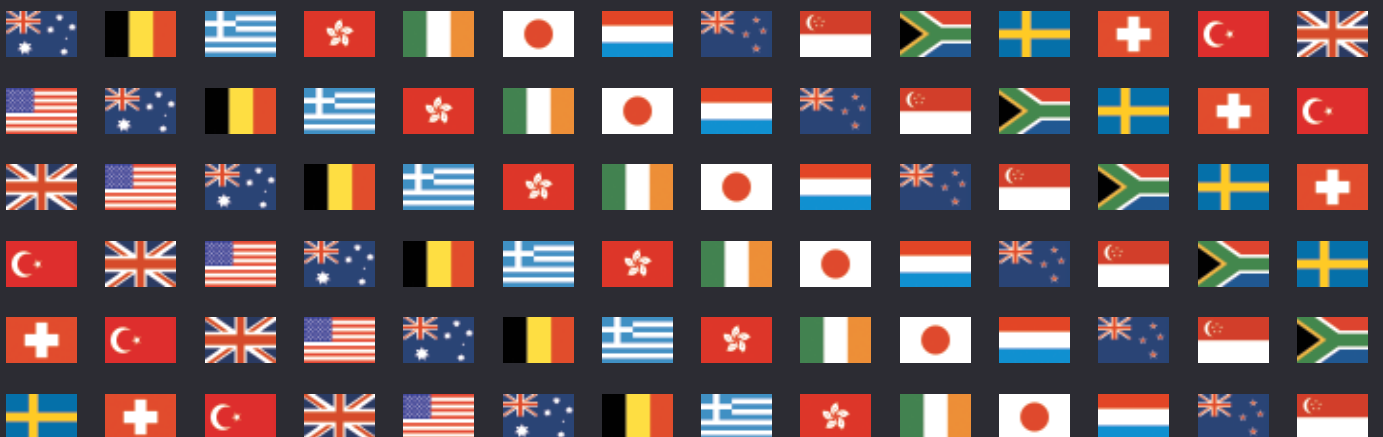


Initial Public Offerings 2022

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Initial Public Offerings 2022

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

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Initial Public Offerings*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 a new chapters on New Zealand and Turkey.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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.



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Luxembourg

François Warken and Laurent Schummer

Arendt & Medernach

MARKET OVERVIEW

Size of market

- 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 and, recently, laws aiming at attenuating the impact of Brexit on the Luxembourg financial services sector.

Over the past 15 years, there has been a growing interest in Luxembourg vehicles carrying out international IPOs, in particular for so-called 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, in 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, but 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.

2021 has been a record year for IPOs using Luxembourg incorporated IPO vehicles.

Issuers

- 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 vast majority of IPOs conducted recently by Luxembourg incorporated issuers are listed abroad. This is mainly due to the fact that Luxembourg has acquired a solid reputation for structuring international IPOs and with ready connections to all major European and overseas stock exchanges.

Most of these IPO issuers are established in the legal form of a Luxembourg public limited company (*société anonyme*) or a European company (*societas europaea*). Alternatively, a partnership limited by shares (*société en commandite par actions*) may also be considered depending on the objectives the company or, as the case may be, its selling shareholders want to achieve in the IPO.

Luxembourg has been the European gateway to many private equity houses. It is therefore rather common to see a Luxembourg-based company being used as an IPO vehicle by a private equity house

that is preparing its exit from an investment 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.

In 2021, Luxembourg special purpose acquisition companies, or SPACs, also known as blank check companies made their comeback. The versatility of Luxembourg company law and corporate governance rules, which allow the key features of US-style special purpose acquisition companies to be precisely replicated in a Luxembourg company, have been key drivers for sponsors of such special purpose acquisition companies to establish a Luxembourg based vehicle for structuring their international IPO. The listing of these SPACs took place on major European stock exchanges, such as Euronext Amsterdam or Frankfurt.

Also, several Luxembourg vehicles, generally in the form of a public limited company, have been set-up in the context of their business combination by US (and sometimes Cayman Islands) SPACs by way of a cross-border merger (or triangular merger) with a European target business. In these types of transactions, the Luxembourg vehicle served as the absorbing entity in the merger and has subsequently been listed in the US.

Thus, the Luxembourg IPO market in fact is an international market because Luxembourg issuers predominantly list in other EU jurisdictions or overseas, rather than in Luxembourg.

This is somehow in contrast to LuxSE. The LuxSE's reputation is built on its pioneering role in listing a broad range of different types of international 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. In 2016, the LuxSE launched the Luxembourg Green Exchange (LGX), a dedicated platform for green, social and sustainable securities. In 2018, the LuxSE launched the Professional Segments of the regulated market and the Euro MTF market (as further set out in the following paragraph); securities admitted to the Professional Segments will not be accessible for retail investors. With more than 37,000 listed securities from more than 2,000 issuers in 2021, 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, social and sustainability bonds listed worldwide, an estimated 50 per cent (2020) share for high yield bonds in Europe and is one of the leading renminbi centres in the world outside Asia with more than 250 Dim Sum bonds listed by the end of 2020. 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; there are currently securities from more than 110 sovereign and quasi-sovereign issuers of 100 different countries listed on the LuxSE. The LuxSE also has a leading role for listings of investment funds, both for Luxembourg funds and funds established in foreign jurisdictions. A broad range of investment funds is listed on the LuxSE, including UCITS, ETFs and AIFs.

Within the LuxSE, which is the only stock exchange in Luxembourg, there are two distinct markets. These are the regulated market and the Euro multilateral trading facility (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 by 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. However, this relies on fulfilling the requirements of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, the Prospectus Regulation. 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.

The LuxSE, in particular, the Euro MTF market, is also a popular venue for the listing of GDRs. GDR-listings are typically implemented by third-country issuers.

Primary exchanges

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 Euro MTF 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 Euro MTF market whenever the listing occurs other than in the context of an IPO. In the latter scenario, and the listing prospectus need not be, and generally is not, Prospectus Regulation-compliant.

However, most IPOs by Luxembourg issuers involve a listing abroad.

REGULATION

Regulators

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 Regulation-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 Luxembourg Stock Exchange (LuxSE), can be approved by the CSSF or by a foreign competent authority only within the meaning of the Prospectus Regulation and subsequently passported into Luxembourg.

The LuxSE is the competent authority to approve a prospectus for a listing on the Euro MTF 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 Euro MTF 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 pre-clearance for the information to be disclosed in a prospectus.

Authorisation for listing

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 16 July 2019 on prospectuses (the Prospectus Law) in conjunction with the Prospectus Regulation 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 (the Prospectus Regulation in conjunction with 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 in form of the Prospectus Regulation, 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 Regulation, and provides an alleviated 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 Euro MTF 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 Euro MTF 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 up-to-date 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) must be added and the 'know your customer', or KYC checks be fulfilled. 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.

Prospectus

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 that, 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 depend on the regime that applies under the Prospectus Law.

Prospectuses can be drawn up in English, French, German or Luxembourgish language.

Prospectuses approved under the first regime must be drawn up in accordance with and contain all information mentioned in the annexes of Commission Delegated Regulation 2019/980. 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 Regulation 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 the Prospectus Law. These prospectuses are called alleviated prospectuses and are approved by the CSSF. 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 Euro MTF market must contain the information set out in the relevant annex 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 Euro MTF market is always possible on the basis of a Prospectus Regulation-compliant listing prospectus approved for that purpose.

Publicity and marketing

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

As long as no Prospectus Regulation-compliant prospectus is approved, it must be ensured that pre-IPO marketing activities do not qualify as an offer of securities to the public and that, to the extent applicable, such activities are conducted in accordance with the market-sounding regime set out in Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 (the Market Abuse Regulation).

If the issuer provides an approved Prospectus Regulation-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 Regulation. 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 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 Regulation. 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 (however, a person intending to make an offer of less than € 8,000,000 in the European Union over a period of 12 months must notify the CSSF thereof prior to any such offer and if the total consideration of an offer amounts to at least € 5,000,000 but less than € 8,000,000, an information note will have to be drawn up and made available to investors pursuant to the relevant provisions of Part II of the Prospectus Law. The list of minimum information to be included in the information note is expressly set out in the Prospectus Law).

Furthermore, material information provided by an issuer or 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.

Enforcement

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 regime. 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 Euro MTF 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 the ESMA or 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

Timetable

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

The procedure for prospectus approval varies according to which authority is competent for its approval. If the Commission for Oversight of the Finance Sector (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 Luxembourg Stock Exchange (LuxSE) is competent, the ROI does not provide specific extensions for the approval of the prospectus. However, by and large the delays are de facto similar.

The table below gives a rough indication of prospectus approval. The actual timing depends on the prospectus approval process, which in turn is often influenced by the factual situation such as the business activity or the complexity of the financial situation of the issuer.

Task	Time frame
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

Task	Time frame
First full round of comments on the draft prospectus by the LuxSE/CSSF	No later than 10 business days after day one, usually earlier
Submission of the second draft of the listing prospectus with the CSSF/LuxSE	Approximately two weeks after receipt of the 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	No later than 10 business days after day one, usually earlier
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 the CSSF has 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 and publication of relevant information	
Delivery of the IPO shares to the underwriters	
Admission to trading and listing	If on the LuxSE, within a maximum of two days following the application for admission
Settlement of the IPO	

Costs

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

The usual costs and fees payable to underwriters and advisers 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 Regulation-compliant prospectus approval (ie, the first regime) are set out in the Grand Ducal Regulation of 26 October 2019 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 an alleviated prospectus not subject to the requirements of the Prospectus Regulation (ie, a prospectus drawn up in accordance with the second regime), a €2,500 fee will be payable to the CSSF.

For a prospectus drawn up in connection with the admission of shares on the Euro MTF market (ie, the third regime), not subject to the requirements of the Prospectus Regulation, 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).

Home member state supervision (relating to the application of the Transparency Law) will also have to be accounted for.

CORPORATE GOVERNANCE

Typical requirements

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 are by far 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 an EU regulated market, 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 Commission for Oversight of the Finance Sector.

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 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 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 a few Luxembourg residents on the board of directors or in executive functions, it must 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. However, the 10 Principles of Corporate Governance of the LuxSE do not apply if the Luxembourg company is only listed abroad, on a regulated market or any other trading venue. The 10 Principles of Corporate Governance of the LuxSE equally 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 Euro MTF 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.

New issuers

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. These companies can now make use of the specific proportionate EU Growth prospectus regime. 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 or, in the case of SMEs and companies with reduced market capitalisation, even the board as a whole.

Anti-takeover devices

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 the 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 include:

- 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.

FOREIGN ISSUERS

Special requirements

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 Luxembourg Stock Exchange (LuxSE) and the approachability of the the Commission for Oversight of the Finance Sector (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.

Selling foreign issues to domestic investors

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 the Prospectus Regulation, 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 regime.

However, the Prospectus Regulation does contain exceptions. Consequently, public offers of shares that fall within the scope of the Prospectus Regulation are exempt from the obligation to publish a Prospectus Regulation-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 Regulation, 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 (except, until at least 31 December 2020, the UK) 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

Tax issues

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

Fora

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 Commission for Oversight of the Finance Sector 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.

Class actions

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

At present, no class action is available under Luxembourg law.

Claims, defendants and remedies

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 Regulation (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:

- 1 a breach (eg, an act or an omission);
- 2 a damage resulting out of the breach; and
- 3 a causal link between the breach and the damage.

Civil proceedings may also be based on a breach (condition 1) 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 the relevant provisions of private international laws to determine whether Luxembourg law is applicable.

UPDATE AND TRENDS

Key developments

20 | Are there any other current developments or emerging trends that should be noted?

Recent trends mainly affect corporate governance and exercise of voting rights. These trends are most notably influenced by the chosen IPO jurisdiction.

With respect to European IPOs by Luxembourg incorporated issuers, there has been a growing interest for adopting a two-tier management structure with a management board the activities of which are supervised by a supervisory board. Also, the creation by the management body of ad-hoc committees, mainly with advisory powers, has become a recurring topic in the context of the structuring of the IPO.

In the case of a Luxembourg incorporated company that contemplates to IPO in the US, the possibility to issue different classes of shares or other instruments similar to shares, typically beneficiary units, with each such class or instrument having different voting rights in the general meeting of the shareholders, are becoming more customary. Finally, 2021 has seen a spectacular comeback of Luxembourg SPACs.

Coronavirus

- 21 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No updates at this time.



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