. However, this amount may offset against the initial listing fee.

**Update and trends**

Australia has seen a lot of activity in aged care, health and consumer businesses. We expect this trend to continue. We have also seen the re-emergence of genuine dual-track exit processes, which has seen potential IPOs used to build competitive tension with trade sale processes.

**Initial listing fee**
This fee is payable upon application and is based on the value of the securities for which quotation is sought. Fees range from A$35,000 (up to A$3 million value) to over A$505,000 (over A$1 billion value).

**Annual listing fee**
Annual listing fees are paid in advance for each year and range from A$13,526 to a maximum of A$425,000.

**Other administrative fees**
There can be additional fees charged, for example, for reviews of documents, applications for waivers and other matters, generally levied at A$300 per hour (if over 10 hours fare required for the ASX to process). There are also fees payable monthly for transactions processed by the Clearing House Electronic Sub-register System (CHESS), including the production of CHESS holding statements. An annual CHESS operating fee equal to 10 per cent of an entity's annual listing fee is also payable by the company (minimum A$1,500).

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The company will need to review its board size and composition and its corporate governance arrangements in connection with the IPO to ensure they are appropriate for an ASX-listed company of the size and nature of the company.

The ASX Corporate Governance Council has published the ASX Recommendations for Australian listed entities in order to promote investor confidence and to assist companies in meeting stakeholder expectations. The ASX Recommendations are not prescriptions, but guidelines. However, under the Listing Rules, the company will be required to disclose the extent to which it has followed the ASX Recommendations and where it does not follow a recommendation, it must give reasons for not following it.

Some of the relevant ASX Recommendations are as follows:

**Board independence**
One of the ASX Recommendations is that the board comprise a majority of independent directors and have a chair who is an independent director. It can take time to identify suitable board nominees where additions are required to meet this recommendation.

**Board committees**
Some ASX Recommendations are binding. An entity that will be included in the S&P All Ordinaries Index on admission must have an audit committee. If it will be in the S&P/ASX300 it must also:

- comply with the ASX Recommendations in relation to the composition, operation and responsibility of the audit committee (at least three members, all non-executive directors and a majority who are independent directors); and
- have a remuneration committee comprising solely of non-executive directors.

In addition, the ASX recommends that each board have a nominations committee.

**Securities trading policy is mandatory**
All ASX listed companies must have in place a securities trading policy that discloses the 'closed periods' for trading in the company's securities and related matters.

**Other recommended corporate governance policies**
It can also take time to develop other corporate governance policies that are recommended by the ASX. These include:

- diversity policy (including gender diversity objectives);
- code of conduct for officers and employees; and
- continuous disclosure policy (including developing the company's internal arrangements to enable it to meet its continuous disclosure obligations).

### 12 Are there special allowances for certain types of new issuers?

A disclosure document is not required if a person makes personal offers of securities that result in securities being issued or transferred to 20 or fewer persons, with no more than A$2 million being raised in any rolling 12-month period. This exemption exists to accommodate small to medium-sized enterprise fundraising involving only a limited investment and a limited number of investors. The exemption is limited to personal offers to prevent potential fundraisers from making offers to the retail market at large without a disclosure document.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

The ability to use anti-takeover devices is restricted in a number of ways owing to the operation of directors' common law and statutory duties as well as the Corporations Act and Listing Rules' restrictions on actions that can be taken in the context of a takeover bid. It is the preference of ASIC and the Takeovers' Panel that shareholders have the opportunity to consider a bid and actions that may have the consequence of removing that opportunity will be viewed in that light. Some devices that can be implemented by IPO issues include:

**Issuance of shares**
The issuance of shares through the IPO in accordance with the Listing Rules to 'friendly' parties such as to employees through employee share plans or through a placement to 'friendly' investors will typically mitigate takeover bids.

**Crown jewel defence**
The company may deal with a significant asset post-takeover in such a way that makes the company as a whole less attractive to a bidder. An example would be if a joint venture partner to a significant asset has the right to buy out the asset at pre-agreed terms if a takeover bid is implemented, thereby depriving the bidder of the benefit of that asset. This strategy is very difficult to implement after receipt of a bid in light of the prevailing directors' duties.

**Poison pill**
Implementing change of control provisions in major contracts, which leads to uncertainty on the bidder's part as to the value of the target post-bid, may mitigate takeover bids.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

The three categories of ASX listing available to foreign entities include:

- a foreign exempt listing;
- a standard ASX listing; and
- an ASX debt listing.

Foreign companies may seek admission under a 'foreign exempt' listing. To encourage foreign listed entities to undertake a secondary listing such entities are exempted from a number of the Listing Rule requirements that would apply if its primary listing was with the ASX. The company must satisfy the ASX that it meets the conditions specified in Listing Rule 1.11 and must complete the ASX Foreign Exempt Listing application and agreement comprised in Appendix 1C. For example, such companies must be, among other things, a foreign entity listed on an overseas exchange which is a member of the World Federation of Exchanges. However, a foreign entity may instead elect to seek general admission to the official list by adhering to the same admission

requirements that apply to an Australian entity. ASX Guidance Note 4 – 'Foreign Entities Listing on ASX' provides a comparison of the differences between the two forms of listing as they would affect a foreign entity.

Some of the requirements that apply to foreign companies listing on the ASX are as follows:

- the company must be registered as a foreign company in Australia;
- the offer document must clearly state that the company is not established in Australia and that its activities (apart from offering of securities in Australia) are not regulated by the Corporations Act, the Commonwealth of Australia or by ASIC;
- the offer document must contain a summary of the rights and obligations of security holders under the law of the company's home jurisdiction, and the regulations and restrictions that apply to the listed securities;
- the offer document must contain a summary of substantial holdings disclosure and takeovers are regulated under the law of the company's home jurisdiction; and
- the offer document must contain specific details relating to the company's accounting practices, including:
  - how the financials in the offer document were prepared;
  - what accounting standards the company will apply after it is listed and, if not the Australian Accounting standards, the standards that will be used (and whether the ASX has approved this use); and
  - similarly detailed information in respect of the company's auditing practices.

### 15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

Australia has a 'mutual recognition' scheme with New Zealand that permits the offering of securities that are made under a New Zealand law compliant prospectus and investment statement to be extended to retail investors in Australia without the need for an Australian prospectus or product disclosure statement (see ASIC Regulatory Guide 190).

Generally, foreign companies offering securities in Australia will have to comply with Australian disclosure requirements if they intend to sell securities to Australian investors. However, a foreign company may apply for relief from this requirement in limited circumstances where the foreign issuer has complied with a foreign disclosure regime that is similar to Australia's prospectus requirements, and the offer of securities is made to a limited number of Australians. Relief is granted on a case-by-case basis.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

There are tax issues relevant to several parties in relation to IPOs as follows:

**The company**

The company should examine relevant documentation that supports the material positions taken by the company (eg, copies of tax advice received) and whether tax issues recommended have been adequately addressed. The company should consider the projected franked dividends available after listing and examine any carried forward losses. The company should also examine its pre-sale structure and any tax consolidation implications.

**The vendors**

Current shareholders who are Australian resident taxpayers will be taxable at their marginal rates on all gains. In the case of gains on capital account, there is a capital gains tax (CGT) discount available where the shares have been held for 12 months. If vendors maintain their shareholding after listing, there is the availability of rollover relief to defer tax liabilities. Other international tax matters may be relevant to the Australian tax implications of an IPO exit, including:

- the residency of entities within the structure;
- the availability of treaty protection for non-resident investors;
- the availability of foreign shareholder CGT exemptions; and
- any 'aggressive' tax positions adopted.

**The purchasers**

Generally, the tax implications for purchasers should be outlined within the prospectus. This includes any material historical tax exposure in the listing group. With regard to stamp duty, there is typically no share transfer duty imposed on a purchaser as a result of an IPO, however, in some circumstances where this does not apply, regard will need to be given to 'land rich' or landholder duty.

Finally, GST and income tax associated with listing can be significant. The GST recoverability and income tax deductibility of transaction costs is often a complex matter, and can be influenced by the IPO structure adopted.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

Investors in an IPO can lodge complaints with ASIC. ASIC has a broad range of enforcement powers in relation to contraventions of the Corporations Act (see question 19). These enforcement powers include administrative action, civil litigation or referring a matter to the Director of Public Prosecutions for prosecution.

### 18 Are class actions possible in IPO-related claims?

Yes. Class actions are possible in Australia and are typically commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) or the equivalent legislation in the Supreme Courts of Victoria and New South Wales.

In order to bring a class action, at least seven persons must have claims against the same person or entity, these claims must relate to the

**John Williamson-Noble** **jwilliamson-noble@gtlaw.com.au**
**Tim Gordon** **tgordon@gtlaw.com.au**

L35, Tower Two, International Towers Sydney
200 Barangaroo Avenue
Barangaroo, NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
www.gtlaw.com.au

same, similar or related circumstances, and the claims must give rise to a substantial common issue of law or fact.

The unrestrictive and plaintiff-friendly nature of these threshold requirements means that class actions are possible in IPO-related claims.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

The causes of action underlying most of the Australian shareholder class actions in relation to an IPO are misleading or deceptive conduct in respect of inaccurate or incomplete statements or a failure to disclose or correct certain information.

Subsection 728(1) of the Corporations Act states that a person must not offer securities under a disclosure document if there is a misleading or deceptive statement in:

- the disclosure document;
- any application form that accompanies the disclosure document;
- any document that contains the offer if the offer is not in the disclosure document or the application form;
- an omission from the disclosure document of material; or
- a new circumstance has arisen since the lodgement of the disclosure document that is required to have been included.

Under section 729 of the Corporations Act, an investor who suffers loss or damage because an offer of securities under a disclosure document was made under a misleading or deceptive statement may recover the amount of the loss or damage from:

- the person making the offer;
- each director of the body making the offer if the offer is made by a body;
- a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered; or
- an underwriter (but not a sub-underwriter) to the issue or sale named in the disclosure document with their consent, in each case where the loss or damage is caused by any contravention of subsection 728(1) in relation to the disclosure document.

Furthermore, an investor may recover the amount of the loss or damage from a person named in the disclosure document with their consent as having made a statement that is included in the disclosure document or on which a statement made in the disclosure document is based, where the loss or damage is caused by the inclusion of that statement in the disclosure document.

Lastly, an investor may recover the amount of the loss or damage from a person who contravenes, or is involved in the contravention of subsection 728(1) where the loss or damage is caused by that contravention.

# Belgium

**Arnaud Coibion, Gilles Nejman, Thierry L'Homme, Filip Lecoutre and Xavier Taton**

**Linklaters LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

In Belgium, 2016 was a weak year for IPOs; particularly compared to the previous year, which had seen the highest number of IPOs since 2008. There was only one true IPO in Belgium and with a modest deal size. Biotech company ASIT BioTech raised €23.5 million in equity simultaneously with its listing. In addition, Cenergy Holding obtained its first listing on Euronext Brussels in 2016 (without raising new capital).

So far, 2017 has started better, with two larger IPOs by Belgian issuers in the first half of the year (X-FAB Silicon Foundries on Euronext Paris and Balta Group on Euronext Brussels) with more listings expected in the second half of the year.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The issuers in Belgium are typically domestic companies. The biotech and pharmaceutical sectors continue to be very active with spin-offs from Belgian universities going public. The beginning of 2017 has seen a promising start of industrial companies seeking a first listing.

A Belgian issuer (TiGenix) has, in 2016, pursued a secondary listing in the United States through a US IPO on NASDAQ. It followed the example of biotech companies Galapagos and Celyad, that sought increased visibility and liquidity in the United States in 2015.

### 3 What are the primary exchanges for IPOs? How do they differ?

The Belgian equity markets are all operated by Euronext Brussels NV, which is part of the pan-European exchange of Euronext, which provides the execution of all transactions in a single, central order book. Euronext has recently rebranded its markets.

The main equity market, on which most Belgian companies list, is Euronext Brussels. This is the Belgian regulated market consisting of three compartments based on the issuers' market capitalisation:

- compartment A (large capitalisations): issuers with a market capitalisation greater than €1 billion;
- compartment B (medium capitalisations): issuers with a market capitalisation of between €150 million and €1 billion; and
- compartment C (small capitalisations): issuers with a market capitalisation of less than €150 million.

Euronext Growth (Brussels) – previously Alternext – is a non-regulated market or multilateral trading facility with a less stringent regulatory regime designed for small and medium-sized enterprises (SMEs), enabling them to avoid the requirement to publish International Financial Standard (IFRS)-compliant financial statements. However, Euronext has created a set of rules to ensure investor transparency and protection.

Euronext Access – previously *Vrije Markt* or *Marché Libre* - is another non-regulated market or multilateral trading facility. The requirements for SMEs listed on this non-regulated market are significantly less demanding (eg, on free float and transparency) than those for companies listed on Euronext Brussels or Euronext Growth (Brussels).

In this chapter, we focus on IPOs on Euronext Brussels.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Financial Services and Markets Authority (FSMA) is the regulator responsible for Belgium's financial markets.

The FSMA is the responsible body for rulemaking and enforcing the rules on IPOs in Belgium, which includes the authority to review and approve the prospectus that is required for an IPO.

Euronext Brussels decides on any requests for admission to the listing.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Any public offering of securities in Belgium or admission to trading on Euronext Brussels requires (save in certain limited specific circumstances) the prior publication of a prospectus, which is a document aimed at informing the public, describing the terms of the transaction and the issuer.

The application for admission to trading must be filed with Euronext Brussels. The draft prospectus must be provided to Euronext Brussels, although it does not formally approve the prospectus, which is the FSMA's responsibility.

The FSMA must make a decision on a request for prospectus approval within 20 business days following receipt of a prospectus that is complete and compliant with the EU prospectus regulation. In practice, the timetable for prospectus approval is usually agreed informally with the FSMA when the proposed transaction is presented to it.

Once approved, the prospectus must be made public at the latest on the first day of the offering period.

Typically, the prospectus is made available in printed form and must also be posted on the issuer's website or, where applicable, on the website of any of its financial intermediaries or paying agents. An electronic version of the prospectus must be sent to the FSMA. The FSMA will publish the prospectus on its website and will forward it to the European Securities and Markets Authority.

### 6 What information must be made available to prospective investors and how must it be presented?

The prospectus must contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading, is necessary to enable investors to make an informed assessment of the following:

- the assets and liabilities;
- the financial position;
- profit and loss;
- the prospects of the issuer; and
- the rights attached to the securities.

Prospectuses must be drawn up in accordance with, and contain, all information required in the annexes of EU prospectus regulation (Commission Regulation No. 809/2004 (implementing EU Directive 2003/71 as regards prospectuses and dissemination of advertisements)).

Among others, the prospectus must contain the following:

- audited statutory financial statements of the issuer for the past three financial years (and, if available, interim financial information);
- a statement certifying that the net working capital is sufficient to cover current liabilities for the next 12 months;
- a statement on shareholders' equity and indebtedness prepared at the latest 90 days before the prospectus is filed;
- a risk factors' section, discussing, among others, the risks associated with the issuers' activities; and
- a description and discussion of historical financial information (operating and financial review).

The information must be presented in an easy-to-analyse and comprehensible form. A summary must also be included in accordance with a specific format.

The prospectus must be supplemented if, among others, a significant new factor arises, which is capable of affecting the assessment of the securities, between the time when the prospectus is approved and the later of either: the final closing of the offering to the public or when trading on Euronext Brussels begins.

Investors who have already agreed to purchase the securities before the supplement is published have the right, exercisable within two business days after the publication of the supplement, to withdraw their acceptances. Withdrawal rights only apply if the new development requiring a supplement has arisen prior to the final closing of the offering and the delivery of the securities. Withdrawal rights do not apply where the trigger event for the supplement is a new event that arises after the securities offered have been delivered or in the context of a prospectus produced only for admission to trading.

### 7 What restrictions on publicity and marketing apply during the IPO process?

A public offering cannot be made prior to the publication of the prospectus.

As a result, the company and the banks will need to avoid any kind of communication prior to the publication of the prospectus that could characterise as a public offering.

The company can continue to promote its products and services and issue press releases concerning its business and development in a way that is consistent with its prior practices (ie, it needs to avoid changing the quantity and nature of the information communicated).

During the IPO process, all marketing materials must be consistent with the information contained in the prospectus. All advertisements must be clearly recognisable as such and state that a prospectus has been published and where it can be obtained. All advertisements and retail marketing materials must be submitted to the FSMA in draft form for sign-off before being disseminated.

Depending on the structure of the IPO, further publicity restrictions may apply, such as a prohibition of any communication to the US or US persons in connection with the IPO, to ensure that no registration with the US Securities and Exchange Commission becomes necessary.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Breaches of the relevant rules are generally monitored and enforced by the FSMA, which can impose various measures including disciplinary sanctions or financial penalties (or both), not only on the issuer but also its senior executives in their capacity as the issuer's legal representatives and, in relevant circumstances, financial intermediaries mandated to carry out the offering to the public.

The FSMA may prohibit or suspend advertisements and may also suspend or prohibit an offering to the public if legal provisions have been infringed. It may also instruct Euronext Brussels to prohibit or suspend trading on Euronext Brussels if it finds that legal provisions have been infringed.

Also, for instance, in the event the FSMA notes that there are discrepancies between the information available on the market and the contents of the prospectus, it may demand that the prospectus be modified accordingly or that a supplement to the prospectus be published. The FSMA may also intervene to ask the company or any other person participating in the offering to cease from practices that the FSMA would view as solicitation of the public's interest before the prospectus has been approved. As for significant violations, the FSMA may, in addition, initiate proceedings, resulting in disciplinary sanctions or fines.

A type of sanction may, for instance, consist of making public that the company (or the financial intermediaries) have not complied with their legal obligations.

The FSMA may also sanction any person who has interfered with proper public disclosure by disseminating information that is incorrect, misleading or incomplete.

In addition, a person can be liable to criminal sanctions (prosecuted by the public ministry) where, for example:

- they wilfully provide incorrect or incomplete information for the preparation of the prospectus;
- they carry out a public offering without a prospectus or without the prospectus having been approved by the FSMA;
- they do not comply with prohibition or suspension orders issued by the FSMA; or
- behaviour that may qualify as market abuse (such as market manipulation or insider dealing).

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

A typical simplified timetable for an institutional and retail IPO (where 'T' is the date of closing and settlement) would be:

- T minus five to four months. In this period, the issuer and, when appointed, its advisers, should:
  - draft a business plan and equity story;
  - analyse and determine the offering structure; and
  - prepare the company for listing (through due diligence, restructuring, if needed, and compliance with conditions for listing);
- T minus four to three months. The issuer and its advisers should:
  - begin preparation of key documents, such as the prospectus; and
  - informally present the IPO project to the FSMA and Euronext Brussels;
- T minus two months. The issuer should file an initial draft of the prospectus with the FSMA and apply for admission to trading with Euronext Brussels. The issuer is presented to financial analysts;
- T minus one month. The intention to float press release is published. Analyst research is published and pre-marketing starts;
- T minus three to two weeks. The FSMA approves the prospectus, which is then published. The retail offering and institutional offering (bookbuilding) start, which are usually based on a price range. Road shows are started;
- T minus three days. The offering closes. The final price is determined. The underwriting agreement is signed. The allocation of shares to the investors is announced;
- T minus two days. Trading starts on an if-and-when issued or delivered basis. The stabilisation period starts;
- T. Closing and settlement; and
- T plus 28 days. The stabilisation period ends. This is the final date for exercise of any over-allotment option (that is, an option allowing underwriters to sell additional shares, at the offering price, if the demand for the shares exceeds the original amount offered).

### 10 What are the usual costs and fees for conducting an IPO?

Companies eligible for listing on a Euronext market are subject to the following three types of fees:

- admission fees – a one-time fee payable at the time of the initial listing;
- annual fees – payable annually by a company to remain listed on an exchange; and
- subsequent admission fees – payable in the event a company chooses to raise additional capital once listed.

For more information, see www.euronext.com/listings/admission-process-obligations-fees/listing-fees.

Admission and annual fees are based on a company's total market capitalisation, whereas subsequent admission fees are based on the amount of capital being raised.

The other costs include underwriters' fees and (issuer and underwriters) counsel's fees, which both vary depending on the size of the transaction, the structuring of the IPO, the stock exchange selected and the scale given to the financial communication. While the underwriters' fees are typically a percentage of the capital raised (in recent years, often between 2 and 4 per cent), counsel's fees depend on the time spent by the lawyers on the transaction.

The fees of the auditors tasked with reviewing the financials appended to the offering prospectus should also be taken into account.

Finally, printer and translator fees should be added, the cost of which will depend on the size of the prospectus. In some IPOs, where financial communication is extensive or sensitive, the fees of a specialist firm should also be added.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

Companies with shares listed on Euronext Brussels (listed companies) are required to abide by the 2009 Belgian Code on Corporate Governance (the Corporate Governance Code). Listed companies may, however, depart from certain provisions of the Corporate Governance Code, if they provide an explanation of their reasons for doing so, which must be published in the company's annual report (comply or explain).

The Corporate Governance Code is structured around a number of core principles, each of which is detailed by various provisions and guidelines. These principles deal with, among others, the transparency of the governance structure of the company, the composition and competences of the board of directors, the powers and duties of the executive management, the remuneration of directors and executive managers and interaction and communication with shareholders.

The one-tier board model prevails in Belgium. Under the Corporate Governance Code, at least half the board should comprise non-executive directors and at least three of them should be independent. Detailed independence criteria apply. In addition, no individual or group of directors should dominate the board's decision-making.

Pursuant to the Companies Code, the provisions of which cannot be deviated from, listed companies will, in most instances, be required by law to have at least two or three independent directors in any case. Furthermore, stringent related-party transactions rules are provided for by the Companies Code.

The Companies Code requires listed companies to have at least an audit committee and a remuneration committee (which often also serves as a nomination committee).

Under the Companies Code, listed companies are required to include a corporate governance statement in their annual report. This statement must mainly refer to the functioning of its corporate bodies and committees and the main features of control and risk management systems. It must also include a detailed remuneration report, which must be submitted every year to the vote of the annual shareholders' meeting.

### 12 Are there special allowances for certain types of new issuers?

All listed companies are principally required to abide by the provisions of the Corporate Governance Code. However, companies recently listed may take the view that some of the Corporate Governance Code's provisions are not relevant to their situation. Accordingly, they may choose to deviate from the Corporate Governance Code to a limited extent, subject to the comply or explain rule (see question 11).

In addition, the Companies Code makes special allowances for smaller listed companies. These listed companies are exempt from having an audit committee or a remuneration committee if they do not exceed certain thresholds. The powers and duties of these committees are then exercised by the board of directors itself.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

Listed companies can take a limited number of measures to protect themselves from public takeover bids. Most of them require the prior authorisation of the shareholders' meeting. For example, listed companies can seek shareholder authorisation to issue or acquire shares, subject to certain limitations, in the event of a takeover bid. Such authorisation is valid for three years. Listed companies can also grant certain rights to third parties, the exercise of which depends on the launch of a takeover bid, provided this has been approved by the shareholders' meeting. Anti-takeover measures have, however, become much less common in Belgium.

For the sake of completion, the articles of association of listed companies can limit the maximum number of voting rights any shareholder can exercise at shareholders' meetings. This limitation must, however, apply equally to all shareholders, so that it is very rarely set up by listed companies.

In the event of a public takeover bid, listed companies are required to inform the FSMA and the bidder of any decision to issue securities with voting rights, or that can give voting rights, and of any other decision that may cause the bid to fail, except for the decision to look for alternative bids.

**Update and trends**

Given the size of the country and growing European harmonisation of the equity capital markets, cross-border IPO activity remains important in the Belgian market. In light of the increased competition between neighbouring countries, the Belgian Minister of Justice has made proposals for a fundamental reform and simplification of the Belgian company law, which is expected to be adopted in 2018. The Corporate Governance Code is also expected to be revised. Another legislative change is the adoption of the new prospectus regulation at European level. It repeals and replaces the Prospectus Directive (2003/71/EC). A staged implementation is being taken to implementation, with the majority of the provisions applying from July 2019. There is no sign yet of level 2 legislation.

The FSMA review of the IPO prospectus continues to be done in a thorough manner, conducted by a joint team of in-house lawyers and accountants. The regulator tends to focus heavily on, among others, the IFRS conversion of financial statements and the prominent disclosure of risk factors. More generally, the FSMA is highly focused on investor protection.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

A foreign issuer will need to take into account the eligibility and key ongoing requirements of the listing venue. A listing in Belgium might be especially contemplated when the issuer's natural market is in Belgium or when it is attracted by the historical presence of active retail investors in Belgium or the expertise concentrated on Euronext Brussels.

The identity of the foreign issuer will determine the competent authority which will approve the IPO-prospectus. For European Economic Area (EEA) issuers, the competent authority will be the relevant authority in the jurisdiction where the issuer has its registered office. In such cases, the main interaction will be with the authority in the home member state even if no public offering is being pursued there. Non-EEA issuers can choose the member state although that will be, in principle, its permanent home member state in all future instances.

One specific set of rules set out in the Belgian royal decree on primary market practices does not apply to offerings for which the prospects has not been submitted for approval by the FSMA. These rules, covering equal treatment of retail investors, the over-allotment facility and greenshoe option, a prohibition to grant benefits in the period preceding a public offer and the public dissemination of information on the size of the demand during and after the end of the public offering, therefore do not apply to transactions passported into Belgium.

A final point is the accounting standards that can be used in the prospectus by foreign issuers. Issuers based in the European Union will need to apply IFRS for consolidated accounts while third country issuers can present their financial information in equivalent accounting standards and generally accepted accounting principles (GAAP) (eg, US GAAP, Japanese GAAP, Chinese GAAP, etc).

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

As in other EEA jurisdictions, foreign issuers can rely on the applicable private placement exemptions when not conducting a public offering in Belgium.

The most relevant exemptions in connection with an IPO are:

- an offering that is addressed in Belgium solely to qualified investors;
- an offering addressed to investors other than qualified investors belonging to a limited circle of fewer than 150 natural or legal persons in Belgium; and
- an offering that is addressed to investors acquiring investment instruments for a total consideration of at least €100,000 per investor, for each separate offer.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

No.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

IPO-related investor claims against issuers or financial intermediaries fall under the concurrent jurisdiction of the courts of first instance and the commerce courts, the judgments of which can be appealed before the courts of appeal.

If the IPO-related tort or breach of contract amounts to a criminal offence – which is the case with omission of prospectus or publication of a wilfully defective prospectus or advertisement – investors can also file their damages claims in criminal courts, which will rule on both the prosecution for criminal offence and the claim for damages.

To the extent all parties agree, alternative dispute resolution methods, such as arbitration and mediation, are also possible.

While an investor can submit a complaint to the FSMA, the FSMA is not competent to award damages to the investor. The investor's complaint might only aim at having the FSMA start an investigation against the issuer or the financial intermediary for an infringement to the prospectus legislation or other legislation for which the FSMA oversees the compliance. An infringement decision of the FSMA can eventually be used by the investor in support of his or her damages claim.

**18 Are class actions possible in IPO-related claims?**

Class actions have only been introduced into Belgian law by an Act of 28 March 2014. A class action can only be lodged to seek compensation for damages suffered by a group of consumers and arising out of the breach by an undertaking of a contractual obligation or certain statutory provisions that are exhaustively enumerated by article XVII.37 of the Code of Economic Law. A class action can only be lodged for damages caused by events that occurred after 1 September 2014.

Only a few provisions relating to financial services and securities are mentioned in the list of statutory provisions, the breach of which can be a cause of class action. Consequently, although it cannot be entirely ruled out, class actions are usually not possible in IPO-related investor claims. To date and to the best of our knowledge, there has been no precedent concerning IPO-related class actions in Belgium.

However, Belgian law allows a number of investors to file a claim together through a single writ of summons in the event that it would be convenient to dispose of each of the investors' claims in the same proceeding. Other investors can also join the proceeding at a later stage subject to the same conditions. There have been precedents where thousands of investors have joined the same proceeding against issuers of securities.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

An IPO-related investor claim often results from an offer of securities to the public without the required, duly approved and published prospectus (omitted prospectus) or with a prospectus or an advertisement that contains misstatements, misleading information or omissions in breach of the prospectus legislation (defective prospectus or advertisement). Such claim will usually be directed against the persons responsible for the prospectus or the advertisement on the basis of tortious liability.

Moreover, an investor may also claim damages from a financial intermediary on the basis of this financial intermediary's contractual liability if he or she can establish the breach of a contractual obligation by the financial intermediary. In the context of an IPO, contractual liability will often be used as the legal basis for misselling claims against financial intermediaries.

IPO-related investor claims are subject to the general civil liability principles as set out by the Civil Code. Civil liability requires the existence of a tort or a breach of contract, a damage resulting out of the tort or breach of contract and a causal link between the damage and the tort or breach of contract.

The prospectus legislation only derogates from these general principles by providing that the prejudice suffered by the investor has presumably been caused, unless proved otherwise, by the defective prospectus or advertisement, when the misstatement, the misleading information or the omission might have created a positive feeling in the market or positively influenced the purchase price of the securities. This derogation only modifies the rule on the burden of proof of the causal link between the tort of the issuer and the prejudice of the investor.

The evaluation of the investor loss to be compensated is uncertain in Belgian law in the absence of well-established doctrine and case law. Some argue that the investor should be placed in the situation as if he or she had never purchased the securities offered through the IPO, and should therefore receive a compensation equal to the difference

Linklaters

**Arnaud Coibion** **arnaud.coibion@linklaters.com**
**Gilles Nejman** **gilles.nejman@linklaters.com**
**Thierry L'Homme** **thierry.lhomme@linklaters.com**
**Filip Lecoutre** **filip.lecoutre@linklaters.com**
**Xavier Taton** **xavier.taton@linklaters.com**

Rue Brederode 13
1000 Brussels
Belgium

Tel: +32 2 501 94 11
Fax: + 32 2 501 94 94
www.linklaters.com

between the purchase price and the sales price of the securities. Others claim that the investor should be placed in the situation as if he or she had purchased the securities at the fair price that would have been fixed by the market if the prospectus or the advertisement had not been defective. In the latter opinion, the compensation should be equal to the difference between the purchase price and this fair price. The investor damage could arguably also be assessed in a third way, being the loss of an opportunity to make another more profitable investment. The investor would then be granted a fraction of the difference of returns between the purchased securities and other securities that the investor would have bought in the alternative.

Other remedies, such as rescission of the purchase of securities and injunction orders, cannot be ruled out. However, the award of damages compensating investor harm is by far the most frequent remedy in practice.

# Cayman Islands

**Rolf Lindsay, Barnaby Gowrie and Andrew Barker**

**Walkers**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The aggregate market value of listed securities on the Cayman Islands Stock Exchange (CSX) is approximately US$210 billion. Specialist debt securities listings accounted for approximately US$106 billion, corporate debt securities listings for approximately US$96 billion, investment fund listings for approximately US$9 billion and equity listings for approximately US$338 million with the remainder of the listings comprising retail debt securities and insurance linked securities. Equity listings currently account for only four of the listings on the CSX.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Of the four equity listings on the CSX, three of these are incorporated in the Cayman Islands and one is incorporated overseas.

The Cayman Islands is a well-established jurisdiction of incorporation for companies seeking a listing on international markets. As at 31 May 2016, there were 30 Cayman Islands companies listed on the Alternative Investment Market of the London Stock Exchange and seven with main market listings on the London Stock Exchange. Over 100 Cayman Islands companies have listings on the New York Stock Exchange or NASDAQ, and over 700 on the Hong Kong Stock Exchange.

There are a number of factors that drive the use of Cayman Islands vehicles for listing purposes. These include the familiarity of many international investors with the jurisdiction and its legal system, which is based on English common law, sensible levels of regulation and the tax neutrality offered by Cayman Islands law.

The Cayman Islands as a jurisdiction is designed to facilitate international finance and the willingness to innovate and improve the laws of the jurisdiction to provide the most suitable statutory framework has also proved to be a key advantage. For example, we regularly see listed Cayman Islands companies take advantage of the Cayman Islands merger statute, which offers a straightforward and cost-effective means for companies to merge either in preparation for an IPO or as a means of acquiring a listed company.

### 3 What are the primary exchanges for IPOs? How do they differ?

The CSX is the sole exchange in the Cayman Islands. The CSX offers listings for corporate and specialist debt, investment funds, equities and insurance-linked securities.

The choice of jurisdiction and exchange made by Cayman Islands companies seeking to list on overseas markets will depend on a number of different factors including the jurisdiction's connection to the business of the company, the location of current and prospective investors and the level of regulation of the market in question. In each case Cayman Islands companies offer a well-established vehicle for undertaking the listing.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The CSX was established under the Cayman Islands Stock Exchange Company Law, 1996 (the Law).

Though the CSX has self-regulatory powers as an exchange, it is still subject to the supervision and regulation of the Stock Exchange Authority (the Authority). The Authority is statutorily responsible for the policy, regulation and supervision of the CSX.

The CSX's Council (the Council) is responsible for carrying out the day-to-day operations and overseeing the affairs of the CSX. The Council comprises six senior professionals appointed by the Authority in addition to the Chief Executive Officer of the CSX. The Council has delegated its powers and functions for listing matters to the CSX's Listing Committee, who further delegate certain functions to the staff of the CSX.

The CSX, in consultation with the Authority, has developed a range of rules and policies for the listing of securities and changes to such rules are subject to the Authority's written approval. The Authority has the statutory authority to require the CSX to make, rescind or amend any of its rules. The CSX Listing Rules (the Listing Rules) govern the admission of all securities wishing to be listed on the CSX as well as the continuing obligations of issuers once listed, the enforcement of those obligations and the suspension and cancellation of listings.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Before an issuer can list its securities on CSX, it must first obtain approval from the Listing Committee, to whom the Council has delegated its powers and functions for listing matters.

Chapter 6 of the Listing Rules sets out the conditions for listing. An applicant to the CSX must fulfil the following requirements to be listed:

- Duly incorporated: an issuer must be duly incorporated or otherwise validly established in a recognised jurisdiction according to the relevant laws of its place of incorporation or establishment and be operating in conformity with its memorandum and articles of association or other constitutional documents.
- Sufficient liquid open market: there must be a sufficiently liquid and open market in the equity securities for which listing is sought, which means:
  - the applicant must normally have an expected initial market capitalisation for all the securities to be listed of at least US$5 million; and
  - the minimum percentage of equity securities in public hands must at all times be at least 25 per cent of the class of shares listed, with a minimum of 50 shareholders. A percentage lower than 25 per cent may be acceptable to the CSX if the market in the shares will be sufficiently liquid and will operate properly with a lower percentage in view of the large number of shares of the same class and the extent of the distribution to the public.
- History of operations: the applicant must have an adequate trading record under substantially the same management, which must be of known character and integrity and, which collectively, must

have appropriate experience and technical expertise to manage the issuer's operations. For the purpose of this rule, an adequate trading record will normally be at least three financial years but the Exchange may accept a shorter period for issuers that meet the Exchange's definition of a specialist company, start-up, mineral company or shipping company or in exceptional circumstances.

- Financial information: an applicant for listing must have published audited financial statements that cover the three financial years preceeding the application for listing:
  - in exceptional circumstances, or for issuers that meet the CSX's definition of a specialist company, start-up, mineral company or shipping company the CSX may accept a shorter period;
  - in the case of a new applicant, the latest financial statements must be in respect of a period ended not more than 12 months before the date of the listing document. If more than nine months have elapsed since the date to which the latest audited accounts of the issuer were made up, an interim financial statement made up to a date no earlier than three months prior to the date of the listing document must be included. If the interim financial statement is unaudited, that fact must be stated. The CSX may, at its discretion, require issuers to have such interim financial statements audited;
  - in the case of a new applicant, the financial statements must be unqualified, unless the qualification is acceptable to the CSX and has been adequately explained so as to enable investors to make a properly informed assessment of the significance of the matter; and
  - the financial statements referred to above must have been prepared in accordance with International Accounting Standards, US, Canadian or, UK Generally Accepted Accounting Principles or other equivalent standard acceptable to the CSX.
- Directors: the board of an issuer must have at least three directors, the majority of whom must be independent.
- Working capital: an issuer that is applying to list with less than three years trading records must demonstrate to the CSX that the working capital available to the group, including guaranteed proceeds from any new securities offering, will be sufficient for at least 12 months from the date of listing.
- Independent auditor: an applicant must appoint an independent auditor acceptable to the CSX to carry out the audit of its financial statements.
- Transferability: the securities for which listing is sought must be freely transferable, except to the extent that any restriction on transferability is approved by the CSX.
- Whole class listing: where none of the securities of a particular class are listed on the CSX, the application for listing must relate to all securities of that class, whether already issued or proposed to be issued.
- Convertible securities: convertible securities can be admitted to listing only if the CSX is satisfied that investors will be able to obtain the information necessary to form a reasonable opinion as to the value of the securities into which they are convertible.
- Clearing and settlement: to be admitted to listing on the CSX, securities must have an International Securities Identification Number and be eligible for deposit in an acceptable electronic clearing and settlement system including Clearstream, Euroclear, the Depositary Trust Company or any acceptable alternative system agreed in advance with the CSX.
- Registrar: the issuer must maintain a share transfer agent or registrar in a financial centre acceptable to the CSX. However, the issuer itself can perform these functions if it can demonstrate to the CSX that it is capable of doing so.
- Constitution: the issuer's constitution must contain the provisions contained in Schedule 6A to Chapter 6 of the Listing Rules. These governance provisions relate to the issuer's capital structure, voting rights of shares and the appointment of and voting by the issuer's directors.

Further requirements will be applicable for start-up companies, mineral companies and shipping companies.

The prospective issuer must provide drafts of the listing document to the CSX for comment and the CSX must formally approve the final version of the listing document before publication. The CSX may also require the issuer to produce copies of its constitution, audited and interim financial statements and any reports, letters, valuations, statements by experts, contracts or other documents pertaining to the issue.

### 6 What information must be made available to prospective investors and how must it be presented?

The Listing Rules provide that one or more listing documents must be produced containing all information that is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the issuer and of its profits and losses and of the obligations of and rights, powers and privileges of such securities. Without prejudice to the foregoing and the specific requirements of the Listing Rules, the CSX adopts a pragmatic approach as concerns the disclosure required in respect of an equity issuer and its securities in a listing document.

The listing document must be submitted to the CSX in draft in reasonable time for the CSX to review it and for amendments to be made to it prior to the proposed publication date.

The listing document in particular must contain the following:

- summary: a summary of the issuer, its advisers and securities being offered;
- risk factors: all material risks associated with investing in the equity securities, including any risks specific to the issuer or industry;
- securities, issuance and distribution: terms of the equities being offered;
- issuer's capital: general information in regard to the shares of the issuer including among other things its authorised total share capital, the amount issued or agreed to be issued pursuant to the listing document, voting rights and convertible shares;
- group's activities: brief history and certain particulars of the business of the group of which the issuer is a part;
- financial information: consolidated financial information outlining the financial health of the issuer;
- management: brief overview of the management of the company including remuneration payable to the directors by any member of the group and what contracts (if any) the director or an associate of that director is materially interested;
- material contracts: dates of and parties to all material contracts together with a summary of principal contents;
- general information: particulars of any litigation or claims of material importance pending or threatened against any member of the issuer's group as well as the issuer's financial year end;
- documents for inspection: a statement that for a reasonable time during which at a place in the Cayman Islands or such other place as the CSX may agree or require certain constitutional and financial documents will be made available for inspection; and
- additional information: certain other disclosures will be required for specialist companies, mineral companies, start-ups and shipping companies.

The CSX may allow the non-publication of certain information, which would otherwise have been required to be published in accordance with the above requirements, provided the CSX receives satisfactory written confirmation that its publication would be contrary to public interest or unduly detrimental to the issuer and the non-publication of such information would not be likely to mislead investors with regard to the facts and circumstances, knowledge of which is essential for the assessment of the securities in question.

A listing document must be published by the issuer by:

- making it available to the public for inspection at:
- the CSX; and
- the issuer's registered office or such other place (including the issuer's website) acceptable to the CSX for a reasonable period of time (being not less than 14 days commencing on the date of the formal approval by the CSX of the listing document); and
- circulating it to existing holders of listed securities.

### 7 What restrictions on publicity and marketing apply during the IPO process?

A listing document must not be published until it has been formally approved by the CSX.

Generally, companies that may be listed on CSX will be seeking to market to investors in other jurisdictions and therefore the laws

and regulations of those jurisdictions will be relevant to the question of marketing. In terms of marketing within the Cayman Islands, a Cayman Islands exempted Company pursuant to section 175 of the Companies Law may only invite the public in the Cayman Islands to subscribe for securities where it is listed on the CSX.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

The CSX may at any time suspend trading in any securities or cancel the listing of any securities in such circumstances and subject to such conditions as it thinks fit, whether requested by the issuer or not. The CSX may do so where:

- an issuer fails, in a manner that the CSX considers material, to comply with the listing rules or its issuer's undertaking (including a failure to pay on time any fees or levies due to the CSX);
- the CSX considers there are insufficient securities of the issuer in the hands of the public;
- the CSX considers that the issuer does not have a sufficient level of operations or sufficient assets to warrant the continued listing of its securities on the CSX; or
- the CSX considers that the issuer or its business to be no longer suitable for listing.

If the CSX considers that an issuer has contravened the Listing Rules it may, in addition to, or instead of, a suspension in trading or cancellation of a listing:

- censure the issuer; and
- publish the fact that the issuer has been censured.

If the CSX considers that a contravention of the listing rules by an issuer is the result of a failure by all or any of its directors to discharge their responsibilities it may do one or more of the following:

- censure the relevant directors;
- publish the fact that the directors have been censured; and
- state publicly that in its opinion the retention of office by or appointment of certain directors is prejudicial to the interests of investors.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

The general listing process is as follows:

- the issuer appoints a CSX registered listing agent who is responsible for dealing with the CSX on all matters relating to the application and for ensuring the applicant's suitability for listing;
- the issuer must ensure that it satisfies the CSX conditions for listing (see question 5);
- the issuer and its listing agent must prepare a draft listing document for review and comment by the CSX;
- once the draft listing document has been approved, the issuer may apply to be listed;
- in the first instance, all applications for listing are dealt with by the CSX's Head of Listing and the staff of the listing department;
- once the CSX staff are satisfied with an application, they will submit it to the listing committee of the CSX for approval;
- once the documents have been approved, supporting documentation must be filed before the securities are admitted to listing;
- following approval and once the securities have been issued the securities will be admitted to listing and trading; and
- information regarding the securities, including any pricing information, will be posted on the CSX's dedicated pages on the Bloomberg system as well as the CSX website.

**10 What are the usual costs and fees for conducting an IPO?**

The initial listing fee charged by the CSX is dependent on the value of the securities being listed. Such initial listing fees are as follows:

- up to US$10 million to US$10,000;
- up to US$100 million to US$15,000; and
- over US$100 million to US$20,000.

In any case, regardless of the value of the securities being listed, the annual fee for listing charged by the CSX is US$10,000.

The underwriter's fees will typically be an amount equal to a percentage of the underwritten portion of the offering. Further, the issuer will be responsible for the fees of all other advisers including, among others, accountants, legal advisers, the registrar or transfer agent and investment banks. The fees chargeable by these advisers will be dependent on a wide range of facts including among other things, the size of the offering as well as its complexity. The small number of IPOs on the CSX means that it is difficult to give an accurate indication of fees likely to be charged by service providers. However, given that many of the service providers involved will be onshore, we would generally expect the fees incurred to be similar to the amounts charged for equivalent listings in other jurisdictions.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

The board of an issuer must have at least three directors, the majority of whom must be independent.

The constitutional documents of the issuer must prohibit a director from voting on any contract or arrangement or any other proposal in which he or she has an interest that is a material interest and must state that such director may not be counted in the quorum present at the meeting. The constitution may provide for exceptions to the prohibition against voting on such matters where the interest arises in respect of a resolution on the following matters:

- the giving of any security or indemnity either: to the director for money lent or obligations incurred or undertaken by him or her at the request of or for the benefit of the issuer or any associate of the issuer; or to a third party for a debt or obligation of the issuer or any of its subsidiaries for which the director has him or herself assumed responsibility in whole or in part and whether alone or jointly under a guarantee or indemnity or by the giving of security;
- any proposal concerning an offer of securities of or by the issuer or any other company that the issuer may promote or be interested in for subscription or purchase where the director is or is to be interested as a participant in the underwriting or sub-underwriting of the offer;
- any proposal concerning dealings with any other company in which the director is interested, whether directly or indirectly, as an officer, executive or shareholder, or in which the director has a beneficial interest in shares of that company, provided that he or she, together with any of his or her associates, is not beneficially interested in five per cent or more of the issued shares of any class of such company or of any third company through which his or her interest is derived;
- any proposal or arrangement concerning the benefit of employees of the issuer or its subsidiaries including: (i) the adoption, modification or operation of any employees' share scheme or any share incentive or share option scheme under which he or she may benefit; or (ii) the adoption, modification or operation of a pension fund or retirement, death or disability benefits scheme that relates both to the directors and employees of the issuer or any of its subsidiaries and does not provide in respect of any director any privilege or advantage not generally accorded to the class of persons to which such scheme or fund relates; and
- any contract or arrangement in which the director is interested in the same manner as other holders of shares or debentures or other securities of the issuer by virtue only of his or her interest in shares or debentures or other securities of the issuer.

The constitution of an issuer is also required to provide that: where any person, other than a director retiring at the meeting or a person recommended by the directors, is to be proposed for re-election or election as a director, notice (of a period specified by the constitution that must be not less than seven days and not more than 42 days) must be given to the company of the intention to propose him or her and of his or her willingness to serve as a director.

Issuers must require every person discharging managerial responsibilities including directors to comply with the Model Code of Conduct published by CSX and to take all reasonable steps to secure their compliance. The purpose of the Model Code of Conduct is to ensure that persons discharging managerial responsibilities and employee insiders

do not abuse, and do not place themselves under suspicion of abusing inside information that they may be thought to have, especially in periods leading up to an announcement of the issuer's results.

In the context of Cayman Islands companies being used for listings on overseas stock exchanges, particularly in the United States, the fiduciary duties of directors are often a key area of distinction for Cayman Islands companies compared to local companies. This can be particularly pertinent in the context of takeovers. For example, unlike a director of a Delaware Company, which has a fiduciary duty to the company and its shareholders, a director of a Cayman Islands company has a fiduciary duty to the company only. While ordinarily that is a distinction without a difference, in the context of public transactions such as IPOs and mergers the differences between US law and Cayman Islands law in this regard can be fairly marked.

Although the Companies Law does not specify the general or specific fiduciary duties of directors, the Cayman Islands has adopted the English common law principles relating to directors' duties, which can generally be summarised as follows:

- a duty to act bona fide in the best interests of the company;
- a duty not to make a profit out of his or her position as director (unless the company permits him or her to do so);
- a duty to exercise his or her powers for the purposes for which they are conferred;
- a duty not to put him or herself in a position where the interests of the company conflict with his or her personal interest or his or her duty to a third party; and
- a duty to act with skill, care and diligence.

### 12 Are there special allowances for certain types of new issuers?

The Listing Rules provide the discretion for the CSX to accept trading records and financial statements for a shorter period than the three financial years that would otherwise be required under the Listing Rules in the case of a specialist company, start-up, mineral company or shipping company.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

The CSX has issued the Cayman Islands Stock Exchange Code on Takeovers and Mergers to ensure fair and equal treatment of all shareholders in relation to takeovers and provides an orderly framework within which takeovers are conducted.

Owing to the small number of equity listings on the CSX, there is not sufficient market practice to indicate which anti-takeover devices are typically implemented. The constitution of Cayman Islands companies together with the Cayman Islands Companies Law provides a flexible framework within which to implement such devices should an issuer wish to do so. For Cayman Islands entities listed on foreign exchanges it will be the local law and custom of the relevant exchange that determines whether and to what extent such devices are in fact employed. By way of illustration: Cayman Islands companies are often used for listings on markets in the United States where such devices are much more common, and it is not unusual for a Cayman Islands entity listed on NASDAQ to provide for staggered board appointments, weighted voting in certain circumstances and 'blank cheque' preferred shares. A Cayman Islands entity listed in the United Kingdom, on the other hand, would be far more restricted by local law and custom and would generally not employ these devices. On the contrary: it would adopt as a constitutional matter the application of the City Code on Takeovers and Mergers.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

The same procedure for listing that applies to domestic issuers applies equally to foreign issuers.

A foreign issuer may wish to list on the CSX for the following reasons:

- The familiarity of many international investors with the jurisdiction and its legal system;
- competitively priced, fast and efficient listing services;
- international standards of issuer regulation;
- sophisticated listing rules that are easy to understand and commercially driven;
- the CSX does not insist on the adoption of International Accounting Standards or International Financial Reporting Standards, provided that an appropriate accounting standard is used;
- as the CSX operates outside the European Union, and no EU directives apply, the regulatory burden is less onerous than listing on other major stock exchanges; and
- the CSX is not bound by US Securities and Exchange Commission regulations.

### 15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

It is unusual for issuers to seek to raise funds from investors in the Cayman Islands. However, should an issuer wish to do so, it would need to consider whether any of its proposed activities would constitute the carrying on of business in the Cayman Islands and therefore whether registration and licensing may be required under Cayman Islands law.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

The Cayman Islands does not impose taxation on the issuance and listing of equity securities.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

A formal legal proceeding initiated in the Grand Court of the Cayman Islands (the Court) is the primary method of dispute resolution in the Cayman Islands. Disputes related to IPOs will usually be heard by experienced commercial judges in the Financial Services Division of the Court. There is no statutory requirement to pursue alternative dispute resolution options prior to commencing any formal legal proceedings in the Court.

Cayman Islands law provides that parties are at liberty to agree via contract the method by which disputes will be resolved. The use of exclusive and non-exclusive jurisdiction clauses is common in matters related to IPOs.

Parties can elect to refer their matter to arbitration as an alternative to Court-based litigation or non-binding forms of dispute resolution such as mediation. The Cayman Islands has a modern arbitral framework as a result of the bringing into force of: (i) the Arbitration Law (2012); and (ii) procedural rules regulating the Court's practice and procedures in relation to arbitrations brought into force in July 2013 (the Rules). The foundation of the Arbitration Law is largely the UNCITRAL Model Law on International Commercial Arbitration (the Model Law); while also utilising successful aspects of arbitral legislative models found in other common law jurisdictions (such as Singapore or Hong Kong). The Arbitration Law has also sought to augment the Model Law where appropriate to suit the nature of the offshore financial business conducted in the Cayman Islands, including IPOs.

### 18 Are class actions possible in IPO-related claims?

Where a variety of plaintiffs have the same interest in a matter, pursuant to the Order 15, Rule 12 of the Rules they are at liberty to commence representative proceedings, one or more of the individuals being named as the representative for the purposes of the litigation. The proceedings can be commenced, and will continue until conclusion, unless ordered otherwise by the judge, as a representative action. A representative action is not the same as a US class action, in that the Court takes no part in the management or composition of the class and persons who are actually parties to the claim will be bound by the result, unless the court orders otherwise.

In certain circumstances, a shareholder may, rather than seeking to enforce a personal right, enforce a claim on behalf of a company. A cause of action can only be brought on a derivative basis if the

company itself could bring such claim (as opposed to the shareholder individually). In general, in order to support such a claim on behalf of a company, the directors of the company (who would ordinarily be the appropriate party to take the relevant action on behalf of the company) must have refused to make the relevant claim. In such circumstances, a derivative action may be brought on behalf of the company as a whole. In derivative actions, the judgment is given in favour of the company rather than the individual shareholder. It should be noted that the law relating to derivative actions is extremely complex and that such actions are exceptionally rare in the common law jurisdictions.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

An issuer responsibility statement is required to be included in the relevant listing document. Notwithstanding that the issuer has the primary responsibility for the contents of the listing document and depending on the relevant facts other parties such as the directors of the issuer, the issuer's promotors, its auditors and agents could also incur liability.

Common causes of action with respect to an IPO include, but are not limited to:

- tortious claims with respect to negligent misstatement, fraudulent misstatement or deceit;
- contractual claims on the basis that the offering document forms the basis of a contract between the issuer and the prospective shareholder;
- breaches of fiduciary duty by the director of the issuer. Breaches could include conflicts of interest or making secret profits;
- fraud (civil and criminal liability); and
- pre-contractual misrepresentation pursuant to section 14(1) of the Contracts Law (1996 Revision) with respect to fraudulent misrepresentation.

Remedies will vary depending on the cause of action that is pursued by the plaintiff, but can include damages, rescission of the relevant contract, specific performance of obligations, disgorgement of profits and imprisonment (criminal actions only).

WALKERS

**Rolf Lindsay** **rolf.lindsay@walkersglobal.com**
**Barnaby Gowrie** **barnaby.gowrie@walkersglobal.com**
**Andrew Barker** **andrew.barker@walkersglobal.com**

190 Elgin Avenue
George Town, Grand Cayman
KY1-9001
Cayman Islands

Tel: +1 345 949 0100
Fax: +1 345 949 7886
www.walkersglobal.com

# China

**Jeffrey Ding and Toby Li**
**Fangda Partners**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

According to the information published on the websites of the China Securities Regulatory Commission (CSRC) of the People's Republic of China ('China' or 'PRC' for the purpose of this chapter, excluding Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan), the Shanghai Stock Exchange (SSE) and the Shenzhen Stock Exchange (SZSE), as of the end of 2016, there were 3,052 companies listed on the PRC domestic stock markets, with a total market capitalisation of about 50.82 trillion yuan. In 2016, 240 companies completed their IPOs, with 116 listed on the SSE and the other 124 on the SZSE. The total proceeds raised through those IPOs amounted to 163.4 billion yuan.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Only companies incorporated under PRC law can be the issuers in the IPO market. Many factors may affect the decision of a domestic company to list at home or overseas, such as how industry prospects in relation to the business of the company are forecast, how such domestic company is valued, in which jurisdiction the listing conditions are easier to satisfy, how long it will take to complete the IPO, or whether the shares held by domestic shareholders will be tradeable. In the past, domestic companies in certain industries such as the internet tend to list overseas after restructuring themselves as offshore-registered companies with substantial amounts or all of their business operations in China.

According to the current PRC law, overseas companies are not allowed to list in the PRC capital market, but China is in the process of amending its Securities Law, which was initially promulgated in 1998. According to the relevant news report (see http://magazine.caijing.com.cn/20150426/3869531.shtml), the draft amended Securities Law as proposed purports to allow foreign companies to issue shares and list in China's domestic stock markets.

### 3 What are the primary exchanges for IPOs? How do they differ?

The SSE and the SZSE are the two primary exchanges in the PRC mainland capital market. IPOs with larger market capitalisation traditionally choose to list on the SSE. According to the information published on the website of the SSE, as of the end of 2016, 1,182 companies were listed on the SSE with a combined market capitalisation of 28.46 trillion yuan.

Prior to March 2014, the CSRC required an IPO with up to 80 million newly issued shares to list on the SSE, and an IPO with up to 50 million newly issued shares to list on the SZSE, while the issuer may choose to list on either the SSE or the SZSE if the number of the newly issued shares is between 50 million and 80 million. The CSRC decided in March 2014 that an IPO issuer would be able to decide which stock exchange to list on at its own discretion.

The SZSE consists of a Main Board, which also includes the Small and Medium-sized Enterprise Board (the SME Board), and the Growth Enterprise Board (ChiNext). The SME Board is part of the Main Board and is designed to attract small and medium-sized companies to list thereon, but the listing conditions are substantially the same as those of the Main Board. The ChiNext market is suitable for the growth enterprises, which are typically fast-growing new and high-technology enterprises, and the listing conditions are more easily satisfied than those of the Main Board. According to the information published on the website of the SZSE, at the end of 2016 a total of 1,870 companies were listed on the SZSE with a total market capitalisation of 22.31 trillion yuan.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The CSRC is responsible for rule-making and enforcing the rules on IPOs in the PRC.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

An issuer must seek the CSRC's approval for its listing. Each issuer must make submissions to the CSRC to prove its satisfaction of the listing conditions under PRC securities law and regulations. The submission documents mainly include the following:

- the prospectus;
- the issuer's resolutions regarding the offering and listing of shares;
- the issuer's financial statements and relevant auditor's reports for the past two or three financial years;
- the issuer's profit forecast report and relevant verification report;
- the internal control attestation report;
- the legal opinion issued by a qualified law firm; and
- the offering sponsorship letter issued by the sponsor.

By examining the listing application documents submitted by the issuer, the CSRC will make a substantive determination on whether the issuer has satisfied the listing conditions under PRC law.

### 6 What information must be made available to prospective investors and how must it be presented?

An issuer is required to disclose all important information in a prospectus prepared by itself. The CSRC promulgated detailed guidelines on the contents of the prospectus, which typically include:

- general information on the share issuance;
- risk factors;
- basic information on the issuer (including corporate history and shareholding information);
- business and technological capabilities;
- competition and related-party transactions;
- directors, supervisors and senior management, and core technology staff;
- corporate governance structure;
- financial and accounting information;
- business development target;
- use of proceeds; and
- issue price and dividend distribution policies.

The prospectus is the most important disclosure document for an IPO issuer. Following the CSRC's acceptance of the IPO application filed by the issuer, the prospectus (submission draft) prepared by the issuer

**Update and trends**

Currently, China is reforming its IPO system to transform it from an approval system to a registration system. Such reform focuses on the veracity, accuracy and completeness of the disclosed information, and redefines and clarifies the responsibilities of the issuer, sponsor, other intermediaries, competent governmental authorities and investors. Following the implementation of the IPO registration system, the Chinese government will reduce its intervention in the capital market, and IPOs in future can be conducted more efficiently. Meanwhile, the information disclosure obligations of issuers and intermediaries will be further strengthened, and the measures to protect investors further improved.

On 27 December 2015, the Standing Committee of the National People's Congress of the PRC adopted an official decision, effective for two years starting from 1 March 2016, to authorise the State Council to adjust the provisions of the PRC Securities Law in relation to the current approval system so as to implement the registration system. This high-level decision is widely deemed as the official legal basis and a big step for China's registration system reform.

Until now, one-and-a-half years has passed but the laws and regulations related to the registration system have not yet been decided. As we believe, the IPO registration system reform is a set target for China, but its pace would depend on the development of capital market and legal conditions. When the lawmakers will agree on the laws and regulations related to IPO registration system is still uncertain.

will be disclosed on the official website of the CSRC. The finalised prospectus will then be published in the designated newspaper and posted on the designated information disclosure websites after the CSRC approves the listing application.

**7 What restrictions on publicity and marketing apply during the IPO process?**

During the IPO process, many activities are prohibited or restricted according to the Measures for the Administration of the Offering and Underwriting of Securities formulated by the CSRC. For example, the issuer and the underwriter will not divulge any book-building or pricing information, or manipulate the issue price by any means, or induce others to subscribe for the shares to be issued by providing overdrafts or kickbacks or by any other improper means determined by the CSRC, or provide financial aid or compensation to investors participating in the subscription, whether directly or through related parties. During the promotion process, the issuer and the lead underwriter may not engage in exaggerated advertising, or induce or mislead investors by false advertising or other improper means, or disclose the information of the issuer other than the publicly available information.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

If any issuer or underwriter violates the above provisions, the CSRC may order the issuer and the underwriter to halt or suspend the offering, and may, depending on the seriousness of such violation, take regulatory measures such as ordering correction, holding a regulatory interview, issuing a warning letter, ordering a public explanation or holding the violator unfit to hold a particular position, or banning the violator from the securities market and reflecting such violation in its public records. If administrative punishment is justified under laws, the violator will be punished in accordance with the relevant provisions; any violator that is suspected of a crime will be referred to the judicial authorities in accordance with the law, and be investigated for criminal liability.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

Under PRC law, the CSRC should decide to approve, reject, or suspend or terminate the examination of an IPO application within three months of the acceptance of the application documents. Within six months (applicable to the IPOs listed on the SSE and on the Main Board of the SZSE) or 12 months (applicable to the IPOs listed on the ChiNext Board of the SZSE) of the CSRC's approval of the IPO application, the issuer may issue shares and list on the stock exchange at such time as may be considered appropriate by it. In practice, however, it usually takes more than three months for the issuer to obtain approval from the CSRC from the date of acceptance of the IPO application. During its examination of the IPO application, the CSRC normally issues several rounds of written comments on the IPO application materials, and the time between the date of issuance of such written comments and the date of the issuer's written reply is not counted as a part of the examination period. Generally, it takes four to six months or even longer to obtain the CSRC's approval for a typical IPO application from the date of acceptance.

**10 What are the usual costs and fees for conducting an IPO?**

The costs and fees incurred for conducting an IPO in the PRC capital market mainly consist of the underwriters' fees and sponsors' fees, the legal fees and the audit fees. The underwriters' fees and sponsors' fees are generally connected with the amount of funds raised in the IPO. According to the statistics from Wind Info, a Chinese service provider of financial data and information, the total amount of underwriting and sponsoring fees paid in 2016 reached around 8.21 billion yuan, accounting for about 5 per cent of the total proceeds raised in the IPO. The average legal fee for IPOs in 2016 was about 2.3 million yuan per IPO, while the average audit fee for IPOs in 2016 was about 5.1 million yuan per IPO.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

Under PRC law, an IPO issuer should have a board of directors consisting of between five and 19 members, of whom at least one-third must be independent, including at least one accounting professional. The issuer should also have a board of supervisors consisting of representatives of shareholders and representatives of employees. Representatives of employees must account for at least one-third of the total number of supervisors, and be democratically elected by the employees of the issuer through the employees' congress, the employees' general meeting or otherwise.

**12 Are there special allowances for certain types of new issuers?**

No, there are not. As stated above, however, smaller or growth companies may apply for listing on the ChiNext Board of the Shenzhen Stock Exchange, whose listing conditions are generally easier to satisfy than those of the Main Board. For example, an issuer intending to list on the Main Board must have achieved net profits in each of the past three fiscal years with an aggregate amount in excess of 30 million yuan; an issuer intending to list on the ChiNext Board only needs to have been profitable for the past two years if its aggregate net profits amount to at least 10 million yuan, or to have made a profit in the past year if its operating revenue in such period amounts to at least 50 million yuan.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

The CSRC has issued the Measures for the Administration of Takeover of Listed Companies to regulate and administer the takeover of listed companies. According to such measures, when the shares beneficially owned by an investor reach 5 per cent of the issued shares of a listed company, such investor will be subject to the corresponding disclosure obligation; any subsequent increase or reduction of shares beneficially owned by such investor by 5 per cent of the issued shares of the listed company will also trigger the above disclosure obligation. If an investor holds 30 per cent of the issued shares of a listed company, and wishes to acquire additional shares of such listed company, the investor should acquire these additional shares by way of a full or partial takeover bid, unless the issuer applies to the CSRC for an exemption and the CSRC has granted such exemption with respect to such acquisition, in accordance with the Measures for the Administration of Takeover of Listed Companies.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

According to current PRC law, foreign issuers are not allowed to list in the PRC capital market.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Owing to China's foreign exchange control regime, foreign exchange has become a barrier preventing domestic investors from purchasing shares issued by foreign issuers in other jurisdictions. Under current PRC law, a domestic individual investor may convert yuan into foreign currencies up to the equivalent of US$50,000 each year, and only qualified domestic institutional investors approved by the competent PRC authorities may invest in foreign capital markets. This category of qualified domestic institutional investor mainly consists of domestic commercial banks, securities companies, fund management companies, insurance companies and trust companies.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

No, there are not.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

If the prospectus or other disclosure document issued by an issuer contains any false or misleading statement or material omission that causes investors to suffer losses in their securities transactions, the investors may claim damages against the issuer, its controlling shareholder or directors, supervisors or senior officers, or the intermediaries issuing the relevant documents (such as the sponsor and the law firm). As of 1 January 2016, the CSRC requires that the sponsor should undertake to indemnify the investors in advance for the losses caused by any false or misleading statement or material omission in the documents prepared or issued by the sponsor for the purpose of the issuer's IPO. Currently, in the PRC, the final resolution of such disputes is available by judicial resolution only.

**18 Are class actions possible in IPO-related claims?**

The Civil Procedure Law of the PRC provides for a representative action system that is similar to class actions in Western countries. Under this system, when the object of action is of the same category, and the number of either party to the action cannot be determined upon the institution of the action, the court may issue an announcement to describe the case and the claims, and notify all the relevant rights holders to register with the court within a specified time limit. The rights holders registered with the court may elect a representative to conduct the litigation. If no representative can be elected, the court may agree a representative with the pre-registered rights holders. The litigation activities carried out by the representative will be binding on the rights holders represented thereby, as will the judgment and decision issued by the court.

Therefore, class actions are theoretically possible in IPO-related claims in the PRC market, but in practice, they are not often seen in the PRC capital market.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

As stated above, if the prospectus or other disclosure document issued by an issuer contains any false or misleading statement or material omission that causes investors to suffer losses in their securities transactions, the investors may claim damages against the issuer, its controlling shareholder or directors, supervisors or senior officers, or the intermediaries issuing the relevant documents (such as the sponsor and the law firm). Currently, such disputes can only be finally resolved before judicial authorities in China.


# Fangda Partners

**Jeffrey Ding** **jding@fangdalaw.com**
**Toby Li** **toby.li@fangdalaw.com**

27/F Kerry Centre North Tower
No. 1 Guanghua Road, Chaoyang District
Beijing 100020
China

Tel: +86 10 5769 5600
Fax: +86 10 5769 5788
www.fangdalaw.com

# France

**Olivier Saba, Jean-Damien Boulanger and Douceline Chabord**

**Bredin Prat AARPI**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

There are two main exchanges for IPOs in France: the Euronext regulated market and Alternext (see question 3 for more details).

In 2016, there were nine IPOs on the Euronext regulated market (down from 22 in 2015), raising about €902 million (down from €4.4 billion in 2015).

There were also 11 IPOs on Alternext (down from 19 in 2015), raising about €89 million (compared with €121 million in 2015) (source: IPO News No. 20, January 2017, KPMG).

In 2016, no company raised more than €500 million, as opposed to four in 2015. In comparison, in the previous years:

- 2015: 22 IPOs on the Euronext regulated market (raising €4.4 billion); 19 IPOs on Alternext (raising €121 million);
- 2014: 21 IPOs on the Euronext regulated market (raising €4.3 billion); 20 IPOs on Alternext (raising €96 million);
- 2013: 15 IPOs on the Euronext regulated market (raising €1.3 billion); 11 IPOs on Alternext (raising €63 million);
- 2012: nine IPOs on the Euronext regulated market (raising €226 million) and 10 on Alternext (raising €32 million); and
- 2011: 15 IPOs on the Euronext regulated market (raising €86 million) and 24 on Alternext (raising €63 million) (source: KPMG, IPO News No. 8, September 2013; IPO News No. 11, November 2014; IPO News No. 16, January 2016).

In 2016, with only 20 IPOs, IPOs decreased significantly compared to the two previous years particularly dynamic. This is 50 per cent less than in 2015 (42 IPOs in 2015) and 2014 (40 IPOs in 2014). In terms of raised funds, the decrease is even more accentuated: €994 million was raised in 2016 from €4.6 billion in 2015 and €4.4 billion in 2014.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

As regards the sectors of activity of the issuers, biotech and medtech companies represented around 25 per cent of the issuers in 2016 (down from 29 per cent in 2015), but only 14 per cent of the raised funds. Next, services providers represented 20 per cent of the issuers (equally 20 per cent in 2015) and 41 per cent of the raised funds (up from 36 per cent in 2015). The technology companies (internet, software) also represented 20 per cent of the issuers (equally 20 per cent in 2015), but only 3 per cent of the raised funds (down from 7 per cent in 2015) (source: KPMG, IPO News No. 20, January 2017). No 'large cap' company made an IPO in 2016. With only one issuer (SPAC Mediawan), the media sector represented 5 per cent of the issuers and 25 per cent of the raised funds. The most important IPO in 2016 was that of Maisons du Monde (service and distribution sector) with funds raised amounting to €380 million.

Between 2003 and 2013, only four French companies were listed overseas: three in the United States (Sequans Communications, Constellium and Critéo) and one in Hong Kong (L'Occitane) (source: Report on the IPOs, Autorité des Marchés Financiers, 1 December 2014).

According to the Financial Markets Authority (AMF), the main reasons why French companies decide to list overseas are not linked to the regulations in effect in France, but are related to four main criteria:

- valuation (shareholders are looking for the exchange that gives the best valuation of their company);
- nationality of the shareholders (shareholders prefer to list their company in their own country as they know the rules in effect there);
- existence of comparable companies (being listed on the same exchange as comparable companies helps reach analysts and investors specialising in the business of the company); and
- internationalisation of the brand (being listed abroad allows for an expansion of the business).

Three foreign issuers have been listed in France in 2016 (down from eight in 2015). The three companies operate in the biotech sector, which shows the attractiveness of the Paris marketplace for this sector. Each of the three IPOs was made with fundraising, amounting to €59.3 million.

### 3 What are the primary exchanges for IPOs? How do they differ?

Euronext is the first pan-European exchange, spanning Belgium, France, the Netherlands, Portugal and the United Kingdom. Created in 2000, it is the primary exchange in the eurozone with over 1,300 issuers worth €2.6 trillion in market capitalisation. In Europe, Euronext trades equities through its two main markets: the Euronext regulated market and Alternext. Alternext is not a regulated market but rather a multilateral trading facility created by Euronext in May 2005 to offer small and medium-sized companies simplified access to the stock market.

**Euronext regulated market**

There is an obligation to publish a prospectus approved by the AMF. On the basis of a single approved prospectus, an issuer can raise capital anywhere in the European Union. There is also an obligation to comply with ongoing and periodic disclosure obligations.

The key listing requirements are as follows:

- a minimum float of 25 per cent of share capital, possible exemption if sufficient liquidity;
- 5 per cent of the share capital representing at least €5 million as a minimum requirement; and
- a three-year set of accounts (possibility of an exemption).

**Companies are categorised on the basis of capitalisation:**

- large caps (group A: over €1 billion);
- mid caps (group B: between €150 million and €1 billion); and
- small caps (group C: less than €150 million).

**Alternext**

The listing requirements are less stringent, and rules are set by the market operator; they are derived from the regulated market but offer a greater level of flexibility. It provides the same pan-European trading platform as the Euronext regulated market. The regulatory framework is borrowed from the regulated market, but without obligations that are disproportionate to the investor base.

The key listing requirements are as follows:

- public offering: minimum free float of €2.5 million (involves issuing a prospectus to be cleared by the AMF);

- private placement: minimum placement of €2.5 million (involves issuing an offering circular that does not need to be cleared by the AMF; disclosures are the responsibility of the listing sponsor and issuer); and
- direct admission: requires that securities with a value of at least €2.5 million have been placed in public hands as a result of the admission to listing or trading on the domestic market.

A two-year set of accounts is required in the case of private placements; for public offerings, three years are required, and only the latest are required for direct admission.

Issuers must have a listing sponsor who is responsible for giving them ongoing advice on their obligations.

**Free Market of Paris**

There is also Euronext's Free Market of Paris. It is not a regulated market under the EU Directive – the admission criteria are much simpler, and the listing costs are much lower. The securities traded on this market have not undergone any admission procedures, and issuers are not subject to any disclosure requirements. The Free Market serves companies that are too young or too small to be listed on the Euronext regulated market or on Alternext.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The AMF is the body responsible for rulemaking and enforcing the rules on IPOs in France, which regulates the French financial market, its participants and products.

The AMF is an independent public body created in August 2003, responsible for safeguarding investments in financial products, ensuring that investors receive material information and maintaining orderly financial markets.

To fulfil its mission, the AMF has enforcement powers and is entitled to set rules, authorise participants, approve disclosures relating to corporate finance transactions and authorise collective investment products, monitor the participants and savings products under its supervision, conduct investigations and inspections, inform investors and it also offers a mediation service.

As a member of the European Union, however, IPOs in France must also observe the recommendations, opinions and technical standards and advices developed by the European Securities and Markets Authority (ESMA).

ESMA was created in 2010 to improve the protection of investors and promote stable and well-functioning financial markets in the European Union. ESMA is involved in setting common standards and practices in regulation and supervision, and, at the request of the European Commission or on its own initiative, issues opinions on legislation that provide the Commission with possible ways forward for regulation.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Any person making a public offering of financial securities or an application for admission to trading on a regulated market must previously publish and make available to any relevant person a prospectus, which is a document intended to inform the public, describing the terms of the transaction and the issuer. The prospectus must contain all information concerning the issuer and its securities necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the company, and of the rights attached to the securities offered to the public or listed.

The prospectus, which is prepared under the responsibility of the issuer, must be submitted for the AMF's approval (with other legal and accounting documentation) and made available to the public before the offering begins. When the documentation is complete and compliant with the EU prospectus regulation, the AMF must give its approval and authorise the issuer to release the prospectus to the public.

It should be noted that the EU Prospectus Directive offers a 'passporting' facility for issuers wishing to publicly offer securities or admit securities to trading on a regulated market in a member state other than their home member state. A prospectus and any supplement approved for use by the competent authority of the home member state is valid for public offers and admissions to trading in any number of host member states provided the competent authorities in those states are duly notified.

Last, issuers making a public offering of securities are exempt from the obligation to produce a prospectus in certain circumstances, including the following:

- the total consideration of the offer, when aggregated with the consideration for all other offers of the same securities, throughout the European Union, over a period of 12 months, is between €100,000 and €5 million and the transaction concerns financial securities accounting for no more than 50 per cent of the capital of the issuer;
- the offer is made solely to 'qualified investors';
- the offer is addressed to fewer than 150 natural or legal persons, other than qualified investors, in each member state;
- the offer is for a minimum total consideration per investor of €100,000;
- the offer is for securities the denomination of which per unit amounts to at least €100,000; and
- there is a subsequent resale, or final placement, of securities through financial intermediaries provided a valid prospectus is available and the issuer gives written consent to its use.

### 6 What information must be made available to prospective investors and how must it be presented?

The EU Prospectus Regulation (809/2004) sets out a list of items that must be disclosed in the prospectus depending on the type of transaction and the type of issuing company.

In particular, the prospectus must contain the statutory accounts of the issuer for the past three fiscal years; a statement of net working capital certifying that the net working capital level is sufficient to cover current liabilities for the next 12 months (or, if it is not, how the issuer will bridge the gap); and a statement on shareholders' equity and indebtedness prepared at the latest 90 days before the prospectus is filed. The issuer can also provide financial forecasts in its prospectus, in compliance with specific rules. The prospectus must have a 'risk factor' section, highlighting the risks associated with the issuer's activities and explaining why and how it is exposed to such risk.

The prospectus can take two forms:

- a single document; or
- three separate documents:
  - a registration document with general information about the issuer (recorded by the AMF and published ahead of the offer period to allow the market to get a better understanding of the issuer);
  - a securities note; and
  - a prospectus summary, approved by the AMF and published no later than the IPO opening day, giving details about the IPO and incorporating the registration document by reference.

Pursuant to new IPO rules that came into effect in January 2015, the IPO prospectus may be drafted in English, provided that the summary is translated into French. Furthermore, if an issuer's IPO prospectus was drafted in English, its prospectus for subsequent public offering may also be drafted in English, provided that the summary is translated into French. The AMF recommends that the choice of language be consistent over time.

The EU Prospectus Directive (2003/71) is currently under review. The European Commission has adopted a proposal for a new Prospectus Regulation, which, as opposed to EU Directives, would be immediately enforceable in all member states without having to be transposed into national law, thus ensuring a level playing field across the European Union.

### 7 What restrictions on publicity and marketing apply during the IPO process?

Rules and restrictions on publicity and marketing vary depending on which of period of the process it takes place in.

During the period prior to the announcement of the offering, the information provided cannot be deemed as attempting to solicit market interest for the offering as long as the prospectus has not been approved. The issuer can continue to promote its products and

services, disseminate financial and legal information, as the case may be, required by the applicable law, issue press releases concerning its business activities and development or reply to factual questions (unrelated to the IPO) from financial analysts or the press. Efforts should be made to avoid changing the quantity and nature of the information communicated. However, pursuant to new IPO rules that came into effect in January 2015, information regarding the offer may be provided to the underwriters' financial analysts before the announcement of the offering, on the condition that those analysts be subject to a non-disclosure agreement and to Chinese walls. The information provided to those analysts must be compliant and consistent, in terms of content and level of detail, with that which will be provided to the public after the announcement of the offering.

Between the announcement of the offering and the date of the approval of the prospectus by the AMF, no information may be disseminated about the IPO except that already disclosed in the announcement of the offering, and no solicitation of the public may be made before obtaining AMF approval on the prospectus.

Once the AMF has given its visa to the prospectus and when the offering is implemented and carried out, the prospectus must be effectively disseminated, made publicly available free of charge at the issuer's registered offices, posted on the issuer's website and published on the AMF website.

During such period, all communications must be compliant and consistent, in terms of content and level of detail, with the information provided in the prospectus.

All significant information not provided in the prospectus, but which may be communicated to the market (eg, in a press conference) must be made public by press release. In addition, if such information potentially has a significant influence on the valuation of the financial securities and occurs or is reported between the time at which the permission is obtained and the end of the offering, an additional note to the summary must be prepared, which may affect the proper conducting of the offering or postpone its end.

Additionally, any institutional advertisement made in France (other than advertisements in relation to the goods or services of the issuer and of its subsidiaries that are consistent with their prior practices) and promotional documentation relating to the offering, irrespective of form and distribution method, must comply with the provisions of the AMF's General Regulations as well as its recommendations and be provided to the AMF before being disseminated.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

A breach of the AMF General Regulations (on insider misconduct, price manipulation, failure to make the public disclosures or meet professional obligations) is assessed by the enforcement committee of the AMF, which can impose financial penalties or disciplinary sanctions (or both), not only on the issuer but also the senior executive in his or her capacity as the issuer's legal representative.

For example, compliance with the provisions relating to the content of advertisements and communications placed or made regarding the offering is monitored by the AMF, which, in the case of any discrepancies between the information available on the market and the contents of the prospectus (after obtaining the visa), will demand that the prospectus be modified accordingly. The AMF may also intervene to ask the issuer or any other persons who participate in the offering to cease and desist from practices that the AMF considers constitute solicitation of the public's interest before the prospectus has been approved. In the event of particularly egregious violations, these orders may include the commencement of proceedings being instituted, resulting in fines.

The committee can also sanction any person or entity that has interfered with proper public disclosure by disseminating information that is inaccurate, imprecise or misleading.

As of 3 July 2016, the provisions of the AMF General Regulations relating to market abuse have been superseded by the EU Market Abuse Regulation (596/2014) to which the AMF General Regulations refer.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The timetable of a typical IPO and stock exchange listing on the Euronext regulated market can be summarised as follows:

| Time | Activity |
|---|---|
| **Preparation of the IPO** | |
| Week 1 | Kick-off meeting |
| | Beginning of the due diligence, structuring of the company and of the offer, preparing the documentation |
| Week 5–6 | Preliminary meeting with the AMF and Euronext |
| | Setting the IPO time frame |
| **Examination of the IPO by the AMF** | |
| Week 11 | Filing of the draft registration document with the AMF (at least 20 trading days before the expected date of registration by the AMF) |
| Week 15 | Approval by the AMF of the registration document |
| | Publication of the registration document |
| | Investor presentation (analyst day)* |
| | Beginning of the 'investor education' period |
| Week 19 | Filing with the AMF of the draft securities note |
| | Publication of the analysts' research reports |
| **Offering – bookbuilding and marketing** | |
| Week 20 | Delivery of the 'completion letter' of the statutory auditors |
| | Delivery of the attestation from the investment service provider |
| | Visa from the AMF on the prospectus (composed of the registration document and the securities note, as well as the summary of the prospectus) |
| | Opening of the offer period |
| | Beginning of roadshows |
| **Listing and stabilisation** | |
| Week 21 | Closing of the offer period |
| | Pricing |
| | Execution of the underwriting agreement |
| | Initial listing of the shares |
| | Commencement of the stabilisation period (if any) |
| | Commencement of trading of the shares |
| Week 22 | Settlement-delivery of the offering |
| Week 25 | Deadline for exercising the 'greenshoe' |
| | End of the stabilisation period (if any) |

* The issuer may convene a meeting restricted to the underwriters' financial analysts before the announcement of the offering.

### 10 What are the usual costs and fees for conducting an IPO?

The companies eligible for listing on a Euronext market are subject to the following three types of fees: admission fees, annual fees and subsequent admission fees. The amounts of these fees can be consulted at https://www.euronext.com/en/listings/admission-process-obligations-fees/listing-fees.

The other costs are variable, depending on the size of the transaction, the structuring of the IPO, the stock exchange selected and the scale given to the financial communication. For large IPOs, counsel fees typically range between €700,000 and €1.5 million, depending on the complexity of the transaction, in particular regarding corporate, restructuring and financing matters, and underwriters' fees range between 2 and 4 per cent of the capital raised, although competition is intense and may result in lower fees.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

An issuer must include in its annual report a statement about its corporate governance in which it indicates which corporate governance code it applies and which provisions, if any, of the code that they do not apply and the reasons for this ('comply-or-explain' rule).

In France, there are two main corporate governance codes, which are prepared by French professional associations: the AFEP/MEDEF corporate governance code for listed companies and the Middlenext code for small and mid caps.

Both of these codes contain recommendations for companies and their governance bodies and most issuers decide to apply the AFEP-MEDEF code, which provides for several corporate governance requirements, which include:

- the appointment of independent members of the board: at least one-third (in controlled companies) or half (in companies without controlling shareholder) of the members of the board must be independent (ie, not having any connection of any kind with the company, its group or its management);
- the setting-up of specialised committees within the board, such as a nomination and remuneration committee and an audit committee in charge of providing it with relevant information;
- term of office of the members of the board may not exceed four years, and the board should be renewed gradually (and not in one go); and
- prohibition on holding a corporate mandate and an employment contract: an employee who is appointed as a corporate officer must terminate his or her employment agreement.

**12 Are there special allowances for certain types of new issuers?**

There is a special corporate governance code for small and medium issuers called the Middlenext code, the requirements of which are adapted to such businesses and are less stringent than those of the AFEP-MEDEF code.

For instance, the Middlenext code does not forbid holding both an employment contract and a corporate mandate. The board will assess whether it is appropriate. It only requires the appointment of two independent members for the board or considers as optional the setting-up of specialised committees within the board.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

IPO issuers in France do not typically implement anti-takeover devices.

Following the entering into force of the Law No. 2014-384 dated 29 March 2014, unless listed companies opt otherwise in their by-laws, their shareholders will have double voting rights for each share held in the register form for at least two years and unless also provided otherwise in the resolutions of the companies, the board is allowed to implement anti-takeover devices without the shareholders' consent. This marks the reversal of the principle of neutrality (according to which the managers of a company subject to a takeover could not undertake any action likely to make it fail without the prior consent of the shareholders in the general meeting). From now on, the managers are allowed to implement anti-takeover devices unless the shareholders have expressly voted in the general meeting in favour of the application of the principle of neutrality, in which case the managers may not try and jeopardise the takeover.

For the purposes of illustration, on the basis of nine IPOs launched by French issuers in 2016 on the Euronext regulated market, the shareholders of one company decided to exclude double voting rights and the shareholders of eight companies decided to keep double voting rights.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

**Special rules for foreign issuers**

A foreign issuer whose registered office is located in a country that is not a party to the Agreement on the European Economic Area (EEA) must provide the AMF with all the information it made available to the public in its home country within the past 12 months. In addition, Euronext Paris requires that the documentation provided by foreign issuers be translated by a certified translator and may also require that the issuer's financial statements be restated in the generally accepted accounting principles applicable to France and that this restatement be reviewed by an auditor acceptable to it.

**Specificity of the professional compartment**

In 2007, the AMF launched the Euronext Paris 'professional segment' for companies not making any securities offers to the public. Its aim is to favour the listing of foreign companies, with lighter ongoing and periodic disclosure obligations, thus presenting specific advantages in terms of efficiency.

The two main possible uses of the professional compartment are double listing and private placement dedicated to qualified investors.

The access to the professional compartment is limited to qualified investors at the time of the offering, but also to retail investors in the secondary market only at their initiative provided they have been informed of the characteristics of this market by their financial intermediary.

The professional compartment is a regulated market, but the AMF has established a specific regulatory framework for it (the rules are less stringent than for the other compartments as a result of the absence of public offerings). A prospectus must be prepared but simplified draft prospectus and language requirements apply (eg, there is no need to translate the summary of the prospectus into French).

**Fast-track**

In 2007, Euronext also introduced a procedure intended to facilitate the listing of US-listed issuers (or about-to-be-listed companies) that are incorporated outside the EEA.

Fast-track enables US-listed issuers, incorporated outside the EEA, to use their SEC filings as a starting point for its listing prospectus in Europe (Amsterdam, Brussels, Paris or Lisbon). The overall process takes five to six weeks once SEC documentation is available.

Although the fast-track listing procedure at this stage is limited to listing without public offering and to offerings to qualified investors, it could be quickly extended to public offerings, which is clearly allowed by the Prospectus Directive.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Such foreign issuer can conduct a private placement in France, which is not considered as an offer to the public and therefore no prospectus is required. Private placements encompass offers made exclusively to:

- providers of portfolio management services on a discretionary basis;
- qualified investors acting on their own account (a qualified investor is a person or a legal entity with the expertise and the facilities required to understand the risks inherent in transactions relating to securities); and
- a restricted circle of investors acting for their own account (ie, fewer than 150 persons, who are not qualified investors).

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

No.

**Investor claims**

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

Under article 5(3) of the Brussels I Regulation (Regulation (EC) No. 44/2001), a person domiciled in a EU member state may, in another EU member state, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

For prospectus liability matters, the damage under French courts is defined as the loss of opportunity to sell, keep or buy securities. There is controversy about the place where the harmful event occurred or may occur. Indeed, the French Supreme Court has ruled that this place is located in the country where the subscription to securities occurred (C Cass, Ch Com. 12 July 2011), whereas the Court of Justice of the European Union has recently ruled that 'under Article 5(3) of Regulation No 44/2001, the courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, particularly when the damage alleged occurred directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts' (28 January 2015, C-375/13).

As a result, as EU law prevails over domestic law, we understand that the IPO investors may seek redress in the country in which they have a bank account. In our view, a non-judicial resolution of complaints is also possible, although we have no knowledge of any precedent.

**18 Are class actions possible in IPO-related claims?**

Class actions have only recently been introduced into French law (law of 17 March 2014) and there is no precedent with respect to IPO-related claims.

The scope of the law covers the damage suffered by consumers and arising out of a breach of a statutory or contractual obligation by a professional relating to the sale of goods or the provision of services.

According to a legal scholar (Professor Jean-Jacques Daigre), although natural persons investing in securities could be considered as 'consumers', class actions would not be possible in IPO-related claims made on the grounds of false or misleading information. Indeed, such claims are tortious, whereas the scope of the French law provisions relating to class actions is limited to actions in contract.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

The main cause of action in IPO-related claims is linked to the violation of the duty to issue a correct and complete prospectus (ie, if inaccurate, imprecise or misleading information is published that may have a material impact on investors' decision-making).

The issuer (which is, except in certain circumstances, responsible for the act of its officers), the officers, the auditors and the investment service providers, may be liable toward investors for the diffusion of inaccurate, imprecise or misleading information. It should be noted that, in almost all cases, investors claim against the issuer, as faults committed by the officers, auditors or investment service providers toward investors are more difficult to establish.

In France, the Supreme Court refuses to grant the plaintiff damages equal to the difference between the purchase price effectively paid by the plaintiff and the fair price, meaning the price that would have been fixed by the market if inaccurate, imprecise or misleading information had not been published (or if significant information that would have had a negative impact on the stock price had been published).

Indeed, the Supreme Court laid down a principle called '*perte de chance*', meaning that it is unclear whether the investor would not have purchased shares issued by a certain company (or sold them in the event that significant information is not published, which gives a wrong picture of the company's situation) had he or she known the company's real situation; the investor has only been deprived of the opportunity not to purchase (or not to sell) such shares.

For instance, in a recent case, an investor had purchased the stocks of a company at a price that turned out to be overestimated by 30 per cent following the publication of negative information that had been withheld for years. This investor claimed damages equal to the difference between the purchase price and the true price (meaning the price dropped by 30 per cent), estimated at €60,000. The Court of Appeal, however, upheld by the Supreme Court, ruling that the compensable damage was only of €30,000 according to the principle of *perte de chance* (CA Paris, pôle 5, ch 7, 19 March 2013, No. 2011/06831, *Sté AFI ESCA v Sté Marionnaud parfumeries et al*, Supreme Court, Chambre commerciale, 6 May 2014, 13-17.632 and 13-18.473).

Such solution prevents investors from being indemnified for the total amount of financial losses.

BREDIN PRAT

**Olivier Saba** **oliviersaba@bredinprat.com**
**Jean-Damien Boulanger** **jean-damienboulanger@bredinprat.com**
**Douceline Chabord** **doucelinechabord@bredinprat.com**

53 Quai d'Orsay
75007 Paris
France

Tel: +33 1 44 35 35 35
Fax: +33 1 42 89 10 73
www.bredinprat.fr

# Germany

**Herbert Harrer and Alexander Schlee**
**Linklaters LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

IPOs experienced a weak average year in 2016. Only five companies completed IPOs on the regulated market of the Frankfurt Stock Exchange and listed their shares on the regulated market of the Frankfurt Stock Exchange (Prime Standard), and the aggregate issue volume of these five IPOs amounted to about €5.1 billion, of which €4.6 billion resulted from the IPO Innogy SE, a carve-out from RWE AG.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The issuers on the German stock exchanges (with the Frankfurt Stock Exchange being by far the market-leading stock exchange) are typically German companies, but there are also companies from other European countries.

### 3 What are the primary exchanges for IPOs? How do they differ?

German companies typically list in Germany, particularly on the Prime Standard market of the Frankfurt Stock Exchange, this being a leading international stock exchange. In specific circumstances, such as having a peer group or shareholder base abroad, German companies may also list on non-German stock exchanges. Frequently, non-German companies (particularly from Europe) list on the Frankfurt Stock Exchange because of the liquid market and high quality standards.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Federal Financial Supervisory Authority (BaFin) is the competent authority under the German Securities Prospectus Law (WpPG) and the respective German stock exchange (usually the Frankfurt Stock Exchange) is the competent authority for the approval of the listing and commencement of trading of shares on a stock exchange. In Germany, there are six stock exchanges with the Frankfurt Stock Exchange being by far the leading German stock exchange. The Frankfurt Stock Exchange offers a broad range of choices for listings with access to international high-quality investors, a competitive regulatory framework, high visibility (indices), cost-efficient listings, high liquidity, legal transparency, availability of listing partners and the choice between different market segments (regulated or unregulated).

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

The public offering of shares in Germany – using the example of having them admitted to trading on the regulated market of the Frankfurt Stock Exchange by way of an IPO – requires the publication of a securities prospectus prepared in accordance with the WpPG. This act implements the European Prospectus Directive 2003/71/EC, as amended, into German law. In this context, 'offer to the public' means the communication in any form and by any means of sufficient information on the terms of the offer and the shares to be offered so as to enable an investor to decide to purchase or subscribe for the shares. Such public offer may only commence after the prospectus has been approved by the BaFin.

The prospectus must be published in German or English. If the prospectus is published in English, it must provide a German language translation of the summary. If a public offering is made, or admission to trading on a regular market is sought, not only in Germany but also in another EU member state (eg, Luxembourg), the prospectus may also be published in a language customary in the sphere of international finance (such as English). Foreign issuers can always publish the prospectus in English. Such prospectus should contain, in accordance with section 5 of the WpPG, all information that, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer, and of the rights attached to such securities. This information must be presented in a form that is easily analysed and is comprehensible.

These general disclosure requirements are further specified in Commission Regulation (EC) No. 809/2004 of 29 April 2004, as amended (the Prospectus Regulation) in connection with a series of schedules that provide for minimum information requirements for different types of security offerings. Annex I (Minimum Disclosure Requirements for the Share Registration Document) applies with respect to the offering of shares.

Typically, the following items relating to the issuer's group and securities must be disclosed in the prospectus and a preceded summary:

**On securities**

- any material risk factors relating the securities;
- general information on the shares, including securities identification numbers (WKN, which is a German standard) or ISIN (global standard), currency, restrictions on transferability and dividend;
- the reasons for the offer;
- use of the issue proceeds and expenses of the issue;
- terms and conditions of the offer;
- dilution; and
- lock-up agreements.

**On the issuer and the issuer's group**

- material risk factors relating the issuer and the issuer's group;
- general information on the issuer, including legal form, date of incorporation, objects and shareholders;
- general information on the management and supervisory bodies, including members, remuneration, conflicts of interest, corporate governance;
- business;
- past, current and future reinvestments;
- material contracts; and
- pending and threatened legal proceedings.

**Financial information**

- audited historical financial information for the past three financial years and, if available, interim financial information;
- capitalisation and indebtedness;

- working capital and business prospects; and
- a description and discussion of historical financial information (management discussion and analysis, operating and financial review).

### 6 What information must be made available to prospective investors and how must it be presented?

With respect to information to be provided to prospective investors, see question 5.

Any other type of offering materials relating either to the public offer of the shares or to the admission to trading on the regulated market must state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it.

In addition, information contained in offering materials may not be false or misleading and it must be consistent with the information contained in the prospectus.

Furthermore, information provided for in the offering materials (other than the prospectus) should also be included in the prospectus (section 15 of the WpPG).

### 7 What restrictions on publicity and marketing apply during the IPO process?

In accordance with the WpPG, a public offering of securities cannot be made in Germany prior to publication of a prospectus (for further details see question 5). Therefore, the company and the banks will avoid any kind of communication prior to the publication of a (approved) prospectus that might constitute a public offer of the shares.

In addition, all information published in connection with an IPO must be consistent with the prospectus (see question 6).

Depending on the structure of the IPO, further publicity restrictions may apply, such as a prohibition of any communication to the United States or US persons in connection with the offering, in order to ensure that no registration of the securities with the US Securities and Exchange Commission is necessary.

The relevant parties agree on formal publicity guidelines at the beginning of the IPO process. Such guidelines ensure compliance with all applicable restrictions on publicity and marketing. Furthermore, through the establishment of a comprehensive review and clearing process for all communication with third parties and the market in general, the IPO participants seek to minimise any risk liability arising from the release of incorrect, misguiding or incomplete information.

In addition, following the listing of shares on the regulated market the issuer has to comply with the provisions of the Securities Trading Act that implement the Transparency Directive and the Market Abuse Regulation (MAR), which became effective in many parts on 3 July 2016.

**Insider dealing (article 8 MAR)**

Generally, someone who is aware of inside information is not permitted to make use of such information for trading in insider securities (including shares), regardless of the sources from which such information was obtained.

Inside information refers to:

- any specific information;
- circumstances that are not public knowledge;
- relationships between one or more issuers of insider securities, or to the insider securities themselves; and
- information that, if publicly known, would likely have a significant effect on the stock exchange or market price of the insider security.

**Ad hoc notices (article 17 MAR)**

The obligation to create an ad hoc notice ensures that all market participants have the same level of knowledge of the issuer or its securities (or both) by providing the market with such information promptly and equally. Such an announcement creates equal opportunities through transparency and avoids inappropriate stock exchange or market prices arising as a result of the market being provided with inaccurate or incomplete information. The requirement to publish ad hoc notices prevents the abuse of inside information.

**Prohibition on market manipulation (article 12 MAR)**

The prohibition on making false or misleading statements and withholding important information relating to financial instruments is another key measure ensuring transparent market conditions.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

BaFin is the competent authority responsible for enforcing compliance with the WpPG, as well as the respective German stock exchange (in particular the Frankfurt Stock Exchange) with regard to the listing process and ongoing compliance with the applicable stock exchange regulations. According to the relevant provisions in the WpPG, BaFin may suspend a public offering for up to 10 days to investigate any possible violations of law in connection with the offering. Should BaFin come to the conclusion that a public offering conflicts with mandatory legal provisions (eg, no approved prospectus was published before the offer commenced), the regulator is authorised to prohibit the offering entirely. Should any information come to the attention of BaFin that implies that the disclosure in a securities prospectus is incorrect, misleading or incomplete, BaFin is authorised to suspend an offering to investigate the situation. Should BaFin come to the conclusion that the prospectus is indeed incorrect, it is also authorised to revoke the approval of the document and prohibit the offering. Violations of the WpPG may result in fines of up to €100,000.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The timetable for a typical IPO is as follows:

| Day number | Events |
|---|---|
| Prior to X | Mandate of banks, legal counsel and other involved parties. |
| X | Start work on documentation and offering materials. |
| X+10 or 20 | First filing with BaFin (the review period of the BaFin is 10 working days in accordance with WpPG, which is extended to 20 working days if the prospectus relates to securities by an issuer whose securities have not been admitted to trading on an organised market in the European Economic Area (EEA). |
| Y | Review comments and second filing with BaFin. |
| Y + 1 | (The overall timetable should be pre-discussed with BaFin.) |
| Y + 10 | Approval of the prospectus by the BaFin (and notification of the approved prospectus to other competent authorities, if any). |
| Y + 11 | Publication of the approved prospectus on the issuer's website (and on the websites of the competent authority and the stock exchange, if appropriate). |
| Y + 14 | • Commencement of the offer period.<br>• Application for listing to be filed with the stock exchange.<br>• Closing of offer period for (natural and institutional) investors.<br>• Issuance of the (new) shares; determination of offer price and allocations; publication of the offer price; and final number of (new) shares.<br>• Resolution for the admission of the shares to the stock exchange.<br>• Typically, publication of ad hoc notices and other notices.<br>• First day of trading.<br>• Commencement of trading by the stock exchange.<br>• Book-entry delivery of (new) shares against payment of the offer price (closing). |

### 10 What are the usual costs and fees for conducting an IPO?

The typical range of the underwriters' fee depends on the structure of the deal, the deal size and the investor basis and is between 0.5 per cent and 5 per cent of the gross proceeds of the offered shares.

In addition, there are fees for the statutory auditors, legal counsel of the company and the underwriters, as well as other advisers (such as IPO advisers, investor relation advisers or financial advisers).

The fees of the respective stock exchange depend on the market segment and the respective stock exchange, and generally do not exceed €10,000 (except for the new open market segment of the Frankfurt Stock Exchange Scale with an inclusion fee of up to €89,000 depending on the market capitalisation of the company).

The fees of BaFin for approving the securities prospectus for a public offer and for the admission of shares to trading amount to €6,500.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

In order to obtain a stock exchange listing, the shares in the issuer must be freely transferrable. Of the German legal forms, only the stock company, the limited partnership by shares and the Societas Europaea meet this requirement.

All three legal forms provide for a rather strict and comprehensive set of corporate governance rules.

A stock company must have a two-tiered board structure with a supervisory board and a management board. Depending on applicable co-determination laws, the members of the supervisory board may be not only representatives of the shareholders of the company but also be part of or representatives of the company's employees. The management board is responsible for the daily affairs of the company but its members are appointed and terminated by the supervisory board.

The third body of a stock company is the general meeting of the shareholders. The general meeting elects the members of the supervisory board and is responsible for a number of major decisions regarding the company, such as amendments to the articles of association.

**12 Are there special allowances for certain types of new issuers?**

In addition to the regulated market, there are non-EU-regulated markets, for example, the Frankfurt Stock Exchange, which provides for a new open market segment of the Frankfurt Stock Exchange Scale for small and medium-sized enterprises, which replaced the entry standard segment.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

There are no typical anti-takeover devices implemented in IPOs of German companies. Depending on the market and on the incorporation of the issuer and the market segment, certain or all provisions of the German Securities Acquisition and Takeover Act, may apply.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

The main considerations for foreign issuers coming to Germany are access to international high-quality investors, a competitive regulatory environment, high visibility (indices), cost-efficient listing, high liquidity, legal transparency and a choice between different market segments.

There are no special requirements for foreign issuers, but certain privileges may apply (such as the publication of an English-language prospectus). In addition, certain foreign generally accepted accounting principles are admissible (eg, from Canada, China, India, Japan, South Korea and the United States). In addition, the German regulator may grant extensions to applicable publication periods.

Finally, global depositary receipts can be admitted to listing on a German stock exchange.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

As described in question 5, the public offering of shares or the listing on the regulated market (or both) in Germany generally requires a prospectus to have been approved by BaFin as the competent authority in Germany.

The Prospectus Directive provides, however, for the passporting of prospectuses within the EEA if such prospectus has been approved by a competent authority in one EEA state. Upon its passporting, the prospectus may be used for public offering and listing purposes in all other EEA states without further examination (except for a German translation of the summary).

### Update and trends

There has been a continuing trend in Germany with respect to the listing of companies after a spin-off or the offering of shares after a carve-out. The spin-off results in the listing of the spun-off company, with the new shares being allocated to the deposit accounts of the shareholders of the parent company without any investment decision.

Recent examples of spin-offs are Uniper from E.ON and the carve-outs of Innogy from RWE, Bayer MaterialScience from Bayer and Sixt and Sixt Leasing Siltronic.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

There are no unique tax issues that may be relevant to IPOs. Depending on whether a potential reorganisation of the IPO vehicle or the IPO assets is necessary in the pre-IPO phase, certain German tax issues may become relevant. Such reorganisation measures may include particularly an asset transfer under a merger, demerger or spin-off under the German Reorganisation Act, which generally is subject to capital gains tax (unless the requirements for tax-neutral transfer with a roll-over of tax book values are fulfilled), the termination of existing tax group arrangements or even the migration of certain entities (including the IPO entity) into Germany. The potential tax issues arising in this respect may particularly include whether the reorganisation triggers any tax costs (eg, capital gains tax, real estate transfer tax or the forfeiture of tax loss carry forwards and its impact on any available deferred tax assets), can be structured tax neutrally (which may potentially be pre-discussed with the German tax authorities by way of binding rulings) or may trigger potential secondary liability issues of the IPO company (or any of its subsidiaries) for unpaid taxes.

Depending on how many shares are offered upon an IPO and on its subscription by new shareholders, the IPO could result in partial or full forfeiture of tax losses, tax loss carry forwards and interest carry forwards of the IPO company (or any of its German subsidiaries with such losses). Generally, such losses are forfeited pro rata or in full if directly or indirectly more than 25 per cent or 50 per cent, respectively, of the shares in the IPO company (share capital or voting rights) are transferred to a single acquirer or a group of acquirers with aligned interests within five years (subject to certain exemptions). Additionally, in the case of real estate held by 100 per cent partnership subsidiaries of the IPO company, only less than 95 per cent of the shares in the IPO company are allowed to be transferred within the five years following the IPO in order to avoid real estate transfer tax being triggered at the level of such real estate partnership.

Investors acquiring shares in the IPO company are subject to regular German taxation rules (including German withholding tax) as regards income from shares in a German corporation (ie, dividends and capital gains). The main German tax implications at investor level are generally described in the tax disclosure section of the securities prospectus relating to the IPO.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

Prospectus liability for securities prospectus published for the listing or public offering of securities on the regulated market are set out in section 21 et seq of the WpPG. For further details, see question 19.

**18 Are class actions possible in IPO-related claims?**

German law permits class actions with regard to securities prospectus litigation pursuant to the Investor Sample Procedure Act under certain circumstances.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

Under section 21 et seq of the WpPG, the person responsible for the content of the prospectus is either:

- the person accepting responsibility for the content of the prospectus, typically by signing the prospectus or the listing application (or both), assuming responsibility for its content in accordance with section 5, paragraph 4 of the WpPG; or
- a person with a certain level of economic interest therein.

Issuers and financial institutions applying for admission to trading are required to sign the prospectus and thereby to assume responsibility for its content.

In addition, individuals who have an independent economic interest in the issuance of the securities described in the prospectus may also be responsible for its content. Such individuals might, depending on the specific circumstances, include selling shareholders or members of the issuer's management board selling securities in the offering. Being a selling shareholder or a member of the issuer's management board does not, however, trigger prospectus liability.

Anyone who acquired the securities within six months of the date of listing may base a cause of action on section 21 et seq of the WpPG if that investor acquired the securities for value.

Prospectus liability is premised on an incorrect or incomplete prospectus, and such incorrect or omitted information being material to the assessment of the value of the securities. A prospectus is incorrect if it contains misstatements about material facts and is incomplete if facts were omitted that are material to the investors' assessment of the securities. Whether a fact is 'material' depends on the circumstances of the specific case and will be determined from the viewpoint of the investor.

The plaintiff must prove the incorrectness or incompleteness of the prospectus and the purchase price of the securities, or the difference between the purchase price and the price at which it sold the securities in the event the plaintiff is no longer in possession of the securities.

An investor in possession of the relevant securities may, pursuant to section 21 of the WpPG, put them to the person responsible for the contents of the prospectus against payment of the price paid by the plaintiff to the extent such price does not exceed the initial offer price. This permits the investor to be put in the position in which it would have been had it been properly informed; however, the investor will not be put in a position in which he or she would have been, had the misstated information in the prospectus been correct and complete.

A plaintiff who is no longer in possession of the securities may only, pursuant to section 21 of the WpPG, claim the difference between the price at which it sold the securities and the initial offer price. As set out above, the duty to mitigate also applies in this circumstance. If the plaintiff sells the securities below market value at the time of the sale, it can only claim the difference between that market value and the initial price of the securities.

Linklaters

**Herbert Harrer** **herbert.harrer@linklaters.com**
**Alexander Schlee** **alexander.schlee@linklaters.com**

Taunusanlage 8
60329 Frankfurt am Main
Germany

Tel: +49 69 710 03 0
Fax: +49 69 710 03 333
www.linklaters.com

# Hong Kong

**Celia Lam and Christopher Wong**
**Simpson Thacher & Bartlett LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

In 2015 and 2016, 124 and 120 companies, respectively, were newly listed on the Stock Exchange of Hong Kong Limited (HKSE), raising a total sum of approximately HK$263.09 billion and HK$195.32 billion, respectively.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The HKSE generally welcomes issuers incorporated in different jurisdictions to seek listing status on the HKSE as long as the relevant issuers can demonstrate to the satisfaction of the HKSE that they are subject to key shareholder protection standards that are at least comparable to those in Hong Kong.

Other than companies incorporated in Hong Kong, the HKSE has, as of May 2017, recognised companies incorporated in the People's Republic of China (PRC), the Cayman Islands and Bermuda as 'eligible' for listing. The relevant listing applicant incorporated in any of these jurisdictions is not required to make specific submissions to seek the HKSE's approval insofar as jurisdiction of incorporation is concerned.

Further, as of May 2017, the HKSE has, based primarily on its analyses of the regulatory regimes of general shareholder protection standards available in the jurisdictions of incorporation, as well as the existence of cross-border cooperation between securities regulators in the home jurisdictions and Hong Kong, identified 25 jurisdictions as 'acceptable' as a company's place of incorporation for seeking listing status in Hong Kong. For each such 'acceptable' jurisdiction, the HKSE has published a specific country guide that contains stipulations that the HKSE considers necessary to be included in the listing applicant's constitutional documents for shareholder protection purposes. As long as the listing applicant or the sponsor to the listing applicant files a confirmation to the HKSE that the principles, laws and practices set out in the relevant country guide are fulfilled and applicable, the HKSE will grant its approval insofar as the listing applicant's jurisdiction of incorporation is concerned. These 25 'acceptable jurisdictions' are Australia, Brazil, British Virgin Islands, Canada (Alberta, British Columbia, Ontario), Cyprus, England and Wales, France, Germany, Guernsey, India, the Isle of Man, Israel, Italy, Japan, Jersey, Korea, Labuan, Luxembourg, Russia, Singapore and the United States (State of California, State of Delaware and State of Nevada).

Notwithstanding that an issuer is not incorporated in any of the 'eligible' or 'acceptable' jurisdictions as listed in the foregoing paragraphs, if the issuer is able to demonstrate to the satisfaction of the HKSE that it is subject to appropriate standards of shareholder protection, which are at least comparable to those in Hong Kong, the HKSE is prepared to accept, on a case-by-case basis, different jurisdictions of incorporation as suitable for seeking listing status in Hong Kong.

In addition, foreign issuers seeking to list in Hong Kong are not required to have their operations or businesses based in, or otherwise closely affiliated to, Hong Kong or mainland China.

The table below, from the website of the HKSE, summarises companies listed in Hong Kong classified by location (in terms of establishment or location of headquarters) as of 31 October 2016.

| Location | Total |
|---|---|
| Mainland China | 989 |
| Hong Kong | 856 |
| Others | 110 |
| *Australia* | *1* |
| *Cambodia* | *2* |
| *Canada* | *5* |
| *France* | *2* |
| *Indonesia* | *4* |
| *Italy* | *1* |
| *Japan* | *6* |
| *Kazakhstan* | *1* |
| *Korea* | *3* |
| *Macau* | *4* |
| *Malaysia* | *15* |
| *Mongolia* | *1* |
| *Netherlands* | *1* |
| *Philippines* | *1* |
| *Russia* | *2* |
| *Singapore* | *14* |
| *Switzerland* | *1* |
| *Taiwan* | *26* |
| *Thailand* | *2* |
| *UK* | *2* |
| *US* | *14* |
| *Vietnam* | *2* |
| Total | 1,955 |

### 3 What are the primary exchanges for IPOs? How do they differ?

The Hong Kong Exchanges and Clearing Limited, through its wholly owned subsidiary The Stock Exchange of Hong Kong Limited, is the only operator of stock market in Hong Kong. Two platforms – the Main Board and the Growth Enterprise Market Board (the GEM Board) – are available for issuers to seek listing on. The Main Board is a market for larger and more established businesses that fulfil the HKSE's higher profit and financial requirements, whereas the GEM Board is positioned as a second board and a stepping stone towards the Main Board (by way of a subsequent transfer of listing from the GEM Board to the Main Board) for those companies that cannot or do not yet fulfil the Main Board listing requirements. In addition, equity securities can be listed on the Main Board in the form of shares or depositary receipts, while equity securities can only be listed in the form of shares on the GEM Board.

At the end of 2015, the shares of 1,644 and 222 companies were listed on the Main Board and the GEM Board, respectively; and at the end of 2016, the shares of 1,713 and 260 companies were listed on the Main Board and the GEM Board, respectively.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The HKSE and the Securities and Futures Commission (SFC) are responsible for promulgating and enforcing the rules and regulations regarding listing matters in Hong Kong. Both these regulatory bodies have the statutory duties to ensure an orderly, informed and fair securities market in Hong Kong. The major piece of regulation promulgated by the HKSE regarding listing matters is the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the Listing Rules), and the primary legislations that the SFC administers relating to offering of securities in Hong Kong are the Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Securities and Futures Ordinance. In addition, both regulators would from time to time publish guidance materials and codes of conduct to regulate, among others, disclosures in prospectuses, due diligence by sponsors of IPO listing applicants and securities offering activities in Hong Kong.

The HKSE and the SFC cooperate under the dual-filing arrangement that came into effect in 2003. Dual filing refers to the requirements of the Securities and Futures (Stock Market Listing) Rules under which listing applicants must file applications, prospectuses and other disclosure materials with the SFC via the HKSE. In other words, while the HKSE is the channel of communication with the listing applicant during the IPO application vetting process, any documents filed by the listing applicant with the HKSE will be passed on to the SFC, which may also review and vet the application. Any comments that the SFC may have on the listing application will be made to the listing applicant via the HKSE. Accordingly, both the HKSE and the SFC are involved in the IPO vetting process and can exercise enforcement powers against persons issuing false or misleading information.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

A listing applicant is required to file an application for listing to the HKSE and, via the dual filing arrangement (see question 4), to the SFC. The shares of any issuer may only be listed on the HKSE after the unconditional listing approval is obtained.

In line with the HKSE's reforms in streamlining the listing application vetting process, the application documents submitted by a listing applicant must be in advanced form and substantially complete in order that the time between the date of the listing application and the actual listing can be shortened. Against this background, the majority of listing application documents are submitted to the HKSE when a listing applicant first filed its listing application. These initial documents comprise a listing application form (commonly known as Form A1 and Form 5A for applications seeking Main Board and GEM Board listing, respectively) setting out the basic information of the listing applicant and the proposed offering structure, a draft application prospectus and a set of requisite documents, including documents such as draft legal opinions and draft profit and working capital forecast memoranda of the listing applicant, as required under the Listing Rules. At various prescribed stages of the vetting process until unconditional listing approval is granted, the HKSE requires other prescribed documents to be submitted to facilitate its review of the listing application in a sequential and orderly manner.

Upon receipt of the initial application documents, which should be in advanced form and substantially complete, the HKSE will conduct a detailed qualitative assessment of the listing application in terms of the following overarching principles:

- eligibility for listing;
- suitability for listing;
- sustainability of its performance or business; and
- compliance of the listing application with relevant securities rules and legislations.

During the vetting process, the listing department of the HKSE and the SFC may raise queries or make prospectus disclosure comments with the listing applicant or sponsors to the IPO. When the enquiries and comments have been satisfactorily addressed, the listing department of the HKSE will then present the relevant listing application for a listing committee hearing (for Main Board applicants) or GEM listing hearing (for GEM Board applicants), as applicable. Once the HKSE is satisfied with the quality of the listing application, taking into account the overarching principles mentioned in the foregoing paragraph, it will grant a no-comment letter for the prospectus and share application forms, after which these may be bulk-printed and the IPO launched.

After the launch of an IPO, the listing applicant and the underwriters are required to submit certain administrative and marketing-related information to the HKSE. Once the HKSE and the SFC are satisfied that all listing-related matters, including those related to marketing and allotment of securities, have been properly arranged, unconditional listing approval will be granted to the issuer for listing of its shares on the HKSE.

### 6 What information must be made available to prospective investors and how must it be presented?

The relevant law and regulations in Hong Kong relating to the public offers of shares require that each such offer is made with a prospectus that complies with certain content requirements set out in the Companies (Winding Up and Miscellaneous Provisions) Ordinance, the Listing Rules and the guidance letters published by the HKSE. Before a prospectus may be distributed to the public, it must be delivered to the Hong Kong Registrar of Companies for registration. The current regime in Hong Kong requires that all prospectuses (in Chinese and English languages) must be available for collection by investors in physical forms, although at the same time, electronic versions thereof should also be available on the websites of the issuer and the HKSE.

The prospectus should be drafted in concise and plain language so that it is comprehensible to, and readable by, investors. A prospectus typically contains the following operative sections:

- expected timetable;
- summary, risk factors, waivers and exemptions from compliance with the Listing Rules, directors and parties involved in the global offering;
- corporate information;
- industry overview;
- regulatory overview;
- history, development and reorganisation;
- business;
- financial information;
- relationship with controlling shareholders;
- connected transactions;
- share capital;
- substantial shareholders;
- cornerstone investors;
- directors, senior management and employees;
- future plans and use of proceeds;
- underwriting;
- structure of the global offering;
- how to apply for the Hong Kong offer shares;
- accountants' report;
- unaudited pro forma financial information;
- expert reports (where applicable, such as property valuation report);
- summary of the applicant's constitutions and law of the place of incorporation; and
- other statutory and general information.

As regards the financial information to be included in the prospectus, a Main Board listing applicant is generally required to include audited financials of the three full financial years immediately preceding the issue of the prospectus, whereas a GEM Board listing applicant is generally required to include audited financials of the two full financial years immediately preceding the issue of the prospectus. Nonetheless, the Listing Rules also require that the latest audited financials included in a prospectus must not have ended more than six months from the date of the prospectus and accordingly, the listing applicant may need to include audited stub period financials in its prospectus.

As mentioned in the foregoing paragraph, before a prospectus may be distributed to the public it must be delivered to the Hong Kong Registrar of Companies for registration. Nonetheless, prior to the distribution of a formal prospectus, redacted versions of the prospectus, with all offer-related information (such as descriptions of how an application for shares may be made) removed and appropriate warning and disclaimer statements included in accordance with the specific guidelines prescribed by the HKSE, must be published electronically on the

HKSE's website. It must be first published in the form of an 'application proof prospectus' upon submission of a listing application to the HKSE and the SFC; and, second, in the form of a 'post-hearing information pack' after the listing committee hearing or GEM listing hearing (as the case may be) and material comments (if any) from the HKSE have been addressed, but in any event prior to the earlier of the distribution of the red herring document to institutions or professional investors, and the commencement of the roadshow phase.

**7 What restrictions on publicity and marketing apply during the IPO process?**

The Hong Kong securities laws and regulations impose restrictions on the publicity and marketing activities that may be conducted by an issuer and other related parties during the course of an IPO process. The restrictions cover two aspects: (i) the offering of securities; and (ii) information relating to the listing applicant.

Regarding (i), the Listing Rules require that all publicity materials released in Hong Kong relating to securities offerings and listing proposals must be reviewed and approved by the HKSE prior to release. The rationale for such requirement is that regulators are concerned about publicity relating to or seen to be relating to listing and public offering, as such publicity may mislead the public into believing that approval for an issuer's listing application or offering plans have already been – or will soon be – approved by the relevant regulatory authorities. In addition, the regulators are concerned about the public being provided with information not contained in the prospectus (which, as mentioned in questions 5 and 6, must be vetted and approved by the regulators and registered with the Hong Kong Registrar of Companies before it may be distributed to the public).

As to (ii), generally speaking, in the course of the preparation for and during an IPO, the listing applicant may still in its ordinary course of business conduct promotional or marketing activities, such as advertising for its products and services, in accordance with its usual marketing practices without obtaining consent from the HKSE. Even though certain materials may on the surface appear to be for the purpose of promoting the listing applicant or its products or services, the HKSE may, however, rule that such materials are intended for the promotion of the securities of the listing applicant if the regulator is of the view that the materials have the effect of conditioning the market. While promotional materials are considered on a case-by-case basis with reference to the particular circumstances pertaining to the listing applicant, as general guiding principles, the HKSE will deem the materials as relating to an issue of securities if such materials are not commensurate with the particular nature of the listing applicant's business, products, customers or markets (eg, materials that place disproportionate emphasis on the applicant's name rather than its products and business), or are likely to affect the perceptions of the upcoming offer. Further, in the past the HKSE has also ruled that advertisements and news articles promoting the listing applicant's products and which are issued shortly before the listing have the effect of conditioning the market, and are therefore in breach of the relevant restrictions on publicity.

Failure to comply with these restrictions may result in the listing application being substantially delayed by the HKSE and, in serious cases, the HKSE or the SFC may even require that the listing applicant make a public statement of clarification or apology.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

Enforcement proceedings and disciplinary actions in respect of breaches of laws and regulations relating to securities offering activities in Hong Kong are generally initiated by the SFC, whose main role, among others, is to enforce the laws governing Hong Kong's securities and futures markets. The SFC may take enforcement actions against both the sponsors to the new listings as well as the listed companies and their directors, depending on the nature of the particular breach.

All IPOs in Hong Kong must be sponsored by corporations (typically investment banks) licensed by the SFC and, as such, all sponsors in Hong Kong IPOs are regulated by the SFC. Representatives and responsible officers of the sponsor entity are also persons regulated by the SFC. The primary role of the sponsor in an IPO is to conduct sufficient due diligence on the listing applicant and make submissions and representations to, and act as a channel of communication with, the HKSE on behalf of the listing applicant in the course of a listing application. Upon the SFC's identification of sponsor's misconduct (for instance, a sponsor's failure to conduct sufficient due diligence on a listing applicant or internal control failures such as lack of proper record of work performed), the SFC has the power to discipline regulated persons in accordance with the Securities and Futures Ordinance. Depending on the seriousness of the breach, the SFC may invoke any of the following disciplinary sanctions (either alone or in combination):

- revocation or suspension (partially or in full) of licence or registration to perform regulated activities;
- revocation or suspension (partially or in full) of approval to be a responsible officer;
- prohibition of application for licence or registration;
- prohibition of application to be a responsible officer;
- reprimand (private or public); and
- fine (up to the maximum of $10 million or three times the profit gained or loss avoided, whichever is higher, for each misconduct).

Where a breach or misconduct concerned is very serious in nature, the SFC may refer the case to the Market Misconduct Tribunal or exercise its power under the Securities and Futures Ordinance and make an application to the High Court of Hong Kong for an order for appropriate remedies on the affected investors and penalties on the parties in default.

In cases that involve the provision of false or misleading information in the prospectus of a listing applicant, the directors of the listing applicant may also bear civil or criminal liabilities for misstatement of information in prospectuses.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

Set out below is a summary of the process for a listing application in Hong Kong.

**Appointment of sponsors**

In order to ensure that reasonable time is committed by the sponsors (typically the lead underwriters) to the listing application to conduct due diligence in respect of the listing applicant, the notification of appointment of sponsors must be filed to the HKSE at least two months before submission of a listing application.

**Submission of listing application**

At least two months after the date of filing of the notification of appointment of sponsors, a listing applicant may file a listing application to the HKSE. Upon receipt of the listing application documents which should be substantially complete, the HKSE will conduct a detailed qualitative assessment of the listing application.

**Detailed vetting**

The HKSE will conduct a detailed qualitative assessment of the listing application in terms of the following overarching principles:

- eligibility for listing;
- suitability for listing;
- sustainability of its performance and business; and
- compliance of the listing application with relevant securities rules and legislation.

During the vetting process, the listing department of the HKSE and the SFC may raise queries or prospectus disclosure comments to the listing applicant or sponsors to the IPO. The HKSE is generally expected to provide the first round of written comments within 10 business days of receipt of the listing application and, where necessary, provide further rounds of written comments within 10 business days of receipt of replies to previous comments. Assuming it takes five business days to respond to the HKSE's written comments and two rounds of written comments are raised, an application will be presented or a listing committee hearing around 40 business days from the date of filing of the listing application. The actual timing will depend on the swiftness in responding to the comments and quality of the responses. An application may still be returned by the HKSE or the SFC if the regulators consider during the vetting process that the application is not substantially complete.

**Listing hearing**
When the enquiries and comments from the listing department of the HKSE and the SFC are satisfactorily addressed, the listing department will present the relevant listing application for listing committee hearing (for Main Board applicants) or GEM listing hearing (for GEM Board applicants), as applicable. The relevant hearing committee will consider the listing application and may raise additional comments if necessary.

**Publication of post-hearing information pack**
After the hearing committee is generally satisfied with the listing application, it will issue a post-hearing letter to the applicant. Once the listing applicant is of the view that material comments (if any) from the HKSE have been addressed, it has to electronically publish a post-hearing information pack (PHIP) on the HKSE website. A PHIP is a redacted version of the latest draft prospectus with all offer-related information (such as descriptions of how an application for shares may be made) removed and appropriate warning and disclaimer statements included in accordance with the specific guidelines prescribed by the HKSE. In any event, the PHIP must be published prior to the earlier of the distribution of the red herring documents to institutions or professional investors or of commencement of the book-building process with institutions or professional investors. As a general principle, all disclosures in the PHIP are expected to be the same as the final prospectus to be issued except that certain information in the PHIP is redacted.

**Launch of deal**
Once the HKSE is satisfied with the quality of the listing application, taking into account the overarching principles mentioned in the foregoing paragraph, it will grant a no-comment letter for the prospectus and share application forms, after which the prospectus and share application forms may be bulk-printed and an IPO may be launched.

**Commencement of dealing in shares**
After the launch of an IPO, the listing applicant and the underwriters are required to submit certain administrative and marketing-related information to the HKSE. Once the HKSE and the SFC are satisfied that all listing-related matters including those related to marketing and allotment of securities have been properly arranged, unconditional listing approval will be granted to the issuer for listing of its shares on the HKSE. Typically, dealing in the shares will commence about five to seven business days after pricing.

### 10 What are the usual costs and fees for conducting an IPO?

The costs and fees involved for conducting an IPO are the initial listing fee payable to the HKSE and any charges incurred for the services provided by various professional parties.

The Listing Rules set out a scale of initial listing fee, which is based on the monetary value of the equity securities to be listed. As a reference, as of May 2017, a minimum initial listing fee of HK$150,000 is payable if the monetary value of the equity securities to be listed does not exceed HK$100 million, and a maximum initial listing fee of HK$650,000 is payable if the monetary value of the equity securities to be listed exceeds HK$5 billion.

As regards the charges for the services provided by various professional parties, including the underwriters, the fees charged by these parties will vary greatly depending on, for example, the complexity of the listing exercise and the size of the share offer.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The Listing Rules require that at least one-third of the board members of a listed company be independent non-executive directors (INEDs) and at least three INEDs must sit on the board, of which at least one must possess appropriate professional qualifications, or accounting or related financial management expertise.

The Listing Rules also require the establishment of at least three board committees: the audit committee; the remuneration committee and the nomination committee. Each of these committees assumes important corporate governance functions in reviewing the financials of the listed group, setting or reviewing directors' and senior management's remuneration packages, and the nomination of directors, respectively.

To help the listed company comply with the ongoing obligations applicable to listed issuers in Hong Kong, and for general governance of the internal affairs of the listed issuers, the Listing Rules require that a listed company appoint a company secretary who, in the opinion of the HKSE, is capable of discharging the functions of company secretary by virtue of his or her academic or professional qualifications or relevant experience. The HKSE considers a member of the Institute of Chartered Secretaries, or a qualified solicitor, barrister or accountant in Hong Kong, as an acceptable candidate for company secretary to listed companies. Even if a candidate is not among one of the aforementioned professionals, the HKSE will also take into consideration an individual's familiarity with the Listing Rules and other relevant securities laws in Hong Kong, for instance, his or her professional qualifications obtained in jurisdictions outside Hong Kong and his or her length of employment, and the roles he or she plays within the listed applicant's group when deciding whether such candidate is capable of discharging the functions of a company secretary.

The Listing Rules also require that a listed company engage an external compliance adviser for a minimum period commencing from the date of listing of its shares on the HKSE and ending on the date on which it publishes the audited financial results for its first full financial year post-listing. The primary role of the compliance adviser is to guide and advise the newly listed issuer to comply with the Listing Rules, review any regulatory announcements and circulars published by the listed company prior to their publication and ensure compliance by the listed company with the terms of any waivers granted by or undertakings to the HKSE in connection with the listing.

The Listing Rules also contain an appendix (Appendix 14, 'Corporate Governance Code and Corporate Governance Report'), which sets out the detailed corporate governance requirements that listed companies should implement and comply with, and the content requirements of a corporate governance report that a listed company should prepare annually and include in its annual report to shareholders.

### 12 Are there special allowances for certain types of new issuers?

No. Issuers listed on the GEM Board, which is the second board for those companies that cannot or do not yet fulfil the Main Board listing requirements, are subject to equivalent corporate governance requirements as issuers listed on the Main Board of the HKSE. See question 2 for the differences between a GEM Board and a Main Board listing.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

In Hong Kong, takeovers of listed companies are governed by the Code on Takeovers and Mergers and Share Buy-backs (the Takeovers Code). Under the Takeovers Code, a mandatory general offer is triggered if: any person, acting singly or in concert with a group of other persons, acquires, whether by a series of transactions over a period of time or not, 30 per cent or more of the voting rights of a listed company; or any person, or group of persons acting in concert collectively, holding 30 to 50 per cent of the voting rights of a company, acquires more than 2 per cent additional voting rights in the listed company (such 2 per cent is calculated from the lowest percentage of holding over a 12-month period ending on the date of the relevant acquisition).

While the Listing Rules require listed companies in Hong Kong to generally maintain a minimum of 25 per cent shareholding to be held in public hands (ie, any person other than a substantial shareholder holding 10 per cent or more shareholding, directors or chief executive of the listed group or a close associate of any of them), most listed companies in Hong Kong have a rather concentrated shareholding structure and generally a single controlling shareholder, who is usually the founder of the business, may hold more than 30 per cent (and often even over 50 per cent) of the shares of the listed companies. Against this background, it is generally quite difficult for a person or group of persons acting in concert to acquire a 30 per cent interest in a listed company to trigger a mandatory general offer. In cases where a listed company

has several founders each owning less than 30 per cent shareholding interests, these shareholders may consider entering into an acting-in-concert deed so that their interests will be aggregated together with a view to countering potential takeover attempts.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Foreign issuers seeking to list in Hong Kong are not required to have their operations or businesses based in, or otherwise closely affiliated to, Hong Kong or mainland China. The main analysis that a foreign issuer must first perform in deciding whether to pursue for a listing in Hong Kong is to consider whether the listing vehicle is incorporated in Hong Kong, PRC, Bermuda or the Cayman Islands. If not, the issuer should consider whether the general shareholder protection standards available in its jurisdiction of incorporation are comparable with those in Hong Kong. As mentioned in question 2, the HKSE generally welcomes issuers incorporated in different jurisdictions seeking listing status on the HKSE as long as the relevant issuers can demonstrate to its satisfaction that they are subject to key shareholder protection standards that are at least comparable to those in Hong Kong. For further information related to foreign issuers' listings on the HKSE, see question 2.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Yes. As a general rule, an offering of shares for sale to the public in Hong Kong for consideration is required to be accompanied by a prospectus. As mentioned in question 5, before a prospectus may be distributed by an issuer seeking an IPO in Hong Kong, it has to undergo a detailed vetting and approval process by and registration with various regulators in Hong Kong. The Seventeenth Schedule to the Companies (Winding Up and Miscellaneous Provisions) Ordinance contains safe-harbour provisions that exempt 12 specific types of offerings in Hong Kong from having to be accompanied by prospectuses. The most relevant exemptions that may be relied on by foreign issuers that are conducting IPO outside Hong Kong but seeking to offer shares for sale to investors within Hong Kong are:

- where the offer is made to professional investors within the meaning of the Securities and Futures Ordinance. In general, a high net-worth individual (him or herself or holding through a special purpose vehicle), partnership or corporation with a portfolio of assets in securities or currency deposits in the aggregate amount of HK$8 million (or its equivalent), or a high net worth corporation or partnership with total assets of HK$40 million (or its equivalent), is considered as a professional investor;
- where the offer is made to no more than 50 persons in Hong Kong;
- where the total consideration payable for the securities offered does not exceed HK$5 million (or its equivalent); and
- where the minimum denomination of or the minimum consideration payable by any person for the shares is at least HK$500,000.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

No tax or levy is imposed in Hong Kong in respect of capital gains from the sale of shares or on dividends. Nonetheless, trading gains from the sale of shares by persons carrying on a trade, profession or business in Hong Kong, where such gains arise in or are derived from Hong Kong, will be chargeable to Hong Kong profits tax. Currently, profits tax is imposed on corporations at the rate of 16.5 per cent and on individuals according to a scale of increasing rates (depending on the amount of the individual's total taxable income) with a maximum rate of 17 per cent or a flat rate of 15 per cent. Gains from the sale of the shares effected on the Hong Kong Stock Exchange will be considered as 'arising in or derived from Hong Kong'.

Besides, all transfers of Hong Kong stock that involve a change in beneficial interest is subject to stamp duty in Hong Kong. Hong Kong stock is a rather broad concept under the Stamp Duty Ordinance and covers shares of all companies listed on the Hong Kong Stock Exchange, as well as listed real estate investment trusts and depositary receipts. The prevailing rate of ad valorem stamp duty as of May 2017 is a total of 0.2 per cent on the consideration for (or if greater, the value of) the shares being transferred, and is generally borne by the transferor and the transferee equally.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

As mentioned in question 8, enforcement proceedings and disciplinary actions in respect of breaches of laws and regulations relating to securities offering activities in Hong Kong are generally initiated by the SFC. Such enforcement proceedings and disciplinary actions can be triggered by the SFC itself in the course of its supervision of the operation of the securities market, including the review of the conduct of, and the information released to the public; they can also be triggered by listed companies and regulated persons (which include sponsors to listing applications), or by disgruntled investors who file complaints with the SFC. Upon identification of potential misconduct or the receipt of a complaint, the SFC will investigate the matter and decide on the appropriate actions to be taken against the persons concerned or, in serious incidents of misconduct, refer the cases to the Market Misconduct Tribunal or the High Court of Hong Kong for an order for appropriate remedies and penalties.

For further information on the disciplinary actions and sanctions that may invoked by a breach of the IPO rules, see question 8.

Simpson Thacher

**Celia Lam** **celia.lam@stblaw.com**
**Christopher Wong** **cwong@stblaw.com**

ICBC Tower, 35th Floor
3 Garden Road
Central
Hong Kong

Tel: +852 2514 7600
Fax: +852 2869 7694
www.stblaw.com

**18 Are class actions possible in IPO-related claims?**

No. Class actions are not available in Hong Kong.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

See question 17.

# Indonesia

**Pheo M Hutabarat and Rosna Chung**
**Hutabarat, Halim & Rekan**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The level of market capitalisation in Indonesia has varied from US$2 million to US$386 million; 15 companies listed their shares on the Indonesian Stock Exchange (IDX) in 2016, and by mid-May 2017, seven companies had listed their shares on the IDX.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Issuers are usually limited liability companies established in Indonesia. As well as being listed on the IDX, some domestic companies also list their shares overseas; but recently, domestic companies have tended to list at home rather than overseas. Overseas companies do not list in the Indonesian market. The underlying regulation for this is not yet in existence.

### 3 What are the primary exchanges for IPOs? How do they differ?

In the past, there were two stock exchanges in Indonesia: the Jakarta Stock Exchange and the Surabaya Stock Exchange. In 2007 these exchanges merged to become the IDX, which is currently the only stock exchange in Indonesia.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Indonesian Financial Service Authority (OJK) is the regulatory and enforcement agency dealing with IPOs. The OJK is a government body that was formed in 2012 to replace the Capital Market and Financial Institution Supervisory Agency. The OJK has the authority to regulate and supervise activities in the financial sector including: banking, financial markets, insurance and reinsurance, pension funds, financing institutions, and other types of financial service institution. The OJK has the authority to issue rules and regulations, including rules on IPOs, and can also impose sanctions, such as: written warnings, fines, restrictions on business activities, temporary suspension of business activities and revocation of business licence.

In addition to the OJK, the IDX, which is a self-regulating organisation, is also authorised to issue rules and regulations including listing regulations, and to impose sanctions, such as: written warnings, fines, temporary suspension of trading of the listed company's shares or forced delisting. Pursuant to IDX Regulation No. I-1 on Delisting and Relisting of Securities, forced delisting can only take place in very limited circumstances, and a breach of the listing regulations is not among these – at least not directly. Persistent breaches of the IDX Regulations may, however, lead to a forced delisting by IDX.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Issuers must seek authorisation from the OJK and IDX for a listing. A company must undertake any actions necessary for going public, such as obtaining approval from its shareholders and preparing documents in accordance with all of the requirements determined by the OJK and IDX.

**OJK**

Prior to having the shares listed, the company must obtain approval from the OJK by submitting a registration statement and supporting documents to the OJK. These documents include:

- a letter of introduction of registration statement;
- a prospectus;
- an abridged prospectus;
- a preliminary prospectus for early bookbuilding (if any);
- a schedule for the IPO;
- a sample of the securities letter;
- a photocopy of the latest articles of association that has received approval from the Minister of Law and Human Rights of the Republic of Indonesia (MoLHR) or a notification of amendment of articles of association has been received by MoLHR;
- audited financial statements for the past three years, audited by a public accountant presented in accordance with the provision of:
  - laws and regulations in capital market governing the presentation and disclosure of financial statement of public listed company; and
  - laws and regulations in capital market regulating accounting guidelines for securities companies;
- comfort letters from the auditors;
- a management letter in the accounting sector, issued in accordance with capital market laws and regulations pertaining to the guidelines for the preparation of a management statement in accounting;
- a prospective financial statement in the form of financial forecast including the public accountant's report on the financial forecast;
- a legal due diligence report and legal opinion issued by a capital market legal consultant;
- curricula vitae of the members of the board of directors and the board of commissioners;
- an underwriting agreement (if any);
- a structure that describes the position of the company vertically from individual shareholders up to subsidiaries at the very latest level, and the position of the company horizontally;
- a statement letter issued by the company;
- a statement letter issued by the capital market supporting profession;
- a statement letter issued by the underwriter (if any); and
- any other documents requested by OJK.

Upon reviewing the registration statement, the OJK will give approval to the company to announce its prospectus or abridged prospectus, or to commence bookbuilding. If, upon thorough review of the documents attached to the registration statement, the OJK does not have any further questions and does not find any factors that could cause harm to public shareholders, it will usually issue a letter declaring the registration effective.

The registration statement will become effective based on the following provisions, on the basis of:

- the lapse of:

  - 45 days from the receipt by the OJK of the completed registration statement that is having covered the whole criteria stipulated in the regulation; or
  - 45 days after the latest amendment submitted by the company or requested by the OJK has been met; or
- a statement from the OJK that there is no further amendment or supplement required to the information.

The OJK may request a change or additional information on registration statement under the following:
- within a period of 45 days after the submission of the first registration statement, the OJK can request for change or additional information needed to complete the registration statement or that any information or material facts for investors or public are disclosed;
- any changes or additional information requested by OJK after a period of 45 days after the submission of the first registration statement, must be based on the consideration that the changes and/or additional information are required to disclose all information or material facts to investors and public;
- all changes or additional information submitted to OJK must first obtain a response from OJK before registration statement is declared effective; and
- any request that require changes or additional information on the registration statement shall cause the change of the submission date of the registration statement.

The OJK may suspend public offering upon issuance of notification to the company and underwriters, if it is concluded that:
- the registration statement, prospectus or other documents submitted as a part of the securities registration process includes the information or material facts that are:
  - false, misleading, or ignore material facts necessary at the time in accordance with the condition at the time the statements are made; or
  - to be untrue, misleading, or ignore material facts owing to the change of circumstances and additional information needed to improve such condition is not communicated to the public; and
- the company or other parties affiliated with the company in public offering has violated Law No. 8 of 1995 on Capital Markets and its implementing regulations; or
- each company or other parties affiliated with the company does not submit changes or additional information requested by OJK.

**IDX**

In addition to the OJK, a company whose shares are to be listed in the IDX must first obtain approval from the IDX by submitting an application and attaching documents evidencing that the company has complied with the IDX requirements, including the following:
- the issuer has independent commissioners, the number of which representing at least 30 per cent of the total members of the board of commissioners;
- the issuer has an independent director;
- the issuer has an audit committee and has an internal audit unit;
- the issuer has appointed a corporate secretary;
- the minimum nominal value of the shares of the issuer is at least 100 rupiah;
- an indication as to whether the issuer will issue a warrant together with the initial listing of the shares;
- the exercise price of the warrant must be at least 90 per cent of the offer price or the initial price of the shares and must be at least the same as the nominal value of the shares; and
- the issuer must enter into a full-commitment underwriting agreement with the underwriter.

In addition to these requirements, an issuer that intends to list its shares on the main board of the IDX must also satisfy the following requirements:
- the issuer has conducted its operational activities within the same core business for at least 36 consecutive months;
- the issuer was in profit in its latest financial period;
- the financial statement of the issuer has been audited for at least three consecutive years where the latest two-year audit report and the latest interim audit report (if applicable) was issued with an unqualified opinion; and
- based on the latest audited financial report, the net tangible assets of the issuer are at least 100 billion rupiah.

If the issuer wishes to register its shares on the developing board of the IDX, it must comply with the following requirements:
- the issuer must have conducted its operational activities in the same core business for at least 12 consecutive months prior to the date on which the application is submitted;
- the last audited financial statement for the latest financial year and the interim audited financial report (if applicable) must have been approved unqualified;
- the issuer owns at least 5 billion rupiah-worth of net tangible assets; and
- if the issuer has not made a profit or has operated for less than two years, it must:
  - at the latest by the second financial year after being listed on the IDX, have made a profit or a net profit based on its financial projections; and
  - if the issuer is operating in a line of business that requires longer to move into profit, such as infrastructure or public service-related businesses, the issuer must gain business profit and net profit at the latest by the end of the sixth financial year, as indicated in its financial projection.

The IDX will review the application and, within 10 working days, issue a letter to either grant approval in principle or to reject the listing of shares on the IDX. Once the IDX has issued in-principle approval, the IDX and issuer will enter into a preliminary listing agreement. In the event that the issuer's registration statement at the OJK has been effective, the issuer will submit a listing application to the IDX, in which case the IDX will approve the listing within, at the latest, five working days after its receipt.

## 6 What information must be made available to prospective investors and how must it be presented?

The issuer is required to issue a propectus containing any information needed to be presented to potential investors. This information includes:
- a covering page containing:
  - the effective date;
  - the offering period;
  - the allotment period;
  - the date of refund;
  - the date of delivery of securities;
  - the recording date;
  - basic information on the issuer, such as line of business, address and contact details, logo (if any), website address, addresses of plant and representative office (if any), and the main business activities of issuer;
  - the name of the stock exchange on which the shares will be listed;
  - the type of offering, including the number and description of the shares, and their nominal value and price;
  - the name of the underwriter;
  - the place and date on which the prospectus will be issued;
  - the following OJK statement in capital letters: OJK OFFERS NO OPINION ON THESE SECURITIES OR ON THE VALIDITY OR COMPREHENSIVENESS OF THE INFORMATION CONTAINED IN THIS PROSPECTUS. ANY REPRESENTATIONS TO THE CONTRARY CONSTITUTE A VIOLATION OF THE LAW. THIS PROSPECTUS IS IMPORTANG AND NEED IMMEDIATE ATTENTION. SHOULD THERE BE ANY DOUBT ON ANY ACTION THAT WILL BE TAKEN, YOU ARE ADVISED TO CONSULT WITH THE COMPETENT PARTY;
  - the statement by the issuer and the underwriter (if any) in capital letters stating that they will bear full responsibility on the accuracy of all information and truthfulness of opinion disclosed in the prospectus as follow: ISSUER AND UNDERWRITER

(if any) ARE FULLY RESPONSIBLE FOR THE VALIDITY AND ACCURACY OF ALL MATERIAL INFORMATION AND FACTS AND THE TRUTHFULLNESS OF THE OPINIONS EXPRESSED IN THIS PROSPECTUS; and

- the table of contents;
- the summary of prospectus;
- information on the public offering;
- the intended use of the proceeds;
- capitalisation and indebtedness;
- selected financial highlights;
- management discussions and analysis;
- the risk factor;
- the significant subsequent event after the date of independent auditor report;
- a description of the issuer's business, financial conditions and business prospects;
- equity;
- the dividend policy;
- the tax policy;
- the summary of the underwriting contract (if any);
- the names of the capital market supporting profession involved in the IPO;
- the important information in articles of association and other important provisions related to the shareholders;
- the terms for shares' booking;
- the distribution of the prospectus and forms to purchase shares;
- legal opinion;
- financial statement; and
- the valuation report and expert report (if any).

### 7 What restrictions on publicity and marketing apply during the IPO process?

The issuer is restricted from publishing any information on the plan for the IPO before it has obtained approval from the OJK that it may commence the bookbuilding process, or publish any information related to the IPO.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Pursuant to article 106 of Law No. 8 of 1995 on Capital Market, any violation of the IPO rules, such as conducting a public offering without first obtaining approval from the OJK, may lead to imprisonment or a fine being imposed by the OJK.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The following table indicates the estimated time frame of the IPO process in Indonesia:

| Activities | Time and notes |
|---|---|
| Business and legal due diligence | 1–3 months + ongoing |
| Financial due diligence | 1–3 months + ongoing |
| Property valuation | 1–3 months + ongoing |
| Preparation of accounts, profit and cash flow forecast, financial forecast model | 1–3 months + ongoing |
| Preparation of prospectus | 1–3 months + ongoing |
| Submission of registration statement to the OJK by issuer | Submitted together with the listing application form required by the OJK |
| OJK reviews and asks for clarification and additional information No. 1 | |
| Issuer responds and submits additional documents and information to the OJK | 10 working days after receiving the OJK's letter |
| OJK reviews and asks for clarification and additional information No. 2 | |
| Issuer responds and submits additional documents to OJK | 7 working days after receiving the OJK's letter |
| OJK grants approval to publish abridged prospectus | |
| Publication of abridged prospectus | 2 working days after receiving the OJK's letter |
| Bookbuilding period | To commence from the publication of abridged prospectus until the submission of pricing information to OJK |
| Issuer submits of evidence of abridged prospectus publication to OJK | 2 working days after the publication |
| Issuer submits information on pricing and other disclosure information to the OJK | 7–21 working days from the date the abridged prospectus was published |
| OJK issues effective letter | |
| Issuer publishes revision or addition to the abridged prospectus | 1 working day after the date of the OJK's effective letter |
| Issuer commences the public offering period | 1–5 working days from the date when the revised abridged prospectus was published |
| Shares allotment | 2 working days after the end of the public offering period |
| Refund or distribution of shares | 2 working days after the date of shares allotment |
| Listing of shares at IDX | 1 working day after the refund or distribution of shares |
| Report on the IPO result | 5 working days after the shares allotment |

### 10 What are the usual costs and fees for conducting an IPO?

Based on Regulation No. I-A attached to Decision Letter of the Board of Directors of IDX No: Kep-00001/BEI/01-2014 on Registration of Shares and Equity Type Securities, the listing fees are as stated below. Also, the other IPO fees and expenses stated hereunder are based on the disclosure of IPO expenses published by the issuers on the IDX website.

| Description | Typical cost |
|---|---|
| **Initial listing fee** | |
| Main board | Between 25 million and 250 million rupiah |
| Development board | Between 25 million and 150 million rupiah |
| **Annual listing fee** | |
| Main board | Between 50 million and 250 million rupiah per year |
| Development board | Between 50 million and 250 million rupiah per year |
| Underwriter's fees | Between 0.3 per cent and 3.25 per cent of the total IPO proceeds received by the issuer |
| Counsel's fees | Between 0.14 per cent to 1.85 per cent of the total IPO proceeds received by the issuer |
| Accountant fees | Between 0.1 per cent to 0.9 per cent of the total IPO proceeds received by the issuer |

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

To comply with good corporate governance, the IPO issuer is required at all times to comply with the following requirements:

- to have independent commissioners comprising at least 30 per cent of the members of the board of commissioners; and any independent commissioner may only serve for two consecutive serving terms;
- to have at least one independent director; and any independent director may only serve for two consecutive serving terms, and can be re-appointed provided that such independent commissioner declares that he or she will remain independent of the general meeting of shareholders;
- to have an audit committee;
- to have a corporate secretary; and
- to have an internal audit unit.

**12 Are there special allowances for certain types of new issuers?**

Smaller or growth companies with net tangible assets of at least 5 billion rupiah, which have complied with IDX listing requirements, may list their shares on the development board. The listing fees for the development board are lower than for the main board, as described in question 10.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

Indonesian company law stipulates anti-takeover devices through the pre-emptive rights requirements, in which case any issuance or transfer of shares must first be offered to the existing shareholders. Other possible defences are to apply the management stock option plan or employee stock option plan, where the management or employee of the target company have the right to request that the shares to be sold or newly issued shares be first offered to them.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

To date, the government has not issued any regulations to enable foreign issuers to list their shares on the IDX.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

To the best of our knowledge there is no restriction on selling the shares of foreign issuers whose shares are listed outside Indonesia to Indonesian investors.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

Pursuant to Law No. 7 of 1983, as last amended by Law No. 36 of 2008 on Income Tax, dividends received by domestic legal entities, co-operatives, state-owned companies, or regional government-owned companies from their shared ownership in a limited liability company incorporated in Indonesia are exempt from income tax if the dividends derive from retained earnings, and the state-owned companies or regional government-owned companies own at least 25 per cent shares in the company that distributes dividends.

Based on Decision of the Minister of Finance of the Republic of Indonesia No. 651/KMK.04/1994 dated 29 December 1994 on types of particular investment that will provide income to a pension fund, and are not deemed as income tax objects, such income received by a pension fund the incorporation of which has been authorised by the Minister of Finance will not attract income tax if such income has been received from capital investment or from dividends received from shares of a public company listed at the IDX.

Pursuant to Government Regulation No. 41 of 1994 regarding Withholding Tax on Income from Share Trading Transactions on the Stock Exchange dated 23 December 1994, and its amendments in Government Regulation No. 14 of 1997 dated 29 May 1997, the sale or transfer of shares that are listed on an Indonesian stock exchange is subject to final withholding tax of 0.1 per cent of the gross amount of the transaction value, which should be withheld by the broker handling the transaction. An additional 0.5 per cent final tax (amounting to a total tax of 0.6 per cent) is imposed on the share value for the holding of the founder shares (except for the founder shares of a mutual fund). The imposition of 0.5 per cent withholding tax will occur at the time of the initial public offering for shares traded on the stock exchange on or after 1 January 1997. The imposition of 0.5 per cent withholding tax on the founder shares is not compulsory. The tax regulations provide an option for the taxpayer to elect to substitute the 0.5 per cent additional final tax with the taxation of actual capital gains (if any) resulting from the sale of the founder shares subject to the normal tax rates (progressive rate with a maximum of 25 per cent for corporate taxpayers or 30 per cent for individual taxpayers). Currently, the tax regulations for listed shares do not contain any provision in respect of treaty protections. In practice, the 0.1 per cent final withholding tax is applied irrespective of whether there are treaty exemptions. The Indonesian tax authorities have a general rule regarding refunds, which may be used in the case of an applicable treaty exemption.

## Investor claims

**17 In which form can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

In practice, IPO investors can file a lawsuit against an issuer if it appears that there is misrepresentation of information in the prospectus and certain required disclosure documents in connection with the IPO.

A misrepresentation is defined as an untrue statement of a material fact or an omission to state a material fact that is required to be stated, is necessary to prevent a statement that is required to be stated, or is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it is made. There is, however, no regulation available to accommodate non-judicial resolution for any complaints addressed by IPO investors.

**18 Are class actions possible in IPO-related claims?**

Class actions are regulated by Regulation of Supreme Court No. 1 of 2002 on Proceeding of Class Action (PERMA No. 1/2002). Pursuant to PERMA No. 1/2002, a class action is a proceeding in which one or more representatives of a group of individuals will submit a lawsuit for him or herself and at the same time represent that group of individuals with the same grievance or argument based on the same event. PERMA No. 1/2002 allows a class action to be filed on any subject matter provided that the matter meets the qualifications in the regulation,

HUTABARAT HALIM & REKAN
LAWYERS

**Pheo M Hutabarat** **pheo.hutabarat@hhrlawyers.com**
**Rosna Chung** **rosna.chung@hhrlawyers.com**

20/F DBS Bank Tower
Ciputra World 1
Jl Prof DR Satrio Kav 3 – 5
Jakarta 12940
Indonesia

Tel: +62 21 2988 5988
Fax: +62 21 2988 5989
www.hhrlawyers.com

including: it would not be an efficient use of resources for all the lawsuits to be filed individually or jointly in one lawsuit, there is similarity of substantial fact, event and legal basis used, and similarity of the type of lawsuit among the representative of the group and its member and the representative of the group has the integrity to protect the interest of the members that he or she represents. The judge can suggest to the group representative that they change their lawyer if the lawyer performs an action that does not protect the interests of the group's members. In view of the foregoing, class actions on IPO-related claims are perfectly possible.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

In the past, a class action was filed in relation to the IPO process of a state-owned company, among others, concerning the determination of the price of the shares offered to the public by the issuer, in which a lawsuit was filed against the issuer and the Capital Market and Financial Services Supervisory Agency, along with a request to cancel the IPO process. The case was rejected by the court, however, given that other parties are not included as defendants, such as the House of Representatives and the underwriters.

# Ireland

**Lee Murphy and Ryan Duggan**
**Eversheds Sutherland**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

To date, there has been one IPO in the first half of 2017 – the Irish government officially listed its approximately 25 per cent stake in the state-owned Irish bank, Allied Irish Banks plc (AIB). The AIB listing on the Main Securities Market (MSM) of the Irish Stock Exchange (ISE) has provided the ISE with the largest IPO to date in Europe in 2017. The AIB IPO is expected to raise approximately €3 to €3.4 billion for the Irish state from Irish and international investors. During 2016, 11 companies trading on the ISE raised €513 million in equity funds from international investors, including funds raised by two secondary listings on the Enterprise Securities Market (ESM).

By contrast, in 2015 there were four IPOs on the ISE with an aggregate total fund raise of €980 million. There were three IPOs in 2014, raising €484 million.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Issuers are generally domestic Irish companies headquartered in Ireland. Many Irish companies undertaking an IPO seek a dual listing, typically with the second listing being on either the main market or the Alternative Investment Market (AIM) of the London Stock Exchange (LSE). This is primarily to obtain greater liquidity and is facilitated by broadly similar eligibility and ongoing general compliance requirements as and between the ISE and LSE markets. Where a dual listing is not favoured for any commercial or technical reasons, Irish companies typically tend to proceed with a sole listing on either the ISE or the LSE, as is most beneficial in the particular circumstances.

While in the minority, a number of overseas companies (primarily UK incorporated companies) are admitted to trading on the ISE's markets. Since the United Kingdom's Brexit decision, there have been various media reports of over 120 overseas banks, insurers and other financial companies considering moving operations to Ireland. It remains to be seen whether some of the companies that move operations may also consider the option of an Irish IPO as part of this process.

For further information relating to ISE listings for overseas companies, see question 4.

### 3 What are the primary exchanges for IPOs? How do they differ?

The ISE is the only equity exchange for IPOs in Ireland, and it is a recognised stock exchange for the purposes of EU legislation.

There are three equity capital markets on the ISE: the MSM, the ESM and the Atlantic Securities Market (ASM).

The MSM is an EU-regulated market under the European Communities (Markets in Financial Instruments) Regulations 2007 and is typically selected by larger, more mature companies.

The ESM is the ISE's junior market and is largely based on the AIM market. In a similar manner to AIM, companies trading on the ESM are not subject to the same level of regulation as those trading on the MSM.

There are different eligibility requirements for admission to trading on the MSM and ESM markets; these requirements are discussed in question 5.

The ASM is a recently launched market. This market is focused on companies listed on the New York Stock Exchange (NYSE) and NASDAQ exchanges and offers access to a euro quotation and European investors. There is more information on the ASM market in the 'Update and trends' section. Aside from any specific mentions of ASM, this chapter focuses solely on IPOs on the MSM and the ESM.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The principal rules for the admission of securities to the official list of the ISE are the MSM Listing Rules and Admission to Trading Rules (the Listing Rules), and ESM Listing Rules. Other stock exchange rules include the ASM Listing Rules, Equity Sponsor Rules, the Rules for ESM Advisors and the Rules for ASM Advisors. The ISE is the competent authority in relation to these various rules.

The ISE has general broad powers to make and modify the various rules and to oversee compliance with the rules by issuers, prospective issuers, sponsors and ESM/ASM advisers. Issuers, sponsors and advisers can be censured by the ISE for breach of applicable rules and ultimately, where merited, issuer listings can be suspended or cancelled.

Many other legislative regimes also apply. The Prospectus (Directive 2003/71/EC) Regulations 2005 and the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012 (together, the Prospectus Regulations) apply in relation to all MSM IPOs. They will also apply to IPOs on the ESM in cases where there is an offer of securities to the public and an exemption under the Prospectus Regulations is not available.

Where the publication of a prospectus is required, the Central Bank of Ireland (CBI), which is the overall competent authority for overseeing the legal framework for securities markets regulation in Ireland, undertakes the required review and prospectus approval process. In certain instances where the issuer's registered office is in a European Economic Area (EEA) member state other than Ireland, a separate EEA regulator may take carriage of this approval process. The CBI has issued a prospectus handbook that gives practical guidance on items such as the CBI review and approval process and on the required content and publication process for prospectuses.

Aside from the Prospectus Regulations and the various listing rules, there are various other statutes, rules and regulations of which IPO issuers will need to be aware. These include the Irish Companies Act, 2014 (which has consolidated Irish company law into a single code) and EU-derived and domestic market abuse, transparency, corporate governance and reporting regulations and rules.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Aside from the prospectus publication and ISE application requirements, an issuer and its securities proposed to be admitted to trading on the MSM need to meet certain eligibility requirements set out in the Listing Rules. The ISE has discretion to dispense with or modify certain of these requirements where it deems appropriate. Some of these key requirements are as follows:

- an applicant must have published or filed historical financial information, including consolidated accounts for itself (and any subsidiaries), covering at least three years;
- this historical financial information must represent at least 75 per cent of the applicant's business for that three-year period;
- the latest balance sheet date should not be more than six months before the date of the prospectus and not more than nine months before the date the shares are admitted to listing;
- an applicant must satisfy the ISE that it (and any subsidiaries) has sufficient working capital available to cover its requirements for at least 12 months from the date of publication of the prospectus;
- the expected aggregate market value of all securities (excluding treasury shares) to be listed must be at least €1 million;
- at the time of admission to trading on the MSM, at least 25 per cent of the class of shares being admitted to trading must be in public hands in one or more EEA states; and
- an applicant must be duly incorporated or otherwise validly established according to the relevant laws of its place of incorporation and be acting in accordance with its constitutional or governance document.

Additionally, the securities to which the application to list relates must conform with the law of the applicant's place of incorporation. The securities must be freely transferable and, generally, shares must be fully paid and free from all liens or restrictions on the right to transfer.

The eligibility requirements for applicants looking to list on the ESM are less prescriptive, and again, the ISE has a certain level of discretion to relax certain rules. In general, it is normal for a company looking to list on the ESM to have a two-year trading record and a minimum market capitalisation of €5 million.

When a dual listing is being undertaken, eligibility requirements will need to be satisfied in both jurisdictions in which the applications to list have been made. Accordingly, in the case of an ISE/LSE dual listing, correspondence will also need to be entered into with the Financial Conduct Authority of the UK. The eligibility requirements of the MSM are broadly similar to the eligibility requirements of the premium listing segment on the LSE's main securities market, and the eligibility requirements of the ESM are broadly similar to those of the AIM market.

### 6 What information must be made available to prospective investors and how must it be presented?

A company listing on the MSM, and in certain cases as described below, a company listing on the ESM, has to publish a regulator-approved prospectus. The Prospectus Regulations (or equivalent regulations in other EEA countries if an EEA regulator has standing to approve the prospectus) sets out the requirements for content inclusion in the prospectus. The role of the regulator in question is to ensure the various content requirements set out in the prospectus legislation are met and to examine the prospectus for its completeness, comprehensibility and consistency. Some of the key content requirements include information relating to:

- the persons responsible for preparing the prospectus;
- risk factors associated with the issuer, its business area and the securities;
- financial information including three-year historical information, pro forma information and a working capital statement;
- reasons for the offer and use of proceeds;
- interests of natural persons in the offer;
- information concerning the securities to be offered or admitted to trading;
- information about the issuer including its assets and liabilities, organisational structure, its business strategy and objectives and principal markets;
- operating and financial review;
- administrative, management and supervisory bodies;
- corporate governance;
- major shareholders;
- related-party transactions;
- terms and conditions of the offer and details of the admission to trading; and
- additional information including material contracts, share capital history and constitutional documents.

The prospectus is required, more generally, to contain all material information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer as well as the rights attaching to the securities. A concise summary of the prospectus in non-technical language is also required to be included containing key information for potential investors.

In exceptional cases, on regulator consent, certain information may be omitted from the prospectus.

There is no primary obligation to publish a prospectus for issuers seeking a listing and admission to trading on the ESM market. A requirement to do so may arise, however, under the Prospectus Regulations if there is a public offering of securities within the jurisdiction which does not fall within one or more of the exemptions detailed in the Prospectus Regulations (for further detail see question 15).

In the absence of a requirement to publish a prospectus, an admission document will be required to be prepared for an ESM listing. The content requirements for an admission document are set out in the ESM Listing Rules. These content requirements are similar, but lighter, than the content requirements for a prospectus. The admission document does not have to be approved by the Central Bank, however, it does have to be filed with the ISE.

### 7 What restrictions on publicity and marketing apply during the IPO process?

It is a key facet of an IPO process that care is taken in terms of marketing and publicity and in terms of document content prepared for investor meetings or circulation. Many of the particular requirements derive from the Prospectus Regulations and from other statutes and common law.

Fundamentally, all information contained in a prospectus, admission document or other IPO-related materials (in particular 'early look' or roadshow investor meetings materials) are vetted and verified such that the statements contained in them are evidenced by third party or other corroboration, or otherwise are validly held management or director belief statements. A failure to undertake this level of discipline could ultimately leave the issuer and officers or management of the issuer open to potential legislative or regulatory breaches or to charges of misrepresentation.

Advertisements relating to a public offer or admission to trading should comply with certain principles contained in the Prospectus Regulations. Any such advertisement should state that a prospectus has been or will be published and where a copy of it can be obtained. The advertisement should not be misleading or inaccurate and the information contained in the advertisement should be consistent with that contained in the prospectus.

In light of the above considerations, it is typical that an IPO applicant would have publicity guidelines drawn up and put in place towards the start of an IPO process.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Under the Listing Rules, matters may be referred to the Disciplinary Committee of the ISE for adjudication where the ISE considers there to have been a contravention of the Listing Rules. If the Disciplinary Committee finds there has been a contravention, it may censure the issuer and publish such censure and suspend or cancel the listing of the issuer's securities. Moreover, if the Disciplinary Committee finds that the contravention was as a result of the failure of all or any of an issuer's directors to discharge their responsibilities, the relevant director or directors can also be censured and that censure published.

Prospectuses must contain all information necessary to enable investors to make an informed assessment of the financial position and prospects of an issuer. It is a criminal offence to issue a prospectus that includes any untrue statement or omits any information required by EU prospectus law to be contained in it. Any person responsible who authorised the issue of the prospectus will be guilty of an offence unless they can prove either that an untrue statement was immaterial or they believed it to be true or in the case of an omission, that it was immaterial or that they did not know about it.

The issuer, directors of the issuer, and in certain circumstances other persons to include those who have authorised contents of the prospectus, are deemed responsible for the content of the prospectus

and such responsible persons are required to include declarations in the prospectus that, to the best of their knowledge, the information therein contained is in accordance with the facts and that there are no omissions from the prospectus likely to affect its import.

One of the roles of the CBI as competent authority under the Prospectus Regulations is to oversee compliance with the Prospectus Regulations and to investigate potential breaches of prospectus law. In the event of a breach of the Prospectus Regulations, criminal proceedings can be brought against responsible persons including in certain instances by the CBI itself.

A person who is found guilty of an offence under Irish prospectus law may be liable on summary conviction to a fine of up to €5,000 or imprisonment for a term of up to 12 months, or on conviction on indictment to a fine of up to €1 million or imprisonment of a term of up to five years.

The Office of the Director of Corporate Enforcement also has an investigative and enforcement function generally in respect of compliance with corporate laws and regulations in Ireland and has the power to prosecute persons for breaches of the Companies Acts.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

There is no set time frame for an IPO but typically an IPO on the MSM will require four to six months to complete. An ESM IPO should enjoy a shorter timeframe and, in particular circumstances, may be able to be achieved within a three-month period.

Particular factors that may go to timing include the nature and complexity of the issuer's assets, history and sector, the level of any required pre-IPO preparation carried out by the issuer, any particular legal complexities or additional workstreams relevant to the transaction (for example, regulatory workstreams), market conditions, and sufficient issuer and advisor resources being in place.

The timetable of an IPO on the MSM IPO might look as follows:

| Time | Activity |
|---|---|
| Four to six months prior to IPO | Engagement with sponsor bank and 'early look' investor meetings to gauge likely investor appetite and to help refine the investment strategy and issuer approach. |
| | Selection and engagement of the IPO adviser team. The team appointed will include the lead bank sponsor(s)/ESM adviser – nominated adviser, the issuer's legal and accounting advisors and the bank's legal advisers. Note for dual listing IPOs, legal advisers to both the issuer and the sponsor will also need to be engaged in the second jurisdiction. |
| | Issuer to ensure it has the appropriate resources in terms of personnel and systems. |
| | System controls and processes to be put in place in light of the impending legal and financial due diligence processes and all IPO corporate, accounting and tax structural considerations to be addressed. |
| | Preparation and circulation of publicity guidelines. |
| | All party kick-off meeting held to determine appropriate timelines, workstreams and project management items. |
| | Commencement of legal and financial due diligence processes. |
| | Commencement of prospectus drafting. |
| | Commencement of long-form financial report and working capital report. |
| One to four months prior to IPO | Legal and financial diligence processes brought through to completion. |
| | Submission of prospectus drafts to the CBI and reply to consequent CBI queries. Prospectus brought through to CBI approval form. |
| | Verification of the prospectus. |
| | Completion of long form financial report and working capital report. |
| | Convening of the issuer board of directors at appropriate milestones to approve relevant matters and to be advised of their duties as directors in the context of a prospectus and as directors of a (soon to be) public listed company. |
| | Drafting of all associated documentation to include board documentation, policy documents, comfort letters and the constitution to be adopted by the issuer on or before IPO completion. |
| Two to four weeks prior to IPO | Negotiation of the placing or underwriting agreement. |
| | Finalisation of any cornerstone subscription agreements. |
| | Finalisation of all other processes. |
| | Pathfinder prospectus board meeting. |
| Final two weeks prior to IPO | Commencement of marketing roadshow and book building. |
| | Final share pricing and allocation. |
| | Publication of prospectus and submission of formal application to ISE. |
| Impact day | Commencement of conditional dealings. |
| Post three day | Admission to trading and commencement of unconditional dealings |

### 10 What are the usual costs and fees for conducting an IPO?

We see aggregate IPO transaction costs, depending on the level of funds raised, ranging between 1 and 5 per cent of the total funds raised in an IPO. Generally, the underwriters or fundraisers are retained on a primarily success fee only basis paid with commission earned on funds raised. Other key transaction fees will involve lawyer and accountant fees and it is worth noting that advisers may have to be engaged across a number of jurisdictions, depending on the nature of the transaction. As many companies dual list in Ireland and the UK, there will be Irish and UK legal advisory fees. If an issuer is raising any of its funds from the US or from non-EEA jurisdictions, this will bring an extra layer of advisory costs.

An admission fee is payable by all companies seeking admission of securities to the ISE at the time of initial admission. Where the issuer is incorporated outside of Ireland, only half of the fees are payable.

The initial admission fees on the MSM are calculated on the market capitalisation of the securities being admitted and range from €100,000 (for market capitalisations of up to €250 million) to €250,000 (for market capitalisations over €1 billion). The annual fee for a company on the MSM ranges between €7,000 and €25,000 depending on market capitalisation.

ESM admission fees range from €10,000 (for market capitalisations of up to €100 million) to €60,000 (for market capitalisations over €250 million). Annual fees payable thereafter range from €5,000 to €8,000 depending on market capitalisation.

ASM admission fees range from €2,000 (for market capitalisations of less than US$10 million) to €80,000 (for market capitalisations over US$2 billion). Annual fees payable thereafter range from €15,000 to €35,000 depending on market capitalisation.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The Listing Rules of the ISE require that all companies listed on the MSM include in their annual report a description as to the extent of the company's application of the principles of the UK Corporate Governance Code (the UK Code) and the Irish Corporate Governance Annex (the Irish Annex) issued by the ISE. There is a 'comply or explain' requirement such that, if there are provisions of the UK Code or the Irish Annex which have not been complied with, the company is required to state the reasons for the non-compliance and provide a clear outline of the rationale for this divergence in its annual report. Where a company does not comply with a provision of the UK Code or the Irish Annex, but intends to comply with it in the future, it should include an explanation of how it so intends to comply. Under the UK Code and the Irish Annex, some of the key items that are addressed include:

- board composition and effectiveness;
- board appointments and re-election;
- independence of directors;
- board committees and remuneration;
- relations with shareholders; and
- board evaluation and accountability.

**Update and trends**

An exemption from stamp duty on the purchase of shares in any Irish company that is listed on the ESM came into effect on 5 June 2017. Previously, stamp duty had been chargeable at a 1 per cent rate, as remains the case currently for share purchases on the MSM. It is understood that the Irish government is undertaking a wider ranging review of the stamp duty regime and the ISE has stated that it hopes the result of this review will extend the measure to all Irish-quoted companies in order to make it easier for them to access finance and scale their business.

As reported in further detail last year, the ISE launched the ASM in 2015 to enable companies to have a dual listing on the NYSE or NASDAQ and on the ISE. This market offers opportunities for companies trading on the NYSE or NASDAQ to have a euro quotation and access to European investors. The ASM's regulatory regime and entry requirements are broadly compatible with the SEC requirements and relatively few additional disclosures are required to be made alongside submission of a company's SEC registration document to the ISE. In addition, companies on the ASM can use US GAAP for financial reporting and trading is stamp duty free.

The first set of candidate companies from the ISE's new '#IPOready' programme graduated in 2016. The programme is directed at any high growth, ambitious companies with a desire to enhance their skills in the IPO process. The #IPOready programme essentially provides extensive support over 15 months, preparing successful applicants for listing. Requirements for the programme consist of company revenue exceeding at least €5 million, an ability to demonstrate a track record of growth and future potential and an ability to commit the senior management team for the 15 months. Applications for 2017 close on 16 June 2017 with the programme starting in September 2017.

The Irish government officially listed its approximately 25 per cent stake in the state-owned Irish bank AIB on 23 June 2017. AIB's admission to a primary listing on the MSM is the largest IPO in Europe so far in 2017. Ireland has raised €3 billion through AIB's return to the stock market for the first time in more than seven years, selling a quarter of the state-owned bank at €4.40 per share. This has been one of the largest bank listings since the global financial crisis of 2009. On 27 June 2017, the shares closed at €4.72, 7 per cent above the IPO of €4.40. It is possible that the IPO will rise to 28.75 per cent if demand proves strong following its debut, after the government included an over-allotment option. This increase would result in another €400 million to the Irish state.

**12 Are there special allowances for certain types of new issuers?**

While the ISE maintains a general discretion in relation to applications to list on any of its markets, there is provision in the Listing Rules that a derogation of certain eligibility criteria can apply to mineral companies and scientific research based companies (as each is defined in the Listing Rules). These derogations are subject to certain minimum capitalisation and other conditions that may be imposed.

No particular allowances are made for any other type of issuer, for example, smaller or growth companies, however, the ESM's less stringent eligibility criteria and regulatory regime may be better suited to and more manageable for smaller companies. There are, however, no prescriptive factors dictating the choice of market of the issuer other than the eligibility requirements described in question 5.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

Ireland's takeover compliance regime comprises the Irish Takeover Panel Act 1997, as amended, the European Communities (Takeover Bids) Regulations 2006, as amended, the (Irish) Takeover Rules and the Substantial Acquisition Rules.

The regime can apply in respect of takeovers or takeover bids of companies incorporated in Ireland and: (i) whose shares are traded on a regulated market in Ireland or another EU or EEA State; or (ii) whose shares are, or have in the previous five years been, traded on the ISE, the LSE, NYSE or NASDAQ. It can also apply in certain circumstances to takeovers or takeover bids of non-Irish companies whose shares are traded on the ISE. Shared jurisdiction with other states' takeover rules can apply in certain circumstances.

The Irish Takeover Panel is the statutory body responsible for monitoring compliance with the Takeover Rules and associated legislation.

Anti-takeover devices are not typically implemented by IPO issuers in Ireland and anti-takeover defences are normally conducted through defence documents, shareholder communications or other actions such as dividend declarations and share buyback opportunities after a hostile bid has been made.

The Takeover Rules carry a prohibition against frustrating actions generally and a concern may also be that the insertion or implementation of anti-takeover devices pre-emptively may conflict with the general duty of directors to act in the interests of the company and shareholders as a whole. Various Companies Act provisions provide that a company can raise queries with registered shareholders as to the identity of beneficial holders of the shares held by them. The Substantial Acquisition Rules additionally restrict how quickly a party may increase their holding of voting securities in a relevant company between 15 and 30 per cent of the voting rights.

**Foreign issuers**

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

An ISE listing provides access to a euro-quoted English-speaking exchange and its associated market investors.

In considering which market to select, the MSM may provide a better platform in terms of liquidity and accentuating a foreign issuer's profile in Ireland or Europe (as applicable). Alternatively, the less stringent eligibility criteria and regulatory regime of the ESM may suit certain foreign issuers better, particularly in instances where they may not have a substantive presence in Ireland.

US companies listed on the NYSE or NASDAQ may be attracted to the possibility of creating a dual listing in Ireland on the ASM. The ASM's regulatory regime and entry requirements are relatively compatible with the Security and Exchange Commission (SEC) requirements and registration document. In addition, companies on the ASM can use US generally accepted accounting principles (GAAP) for financial reporting and in most cases, trading is stamp duty free.

There are no particular requirements for foreign issuer IPOs, however, as described in question 5, an applicant must be acting in accordance with its constitution and be duly incorporated or validly established under, and its securities must conform with, the law of its place of incorporation. It is also required that certain pre-emption rights are conferred on shareholders.

The ISE will not admit shares of a company incorporated in a non-EEA state that are not listed either in its country of incorporation or in the country in which a majority of its shares are held, unless the ISE is satisfied that the absence of the listing is not because of the need to protect investors.

Issuers from within the EEA looking to list and admit their shares for trading on the MSM will generally not have to publish a new prospectus where they already have a prospectus approved in their home member state. In such circumstances, a passporting application can be made whereupon the relevant approving regulator shall supply the CBI with a copy of the approved prospectus, a certificate of its approval and, if applicable, an English translation of the summary section of the prospectus. Additionally, as described in question 10, ISE admission fees are reduced for overseas companies.

Companies that have their securities traded on an 'ESM Designated Market' (including, the ISE's MSM, AIM, UKLA Official List, NASDAQ, NYSE, Euronext, Toronto Stock Exchange, Deutsche Börse, Stockholmsbörsen and Johannesburg Stock Exchange) for at least 18 months before seeking admission to the ESM can be fast-tracked, meaning an admission document would not have to be published but rather a detailed pre-admission announcement submitted.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

There are certain prescribed circumstances when a prospectus does not have to be published in respect of an offer of securities to the public. Under the Prospectus Regulations, the obligation to publish a prospectus does not apply to an offer of securities in Ireland falling within one or more of the below circumstances:

- an offer of securities addressed solely to qualified investors;
- an offer of securities addressed to fewer than 150 natural or legal persons other than qualified investors;
- an offer of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
- an offer of securities whose denomination per unit amounts to at least €100,000; or
- an offer of securities with a total consideration in the EU less than €100,000, which shall be calculated over a period of 12 months.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

The issue of new shares through an IPO should not attract stamp duty, however, the transfer of such shares thereafter (on the MSM only) will generally be subject to stamp duty where the company holds its share register in Ireland. A stamp duty exemption for trading shares on the ESM was introduced this year (2017). See further in the 'Update and trends' section.

Shares bought back by a listed company from existing shareholders should be subject to capital gains tax in the hands of the shareholder generally rather than being subject to income tax, which carries a higher rate.

Companies should also consider whether any existing employee share option schemes require the exercise of the option prior to any IPO.

A company contemplating a listing should consider whether the change in the ownership structure of the company would cause any clawbacks of any tax relief previously claimed by the group, and also consider any taxation aspects that may arise as a result of any pre-IPO corporate restructuring that may take place.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

In Ireland, an investor who has suffered a financial loss may seek redress through the courts. Possible causes of action are given in question 19.

Where the quantum of the claim is over €1 million the dispute may be entered into the Irish Commercial Court. The benefit of the Commercial Court is a case-managed approach by the judiciary, which leads to matters being heard promptly.

Disputes may be resolved by way of Alternative Dispute Resolution (ADR) where: (i) the parties have entered into an agreement with a binding ADR clause; or (ii) agree to enter into a binding ADR process. In recent years the Irish judiciary have encouraged parties to engage in mediation at the outset of a dispute and Court rules have been introduced to potentially penalise a party's ability to recover legal costs if they refuse to do so.

**18 Are class actions possible in IPO-related claims?**

Although there are no Irish provisions specifically relating to a class action procedure, in certain circumstances the courts have allowed a test case (or test cases) to proceed, where the 'test' case is representative of a number of cases that all arise out of an identical or similar set of circumstances or facts.

Where a test case process is allowed by the court, each claimant must have initiated their own separate set of court proceedings and agree to their proceedings being part of the representative group and to be bound by the outcome of the test case.

Alternatively, a number of investors may file a single set of court proceedings and progress these proceedings as co-plaintiffs, although this can be impractical where the number of potential claimants is high.

While not common previously, there have been a number of substantial representative group claims progressed in the Irish courts in recent years in the area of financial services litigation, and the courts are open to this method of progressing claims because of its time and cost efficiency.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

Irish legislation provides that a variety of persons may be liable to pay compensation to persons who acquire any securities based on a prospectus. The claimant must have suffered loss by reason of any untrue statement in a prospectus or by reason of the omission of information required to be contained in the prospectus. A statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included.

The issuer, directors of the issuer and other persons, to include promoters, those who have authorised contents of the prospectus, or the issue of the prospectus, and any guarantor may be held liable. An expert may also be held liable for an untrue statement in a prospectus. The legislation (primarily the Companies Act 2014) contains certain exceptions and exemptions to this liability, including where a person did not know of or consent to the issuance of a prospectus or had reasonable grounds to believe that an untrue statement was true. Additionally, a person will not be held liable solely on the basis of a prospectus summary unless it is misleading, inaccurate or inconsistent when read together with other parts of the prospectus.

Where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might have to bear

EVERSHEDS

**Lee Murphy** **leemurphy@eversheds-sutherland.ie**
**Ryan Duggan** **ryanduggan@eversheds-sutherland.ie**

One Earlsfort Centre
Earlsfort Terrace
Dublin 2
Ireland

Tel: +353 1 6644 200
Fax: +353 1 6644 300
www.eversheds-sutherland.com

the costs, if applicable, of translating the prospectus before the legal proceedings are initiated.

Depending on the facts of each case, there may be a number of remedies open to an investor. The most common, similar to the UK, is a claim damages in tort on the basis of negligent misstatement, deceit or fraud. The basic principle is that the investor must be able to demonstrate loss. An investor could also potentially bring a claim for rescission in contract for misrepresentation.

# Italy

**Nicola Brunetti, Emanuela Ciaffi and Maria Diletta Camicia**

**Gattai, Minoli, Agostinelli & Partners**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The main Italian exchanges for IPOs (Mercato Telematico Azionario (MTA) and AIM Italia, see question 3) have shown stable growth during the past four years, showing only a slight decrease in 2016; indeed, there were 18 IPOs in 2013, 26 in 2014, 27 in 2015 and 14 in 2016. The first five months of 2017 have generated seven IPOs: three on the MTA and four on AIM Italia.

There has been increasing interest in AIM Italia. At the end of 2016, there were 77 companies listed on said market (35.1 per cent up on 2014).

The total capital raised through IPOs amounted to approximately €2.9 billion in 2014, more than €5.7 billion in 2015 (that year witnessing the biggest IPO for capital raised in the last decade, the Italian postal services company Poste Italiane) and €5.25 billion in 2016.

As of 28 April 2017, Borsa Italiana's markets (including the Global Equity Market (GEM)) counted 389 listed companies (compared with 342 in 2014), with a total market capitalisation of nearly €591 billion.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The companies listed on the Italian stock markets are mainly domestic; however, the past year has seen significant growth of admissions to listing on the GEM segment, a specific segment of Borsa Italiana's secondary market dedicated to the daily share trading of non-Italian issuers already traded on regulated markets in EU member states or in other OECD member countries wishing to have their shares traded on the Italian Stock Exchange too. As of April 2017, GEM counted 66 listed companies, a rise of 84 per cent on 2016.

The GEM segment (which replaced the MTA-International Segment on 11 July 2016) forms part of the new market known as Borsa Italiana Equity Multilateral Trading Facility (MTF), which includes the after-hours segment as well. With regard to trading methods, the microstructure of the GEM segment reproduces the trading methods of the regulated market and for hours and phases of the trading, type and validity of orders (equal to one day), obligations of specialists, price statistics (reference prices and official prices defined in accordance with the conditions currently provided for the MTA) and trading automatic control. Trading fees for this segment have been waived until 31 December 2016. Italian companies, with a few exceptions such as biotech start-ups, tend to carry out IPOs locally.

### 3 What are the primary exchanges for IPOs? How do they differ?

The primary exchanges for IPOs are the MTA and AIM Italia, both managed by Borsa Italiana SpA, which is part of the London Stock Exchange Group.

According to Borsa Italiana, the MTA is one of the most liquid cash equities markets in Europe, on which shares, convertible bonds, warrants and option rights are traded.

The MTA includes three main segments:

- the STAR segment, dedicated to medium-sized companies who accept to maintain stricter corporate governance rules and a more pervasive disclosure regime;
- the blue-chip segment, dedicated to companies with a capitalisation higher than €1 billion; and
- the standard segment, dedicated to companies with a capitalisation between €40 million and €1 billion.

AIM is a multilateral trading facility dedicated to small and medium-sized Italian enterprises with high growth potential. It is characterised by a more flexible and straightforward admission procedure compared with the MTA.

The main differences between the MTA and AIM can be summarised as follows:

- Admission requirements: companies listing on the MTA are required to have:
  - a minimum capitalisation equal to €40 million (no higher than €1 billion if listing on STAR);
  - been established for at least three years;
  - a corporate governance structure complying with the specific rules set out in the Italian Financial Act; and
  - a minimum 25 per cent free float (35 per cent for STAR). In contrast, no minimum or maximum size in terms of capitalisation, no years of establishment and no specific corporate structure are required for companies listing on the AIM; however, companies must have a minimum 10 per cent free float.
- Documents for admission: companies seeking authorisation for the MTA must provide the National Commission for Companies and the Stock Exchange (Consob) (see question 4) and Borsa Italiana, respectively, with an application for authorisation and an admission to listing, both enclosing a draft of the prospectus drawn up according to the criteria set out by Italian and EU regulations (see question 6). Furthermore, companies must have published and filed financial statements, including consolidated ones, audited by a reputable auditing firm for the past three financial years. Companies seeking authorisation for AIM need only provide Borsa Italiana with an admission document and one fiscal year's audited financial statements, together with a few certain pieces of information required by the Rules for Companies approved by Borsa Italiana.
- Admission process: on AIM, no due diligence by Consob or Borsa Italiana (or both) is carried out in relation to the admission requirements, this being the responsibility of the nominated adviser (NOMAD) to verify that all said requirements have been complied with by the issuer. On the MTA, issuers are instead subject to due diligence processes carried out by Borsa Italiana, in order to ascertain fulfilment of the admission requirements, and by Consob, in order to grant or deny the authorisation to publish the prospectus.
- Post-listing obligations: after companies have been listed either on the MTA or AIM, they are required to file annual financial statements and biannual reports. Prior to the approval of Legislative Decree No. 25/2016, issuers listed on the MTA were required to publish their quarterly reports as well; however, by resolution dated 26 October 2016, Consob added a new article to Issuer's Regulation (82-ter), stating that issuers on the MTA may continue to communicate with the market, on a voluntary basis, 'additional periodic financial disclosure' to the annual and biannual reports. Issuers trading on the STAR segment are subject to specific and further requirements in terms of disclosure.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Italian authorities involved in the IPO process are Consob and Borsa Italiana.

Consob is the public supervisory authority responsible for regulating the Italian financial markets, its activities mainly focusing on the protection of investors as well as of the efficiency, transparency and development of the markets. With particular reference to IPOs, Consob is entrusted with the power to approve the prospectus that the issuers, offerors or persons asking for the admission to trade securities on a regulated market are required to publish in order to perform such public offering or trading. Consob also verifies and takes the necessary measures to ensure that IPOs take place in compliance with the rules upheld by Italian laws and regulations.

Borsa Italiana is in charge of organising and managing the Italian Stock Exchange. Its responsibilities are mainly to define the rules and procedures for admission and listing on the markets, verify that the applicants and their securities meet all the regulatory requirements, and admit or reject the listing applications.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

The listing process varies depending on whether the issuer is seeking listing on the MTA or AIM. In both cases, however, issuers must obtain approval from the governing authorities.

If the IPO is on the MTA, the issuer must obtain approval of the prospectus by Consob and the admission to trading by Borsa Italiana. For this purpose, in addition to the information in the prospectus (see question 6), issuers must provide said authorities with a comprehensive set of information, as listed in Regulation on Issuers No. 11971/1999 as well as in the Borsa Italiana Instructions, including:

- a copy of the current by-laws of the issuer and, where different, a copy of the by-laws in force at the date of admission to listing;
- a copy of the resolutions according to which the shares will be issued;
- a copy of the reports of the auditing firm on the financial statements of the issuer (as well as on the consolidated financial statement if applicable) as of the last financial year;
- a copy of the shareholders' resolution approving the submission of the admission application;
- information concerning and curricula vitae of the members of the management body of the issuer;
- a declaration by the issuer that its shares are freely transferable;
- a memorandum on the management control system adopted by the issuer compared with the corporate governance structure recommended under the Corporate Governance Code approved by Borsa Italiana;
- a copy of the industrial plan as of the current financial year and the two financial years thereafter;
- an analysis of the issuer and its group's debts; and
- certain declarations by the sponsor (the approved intermediary who collaborates with the issuer during the IPO admission procedure to ensure its orderly implementation) attesting, inter alia, the completeness of the documentation submitted to Borsa Italiana pursuant to Italian law and regulations, and of the information provided to the management and supervisory bodies of the issuer on the responsibilities and obligations resulting from an admission to listing.

If the IPO is on AIM, the admission to trading becomes effective when Borsa Italiana issues a notice to that effect. To this end, the issuer must provide Borsa Italiana, at least 10 business days before the expected date of admission, with a pre-admission announcement, including the following information:

- information on the issuer;
- a brief description of the business;
- the number and type of securities to be listed;
- the capital to be raised on admission, if applicable, and its anticipated market capitalisation on admission;
- the percentage of AIM securities in public hands and the total number of shareholders at admission (insofar as it is aware);
- a list of its directors and statutory auditors as well as of the proposed directors and statutory auditors, including their specific offices;
- insofar as is known, the full name of any significant shareholder before and after admission, together with the percentage of each such person's interest;
- the expected admission date;
- information concerning its NOMAD and specialist; and
- details of where any admission document will be available.

At least three business days before the expected date of admission, the issuer must then provide Borsa Italiana with the following documents:

- an admission application form;
- an admission document, to which the latest fully audited annual accounts or the annual statement of operations, if applicable, should be attached;
- evidence of the payment of the AIM listing fee;
- a statement from the NOMAD containing, inter alia, an assurance of the suitability of the issuer and its securities; and
- a statement by the issuer's directors stating that the admission document is complete under the Rules of Companies and does not contain false or misleading information.

The content of the admission document basically follows the model of the EU prospectus provided for in EU Directive 2003/71/EC, with certain additions and exceptions.

### 6 What information must be made available to prospective investors and how must it be presented?

Italian law requires the issuer or the offeror to draw up a prospectus before offering securities to the public, which cannot be published without the prior approval of Consob. Pursuant to EC Regulation No. 809/2004 (which implemented EU Directive No. 2003/71/EC on the prospectus) and article 94 of Legislative Decree No. 58/1998 (the Italian Financial Act), the prospectus must contain any information that, depending on the characteristics of the issuer and the securities publicly offered or admitted to trading, are necessary to enable investors to carry out an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer and of any guarantor, as well as of the rights relating to securities. The prospectus must also include a security note conveying, briefly and clearly, the key features of, and the risks associated with, the issuer, any guarantor and the relevant securities as to enable the investors to decide whether to invest therein. In this respect, the information included in prospectuses is basically the same in all EU countries. In contrast, should the offer concern securities other than EU securities, the content of the prospectus will be specifically determined by Consob upon request of the issuer and offeror.

Pursuant to Regulation on Issuers No. 11971/1999 (as approved by Consob), should an offer or admission to trading be sought solely in Italy, the prospectus must be drawn up in Italian, while in the event that the offer is sought both in Italy and other EU member states, the prospectus must be drawn up both in Italian and in the language accepted by the competent authorities of said member states or a language customary in the sphere of international finance, at the choice of the issuer, offeror or person asking for admission (usually English). The admission document required for listing on AIM (as well as all communications with the public) can be drawn up either in Italian or English at the discretion of the issuer, provided that once the language has been chosen upon admission, it cannot be changed without the prior consent of the shareholders.

Several exceptions are set out in relation to the obligation of publishing the prospectus. In particular, no prospectus has to be published when the offer is exclusively addressed to qualified investors (therefore, as mentioned in question 5, companies applying for AIM Italian market must provide Borsa Italiana with an admission document rather than a prospectus). Other relevant exceptions include offers addressed to fewer than 150 non-qualified investors, concerning financial products with a total consideration of less than €5 million, involving open-end collective investment undertakings whose minimum subscription amounts are at least €100,000, and involving financial products issued

by insurance companies with an initial minimum premium of at least €100,000.

Once approved by Consob, the prospectus must be filed with the latter and made available to the public, at the latest by the beginning of the offer process, in an electronic form on the issuer's website and, if applicable, on the website of any financial intermediaries placing or selling the securities.

### 7 What restrictions on publicity and marketing apply during the IPO process?

During the IPO process, there are certain restrictions on contact with press and securities analysts as well as on publicity, and all other broad-based or general investor communications are imposed on the issuer, offeror, distributors and other persons related to said parties.

In particular, the latter must comply with the principle of fairness, transparency and equal treatment of the recipients of the offer and must refrain from disseminating information that is not consistent with that contained in the prospectus or that may influence the attractiveness of the same offer. The offeror, the issuer and the lead placement manager should further ensure the consistency between the information contained in the prospectus (if already published) or the information required to be in the prospectus (if the latter is published afterwards), and information disclosed in whatsoever manner in connection with the offer and placement to qualified investors.

As regards the advertising of the offer, the Italian Financial Act allows appropriate dissemination, even before the publication of prospectus, provided that the advertising relates to an offer concerning EU securities, is notified and sent to Consob upon its dissemination (see article 101 of the Italian Financial Act), and is prepared in accordance with the criteria set out by Consob to ensure compliance with the general principles mentioned above. (To illustrate some of these criteria, advertising must be clearly recognisable and the information provided therein must be accurate and not misleading as to the features, nature and risks of the securities offered to the public. Each advertisement must also indicate whether a prospectus was or will be published.) In this respect, it should, however, be pointed out that, in the absence of a clear indication as regards the contents and the extent of the advertising carried out before the start of the public offering, it may not be qualified as a 'public offering of financial products'; therefore, the advertisement should not contain information sufficient to enable an investor to decide whether to purchase or subscribe the offered financial products.

With reference to advertising relating to an offer concerning non-EU securities, any relevant dissemination is only permitted after the prospectus has been published.

Institutional advertising, as well as other forms of communications aimed at promoting the image of the offeror and of the respective products and services (reference is made, by way of example, to normal and routine product advertising as well as to routine corporate communications), may be freely carried out, provided that none of said communications discloses information sufficient to enable an investor to decide whether to purchase or subscribe to financial products, thus qualifying as 'public offering of financial instruments' (which, as already noted, could not be carried out in Italy without a prospectus duly approved by Consob).

When no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, should be equally disclosed to all such investors.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

A system of criminal and administrative sanctions for breaches of the IPO rules has been laid down by Italian legislators in compliance with the provisions set out by EU Directive No. 2003/71/EC.

Article 173-bis of the Italian Financial Act punishes by imprisonment of between one and five years any person who, in order to obtain undue profit for him or herself or for others, in prospectuses required for public offers or for admission to trading on regulated markets, with the intention of deceiving the recipients of the prospectus, includes false information or conceals data or news in a way that is likely to mislead such recipients.

Moreover, administrative fines may be imposed by the competent authorities on anyone who makes a public offering in violation of the provisions relating to, inter alia, the publication of the prospectus, its content and the advertising activities carried out in connection with the public offering. The amount of such fines has been recently amended by Legislative Decrees No. 72/2015 and 71/2016, which now depends on the type of offence and time of relevant commission. In particular, offences concerning the publication of the prospectus; if committed before 8 March 2016, are subject to the previous regulation and therefore punished with a fine of between a quarter of the total value of the financial products marketed and twice such total value, or, should such total value not be determined, between €100,000 and €2 million; but if committed after 9 March 2016, are subject to a fine between a minimum of €25,000 up to a maximum of €5 million. The breach of the other provisions mentioned above (among others, prospectus' content and advertising activities) is punishable with an administrative fine of between a minimum of €5,000 up to a maximum of €500,000, if committed before 8 March 2016, and between a minimum of €5,000 up to a maximum of €750,000, if committed after 9 March 2016. In both these cases, the same fines are applied to issuers' representatives and/or staff in the event that the conduct had a significant impact on the overall organisation or company risk profiles of business, or caused serious harm to the protection of investors or to the integrity and proper functioning of the market. Furthermore, if a natural person is required to comply with the same provisions, fines apply to the latter in case of breach.

The Italian statutory and regulatory provisions grant Consob with strict supervisory and enforcement powers in connection with both the offer and any advertising activities carried out in the context of the same. Such powers may result in the suspension of the challenged offer or the advertising activities connected thereto in the event of a grounded suspicion that a primary rule or regulation has been violated or in a complete prohibition if such violation is confirmed.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

A typical listing process on MTA takes approximately five to six months from the kick off meeting – in which the terms and conditions of the entire listing process implementation are agreed upon by and among the issuer, its legal and financial advisers, the banks, the global co-ordinator, the auditors and other consultants involved in the IPO process – to the opening day of trading of the newly listed shares.

The first phase, which lasts about two months, is mainly devoted to the implementation of a financial, legal and tax due diligence investigation of the issuer; to the drafting of the documentation to be filed with Consob and Borsa Italiana and to the definition of the structure of the offer. During the second phase, which takes approximately two months from the first filing of the prospectus, Consob reviews the prospectus, while Borsa Italiana verifies the fulfilment by the issuer of all the listing requirements. Consob has 20 business days to approve the prospectus, unless it requires the issuer to provide additional information or missing documentation (or both); in any case, the entire procedure cannot last more than 70 business days from the date on which the filing of the prospectus is deemed complete (in practice, the procedure takes on average 60 days). Once Consob has approved the prospectus and Borsa Italiana has granted its admission to listing, the final phase dedicated to the offer lasts for about three or four weeks.

The listing process on the AIM is more straightforward (see questions 3, 5 and 6) and usually takes on average approximately from three to four months.

### 10 What are the usual costs and fees for conducting an IPO?

The usual costs for conducting an IPO on the MTA can be divided into variable and fixed costs.

Variable costs include the fees to be paid in relation to the placement of the shares, including their underwriting; said fees are calculated as a percentage of the proceeds from the offer, which may vary between 2 per cent and 5 per cent, mainly depending on the size of the offer.

Fixed costs, which must be paid separately, include all fees to be incurred to prepare the issuer for an IPO. Generally speaking, these costs will include:

- the fees to be paid to the issuer's legal advisers (between €350,000 and €850,000 for bigger and more complex transactions);
- the fees to be paid to the banks' legal advisers (between €300,000 and €500,000);
- the fees to be paid to the auditors (between €250,000 and €500,000);
- sponsor's fees (ranging from 2 per cent to 4 per cent of the listing value);
- fees for any promotional roadshow activity (about €80,000);
- communication and investor relations costs (about €40,000); and
- the costs for printing and publishing the prospectus (about €100,000).

The costs for conducting an IPO on AIM are slightly lower than those mentioned above.

Borsa Italiana charges issuers an admission fee, which in 2017 amounts to €75 for every €500,000 of capitalisation (there is a cap of €500,000 and a floor value varying depending on the market on which the shares are going to be listed).

**Update and trends**

The increasing growth of special purpose acquisition company (SPAC) IPOs started in 2015, and is continuing with the trend confirmed in 2016. In January 2013, there were only two SPACs listed on the Italian stock markets, and as of today, there are 12. Capital raised by SPACs from investors is increasingly high, allowing their management teams to incorporate new SPACs with higher capitalisation that can be used for more than a single business combination. By way of example, the management team of Space, after the completion of the business combination with FILA in 2013, realised the incorporation of Space 2, which in 2015 announced its business combination with Avio. Space 2 will use the remaining euros raised in an IPO to finance a new investment vehicle, Space 3. This trend is destined to steadily increase in Italy also, owing to the onerous costs and long time frames that characterise traditional IPOs; for a couple of years now, Consob has adopted a very strict approach as regards the level of details and information to be included in a prospectus.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

Turning a private company into a public one entails numerous changes, including the restructuring of the corporate governance of the issuer so as to comply with the stricter provisions of law (reference is particularly made to the Italian Financial Act) and soft law (such as the Corporate Governance Code approved by Borsa Italiana). The Corporate Governance Code allows issuers not to comply, in whole or in part, with its recommendations (except for companies seeking listing on STAR, which are required to implement some of them) provided that, in the event of non-compliance, the issuer explains the relevant reasons.

According to article 147-ter of the Italian Financial Act: the appointment of the board of directors must be made on the basis of a voting list mechanism, at least one director must be appointed by the minority shareholders' list, and at least one-third of the appointed directors must be of the less-represented gender. Furthermore, the board of directors must include at least one (or two, if the board has more than seven members) independent director.

The Corporate Governance Code recommends listed companies to, inter alia:

- appoint – within the board of directors – one or more committees with proposing and consultative functions (such as an appointment committee, a remuneration committee and an internal control committee);
- grant the separation of the roles of the chairman and chief executive officer or, alternatively, appoint a lead independent director;
- provide for stricter independence requirements for independent directors;
- adopt an internal control and risk management system (involving the board of directors, the board of statutory auditors, the person in charge of the internal audit and the other business functions having specific tasks with regard to internal control and risk management) aimed at identifying, measuring, managing and monitoring the main risks; and
- appoint a person responsible for handling the relationships with the shareholders and, in particular, with institutional investors.

As regards the board of statutory auditors, article 148 of the Italian Financial Act sets out that they must be appointed on the basis of a voting list mechanism, minority shareholders must have the power to appoint at least one member to the same board, the chairman of the board must be appointed from among the auditors appointed by the minority shareholders, and at least one-third of the appointed auditors must be of the less-represented gender. Moreover, the appointment of an external auditor entrusted with the auditing of the issuers' financial statements is required, provided that the same remains in charge for a period of nine years.

In compliance with EU Regulation No. 596/2014 on market abuse (MAR), companies who are filing the application for admission to listing (also for the MTF) adopt specific procedures for the internal management and external communication of documents and information concerning the same, with particular reference to price-sensitive information (being such adoption also recommended by the Corporate Governance Code). Furthermore, pursuant to article 19 of the MAR, persons discharging managerial responsibilities, as well as persons closely associated with them, shall notify the issuer and Consob, promptly and no later than three business days after the date of the transaction, 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. Issuers, on their turn, shall ensure that the information so notified is made public promptly and no later than three business days after the transaction. The Issuers' Regulation widens the list of persons subject to such obligation by including those persons holding a stake representing more than 10 per cent of the corporate capital with voting rights of the issuer as well as any other controlling entity of the issuer. The threshold set out by Consob is €20,000, which triggers, if exceeded, the disclosure requirements for transactions carried out by managers.

Under the Consob Regulation on Related Party Transactions (RPTs), listed companies adopt specific internal codes setting out the rules and procedures designed to ensure transparency as well as substantial and procedural fairness of material RPTs (transfer of resources, services or obligations exceeding specified quantitative thresholds) entered into by the company (directly or indirectly, through subsidiaries).

Finally, issuers of listed financial instruments must notify to Borsa Italiana the name of the person to whom requests for information necessary (on a case-by-case or general basis) to ensure the proper operation of the market are to be sent as well as the name of his or her substitute.

### 12 Are there special allowances for certain types of new issuers?

In addition to the allowances granted to companies applying for AIM, the Rules of the Markets organised and managed by Borsa Italiana (adopted on 7 November 2014 and approved by Consob in January 2015) provide special allowances for investment companies.

Investment companies must have audited standalone or consolidated annual accounts for at least one financial year (rather than for three years, as imposed on most other categories of issuer). It is also provided that, in the case of recently created companies and by way of derogation to the foregoing, Borsa Italiana, upon reasoned request from the issuer, may accept a balance sheet and income statement for a period of less than one year provided that they have been audited by a statutory auditor or auditing firm. Further exceptions may be allowed by Borsa Italiana as regards the requirements to be met by the shares issued by investment companies. For example, an estimated market capitalisation of at least €40 million is usually required, but Borsa Italiana may admit the shares of investment companies with a smaller market capitalisation in the event that it believes that an adequate market for such shares will develop. Also, shares must usually satisfy an adequate distribution, which is presumed to exist when shares representing at least 25 per cent of the capital represented by shares of the same class are distributed among non-professional or professional investors; however, Borsa Italiana may consider this requirement satisfied if the market value of the shares held by the public suggests that the

conditions for regular operation of the market can be met by a percentage below 25 per cent.

A valuable initiative was promoted in 2012 by Borsa Italiana through the creation of the ELITE programme, a single platform of integrated services dedicated to SMEs with growth potential, seeking expansion and access to the capital markets, for the purpose of providing the latter with industrial, financial and organisational competences useful to beat the challenges of international markets. In particular, ELITE introduces its members to capital markets, improves their relations with the banking and entrepreneurial system and facilitates their internationalisation. Companies admitted to it will enjoy certain facilitations in the IPO process, such as: the waiver from the obligation to produce both the business plan and the memorandum of the management control system; a simplification of declarations to be issued by the sponsor to Borsa Italiana and a reduction of the time limit by when Borsa Italiana shall grant or reject the admission to listing (eg, one month rather than two months from the submission to Borsa Italiana of the complete set of documentation to be produced after submission of the application to listing).

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

Anti-takeover devices are rare in Italy; in fact, the Italian Financial Act provides certain passivity rules.

In particular, listed companies whose securities are involved in a takeover bid or exchange tender offering must refrain from performing any actions or transactions that may counteract the achievement of the purposes of said offerings, unless prior approval from the ordinary or extraordinary shareholders' meeting (as the case may be) is granted thereto. Said prohibition applies from the date of the notice to Consob of the specific resolution or event giving rise to the mandatory promotion of the takeover bid or exchange tender offering until the closing of the same offering or the relevant expiration. In any case, the authorisation of the ordinary or extraordinary shareholders' meeting (as the case may be) is required in relation to all decisions taken before the aforementioned period, in the event that they fall outside the normal business practices of the listed company and risk affecting, where implemented, the achievement of the aims of the offering. Pursuant to article 104, paragraph 1-ter of the Italian Financial Act, however, the by-laws of the companies may derogate to the aforementioned provisions, provided that in such a case the relevant listed company promptly notifies Consob of, and discloses to the public, the said derogations.

Furthermore, article 104-bis of the Italian Financial Act provides for a discretionary measure (the 'breakthrough' rule) aimed at neutralising certain defensive measures to takeover bids that could be included in the by-laws or shareholders' agreements of a listed company. The said rule, where introduced, implies that limitations on the transfer of shares provided for in the by-laws have no effect on the offeror during the acceptance period of a tender offer, and limitations on voting rights provided for in the by-laws or shareholders' agreement have no effect during a shareholders' meeting called to authorise the relevant defensive measure. According to the 'reciprocity clause' under article 104-ter of the Italian Financial Act, however, neither the passivity rule nor the breakthrough rule apply unless the same or equivalent rules apply to the offeror (or its controlling company), and any defensive measures adopted pursuant to the reciprocity clause must have been expressly authorised by the company's share-holders during the 18 months before the notice of the takeover bid.

Finally, it should be mentioned that article 127-quinquies of the Italian Financial Act, introduced by Legislative Decree No. 91/2014, provides for the faculty, only for listed companies and companies seeking a listing, to include in the respective by-laws the right to assign loyalty voting shares (eg, the increase is up to two votes per share and is applicable only to those shares owned by the same shareholder for at least 24 consecutive months). Its introduction had several effects on mandatory takeover bid regulation, including: a takeover bid having to be launched whenever the relevant threshold is crossed as a result of the increased voting rights, and should a takeover bid be launched, the by-laws of the listed company may not allow the increased voting rights to count at the shareholders' meeting called to agree actions and transactions aimed at counteracting the relevant bid.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

The Rules of the Markets organised and managed by Borsa Italiana require foreign issuers from non-EU member states to demonstrate

GATTAI, MINOLI, AGOSTINELLI, PARTNERS
STUDIO LEGALE

**Nicola Brunetti** **nbrunetti@gattai.it**
**Emanuela Ciaffi** **eciaffi@gattai.it**
**Maria Diletta Camicia** **dcamicia@gattai.it**

Via Manzoni 30
20121 Milan
Italy
Tel: +39 02 30 32 32 32
Fax: +39 02 30 32 32 42

Via Bertoloni 29
00197 Rome
Italy
Tel: +39 06 83 36 58 10

130 Mount Street
London W1K 3NY
United Kingdom
Tel: +44 20 3405 6490
Fax: +44 20 3405 6498

www.gattai.it

that no impediments hamper their compliance with the provisions contained in the same rules and relevant instructions, as well as in other applicable laws or regulations concerning information to be made available to the public, Consob or Borsa Italiana. Furthermore, said issuers must demonstrate that no impediments hamper the exercise of all the rights attached to their financial instruments admitted for stock exchange listing.

A recent amendment to the Rules of the Markets and related Instructions has been approved by Consob Resolution No. 20003/2017, effective from 3 July 2017, as regards the method of calculating the free float necessary for the purposes of admission of issuers established under foreign law; in particular, in the case of issuers established under foreign law, Borsa Italiana shall assess the sufficient distribution requirement (eg, 25 per cent free float) by applying the thresholds provided by domestic legislation applicable to them. The same method shall apply to the admission to trading of foreign issuers whose ordinary shares are already admitted and are admitted to trading simultaneously on a regulated EU market.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Exemptions are mentioned in question 6.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

Italian Law No. 232/2016 (the 2017 Budget Law) introduced a tax incentive for companies listed on EU or EEA-regulated markets that wish to invest in start-up companies. In particular, start-up companies are now allowed to transfer their tax losses incurred in the first three fiscal years of activity to their holding company listed on the above markets, provided that a minimum 20 per cent participation requirement is met. The transferee can fully offset its own taxable income with the tax losses received, and the excess may be carried forward.

A further incentive introduced by Italian Law No. 116/2014, known as Super-ACE, which allowed companies listed on EU or EEA regulated markets or EU or EEA multilateral trading platforms to benefit from a 40 per cent increase on the new equity raised during the first three years from their listing, has been definitively repealed by the 2017 Budget Law.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

In accordance with established Italian case law, should a prospectus contain false or misleading information, the misled investor can sue the issuer, the offeror, the guarantor and, generally, the persons responsible for said information in tort; indeed, the prospectus is treated as pre-contractual information. For the purposes of identifying the competent forum for investors' disputes, the Italian rules concerning claims in tort apply. Therefore, the competent forum will be the court of the place in which the defendant has its registered seat or, alternatively, where the obligation to provide accurate and non-misleading information was undertaken or breached. In the latter, many troubles arise when it comes to determine the place where the obligation of providing accurate and non-misleading information was undertaken or breached (several debates are ongoing in Italian courts in relation to this). If the investor is a consumer, however, the action may be brought before the court at the place of residence of the consumer. Access to ADR is limited because public companies may not insert arbitration clauses in their by-laws.

**18 Are class actions possible in IPO-related claims?**

Italian law provides for class actions as regards IPO claims; however, in practice, investors rarely resort to these for several reasons. In particular, class actions are reserved for consumers; professional investors are prevented from filing them. Recent authoritative case law has broadened the definition of 'professional investors' to include all shareholders of a listed company subscribing a share capital increase. Therefore, the narrow scope of its application, combined with the high associated costs, generally dissuades investors from starting class actions.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

In suing the persons responsible for the provision of inaccurate or misleading information in a prospectus, investors may seek compensation for direct damages suffered as a consequence of such falsehood or inaccuracy. Such compensation is calculated as the difference between the consideration paid by the relevant investor for underwriting the listed securities and their actual value at the time of the transaction. Damages suffered as a consequence of markets' floating are excluded. In addition, consumers' associations may request injunctive relief against financial intermediaries and issuers in order for the latter to be ordered to immediately stop their illegitimate conduct, and take all measures deemed necessary to remove the consequences of their violations. In such a case, the decision of the judge is published at the expense of the defendants.

# Japan

**Kohei Koikawa and Masashi Ueda**
Nishimura & Asahi

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

There are two types of listing market in Japan. The first listing market is a normal one and includes the Main Market (First and Second Sections) of the Tokyo Stock Exchange, the JASDAQ market and the Mothers market. In 2016, 81 issuers were newly listed on the normal market. The second listing market is Tokyo Pro Market, which is operated by the Tokyo Stock Exchange, and only professional investors can invest in such Japanese stock exchanges. In 2016, three issuers were newly listed on the Tokyo Pro Market.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Most of the issuers in the Japanese IPO market are joint-stock corporations established under the laws of Japan. While large IPOs tend to include Rule 144A offerings in the United States and Regulation S offerings in other jurisdictions, Japanese domestic companies generally choose to list at home only, and not overseas. In some cases, Japanese listed companies complete their secondary listing on overseas markets such as the United States (NYSE and Nasdaq), Hong Kong and Singapore.

Overseas companies that conduct global IPOs typically choose a public offering or private placement in Japan and are not listed in Japan. At present, only nine overseas companies are listed on the Tokyo Stock Exchange.

### 3 What are the primary exchanges for IPOs? How do they differ?

In 2016, the majority of newly listed companies were listed on JASDAQ or Mothers, both of which are operated by the Tokyo Stock Exchange as a market for venture and emerging companies. JASDAQ has two types of market: Standard or Growth. The Standard market is for growing companies with a certain business scale and performance and the Growth market is for companies with unique technologies or business models and abundant future growth potential. Mothers is for emerging companies that aim towards the First Section in the future.

The First Section and Second Section of the Main Market of the Tokyo Stock Exchange are the central stock markets in Japan, especially for large and medium-sized companies; the two sections are distinguished by certain conditions such as the amount of market capitalisation.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Financial Services Agency of Japan (FSA) and the stock exchanges are responsible for rulemaking. The FSA has the authority to establish its regulations and guidelines related to disclosure requirements under the Financial Instruments and Exchange Act of Japan (Act No. 25 of 1948 (the FIEA)). Each stock exchange publishes certain rules and guidelines including the listing requirements and listing process, in accordance with which such stock exchange carries out listing examinations.

If an issuer violates any of the disclosure requirements under the FIEA, the FSA, the local financial bureaus of the Ministry of Finance of Japan and the Securities and Exchange Surveillance Commission of Japan have the authority to enforce the FIEA and the regulations thereunder. If the rules of a stock exchange are violated, such stock exchange has the authority to enforce its rules.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Issuers must be examined by the stock exchanges in order to obtain listing approval. Issuers must provide detailed information, such as an overview of the corporate group, overview of the business, organisational control system and distribution of shares to the stock exchanges. For example, the Tokyo Stock Exchange and Japan Exchange Regulation (to which the Tokyo Stock Exchange entrusts the listing examination) will measure the issuer's conformity with the listing criteria set out under the Securities Listing Regulations; furthermore, it will carry out listing examinations particularly focusing on facilitating fair price formation and smooth securities trading and whether the relevant matter at issue is necessary and appropriate in light of the public interest or the protection of investors. The disclosure document is subject to review by the local finance bureau via preliminary consultation before filing.

### 6 What information must be made available to prospective investors and how must it be presented?

Upon an IPO, a securities registration statement must be filed and presented via the Electronic Disclosure for Investors' NETwork system (EDINET).

The contents of a securities registration statement mainly comprises a securities information section, in which the offering structure and the offered securities are described, and a corporate information section (including financial statements and audit reports). The form and substance of the securities registration statement are established by the Cabinet Office Ordinance on the Disclosure of Corporate Affairs, etc, of Companies (Ministry of Finance Ordinance No. 5 of 1973).

**Domestic companies**

In the case of a domestic corporation, a securities registration statement comprises four parts, as follows.

***Part I: Information Concerning the Securities***

The issuer must provide information concerning the terms and conditions of securities and the structure of the public offering, including an offering timetable, the names of underwriters and pricing information.

***Part II: Information Concerning the Company***

The issuer must provide information about itself including an outline of its business, selected financial data, risk factors, analysis of balance sheets, business results and cash flows, corporate governance, material contracts, material facilities, research and development activities, management and financial statements.

***Part III: Special Information***
In a case where the issuer has issued the tracking stock the amount of dividends of which would be determined based on the amount of dividends of a certain subsidiary thereof, the issuer must provide the financial statements for the five fiscal years of such subsidiary.

***Part IV: Information Concerning the Initial Public Offering***
The issuer must disclose the past assignment or acquisition of the equity securities of the issuer by persons having a special interest in the issuer, an outline of past third-party allotment and the status of the shareholders.

A securities registration statement also must contain the audited consolidated and non-consolidated financial statements (including their notes) for the most recent two fiscal years, together with relevant audit reports (and their quarterly consolidated or non-consolidated financial statements and their notes, if applicable) in Part II.

**Foreign companies**
In the case of a foreign corporation, a securities registration statement comprises four parts, as follows.

***Part I: Information Concerning the Securities***
The issuer must provide information concerning the terms and conditions of securities and the structure of the public offering, including the offering timetable, the names of underwriters and pricing information.

***Part II: Information Concerning the Company***
The issuer must provide information about itself including an outline of the issuer's business, selected financial data, risk factors, analysis of balance sheets, business results and cash flows, corporate governance, material contracts, material facilities, research and development activities, and management and financial statements; this part also includes a summary of the corporate legal system of the home country of the issuer.

***Part III: Information Concerning the Guarantor***
The issuer must provide information similar to information to be included in Part II about the guarantor of the securities or any other equivalent entity (the guarantor) if the securities are guaranteed by another entity or there are any other entities that would be likely to materially affect the investment decision in relation to the securities.

***Part IV: Special Information***
Unless the three-year audited financial statements are included in Part II and Part III, the recent five-year financial statements (including their footnotes) of the issuer and the guarantor (other than those contained in Part II and Part III) must generally be included in this section; this five-year financial statements' requirement is exempted for issuers and the guarantors who disclose the three-year audited financial statements in Part II and Part III.

With regard to the financial statements of the issuer (in the case of a foreign corporation) and the guarantor, if any, a securities registration statement must contain their audited consolidated financial statements (including their notes) for the two most recent fiscal years, together with the relevant audit reports, (and their semi-annual financial statements and their notes, if applicable) in Part II and Part III and their non-audited or audited consolidated financial statements for the three fiscal years before the said two years in Part IV. Alternatively, the issuer and the guarantor, if any, can include their audited consolidated financial statements for the three most recent fiscal years in Part II and Part III, as the case may be, where no additional financial statements need to be included in Part IV.

**7 What restrictions on publicity and marketing apply during the IPO process?**

The FIEA prohibits an issuer from soliciting investors before filing a securities registration statement. This means that the publicity and contact with investors can only be made to the extent that such activities do not fall within 'solicitation'. The FSA's guidelines provide that any dissemination of information relating to an issuer of securities (excluding any information relating to a primary or secondary public offering of securities issued or to be issued by such issuer) made no later than one month before the filing date of the securities registration statement does not constitute 'solicitation', and pre-IPO roadshows are usually conducted on the basis of this safe-harbour rule.

After filing a securities registration statement, the issuer can solicit investors; however, in order to mitigate civil liabilities risk, it is normal practice that the information to be provided in the marketing process is limited to that included in the securities registration statement, the prospectus (the contents of which are generally identical to the securities registration statement) and the roadshow materials that are prepared, based on the information included in the securities registration statement.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

If there is a breach of the disclosure requirements under the FIEA, an issuer and certain parties or individuals related thereto may be subject to administrative or criminal sanctions. Administrative sanctions include suspension of permissions resulting from registration of the securities registration statement and fines. It should also be noted that any false or misleading statements in the securities registration statement, the prospectus and any other offering materials may result in civil liabilities.

If the stock exchanges find any breach of the rules prescribed by them after the listing, they are entitled to take certain measures, such as:
- announcing the breach to the public;
- requesting payment of a penalty because of a breach of the listing agreement;
- requesting that an improvement report be submitted;
- designating the security as being on alert; and
- delisting the relevant security.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

The listing examination of a stock exchange takes the following steps:
- preliminary application for listing;
- official application for listing;
- listing examination; and
- listing approval.

A listing on the First Section or the Second Section of the Tokyo Stock Exchange generally takes three months from the official application to listing approval (but a considerable amount of time is also required for the preliminary application process). The underwriters conduct their due diligence concurrently with the listing examination process.

A securities registration statement is prepared based on a listing application document called an *ichi-no-bu*, the contents of which are identical to the securities registration statement except that it does not include the securities information section. The draft securities registration statement is subject to the local finance bureau's review process, which usually commences approximately 45 days before the filing date.

Once an issuer obtains approval for listing, it launches the IPO by filing a securities registration statement. After the pre-marketing period, the price range is determined and the book-building process commences. The IPO price is determined in the light of investors' demands obtained through the book-building process. The closing of the IPO and listing occurs approximately one week after the pricing date. It typically takes one month from the launch of the IPO to the actual listing.

**10 What are the usual costs and fees for conducting an IPO?**

The issuer must pay the listing examination fee and the initial listing fee to the relevant stock exchange. For example, in the case of a listing by a domestic company on the First Section of the Tokyo Stock Exchange, the listing examination fee (¥4 million) and the initial listing fee (¥15 million) is charged by the Tokyo Stock Exchange. In addition, fees will be incurred according to the number of shares offered by public offering and the number of shares offered by secondary offering. Also, even after listing, the issuer must pay listing maintenance costs, the amount of which varies according to its market capitalisation.

An issuer is also required to pay fees to its auditors, listing adviser and shareholder services agent. While counsel are not typically

**Update and trends**

Some recent IPOs were the focus of public criticism owing to certain problems such as inappropriate transactions made by the management of the IPO company and large changes to projections immediately after the IPO.

In response to this, the Tokyo Stock Exchange has tightened the IPO examination procedure. More specifically, the Tokyo Stock Exchange has:

- strengthened its listing examination procedures in connection with inappropriate transactions by management;
- held seminars on the process for the management of companies applying for listing; and
- requested that disclosure of preconditions be made on an IPO, and should appropriately include assumptions and grounds for projections.

In addition, in recent years the number of cases where companies that conducted management buyouts and were delisted from the stock exchange for several years applied to be relisted on the stock exchange has increased. In this connection, the Tokyo Stock Exchange has announced its policies on the examination process of such relisting cases after a management buyout, under which the examination is to be made focusing on:

- the relevance between a management buyout and a relisting;
- appropriate allocation of a premium by implementing a management buyout; and
- the rationality of implementing a management buyout.

The Tokyo Stock Exchange has also announced that it will consider the corporate governance structure at the time of the relisting after the management buyout, and the explanation and disclosure of the background to the relisting after the management buyout.

retained in the case of domestic IPOs, counsel fees should be paid in the case of global IPOs and foreign issuers' IPOs. Printing costs, including those related to preparation of a securities registration statement and the printing of prospectuses, should be taken into account.

A foreign issuer must appoint an agent residing in Japan in connection with filing the disclosure documents under the FIEA. It is typical that the Japanese counsel to the issuer acts as such agent and, in such a case, fees related to this are usually included in the fees for the issuer's Japanese counsel.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

The corporate governance structure is considered in the process of the listing examination. For example, the following matters are to be examined in a listing examination for a stock exchange:

- whether there is an organised and implemented structure to ensure that the management of the issuer group is executing its duties appropriately;
- whether the issuer group has established its internal control system necessary for conducting its business activities effectively; and
- whether the issuer group has established a suitable accounting system for the protection of investors.

In addition, under the listing rules of the Tokyo Stock Exchange, domestic issuers are required to have at least one independent officer. Such independent officer is required to be an outside director or outside corporate auditor who is unlikely to have a conflict of interest with the shareholders of the relevant company. The listing rules also require domestic issuers to make efforts to have at least one director who meets the requirements for an independent officer (independent director). Further, a recent amendment to the listing rules of the Tokyo Stock Exchange, which became effective as of 1 June 2015, includes certain changes related to corporate governance structure of listed companies. Following the effectiveness of the amendment, if a domestic issuer does not have two or more independent directors, it is required to publicly explain why it does not have two or more independent directors.

Stock exchanges require that issuers submit a corporate governance report, which will become publicly available together with the *ichi-no-bu*. The corporate governance report must cover, inter alia, basic policies regarding the corporate governance, capital structure, basic information of the issuer, corporate governance structure, actions taken against shareholders or other relevant parties, and information on the internal control system and anti-takeover devices.

**12 Are there special allowances for certain types of new issuers?**

Under the FIEA, a listed company is required to file an internal control report with the local finance bureau, evaluating the effectiveness of its internal controls and those of its group for each business year. In principle, an internal control report must receive audit certification by a certified public accountant or an auditing firm. In this connection, the FIEA was amended in 2014 to allow a newly listed company with capital of less than ¥10 billion or total debt of less than ¥100 billion to be exempt from the requirement to receive audit certification for three years after the listing.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

A typical anti-takeover device is a poison pill, which includes issuance of stock acquisition rights that can only be exercised by parties other than the hostile acquirer. When introducing and renewing anti-takeover devices, the Tokyo Stock Exchange considers whether companies consider the nature of the shareholders' rights and the exercise thereof in the listing examination process. Also, the Tokyo Stock Exchange checks whether companies consider the sufficiency of disclosure, transparency, and the effect on the secondary market.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Like domestic issuers, foreign issuers are generally required to prepare disclosure documents (including a securities registration statement) in Japanese. A foreign issuer who meets certain requirements will, however, be able to prepare disclosure documents in English provided that a summary of the disclosure document is prepared in Japanese.

Even in the case of foreign issuers, the FIEA and the regulations thereunder generally require that financial statements be contained in any disclosure documents, including a securities registration statement, and they should be prepared in accordance with the general accepted accounting principles of Japan or international financial reporting standards. In addition, a foreign issuer may, subject to regulatory approval, use its financial statements disclosed in its home country or any third country.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

A foreign issuer can rely on private placement exemptions. There are usually two types of private placement exemption (ie, private placement to a small number of investors and private placement to qualified institutional investors) available for a foreign issuer. In the case of private placement to a small number of investors, a foreign issuer may solicit up to 49 investors. In the case of private placement to qualified institutional investors, solicitation must be made to qualified institutional investors only, and investors are subject to the selling restriction that they may only sell shares to qualified institutional investors. A foreign issuer should note that it will be required to appoint its agent resident in Japan when it relies on the exemption of private placement to qualified institutional investors, so it is more usual that foreign issuers rely on the exemption of private placement to a small number of investors.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

None.

**Investor claims**

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

An investor can seek redress by filing a suit against an issuer, an underwriter or another party with a court of competent jurisdiction in Japan. Since there are no sufficient precedents, it is not clear whether non-judicial resolution would be feasible.

**18 Are class actions possible in IPO-related claims?**

The Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers of Japan (Act No. 96 of 2013), which was promulgated on 11 December 2013 and should become effective within three years thereafter, has introduced a class action system to Japan. While this act does not cover claims of investors under the FIEA, investors will be entitled to initiate class actions as long as they have a tort claim under the Civil Code of Japan (Act No. 89 of 1896).

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

If a disclosure document contains any untrue statement of material fact, or omits to state a material fact necessary in order to make the statements therein, in the light of the circumstances in which they were made, not misleading and an investor incurs loss thereby, such investor may have a claim against the issuer, underwriter or other parties (such as auditors) under the FIEA and the Civil Code. Claims under the FIEA are more beneficial for investors since it is subject to a reversed burden of proof, and presumption of an amount of damages. An investor's remedy is limited to monetary compensation for the loss it has incurred.

NISHIMURA & ASAHI

**Kohei Koikawa** **k_koikawa@jurists.co.jp**
**Masashi Ueda** **m_ueda@jurists.co.jp**

Otemon Tower
1-1-2 Otemachi
Chiyoda-ku
Tokyo 100-8124
Japan

Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
www.jurists.co.jp/en

# Luxembourg

**François Warken and Laurent Schummer**
**Arendt & Medernach SA**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

Luxembourg is a multilingual leading financial and investment centre in Western Europe with an innovative and evolving legislative framework. Capital markets represents one of its four main activities. Many of the most recent legal and regulatory changes were introduced in Luxembourg in response to an ever-growing interest in and importance of the Luxembourg securities market, while others were the result of the implementation of European corporate and securities law directives.

Especially in the past decade there has been a growing interest in Luxembourg vehicles carrying out international IPOs; in particular, for sponsor-driven IPOs. Compared to the size of its domestic market, Luxembourg hosts a significant number of public companies, which are listed on major international stock markets, not only in Europe but also in the United States, Latin America and in Hong Kong. Luxembourg has also proved itself an attractive jurisdiction for international capital markets transactions as not only has it been very stable politically, its legal framework allows for flexible innovative structuring solutions, because of the wide choice of specific legal entities on offer.

Luxembourg offers a full value chain of all relevant financial services and multilingual support functions capable of handling international IPOs.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

To understand the Luxembourg IPO market and the securities listed on the Luxembourg Stock Exchange (LuxSE), it is useful to formulate a short introduction to the LuxSE. The LuxSE's reputation is built on its pioneering role in listing a broad range of different types of securities including shares, warrants, certificates and global depositary receipts (GDRs) as well as a long history of listing international bonds and other debt securities in Europe. The LuxSE was the first to list the class of securities that became known as 'eurobonds' with the Autostrade issue in 1963. With nearly 40,000 listed securities, including some 26,000 bonds from 3,000 issuers in 100 countries in 2015, the LuxSE is the world's number one exchange for the listing of international securities. It had a 50 per cent world market share for green bonds, an estimated 55 per cent share for high yield bonds in Europe and a 43 per cent share for renmimbi-denominated bonds outside Asia. International issues of debt obligations by governments who choose to list in the EU also find their home on the LuxSE more often than not. For example, the LuxSE admitted to trading a sovereign bond issue from the state of Argentina on 4 May 2016, with a total amount of US$16.5 billion issued. This is the largest emerging market single day issuance on record. Investment funds are also very commonly listed in Luxembourg, with 385 funds listed and over 6,500 share classes of UCIs were listed in 2015 and it is expected that the LuxSE will want to extent its leading role in this field.

Within the LuxSE, which is the only stock exchange in Luxembourg, there are two distinct markets. These are the 'regulated' market and the Euro MTF market. The former is a regulated market within the meaning of the EU Markets in Financial Instruments Directive, MiFID II (Directive 2014/65/EU) and the latter is a multilateral trading facility, also defined within MiFID II. The advantage of listing on the regulated market is that the issuer benefits from a regulatory European passport, which allows it to apply for admission of the securities to the regulated market of any other member state of the EU, or conduct a public offer there, without substantive additional disclosure requirements in the host member state. This relies, however, on fulfilling the requirements of the EU Prospectus Directive (2003/71/EC, as amended). The requirements are comprehensive, and compliance therewith may be onerous. Moreover, if the securities are traded on the LuxSE's regulated market, ongoing disclosure and reporting obligations arising out of the Transparency Directive (Directive 2004/109/EC, as amended) apply. For some issuers, who may not need the option of the European passport, the Euro MTF market (launched in 2005) offers a more straightforward option, with fewer regulatory restraints. This has proved to be very successful in attracting issuers, especially from outside the EU.

As indicated in the answer to question 1, the majority of IPOs conducted recently by domestic issuers are listed abroad. Luxembourg has traditionally been the home to many private equity houses. Likewise, it is not at all unusual to see a Luxembourg-based company being used as an IPO vehicle by a private equity house that is preparing its exit in this way whether or not the IPO is made in Luxembourg or abroad. Some issuers request a dual listing or an additional listing on the LuxSE. This is probably because of the size of the country and the small domestic market. In recent years, however, a growing number of issuers have submitted applications for listings of their shares on the LuxSE other than in the course of an IPO in Luxembourg.

The LuxSE is also a popular venue for the listing of GDRs.

### 3 What are the primary exchanges for IPOs? How do they differ?

With respect to the two market segments operated by the LuxSE (the regulated market and the EuroMTF market) the trend is to list on the regulated market if the application for listing is made in the context of an IPO, whereas issuers tend to apply for listings on the EuroMTF market whenever the listing occurs other than in the context of an IPO. In the latter scenario and as further set out in the answer to question 6, the listing prospectus need not be, and generally is not, Prospectus Directive-compliant.

As already stated in the answer to question 1, however, most IPOs by Luxembourg issuers involve a listing abroad.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The authority competent for the supervision of the securities markets and their operators in Luxembourg is the Commission for Oversight of the Finance Sector (CSSF). A Prospectus Directive-compliant prospectus, which is typically required where an IPO takes place in Luxembourg or in the case of a listing on the regulated market of the LuxSE, can only be approved by the CSSF or by a foreign competent authority within the meaning of the Prospectus Directive and subsequently passported into Luxembourg.

The LuxSE is the competent authority to approve a prospectus for a listing on the EuroMTF (see question 6) and exercises specific powers, with a particular focus on applications for listing and trading on the LuxSE. Furthermore, the LuxSE is competent to monitor issuers with

securities listed on the EuroMTF market and to ensure that they comply with disclosure and reporting obligations.

The CSSF and the LuxSE are known for their pragmatic and flexible yet investor-protective approach. Prospectuses can be submitted for approval in English, French or German.

Both the CSSF and the LuxSE offer the possibility to seek preclearance for the information to be disclosed in a prospectus.

**5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?**

Admissions to trading are regulated by the Luxembourg law of 10 July 2005 on prospectuses, as amended (the Prospectus Law) and, where a listing is sought in Luxembourg, the Rules and Regulations of the LuxSE (ROI). The Prospectus Law sets out three different prospectus regimes:

- the first regime (Part II of the Prospectus Law): this applies to prospectuses for admissions of securities to trading on a regulated market, which are subject to Community harmonisation, and transposing the rules of the Prospectus Directive including the possibility to apply for 'passporting' of the prospectus;
- the second regime (Part III of the Prospectus Law): this defines the rules applying to prospectuses for admissions to trading on the regulated market of securities and other comparable instruments that fall outside the scope of the Prospectus Directive, and provides a simplified prospectus regime; and
- the third, Luxembourg-specific regime (Part IV of the Prospectus Law): this applies to prospectuses drawn up in connection with the listing and admission of securities to trading on a Luxembourg market that are not included in the list of regulated markets published by the European Securities and Markets Authority (ESMA). To date, the EuroMTF market is the only such market operating in Luxembourg. The rules that apply to prospectuses drawn up in connection with the listing and admission of securities to trading on the EuroMTF market are set out in the ROI.

To list on the LuxSE a listing application must be presented. The listing application (by way of an application form) must be accompanied by the approved prospectus (and, where applicable, the certificate of approval) and a signed undertaking letter for purposes of confirming compliance with the ROI. In addition, the most recent articles of associations of the issuer and its annual financial reports relating to the last three years (or such shorter period the issuer is in existence) should be added. The LuxSE is competent to grant the admission to list securities on one of its two markets. Any such admission is typically granted within less than 48 hours.

The appointment of a local listing agent is not required throughout the whole listing process.

**6 What information must be made available to prospective investors and how must it be presented?**

Persons who intend to invest in a company in the course of an IPO are entitled to rely on the information set out in the prospectus, which has to be published for the public offer of the relevant securities. The prospectus must contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of the rights attaching to the securities. The information must be presented in an easily analysable and comprehensible form. The exact rules on the content and approval of a prospectus will depend on the regime that applies under the Prospectus Law as discussed in question 5.

Prospectuses approved under the first regime must be drawn up in accordance with and contain all information mentioned in the annexes of Commission Regulation (EC) No. 809/2004, as amended (the Prospectus Regulation). The CSSF is competent to approve these prospectuses, except where the prospectus has been approved by a foreign competent authority, within the meaning of the Prospectus Directive and subsequently passported into Luxembourg.

Prospectuses approved under the second regime must be drawn up in accordance with the minimum content requirements set out in CSSF circular 05/210, which in practice means the minimum content requirements set out in the relevant annexe to the ROI. These prospectuses are called simplified prospectuses and are approved by the CSSF (in the case of a simplified offer prospectus) or the LuxSE (in the case of a simplified listing prospectus). In the context of an IPO, the simplified regime is only of limited use.

Prospectuses approved under the third regime for admission to trading on the EuroMTF market must contain the information set out in the relevant annexe to the ROI. The disclosure requirements for prospectuses that are set out in the ROI are mainly derived from the now-repealed Directive 2001/34/EC.

Furthermore, admission to trading on the EuroMTF market is always possible on the basis of a Prospectus Directive-compliant listing prospectus approved for that purpose.

**7 What restrictions on publicity and marketing apply during the IPO process?**

As long as no Prospectus Directive-compliant prospectus is approved, it must be ensured that pre-IPO marketing activities do not qualify as an offer of securities to the public.

If the issuer provides over an approved Prospectus Directive-compliant prospectus for purposes of making an offer of the IPO shares to the public in Luxembourg, no specific restrictions apply.

During the IPO process, any marketing material must comply with the principles set out in the Prospectus Law. For example, advertisements must be clearly recognisable as such and, if applicable, must state that a prospectus has been or will be published and where it can be obtained. Notwithstanding the foregoing, Luxembourg law does not require the prior communication to or the formal approval of marketing material by the CSSF, but issuers or offerors engaged in the IPO process may submit draft marketing material to the CSSF to obtain its opinion on the compliance of the relevant documents with the principles set out in the Prospectus Law. No specific language requirements apply with respect to marketing materials. In the case of an exempt offer of securities to the public in Luxembourg, the issuer or offeror need not notify the CSSF of the offer.

Furthermore, material information provided by an issuer or an offeror engaged in the IPO process must always be consistent with that contained in the prospectus and, if addressed to qualified investors or special categories of investors, must be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

In addition to the criminal and administrative sanctions that would apply if the relevant facts were to qualify as market abuse, issuers, offerors (including financial intermediaries commissioned to carry out the offer to the public) or persons asking for admission to trading on a regulated market face criminal charges in the event they made an offer of securities to the public or obtained an admission of securities to trading on a regulated market in breach of the Prospectus Law provisions. The same applies to their legal representatives.

Moreover, the CSSF may prohibit or suspend advertisements for a maximum of 10 consecutive working days and it may also suspend or prohibit an offer to the public if legal provisions have been infringed. Likewise, it may prohibit or suspend trading on the regulated market of the LuxSE if it finds that legal provisions have been infringed (or ask other regulated markets that are concerned to suspend trading if, in its opinion, the issuer's situation is such that trading would be detrimental to investors' interests). The LuxSE has a similar right with regard to the EuroMTF market.

The CSSF further has extensive rights to obtain information (including the right to make on-site inspections) and to make public the fact that issuers, offerors, including financial intermediaries commissioned to carry out the offer to the public, or persons asking for admission to trading have not complied with their legal obligations.

The CSSF may exchange confidential information with competent authorities of other member states or transmit confidential information to ESMA or to the European Systemic Risk Board subject to constraints relating to firm-specific information and effects on third countries as provided for in Regulation (EU) No. 1095/2010 and Regulation (EU) No. 1092/2010, respectively.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

As set out in the answer to question 6, the procedure for prospectus approval will vary according to which authority is competent for its approval. If the CSSF is competent, it must notify the person filing for approval of its decision regarding approval or its comments on the prospectus within 10 working days of submission of the draft prospectus, as long as the file that has been submitted is complete. This can be extended to 20 working days if the public offer involves securities from an issuer who does not yet have any securities admitted to trading on a regulated market, and that has not previously offered securities to the public. If the LuxSE is competent, the ROI does not provide specific extensions for the approval of the prospectus. By and large, however, the delays are de facto similar.

| Task | Time frame |
|---|---|
| Education of potential investors and pre-marketing | |
| Submission of the first draft of the listing prospectus with the CSSF/LuxSE | Day one |
| Preliminary comments (if any) on the draft prospectus by the CSSF/LuxSE | Within less than three business days |
| First full round of comments on the draft prospectus by the LuxSE/CSSF | Usually no later than 10 business days after day one |
| Submission of the second draft of the listing prospectus with the CSSF/LuxSE | Approximately two weeks after receipt of first round of comments from the CSSF/LuxSE (depending on the time required by the issuer to process the comments made by the CSSF/LuxSE) |
| Second round of comments on the draft listing prospectus by the LCSSF/LuxSE | Usually less than 10 business days after second submission |
| Submission of the third draft of the listing prospectus with the CSSF/LuxSE | Approximately one week after receipt of the second round of comments from the CSSF/LuxSE (depending on the time required by the issuer to process the comments made by the CSSF/LuxSE) |
| Confirmation from the CSSF/LuxSE that they have no further comments on the draft listing prospectus | Approximately within six weeks from day one (depending on the time required by the issuer to process the comments made by the CSSF/LuxSE) |
| Filing final version of the listing prospectus and approval of the listing prospectus by the CSSF/LuxSE | Approximately within six weeks from day one |
| Roadshows and marketing | |
| Pricing of the IPO shares | |
| Request for the admission of the shares to listing on the official list of the LuxSE and to trading on the regulated market or the EuroMT | Promptly upon the settlement of the IPO |
| Settlement of the IPO | |
| Admission to trading and listing of the shares | Within a maximum of two days following the request for the admission |

The above table only gives a rough indication of the prospectus approval. The actual timing depends on the prospectus approval process, which in turn is often influenced by the factual situation such as, in particular, the business activity or the complexity of the financial situation of the issuer.

### 10 What are the usual costs and fees for conducting an IPO?

The usual costs and fees payable to underwriters and advisors in connection with an IPO in Luxembourg are largely comparable with those in most other central European jurisdictions. As most 'Luxembourg' IPOs are taking place at an international level, the underwriting fees incurred in relation to Luxembourg are generally viewed as being encompassed within the total fees.

The fees due to the CSSF for a Prospectus Directive-compliant prospectus approval (ie, the first regime as set out in question 6) are set out in the Grand Ducal Regulation of 28 October 2013 relating to the fees to be levied by the CSSF. In the case of equity securities the fees amount to 0.05 per cent of the value in euros of the total amount offered to the public or of the total amount for which admission to trading on a regulated market is requested. This percentage must be applied on the higher of the two amounts indicated above, with a minimum fee of €15,000 and a maximum fee of €100,000.

For a simplified prospectus not subject to the requirements of the Prospectus Directive (ie, a prospectus drawn up in accordance with the second regime as set out in question 6), a €2,500 fee will be payable to the CSSF.

For a prospectus drawn up in connection with the admission of shares on the EuroMTF market (ie, the third regime as set out in question 6), not subject to the requirements of the Prospectus Directive, a €2,500 fee is payable to the LuxSE.

In addition to the prospectus approval fees set out above, listing fees are payable. The listing fees charged by the LuxSE vary in accordance with whether the request is submitted by an established or by a recently incorporated issuer. The latter is defined by the LuxSE as a company that has not published or registered annual accounts for the three preceding financial years.

For established companies, the listing fee amounts to €2,500 (and €1,250 for subsequent listings) and the annual maintenance fee amounts to €2,500, including the year of the admission (and €1,875 for subsequent listings). For recently incorporated companies, the listing fee amounts to €5,000, including the year of the admission (and €1,250 for subsequent listings); as long as the issuer remains a 'recently incorporated company' the annual maintenance fee amounts to €5,000 (€3,750 for subsequent listings).

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

In a Luxembourg public limited company or a *societas europaea* – which by far are the two most common legal forms of IPO issuers – the board of directors has the broadest powers to manage the business of the company and to authorise and perform all acts of disposal, management and administration within the limits of the corporate purpose. The board of directors can delegate the daily management of the company and appoint special proxies. Alternatively, the company may opt for a two-tier management in which case it is managed by a management board and a supervisory board.

The day-to-day management of the company may be delegated to a single executive or to an executive committee composed of several members.

The company must be supervised by an independent auditor. If the shares are listed on the regulated market of the LuxSE, the independent auditor must qualify as a certified independent auditor or, if the issuer is incorporated in a jurisdiction other than Luxembourg, be registered with the CSSF.

The general meeting of the shareholders appoints the members of the administrative and supervisory bodies, decides on the allocation of results, may amend the articles of association and decide on the winding-up of the company.

Luxembourg law provides a lot of flexibility and thus allows IPO issuers to adopt a bespoke corporate governance regime that should allow each issuer to accommodate best its own governance needs or the governance requirements of its shareholders.

The board of directors must be composed of at least three members. A member of the board of directors may cumulate its membership in the board with an executive position in the company. Likewise, a director may also sit on the board or hold an executive position in an affiliated company. The term of office of a member of the board of directors cannot exceed six years but it can be renewed. Board members must always act in the best interest of the company as a whole (which interest may be different from that of a majority shareholder); as a consequence, Luxembourg law does not require the board to be at least partly composed of independent directors (there is only one exception to this rule as regards one member of the audit committee; see below).

There are no residence or nationality requirements as regards the members of the board of directors (or those of the management board and supervisory board if the issuer has a two-tier management

structure) or executives. In any case, but especially where there are no or only few Luxembourg residents on the board of directors or in executive functions, it must, however, be ensured that the company provides sufficient substance in Luxembourg.

Even though recommended from a liability management perspective, directors do not have to demonstrate specific professional skills.

If the shares of the company are listed on a regulated market, the board of directors must appoint an audit committee. In addition, the board may appoint additional committees (eg, nomination committee, remuneration committee) as deemed necessary.

All Luxembourg companies with shares admitted to trading on the regulated market operated by the LuxSE must comply with the 10 Principles of Corporate Governance of the LuxSE. These do not apply to foreign issuers with shares listed on the LuxSE.

The 10 Principles include three levels of rules:

- the actual mandatory (compliance) principles;
- the 'comply-or-explain' recommendations; and
- the guidelines, which are indicative but not binding.

The scope of the 10 Principles is sufficiently broad for all companies to be able to adhere to them, regardless of their specific features. The recommendations describe the proper application of the principles. Companies must either comply with the recommendations or explain why they deviate from them. In such cases, companies must determine which rules are most suited to their specific situations and provide an appropriate explanation in the statements on corporate governance in their annual reports.

This flexible approach is based on the comply-or-explain system. This system, which has long been adopted in many countries, is recommended by the OECD and the European Commission. Owing to its flexibility, this approach enables companies (including non-Luxembourg companies or EuroMTF market-listed companies who voluntarily adopt the 10 Principles) to take into account their specific circumstances, such as their nationality, size, shareholder structure, business activities, exposure to risk or management structure.

**12 Are there special allowances for certain types of new issuers?**

Smaller companies, in particular those that have recently been admitted to trading on the market, as well as start-up companies, may take the view that some of the recommendations are disproportionate or less relevant in their case. Likewise, holding and investment companies may require a different structure for their board of directors, which may affect the relevance of some of the recommendations to them. For instance, in such cases, the role of the nomination committee and the remuneration committee may be filled by a single committee.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

The Takeover Directive provides that a company must in principle remain passive in the event of a takeover, but in Luxembourg the Takeover Law provides for an 'opt-out' from the passivity regime introduced by the Takeover Directive. As a consequence, defences against takeovers may thus in principle be put in place by the issuer in compliance with some general principles set out in the Takeover Directive. However, the general meeting of shareholders of the issuer may decide to 'opt in' to the passivity regime and certain defensive mechanisms may then no longer be used without prior shareholder approval.

The general principles laid down by the Takeover Directive with which defence measures against takeovers must comply, comprise, in particular the equivalent treatment for shareholders of the same class, the protection of corporate interests of the target company, the possibility by the target's shareholders to eventually decide on the merits of the bid, the avoidance of market manipulation and share price distortions and the avoidance of a protracted takeover process.

Luxembourg law offers a variety of takeover defences (and these can be combined). These can either be foreseen by the articles of association or contractually.

Typical examples of corporate takeover defences are the issuance of various classes of shares, the issuance of non-voting preference shares, the issuance of beneficiary units or supermajorities for certain decisions. Examples of contractual takeover defences include change-of-control provisions in strategic agreements, issuance of convertible instruments and the creation of shareholder blocks.

In practice, it is recommended that takeover defences be put in place proactively rather than to decide on the use of takeover defences only once a takeover has been announced.

**Update and trends**

In August 2016, the Luxembourg corporate legal framework underwent a profound modernisation with a view to offer even more flexibility and to increase legal certainty. As a result of this legislative change, Luxembourg provides Europe's most attractive corporate legal system for doing business, with a perfect balance between shareholders rights and obligations. Most of the recently structured IPOs have seen issuers using shares in dematerialised form. The possibility for a Luxembourg company to issue shares in dematerialised form has been introduced already in 2013 but only few issuers made use of this possibility. Today, the use of shares in dematerialised form appears to have become the new standard in structuring a European IPO.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Foreign issuers tend to be attracted by the known track record in terms of stability and the experience of the Luxembourg financial industry, coupled with a company law that is sometimes more favourable to companies than in the jurisdiction of the group of the issuer. Mention is also made of the talent and expertise evidenced by the players who are involved in all levels of IPO transactions, as well as their language skills. Foreign issuers also look at the flexible and innovative approach of the LuxSE and the approachability of the CSSF. The LuxSE and the CSSF accept English as correspondence language and also respond in English. Luxembourg thrives on cross-border business and there are no special requirements for foreign issuer IPOs.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

As a matter of Luxembourg law, 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 and the definition also applies to the placing of securities through financial intermediaries. This means that there is in principle no distinction between 'private' and 'public' offers of shares in Luxembourg and marketing communications published in or addressed to persons located in Luxembourg easily fall within the definition of an offer of securities to the public, triggering the prospectus requirement set out in the Prospectus Law.

The Prospectus Law does, however, contain exceptions. Consequently, public offers of shares that fall within the scope of the Prospectus Law are exempt from the obligation to publish a Prospectus Directive-compliant prospectus when the offer is made:

- to qualified investors;
- to fewer than 150 investors (either natural or legal persons) in Luxembourg other than qualified investors;
- to investors acquiring securities of more than €100,000 per investor, for each separate offer;
- for securities where the denomination per unit amounts to at least €100,000; and
- for a total consideration in all European member states of less than €100,000 calculated over a period of 12 months.

'Qualified investors' for purposes of the Prospectus Law are persons or entities that are described in points (1)–(4) of section I of annex II to MiFID II, and persons or entities who are, on request, treated as professional clients in accordance with annex II to MiFID II, or recognised as eligible counterparties in accordance with article 30 of MiFID II unless they have requested that they be treated as non-professional clients.

Certain marketing activities (including investment advice, brokerage, underwriting and placing) carried out in Luxembourg by professional intermediaries incorporated in a jurisdiction other than a European Economic Area member state require prior authorisation from the minister responsible for the CSSF and subject the entity (other than the issuer) engaged in such activities to the prudential supervision of the CSSF. In addition, the marketing must ordinarily be carried out in accordance with the conduct of business rules of the Luxembourg financial sector.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

Generally there are no taxes or duties payable in Luxembourg in connection with the offer and sale of shares in Luxembourg, or the execution of and performance by the issuer or other party involved in the IPO of their respective obligations under the common IPO transaction documents.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

Investors may file a claim for damages in civil and, under certain circumstances, in criminal courts, which, if successful, may result in damages for any losses arising out of an IPO transaction.

Even where the CSSF is competent to supervise an IPO (or part of it) or has approved the prospectus, it is not competent to award damages to investors in the event that an investor has suffered a loss as a result of a breach by the issuer or its financial advisors of prevailing IPO rules. To the extent all parties agree, alternative dispute resolution could also be possible.

To date, to the best of our knowledge, there has been no precedent concerning IPO-related claims in Luxembourg or under Luxembourg law.

### 18 Are class actions possible in IPO-related claims?

At present no class action is available under Luxembourg law.

### 19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

To date, to the best of our knowledge, there has been no precedent of IPO-related claims under Luxembourg law. Consequently, the following is a theoretical discussion of possible proceedings relating to IPOs and is yet to be confirmed by Luxembourg courts.

An IPO-related claim would most likely result from an offer of shares to the public without the required, duly approved and published prospectus (omitted prospectus) or with a prospectus that contained misstatements, misleading information or omissions in breach of the Prospectus Law (a defective prospectus).

Pursuant to the Prospectus Law, responsibility for the content of a prospectus attaches to the issuer, the offeror or the person requesting the admission to trading on a regulated market, as the case may be. The responsible persons as set out above, who must be indicated in the prospectus could be subject to civil liability as a result of a defective prospectus. No autonomous civil liability regime exists under the Prospectus Law; instead, the general civil liability principles as set out in the Civil Code apply.

Investors may try to seek redress from the issuer of the damage they suffered on the basis of liability in tort. Liability in tort requires the existence of a (i) a breach (eg, an act or an omission), (ii) a damage resulting out of the breach and (iii) a causal link between the breach and the damage. Civil proceedings may also be based on a breach (condition (i)) that has been declared in previous administrative or criminal proceedings. Moreover, an investor may want to claim damages from a financial intermediary on the basis of this financial intermediary's contractual liability if the investor can establish the existence of a breach by the financial intermediary of a contractual obligation with regard to the investor. Generally, it will be difficult to evaluate the actual loss suffered by investors in connection with an omitted prospectus or a defective prospectus, or in connection with the breach of a contractual obligation. While it may be relatively straightforward to establish any direct financial losses, indirect or non-material loss is extremely difficult to evaluate. Any damage suffered in the form of an opportunity cost may be one of the successful but limited remedies an investor may seek in this respect.

Finally, given the international context of most Luxembourg IPOs, particular attention needs to be drawn to relevant provisions of private international laws to determine whether Luxembourg law is applicable.

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**François Warken** **francois.warken@arendt.com**
**Laurent Schummer** **laurent.schummer@arendt.com**

41A Avenue J-F Kennedy
2082 Luxembourg

Tel: +352 40 78 78 1
Fax: +352 40 78 04
www.arendt.com

# Malta

**Malcolm Falzon and Nicola Buhagiar**
**Camilleri Preziosi Advocates**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The IPO market in Malta is relatively limited in size and is currently emerging from a three-year phase of inactivity in so far as new listings are concerned. From a capital raising perspective, domestic issuers have typically elected to enter or return to the market via debt issues rather than equity listings. In March 2017, the first equity listing since 2013 took place. The listing of PG plc (which involved the sale by its majority shareholder of €27 million shares having a nominal value of €0.25 at the price of €1.00 each) was positively received by the market, as evidenced by the fact that the offer was oversubscribed by almost four times. Furthermore, the company closed the first week of trading of its equity at 24.5 per cent higher than its IPO price. PG plc operates in the supermarket sector and is also the franchisee of a multinational fashion brand. In terms of the PG plc IPO, the entire issued share capital of the company was floated, however, only 25 per cent of it was offered to investors, with the remaining 75 per cent being retained by the majority shareholder of the company.

Although the Maltese IPO market over the past three years was particularly passive, it is expected that further equity listings will take place in the near future, following the success of the listing of PG plc and the confidence this has reignited in the market, as well as in light of certain recent fiscal incentives introduced with the specific aim of reinvigorating the market and attracting further domestic companies to list their equity on the Official List of the Malta Stock Exchange (MSE).

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The issuers in the Maltese IPO market are principally domestic companies from various sectors including the property, hospitality, banking and retail sectors. Barring some exceptions, domestic companies tend to list their equity in Malta on the MSE, even though the alternative to list equity overseas is available. Companies registered in Malta would typically list their equity in an overseas jurisdiction if their investor base is located overseas or if there is a connection with the relative jurisdiction. An example of a domestic company that listed its equity overseas is Kindred Group plc (formerly Unibet), one of Europe's leading online gambling operators and a company registered in Malta, which opted for a listing on the Nasdaq Stockholm.

### 3 What are the primary exchanges for IPOs? How do they differ?

The primary exchange for IPOs in Malta is the MSE, a recognised trading venue for the purposes of the Financial Markets Act (Chapter 345, Laws of Malta) (FMA). The Main Market is the MSE's principal market for the trading of equity. Issuers wishing to admit their securities to the Official List of the MSE must submit two applications, one to the Listing Authority of Malta for the admission of its securities to listing and the other to the MSE for the admission of its securities on the Official List of the MSE. Securities traded on the Main Market are passportable within the European Union.

In 2016, the MSE launched Prospects, a market for the trading of securities (including equity) of SMEs, which operates under a Markets in Financial Instruments Directive 2004/39/EC-compliant multilateral trading facility structure. This year, SFA SpA (an Italian company in the business of asbestos remediation for railway coaches) listed 700,000 Ordinary Shares on Prospects. It is the first company to list its shares on the Prospects market, which is otherwise untested territory for equity listings. Since then, a number of further issues have followed in quick succession. Prospects was designed specifically for SMEs and is intended to cater for the particular needs and circumstances of smaller businesses. To this end, admission to Prospects is expected to have a turnaround of just one month from the date of the formal application. Lighter admission requirements for SMEs are also applicable – the basic criteria are that the company needs to be a public limited company together with the appointment and retention of a corporate adviser to ensure compliance with the applicable rules. Although Prospects is accessible to both domestic and overseas companies alike, securities admitted to Prospects are not passportable within the European Union.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

In terms of the FMA, the Listing Authority is the competent authority to make the listing rules and ensures compliance with any requirements or conditions set out in such rules and grants or refuses authorisation for admissibility to the listing of securities or to discontinue the listing of such securities. The principal rules regulating IPOs are found in the Listing Rules, which also regulate the continuing obligations of issuers, shareholders' rights and the imposition of sanctions on issuers.

Securities traded on Prospects are subject to the Prospects Rules. The MSE is solely responsible for the supervision of the Prospects marketplace, including of companies listed in terms of Prospects and the corporate advisers appointed by the Prospects issuers.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Issuers wishing to list their securities on the Main Market must seek an authorisation for a listing from both the Listing Authority and the MSE. With respect to securities to be admitted on Prospects, it is the MSE that would approve their admission.

The Listing Rules set out the conditions for admissibility of securities to the Main Market and the documentation that is required to be submitted by prospective issuers. The following are principal criteria to be satisfied by an applicant:

- the applicant must be a public limited company duly incorporated or otherwise validly established according to the relevant laws of its place of incorporation or establishment and operating in conformity with its memorandum and articles of association (M&As) or equivalent constitutional document;
- the M&As of the applicant must conform with certain requirements under the Listing Rules;
- the securities for which authorisation for admissibility to listing is sought must be issued in accordance with the law of the applicant's place of incorporation, be duly authorised according to the requirements of the applicant's M&As and be duly authorised in

terms of all necessary statutory and other authorisations for the creation and issue of such securities in terms of any applicable system of law;
- the securities for which authorisation to listing is sought must be freely transferable and fully paid-up, unless otherwise approved by the Listing Authority;
- the aggregate market value of all equity securities (not being preference shares), which are the subject of the application for admissibility must be at least €1 million, unless otherwise accepted by the Listing Authority;
- the applicant must have fully paid-up capital of at least €1 million including preference shares other than redeemable preference shares;
- the applicant must have published or filed audited annual accounts that cover at least three financial years preceding the application for admissibility to listing and the last audited information may not be older than 18 months from the date of the registration document;
- at least 75 per cent of the company's business must be supported by a historical revenue earning record that covers the period for which annual accounts are required under the Listing Rules (as described above) and must carry on as an independent business as its main activity; and
- at least 25 per cent of the class of shares in respect of which application is made must be held in public hands in one or more recognised jurisdictions unless the Listing Authority accepts a lower percentage on the basis that it considers that the market would operate properly notwithstanding such lower percentage.

An applicant must also engage a sponsor, which must be an entity licensed under the Investment Services Act (Chapter 370, Laws of Malta), through which all communications or meetings with the Listing Authority must be made, up until approval of admission by the Listing Authority is given. During the application process, the following key documentation must be submitted to the Listing Authority through the sponsor:
- a completed application for authorisation for admissibility to listing in the prescribed form;
- a prospectus and any supplements;
- one copy of the issuer's audited annual accounts for each of the last three financial years;
- certain formal notices in the prescribed form;
- declarations from the officers of the issuer;
- appropriate corporate authorities sanctioning the application for admissibility to listing; and
- where the issuer is a property company, a valuation report prepared by an independent expert in compliance with the rules of property companies in the Listing Rules.

The Listing Authority may further require a copy of any other document which is considers necessary or beneficial in order for it to decide upon the authorisation of admissibility to listing.

The eligibility requirements for SMEs seeking a listing on Prospects are lighter than those applicable to issuers that wish to list securities on the Main Market. The Prospects Rules set out the details of the eligibility criteria for Prospects companies and the documentation to be submitted to the MSE. A notable derogation from the eligibility criteria set out in the Listing Rules is that SME companies need not have a three-year trading record. Rather, audited accounts that cannot be more than six months old are sufficient for the purposes of a listing on Prospects. Furthermore, there is no requirement for a minimum percentage of shares to be held by the public. Besides the submission of audited accounts, SME issuers would also need to submit a business specialist report as well as any other additional information that the MSE may require.

Although Prospects companies are not required to engage a sponsor, the services of a corporate adviser must be employed. The corporate adviser is responsible for communication with the MSE and to provide a broad range of advice to the issuer on an ongoing basis, even after the listing on Prospects. Among the documents to be submitted to the MSE, the corporate adviser must submit a declaration on the suitability of the company for admission to Prospects.

### 6 What information must be made available to prospective investors and how must it be presented?

The issuer must publish a prospectus in line with the provisions of EU regulations on the format and presentation of prospectuses, specifically the following:
- Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in a prospectus and dissemination of advertisements, as amended by Commission Delegated Regulation (EU) No. 486/2012 of 30 March 2012 amending Regulation (EC) No. 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements;
- Commission Delegated Regulation (EU) No. 862/2012 of 4 June 2012 amending Regulation (EC) No. 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors;
- Commission Delegated Regulation (EU) No. 759/2013 of 30 April 2013 amending Regulation (EC) No. 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities;
- Commission Delegated Regulation (EU) No. 382/2014 of 7 March 2014 amending Regulation (EC) No. 809/2004 as regards regulatory technical standards for publication of supplements to the prospectus; and
- Commission Delegated Regulation (EU) No. 2016/301 of 30 November 2015 amending Regulation (EC) No. 809/2004 as regards regulatory technical standards for publication of the prospectus and dissemination of advertisements.

The prospectus is composed of a detailed table of contents, summary note, registration document and securities note and must include the information contained in the requisite building blocks set out in the regulation. Broadly speaking, a prospectus must contain all information, which, according to the particular nature of the issuer and of the securities being considered for admissibility to listing, is necessary to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of any guarantor and of the rights attaching to such securities.

With respect to securities listed on Prospects, where IPOs made under the Prospects Rules do not exceed €5 million, or have fewer than 150 investors from any single jurisdiction, a company admission document in the prescribed form must be approved by the MSE and made available to investors. IPOs with a value greater than €5 million (or which would exceed €5 million within 12 consecutive months with respect to the same issue), or with 150 investors or more, or that otherwise fall within the definition of 'offer of securities to the public' in terms of article 2 of the Companies Act (Chapter 386, Laws of Malta) will fall under the requirements of the above-mentioned regulation (as amended) and will, therefore, require a fully-fledged prospectus.

### 7 What restrictions on publicity and marketing apply during the IPO process?

The Listing Rules provide for certain restrictions on advertising in the run-up to and during the IPO process. The Listing Authority is the body responsible for exercising control over compliance with the applicable rules on advertising. The general rule is that once an application for admissibility to listing has been lodged, a prospective issuer must refrain from advertising in any manner, until final written notice of the approval of the admissibility is received by the issuer from the Listing Authority. Accordingly, any form of publicity specific or referring to the prospective IPO released by the prospective issuer during this period is prohibited.

Prior to the release of any advertisement or publication by prospective issuer, the Listing Authority should vet such material to ensure that, as required in terms of the Listing Rules, such advertisements or publications are accurate, factual and not misleading, do not contain any unverifiable claims and are consistent with the information contained in the prospectus. Such requirement would apply equally whether the Prospectus has been published before or after advertisement is issued. The Listing Rules further prescribe that information concerning the

admission to listing disclosed in an oral or written form, even if not for advertising purposes, must be consistent with the information contained in the prospectus.

The rules on advertising contained in the Prospects Rules effectively reflect the advertising principles set out in the Listing Rules.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

The Listing Authority has wide investigatory powers with regards to issuers that are allegedly not in compliance with the Listing Rules. In particular, the Listing Authority may require an issuer to furnish it with information and documentation at such time, place and form as it may require. Moreover, representatives of the issuer may be requested to attend before the Listing Authority to answer questions and provide information required by it. The issuer is further duty bound to provide the Listing Authority with any assistance that it requires and that the issuer can reasonably give. For the purpose of exercising its investigatory powers, agents or officers of the Listing Authority may enter the premises of the issuer for the purpose of obtaining information relevant to the investigation.

The Listing Authority may also impose penalties on the issuer. In terms of the FMA, if the Listing Authority considers that an issuer of listed financial instruments or an applicant for admissibility to listing has contravened any provision of the Listing Rules, it may, without recourse to a court hearing, impose on the issuer or applicant, as the case may be, a fine of up to €150,000 for each infringement or failure to comply. Additional administrative penalties apply if the Listing Authority considers that an issuer of listed financial instruments has failed to make public any regulated information, in the form of an administrative penalty of up to €10 million or up to 5 per cent of the total annual turnover of the issuer according to the last annual accounts or up to twice the amount of the profits gained or losses avoided because of the breach (whichever is the higher). The penalties that may be imposed by the Listing Authority are without prejudice to the Listing Authority's power to take any other steps available to it at law.

Over and above the imposition of penalties, the Listing Authority also has the general power to suspend an admission to trading, suspend or prohibit trading, prohibit or suspend advertisements as well as to make public the fact that the issuer is failing to comply with its obligations. Where obligations imposed in terms of the FMA or any applicable regulations or the Listing Rules are applicable to an issuer, in the event of a breach, sanctions may also be applied to the members of the administrative, management or supervisory bodies of the legal entity concerned and to other individuals who are responsible for the breach.

With respect to Prospects companies, pecuniary penalties that may be imposed by the MSE could be up to a maximum of €100,000. Daily penalties of no more than €5,000 per day for any persisting non-compliance or omitted corrective action could also be implemented. As with the Listing Authority, the MSE has investigative powers and the power to suspend admission to the Prospects market.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

The time required to complete an IPO depends on the particular circumstances of the issuer, its financial standing and, to a large extent, the outcome of the due diligence to be undertaken at the preparatory stage.

As a first step, a sponsor as well as legal and financial advisers would be engaged by the prospective issuer. The legal advisers to the issuer would typically carry out legal due diligence on the prospective issuer with a view to collating all information relevant for the purpose of drawing up the prospectus and identifying any legal or structural issues that could potentially stall or otherwise inhibit the IPO process. A restructuring of the group of companies of which the issuer forms part may be particularly pertinent for the purpose of streamlining the group, which is to be described in the prospectus in a manner that investors can easily understand. In some instances, underwriters are also engaged by the prospective issuer, in which case the preparatory stage would also involve the negotiation and drafting of the underwriting agreement and any other transaction documents relating to the arrangement of the IPO. In parallel, the financial advisers would also be undergoing their own financial due diligence and preparing the parts of the prospectus relative to past and projected performance.

Once the due diligence on the issuer and any necessary restructuring of the group are complete, a first draft of the prospectus is submitted to the Listing Authority. Liaison with the Listing Authority is made exclusively through the sponsor appointed by the prospective issuer. Any comments by the Listing Authority on the drafts of the submitted prospectus and on matters or ancillary documentation relating to it will be received by the sponsor, which, in turn, has the responsibility to respond in writing.

The bookbuilding and marketing stage typically takes place at such time as the prospectus has reached an advanced stage and is considered an important step to gauge the interest of key investors in the IPO. Roadshows and market soundings must be carried out in accordance with applicable rules and regulations (particularly, the Market Abuse Regulation and applicable rules on market abuse) and would ordinarily be in the form of one-to-one meetings with reputable brokers or professional or institutional investors.

Following final approval of the prospectus by the Listing Authority, pricing of the shares and execution of all transaction documents takes place as a final stage. Under Maltese law, an original of the signed prospectus must be delivered to the Listing Authority and also registered with the Registry of Companies in Malta (in the case of a domestic company). The shares will then be issued and admitted to the Official List of the MSE for trading to commence and the IPO proceeds will be received by the issuer. In the case of a sale of shares, the IPO proceeds will be received by the offeror shareholder/s.

**10 What are the usual costs and fees for conducting an IPO?**

The admission fee payable to the Listing Authority depends on the market capitalisation on admission. The fees applicable for admission of equity securities are the following:

| Market capitalisation | Initial fee |
|---|---|
| On the first €12,500,000 | Increment per €2.5 million to €1,500, with a minimum of €12,500 |
| On the next €12,500,000 | Increment per €2.5 million to €2,500 |
| On the next €25,000,000 | Increment per €2.5 million to €2,000 |
| On the excess | Increment per €2.5 million to €1,500 |
| The maximum amount that may be paid in such fees is set at €60,000. | |

The admission fees for admission to Prospects are the following:

| Market capitalisation | Annual fee |
|---|---|
| On the first €15 million | 0.1 per cent, with a minimum of €5,000 |
| On the next €35 million | 0.05 per cent |
| Above €50 million | No additional fees |

Sales commissions typically hover around the 1.00 to 1.25 per cent mark. Total legal and financial advisory fees would ultimately depend on the extent of preparatory work required in advance of the prospective issuer going to market, as well as on such advisers' familiarity with the issuer and related business and group.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

Issuers whose equity securities are admitted to listing must adhere to the Code of Principles of Good Corporate Governance contained in the Listing Rules (the Code). Should an issuer fail to comply with the main principles contained within the Code, an explanation for non-compliance giving reasons must be disclosed on an ongoing basis in the issuer's corporate governance statement to be included in its annual financial report. In terms of the Code, the key corporate governance requirements that are particular to listed entities are the following:

- composition of the board: the board should be composed of a minimum number of non-executive directors sitting on the board in order to ensure a balance, such that no individual or small group of individuals can dominate the board's decision making. The Code provides that the exact composition and balance on a board will depend on the circumstances and business of each enterprise but it is recommended that at least one-third of board members are non-executive and the majority of these should be independent. A Director is considered to be independent when he or she is free from any business, family or other relationship with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to jeopardise exercise of his or her free judgment;
- audit committee: in terms of the Code, the issuer must establish and maintain an audit committee composed entirely of directors and having at least three members. The majority of such members must be non-executive directors. At least one member of the audit committee must be independent and must be competent in accounting and or auditing. The meaning of 'independence' of a director for the purposes of the audit committee is set out in the Code. The primary purpose of the audit committee is to protect the interests of the company`s shareholders and assist the directors in conducting their role effectively so that the company's decision-making capability and the accuracy of its reporting and financial results are maintained at a high level at all times; and
- nominations committee and remunerations committee: the Code also expects that the board of the issuer establishes a nomination committee to lead the process for board appointments and to make recommendations to it. Such committee should be composed entirely of directors of the company. The majority of the members of the nomination committee must be non-executive directors, at least one of whom must be independent. The board should also establish a remuneration policy for directors and senior executives and set up formal and transparent procedures for developing such a policy and for establishing the remuneration packages of individual directors. For such purpose, a remuneration committee should be appointed.

Various other requirements apply, particularly in relation to the proper functioning of the board, the avoidance of conflicts of interest and adequate disclosure of information to investors.

**12 Are there special allowances for certain types of new issuers?**

SMEs seeking a listing to Prospects are subject to the Code of Principles of Corporate Governance contained in the Listing Rules. The principles set out in the Code are non-binding; however, should an SME fail to comply with principles of the Code, the reasons for non-compliance must be given in its corporate governance statement. Where applicable, the size of the company may be one of the reasons for which a principle of the Code is not complied with and is set out as the basis for such non-compliance.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

One important consideration with respect to the takeover of Maltese listed companies is that the majority shareholding is often consolidated in one or a small number of shareholders. Accordingly, the takeover of a Maltese company is often not a hostile takeover but one where the offeror and offeree agree on negotiated terms, with a voluntary takeover bid to be made subsequently in accordance with the provisions of Chapter 11 of the Listing Rules.

In terms of the Listing Rules, if a target company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the board of directors of the company must not take or permit any action in relation to the affairs of the target company that could effectively result in an offer being frustrated or the holders of securities of the target company being denied an opportunity to decide on the merits of an offer without shareholder approval.

Moreover, the Listing Rules require that the memorandum and articles of association of the issuer do not permit the issue of shares that would dilute a substantial interest without shareholder approval.

Chapter 11 of the Listing Rules is currently subject to a consultation process and is expected to be the overhauled in the near future. While Chapter 11 seeks to implement the provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, the Listing Authority has reached out to practitioners for their comments; particularly with a view to codifying the exceptions and derogations which may be essential for the purpose of rendering the rules effective and in sync with the particular features of our market.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Foreign issuers wishing to list in Malta should primarily consider the nature of the market on which their securities will be traded (eg, Prospects or the Main Market), the applicable admission fees and the ongoing obligations under Maltese law. There are no special requirements for admission applicable to foreign issuers.

The identity of the issuer will determine the competent authority that will approve the prospectus relative to the IPO. For all EU issuers of securities, the competent authority of the jurisdiction where the issuer has its registered office will be responsible for approving the IPO prospectus. With respect to issuers that are incorporated in a third country, the home member state will be the competent authority of the member state where the securities intend to be offered for the first time or where the first application for admission to trading on a regulated market is made, at the choice of the issuer. The Listing Authority will only approve a prospectus if it is satisfied that Malta is the home member state in relation to the issuer of the securities to which it relates.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

There are certain instances in which a foreign issuer may offer securities to the public in Malta without the use of a prospectus. Such situations include:

- an offer of securities solely to qualified investors;
- an offer of securities to less than 150 natural or legal persons other than qualified investors;
- an offer of securities where the minimum consideration that may be paid by an investor for the acquisition of securities is at least €100,000, for each separate offer;
- an offer of securities where the nominal value of each security amounts to €100,000; or
- an offer where the total consideration of the securities for the offer in the European Union and the European Economic Area is less than €5 million), which limit shall be calculated over a period of 12 months.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

The first key point in this respect is that there is a blanket exemption in respect of transfers of marketable securities listed on the MSE. In the Budget speech for 2017, the Minister for Finance announced a number of fiscal incentives and measures targeted towards attracting local and foreign investment on the MSE. These measures were implemented into Maltese law via the Budget Measures Implementation Act 2017. The most pertinent measure was the extension of the exemption from income tax on capital gains arising upon a disposal of shares listed on the MSE, to persons who held the shares immediately prior to listing. Prior to 2017, the Income Tax Act prescribed that only capital gains realised upon the transfer of shares listed on the MSE were exempt from income tax. However, where such shares were owned immediately prior to listing and were disposed of post-listing, the capital gain from the disposal of such shares attracted income tax on those capital gains at the flat rate of 15 per cent. The Income Tax Act now exempts the latter scenario from income tax.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

IPO investors must seek redress for civil damages from the ordinary courts in Malta. Although the Listing Authority has the power to investigate an investor's complaint and impose penalties on an issuer, it has no competence to award damages to an investor seeking redress.

**18 Are class actions possible in IPO-related claims?**

Class actions or collective proceedings are not possible with respect to IPO-related claims. Although Maltese law recognises the concept of collective proceedings or class actions, collective proceedings are limited to matters of competition law, consumer law and product safety matters. Notwithstanding the fact that class actions are not applicable to IPO-related claims, investors may file one application in the ordinary courts as joint plaintiffs provided that the cause of action or the 'interest' of the investors is the same.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

The cause of action would typically be a breach of the Listing Rules or financial market rules. In terms of the FMA, the courts have the following powers, among others:

- to give such orders as it deems appropriate to restrain the contravention of the applicable rules;
- if there are steps that may be taken to remedy a contravention, the court may give such orders as it deems appropriate to require that person to take steps to remedy or mitigate its effect; and
- if the court is further satisfied that by virtue of a breach of applicable rules and regulations and the investor has suffered loss or has been adversely affected as a result of that contravention, it has the power to require the issuer to pay a sum that it considers just to the investor suffering such loss.

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ADVOCATES
CELEBRATING 50 YEARS IN THE PRACTICE OF LAW

**Malcolm Falzon** **malcolm.falzon@camilleripreziosi.com**
**Nicola Buhagiar** **nicola.buhagiar@camilleripreziosi.com**

Level 3, Valletta Buildings
South Street
Valletta
VLT 1103
Malta

Tel: +356 21 23 89 89
Fax: +356 21 22 30 48
www.camilleripreziosi.com

# Netherlands

**Pieter Schütte, Nora Offergelt and Derk Lemstra**

**Stibbe**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

Only a few companies undertook an IPO on Euronext Amsterdam in the years following the financial crisis, primarily because of difficult conditions within the Dutch and international equity capital markets. The turning point for the Dutch IPO market came in 2014, with seven IPOs raising approximately €5.8 billion in that year, followed by nine IPOs raising approximately €6.8 billion in 2015 and a further seven IPOs completed in 2016, raising approximately €2.8 billion. The current IPO pipeline remains strong, and if capital markets continue to be receptive, we expect a large number of companies to undertake an IPO on Euronext Amsterdam in the short to medium term.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Dutch companies tend to list on Euronext Amsterdam. Euronext Amsterdam has also proven to be an attractive platform on which to list for foreign issuers. In the period spanning 2014 to 2017, approximately six non-Dutch companies were listed on Euronext Amsterdam. In addition, a large number of foreign closed-end investment funds are listed on Euronext Amsterdam.

### 3 What are the primary exchanges for IPOs? How do they differ?

The main regulated market in the Netherlands is Euronext Amsterdam. In 2016, a new regulated market was established, called Nx'change. Nx'change is a decentralised stock exchange, which means that no brokers or banks are involved in trading. Euronext Amsterdam, however, remains the primary exchange for IPOs in the Netherlands.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Dutch Authority on Financial Markets (AFM) is the competent authority with respect to public offerings in the Netherlands. Euronext Amsterdam is responsible for deciding on the request of a company to be admitted to trading and for enforcing the listing rules as set out in the Euronext Rulebooks.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

A company that intends to file a request for its shares to be admitted to trading is required to publish a prospectus that should be approved by the competent authority, which will, in the case of a Dutch NV listing on Euronext Amsterdam, be the AFM.

Furthermore, it should file a listing application with Euronext Amsterdam. The listing application form contains certain details on the issuer, on the shares for which admission is requested, and includes certain undertakings of the issuer (eg, to comply with legislation and the Euronext Rules). In addition to the listing application form, Euronext Amsterdam should be sent certain documents relating to the company, such as the prospectus, the articles of association, minutes of the relevant corporate body approving the admission to listing and a letter from the listing agent.

### 6 What information must be made available to prospective investors and how must it be presented?

Any company undertaking an IPO should publish a prospectus. The prospectus should include all information that is necessary for investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the company, as well as the rights and obligations attached to the shares that are being offered. This information must be presented in a form that is easy to analyse, comprehensive and tailored to the particular nature of the shares and the company.

The specific disclosure requirements are laid down in the Prospectus Regulation (Commission Regulation (EC) No. 809/2004 of 29 April 2004 (as amended).

This regulation will be replaced once the new prospectus regulation enters into force (the Prospectus Regulation) on 21 July 2017.

### 7 What restrictions on publicity and marketing apply during the IPO process?

There are various legal restrictions that apply to publicity and marketing during an IPO process dictating how, when, and to whom the company and the underwriters can market the IPO. Generally, at the beginning of the IPO process, publicity guidelines are put in place and legal counsel will be closely involved in the preparation and dissemination of the marketing materials in order to ensure that the relevant requirements are complied with.

The most important rule to comply with is that all marketing and related materials should be consistent with the prospectus. Recently, the AFM has requested to review certain specific marketing materials to check for compliance with this requirement. Furthermore, all marketing materials should be recognisable as such and should state that a prospectus has been or will be published and should indicate where the prospectus can be obtained.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

The AFM can decide not to approve the prospectus, resulting in the company not being able to undertake the IPO. Furthermore, if an issuer does not comply with the relevant rules the AFM can issue an instruction in which it includes a term within which the issuer should comply with the requirements included in the instruction.

Under the current regime, the sanctions are dealt with on a member-state level. The New Prospectus Regulation contains more rules on sanctions. One of the sanctions that can be imposed under the New Prospectus Regulation is that if an issuer has repeatedly and severely infringed the Regulation, the competent authority can refuse the approval of any prospectus for a period of five years.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

IPOs generally take four to six months to complete, but more complex IPOs can take substantially longer to execute. The timetable for a typical IPO on Euronext Amsterdam is as follows in the given table:

| | |
|---|---|
| **Marketing** | |
| Week one | Kick-off meeting |
| Weeks one to four | Early look meetings |
| Weeks four to seven | Pilot fishing presentation |
| Weeks two to nine | Drafting and rehearsal of the analyst presentation |
| Week nine | Analyst presentation |
| Week eight to 12 | Drafting of the roadshow presentation |
| Week 14 | ITF and publication of research |
| Week 14 to 16 | PDIE |
| Week 16 to 18 | Management roadshow |
| **Regulatory process** | |
| Weeks one to 16 | Due-diligence review |
| Weeks one to 16 | Prospectus drafting and submissions |
| Week 16 | Approval by the AFM |
| **Listing** | |
| Week 16 | Price range meeting |
| Week 16 to 18 | Bookbuilding |
| End of week 18 | Pricing |
| Pricing plus one | First trading date |
| First trading date plus two | Settlement and closing |
| Until 30 days after closing | Stabilisation period and possibility to exercise overallotment option |

### 10 What are the usual costs and fees for conducting an IPO?

The costs of pursuing and completing an IPO generally vary because it depends on the structure and the complexity of the transaction. For a 'standard' IPO of less than €75 million, the aggregate costs are between €7 and €10 million; and for an IPO of more than €250 million, the aggregate costs are around €15 to €20 million.

The AFM prospectus approval fees are €65,000. The Euronext Amsterdam initial admission fees depend on the market cap of the company. The administration fees are €10,000 and an additional fee is added depending on the market-capitalisation, which ranges from maximum costs of €55,000 for companies with a market cap below €100 million and maximum costs of €2 million for a company with a market cap of more than €2.5 billion.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The Dutch Corporate Governance Code applies to Dutch companies listed on a stock exchange, such as Euronext Amsterdam. The Corporate Governance Code contains certain principles and best practice provisions that regulate the relationships between the management board, supervisory board (or a one-tier board if the company has one) and the shareholders. The Dutch Corporate Governance Code is based on a 'comply or explain' principle, which means that a company may deviate from the principles and provisions, provided that it explains the reason for such deviation in its annual report.

Dutch companies listed on Euronext Amsterdam generally have both a management board and a supervisory board. However, it is possible for a Dutch company to have a one-tier board consisting both of executive and non-executive directors.

An important best practice provision is that the majority of the supervisory board members, or the non-executive board members in case of a one-tier board, including the chairman, should be independent.

Pursuant to the Dutch Corporate Governance Code, a Dutch company that has more than four supervisory board members or non-executive board members should install an audit committee (which is also required to be installed pursuant to mandatory Dutch law), a remuneration committee and a selection and appointment committee. The audit committee and the remuneration committee may not be chaired by the chairman of the supervisory board or by a former member of the management board of the company and more than half of the members of the committees should be independent. With respect to the audit committee, it is further required under mandatory Dutch law, that the chairman is independent, that at least one of the members is a financial expert and that the audit committee as a whole has relevant experience for the sector in which the company operates.

### 12 Are there special allowances for certain types of new issuers?

There are no special allowances for certain types of new issuers. The Dutch Corporate Governance Code applies to all Dutch companies listed on a stock exchange. However, given that the Dutch Corporate Governance Code is based on a comply or explain principle, smaller or growth companies can choose not to apply certain best practice provisions, explaining that owing to their size compliance is difficult, which investors will generally understand.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

Under Dutch law, a company may use protective measures against a hostile takeover offer or against undue influence of a shareholder if such measures are necessary to ensure the continuity of the company and its long-term objectives and to safeguard the interests of the company's stakeholders. There are various hostile takeover measures that can be implemented under Dutch law. Examples include:

- hostile takeover foundation: the most common protective measure is the incorporation on an independent protective foundation. The company grants a call option to an independent foundation to acquire preferred shares in the company, constituting up to 50 per cent of the voting shares. The sole corporate object of the foundation is normally to safeguard the interest of the company and its stakeholders;
- priority shares: under Dutch law, a company's articles of association may provide that certain shares carry special control rights, such as the right to make a binding nomination for the appointment of board members or the right to approve certain important decisions of the company. Priority shares can be issued to a 'friendly' entity;
- dual-class voting: under Dutch law, it is possible to implement a dual-class share structure, whereby different classes of shares carry different voting powers. The shares that are subject to the public offer only hold a fraction of the voting rights compared to the voting rights attached to the shares held by the company's founders or pre-IPO shareholders; and
- depositary receipts: by issuing depositary receipts the economic rights are separated from the shares' voting rights. The shares and the attached voting rights will be held by an independent foundation and the depository receipts of the shares, that have the economic benefit, will be listed and offered to the public. Depositary receipt holders have the right to require the foundation to grant a power of attorney to vote in shareholder meetings. However, under certain circumstances (eg, in hostile takeover situations) the foundation is not obliged to grant such power of attorney. It is not common to use depository receipts as a protective measure against a hostile takeover and the Dutch Corporate Governance Code also provides that depository receipts should not be used as a protective measure – but it is possible to deviate from the code, provided this is explained.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

There are various reasons why foreign issuers seek a listing in the Netherlands. The Netherlands has an accessible climate and is a robust jurisdiction. The Dutch professional services infrastructure

**Update and trends**

An important development is that the current EU prospectus regime will be amended by the new Prospectus Regulation. One of that Regulation's goals is to make the prospectus more relevant, easy to analyse, concise and comprehensible and therefore more accessible for investors. This is a trend that we have already seen in recent years. For example, with respect to the risk factors, rather than having generic lengthy risk factors that seem to be aimed at disclaiming liability and not so much at informing investors, we have seen a trend that they are becoming more concise, more specific to the issuer and therefore more relevant for the investor.

Under the Prospectus Regulation, there will also be a limit to the number of pages that can be used for the summary. A maximum of seven sides of A4 paper applies, with a maximum of 15 risk factors that can be included in the summary. Again, this is a trend that we have already seen in recent years. The AFM has, in its review process, tried to reduce the number of risk factors included in the summary, in order to establish that only the key risk factors were included there.

A third aim of the Prospectus Regulation is to tailor disclosure to various types of issuers. For SMEs, a lighter disclosure regime will apply and for companies that are already listed for more than 18 months on a regulated market it will not be required to publish a full prospectus.

is well developed, the advisors involved in a listing process – banks, lawyers, accountants, financial advisors – are experienced in structuring and executing capital market transactions. Furthermore, in the Netherlands, in general, all communication and documentation is in English, which makes it easy for foreign issuers to apply for a listing on Euronext Amsterdam. Finally, the regulator, the AFM, is a professional, responsive and pragmatic institution willing to facilitate foreign issuers and is committed to meeting the timelines of the IPO process, which is instrumental to completing a successful capital market transaction.

There are no specific requirements for foreign issuers. The Dutch Corporate Governance Code is not applicable to foreign issuers listed on Euronext Amsterdam. Furthermore, if it concerns a third-party issuer from a non-EEA country, there are certain rules (such as the requirement to send out a convocation notice 42 days prior to a general meeting) that do not apply.

### 15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

If a company undertakes a public offering in another EEA member state, then it is possible to passport the prospectus to the Netherlands and use that for sales to investors in the Netherlands. Additionally, it is possible to use one of the exemptions under the Prospectus Directive for an offer in the Netherlands. A company is not required to publish a prospectus for an offering to less than 150 natural or legal persons, or for an offering only addressed to qualified investors. Furthermore, if the offer is addressed to investors that acquire securities for a total consideration of at least €100,000 per investor for each separate offer, it will also not be required to publish a prospectus.

If a company makes use of the less than 150 persons or more than €100,000 exemption, it will be required to include a warning in all marketing materials and documents relating to the offering that no AFM-approved prospectus will be made available and that the offer is not subject to the supervision of the AFM.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

**Stamp duties and transfer taxes**

The Netherlands does not levy stamp duties on the issue or transfer of shares in connection with an IPO. It is noted that the acquisition of shares in real estate holding companies, as given in article 4 of the Legal Transaction Tax Act 1970, may under certain circumstances be subject to Dutch real estate transfer tax.

**Certain other tax considerations**

Any restructuring in connection with an IPO should be carefully considered with a view to safeguarding the continued availability of tax loss carry forwards.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

IPO investors can claim damages by submitting claims to the competent civil district courts. These judgments can be appealed before the courts of appeal and, ultimately, brought before the Supreme Court.

Private dispute resolution is also available for IPO investors. The primary alternative to litigation is arbitration. Under Dutch law, arbitration can be based on an explicit choice for arbitration in a written agreement between the parties. In the case of securities actions based on general liability in tort, an arbitration agreement can only be concluded after the harmful event occurred. An arbitration clause in a prospectus does not preclude litigation before the regular courts, unless an investor has explicitly accepted the offer to arbitrate in writing.

### 18 Are class actions possible in IPO-related claims?

Under Dutch law it is currently not possible to claim damages in a collective action. A legislative proposal is pending that would change this allowing a claim vehicle to lodge a claim for damages on a collective basis. As the law stands, damages have to be assessed on an individual basis.

However, Dutch law recognises the following options for collective proceedings:

- collective actions by a representative entity of injured parties. This model is commonly used by the Dutch Association of Stockholders, an active representative body of non-institutional investors. It is not possible for such a representative entity to claim damages, but all other remedies are available. It can claim, for example, injunctive relief or a declaratory judgment or both. A declaratory judgment stating that the issuer is liable with regard to the investors, can subsequently be relied on by an individual claimant, when it initiates a proceeding for damages;
- actions based on the Dutch Collective Settlements Act: if a representative entity agrees with one or more defendants on the terms of a collective settlement, the representative entity and the defendant can jointly request the Amsterdam Court of Appeal to declare this settlement binding on all persons that suffered a similar harm;
- actions based on the 'assignment model': individual claimants assign their claims to one special purpose vehicle (a 'claims vehicle'), who bundle and pursue the claims at his or her own risk;
- actions based on the 'power of attorney model': individual claimants grant a power of attorney to one person or entity who pursues the claims on their behalf. This party may then initiate a claim against the defendant in the name of those who have issued a power of attorney. This model is often used as a back-up if a collective action proves impossible; and
- finally, it is also possible for claimants to team up and jointly start legal proceedings.

### 19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

Investors can lodge a claim against the issuer or the underwriters (particularly the global coordinators). If a selling shareholder is involved, then in specific circumstances a claim could also be initiated against the selling shareholder.

Claims can be based on the general provision of liability in tort or the provisions with respect to misleading advertising. In the case of retail investors, they can also base their claim on the Unfair Commercial Practices Act, which is an implementation of EU Directive 2005/29/EC. If claims are based on misleading advertising or on the unfair commercial practices act the burden of proof rests with the defendant. If the claims are based on the general provisions of tort, the burden of proof lies with the claimant.

The defendant can be held liable if the information in the prospectus is misleading. This can be the case when the information is incorrect or when important information is omitted. In deciding whether information is misleading, an objectified standard is applied.

It does not matter if the specific investor was actually misled, but an assessment will be made to determine whether the prospectus can mislead any reasonably informed, prudent and observant average investor who is prepared to study the relevant information but does not possess specialist knowledge.

In theory, non-monetary compensation would also be possible for IPO-related claims, but such remedies are usually not sought or rewarded.

Stibbe

**Pieter Schütte** **pieter.schütte@stibbe.com**
**Nora Offergelt** **nora.offergelt@stibbe.com**
**Derk Lemstra** **derk.lemstra@stibbe.com**

Beethovenplein 10
1077 WM Amsterdam
The Netherlands

Tel: +31 20 546 06 06
Fax: +31 20 546 01 23
www.stibbe.com

# New Zealand

**Michael Pritchard**
Mayne Wetherell

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

In 2016, there were three main board IPOs in New Zealand with a total market capitalisation of NZ$562 million, the largest listing being Investore Property. This is the same number of IPOs as the previous year, suggesting a trend that around three IPOs a year is to be expected. Several much larger IPOs were planned by domestic issuers during 2016, although these IPOs did not come to market.

In addition, during 2016, Oceania Natural and Marlborough Wine Estates joined the NXT, New Zealand's alternative market, and NZME and Tilt Renewables joined the main board through compliance listings following their respective demergers.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Most listed issuers in New Zealand are domestic businesses. New Zealand-based businesses typically have their primary listing in New Zealand, with larger businesses dual listing on the Australian exchange. However there has been a recent move by some New Zealand companies to list offshore instead (namely Sistema, Bendon, Brew Group, Volpara Health Technologies, 9 Spokes and Powerhouse Ventures). Overseas companies, primarily from Australia and the United Kingdom, comprise about 10 per cent of the issuers listed on New Zealand's main board.

### 3 What are the primary exchanges for IPOs? How do they differ?

The primary stock exchange for IPOs in New Zealand is the NZX Main Board, which is owned and operated by NZX Limited, a company that itself is listed on the NZX Main Board. The NZX Main Board is designed for large and established companies. Entities listing on the NZX Main Board generally must have an expected market capitalisation on listing of NZ$50 million or more.

A second market operated by the NZX is the NXT Market. The NXT is an alternative market that is specifically designed to simplify listing and lower costs for small to medium-sized businesses. Entities listing on the NXT Market must have an expected market capitalisation on listing of more than NZ$10 million and less than NZ$100 million, and if making a public offer prior to listing, raise more than NZ$5 million in that offer.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Financial Markets Authority and the NZX are co-regulators of IPOs.

The Financial Markets Authority, a governmental authority, is the principal regulator of New Zealand's capital markets. The Financial Markets Authority aims to promote the development of fair, efficient and transparent financial markets, and the confident and informed participation of businesses, investors and consumers in financial markets. The Financial Markets Authority oversees the NZX's markets to, among other things, ensure that offer documents for IPOs comply with the law, enforce the disclosure obligations of market participants, and take action against market misconduct such as insider trading and market manipulation.

The NZX, a publicly owned business, is responsible for monitoring and enforcing the rules under which the NZX's markets operate. Entities listing on the NZX's markets are required to enter into a listing agreement with the NZX under which they agree to be bound by the listing rules.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

An issuer must apply (through an organising broker) to the NZX to be listed before it can conduct an IPO on an NZX market. The NZX may approve or reject an application in its sole discretion. For a main board listing, the issuer generally must satisfy the following criteria:

- the expected market capitalisation on listing is NZ$50 million or more;
- the expected market value of the securities to be listed is at least NZ$5 million;
- the issuer will be 'widely held' such that its securities are held by at least 500 members of the public holding at least 25 per cent of the securities of that class; and
- each security holder will hold at least a 'minimum holding', as prescribed by the listing rules.

The key documents that need to be provided to the NZX in an application for listing are:

- an executed listing agreement in which the issuer agrees to comply with the listing rules;
- acknowledgements by each director that he or she is aware that the issuer is contractually bound to observe the listing agreement and the listing rules and will use his or her best endeavours to procure compliance by the issuer with the listing rules;
- the proposed offering document and advertisements for the offer;
- the issuer's constitution and certificate of incorporation;
- confirmation that fees will be paid to the NZX;
- delivery of a bond to secure money payable to the NZX under the listing rules;
- copies of annual reports for the past five years, if available; and
- if quotation of the securities is sought at the time of listing, more detailed information in respect of those securities.

### 6 What information must be made available to prospective investors and how must it be presented?

Issuers must publish an offering document called a product disclosure statement (PDS). A PDS is the key document for communicating with potential investors. In essence, a PDS must provide all the information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the securities. The PDS must have the following sections:

- a key information summary, which sets out the salient features of the IPO;
- the name of issuer and what it does;
- purpose of the offer;

- key dates and offer process;
- terms of the offer;
- key features of the securities;
- the issuer's financial information (including prospective financial information);
- risks to the issuer's business and plans;
- tax;
- where you can find more information;
- how to apply; and
- contact information.

The PDS must be presented in a clear, concise and effective manner, and the content, format and length of the PDS is prescribed by legislation. The amount and type of information that can be disclosed in the PDS is accordingly limited.

More detailed information about the IPO can be lodged on the Disclose Register, a register administered by the New Zealand Companies Office, a government entity. The Disclose Register must include the PDS and all other material information relating to the IPO not included in the PDS.

In addition to the above, listed companies are subject to continuous disclosure rules under the listing rules. The continuous disclosure rules require the issuer, once it becomes aware of any material information concerning it, to immediately release that material information to the NZX. Material information is information that is likely to have a material effect of the value of the securities. Examples include a change in the issuer's financial forecast, a recommendation or declaration of a dividend, or the giving or receiving of a notice of intention to make a takeover.

### 7 What restrictions on publicity and marketing apply during the IPO process?

Under New Zealand's securities laws, an advertisement is any form of communication made to the public or a section of the public for the purpose of promoting the offer or intended offer of securities.

Before the PDS is lodged with the registrar, an issuer may advertise the offer to the public provided that the advertisement contains a statement that:

- no money is currently being sought;
- securities cannot currently be applied for or acquired under the offer;
- the offer will be made in accordance with the Financial Markets Conduct Act, New Zealand's securities legislation; and
- if the issuer wishes, specifies the issuer is seeking preliminary indications of interest and, in that case, specifies how indications of interest can be made.

After the PDS is lodged with the registrar, an issuer may advertise the offer to the public provided that the advertisement includes a statement that identifies the issuer and (if applicable) the offeror of the securities, a statement that indicates that the PDS for the offer is available and how and where it can be obtained, and does not contain anything that is materially inconsistent with the PDS or the register entry.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

The Financial Markets Authority and the NZX use a variety of enforcement tools and sanctions depending on the circumstances and the regulatory outcomes that the regulator seeks to achieve.

**Financial Markets Authority**

The Financial Markets Authority is primarily responsible for enforcing the Financial Markets Conduct Act. For minor breaches of the Financial Markets Conduct Act, the Financial Markets Authority is likely to simply issue a warning letter to the issuer. For moderate breaches, the Financial Markets Authority may publish a public warning about the issuer, or issue infringement notices, injunctions, stop orders and direction orders against the issuer.

For more serious breaches, there is the potential for civil or criminal liability under the Financial Markets Conduct Act. The Financial Markets Authority may bring proceedings in a New Zealand court against the issuer, the directors of the issuer, and persons involved in the relevant contravention.

Sanctions for civil liability include declarations of contravention, civil pecuniary penalty orders and compensatory orders. Civil liability is strict, meaning that an issuer or person who contravenes a civil liability provision is liable unless they can rely on a defence. The Financial Markets Conduct Act includes robust defences for issuers with good corporate governance structures and due diligence procedures in place.

Criminal liability under the Financial Markets Conduct Act requires proof of fault in the form of knowledge or recklessness (except for a few minor infringement offences). Once proven, possible criminal sanctions include fines and imprisonment.

**NZX**

The NZX's enforcement team is responsible for investigating suspected breaches of the listing rules, by which listed issuers are contractually bound, and takes action where required.

For minor breaches, potential enforcement options include 'obligations' letters', which simply note the breach and require the issuer review its compliance framework, infringement fees, and the imposition of additional requirements to assist the issuer to comply with the listing rules. For more serious breaches, NZX may halt or suspend trading of an issuer's securities, cancel an issuer's listing, or refer the issuer to the Financial Markets Authority for investigation.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

Generally, an IPO process takes around five months and follows a timetable similar to that set out below.

**Weeks 1–2**

IPO advisers and the due diligence committee are appointed. A due diligence process memorandum is prepared, which sets out the objectives and scope of the due diligence process, including any materiality thresholds. Advisers identify any necessary corporate restructuring, whether overseas investment approvals or other regulatory approvals are required, and provide advice to the board of the issuer about the securities law regime.

**Weeks 3–15**

The due diligence process is undertaken, and the offer documents, financial forecasts and transaction documents relating to the proposed offer structure are prepared. The offer structure is finalised. If applicable, overseas investment and other regulatory approval applications are finalised. A 'non-deal roadshow' is frequently undertaken during this time to raise awareness and commence investor education.

**Weeks 16–18**

Regulatory review of offer document.

**Weeks 19–20**

The due diligence committee and the board of the issuer approves and registers the final offer document. The issuer typically undertakes a 'deal roadshow' with institutional and retail investors.

**Weeks 21–22**

Bring-down due diligence is completed and securities are allotted. Trading on the NZX Main Board can begin.

### 10 What are the usual costs and fees for conducting an IPO?

The costs of conducting an IPO include the NZX listing fees, and the appointment of advisers, including investment banks, lawyers, accountants and underwriters. Other fees will vary and depend on the size and complexity of the business and the offer structure. Larger IPOs can involve fees in excess of NZ$1 million.

The NZX charges various fees, including:

- Pre-listing fee: on making an application for listing, an issuer must pay a pre-listing fee equal to 25 per cent of the applicable initial listing fee (with a maximum pre-listing fee payable of NZ$100,000). For the purpose of calculating the pre-listing fee, the initial listing fee is based on the NZX's estimate of the issuer's market capitalisation.

**Update and trends**

The number of companies listed on the NZX Main Board is reasonably stable. In 2016, the new entrants to the markets were balanced by de-listings following takeovers. With a modest number of IPOs per year, this stability is expected to continue.

- Initial fees: initial fees apply to issuers quoting a new class of securities on an NZX market for the first time, as is the case for an IPO. The initial fee is calculated based on the market capitalisation of the issuer at the close of trading on the first day. For example, if the market capitalisation of the issuer is between NZ$50 million to NZ$149.9 million at the close of trading on the first day, the fee payable will be the sum of a NZ$68,250 base fee plus an additional charge of 0.057750 per cent of the market cap above NZ$50 million.
- Subsequent fees: payable on the allotment of additional quoted securities. Subsequent fees are based on the value of the additional quoted securities that are allotted by the issuer.
- Annual fees: payable annually in July for the prospective 12 months to 30 June. Annual fees are determined at NZX's discretion based on a combination of the market capitalisation of the issuer and the position of that issuer in the S&P/NZX 50.
- Other fees: payable for other matters including administrative, review and approval services.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The board of a listed company must be composed of a minimum of three directors, of which two directors must be ordinarily resident in New Zealand. The board must have at least two independent directors or, if there are eight or more directors on the board, the minimum number of independent directors is three or one-third of the total number of directors (rounded down to the nearest whole number), whichever is greater.

NZX has recently published a corporate governance code to promote strong governance. Issuers are not required to comply with the code, but they must include a statement in their annual report as to whether and, if so, how the corporate governance practice of the issuer materially differs from the code.

Some of the code recommendations are:

- Code of ethics: each listed issuer should formulate a code of ethics that deals with, among other things, conflicts of interest, receipt and use of corporate information and assets, directors giving proper attention to the matters before them, a general obligation to act honestly and in the best interests of the company as required by law, and compliance with any other applicable laws, regulations and rules.
- Separation of chief executive and chairman: a director should not simultaneously hold the positions of chief executive and chairman of the board of the same listed issuer.
- Director remuneration: every listed issuer should have a formal and transparent method to recommend director remuneration packages to shareholders. Directors are encouraged to take a portion of their remuneration under a performance-based equity security compensation plan.
- Committees: every listed issuer should have an audit committee, a remuneration committee and a nominations committee.
- Independent auditor: the board should establish a formal and transparent procedure for sustaining communication with the listed issuer's independent and internal auditors.

### 12 Are there special allowances for certain types of new issuers?

Relevant to small and medium-sized business, the NZX corporate governance code explicitly recognises that issuers are not required to establish a nomination committee or a remuneration committee if they are constrained by size. For companies that choose to list on the NXT market rather than the NZX Main Board, the corporate governance rules are less prescriptive.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

A company's ability to implement anti-takeover devices is restricted by prohibitions on defensive tactics under the New Zealand Takeovers Code. The Takeovers Code sets out New Zealand's takeovers regime, which applies to transactions and events that impact on the voting rights attaching to the shares owned by shareholders of 'code companies'. Code companies are companies that are listed on an NZX market (or have been in the previous 12 months) or that have 50 or more shareholders and 50 or more share parcels.

A defensive tactic under the Code is any action that is taken or permitted by the directors of a target company, once the company has received a takeover notice or has reason to believe that a bonda fide offer is imminent. Examples of defensive tactics include acquiring or disposing of a major asset, incurring a material new liability or making a material change to an existing liability, or undertaking material issues of new shares. The Takeovers Panel (New Zealand's takeovers regulator) may issue a restraining order or a permanent compliance order against the company if it determines that the company has implemented defensive tactics.

Notwithstanding the above, defensive tactics may be implemented if:

(i) the action has been approved by an ordinary resolution of the shareholders of the code company;
(ii) the action is taken under a contractual obligation entered into by the code company, or in the implementation of proposals approved by the directors of the code company, and the obligations were entered into, or the proposals were approved, before the code company received the takeover notice or became aware that the offer was imminent; or
(iii) if paragraphs (i) and (ii) do not apply, the action is taken or permitted for reasons unrelated to the offer with the prior approval of the Takeovers Panel.

Companies may also be restricted from implementing anti-takeover devices in some cases because of its directors' duties to act in the best interests of the company and to exercise his or her powers for a proper purpose.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

Any foreign issuer can apply to list on the NZX Main Board if it meets the admission criteria, detailed in relation to question five. In some cases, a foreign issuer may be able to list as a 'dual-listed issuer' or an 'overseas-listed issuer'.

**Dual-listed issuer**

An issuer incorporated in Australia, which is listed on the Australian stock exchange (ASX), may list on the NZX Main Board as a dual-listed issuer. NZX applies a substituted compliance approach to dual-listed issuers. This means that dual-listed issuers are only required to comply with a few relatively non-burdensome NZX listing rules, if they also comply with the ASX listing rules.

**Overseas-listed issuer**

An issuer that is already listed on a 'recognised overseas exchange' can also list on the NZX Main Board as an overseas-listed issuer. The current recognised overseas exchanges are the London Stock Exchange, the Nasdaq Stock Market and the New York Stock Exchange. Overseas-listed issuers are exempt from compliance with the NZX listing rules, if they comply with the rules of the relevant recognised stock exchange.

### 15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

It is relatively simple for an Australian issuer that chooses to IPO to extend the offer into New Zealand, which may be useful to reach a

greater number of potential investors. Australia and New Zealand have a mutual recognition scheme that allows companies to offer securities in Australia and New Zealand using the same offering document prepared under the laws of the issuer's home country. The aim of the scheme is to remove unnecessary regulatory barriers to trans-Tasman securities offerings and reduce the costs of capital-raising.

Otherwise, foreign issuers offering securities in New Zealand will generally have to comply with New Zealand disclosure requirements if they wish to sell securities to New Zealand investors. A foreign issuer may apply for an exemption from some New Zealand securities laws if the regulatory standards of their home country are equivalent to those in New Zealand.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

**Investors**

Although New Zealand does not currently have a comprehensive capital gains tax, there are instances where an investor will be subject to New Zealand tax on gains the investor makes on the sale or disposal of its securities (or be allowed a deduction for any loss made). The individual circumstances of the investor will determine whether the securities are held on revenue account (such that gains are taxable) or held on capital account (such that gains are not taxable).

New Zealand operates an imputation regime under which income tax paid by the issuer gives rise to credits, known as imputation credits, which can be attached to distributions that it pays. Imputation credits attached to distributions may be used by New Zealand tax resident investors as a credit against their tax liability in respect of the distributions.

The tax treatment of distributions paid by an issuer will depend on whether the investor is a resident in New Zealand (in which case resident withholding tax is deducted from payments) or non-resident for tax purposes (in which case non-resident withholding tax is deducted).

**The issuer**

In addition to usual tax diligence, the issuer should consider the impact that a loss of shareholder continuity may have on accrued tax losses or on imputation credits.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

Investors can seek redress by bringing civil proceedings in a New Zealand court or by lodging a complaint with the Financial Markets Authority. One of the Financial Markets Authority's enforcement powers (detailed in relation to question eight), which is particularly useful for investors, is a declaration of contravention. A declaration of contravention enables an applicant for a compensatory order or other civil liability order to rely on the declaration rather than spending time and effort proving the contravention.

### 18 Are class actions possible in IPO-related claims?

Class actions are not common in New Zealand but they are possible. A 'representative action' may be brought under the Companies Act 1993 where a shareholder of a company brings proceedings against a company or a director and other shareholders have the same or substantially the same interest in relation to the subject matter of the proceedings. One of New Zealand's highest profile representative actions, referred to as *Houghton v Saunders* [2017] NZSC 55, was in relation to an IPO.

New Zealand's securities laws facilitate class actions with a 'presumption of loss', whereby if there has been defective disclosure and an investor has lost money, the loss is deemed to be a result of the contravention unless some other cause is proven. This presumption makes class actions significantly easier, where previously proving causation in relation to each plaintiff's loss would be difficult.

### 19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

The cause of action underlying most of the securities law litigation in New Zealand is defective disclosure. An offeror must not offer, or continue to offer, securities to retail investors if:

- there is a statement in the PDS, any application form that accompanies the PDS, or the register entry that is false or misleading or is likely to mislead; or
- there is an omission from the PDS, or the register entry, of information that is required to be contained in the PDS, or the register entry, under the Financial Markets Conduct Act or associated regulations; or
- a circumstance has arisen since the PDS was lodged with the Disclose Register registrar that would have been required by the Financial Markets Conduct Act or associated regulations to be disclosed or otherwise contained in the PDS, or the register entry, if it had arisen before the PDS was lodged, and the circumstance is not disclosed; and
- the matter is materially adverse from the point of view of an investor.

Liability may attach to the issuer who offered the securities, the directors at the time of the contravention, and persons involved in the contravention. As to remedies, the issuer and directors may be liable for civil sanctions including compensatory orders and, where the defective disclosure is committed knowingly or recklessly, criminal liability.

Mayne Wetherell

**Michael Pritchard** **michael.pritchard@maynewetherell.com**

Level 5, Bayleys House
30 Gaunt Street
Auckland 1010
New Zealand

Tel: +64 9 921 6000
Fax: +64 9 921 6001
www.maynewetherell.com

# Singapore

**Loo Choon Chiaw, Gerald Cheong and Jasselyn Seet**

**Loo & Partners LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The Singapore Exchange (SGX) maintains two boards: Mainboard and Catalist. Mainboard is positioned for relatively larger and more established companies with sustained track records, whereas Catalist is a sponsor-supervised listing platform for fast-growing local and international companies that do not need to meet any minimum earnings, operational track record or market capitalisation requirements. As of May 2017, the SGX has a total of 751 listings, comprising 559 listings and 192 listings on Mainboard and Catalist, respectively. The total market capitalisation was approximately S$1.0 trillion.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The SGX is considered an international exchange, with a sizeable segment of foreign issuers. As of May 2017, the SGX has a listing of 163 foreign issuers, which constituted approximately 22 per cent of the total listed companies. The majority of the foreign issuers are from the People's Republic of China, which has accounted for a total of 112 listings, and the remaining 51 listings are from various other countries, including South East Asian countries (eg, Australia, India Japan, Korea) and countries in Europe and the United States. It is therefore not surprising that the SGX prides itself on being the 'the Asian Gateway' to allow foreign issuers in the region to tap into the Asian capital markets. Apart from attracting international listing issuers, the SGX also has strong listings in diverse industries, which can be broadly classified into 10 sectors based on the Industry Classification Benchmark: basic materials, consumer goods, consumer services, financials, healthcare, industrials, oil and gas, technology, telecommunications and utilities.

### 3 What are the primary exchanges for IPOs? How do they differ?

The SGX is the sole stock market exchange in Singapore.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Monetary Authority of Singapore (MAS) supervises the securities industry and is responsible for the administration of the Securities and Futures Act (Chapter 289) (SFA). The SFA prescribes prospectus requirements and contains various provisions regulating the securities market. For instance, section 243 of the SFA provides that issuers and their advisers must disclose all information that investors and their professional advisers would reasonably require to make an informed assessment of the relevant securities. In addition, in the event of an initial public offering of shares, a prospectus must contain the documents and information prescribed in the Fifth Schedule of the Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2005 (Fifth Schedule of the SFR).

The SGX supervises the securities market on a day-to-day basis and oversees the disciplinary procedures and rule changes. Listing of securities on Mainboard and Catalist is regulated by the SGX Rules (Mainboard Rules or Catalist Rules, where applicable, and collectively, the SGX Rules), where the criteria for listing and the obligations of listed companies can also be found.

As Catalist is a sponsor-supervised listing platform, issuers that wish to be admitted on the Catalist must do so with an approved sponsor. The SGX does not directly review an issuer's application for admission to Catalist or directly supervise the issuers listed on Catalist. However, it retains absolute discretion concerning the admission and listing of a company and may vary or impose additional conditions. The onus to ultimately qualify an issuer seeking admission falls upon the sponsor. Sponsors are qualified professional companies experienced in corporate finance and compliance regulatory work authorised by the SGX to act as gatekeepers, advisers and regulators of Catalist issuers.

There are two types of sponsors in Singapore: full sponsors and continuing sponsors. Full sponsors will assess issuers' suitability to list and will advise and guide the issuers through the listing process. They are authorised to assume IPO and post-IPO continuing sponsorship activities, while continuing sponsors are authorised to take on only post-IPO continuing sponsorship activities. After listing, the relevant full sponsor must act as the continuing sponsor for the issuer for at least three years after admission, unless approval from the SGX has been obtained. In exceptional circumstances, the SGX may grant such approval. The continuing sponsor must comply with certain obligations, including without limitation, advising the issuer on compliance with Catalist Rules, reviewing announcements to be released by the issuer to the market, monitoring the trading of the issuer's listed securities and seeking and reviewing reasons for any unusual fluctuations in the price and volume of the listed securities. In the event that the continuing sponsor forms an opinion that the issuer has breached the Catalist Rules, or that trading of the issuers' securities should be halted or suspended, it must notify the SGX promptly.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

An applicant seeking listing on the Mainboard may consult the SGX to resolve specific issues prior to submission of the application. It is required to submit its listing application in accordance with the requirements under the Mainboard Rules. Generally, there is a two-stage submission process. Stage 1 refers to the submission of Section (A) of the Listing Admissions Pack (including information of the applicant and key issues for the SGX's assessment on whether these issues have been adequately resolved). Applications may be referred to the Listing Advisory Committee (LAC) if the SGX is of the view that there are issues that meet the LAC referral criteria. Stage 2 refers to the submission of Section (B) of the Listing Admission Pack, together with the full listing application (including the relevant undertakings and confirmations required under the Mainboard Rules and the prospectus). The SGX will decide whether to issue an eligibility-to-list (ETL) (with or without conditions) letter, which is valid for three months. Listing will not be permitted until all conditions set out in the ETL letter have been satisfied.

The listing application is intended to serve the purpose of placing before the SGX the information essential in determining the suitability of the applicant for admission to the Official List of (and its securities for public trading on) the SGX. The applicant, its issue manager and all professionals who are involved in the preparation of the listing

application must ensure that all information that is material to the SGX's decision on the application is made available promptly to the SGX. The contents in the offer document or prospectus must include information in sufficient detail to enable targeted investors to have a full and proper understanding of the issuer's business, financial conditions, prospects and risks.

Once the submission is approved, the applicant may lodge the preliminary prospectus with the MAS for public feedback for at least one week. After lodgement of the preliminary prospectus, a bookbuilding exercise may commence where the applicant may find cornerstone and institutional investors. The applicant may also decide to discuss with the issue manager a suitable underwriting agreement. Once the final prospectus is registered with MAS, the offer period commences and applications to subscribe for the applicant's securities begin.

An applicant seeking listing on Catalist may arrange for consultations with the SGX, together with its full sponsor and professional parties, to present major issues and possible solutions to the SGX before pre-admission notification is submitted to the SGX. After receipt of clearance from the SGX for the pre-clearance consultation, the applicant may submit the pre-admission notification to apply for a listing. The SGX is committed to provide a response within four to five weeks from the date of submission of the pre-admission notification. Thereafter, the applicant is required to lodge the preliminary offer document with the SGX (as agent of the MAS), for public exposure for at least 14 calendar days. After lodgement of the preliminary prospectus, the bookbuilding exercise may commence where the applicant may find cornerstone and institutional investors. The applicant may also decide to discuss with the full sponsor a suitable underwriting agreement. Once the final offer document is registered with the SGX, the offer period commences and applications to subscribe for the applicant's securities starts.

### 6 What information must be made available to prospective investors and how must it be presented?

Section 243 of the SFA and the Fifth Schedule of the SFR set out the necessary information and documents that must be made available to prospective investors.

Briefly, the information must be presented in an offering document known as the prospectus (in the case of a Mainboard listing) or offer document (in the case of a Catalist listing), and has to be information that investors and their professional advisers would reasonably require to make an informed assessment of the following:

- the rights and liabilities attaching to the securities;
- the assets and liabilities, profits and losses, financial position and performance, and prospects of the issuer; and
- the assets and liabilities, profits and losses, financial position and performance, and prospects of the entity if it is controlled by:
  - the person making the offer;
  - one or more of the related parties of the person making the offer; or
  - the person making the offer and one or more of his or her related parties.

In the case of an offer of units of shares or debentures, and in which the person making the offer, or an entity that is controlled by:

- the person making the offer;
- one or more of the related parties of the person making the offer; or
- the person making the offer and one or more of his or her related parties is or will be required to issue or deliver the relevant securities, or to meet financial or contractual obligations to the holders of those units, the capacity of that person or entity to issue or deliver the relevant securities, or the ability of that person or entity to meet those financial or contractual obligations, must be attested to.

### 7 What restrictions on publicity and marketing apply during the IPO process?

Under section 251 of the SFA, a person shall not advertise an offer or an intended offer, or publish a statement that directly or indirectly refers to the offer or intended offer, or is reasonably likely to induce persons to subscribe to or purchase the securities ('advertising effect'), unless the advertisement or publication contains only the following:

- a statement that identifies the securities, the person making the offer, the issuer and, where applicable, the underlying entity;
- a statement that a prospectus or profile statement for the offer will be made available when the offer is made;
- a statement that anyone wishing to acquire the securities will need to make an application in the manner set out in the prospectus or profile statement; and
- a statement of how to obtain, or arrange to receive, a copy of the prospectus or profile statement.

In determining whether a statement has the aforesaid advertising effect, regard should be paid to whether the statement forms part of the normal advertising of an entity's products or services and is genuinely directed at maintaining its existing customers, or attracting new customers, for those products or services, communicates information that materially deals with the affairs of the entity, and is likely to encourage investment decisions being made on the basis of the statement rather than on the basis of information contained in a prospectus or profile statement.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Sections 253 and 254 of the SFA impose both criminal and civil liability for:

- false or misleading statements contained in the prospectus;
- omission of any information required to be included in the prospectus under section 243 of the SFA; and
- omission to state any new circumstances (which would have been required to have been disclosed in the prospectus had it arisen before lodgement) that have arisen since lodgement of the prospectus.

The persons liable include the listed issuer, its directors, proposed directors, issue manager and underwriter (but not sub-underwriter). If found guilty of criminal liability under section 253 of the SFA a person would be punishable by a fine not exceeding S$150,000, or to imprisonment for a term not exceeding two years, or to both. He or she may also be liable under section 254 of the SFA to compensate any person who suffers loss or damage as a result of the false or misleading statement in, or omission from, the prospectus, even if such persons, unless otherwise specified, were not involved in the making of the false or misleading statement or the omission.

Section 203 of the SFA creates a statutory obligation on the listed issuer and others to comply with the SGX's continuing disclosure requirements, if the listed issuer or responsible person is required by the SGX Rules to notify the SGX of information on specified events or matters as they occur or arise for the purposes of the SGX making that information available to a securities market operated by the SGX. The listed issuer must not intentionally, recklessly or negligently fail to notify the SGX of such information as is required to be disclosed under the SGX Rules.

A person who contravenes section 203 of the SFA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$250,000 or to imprisonment for a term not exceeding seven years or both. A person who contravenes section 251 of the SFA regarding restrictions on publicity prior to registration of a prospectus shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$50,000 or to imprisonment for a term not exceeding 12 months or to both, and in the case of a continuing offence, to a further fine not exceeding S$5,000 for every day or part thereof during which the offence continues after conviction. Section 331 of the SFA provides that an offence under the SFA committed with the consent or connivance of, or attributable to any neglect on the part of, an officer of the body corporate makes that officer guilty of the offence as well.

For issuers listed on Catalist, a sponsor is expected to whistleblow to the SGX when an issuer has or is suspected to have breached the Catalist Rules.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

A typical IPO process in Singapore for a Mainboard listing takes approximately nine to 12 months, from the kick-off of the IPO to a successful listing. The key steps of the IPO process include the following:

- preparation: this includes the appointment of issue manager and other professionals, conduct of due diligence on the issuer, audit of the financial accounts of the issuer, preparation of prospectus and necessary documents required for submission to the SGX, and pre-clearance consultation with the SGX, all of which may take approximately six to nine months;
- submission to the SGX: during this step, the issuer needs to address all queries raised by the SGX;
- if there are no further queries from the SGX and no major issues regarding the issuer, the SGX will issue the eligibility-to-list letter and the preliminary prospectus may be lodged with the MAS website for public feedback. After the lodgement of the preliminary prospectus, the issuer may commence its marketing activities to cornerstone or institutional investors;
- during the public exposure period, the issuer may receive queries from the MAS and must address them, a process that may last for about two to three weeks; and
- if there are no further queries from the MAS and no major issues regarding the issuer, the final prospectus will be registered with the MAS website. After the final prospectus is registered, the public may start subscribing for the issuer's IPO shares.

After one to two weeks of public subscription, the shares will be officially listed and quoted on the SGX and trading commences.

The IPO process for a Catalist listing may be relatively shorter than for a Mainboard listing, but it depends on the complexity and issues arising out of the IPO process.

The key steps of a typical listing on Catalist include the following:

- preparation: this includes meeting with a full sponsor, appointment of a full sponsor to work with on the listing, planning the listing strategy with the full sponsor, presenting major issues and possible solutions to the SGX through the sponsor, all of which may take approximately three to four months, subject to the listed issuer's process;
- after preparation, a pre-admission notification will be submitted to the SGX with the draft preliminary offer document. It usually takes approximately four to five weeks for the SGX to review and provide a response to confirm whether the issuer may proceed with the lodgement of the preliminary offer document;
- upon clearance by the SGX, the preliminary offer document will be lodged with Catalodge (SGX) for public feedback for at least 14 calendar days, unless extended by the SGX; and
- the final offer document will be registered with Catalodge and the issuer may launch its IPO for public subscription.

### 10 What are the usual costs and fees for conducting an IPO?

The usual costs and fees for conducting an IPO in Singapore are mainly the following:

| Costs/fees | Description |
|---|---|
| Listing fees | Mainboard: a minimum fee of S$100,000 and a maximum fee of S$200,000 (based on S$100 per million dollars or part thereof of the market valuation at admission), coupled with a fixed non-refundable processing fee of S$20,000 for an application for admission to Mainboard.<br>Catalist: a minimum fee of S$30,000 and a maximum fee of S$100,000 (based on S$100 per million dollars or part thereof of the market value at admission), coupled with a fixed non-refundable administrative fee of S$2,000 for an application for admission to the Catalist. |
| Underwriters' and placement fees | Typically range from 3.5 per cent to 5.0 per cent of the size of the offer. |
| Professional fees | Mainly for the issue manager or sponsor, solicitors to the IPO, solicitors to the issue manager or sponsor (if required), foreign solicitors to the issuer or issue manager or sponsor (if required) auditors, industry expert, valuer, receiving bank and share registrar. The professional fees vary in each case, taking into account various factors, such as the complexity of the matter and time required for the preparation of the listing. |
| Miscellaneous fees | Public relations, printers and translation (if required). |

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

All companies listed on the SGX are required to comply with the corporate governance requirements set out in the Code of Corporate Governance 2012 (Code). The Code prescribes, inter alia, the board composition requirements as well as the establishment and functions of board committees.

The Code requires issuers to have a strong and independent element on the board of directors of the issuer (board) so as to exercise objective judgment on corporate affairs independently. In most cases, independent directors make up at least one-third of the board; however, in cases where the chairman of the board (chairman) and the chief executive officer of the issuer (CEO) is the same person, the chairman and the CEO are immediate family members, the chairman is part of the management team, or the chairman is not an independent director, independent directors must make up at least half of the board. In such a scenario, the Code also requires that the issuer appoint an independent director to be the lead independent director. This lead independent director should be available to shareholders to address their respective concerns, if any.

The board is required to establish three board committees: the nominating committee (NC), the remuneration committee (RC) and the audit committee (AC).

The NC ensures that there is a formal and transparent process for the appointment and re-appointment of directors to the board. Generally, the NC comprises at least three directors, the majority of whom, including the NC chairman, are independent. Their authority and duties are set out in written terms of reference, which include assessing and determining the independence of a director and carrying out a formal annual assessment of the effectiveness of the board as a whole and its board committees.

The RC ensures that there is a formal and transparent procedure for developing policy and executive remuneration, and fixing the remuneration packages of individual directors. Generally, the RC comprises at least three directors, the majority of whom, including the RC chairman, are independent. All of the members of the RC should be non-executive directors to minimise the risk of any potential conflict of interest. Their authority and duties are set out in written terms of reference, which include the review and recommendation to the board of a general framework of remuneration and specific remuneration package for the board and key management personnel. Such recommendation needs to be approved by the entire board.

The AC ensures the integrity of the financial statements through overseeing the issuer's financial reporting process, internal control system and audit function. Generally, the AC comprises at least three directors, the majority of whom, including the AC chairman, are independent. All of the members of the AC should be non-executive directors. The AC should have recent and relevant accounting or related financial management expertise, or experience to carry out its authority and duties, which are set out in written terms of reference.

### 12 Are there special allowances for certain types of new issuers?

As the SGX introduces stricter admission criteria for issuers seeking to list on Mainboard, smaller or growing companies are more likely to head for listing on the Catalist platform.

Catalist is an attractive alternative for smaller companies with short track records as there is no quantitative entry criteria requirement such as minimum operating track record, profit or share capital requirement to be fulfilled. Instead, approved sponsors decide whether the listing applicant is suitable to be listed (including being satisfied that the working capital available to the listing applicant, as at the date of lodgement of the offer document, is sufficient for the present requirements and for at least 12 months after listing). Therefore, there is more room for growth and it is not surprising for companies listed on Catalist to outperform companies listed on Mainboard.

Nonetheless, all companies, regardless of size or listing platform, are subject to the corporate governance standards under the Code. Compliance with the Code is not mandatory but listed companies are required under the Mainboard Rules and Catalist Rules to disclose their corporate governance practices and give explanations for deviations

from the Code in their annual reports. All listed companies are also required to comply with the corporate disclosure rules and corporate disclosure policy set out in the Mainboard Rules and Catalist Rules.

With the support of China Securities Regulatory Commission (CSRC), SGX offers a platform for Chinese companies that meet Singapore's regulatory and governance standards to seek a direct listing on the SGX Mainboard under the direct listing framework. Under such framework, the applicants must meet the prescribed requirements, which include:

- filing applications with the CSRC and SGX;
- complying with all relevant laws and regulations in China, as well as all requirements and regulatory standards of SGX and Singapore;
- review of the application by CRSC before granting administrative licensing approval for the issuer's listing in Singapore;
- receipt of an eligibility-to-list letter from the SGX, which shall be subject to administrative licensing approval and satisfactory review; and
- the financial statements of the applicants having been audited by certified public accountants in accordance with the required auditing standards.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

The SFA and the Singapore Code on Take-overs and Mergers (Take-over Code) set out provisions that may discourage or prevent a future takeover of an issuer in Singapore. The Take-over Code applies to, inter alia, Singapore-incorporated public companies listed on the SGX.

Under the Take-over Code, any person acquiring shares in an offeree company (either on its own or together with persons acting in concert with it) worth 30 per cent or more of the voting rights of the offeree company, triggers an obligation to make a mandatory offer and must, except with the consent of the Securities Industry Council, extend a takeover offer for the remaining voting shares not already owned by that person or the person acting in concert with it. A person holding between 30 per cent and 50 per cent of a company's voting shares, either on its own or together with persons acting in concert with it, must also make a takeover offer if that person, together with persons acting in concert with it, acquires in any six-month period additional shares carrying more than 1 per cent of the voting rights. Such provisions may delay, deter or prevent transactions that involve an actual or threatened change of control of the offeree company.

Issuers may also defend a hostile takeover bid. While it must not take any action without its shareholders' approval that could effectively result in a bona fide offer being frustrated or its shareholders being denied any opportunity to decide on the merits of the offer, the issuer's board may pursue other corporate initiatives, including looking for friendly investors to place a competing bid. The board can declare dividends and issue employee share options although only to the extent that such actions are in the ordinary course of business. The board may also recommend that its shareholders reject the offer.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Foreign issuers looking to list in Singapore would consider a range of factors. A main consideration would be whether Singapore provides an economic environment conducive to raising capital for growth. For example, is there an attractive pool of investors to raise capital from? Is there an active and vibrant retail market? Will there be institutional and retail demand for shares of emerging companies with small market capitalisation (many issuers fall into this category) but that have huge potential for growth?

Foreign issuers would also consider whether the listing rules and regulatory framework are favourable. Favourable policies to attract foreign listings include dual-currency trading and softer financial eligibility requirements. The continuing listing obligations imposed on foreign issuers subsequent to their listing should also not be overly onerous. Another consideration would be whether listing in Singapore raises the profile of the foreign issuer. Foreign issuers would want to list in a jurisdiction that will enable them to project an image of international or regional recognition and credibility as well as strong corporate governance.

**Update and trends**

During the first half of 2017, SGX launched nine IPOs raising total proceeds to S$464.3 million. This is less than the total proceeds of S$1.6 billion raised by nine IPOs in the same period in 2016. The new listings in the first half of 2017 encompass diverse sectors, namely real estate, consumer products and services, and industrials. While IPO activity in the first half of the 2017 is lower than last year, the second half of 2017 is expected to fare better with larger-sized deals, especially in the technology sector.

In a bid to make Singapore a more attractive listing venue to high-quality companies, SGX has sought public consultation to allow companies to list with dual-class share structures (DCS), where certain shares have higher voting rights than others. This is aligned to the global trend where DCS listings are increasingly being considered by companies in high-technology industries. SGX also entered into a memorandum of understanding with the InfoComm Media Development Authority of Singapore (IMDA) to create a streamlined pathway for fast growing IMDA-accredited technology companies to access capital markets more efficiently for expansion.

Foreign issuers may list on Mainboard or Catalist. The listing may be a primary listing or a secondary listing. Foreign issuers seeking a primary listing on Mainboard will have to comply with all the listing requirements of the SGX. In addition, an announcement must be made via SGXNET as soon as there is any change in the law of its place of incorporation that may affect or change shareholders' rights or obligations over its securities, including:

- the right to attend, speak, vote at shareholders' meetings and the right to appoint proxies;
- the right to receive rights offering and any other entitlements;
- withholding taxes on its securities;
- stamp duties on its securities;
- substantial shareholder reporting requirements for its securities;
- foreign shareholding limits on the securities;
- capital controls over cash dividends or other cash distributions payable in respect of its securities; and
- obligations to file documents or make declarations in respect of its securities.

A foreign issuer must also have at least two independent directors who are resident in Singapore.

A foreign issuer applying for a secondary listing must already be listed or will be concurrently listed on a foreign stock exchange (the home exchange) and must be, or will be, subject to the listing (or other) rules of the home exchange where it has a primary listing.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Under the SFA, all offers of securities must, prima facie, be accompanied by a prospectus to be registered with the MAS unless the offer is excluded or exempted from the prospectus requirements.

Generally, any prospectus not registered as such with the MAS and any other document or material in connection with the offer or sale, or invitation for subscription or purchase, of the shares may not be circulated or distributed, nor may the shares be offered or sold, or be made the subject of an invitation for subscription or purchase (directly or indirectly) to persons in Singapore other than:

- to an institutional investor under section 274;
- to a relevant person, or any person pursuant to section 275(1A), and in accordance with the conditions, specified in section 275; or
- otherwise pursuant to, and in accordance with the conditions of, any other applicable provision of the SFA.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

The usual tax consideration when an issuer has to carry out restructuring exercise in the preparation for IPO is the payment of stamp duty (or transfer taxes), which are levied on certain written agreements and transfer documents that effect, whether directly or indirectly, wholly or partially, any arrangements for the transfer or disposal of shares of a Singapore-incorporated company. Stamp duty is also levied on the conveyance or transfer of land. The rate of stamp duty for the transfer of shares in a Singapore-incorporated company is currently 0.2 per cent of the purchase price or the net asset value of the shares, whichever is higher. When there is no document executed for the transfer of scripless shares, stamp duty is not payable. There is no capital gains tax in Singapore.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

The forum in which IPO investors can seek redress and the mode of dispute resolution will be provided for in the prospectus. Where the IPO is to be conducted in Singapore, the IPO investors and the issuer customarily submit themselves to the exclusive jurisdiction of the Singapore courts. That said, issuers are free to impose forum selection or even non-judicial resolution of complaints in the case of an IPO, and IPO investors will have to accept such options.

### 18 Are class actions possible in IPO-related claims?

Unlike other jurisdictions that recognise class actions or a case-managed group litigation system, the representative action under Order 15, Rule 12 of the Rules of Court (Order 15) is the only general process in Singapore that enables a large number of persons to be directly involved in the litigation. Representative actions are similar to, but not the same as, statutory class action suits. The class action regime as a procedural tool includes various protections and benefits that are not present in representative actions (such as compulsory judicial approval of settlement agreements and the aggregate assessment of damages).

Under Order 15, whether a representative action may be brought depends on whether the persons seeking to be represented in the action have the 'same interest' in the proceedings. In *Koh Chong Chiah and others v Treasure Resort Pte Ltd* [2013] SGCA 52, the Court of Appeal laid down a broad and flexible approach in its interpretation of 'same interest' with a view to facilitating the conduct of mass litigation and the administration of justice. The factors that a court will take into account in determining whether persons seeking to be represented in the action have the same interest in the proceedings include whether the class of represented persons is clearly defined and whether the claimants to a representative action have significant common issues of fact or law. Whether claimants in IPO-related claims will be regarded as having the same interest in the proceedings to the extent that they are able to commence a representative action will depend on the facts of the case.

### 19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

Investors can maintain a cause of action under the provisions of the SFA or under common law.

Investors may rely on section 254 of the SFA, which provides for civil liability in respect of false or misleading statements and non-disclosures of material facts in prospectuses (see question 8). Section 255 of the SFA provides two defences to civil liability under section 254 of the SFA. First, the defendant had made all enquiries that were reasonable in the circumstances and, after doing so, believed on reasonable grounds that the statement was not false or misleading and that there was no material omission. Second, the defendant had placed reasonable reliance on information given to him or her.

At common law, issuers may potentially be liable towards investors in contract or in tort in relation to defective prospectuses and other disclosure documents. The remedies available generally include damages for breach of contract or breach of a duty of care, as the case may be.

Loo&partners LLP
俊昭法律事務所

**Loo Choon Chiaw** **ccloo@loopartners.com.sg**
**Gerald Cheong** **geraldcheong@loopartners.com.sg**
**Jasselyn Seet** **jasselynseet@loopartners.com.sg**

143 Cecil Street
Level 10, GB Building
Singapore 069542

Tel: +65 6534 3288
Fax: +65 6534 0833
www.loopartners.com.sg

# Switzerland

**Philippe A Weber and Christina Del Vecchio**
**Niederer Kraft & Frey**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

As of 31 May 2017, there has been one IPO in 2017 on the Zurich-based SIX Swiss Exchange Ltd (www.six-swiss-exchange.com). Galenica Santé, the leading Swiss fully integrated healthcare provider, completed its 1.90 billion Swiss franc initial public offering with trading commencing on 7 April 2017. In addition, Rapid Nutrition PLC, a company operating in the life sciences area, listed its ordinary shares on SIX with trading commencing on 29 March 2017.

In 2016 there were three IPOs on SIX. VAT Group AG, the leading global manufacturer of high-end vacuum valves and related products and services, successfully completed its 621 million Swiss franc initial public offering. This was followed by the initial public offerings of two Swiss residential property companies: Investis Holding AG, with a 163 million Swiss franc offering and Varia US Properties AG, which specialises in investments in the United States, with a 124 million Swiss franc offering. In addition, WISeKey International Holding Ltd listed class B shares on SIX, along with KTM Industries AG listing its ordinary bearer shares on SIX.

In 2015, there were three IPOs on SIX, worth a total of approximately 2.45 billion Swiss francs, including the IPO of Sunrise Communications Group AG, the second-largest integrated telecommunications provider in Switzerland, with a total offer size of 2.27 billion Swiss francs. The Sunrise Communications Group AG IPO was the largest Swiss IPO since 2006 and the largest telecoms IPO Europe, the Middle East and Africa holding since 2004.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

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, but Swiss companies may, nonetheless, decide to list outside Switzerland where, for example, their main centre of business is outside Switzerland. This is particularly true for companies that have re-domiciled in Switzerland or where their peer companies have tended to list on a particular market outside Switzerland. Foreign companies do list in Switzerland, especially given the flexible nature of SIX. 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. Of the 259 companies listed on SIX as of 31 May 2017, 40 have their registered offices outside Switzerland. There are no foreign companies listed on the BX Berne eXchange (www.berne-x.com).

### 3 What are the primary exchanges for IPOs? How do they differ?

SIX operates the principal equity exchange in Switzerland. As at 31 December 2016, the market capitalisation of all SIX-listed shares of issuers domiciled in Switzerland and Liechtenstein was approximately 1.4 trillion Swiss francs. As previously noted, at 31 May 2017, 259 companies were listed on SIX.

The only other equity exchange in Switzerland is BX. The BX is much smaller than SIX and mainly targets small and medium-sized Swiss enterprises. As of 31 May 2017, 17 companies were listed on the BX.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

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 legislation. Below is a summary 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 respect to IPOs and equity securities markets and exchanges in Switzerland consists of the following:

- Swiss Code of Obligations (CO) of 30 March 1911 (unofficial English translation at www.admin.ch/ch/e/rs/2/220.en.pdf);
- Financial Markets Infrastructure Act (FMIA) of 19 June 2015 (unofficial English translation at www.admin.ch/opc/en/classified-compilation/20141779/201601010000/958.1.pdf);
- Financial Market Infrastructure Ordinance of 25 November 2015 (unofficial English translation at www.admin.ch/opc/en/classified-compilation/20152105/201608010000/958.11.pdf); and
- additional ordinances issued by Swiss Financial Market Supervisory Authority (FINMA).

These statutes and regulations contain rules that impose direct obligations on issuers and other market participants, such as specific content requirements for offering and listing prospectuses, disclosure rules in respect of qualified shareholdings and rules on insider trading and market manipulation.

Currently, existing Swiss financial market regulations are undergoing significant reforms. For further information regarding these reforms and their status see 'Update and trends'.

#### 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, the SIX Group Ltd is mandated with the issuance, monitoring and enforcement of regulations related to SIX.

As noted above, 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 Financial Services Act (FinSA) and the proposed Financial Institutions Act (FinIA), 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 FinIA and there will be increased cooperation and exchanges of information between FINMA and other Swiss and foreign supervisory, regulatory, governmental and judicial authorities (for further information, see 'Update and trends').

***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 (www.six-exchange-regulation.com/en/home/profile/regulatory-board.html). 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 FinSA, any prospectus for a public offering would need to be approved by a competent authority, which is anticipated to be SIX (see 'Update and trends').

***SIX Exchange Regulation***

The SIX Exchange Regulation, an independent and autonomous entity within SIX Group Ltd (www.six-exchange-regulation.com/en/home/profile/six-exchange-regulation.html), regulates and monitors participants and issuers listed on 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.

***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 (www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board.html).

**5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?**

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, albeit 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, 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 a scheme rule check and amended drafts of the listing prospectus can be filed within the 20-SIX 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.

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 in Switzerland. However, pursuant to the new proposed prospectus regime under FinSA, any prospectus for a public offering would need to be approved by a competent authority (see 'Update and trends').

**Listing application**

Either the issuer or a 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:

- the listing prospectus (described in greater detail in question 6);
- 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;
- a copy of a current extract from the commercial register of the issuer;
- a copy of the valid articles of association of the issuer;
- evidence that the auditors of the issuer fulfil the requirements of auditors for public companies;
- an original of the duly signed declaration by the lead manager that the free float of relevant equity securities is sufficient;
- 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
- a duly signed declaration by the issuer in accordance with article 45 of the SIX Listing Rules stating that:
  - its responsible bodies are in agreement with the listing;
  - the listing prospectus and official notice (if required) are complete pursuant to the SIX Listing Rules;
  - 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;
  - the issuer has read and acknowledges the SIX Listing Rules together with any applicable Additional Rules and the corresponding implementing provisions, as well as the SIX rules of procedure and sanction regulations and recognises them expressly in the form of a declaration of consent. The issuer further recognises the board of arbitration determined by SIX and expressly agrees to be bound by any arbitration agreement. The issuer also recognises that its continued listing is conditional upon its agreeing to be bound by the version of the legal foundations that is in force at any given time; and
  - it will pay the listing fees.

**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:

- 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.
- Swiss Reporting Standard. This is aimed at domestic investors. Issuers may apply Swiss GAAP FER, with the other listing requirements remaining consistent with the International Reporting Standard.
- Standard for Investment Companies. This is for the listing of equity securities issued by investment companies (ie, companies whose sole purpose is to pursue investment schemes to generate income or capital gains, without engaging in any actual entrepreneurial activity as such and that do not operate under a licence as collective

investment scheme under the Swiss Federal Act on Collective Investments).
- Standard for Real Estate Companies. This is for the listing of equity securities issued by a real estate company (ie, companies generate at least two-thirds of their revenue from real estate-related activities).

The table below outlines the key listing requirements pursuant to these SIX regulatory standards, followed by more detailed summaries.

| Standard for equity security* | International Reporting Standard | Swiss Reporting Standard | Standard for Investment Companies | Standard for Real Estate Companies |
|---|---|---|---|---|
| **Minimum equity capital requirements (in million Swiss francs)** | 2.5 | 2.5 | 2.5 | 2.5 |
| **Financial track record** | Three years | Three years | N/A | N/A |
| **Free float in %** | 20% | 20% | 20% | 20% |
| **Free float market capitalisation (in million Swiss francs)** | 25 | 25 | 25 | 25 |
| **Financial reporting** | IFRS/US GAAP | Swiss GAAP FER, Standard according to Banking Act | IFRS/US GAAP | Swiss GAAP FER/IFRS |

* Additional standards are the Standard for Depositary Receipts and the Standard for Collective Investment Schemes

**Minimum equity capital requirements**
Pursuant to the regulatory standards, an issuer's consolidated equity capital, as reported on its consolidated balance sheet as at the first day of trading, must amount to at least 2.5 million Swiss francs for all the standards listed above. Collective investment schemes must hold assets of at least 100 million Swiss francs, but exchange-traded funds differ from classic investment funds in this respect and no minimum capitalisation requirements apply to them (although there is a requirement that one or two market makers commit to posting firm bids and asks, the spread between which does not exceed a predefined percentage of indicated net asset value).

**Financial track record**
Pursuant to the regulatory standards, an issuer must:
- have existed as a company for at least three years; and
- have produced audited annual financial statements for the 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:
- 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
- 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).

For further details, see the SIX Directive on Exemptions regarding Duration of Existence of the Issuer (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_02-DTR_en.pdf) and the SIX Directive on the Presentation of a Complex Financial History in the Listing Prospectus (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf).

**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 (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_03-DDES_en.pdf).

**Special listing requirements 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 (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf). Generally speaking, these additional requirements are not very onerous and in practice they do not pose particular issues. For further details, see question 14.

## 6 What information must be made available to prospective investors and how must it be presented?

In connection with public IPOs, issuers are currently required to publish a prospectus pursuant to both Swiss corporate law, the 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 FinSA includes certain requirements regarding the content of prospectuses, which will need to be reviewed and approved by a competent authority with respect to its completeness, coherence and comprehensibility. It is expected that SIX will be mandated to act as the competent authority to approve prospectuses. See 'Update and trends' for further information.

**Issuance or offering prospectus**
Article 652a of the CO requires an offering prospectus when new shares are offered to the public in Switzerland. The offering prospectus must include information on:
- the content of the existing entry in the commercial register, with the exception of details relating to the persons authorised to represent the company;
- 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;
- the provisions of the articles of association relating to any authorised or conditional capital increase;
- the number of dividend rights certificates and the nature of the associated rights;
- 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;
- the dividends distributed in the past five years or since the company was established; and
- 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 FinSA, any prospectus for a public offering will need to be reviewed and approved by a competent authority (see 'Update and trends'). Nevertheless, a breach of the CO prospectus requirements may, in any event, lead to prospectus liability claims (see question 19).

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.

**Listing prospectus**

As indicated in question 5, 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 (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/schemes/04_03-SCHA_en.pdf). 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 summary;
- general information about the issuer, such as its name, registered office, legal form and purpose;
- information on the securities offered, including the rights attached to such securities and on the offering;
- risk factors;
- use of proceeds;
- dividends and other distributions;
- capitalisation;
- information on the business activities of the issuer, its turnover, assets and investments;
- information on the board of directors and the management of the issuer as well as its auditors;
- shares, share capital and voting rights;
- significant shareholders – for issuers domiciled in Switzerland, this information must be provided in accordance with article 120 of FMIA;
- offering restrictions;
- taxation;
- 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
- 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 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 question 5).

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 (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf). 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 (ie, 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.

**7 What restrictions on publicity and marketing apply during the IPO process?**

Under Swiss law, there are no specific regulations limiting or restricting the type or content of publicity made prior to a public offering of equity securities of operating companies (as opposed to investment companies that may fall within the stricter rules applicable to collective investment vehicles). Accordingly, an issuer of equity securities may generally engage in any type of public relations or marketing activities, including promotion of its products and services and advertising a forthcoming equity offering, without having to observe any regulatory restriction other than the Swiss statutory rules on the issuance of a prospectus and prospectus liability.

Pursuant to article 652a of the CO, any company that undertakes a public offering of equity securities in Switzerland, including by way of marketing or otherwise, must make a prospectus available to the investing public (see question 6). In addition, article 752 of the CO attaches prospectus liability to any untrue or misleading statements, or statements not in compliance with the statutory requirements, made or disseminated in a prospectus or in similar communications in connection with the issuance of shares. Thus, the term 'similar communications' extends the application of article 752 of the CO beyond the offering prospectus and potentially attaches liability to any misleading publicity relating to a securities offering (regardless of the form of media) (see question 19).

Nevertheless, as long as article 652a and article 752 of the CO are observed, permitted activities include press releases, routine publications, the granting of interviews, the holding of press conferences and meetings with the investment community, the dissemination of research reports, the placement of advertisements in newspapers, radios, TV and other media (including websites), and the conducting of roadshows in Switzerland. Publication in connection with equity offerings may be made in any Swiss official language or in English.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

Unlike other countries where government agencies closely regulate the financial markets, in Switzerland this supervision has been delegated by FINMA to certain self-regulatory bodies, such as SIX Group Ltd; thus, in the first instance, SIX responds to any breaches of the SIX Listing Rules.

In the case of a breach of the SIX Listing Rules, or of any additional rules or regulations issued by SIX, the SIX Sanction Commission can impose one or more of the following sanctions on issuers, guarantors or recognised representatives:

- reprimand;
- a fine of up to 1 million Swiss francs (in cases of negligence) or 10 million Swiss francs (in cases of wrongful intent);
- suspension of trading;
- delisting or reallocation to a different regulatory listing standard;
- exclusion from further listings; and
- withdrawal of recognition.

As noted in question 4, the SIX Exchange Regulation is also, 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.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

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 respect 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.

**IPO planning and preparation phase**
During the IPO planning and preparation phase, there are likely to be many workstreams operating in parallel and which may overlap. During this phase, these workstreams generally address the following tasks:
- discuss and develop the issuer's strategy, business plan, equity story (ie, investment case) and offering structure;
- establish a timetable and hold kick-off meetings;
- select the responsible team both internally at the issuer and externally, including the underwriters, the bookrunners and any other managers (ie, the banking syndicate) and legal and financial advisers;
- make 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);
- consider matters concerning capital, financial and accounting or tax structures; and
- begin due diligence exercises (which includes business, financial and legal due diligence and will continue throughout the prospectus drafting process).

**Drafting phase**
During the drafting phase, the issuer along with its other advisers:
- draft the prospectus and other key legal documents;
- develop marketing and presentation materials, such as analyst and pilot fishing investor presentations;
- engage with the issuer's auditors regarding presentation of financial information in the prospectus and delivery of comfort letters; and
- attend courtesy meetings at SIX to discuss the contemplated offering structure and content of the prospectus.

**Negotiating and investor education phase**
During the negotiating and investor education phase, the IPO workstreams generally address the following tasks:
- shareholders' resolutions in respect of the offering and capital increase (if applicable);
- negotiation of underwriting agreement and any sub-underwriting agreements (if applicable);
- delivery of the analyst presentation and review of research reports;
- preparation of the SIX listing application;
- submission of the listing application together with the preliminary listing prospectus and any additional required documents;
- draft of roadshow presentation and other materials for analysts, press and investors;
- respond to SIX comments (if applicable);
- inclusion of interim financial statements into offering documents and update analysts (if applicable); and
- issue 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.

**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:
- approval of the prospectus and underwriting agreement by the board of directors of the issuer;
- final price discussions with the board of directors of the issuer and setting of price range;
- execution of underwriting agreement; and
- begin the offer period, publish the prospectus, start price-fixing process (eg, book-building process) and begin roadshow presentations.

During the period, approximately one to two trading days prior to the first day of trading, the IPO workstreams generally address the following tasks:
- subscription and payment of the nominal value of the equity securities to be offered;
- registration of capital increase in the commercial register of the issuer;
- establish 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
- allocate shares to investors.

**First trading day and aftermarket phase**
Following the first trading day, the IPO workstreams generally address the following tasks:
- stabilisation of the shares along with the disclosure of stabilisation measures (within five trading days);
- settlement and payment of net proceeds (usually within two trading days of the first trading day); and
- exercise of the over-allotment option (30 calendar days after first trading day) and disclosure of exercise of over-allotment option (within five trading days after exercise).

### 10 What are the usual costs and fees for conducting an IPO?

The costs and fees associated with IPOs in Switzerland can vary greatly depending on the size and nature of the offering. The typical costs and fees associated with a Swiss issuer conducting an IPO exclusively on SIX can generally be allocated as follows:
- SIX listing fees: depending on size and other factors between 20,000 and 100,000 Swiss francs;
- underwriters' fees: depending on size, type of issuer and other factors typically between 2 and 5 per cent of the gross proceeds of the sale of the shares (reflecting various possible fee appropriations, including base fee, selling fee, management fee and incentive fees);
- issuer's counsel fees: depending on type of offering (eg, Reg S as opposed to Rule 144A) and other factors typically between 500,000 and 1 million Swiss francs;
- underwriters' counsel fees: depending on type of offering (eg, Reg S as opposed to Rule 144A) and other factors typically between 250,000 and 600,000 Swiss francs;
- financial printer fees: typically, between 20,000 and 30,000 Swiss francs;
- Swiss federal stamp duty (if shares are newly issued): 1 per cent on the issue price of the new shares placed in the offering; and
- Swiss federal securities transfer taxes (if shares are already in existence): up to 0.3 per cent of the offer price for the existing shares sold in the offering.

In addition to the above, miscellaneous fees and expenses, such as auditor fees, roadshow fees or the fees of the commercial registry and the notary public (in the event that the IPO involves a capital increase or other changes to the articles of association of the issuer), must also be taken into consideration.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

Prior to becoming a public company, there are no specific corporate governance requirements that issuers have to satisfy ahead of their shares being admitted to trading. Nevertheless, during the IPO planning process, issuers typically evaluate the structure of their board and corporate governance strategy and consult authoritative industry standards for best practices that can and should be adopted prior to becoming a publicly listed company. The four main sources of rules on corporate governance that issuers should bear in mind ahead of conducting an IPO in Switzerland are listed below.

**Swiss Code of Obligations**
The CO requires, inter alia, that listed companies appoint recognised auditors and disclose significant shareholders in their annual report.

**Swiss Ordinance against Excessive Compensation in Listed Companies (OAEC)**

The popular referendum on 'say on pay' in Switzerland, known as the Minder Initiative, resulted in an amendment to the Swiss constitution and implemented rules currently codified in the OAEC on 'say on pay' that apply from the first day Swiss issuers are listed on an exchange in Switzerland or abroad. Among other requirements, shareholders need to separately approve the annual fixed and variable aggregate compensation of the board of directors and the executive management at the annual general meeting. In addition, directors, including the chairman, must be elected annually and the board of directors must prepare a separate compensation report. An issuer's articles of association must also include provisions for members of the board of directors and executive management regarding loans, retirement benefits, incentive and participations plans and the number of additional board and senior management positions such individuals are permitted to participate in outside of the issuer and related companies. Furthermore, certain categories of compensation are prohibited, including severance payments; thus, employment contracts of an issuer must be reviewed and brought in line with current Swiss law prior to becoming a public company. Notably, these provisions only apply to Swiss companies listed on an exchange in Switzerland or abroad. Foreign issuers with a registered address outside of Switzerland would not need to comply with these requirements.

**SIX Swiss Exchange Directive on Information relating to Corporate Governance**

The SIX Regulatory Board has issued the Directive on Information relating to Corporate Governance (DCG) (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_16-DCG_en.pdf) that outlines certain corporate governance information issuers are required to publish annually so that investors are able to evaluate the characteristics of securities and the quality of issuers, including details on the issuer's management and control mechanisms. The categories of information that issuers are required to publish include descriptions on the group structure and shareholders, capital structure, board of directors, executive committee, board and executive committee compensation and shareholdings and loans, shareholders' participation rights, change of control and defence measures, information policy and the issuer's auditors. Notably, this directive applies to all issuers whose equity securities have their primary listing on SIX once their shares have been admitted to trading. The DCG follows a 'comply or explain' approach permitting an issuer to deviate from the disclosure obligations set out therein to the extent that the annual report contains substantiated justifications for such deviation or non-disclosure.

**Swiss Code of Best Practice for Corporate Governance**

This publication is a 'best practice' industry standard in Switzerland that contains recommendations for the organisation of the board of directors, including the formation of committees and the recommended composition of such committees, and the compensation of the board of directors.

### 12 Are there special allowances for certain types of new issuers?

As discussed in question 5, upon application to the SIX Regulatory Board, issuers with financial histories of less than three full financial years available can apply for an exemption from this requirement.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

**Anti-takeover measures**

Issuers in Switzerland can include certain anti-takeover measures in their articles of association. These measures may include:

- share transfer restrictions;
- limitations on the voting rights per shareholder;
- qualified quorum for the cancellation of certain provisions of the articles of association, such as share transfer restrictions;
- shares with enhanced voting rights;
- provisions requiring a certain percentage of voting rights represented in the shareholders' meeting in order to pass resolutions; and
- authorised or conditional share capital with exclusion of pre-emptive rights that the board of directors may use in the event of a tender offer.

Notably, as in the EU, Swiss law restricts the board of directors' ability to take defensive measures once a public tender offer has been announced.

**Mandatory tender offers**

Pursuant to article 135 FMIA, anyone holding shares of a Swiss listed company, whether directly or indirectly or acting in concert with third parties, which, when added to the shares already held by such person, exceed 33.33 per cent of the voting rights of a company, whether such rights may be exercised, must submit a mandatory tender offer for all listed equity securities of such company. Mandatory tender offers may not be subject to conditions except for important reasons, such as where official authorisation is required or a transfer restriction or a restriction on the exercise of voting rights is provided for in the articles of incorporation of the company.

The articles of association of companies may, however, provide for a higher threshold of up to 49 per cent (opting-up) or may declare the mandatory tender offer obligations to be inapplicable at all (opting-out). Such provisions are often put in place where there are large shareholders who may risk accidentally triggering the threshold if their shareholdings change or if they, perhaps along with other family member shareholders, are viewed as a group acting in concert.

If an opting-up or opting-out clause is included following the listing of the company, strict transparency and majority requirements in the shareholders meeting must be observed; thus, many issuers contemplating an IPO consider whether such opting-up or opting-out provisions are important aspects of their corporate strategy.

## Foreign issuers

### 14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

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 re-domicile to Switzerland by setting up a new Swiss holding company and list 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, the re-domiciliation route is often taken for tax or regulatory purposes.

A particularly attractive aspect of listing in Switzerland is that no government agencies are involved in the listing process, which currently results in a much faster and flexible process. In some respects, SIX views itself as a market participant as opposed to being exclusively a supervisor, and this results in it being much more accessible with greater 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.

**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 respect to foreign issuers as set out in the SIX Directive on the Listing of Foreign Companies (see www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf).

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.

**Update and trends**

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:

- FMIA (which came into force on 1 January 2016);
- FinSA; and
- FinIA.

The FMIA is of particular relevance in the context of equity capital markets in Switzerland, because it primarily regulates financial market infrastructure, disclosure of shareholdings, insider trading, market manipulation and public takeover offers. In addition, the current draft of FinSA includes proposals for, among other things:

- a new prospectus regime for public offerings of securities in Switzerland;
- the codification of private placement exemptions; and
- revisions of the prospectus liability regime.

The Swiss Federal Council finalised and adopted the draft of FinSA and FinIA on 4 November 2015 and submitted it to the Swiss Parliament. In December 2016, the Swiss Council of States, the upper chamber of the Swiss Parliament, approved revised drafts of FinSA and FinIA. Currently, both proposed legislations are now under review by the National Counsel, the lower chamber of the Swiss Parliament. It is currently expected that FinSA and FinIA will not be enacted before mid-2018, or perhaps even 2019. However, it is also anticipated that there will be a transition period in relation to full compliance with the final legislation.

**Proposed new prospectus regime**

To establish a level playing field with internationally comparative prospectus disclosure standards, the Swiss Federal Council's draft of the FinSA sets out, among other things, 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 public offering prospectuses will need to be reviewed and approved by a competent authority with respect 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 (all other issuers at least 10 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.

**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 FinSA 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 other things, offerings limited to investors classified as professional clients and offerings addressed to less than 150 investors classified as private clients. Regarding private placements that do not require a prospectus, FinSA further provides that offerees must, however, be able to take note of the essential information within the framework of the offer.

**Proposed revisions of the prospectus liability regime**

FinSA also includes changes to the current prospectus liability regime. While the current regime will largely remain intact, it is 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. In addition, the draft of FinSA introduces 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.

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. Furthermore, the foreign issuer must recognise the Swiss courts as having jurisdiction over claims arising out of or in connection with the listing on SIX. In addition, the SIX Regulatory Board reserves the right to modify the listing procedure as 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 (ie, 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.

**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. Furthermore, 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 (eg, security number, paying agent, settling agent and trading currency) is added for the Swiss market.

If, however, the listing on SIX occurs more than six months after the listing on the primary exchange, the issuer must submit a short-form prospectus which 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 SIX. The short-form prospectus must 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.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

According to article 652a, paragraph 2 of the CO, an invitation for subscription of equity securities is public unless addressed to a limited

number of persons. Generally speaking, a public offering is understood to be an offering made to an indefinite number of investors by means of public advertisement (eg, newspaper announcement, mailshots, web pages with unrestricted access). By contrast, if issuers solicit a limited number of selected investors individually, including by inviting them to roadshows, the offering could arguably be considered private as long as there are no public advertisements or similar communications relating to the offering. In other words, in the absence of public advertising, any offer to a 'selected and limited circle of investors' could arguably be construed as a private placement.

However, because, the term 'public offering' is not clearly defined under Swiss law and because there is no express private placement safe harbour for share offerings, what constitutes a selected and limited circle of investors has been and continues to be subject to legal debate. For the purposes of this debate, it is important to bear in mind that the Swiss Federal Act on Collective Investment Schemes contains a definition of qualified investors that practitioners and legal scholars often apply by analogy to equity offerings.

The current views expressed in Swiss legal doctrine can be summarised as follows:

- Qualitative approach: this approach considers whether investors were selected based on objective criteria or whether the investors have a pre-existing specific relationship with the issuer (ie, typically existing shareholders or employees).
- Quantitative approach: given the need for numeric guidance, practitioners and legal scholars have developed a quantitative rule of thumb that focuses on the number of offerees. The most restrictive view is that any offer made to more than 20 investors is deemed a public offer. There is a trend among practitioners, however, to advocate an increase of this threshold to up to 100 qualified investors.

Given that there is currently no private placement safe harbour, regardless of whether a qualitative or quantitative approach is applied, each equity offering into Switzerland and the accompanying requirement of a Swiss-compliant offering prospectus must be considered on a case-by-case basis.

Currently, existing Swiss financial market regulations are undergoing significant reforms. For further information regarding reforms in relation to the codification of private placement exemptions, see 'Update and trends'.

## Tax

### 16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

The issuance of new shares by, and capital contributions to, a company resident in Switzerland are subject to a one-off capital duty of 1 per cent, with issuances of up to 1 million Swiss francs being exempt. Exemptions also apply for certain restructurings.

The transfer of Swiss equity securities is subject to securities transfer tax at a rate of 0.15 per cent, whereas the transfer of foreign equity securities is taxed at a rate of 0.3 per cent, in each case if at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer (as defined in the Swiss Federal Stamp Duty Act). Certain types of transactions or parties are exempt; for example, group restructurings and Swiss and foreign funds.

## Investor claims

### 17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

IPO investors can seek redress for their claims via the Swiss judicial system with prospectus liability being their main cause of action (see question 19 for a further discussion on prospectus liability claims in Switzerland).

### 18 Are class actions possible in IPO-related claims?

IPO-related class action claims are not provided for under the current laws of Switzerland.

### 19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

The applicable Swiss civil law rule on prospectus liability (contained in article 752 of the CO) provides redress for investors where information that is inaccurate, misleading or in breach of statutory requirements is included in a prospectus or similar statement disseminated in connection with the issue of shares, bonds or other securities. Any person or entity involved, whether wilfully or through negligence, is jointly and severally liable to the acquirer of such securities for any resulting attributable losses. Thus, prospectus liability claims in relation to prospectuses and similar statements (eg, press releases and roadshows materials) may be brought in Switzerland against all persons involved in the drafting or the dissemination of the prospectus or similar statements, including:

- the issuer or company whose shares are offered to the public;
- the members of its board of directors;
- the management of the issuer;
- the syndicate banks;
- auditors;
- legal advisers;
- public notaries; and
- other external advisers or experts.

Notably, the underwriting agreement executed in connection with an IPO usually provides that the issuer or selling shareholders (if any) will indemnify the underwriters, inter alia, in the event of prospectus liability claims predicated on false or misleading statements provided or material information omitted by the issuer or selling shareholders (if any).

In essence, the following conditions must be met in order to establish prospectus liability:

- the issue prospectus or similar statements and information in connection with the issue of equity securities including, but not limited to, research reports, press releases and information posted on the issuer's website contained information that was inaccurate, misleading or otherwise in breach of statutory requirements;
- the defendant was wilfully or negligently responsible for such statements;
- the claimant suffered damages; and
- the damages were caused by such inaccurate, misleading or legally non-compliant information.

An issuer is in breach of the statutory requirements, for example, if the statutory disclosure requirements pursuant to article 652a of the CO are not met in the prospectus or if there is no prospectus at all where required by law. If facts material to the investment decision are omitted from the prospectus, this is considered to be misleading. As noted above, the claimant investor must prove that the inaccurate or misleading statements or other non-compliance with the statutory requirements is a direct cause of the damage it has suffered and that the defendant responsible for such information acted wilfully or at least negligently. The standard of proof is not a strict evidence standard (balance of probabilities), but rather one of predominant probability.

It is important to note that not only the prospectus, but also any other information provided in connection with the offering, such as press releases, research reports and roadshow materials, may be qualified as 'similar communications' in the sense of article 752 of the CO and therefore could be the basis of a liability claim. Certain risks can be mitigated by including a disclaimer with the relevant materials stating, inter alia, that the document is not a prospectus, that any investment decision should be based on the prospectus and where the prospectus can be obtained. In addition, a restricted period usually applies during which no information about the issuer's business or its earnings and financial situation that is not otherwise contained in the prospectus may be disclosed.

In connection with a prospectus liability claim, defendants can often mitigate and defend themselves against claims of wilful or negligent conduct by evoking a 'due diligence defence'. Switzerland does not have official due diligence guidelines, and, thus, the essence of this defence will be based on standard market practice and the adherence to these established due diligence undertakings, which demonstrate that they acted with due care and diligence in the preparation of the prospectus or similar statements. Recognised due diligence undertakings

include, inter alia, comprehensive documentary due diligence, meetings with management, review of the issuer's business plan, review of financial statements and meetings with the issuer's accounting personnel and auditors, interviews with third parties (such as customers and suppliers), site visits, directors' and officers' questionnaires, negotiation of representations and warranties in the underwriting agreement, legal opinions and disclosure letters from legal counsel, comfort letters from auditors, officers' certificates and bring-down diligence calls.

In addition to initiating a prospectus liability claim, a plaintiff may also try to invoke general remedies under Swiss contract or tort law.

Furthermore, a person liable for a false or misleading prospectus may also become subject to criminal prosecution under the Swiss Penal Code (for example, in the case of fraud (article 146) or forgery of documents (article 251)).

Currently, existing Swiss financial market regulations are undergoing significant reforms. For further information regarding reforms in relation to prospectus liability under Swiss law, see 'Update and trends'.

NIEDERER KRAFT & FREY

**Philippe A Weber** **philippe.a.weber@nkf.ch**
**Christina Del Vecchio** **christina.delvecchio@nkf.ch**

Bahnhofstrasse 13
8001 Zurich
Switzerland

Tel: +41 58 800 8000
Fax: +41 58 800 8080
www.nkf.ch

# Taiwan

**Lihuei (Grace) Mao**
**Lee and Li, Attorneys-at-Law**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

There are two primary exchanges in Taiwan: the Taiwan Stock Exchange (TWSE) and the Taipei Exchange (TPEx). In 2016, there were 24 domestic and foreign issuers who had their shares primarily listed on the TWSE with capital of NT$11.8 billion raised from the IPO, while 36 domestic and foreign issuers had their shares primarily listed on the TPEx with capital of NT$13.7 billion raised. As of 2016, there were 892 domestic and foreign issuers in total who have had their shares listed on the TWSE with market capitalisation of NT$27,247.913 billion, and there were 732 domestic and foreign issuers in total who have had their shares listed on the TPEx with market capitalisation of NT$2,722.643 billion.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Both domestic and foreign issuers may have their shares primarily listed in Taiwan. Domestic companies tend to list at home, while some with major operations in the People's Republic of China (PRC) may choose to list at Hong Kong or the PRC (mainly on Shanghai or Shenzhen stock exchanges). Only very few domestic issuers have their shares listed offshore (the most famous one would be Taiwan Semiconductor Manufacturing Company Limited that has its American depositary receipts traded on the NYSE). The Taiwan IPO market has been open to foreign issuers since 2009. Subject to the listing requirements set out in the Taiwan Stock Exchange Rules on Review of Securities Listing (TWSE Listing Rules) or Taipei Exchange Rules Governing the Review of Securities for Trading on the TPEx (TPEx Listing Rules), a foreign issuer that has been duly incorporated and validly exists as a company limited by shares under the laws of its place of incorporation, other than the PRC, is eligible to apply for an IPO listing in Taiwan.

### 3 What are the primary exchanges for IPOs? How do they differ?

The TWSE and the TPEx are the primary exchanges for IPOs. Company size and profitability would be the main concerns for an issuer to decide whether to list on the TWSE or the TPEx. The TWSE requires that an issuer applicant have paid-in capital or net value (only applicable to foreign issuers) in the amount of at least NT$600 million, or its market capital (only applicable to foreign issuers) at the time of listing must have reached at least NT$1.6 billion, while TPEx only requires that a domestic issuer applicant have paid-in capital of NT$50 million and a foreign issuer applicant have shareholders' equity in the amount of at least NT$100 million. The TWSE requires that a domestic issuer applicant's net income before tax in its financial reports meets certain criteria (eg, the net income before tax for the most recent two fiscal years represents 6 per cent or greater of the share capital stated in the financial report) with no accumulated loss in the final accounts for the most recent fiscal year, while the TPEx only requires the ratio of net income before tax to share capital stated in the financial report to be 4 per cent or more for the most recent fiscal year, with no accumulated loss in the final accounts for the most recent fiscal year. A start-up company obtaining an assessment opinion from the competent authorities (ie, the Industrial Development Bureau, Counsel of Agriculture or Ministry of Culture) stating that it is part of the technology, agriculture, or culture and creative industries, with marketable products or services, may be exempt from the period-of-establishment and profitability requirements (see question 12) and may apply to the TPEx or the TWSE for the primary listing.

Before an issuer can be eligible as an applicant for IPO with the TWSE or the TPEx, it must first complete the registration of its shares and have its shares traded on the emerging stock market (ESM) for at least six months (foreign issuers may bypass this requirement by going through a six-month underwriter advisory period). The TPEx launched the ESM in 2002, on which shares may be traded over the counter by negotiation. ESM registration is not considered a formal IPO, but serves as a platform for issuers to acquaint themselves with securities market regulations and enjoy a certain level of liquidity of their stocks before the IPO. In other words, it serves as a 'warm up' before an issuer is eligible for a formal listing on the TWSE or the TPEx.

For a foreign issuer, similar listing criteria are applicable, except that a foreign issuer may replace the six-month ESM period with a six-month advisory period by engaging a lead underwriter in Taiwan.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Financial Supervisory Commission (FSC) is the competent authority for public offering companies. Companies registered on ESM or traded on the TWSE or the TPEx are subject to the Securities and Exchange Act (SEA), the TWSE Operating Rules, the TPEx Rules Governing Securities Trading on the TPEx, and other applicable laws and regulations. Certain provisions of the SEA are also applicable to foreign issuers whose shares are registered on the ESM or listed on the TWSE or the TPEx.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

An issuer should file an application for listing with the TWSE or the TPEx. Along with the application, the issuer must provide:

- consolidated financial reports for the most recent three fiscal years, certified and audited by a certified public accountant (CPA);
- a financial forecast for the two most recent quarters;
- recommendations on the internal control system for the most recent three years issued by a CPA;
- a listing evaluation report issued by the underwriters;
- prospectus, legal matter checklist issued by Taiwan legal counsel;
- a list of corporate insiders; and
- any other documents and information required by the TWSE or the TPEx.

Upon receipt of the application, the TWSE or the TPEx will commence with the documentation review and provide questions and comments thereon. The issuer may respond to the TWSE's or the TPEx's queries in writing or by oral presentation. The TWSE or the TPEx may request that the issuer, underwriters, accountants and legal counsel provide supporting documents and responses to its questions.

**6 What information must be made available to prospective investors and how must it be presented?**

When applying for an IPO, the issuer must prepare a prospectus. The prospectus should include the following major items:

- a company overview, including the introduction of the company and its group, the group structure, risk matters, capital shares, the directors, supervisors, managers and officers, and major shareholder;
- an operational overview, including business scope, competitive strategies, business objectives, strategies and plans, overview of markets, production and sales, major contracts and other necessary supplements;
- a plan of issuance and use of proceeds, including the pricing method for this issuance and an analysis on the plan of use of proceeds and relevant agreements;
- a financial overview, including a summary of financial data, financial statements, a review and analysis on the financial condition and operation for the most recent five fiscal years and relevant significant matters;
- the status of corporate governance and other necessary disclosure;
- a conclusive evaluation report from the underwriters;
- legal opinion issued by the issuer's Taiwan legal counsel;
- methods for shareholders to exercise shareholders' rights; and
- material contracts.

At the time of filing the listing application with the TWSE or the TPEx, the issuer must upload its prospectus onto the Market Observation Post System (MOPS) at http://mops.twse.com.tw/mops/web/index. From then on, the issuer must upload material information onto the MOPS in a timely manner.

**7 What restrictions on publicity and marketing apply during the IPO process?**

Underwriters should observe the Taiwan Securities Association Directions Governing the Underwriting Procedures to be Followed by Underwriters in Conducting an Initial Listing on a Stock Exchange or Over-the-Counter Market for the underwriting, publicity and marketing during the IPO process. The issuer should sign an agreement with the underwriters to stipulate the overallotment arrangements, lock-up requirements and other relevant matters.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

The offering of securities may not involve misrepresentation, fraud or any other acts that are misleading. Any person violating such requirement will be liable for the damage suffered by bona fide purchasers or sellers of relevant securities. If the issuer or its responsible persons (ie, directors, supervisors and managerial officers acting within the scope of their duties) or employees misrepresent or conduct fraudulent acts, they commit a criminal offence, which may result in imprisonment of three to 10 years and a fine of between NT$10 million and NT$200 million.

If a prospectus contains any material misrepresentation or omission, the following persons, within the scope of their responsibilities, will be jointly and severally liable to any bona fide persons for the damage caused:

(i) the issuer and its responsible persons;
(ii) any employees of the issuer who have signed or sealed the prospectus to certify its accuracy in whole or in part;
(iii) any underwriter for the securities; and
(iv) any CPA, legal counsel, engineer, or any professional or technical person who has signed or sealed the prospectus to certify its accuracy in whole or in part, or when rendering his or her opinion.

Except for the issuer, any persons listed in (i) to (iii) may be exempt from their liabilities if they prove that they have exercised reasonable care and that they had reasonable grounds to believe that the contents (other than those certified by persons listed in (iv) contained no misrepresentations or omissions, or they had reasonable grounds to believe that the certification was accurate. Any persons referred to in (iv) above may be exempt from their liabilities if they prove that they have conducted a due diligence review and had reasonable grounds to believe that such certification or opinion was accurate. Notwithstanding the foregoing, the issuer will be liable for paying damages in any event. Also, such violation by the issuer or its responsible persons or employees with no exemption of liability is a criminal offence and may result in an imprisonment of between one and seven years and a fine of up to NT$20 million.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

Prior to the IPO application, the issuer must have gone through a six-month ESM-traded period (or a six-month underwriter advisory period for a foreign issuer). Upon receipt of the IPO application, the TWSE or the TPEx will commence a documentation review and provide questions and comments thereon. This initial documentation review will take about six weeks. Unless otherwise extended, the application will be submitted to the TWSE or the TPEx review committees and boards of directors for final resolution (meetings of boards of directors usually take place once a month). Once the board of directors has come to a resolution, the TWSE or the TPEx will issue an approval letter to the issuer, who should pass this on to the FSC for new share issue. The new share issue application will automatically take effect seven business days after the filing. After the underwriting of the new shares completes, the issuer should submit the final shareholding spread chart to the TWSE or the TPEx and decide on the listing date. After the listing ceremony on the exchange, the shares will commence trading.

**10 What are the usual costs and fees for conducting an IPO?**

The costs for a domestic issuer to conduct an IPO in Taiwan are generally around NT$10 million, including the following major fees:

- listing review fees charged by the TWSE and the TPEx: NT$500,000;
- underwriters' fees: depending on the size of the offering, usually ranging from NT$5 million to NT$10 million; and
- counsels' fees: around NT$3 million to NT$5 million for a CPA, and around NT$300,000 to NT$500,000 for legal counsel.

For a foreign issuer, the costs for an IPO in Taiwan would be at least doubled compared with those for a domestic issuer because the underwriters' and the counsel's fees are higher due to the expanded review work and documentation preparation.

## Corporate governance

**11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?**

An IPO issuer is required to have a board of at least five directors, including at least two independent directors, and the number of independent directors may not be less than one-fifth of the total number of directors on the board. Furthermore, an IPO issuer must have at least three supervisors or an audit committee composed of all the independent directors. The number of audit committee members should be at least three. At least one of the audit committee members must have expertise in accounting or finance. In addition, an IPO issuer has to have a compensation committee. The qualifications and responsibilities of compensation committee members are stipulated under the rules issued by the Taiwanese authorities.

For a foreign issuer, at least one independent director has to have a registered residence in Taiwan. Foreign issuers will, however, need to have two independent directors with registered residences in Taiwan if the Taiwanese courts do not have jurisdiction over matters related to shareholder protection as a result of the law of the jurisdiction in which the foreign issuer is incorporated or because the foreign issuer fails to include a stipulation regarding Taiwanese courts' jurisdiction over such matters in its articles of incorporation.

**12 Are there special allowances for certain types of new issuers?**

The period-of-establishment and profitability requirements may be waived for technology-based companies, such as high-tech or pharmaceutical companies, if they have obtained assessments from the competent authorities stating that they are technology-based enterprises and that their products or technologies have been successfully developed and marketable. However, starting from May 2016, it is required that the net value of the issuer must not be lower than

two-thirds of its share capital. To apply for such assessment, applicants are required to submit, inter alia, assessment reports on the products, which include sales data or consolidated financial statements audited by Taiwanese accountants, tax returns, catalogue of the products, and market surveys, or assessment reports on the market value of the technologies.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

It is less common for IPO issuers in Taiwan to adopt any anti-takeover mechanism. Commonly seen anti-takeover devices in other countries, such as staggered boards or poison pills, are generally not permitted in Taiwan. Generally speaking, under the Company Act, one share represents one vote, and a company is not permitted to issue preferred shares with multiple votes. Hence, a dual-class stock arrangement is not possible.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Taiwanese capital markets are known for their excellent price-to-earnings ratios and high liquidity. In addition, the costs of IPOs and secondary public offerings are relatively low compared with capital markets in other areas within the region, such as Shanghai, Hong Kong and Singapore. Due to the prosperous high-tech industry in Taiwan, technology-related companies are given higher value by local investors than similar companies on other stock exchanges within the region.

With regard to the shareholding structure of a foreign issuer, no citizen, juristic person, organisation or other institution from mainland China may individually or jointly hold more than 30 per cent of the foreign issuer's equity interest or be a controlling shareholder of the foreign issuer. For a Taiwanese-controlled foreign issuer of which more than 30 per cent of the total issued shares are owned by mainland China investors, special approval is required for a listing application. As of the time of writing, however, such special approval has never been granted. Prior to submitting the listing application, the foreign issuer must have been advised by an underwriter in regard to Taiwanese listing requirements for a period of six months or have registered its shares on the ESM for at least six months. All foreign issuers are required to amend their articles of incorporation to include certain provisions on protecting Taiwanese or minority shareholders before submitting the listing application.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

The SEA provides that any public offering or issuance of securities in Taiwan requires prior approval of, or prior registration with (as the case may be), the FSC. According to an FSC ruling dated 12 September 1987, any offering, issuance, sale or rendering of investment services in connection with foreign securities in Taiwan should also be governed by Taiwan securities laws and regulations. With this in mind, in December 2008, the FSC promulgated and amended the Regulations Governing the Offering and Issuance of Securities by Foreign Issuers (the Regulations) to govern the public offering of foreign securities. These essentially require that foreign issuers seek approval from the Central Bank of the Republic of China (Taiwan) and apply for registration of their securities with the FSC when making a public offering or issuance of securities in Taiwan. The SEA defines 'public offering' as the offering of securities for subscription to non-specific persons, either by promoters before the incorporation of a company, or by an existing company before the issuance of such securities.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

Pre-IPO restructuring may have tax implications for the shareholders, depending on their nationalities and the regulations in the countries in which the companies involved are incorporated.

In Taiwan, share transactions are subject to securities transaction tax at 0.3 per cent of the transaction price. Securities transaction tax is borne by the seller but withheld and paid by the buyer.

According to the Income Tax Act, personal income tax will be incurred from trading IPO shares, unless the IPO took place before 31 December 2012, or the shares traded are acquired during the IPO underwriting stage and the investor acquired fewer than 10,000 shares during that stage.

Starting from 2018, capital gains tax will be levied on securities transactions meeting certain criteria.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

Investors may seek redress by initiating a lawsuit in accordance with the SEA for any misrepresentation or omission in the prospectus (see question 19). To afford further protection to investors, the Securities and Futures Investors Protection Centre (the Investors Protection Centre) was established in accordance with the Securities Investors and Futures Traders Protection Act. The Investors Protection Centre provides mediation services to investors in civil disputes over securities investment. A successful mediation, once ratified by the court, has the same effect as a final and unappealable civil judgment.

**18 Are class actions possible in IPO-related claims?**

In addition to the mediation service, the Investors Protection Centre may initiate a class action in court or by arbitration in its own name if it is authorised by 20 or more investors who sustained loss and damage from the same event. The authorisation may be terminated by investors


**Lihuei (Grace) Mao** **lihueimao@leeandli.com**

7F, No. 201 Tun Hua N Road
Taipei 10508
Taiwan
Republic of China

Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
www.leeandli.com/en/

before the end of the oral debate or inquiry session. The Investors Protection Centre may also accept authorisation from additional investors who suffer loss or damage from the same events before the end of the oral debate or inquiry session and increase the claim amount. The Investors Protection Centre may request the issuer, underwriter, stock exchange and other related parties to produce the documents required to facilitate the class action, arbitration or mediation. If the requested parties fail to provide the documents, the Investors Protection Centre may seek assistance from the Financial Supervisory Commission. The Investors Protection Centre may not claim any compensation from the investors for initiating the class action, except for the costs of the lawsuit or arbitration.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

In the event that the offering of securities involves misrepresentation, fraud or any other acts that are misleading, a bona fide investor who has sustained loss or damage may initiate a lawsuit against the person who made the misrepresentation or committed the fraudulent or misleading acts.

In the event of any material misrepresentation or omission in the prospectus, a bona fide investor who has sustained loss or damage may initiate a lawsuit against the parties outlined in question 8.

# Turkey

**Ömer Çollak and Ökkeş Şahan**
**Paksoy**

## Market overview

**1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?**

In 2016, two companies successfully launched initial public offerings in Turkey and collected approximately US$27.87 million.

**2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?**

Generally, domestic companies tend to list their shares at home. Overseas companies do not tend to list in the Turkish market.

**3 What are the primary exchanges for IPOs? How do they differ?**

Borsa Istanbul is the sole exchange entity in Turkey, combining the former Istanbul Stock Exchange, Istanbul Gold Exchange and the Derivatives Exchange of Turkey. Each of the previous exchanges constitutes a separate market in Borsa Istanbul.

## Regulation

**4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?**

The Capital Markets Board (CMB), Borsa Istanbul and the Central Registry Agency are the main rulemaking and enforcing authorities on IPOs.

**5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?**

The issuer must prepare a prospectus used for domestic offering and submit it to the CMB for approval. The issuer shall 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:

- the company's articles of association must be amended to comply with the CMB rules and regulations;
- 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
- 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
- the total amount of non-trade related party receivables cannot exceed 20 per cent of the issuer's total receivables and cannot exceed 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.

**Listing requirements**

Borsa Istanbul Listing Directive (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 calendar years in accordance with the relevant CMB regulations.

**Minimum size requirements**

The company must meet all the conditions of the group of the market to which it belongs. The groups are generally determined by the value of the shares offered to the public.

***Star Market Group 1***

The following rules apply:

- the market value of shares offered to the public must be at least 250 million liras;
- total market value of the company must be at least 1 billion liras;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 5 per cent; and
- the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 0.75.

***Star Market Group 2***

The following rules apply:

- the market value of shares offered to the public must be at least 100 million liras;
- the total market value of the company must be at least 400 million liras;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 10 per cent; and
- the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.

***Main Market Group 1***

The following rules apply:

- the market value of shares offered to the public must be at least 50 million liras;
- there is no total market value requirement;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 15 per cent; and
- the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.

***Main Market Group 2***

The following rules apply:

- the market value of shares offered to the public must be at least 25 million liras;
- there is no total market value requirement;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 25 per cent; and
- the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.25.

**Other requirements**

The following requirements also apply:

- two calendar 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 calendar years but owns a minimum of 51 per cent in shares of a company that has been established for more than two calendar years);
- the exchange management must have had the corporation's financial structure examined and accepted its ability to continue as an ongoing concern;
- the company must have obtained confirmation from Borsa Istanbul that its financial structure is sufficient for its operations;
- the shares must not contain any clauses prohibiting the shareholders to use their rights;
- the articles of association of the company must not contain any clauses restraining the transfer or the circulation of the shares;
- 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;
- there must be no major legal disputes that may affect the production and the operation of the company;
- there must be an independent legal report confirming that the establishment and the operation are in compliance with the relevant laws;
- it has no material legal disputes that might adversely affect its production or other commercial activities;
- the company must not have done any of the following:
  - 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;
- the company's securities must comply with Borsa Istanbul's criteria on current and potential trading volumes; and
- the company's legal status in terms of its establishment and activities and its shares must comply with the applicable law.

For an initial offering of securities representing shareholding rights, the application must indicate all of the issuer's securities prior to the application.

### 6 What information must be made available to prospective investors and how must it be presented?

The prospectus is the main document for an IPO. It will contain separate financial statements prepared in accordance with Turkish Financial Reporting Standards, which are virtually identical to the International Financial Reporting Standards. In terms of disclosure, the prospectus must include all material information. The layout will follow a specific format prescribed by the CMB.

### 7 What restrictions on publicity and marketing apply during the IPO process?

IPOs are marketed through the following:

- company research reports produced by connected brokers;
- early-stage 'pilot fishing' pre-marketing discussions with potential investors identified by the investment banks;
- roadshows and presentations following the publication of the intention to float announcement; and
- for retail offerings, more general advertising in order to generate additional interest in the IPO.

The issuer, the selling shareholders and the underwriters may decide to conduct a marketing campaign for Turkish investors, as is customary in Turkey. The publicity to be used in any such campaign must be in Turkish, distributed exclusively to investors in Turkey and limited to information contained in the Turkish prospectus.

After the application to the CMB and prior to the publication of the Turkish prospectus, publicity must be limited to information relating to the industry sector in which the issuer operates, its position in the sector, its fields of business, and goods or services provided by it. Any publicity directed to the public in connection with the offering of securities must not include inaccurate, exaggerated, incomplete, unfounded or misleading information about the conditions of the issuer or the securities. In addition, equal access to information among all investors must be ensured. Any publicity related to the securities must also include cautionary disclosures indicating:

- if published prior to the approval of the Turkish prospectus by the CMB, that the Turkish prospectus has not yet been approved;
- following the approval by the CMB and publication of the Turkish prospectus, where copies of the Turkish prospectus may be obtained as well as websites (including the Public Disclosure Platform (PDP)) where the Turkish prospectus has been made available;
- if the publicity contains a statement with respect to the public offering price for the securities, that neither the CMB nor the relevant stock exchange has any right of discretion or approval in determining such public offering price; and
- that any investment decision with respect to the securities should be made based on such investor's review of the Turkish prospectus.

The public offering in Turkey (Turkish offering) is not permitted to take place in Turkey prior to the approval of the Turkish prospectus by the CMB. Any information required to be disclosed in connection with the public offering in accordance with the CMB regulations must be included in the Turkish prospectus. In addition, any advertising or announcements directed to the public in connection with the Turkish offering must be consistent with the information contained in or expected to be contained in the Turkish prospectus, and must not include inaccurate, exaggerated, incomplete, unfounded or misleading information and must not misguide the investors to create false impressions about the issuer, the selling shareholders or the securities. In the event that any information regarding the public offering price for the securities is included in advertisements or announcements, disclosures indicating that the CMB or the relevant stock exchange does not have discretion over the public offering price or that it has not approved such public offering price, must be included in such advertisements or announcements. The CMB may request the suspension and removal of the publicity that it considers inaccurate, exaggerated, incomplete, unfounded or misleading. Furthermore, any such publicity must not imply that the approval of the Turkish offering and the Turkish prospectus by the CMB would constitute any guarantee by the CMB or another administrative authority.

It is important to note that the content of any advertisements in relation to the issuer or the offering may trigger liability of the issuer and certain other persons with respect to the information disclosed (or not disclosed) in the Turkish prospectus. The persons involved are responsible for the fair reflection in any such advertisements of the facts and information contained in the Turkish prospectus. Any change in the information disclosed to the public in the Turkish prospectus and any new information that may affect investors' investment decisions must be notified by the Issuer to the CMB immediately through the most convenient means of communication, preferably in writing. The content of any publicity following the publication of the Turkish prospectus must be consistent with the information included in the Turkish prospectus.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

The issuers, brokers or dealers, underwriters and guarantors may be held liable for various breaches of the IPO rules. The CMB and Borsa

Istanbul are authorised to impose various administrative and criminal sanctions on them (see also question 19).

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

Each deal is different, but an indicative timetable for an IPO is set out below (where 'T' is the first day of trading on Borsa Istanbul).

| | |
|---|---|
| **T minus 6 months to T minus 3 months** | Preparation for the IPO, for example:<br>• articles of association of the company must be amended to comply with the CMB;<br>• requirements for public companies;<br>• advisers must be appointed;<br>• eligibility for an IPO and listing is discussed; and<br>• due diligence is started.<br>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 preliminary immediate or cancel (IOC) order with price range (subject to approval by the CMB) is distributed. 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 bookbuilding starts and announcement of sales. |
| **T minus 9 days** | Domestic bookbuilding starts. |
| **T minus 6 days** | The pricing decision is made. Domestic and international bookbuilding 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). |

### 10 What are the usual costs and fees for conducting an IPO?

Below are the usual costs and fees for conducting an IPO and their percentage of the total amount of such costs and fees:

- brokerage and IPO consultancy fees (71 per cent);
- independent audit fees (5 per cent);
- legal consultancy fees (9 per cent);
- CMB fees (4 per cent);
- CSD (MKK)) fees (1 per cent);
- Borsa Istanbul listing fees (2 per cent); and
- 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.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

Below are the basic corporate governance principles that are applicable to the issuers conducting an IPO:

- various information and documents must be announced in the corporate website and at PDP at least three weeks before the general assembly meeting;
- informing the shareholders in the general assembly in relation to the related party transactions of the company in which a director or manager of the company or their certain relatives are party;
- the number of the directors shall be determined in order to ensure that the board members conduct productive and constructive activities, make rapid and rational decisions and efficiently organise the formation and activities of the committees provided that the number cannot be less than five in any case;
- a majority of the members of the board of directors shall consist of members who do not have an executive duty;
- a non-executive member of the board of directors is the person who does not have any administrative duty or any other executive unit of the company other than having a board member status and is not involved in the daily work flow or ordinary activities of the corporation;
- there must be independent members from among the non-executive board members who have the ability to fulfil their duties impartially and independently;
- the number of independent board members cannot be less than two;
- the term of office of the independent members is up to three years – it is possible to re-nominate and re-elect them as independent directors;
- the nomination committee shall evaluate the candidate proposals for independent membership, including those of the management and the investors, by considering whether the candidate meets the independence criteria and shall report its evaluations and submit its report for the approval of the board of directors; and
- the board of directors shall form an audit committee (except for banks), early detection of risk committee (except for banks), corporate governance committee, nomination committee, remuneration committee (except for banks) in order to fulfil its duties and responsibilities duly and adequately (however, in case a separate nomination committee and remuneration committee cannot be established due to the structure of the board of directors, the corporate governance committee shall fulfil the duties of such committees.

### 12 Are there special allowances for certain types of new issuers?

The Emerging Companies Market is the market in which the shares of smaller or growth companies may be listed. There are special allowances and discounts in relation to CMB fees, CSD (MKK) fees and Borsa Istanbul listing fees for such smaller and growth companies.

### 13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

There are no regulated specific forms of anti-takeover defence under Turkish law. The management of a target would have fiduciary duties against the shareholders and should at all times act in the best interest of the company; therefore, if the management tries to jeopardise the offer based on personal gains, it may be liable for damages to the shareholders.

Anti-takeover defences are not precedential. In case of voluntary tender offers, the target's board is required to prepare and announce a report on the features of the offer and prospects of the acquisition on the target, which could be used to convince the shareholders in declining the offer; or the management can try to buy additional time from the CMB to call the shareholders for a meeting, and try to indulge competing offers. Anti-trust concerns may also be used as a defence.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

Requirements for the listing of securities of foreign-based institutions that are operating abroad are the same as for the Turkish institutions. 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 board 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.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

There is no explicit exemption in the legislation. However, we think that investors located in Turkey can participate in an IPO of the foreign issuer conducted abroad as long as the following conditions are met:

- the offer does not take place in Turkey (ie, all of the offering, marketing and settlement take place outside of Turkey);
- no transaction is conducted that can be defined as a public offering in Turkey;
- the information provided to investors located in Turkey does not contain any statements that give the impression of a public offering; and
- the foreign issuer and the intermediary financial institutions do not engage in any sort of marketing, advertising or publicity activities towards Turkish resident investors relating to the offering.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

There are two regimes for the taxation of securities in Turkey:

- the declaration regime: the primary regime where taxes are declared by taxpayers in their annual tax return; and
- the provisional regime: a provisional regime that, although currently temporary and was initially set to conclude at the end of 2015, has been extended until the end of 2020.

Income tax is covered by the declaration regime. Capital gains and interest income derived mainly from listed securities are covered by the provisional regime.

Under the provisional regime, taxation is carried out through withholding, mainly by brokerage houses, banks and custody banks. The capital gains derived for a listing of equities on the stock exchange falls under the provisional system and will be subject to a zero per cent rate withholding tax.

In addition to the withholding tax above, any capital gains derived from listing will be subject to corporate tax at a rate of 20 per cent. Certain exemptions can apply to the corporate tax due. For example, there is a 75 per cent capital gains exemption applicable provided that:

- the shares are held for more than two years;
- the seller does not engage in securities trading;
- the proceeds are collected within two years following the sale year;
- the exempted amount is kept under a special reserve account for five years and is not distributed to shareholders; and
- the transfer of shares is exempt from VAT and the documentation related to listing is exempt from stamp tax.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

Judicial authorities (ie, the courts) are authorised to resolve the disputes arising between the investors and the issuers' underwriters. The CMB may be involved in such disputes only for regulatory purposes (ie, whether there are any incompliances of the relevant CMB rules and regulations for sanctioning purposes).

**18 Are class actions possible in IPO-related claims?**

Class actions have been recently introduced by the new Turkish Civil Procedural Code. Only associations and other legal entities are entitled to file class actions in order to protect the interest of their members or persons they represent. Real persons are not entitled to file class actions.

Paksoy

**Ömer Çollak** **ocollak@paksoy.av.tr**
**Ökkeş Şahan** **osahan@paksoy.av.tr**

Orjin Maslak
Eski Büyükdere Caddesi
No. 27 K. 11 Maslak 34398
Istanbul
Turkey

Tel: +90 212 366 4732 / +90 212 366 4790
Fax: +90 212 290 2355
www.paksoy.av.tr

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

The company drafts the prospectus (generally through its lawyers). All the IPO and special payment order advisers must contribute to its preparation, review it and sign it off. A formal verification exercise is undertaken to test the accuracy of key statements in the prospectus.

The issuer is primarily liable for a prospectus relating to equity securities. In addition to the issuer, in the case of a public offering, the underwriters and guarantors, if any, are also liable for the accuracy and completeness of the information provided to the investors, in proportion to their fault.

Issuers are responsible for making sure that the information contained in the documents is a fair reflection of the facts. However, intermediary institutions, those conducting the public offering, guarantors (if any) and any board members of the issuer who have acted without due diligence can be held responsible for the part of the loss that cannot be indemnified by the issuers. Their liability is a secondary one and is based on their negligence.

In relation to offering documents that are not mandatory and are not subject to CMB approval, the parties must comply with the relevant Turkish law provisions. Criminal liability will only be based on fraud.

An issuer can be liable to investors in contract or tort. Underwriters and guarantors involved in an equity offering can also, in certain circumstances, be liable. Under statute, any person who has acquired securities to which the prospectus relates and has suffered loss as a result of the prospectus can claim compensation from those responsible for the prospectus if the prospectus: contained any untrue or misleading information, or failed to disclose any material information.

There are a number of statutory defences. For example, a person who proves that he or she was not informed about the inaccurate, misleading or incomplete information included in the public disclosure documents, and that the fact they were not informed was not a result of their gross negligence or wilful intention, will not be responsible for the deficiency.

# United Kingdom

**Clare Gaskell, Deborah Harris and Lucy Gillett**
**Simpson Thacher & Bartlett LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The London IPO market continued to be relatively slow during the first half of 2017, with 44 IPOs on the London Stock Exchange (LSE) during this time according to information released by PricewaterhouseCoopers, albeit representing a slight increase from the 39 IPOs on the LSE during the first half of 2016. The largest IPO during the first half of 2017 was by Allied Irish Banks plc, with a total market capitalisation of €12 billion on admission, a total raise, excluding any over-allotment option, of €3 billion and with its shares admitted to trading on both the LSE and the Irish Stock Exchange.

In total, during 2016 there were 67 IPOs on the LSE, raising a total of approximately £6.7 billion, making 2016 the LSE's lowest year, in terms of both deal volumes and proceeds, since 2009, according to information released by PricewaterhouseCoopers.

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The UK IPO market attracts issuers from a wide variety of sectors. At 1 July 2017, there were 1,062 issuers on the LSE's Main Market, of which 797 were UK issuers and 265 were non-UK issuers. A UK issuer may choose to list overseas where it has a closer connection with a particular jurisdiction or where it is seeking to attract a specific category of investors.

### 3 What are the primary exchanges for IPOs? How do they differ?

The primary exchange for IPOs in the United Kingdom is the LSE. The LSE is the principal London exchange for equity trading and is a recognised investment exchange for the purposes of the Financial Services and Markets Act 2000 (FSMA). It has a number of markets, including the Main Market and AIM.

The Main Market is the LSE's flagship market and its principal market for UK and overseas listed companies. It is a regulated market for the purposes of the Markets in Financial Instruments Directive. Admission to the Main Market requires an issuer's securities to be admitted to listing on the Official List maintained by the Financial Conduct Authority (FCA). As a result, an issuer is required to submit two separate applications: to the FCA for admission to listing on the Official List; and to the LSE for admission to trading on the Main Market. An issuer may choose to list its shares on the premium or standard listing segment of the Official List. A standard listing requires compliance with EU Directive minimum standards whereas a premium listing requires compliance with more onerous or super-equivalent listing requirements imposed by the FCA (see question 5 for a comparison of the premium and standard listing requirements). A premium listing is a prerequisite for inclusion in the FTSE UK Index Series. Of the total shares listed on the Main Market as at 1 July 2017, approximately three-quarters were listed on the premium listing segment.

AIM is the LSE's junior market for smaller and growing companies and is not a regulated market for EU Directive purposes. Securities admitted to AIM are admitted to trading on an exchange regulated market and are subject to a lower level of regulation, both at the time of admission and, in certain areas, on an ongoing basis.

In March 2013, the LSE launched a further Main Market segment: the high growth segment (HGS). The HGS is a regulated market for EU Directive purposes but sits outside the FCA's listing regime. It is aimed principally at high growth, trading businesses that intend, in due course, to seek admission to the Official List but may not yet meet the eligibility criteria for a premium or standard listing. However, to date, issuers have largely ignored this option.

Unless indicated otherwise, this chapter focuses solely on IPOs on the Main Market and principally an application for a premium listing.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The principal statute governing securities offerings in the United Kingdom is the FSMA, pursuant to which power is given to the FCA, in its capacity as competent authority, to make rules relating to the admission of securities to the Official List, certain continuing obligations for listed issuers, the enforcement of such obligations and the suspension and cancellation of listing. When exercising its functions in relation to the admission of securities to the Official List the FCA may use the name the UK Listing Authority (UKLA).

The principal rules for IPOs are found in the Listing Rules and the Prospectus Rules (which form part of the FCA Handbook). Parts of the FCA's Supervision Manual, the Decision Procedure and Penalties Manual, and the Enforcement Guide cover the FCA's related supervision and enforcement policies and procedures. In addition, the FCA's Fees Manual contains details of fees charged by the FCA in relation to an application for listing, annual fees for listed issuers and fees for certain transactions by listed issuers. Following an IPO, a premium-listed issuer will be required to comply with the disclosure requirements in the EU Market Abuse Regulation (MAR) and will be subject to the continuing obligations regime set out in the Listing Rules and the Transparency Rules (which form part of the FCA Handbook). The Disclosure Guidance, which also forms part of the FCA Handbook, provides guidance on certain aspects of the disclosure requirements in MAR and related issues. The UKLA Knowledge Base, which can be found on the FCA's website, contains certain technical and procedural notes designed to provide guidance on the application of the Listing Rules, the Prospectus Rules, the Transparency Rules and MAR.

The LSE regulates admission of securities to trading on the Main Market and has its own set of rules, which include the Admission and Disclosure Standards and the Rules of the London Stock Exchange.

In addition, there are several institutional shareholder bodies that publish guidelines on good practice for UK-listed companies. Although the guidelines are generally not legally binding, the shareholder bodies may exert significant influence on institutional shareholder voting and, as a result, on the actions of UK-listed issuers.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

As discussed in question 3, issuers apply to the FCA for admission to the Official List and to the LSE for admission to trading on the Main Market.

The Listing Rules provide details of the eligibility requirements and the documents to be provided by issuers in connection with an

application for listing. Certain eligibility requirements apply to applications for a premium or standard listing of shares and a further set of more stringent requirements apply solely to applications for a premium listing of shares. The key eligibility requirements for applications for a premium or standard listing of shares are as follows:

- an issuer must be duly incorporated or otherwise validly established according to the relevant laws of its place of incorporation or establishment, and operating in conformity with its constitution;
- the shares must conform with the law of the issuer's place of incorporation, be duly authorised according to the requirements of the issuer's constitution and have any necessary statutory or other consents;
- the shares must be freely transferable, fully paid and free from all liens, and an application for listing must relate to all the shares of the class to be listed.
- the shares must be admitted to trading on a regulated market for listed securities operated by a recognised investment exchange (see question 3);
- the shares must have an expected aggregate market value of at least £700,000; and
- at least 25 per cent of the issuer's shares of the class to be listed must be held in public hands in one or more states of the European Economic Area (EEA) on admission. Shares considered not to be 'held in public hands' include, among others, the interests of directors of the issuer or any of its subsidiary undertakings and interests of 5 per cent or more held by persons in the same group or persons acting in concert. The FCA may take into account holders in one or more non-EEA states in which the shares are listed. The FCA also has the discretion to accept a percentage lower than 25 per cent if it considers that the market will operate properly with a lower percentage in view of the large number of shares of the same class and the extent of their distribution to the public.

The key additional eligibility requirements for an application for a premium listing of shares are as follows:

- the issuer must appoint a sponsor in relation to its application for admission. This will typically be an investment bank or a corporate broker approved for such purposes by the FCA;
- the issuer must have published or filed audited, consolidated historical financial information that covers at least three financial years and includes a balance sheet date that is no more than six months before the date of publication of the prospectus and no more than nine months before the date of admission to the Official List. The historical financial information must represent at least 75 per cent of the issuer's business for the full three-year period;
- the issuer must satisfy the FCA that it has sufficient working capital available for the group's requirements for at least the next 12 months from the date of publication of the prospectus, subject to certain exceptions;
- the issuer must be carrying on an independent business as its main activity; and
- where an issuer will have a controlling shareholder on admission it must enter into a written and legally binding agreement that complies with certain independence provisions set out in the Listing Rules. The issuer's constitution must also allow for specific dual voting requirements in relation to the election of independent directors. A controlling shareholder for these purposes is a person who exercises or controls on their own, or together with any person with whom they are acting in concert, 30 per cent or more of the voting rights in the issuer, subject to certain exceptions.

Issuers will need to submit an eligibility letter and checklist to the FCA, demonstrating how the relevant requirements have been met. Further correspondence with the FCA may be required before the FCA is satisfied that the eligibility criteria have been met. The eligibility review is typically undertaken in parallel with the FCA's review of the draft prospectus. In addition, the relevant prospectus checklists (as discussed in question 6) and UKLA fees (as discussed in question 10) must be submitted at the same time as the draft prospectus. During the course of the listing application process an issuer is required to submit further documents including a completed Application for Admission of Securities to the Official List. The Admission and Disclosure Standards set out the documents to be provided to the LSE, which include a completed Form 1, the prospectus and the announcement relating to admission.

### 6 What information must be made available to prospective investors and how must it be presented?

In connection with an IPO and subject to certain exceptions, a prospectus must be published where an issuer either makes an offer of securities to the public or seeks admission of securities to trading on a UK regulated market. The prospectus must be approved by the FCA. The Prospectus Rules set out detailed content requirements for a prospectus. A prospectus must include a clear and detailed table of contents, a summary that must satisfy specific content and formatting requirements, the risk factors relating to the issuer and the type of security and further information items. The further information items are set out in a combination of schedules to the Prospectus Rules, containing minimum disclosure requirements for shares and building blocks covering additional requirements such as the presentation of pro forma financial information. Together with each draft of the prospectus, issuers will need to submit checklists to the FCA, cross-referring each minimum disclosure requirement to the relevant page in the prospectus.

The overriding principle under the FSMA is that the prospectus must contain all the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to the securities.

### 7 What restrictions on publicity and marketing apply during the IPO process?

Throughout the IPO process, all information disseminated internally and externally by an issuer and other parties to the IPO must be strictly controlled to comply with UK and other legal and regulatory requirements. It is customary for publicity guidelines to be put in place at an early stage to ensure adherence to the relevant restrictions on pre-prospectus publicity and marketing. All IPO-related materials must be vetted to ensure consistency with the prospectus and information should be limited to factual matters and should not include any projections, estimates or forecasts about the issuer's performance. Information contained on the issuer's website and any information released to the press must also be carefully controlled. Non-IPO-related communications, such as typical product advertising and ordinary course communications with customers and employees, are permitted provided that they contain no references to the IPO or the issuer's prospects and are consistent with past practice.

No information may be released that contradicts anything in the prospectus or that would, if read in conjunction with the prospectus, lead a potential investor to form a different understanding to what is presented in the prospectus. Offering and marketing materials, including press announcements, are likely to be caught by the advertisement regime under the Prospectus Rules, which requires specific disclosures to be included on all relevant communications.

The financial promotion regime will apply to the communication of an invitation or inducement to engage in investment activity that is made in the course of business and capable of having an effect in the United Kingdom. These rules seek to limit the promotion of investments by persons who are not authorised by the FCA unless the promotion is made within specified parameters and in accordance with specified procedures to clearly defined categories of investors. If an IPO-related communication constitutes a financial promotion, either it must be made by an FCA-authorised person or its content must be approved by an FCA-authorised person or the communication must be covered by an exemption.

### 8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Under the Listing Rules, the FCA may not grant admission unless it is satisfied that the requirements of the Listing Rules are complied with (including any special requirements it deems appropriate to protect investors) or if it considers that it would be detrimental to investors' interests. It may also refuse to grant admission for securities already listed in another EEA state, if it considers that the issuer has failed to comply with any obligations in respect of that listing. The LSE has similar powers to refuse an application for admission to trading in specified circumstances.

The FCA has information gathering powers to verify compliance with the Listing Rules or to enable it to decide whether to grant an application for admission. It has a number of enforcement powers available

to it where an issuer has made an offer of transferable securities to the public in the United Kingdom or an application for the admission of transferable securities to trading on the LSE. These powers include requiring the withdrawal or temporary suspension of the offer, requiring the temporary suspension of the application for admission or the prohibition of trading in the securities, and private or public censure of the issuer. The FCA may also impose unlimited financial penalties on an applicant for breaches of the Listing Rules or the Prospectus Rules under section 91 of the FSMA or on a director of the applicant who was knowingly involved in such a breach.

The FCA has power to bring charges under the offences of making a false or misleading statement or creating a false or misleading impression pursuant to sections 89 and 90 of the Financial Services Act 2012. Penalties may include a fine or imprisonment (or both). The FCA also has disciplinary powers in relation to the market abuse civil regime and sanctions include financial penalties and public censure. Criminal liability may arise pursuant to section 19 of the Theft Act 1968 for directors who make false or misleading statements with intent to deceive shareholders, or the Fraud Act 2006 for dishonestly making a representation with the intent to gain or cause a loss, resulting in fines or imprisonment for those found guilty of such an offence.

## Timetable and costs

### 9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The timing of an IPO will depend on a number of factors, including the complexity of the transaction, the issuer's financial reporting timetable and current market conditions. An issuer is likely to require at least four to six months for the process, particularly where a premium listing is sought. A typical IPO timetable may be split into the following key stages (assuming a bookbuilding process):

**Preparatory**

An issuer will need to select a number of advisers including the lead bank or banks and the other banks in the syndicate, a sponsor (in the case of a premium listing), legal advisers, reporting accountants, registrars and financial printers. It is becoming increasingly common for an engagement letter to be entered into between the lead bank or banks (often referred to as the global coordinator or joint global coordinators) and the issuer. The initial stages of the IPO will include a due-diligence exercise, preparing a draft prospectus and drafts of the key transaction documentation and highlighting any issues that may affect the eligibility and disclosure process. Once the draft prospectus is in a fairly advanced form, the sponsor will clear any eligibility issues with the FCA and initiate the prospectus review exercise. Management will be involved in briefing the syndicate or connected research analysts with key facts about the issuer in connection with the preparation by the analysts of independent pre-deal research reports.

The lead banks may recommend limited 'early' marketing to provide management with an opportunity to warm up key potential investors, subject to relevant legal and regulatory constraints. Once the preparatory work has been completed and any warm-up meetings have occurred, the issuer may publish an 'intention to float' press announcement (ITF) to signal to the market its intention to proceed with an IPO. The connected research analysts will typically publish their pre-deal research reports at the same time and an investor education process by such analysts may follow.

**Marketing**

For a bookbuilt offering, the formal marketing stage is likely to take the form of a one to two-week management roadshow comprising a series of management presentations and one-to-one meetings with key potential investors. This is typically done on the basis of an FCA-approved price range prospectus or an unapproved draft 'pathfinder' prospectus. The choice of document will depend on a number of factors, including the type of offering and the target investors, and will have certain legal and timing implications for the process. Where an approved price range prospectus is used, certain transaction documentation will be signed at the time of publication of the price range prospectus.

**Pricing and closing**

At the end of the bookbuilding process, the price of the shares and size of the offering will be determined and the transaction documentation will be signed. Where a price range prospectus was used, this will comprise the outstanding transaction documentation not previously executed. The price will be announced and the FCA-approved prospectus published or, where a price-range prospectus was previously published, a pricing statement will be published containing all outstanding price-related information. Conditional dealings in the shares may commence at this stage.

Closing is typically on a T+3 basis, that is on the third business day following the announcement of the price. On closing, admission to the Official List of the FCA and to trading on the Main Market will occur, unconditional dealings in the shares will commence, the shares will be issued to investors and the issuer will receive the IPO proceeds, less any fees and expenses of the IPO.

### 10 What are the usual costs and fees for conducting an IPO?

The transaction fee payable to the FCA is currently £15,000 for both a standard and premium listing, which covers reviews of both the prospectus, and the issuer's eligibility. However, for a new issuer applying for a premium listing with a market capitalisation in excess of £1.5 billion, the transaction fee is increased to £50,000.

The admission fee payable to the LSE is calculated on a sliding scale depending on the market capitalisation on admission up to a maximum fee of £500,000. Where applicable, the issuer must also pay value added tax (VAT) on these sums. As at 1 July 2017, the standard rate of VAT was 20 per cent. The amounts included in section 10 are the fees payable as at 1 July 2017.

The underwriters typically receive an amount equal to a percentage of the proceeds of the underwritten portion of the offering. This may comprise a fixed and a discretionary or success element and there may also be a transaction fee payable to the lead banks. In addition to underwriting fees, the issuer will be responsible for the fees and expenses of its legal counsel and typically the banks' legal counsel, and other advisers such as the reporting accountants and the registrars. There will also be costs associated with the marketing of the offering, including the roadshow, and printing costs, which will typically be borne by the issuer.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The key guidelines relating to corporate governance standards for premium listed companies are set out in the UK Corporate Governance Code (UKCGC). A premium listed issuer is required under the Listing Rules to state whether it has complied with the principles set out in the UKCGC in its annual financial report and, if not, must explain the provisions it has not complied with, the period during which it has not complied and its reasons for non-compliance (known as the 'comply or explain' requirement). An applicant for a premium listing is required to include a similar statement in the prospectus.

In terms of board composition, the UKCGC stipulates that at least half the board, excluding the chairman, should comprise independent non-executive directors, except in the case of 'smaller companies' (ie, those that were outside the FTSE 350 index throughout the prior year), where there should be at least two independent non-executive directors. The roles of chairman and chief executive should be exercised by different individuals and all directors should be subject to annual re-election by shareholders, except in the case of smaller companies, where directors should be subject to re-election at the first annual general meeting following their appointment and every three years thereafter.

The board should establish a nomination committee for the purposes of recommending board candidates, an audit committee for the purposes of monitoring financial reporting, risk management and internal financial controls and a remuneration committee for the purposes of determining executive directors' remuneration. Each committee should have formal terms of reference, which should be made available to shareholders.

**Update and trends**

**Recent IPO trends**
The continued uncertainty surrounding the manner in which the UK will cease to be a member of the European Union and, in particular, the nature of any future UK–EU agreement on financial services contributed to a slow start to the UK IPO market during the first half of 2017 with a number of financial sponsors favouring an exit via a sale process over an IPO. The UK's departure from the EU may result in significant changes to law, regulation and market activity within the UK in the capital markets sphere. The outlook remains uncertain, and it is difficult to predict with authority how and when the framework may change and, at that stage, the status of any EU regulations, including the new Prospectus Regulation.

**IPO reform**
The FCA is currently consulting on proposed changes to the way in which information is made available to potential investors in the context of a UK IPO. Key reforms include re-sequencing the publication of the prospectus and pre-deal research prepared by connected research analysts with the aim of making the approved prospectus the primary source of information available to potential investors. Under the new proposals an approved prospectus or registration statement would be published up to seven days prior to the ITF. The exact timing would depend on the stage at which any unconnected research analysts are provided with access to the issuer's management. The proposals seek to reduce the reliance placed on pre-deal research prepared by connected analysts in view of increasing concerns of bias owing to undue pressure on connected analysts to produce favourable research. Where connected and unconnected analysts are briefed by management at the same time, the FCA is proposing a 24-hour gap between the publication of the approved prospectus or registration statement and the publication of the ITF and connected research. Where the unconnected analysts are brought on board at a later stage the FCA is proposing a seven-day gap between the publication of the approved prospectus or registration statement and the publication of the connected research to allow the unconnected analysts more time to publish their own research before the start of the investor education process. The FCA is also proposing to restrict analysts from interacting with the issuer's management and its corporate finance advisers while their bank is pitching for a role in the IPO.

**Proposals to amend listing categories**
The FCA is currently seeking views on whether to introduce a new international listing segment for overseas issuers that may not be able to meet the eligibility requirements for a premium listing but for which a standard listing is not seen as an attractive option. The FCA believes that an increasing number of large overseas issuers favour a listing of global depository receipts, which are typically aimed at sophisticated investors and tend to be inaccessible to the retail market. A new international segment would have concessions from some of the more onerous premium listing eligibility requirements. The FCA has requested feedback on whether it should continue to avoid treating UK and non-UK issuers differently and on an appropriate package of investor protections for the new segment. In addition to the proposals to create a new international listing segment, the FCA is seeking views more generally on the underlying rationale for the standard listing segment. Early indications are that there is a demand for a segment for companies unable to meet the super equivalent requirements of a premium listing, including those who want to use it as a stepping stone to a premium listing. The FCA is further investigating proposals to create a new premium listing category for sovereign controlled companies, with concessions from certain requirements relating to controlling shareholders.

**Changes to the prospectus regime**
A new EU Prospectus Regulation entered into force on 20 July 2017 and will apply from 20 July 2019, subject to certain exceptions. The new regulation replaces the Prospectus Directive in its entirety and, as a directly applicable regulation, does not require transposition into national law, save for a limited number of provisions which are due to come into effect at an earlier date. Key changes include a more user-friendly prospectus summary, an increase in the type of information which may be incorporated by reference in a prospectus and restricting risk factors to relevant, specific and material risks. Other changes include a shorter prospectus for secondary issues, a fast-track shelf-style approval process for frequent issuers and a lighter regime for small and medium sized issuers with a market capitalisation of up to €500 million. Certain changes to the exemption from the requirement to produce a prospectus in connection with an application to trading on a regulated market apply with effect from 20 July 2017.

As well as the board composition requirements described above, the UKCGC also sets out various standards of good practice in relation to financial reporting, general board practices and relations with shareholders.

A standard listed issuer is required to include a corporate governance statement in the directors' report in its annual financial statements. This will include details of any corporate governance code that it has voluntarily decided to apply and a 'comply or explain' statement in relation to such code. An applicant for a standard listing will be required to include a similar statement in the prospectus.

**12 Are there special allowances for certain types of new issuers?**

As discussed in question 11, certain areas of the UKCGC set lower thresholds for smaller companies. In addition, given the 'comply or explain' nature of the UKCGC, there is no hard requirement for issuers to comply fully with all of its standards. If a new issuer is initially non-compliant in certain areas of corporate governance it would need to disclose this in the prospectus (as well as annually as part of its ongoing reporting requirements).

Separately, as discussed in question 3, many smaller or growth companies may choose to be quoted on AIM or the HGS. In both cases, there is no express requirement for the issuer to comply with the UKCGC or any other corporate governance standards, although many such issuers voluntarily adopt the Corporate Governance Code for Small and Mid-Size Quoted Companies (the QCA Code), which sets lower corporate governance standards than the UKCGC.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

Anti-takeover devices are much less common in the United Kingdom than in the United States, for example, for a number of reasons.

The City Code on Takeovers and Mergers (the Takeover Code) provides that during the course of a takeover offer, or beforehand if the board of the target company has reason to believe that a bona fide offer may be imminent, the board must not, without shareholder approval, take any action that may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits. In particular, the target company cannot, without specific shareholder approval and subject to limited exceptions:

- issue shares, options or securities convertible into shares;
- dispose of assets of a material amount (generally where the value of the consideration represents 10 per cent or more of the target company's market capitalisation or the assets represent 10 per cent or more of the target company's assets); or
- enter into contracts other than in the ordinary course of business.

The Takeover Code restrictions do not apply before a target board is aware of a potential offer, but the director of a listed company incorporated in England and Wales will at all times need to take into account his or her duties under the Companies Act 2006. These include a duty to act in a way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Directors are also required to consider a range of other interests, including those of employees. Devices with the primary purpose of deterring or frustrating any offer for the company might not, depending on the circumstances, be consistent with the target directors' duties. On the other hand, action taken in order to produce a higher offer may well be consistent with those duties.

In practice, issuers may publish defence documents setting out arguments against a bid, release new information or declare and pay increased dividends (provided they can be justified by the company's finances) to encourage target shareholders to reject an unwelcome takeover bid. They may also seek out and encourage an alternative, more welcome bid. US-style poison pills, effected through a listed company's share rights, are rarely adopted. UK institutional shareholders

are usually hostile to such measures and weighted voting structures are rarely utilised because the Listing Rules require that all equity shares in a class that has been admitted to premium listing carry an equal number of votes and that, where a premium-listed company has more than one listed class of shares, the aggregate voting rights of each class should be broadly proportionate to the relative interests of the classes in the company's equity.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

A foreign issuer looking to list shares in the United Kingdom will need to decide which market is most appropriate for it. Key to any decision will be the entry requirements of each market, ongoing post-admission obligations and what type of investor base the issuer is targeting. Admission to the Main Market may be seen as the best way to boost an issuer's status and profile, whereas an issuer admitted to AIM will benefit from a lighter touch post-admission regime. For a Main Market admission, a foreign issuer will have the choice between a premium listing, with its more stringent eligibility requirements, and a standard listing, as discussed in more detail in question 5. If inclusion in the FTSE UK Index Series is important, a premium listing will be necessary, alongside other requirements for inclusion.

The requirements for a foreign issuer to admit shares to the Main Market in connection with an IPO are broadly the same as those that apply to a UK issuer. The exact nature of any differences will depend on whether the foreign issuer is incorporated in the EEA and the type of listing sought.

A foreign issuer will need to produce a prospectus which will be vetted by the competent authority of its home member state. For an EEA issuer, the prospectus will be approved by the competent authority in the EEA state in which it has its registered office and 'passported' into the United Kingdom under the provisions of the FSMA and the Prospectus Rules. For a non-EEA issuer, it will be necessary to identify which EEA state is its 'home member state' under the provisions of the Prospectus Directive. Where the United Kingdom is the home member state, the FCA will be responsible for reviewing and approving the draft prospectus.

The FCA will only admit the shares of a non-EEA issuer that are not listed either in its country of incorporation or in the country in which a majority of its shares are held if it is satisfied that the absence of the listing is not because of the need to protect investors.

The foreign issuer's accounts must have been independently audited or reported on in accordance with international financial reporting standards (IFRS) or in accordance with national accounting standards if these have been declared 'equivalent' to IFRS. A foreign issuer with a premium listing will be required to comply with the UKCGC (or explain any non-compliance) in the same way as a UK issuer with a premium listing and must also comply with similar provisions relating to pre-emption rights in connection with further issues of shares for cash.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

There are a number of situations where a foreign issuer may offer shares in the United Kingdom without the need to publish a Prospectus Directive-compliant prospectus, assuming no application is being made for admission to trading on a regulated market in the United Kingdom. These include offers made solely to qualified investors and offers made to fewer than 150 persons, other than qualified investors, per EEA state. Where a foreign issuer is relying on one or more exemptions from the requirement to produce a prospectus, it will still need to consider the financial promotion regime as outlined in question 7 in relation to any offering or marketing materials.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

The issue of new shares as part of an IPO will not give rise to a liability to stamp duty or stamp duty reserve tax (SDRT). Any transfer of shares, whether subsequent to the IPO or as part of a secondary offering, will attract stamp duty or SDRT at a rate of 0.5 per cent. In the case of a secondary offering, this liability is typically met by the selling shareholders.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

In order to seek redress under any of the civil liabilities described in more detail in question 19, the IPO investor would need to file a claim with the courts of England and Wales, and follow the process through the courts unless the matter is settled.

While an investor can submit a complaint to the FCA, the FCA does not act as an ombudsman, and will not be able to seek compensation for the investor.

**18 Are class actions possible in IPO-related claims?**

English law does not generally have an equivalent to the 'opt-out' class action procedure in the United States. While the first 'opt-out' class actions in the UK were launched during 2016 in relation to competition law, such actions are currently only permitted in the Competition Appeal Tribunal, and it is not envisaged that English courts will follow suit. However, should a group of investors wish to bring a claim against an issuer following an IPO, there are options under English law to 'opt in' to a collective claim.

First, a number of investors may file a claim together on a single claim form, in the event that it would be convenient to dispose of each of the investors' claims in the same proceeding. If other investors wish to join the claim at a later stage, they would need to seek the court's permission. This is likely to be impractical in an IPO situation, where the number of potential claimants could be high.

Simpson Thacher

**Clare Gaskell** **cgaskell@stblaw.com**
**Deborah Harris** **deborah.harris@stblaw.com**
**Lucy Gillett** **lucy.gillett@stblaw.com**

CityPoint
One Ropemaker Street
London EC2Y 9HU
United Kingdom

Tel: +44 20 7275 6500
Fax: +44 20 7275 6502
www.stblaw.com

Second, if impractical for all affected investors to be a party to the claim, the court may order one or more persons to act as a representative, provided that each investor can be shown to have the 'same interest' as the representative. Any decision made in such proceedings will be binding on all those represented, but anyone other than the representative may only enforce the judgment with the court's permission. In reality, representative actions are rare, as the courts have taken a restrictive approach to the meaning of 'same interest'.

Last, the investors may apply for a group litigation order (GLO), where their claims give rise to common or related issues of fact or law. This test is more flexible in comparison with representative actions and, as such, claimants have tended to favour the GLO. If the court grants the GLO, a register will be set up listing the issues to which a claim needs to relate to be added to the GLO. Unless the court directs otherwise, any judgment relating to the GLO will be binding on all parties on the register at the time of the judgment.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

Under section 90 of the FSMA, if an investor has acquired shares in the issuer and has suffered a loss in respect of those shares as a result of an untrue or misleading statement in or omission from the prospectus, they may be entitled to seek compensation from those persons responsible for the prospectus. The persons deemed responsible for the prospectus include the issuer, its directors at the time the prospectus was submitted to the FCA, any persons named in the prospectus as current or future directors (and who have authorised themselves to be so named) and anyone who has accepted responsibility for, or authorised the content of, the prospectus or a part thereof (and such acceptance is stated in the prospectus).

The FSMA sets out a number of defences against liability, including where such persons can show that they reasonably believed the information to be true and not misleading or properly omitted at the time of publication and either had continued to believe this until the shares were acquired by the investor, or had taken all reasonable steps to correct the statement or omission.

The prospectus will form the basis of a contract between the issuer and the IPO investor. If the prospectus is inaccurate or misleading the IPO investor may be able to rescind the contract and claim for damages.

The IPO investor may also be able to claim damages for liability in tort, including the tort of deceit (if the investor proves fraud) or negligent misstatement (on the basis that those persons responsible for the prospectus owe a duty of care to investors), or claim damages or the right to rescind (or both) for misrepresentation, including negligent misrepresentation pursuant to the Misrepresentation Act 1967.

# United States

**Joshua Ford Bonnie and Kevin P Kennedy**
**Simpson Thacher & Bartlett LLP**

## Market overview

### 1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The size of the IPO market in the United States can vary significantly from year to year based on market conditions and other factors. While it experienced a late-year rally, the US IPO market disappointed in 2016, and continued a two-year decline from the banner year of 2014, a year that saw the successful conclusion of the largest IPO in world history when Alibaba Group Holding Ltd sold approximately US$25 billion in securities in its debut. In 2016, 105 companies went public with total proceeds of US$18.8 billion, a year-over-year decrease of 38 per cent in the number of companies completing IPOs and 37 per cent in aggregate proceeds.

| Year | Proceeds (US$ billions) | Number of IPOs |
|---|---|---|
| 2000 | 96.9 | 406 |
| 2001 | 41.2 | 84 |
| 2002 | 23.7 | 70 |
| 2003 | 15.2 | 68 |
| 2004 | 42.9 | 216 |
| 2005 | 33.7 | 192 |
| 2006 | 42.2 | 196 |
| 2007 | 48.9 | 213 |
| 2008 | 24.5 | 31 |
| 2009 | 21.9 | 63 |
| 2010 | 38.7 | 154 |
| 2011 | 35.5 | 124 |
| 2012 | 42.7 | 128 |
| 2013 | 54.9 | 222 |
| 2014 | 85.3 | 275 |
| 2015 | 30.0 | 170 |
| 2016 | 18.8 | 105 |

### 2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The US IPO market includes companies from nearly every sector of the economy, from health care to financial services to energy and power to technology and media companies. In addition, the US IPO market includes large companies raising well in excess of US$1 billion and smaller companies raising under US$100 million. Non-US companies also avail themselves of the US capital markets; in fact, non-US companies accounted for 24 per cent of the IPOs listed on the US exchanges in 2016.

### 3 What are the primary exchanges for IPOs? How do they differ?

Companies normally apply to list their securities on either the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (Nasdaq). Generally, the two exchanges are quite similar, although historically the NYSE had stricter quantitative requirements such as earnings and market cap tests. In addition, Nasdaq has traditionally attracted more technology and biotechnology issuers while the NYSE found itself home to more financial, industrial and energy companies. These lines have blurred significantly over the years, but smaller technology companies still tend to gravitate towards Nasdaq and larger financial services firms are almost all found on the NYSE. Also, while each exchange has its own corporate governance requirements, such requirements have converged over the years and are now fairly similar.

## Regulation

### 4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Securities and Exchange Commission (SEC) is the primary regulator for the US securities markets and, as discussed below, its staff will review a company's registration statement in connection with such company's IPO.

Further, the activities of underwriters in connection with an IPO are regulated by the Financial Industry Regulatory Authority (FINRA). While FINRA technically has no jurisdiction over non-members, its ability to control the activities of underwriters gives it influence over the conduct of an IPO – from the disclosure that must be made as to potential conflicts of interest relating to the underwriters to the appropriate amount of compensation the underwriters may be paid for their services.

While each state also has its own set of securities laws, known colloquially as 'blue sky laws', which regulate both the offer and sale of securities in such state, for an IPO registered with the SEC and listed on a national securities exchange, registration requirements under federal securities laws will generally pre-empt state-level securities registration requirements and state-level registration is typically not required.

### 5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Yes. Registration statements for IPOs are subject to review by the SEC's staff. In such reviews, the SEC generally seeks to ensure that the company's disclosures comply with SEC rules and that its financial statements comply with SEC requirements and generally accepted accounting principles (GAAP). Primary areas of disclosure within the registration statement for an IPO include:

- audited financial statements and a discussion and analysis of the company's results of operations and financial condition;
- a description of the company's business;
- disclosure regarding the material risks relating to the company's business and an investment in its stock; and
- information relating to the company's directors and executive officers and significant stockholders.

The SEC review process in an IPO almost always results in revisions to the initial version of the registration statement submitted to the SEC. It is, however, important to note that the review process is not a guarantee that a company's disclosure is complete or accurate and the SEC does not evaluate the merits of any IPO or determine whether an investment is appropriate for any investor. Rather, responsibility

for compliance with applicable disclosure requirements lies with the company and others involved in the preparation of the company's registration statement and prospectus.

In addition to the SEC review process, a company must apply to the US securities exchange (eg, the NYSE or Nasdaq) on which it wishes to list its securities. In the listing process, the company will need to meet certain basic financial requirements, which are set by the exchange where such company expects to list. For example, the NYSE and Nasdaq will require that an IPO company satisfy certain earnings, income or market-value tests. Unlike in many other jurisdictions, however, the securities exchange does not typically require substantive revisions to the company's registration statement.

Finally, the underwriters must file specified information and documents with FINRA relating to the underwriting terms and arrangements, which FINRA must approve prior to the completion of any IPO.

## 6 What information must be made available to prospective investors and how must it be presented?

An offering document known as a prospectus, which describes the company, the terms of the offering and other information and which must be compliant with section 10 of the US Securities Act of 1933, as amended (the Securities Act), is used by the company to solicit investors.

The prospectus is the most important part of a registration statement, which the company must file with the SEC prior to a company's shares being publicly distributed in the United States for the first time. US companies generally file registration statements on Form S-1. Most non-Canadian foreign private issuers use registration statements on Form F-1, although other forms may be available. There are special forms available to certain Canadian companies. The applicable SEC form for the registration statement outlines the information that must be included in the registration statement and the prospectus. Such form will generally reference the requirements of Regulation S-K and Regulation S-X that provide instructions on what information to present, and in some instances what format, to prospective investors.

## 7 What restrictions on publicity and marketing apply during the IPO process?

Restrictions on publicity in connection with an initial public offering generally divide into three time periods:

- the period beginning when the issuer reaches an understanding with an underwriter or underwriters to pursue an IPO and ending upon the filing of the registration statement with the SEC, commonly referred to as the 'pre-filing period';
- the period between the filing of the registration statement and the time that the registration statement is declared effective by the SEC, commonly referred to as the 'waiting period'; and
- the period beginning when the registration statement is declared effective by the SEC and ending 25 days later, commonly referred to as the 'post-effectiveness period'.

**The period before the filing of the registration statement**

Under the Securities Act an issuer is generally not allowed to 'offer to sell' any of its securities before filing a registration statement. The SEC construes an 'offer to sell' broadly. The phrase includes the publication of information and publicity efforts made in advance of a proposed offering that have the effect of 'conditioning the public mind' or 'arousing public interest' in the issuer or in its securities. The SEC may construe a communication as an 'offer to sell' even if it does not make reference to the securities being offered or the offering. Unauthorised efforts to offer securities before filing are generally labelled 'gun jumping'. Among other things, gun jumping may cause the SEC to delay the effectiveness of the registration statement, thereby creating practical marketing problems and delaying the transaction. In addition, the SEC will occasionally respond to gun jumping by forcing the company to add disclosure to its prospectus stating that investors in the IPO may have a rescission right against the company, whereby they can force the company to repurchase whatever securities the investors bought in the offering at the IPO price for up to a year after the offering.

While the SEC's rules permit an issuer, subject to a number of significant limitations, to continue to release factual (but not forward-looking) information about its business in a manner consistent with past practice to persons (such as customers) other than in their capacities as investors or potential investors in the issuer's securities, issuers are advised to take steps during the pre-filing period to ensure that their public relations and other departments do not inadvertently issue announcements, releases or other information that the SEC might construe as an attempt to stimulate the market for the issuer's stock. Communications by an issuer made more than 30 days prior to filing the registration statement that do not reference the proposed offering are generally permissible, even if they could be construed as 'pumping' the issuer, provided that the issuer takes reasonable steps to prevent further distribution or publication of the communication within this 30-day period. During the pre-filing period issuers may also issue a very limited press release regarding the proposed offering (a Rule 135 Release) stating only the approximate size, purpose and timing of the issuer's plans to go public (and not naming any potential underwriters). Commencing 30 days prior to the initial filing of the registration statement, communications must be more limited. Issuers may continue to advertise their products and services, but they should carefully avoid any publicity that might be construed as gun jumping. For example, a company extolling the virtues of its latest product in a way to stimulate demand for that product where the audience is potential customers is generally permissible as long as these efforts are consistent with the issuer's prior operating conduct. Conversely, an issuer giving interviews talking about how much revenue it will generate or the margins it will achieve from its new product may be problematic, since this is information of more interest to an investor than a customer.

A limited exception to these gun-jumping rules is available for emerging growth companies (EGCs), which, as discussed in further detail below, generally are companies with less than US$1 billion in annual revenue. The Jumpstart Our Business Startups Act of 2012 (the JOBS Act) added section 5(d) to the Securities Act, which permits an EGC or its representatives to communicate with certain institutional investors, either prior to or following the date of filing of the registration statement, in order to determine whether such investors might have an interest in a contemplated securities offering. Any such testing the waters should be carefully vetted in advance by counsel. The anti-fraud provisions of the federal securities laws apply to the content of testing-the-waters communications. As with traditional roadshow materials, any testing-the-waters communications should be reviewed to ensure consistency with the contents of the registration statement. Testing-the-waters communications are subject to review by SEC staff.

**The period between the filing of the registration statement and its effectiveness**

During the waiting period, the same principles discussed above generally continue to apply, with some exceptions. Most importantly, written offers may be made, but only through the use of the preliminary (or red herring) prospectus. (While SEC rules permit written offers other than the traditional prospectus, referred to as 'free-writing prospectuses', in certain circumstances, IPO issuers are subject to significant constraints on the use of these non-traditional offering documents and counsel should be consulted if consideration is being given to the use of any such documents.) Second, in contrast to the general rule applicable to the pre-filing period, oral offers can be made during the waiting period. In addition, indications of interest may be solicited from prospective purchasers, provided specified conditions are met. It is important to note, however, that an offer cannot be accepted until after the registration statement becomes effective. In addition, issuers may issue a somewhat more detailed press release during this period (which must contain an SEC-mandated legend) that names the underwriters and provides more information about the offering (a Rule 134 Release). It is important to note that any communications regarding the issuer or the offering, oral or written, during this period should be consistent with the information disclosed in the prospectus.

**The period after effectiveness of the registration statement**

Generally, for 25 days after the pricing of an IPO, securities dealers are required to deliver a prospectus in connection with any trades they make in the issuer's common equity. The issuer will have an obligation under the underwriting agreement to update the IPO prospectus for any material developments occurring while securities dealers are subject to this prospectus delivery requirement. Accordingly, during this period, many issuers take a conservative approach and limit publicity during this period to ordinary-course business activities, consistent with past practice.

**8 What sanctions can public enforcers impose for breach of IPO rules? On whom?**

Liability under the US securities laws in an IPO primarily arises under the Securities Act and the US Securities Exchange Act of 1934, as amended (the Exchange Act). The SEC has broad powers to investigate public companies and their directors and officers and to bring civil enforcement proceedings that could result in fines and monetary penalties or other sanctions, such as a bar from serving as a director or officer of a public company. In addition, a public company and its directors and officers could also become subject to criminal liability for, among other things, wilful violations of US securities laws or interference with a government investigation. Finally, many of the provisions of the US securities laws also provide for private rights of action in which investors individually or as representatives of a class can bring a lawsuit against the company and its directors and officers. These private class action lawsuits are the most common proceeding to which companies and their directors and officers are subject for alleged misstatements or omissions in connection with US-registered securities offerings. The provisions are as follows:

- Securities Act, section 11 liability: under section 11, the issuer, its directors, its principal executive, financial and accounting officers, its underwriters and a foreign issuer's authorised US representative can be liable for material misstatements or omissions in the issuer's registration statement. 'Experts', such as the issuer's accountants, can also be held responsible and sued directly for misrepresentations made on their authority. Section 11 entitles a purchaser of securities in a registered offering, or whose securities are 'traceable' to those distributed in such offering, to obtain damages for a violation. While the issuer is subject to strict liability for material misstatements and omissions in its registration statement, non-issuer defendants (ie, all defendants, other than the issuer itself) are afforded, among other defences, an affirmative 'due diligence' defence if they can show that 'after reasonable investigation, [they had] reasonable ground to believe and did believe' that statements made in the registration statements were not misleading.
- Securities Act, section 12 liability: under section 12(a)(2), the issuer, its officers and directors, its underwriters and other persons can be liable if they sell or solicit the sale of a security by means of a prospectus or an oral communication containing a material misstatement or omission. Section 12(a)(2) permits a purchaser of securities in a registered offering, or whose securities are 'traceable' to those distributed in such offering, to obtain rescission of the sale, or damages in certain circumstances. Non-issuer defendants similarly have an affirmative defence if they 'did not know, and in the exercise of reasonable care could not have known,' of the misrepresentation.
- Securities Act, section 15 liability: under section 15, any person who 'controls' a primary violator of section 11 or 12 can also be held liable under a theory of secondary liability. 'Control' exists if the defendant has the direct or indirect power 'to direct or cause the direction of the management and policies' of the primary violator (typically the issuer) through stock ownership, contract or other means. Control person claims are frequently asserted against officers and directors of issuers, and can be brought against a controlling shareholder or group of shareholders, in connection with section 11 and 12 lawsuits. Defendants have an affirmative defence if they 'had no knowledge of or reasonable ground to' know the facts underlying the violation.
- Exchange Act, section 10(b) and rule 10b-5: a section 10(b) and SEC rule 10b-5 claim is the most commonly asserted claim against public companies, officers and directors, underwriters and accountants and other persons. A claim can be brought for use of 'any device, scheme or artifice to defraud', any material misstatement or omission, or 'any act, practice, or course of business' that deceives in connection with the purchase or sale of securities. A claim can be brought concerning statements made in connection with a public offering or with secondary market trading based on misstatements made in press releases, officer or director communications and periodic reporting, among other things. Unlike the Securities Act claims discussed above, however, in order to establish a violation of section 10(b) a defendant must be shown to have had 'scienter' – an intent to defraud or otherwise engage in reckless conduct. The plaintiff must also demonstrate 'loss causation' – a connection between the defendant's alleged misconduct and the economic harm suffered.
- Exchange Act, section 20(a): similar to section 15 of the Securities Act discussed above, section 20(a) of the Exchange Act provides for secondary liability of any person who 'controls' a primary violator of section 10(b) or rule 10b-5 can also be held liable under a theory of secondary liability. Section 20(a) provides an affirmative defence for persons who acted 'in good faith and did not directly or indirectly induce [. . .] the violation'.

As mentioned above, section 11 of the Securities Act provides non-issuer defendants (including directors, officers and underwriters) with an affirmative 'due diligence' defence if they can show that 'after reasonable investigation, [they had] reasonable ground to believe and did believe' that statements made in the registration statement were not misleading. Similarly, non-issuer defendants have an affirmative defence to a claim under section 12 of the Securities Act if they 'did not know, and in the exercise of reasonable care could not have known' of the alleged misrepresentation. Defendants in a Securities Act, section 15 or Exchange Act, section 20 'control person' claim have an affirmative defence if they 'had no knowledge of or reasonable ground to' know the facts underlying the violation or acted in 'good faith', respectively. A defendant in an Exchange Act, section 10(b) or rule 10b-5 claim must be shown to have had an intent to defraud or been reckless. A non-issuer defendant that is able to establish that he or she or it performed a reasonable investigation sufficient to establish an affirmative defence under section 11 will typically also be thereby able to defeat claims under each of the other provisions as well. It is for the purposes of establishing such a defence under section 11 and these other provisions that underwriters and other offering participants engage in extensive due diligence on the issuer and its business in connection with an IPO. It should be noted that, as a procedural matter, the affirmative due diligence defence, typically, is not available at the incipient 'motion to dismiss' stage of a securities litigation (when a plaintiff's allegations must be assumed to be true), but rather only after discovery has been taken and the defendant moves for 'summary judgment'. An issuer arriving at this later stage of a securities litigation will typically have already incurred significant expense, and companies accordingly have a significant incentive to settle these actions.

## Timetable and costs

**9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.**

An IPO timetable may be thought of as having several phases. Initially, from six to 18 or even 24 months or more prior to making an initial submission of a registration statement to the SEC, the IPO issuer will typically evaluate the decision to proceed and prepare itself for life as a public company, including by developing the internal capabilities to produce SEC-compliant financial reporting on a timely and recurring basis going forward. Commencing two to six months prior to the initial submission of the IPO registration statement to the SEC, the issuer will typically engage underwriters and commence preparing the registration statement itself, including developing and refining the investment thesis for the offering. The preparation of the registration statement is a major undertaking, entailing a cooperative effort by the company and its counsel and its auditors working with the lead underwriters and their counsel. Once the registration statement is in a form appropriate for SEC review, the issuer will submit it to the SEC – this submission may be confidential. Once the SEC review process starts, the SEC staff will take approximately 30 days to perform their initial review of the registration statement and issue their initial comment letter. During this 30-day initial review period, the issuer and its underwriters (and their respective counsel) will typically work on the roadshow presentation and finalise the underwriting agreement and other required documentation, including revisions to the issuer's organisational documents appropriate for a public company. During this time period the issuer will also typically prepare and submit its listing application to the relevant stock exchange, with the listing process thereafter proceeding in parallel with the SEC review process. Following receipt of the initial SEC staff comment letter, the issuer will respond by resubmitting the registration statement, revised to reflect the SEC staff's comments and accompanied by its own letter explaining its responses to each of the staff's comments. In an IPO, there will typically be several rounds of SEC staff comments and resubmissions of the registration statement in response thereto, with the overall time required for this phase taking from two-and-a-half to four

months, or even longer if problematic SEC staff comments are encountered or if the issuer takes additional time in moving forward. Once the issuer has largely (if not entirely) cleared the SEC staff comments, it is in a position to commence the active marketing of the IPO, which in the United States typically starts with meetings with the sales forces of the lead underwriters and is followed by at least a week-and-a-half roadshow where company management (typically including the chief executive officer and the chief financial officer), accompanied by the lead underwriters, meet with prospective investors in cities throughout the United States and also sometimes internationally. A recorded version of the roadshow presentation is also ordinarily made publicly available on the internet at retailroadshow.com, a website that has specialised bells and whistles that enable it to comply with the applicable SEC rules requiring broad access to the public and that the issuer's roadshow be accompanied by the statutory prospectus. Note that if the issuer has availed itself of the ability to submit its registration statement to the SEC staff on a confidential basis, the registration statement must have been publicly filed at least 15 days prior to the commencement of the roadshow. Typically, on the day that the roadshow concludes, the issuer's counsel arranges for the registration statement to be declared 'effective' by the SEC and, after the market close on such date, the IPO will be priced and the issuer will enter into the underwriting agreement with the underwriters. On the following trading day, the company's stock will open for trading on the relevant stock exchange and its life as a public company will begin. Several trading days thereafter the IPO will 'close', with the stock being delivered to the underwriters in exchange for the offering proceeds, net of underwriting discounts.

### 10 What are the usual costs and fees for conducting an IPO?

IPOs in the United States are expensive. There are significant costs relating to the transaction itself, as well as incremental costs to operate as a public company going forward. The largest offering cost is typically the underwriting discount received by the underwriters, which is almost always calculated as a percentage of the gross proceeds and typically ranges from 5.5 per cent to 7 per cent (with 7 per cent being the norm for average-sized IPOs) but may be a lower percentage in the case of large offerings. The most significant other offering expenses tend to be the cost of the company's outside counsel, its auditors and the cost of the financial printer. The issuer will also be required to pay a registration fee to the SEC, which is calculated based on the offering size and varies from year to year based on the funding requirements of the SEC, as well as fees to the relevant stock exchange. A number of third parties make publicly available annual surveys of these other expenses that are gleaned from the required disclosures made by issuers in their IPO registration statements; however, suffice to say that these other offering expenses typically range upwards from US$3 million in the aggregate and are frequently significantly higher. Note that companies typically also incur incremental expenses on an ongoing basis to be a public company, including:

- expanded accounting;
- investor relations and legal capabilities;
- higher levels of professional fees for auditors;
- outside counsel and other advisers;
- annual stock exchange listing fees;
- director fees; and
- directors' and officers' insurance coverage.

## Corporate governance

### 11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

A US company listed on either the NYSE or Nasdaq is generally required to have a board of directors comprising a majority of independent directors, an audit committee composed of three or more directors, all of whom must be independent, and compensation and corporate governance and nominating committees, both of which are composed solely of independent directors. In connection with its IPO and listing, a company may employ a phased-in schedule to meet the board and committee independence requirements. At least one director on each of the required committees at the time of listing must be independent, subsequently followed by a majority of independent directors on each requisite committee within 90 days after listing and fully independent committees and a majority of independent members of the board of directors within 12 months after listing.

In addition, there are important exemptions for 'controlled companies' (generally, a company in which more than 50 per cent of the voting power for the election of directors is held by an individual, a group or another company) and foreign private issuers. If an issuer is a controlled company and elects to rely on the applicable exemptions, then it will not be required to have a majority of independent directors on its board of directors, nor will its board be required to have a nominating and corporate governance committee or a compensation committee. The issuer must, however, still comply with the audit committee requirements described above. The issuer must disclose in the annual proxy statement that it is relying on the controlled-company exemption and explain the basis for its conclusion that the exemption is applicable. Similarly, foreign private issuers are not required to have a majority of independent directors and are generally only required to meet the audit committee requirements noted above. Although not required, implementation of other corporate governance practices such as corporate governance committees and compensation committees are frequently recommended as preferred practices. Any variation by a foreign private issuer, based on home-country practices, from the governance requirements applicable for US companies on the relevant US exchange, must be disclosed each year in a concise summary in its annual report on Form 20-F.

### 12 Are there special allowances for certain types of new issuers?

The JOBS Act, as modified in certain respects by the Fixing America's Surface Transportation Act passed in 2015, has enabled certain companies to enjoy the benefits of being an EGC, which is any company with total gross revenues of less than US$1 billion during its most recently completed fiscal year. An EGC may generally continue holding this status until the earliest to occur of:

- the final day of the fiscal year in which such company had total gross revenues that exceeded US$1 billion;
- the fifth anniversary of such company's IPO;
- the date that such company has issued more than US$1 billion in non-convertible debt in the three years prior; and
- the date that such company is deemed a 'large accelerated filer' (ie, a seasoned issuer with US$700 million or more of public float held by non-affiliates).

A number of JOBS Act provisions benefit an EGC pursuing an IPO, including the following:

- As discussed above, an EGC is entitled to a confidential non-public review of the registration statement for its IPO by the staff of the SEC (the SEC has recently extended a confidential non-public review of an IPO registration statement to non-EGCs as well). The initial confidential submission and all amendments to it need to be publicly filed at least 15 days prior to the start of the roadshow.
- An EGC need not present more than two years of audited financial statements (rather than three years) or selected financial data (rather than five years) in the registration statement for its IPO. With respect to executive compensation, among other things, an EGC is generally only required to disclose the compensation of three executive officers (including the principal executive officer) rather than five (including the principal executive and financial officers). Also, such company is not required to present a compensation discussion and analysis.
- Certain audit and accounting rules are relaxed for EGCs. For example, auditors of EGCs are not required to attest to the internal controls under the Sarbanes-Oxley Act of 2002, section 404(b).
- As discussed above, an EGC is permitted to make oral and written communications with certain institutional investors before or after filing the registration statement to determine whether such investors might have an interest in a contemplated securities offering.

Although practice in this area has not changed widely following enactment of the JOBS Act, publication or distribution by a broker or dealer of research reports about an EGC subject to a proposed public offering, whether before or after the registration statement has been filed or become effective, would not constitute an offer for sale even if the broker or dealer is participating or will participate in the offering. Also, rules limiting the ability of a broker or dealer to publish reports about an EGC during the customary lock-up or other post-IPO period are also relaxed.

**13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?**

Once a company has made a large portion of its stock available to the public through an IPO, the company could be a potential target for a takeover. Accordingly, it is worth considering as part of the lead-up to an IPO whether to implement anti-takeover protections that will impede hostile acquirers who may seek to gain control of the company without negotiating with the company's board. Given that investors may suspect that management is attempting to use such protections to entrench its own position at the expense of shareholders, a company should be thoughtful about its approach to such protections.

A number of devices and protections are available to IPO issuers. The most powerful anti-takeover protection seen with some level of frequency in the United States, particularly in the high-technology industry, is a dual-class high vote/low vote structure, which affords the holders of a high vote class of stock (typically selected pre-IPO owners or insiders) with voting power sufficient to control the election of directors even when public investors, who hold a separate low vote class of stock, own a majority of the economic interests in the company. Another such device is a classified board, which is a board of directors divided into multiple classes (almost always three), each of which serves a staggered multi-year term (almost always three years), which prevents a hostile acquirer from replacing more than a specified percentage (almost always one-third) of the directors at any single annual meeting. The prospect of having to conduct successful proxy fights at two successive annual meetings in order to gain control of a company's board can, in and of itself, be a significant deterrent to a hostile bidder. In contrast to the use of a high vote/low vote structure, which remains less common outside specific industries and can attract investor resistance, the significant majority of IPO issuers have classified boards, although among larger publicly traded companies it is becoming increasingly rare for this board structure to be retained over the long-term.

There is also a welter of additional measures that are nearly universally implemented without significant investor resistance. For example, an IPO issuer's certificate of incorporation typically prohibits stockholder action by written consent, which prevents a majority of the shareholders of the company from taking pre-emptive, unilateral action in lieu of a meeting. The certificate will also typically be drafted to include provisions restricting stockholders' ability to call a special stockholders' meeting, thus further inhibiting their ability to take extraordinary action. A company's by-laws will also require timely advance notice to the company from stockholders before such stockholders may nominate new directors or seek to make corporate changes. A supermajority of shareholders' votes may also be required in order to amend the company's certificate of incorporation or by-laws.

It is also almost universal for IPO issuers in the United States to authorise in their certificate of incorporation what is referred to as 'blank check' preferred stock, which enables a board to create and issue new series of preferred stock with whatever rights and preferences the board may desire at a given time. The board may use this ability to take certain anti-takeover actions, including the implementation of a stockholder rights plan, or 'poison pill', without further stockholder approval. A poison pill generally allows stockholders to purchase a company's common stock at a highly discounted price, triggered upon the acquisition of a large block of such stock by a third party, the effect of which is to dilute the acquirer's value. In recent years poison pills have become rare in US IPOs because of the negative reaction they tend to engender among investors and the fact that the board may deploy a poison pill later when needed.

In addition, unless an IPO issuer takes affirmative action to opt out, Delaware's anti-takeover statute (section 203 of the Delaware General Corporation Law) will apply to each IPO issuer incorporated in that state (which is the jurisdiction of organisation for most publicly traded US companies). This statute provides that, subject to certain exceptions specified in the law, a publicly held Delaware corporation may not engage in certain 'business combinations' with any 'interested stockholder' for three years after the date of the transaction on which the person became an interested stockholder. In general, a stockholder becomes an 'interested stockholder' on the day it acquires more than 15 per cent of the voting stock of the corporation. These provisions generally prohibit or delay the accomplishment of mergers, assets or stock sales or other takeover or change-in-control attempts that are not approved by a company's board of directors. Other states have adopted similar statutes. Some entities, such as companies controlled by financial sponsors, opt out of these anti-takeover statutes to avoid impeding the sponsors' ability to sell off their stake following the IPO.

**Update and trends**

While the US IPO market was relatively quiet in 2015 and 2016, there are some positive signs that the market is rebounding. In fact, as of 1 June 2017, IPO proceeds for 2017 have already exceeded IPO proceeds for all of 2016. In addition, it has been reported that some of the largest private companies in the United States could decide to enter the US public markets over the next 18 months. The new US administration has placed significant emphasis on reducing regulatory burdens, and should those reforms materialise many believe the volume of IPOs could increase. Such developments are welcome indeed given that the IPO market hit a seven-year low in terms of volume in 2016 and a 13-year low in terms of IPO proceeds raised.

## Foreign issuers

**14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?**

As noted in the previous answers, before a foreign private issuer (as defined below) proceeds with an IPO and listing in the United States it should consider the costs associated with the preparation of the SEC registration statement (typically, on the SEC Form F-1), including the expense associated with the preparation and audit of SEC-compliant financial statements. This registration statement, and the foreign private issuer's required ongoing annual report on Form 20-F, will require extensive disclosure. Generally, these disclosures are consistent with prevailing disclosure requirements for publicly traded companies in other jurisdictions, but are more specific and comprehensive. While compliance costs will decline over time, foreign private issuers should also anticipate ongoing compliance costs as US-listed companies. Although the ongoing compliance burdens on a foreign issuer are lower than those applicable to a US issuer (as described further in the next paragraph), once listed in the United States, a foreign private issuer will be required to maintain (and ultimately have its outside auditors opine as to the effectiveness of) internal control over financial reporting and its principal executive and principal financial officers will be required to personally certify the foreign private issuer's required annual reports. As discussed in question 8, a foreign private issuer should also understand potential exposure to legal proceedings in the United States and that, by becoming an SEC-reporting company, it becomes subject to certain US laws and regulations, including the Foreign Corrupt Practices Act of 1977, which may not otherwise have applied to it.

Foreign private issuers do benefit from a number of dispensations and exemptions from requirements otherwise applicable to US issuers when conducting an IPO and listing in the United States. Primarily among these, the foreign private issuer may prepare its financial statements in accordance with US GAAP, international financial reporting standards (IFRS) or its home country GAAP (although, if it uses home country GAAP or IFRS instead of that issued by the International Accounting Standards Board it will be required to include a reconciliation to US GAAP) and these financial statements become stale less quickly. In addition, the disclosure requirements in Form F-1 available to foreign private issuers (versus Form S-1) permit reduced levels of disclosure relating to, among other things, executive compensation. Following the IPO, unlike a US issuer, a foreign private issuer is generally not required to file quarterly reports, including interim financial statements, with the SEC or to file current reports upon the occurrence of specified corporate developments. In addition, certain provisions of the US securities laws and regulations simply will not apply to a foreign private issuer, such as the federal proxy rules and section 16 of the Exchange Act relating to beneficial ownership reporting and short swing trading by directors, officers and 10 per cent owners.

A foreign private issuer is any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last day of its most recently completed second fiscal quarter:

- more than 50 per cent of the outstanding voting securities of such issuer are directly or indirectly owned of record by US residents; and
- any of the following:
  - the majority of the executive officers of directors are US citizens or residents;
  - more than 50 per cent of the assets of the issuer are located in the United States; and
  - the business of the issuer is administered principally in the United States.

In the case of a new registrant, the foreign private issuer determination will be made as of a date within 30 days prior to the issuer's filing of an initial registrant statement with the SEC.

In the event that a company fails to qualify as a foreign private issuer as of the last business day of its most recently completed second fiscal quarter, it will no longer be eligible to use the SEC form and rules designated for foreign private issuers beginning on the first day of the next fiscal year.

**15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?**

Yes, a foreign issuer who is conducting an IPO and listing in its home country will frequently make offers and sales in the United States to qualified institutional buyers (ie, generally a corporate entity that owns and invests, on a discretionary basis, at least US$100 million in securities) in reliance upon rule 144A of the Securities Act. In addition, we note that a foreign private issuer that maintains a primary listing outside of the United States and has not conducted a public offering or listing in the United States may be exempt from the ongoing SEC reporting requirements of the Exchange Act under rule 12g3-2(b) even if such issuer has numerous US shareholders.

## Tax

**16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?**

Generally speaking, the fact that a foreign private issuer conducts an IPO and lists its securities in the United States (as opposed to having conducted an IPO and listing outside of the United States) does not alter the otherwise-applicable US federal taxation of the company or its stockholders. For a variety of reasons, foreign private issuers would typically not change their places of domicile to the United States to facilitate an IPO in the United States.

## Investor claims

**17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?**

A private claim by an investor relating to a US IPO is typically brought in the US courts that have federal jurisdiction over the defendants; however, suits that allege violation of the federal securities laws may also be filed in certain state courts under certain circumstances, as section 22(a) of the Securities Act provides for concurrent state court jurisdiction for civil actions alleging a violation of the Securities Act's liability provisions. Typically, arbitration clauses are not included in documentation relating to US IPOs, so non-judicial resolution of complaints related to IPOs is uncommon. The SEC also may investigate violations of securities laws and institute court or administrative proceedings. The SEC may also bring actions for causing or aiding and abetting violations – a claim not available to private investors. In federal court proceedings, investors may seek to obtain injunctive relief, financial relief, a prohibition against a certain individual serving as an officer or director of a public company, or other equitable relief. In SEC administrative proceedings, the SEC can issue a cease-and-desist order, impose financial penalties and bar an individual from serving as a director or officer of an issuer.

**18 Are class actions possible in IPO-related claims?**

Yes. As previously noted, there are a number of claims that investors could bring against a company (and its directors and officers) that has undertaken an IPO in the United States. Such claims are frequently brought by a claimant on behalf of a class pursuant to a class action lawsuit.

**19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?**

As discussed more fully in question 8, a company pursuing an IPO in the United States may be subject to both civil and criminal liability. In a civil context, the remedy investors may seek depends on the specific cause of action. For section 11 liability, damages generally are calculated as the loss in the value of the investor's shareholdings; therefore, the maximum amount of section 11 liability in an IPO equals the aggregate sale price of the shares offered in the IPO. The remedy for section 12 violations typically is rescission, which in an IPO means that the defendant (eg, the company going public) must repurchase the shares offered in the IPO at cost plus interest or pay damages directly to the plaintiff if the securities were sold during the interim period. Under rule 10b-5, a plaintiff may be entitled to recover the out-of-pocket loss caused by a material misstatement or omission.

Simpson Thacher

**Joshua Ford Bonnie**
**jbonnie@stblaw.com**

900 G Street NW
Washington, DC 20001
United States
Tel: +1 202 636 5500
Fax: +1 202 636 5502

**Kevin P Kennedy**
**kkennedy@stblaw.com**

2475 Hanover Street
Palo Alto
CA 94304
United States
Tel: +1 650 251 5000
Fax: +1 650 251 5002

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