GETTING THE DEAL THROUGH

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in 18 jurisdictions worldwide

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Getting the Deal Through is delighted to publish the eleventh edition of *Securities Finance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 18 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The legal framework governing the offering of securities on the Luxembourg Stock Exchange (LSE) and their admission to trading on a regulated market results from a blend of national laws and European directives requirements. The offering of securities is primarily governed by the Law of 10 July 2005 relating to the prospectus for securities (the Prospectus Law), which implements Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, and amending Directive 2001/34/EC (the 2003 Prospectus Directive). The prospectus law was further amended by the Luxembourg law of 3 July 2012 (2012 Law) implementing Directive 2010/73/EU and by the law of 21 December 2012, with the view to take into consideration the EU Regulation No. 1095/2010 establishing the European Supervisory Authority (ESA).

The 2012 Law, beyond the strict implementation of the 2010 Prospectus Directive, further amended the Prospectus Law in respect of public offerings and the admission to trading on a regulated market of securities that are not subject to Community harmonisation under the 2003 Prospectus Directive.

The public offering of securities representing units issued by undertakings for collective investment other than the closed-end type are subject to the sole provisions of the Laws on Undertaking of Collective Investments dated 17 December 2010. Units of an open-end type are out of the scope of the Prospectus Law irrespective of the frequency and periodicity of their repurchase. The prospectus they issue is valid for an offer to the public or their admission on a regulated market.

The Prospectus Law distinguishes three different types of legal regimes for offerings and admission:

- First Regime: relating to the offering and admission on a regulated market of securities subject to European harmonisation under the Prospectus Directive (Part II of the Prospectus Law with a full prospectus regime).
- Second Regime: relating to securities that are not encompassed by the Prospectus Directive and addressing two types of operations (Part III of the Prospectus Law with a simplified prospectus regime):
  - their public offering in Luxembourg; and
  - their admission to a Luxembourg regulated market.
- Third Regime: relating to the admission of securities to trading on markets not listed as a regulated market by the European Commission (Part IV of the Prospectus Law). At present, there is only one such regulated market in Luxembourg: the Euro Multilateral Trading Facility (MTF) market.

The regulatory supervisory authority, the Commission for the Supervision of the Financial Sector (CSSF) has issued several administrative circulars, which complete the body of existing rules and regulations, and which provide an overview and recommendations in respect of the Prospectus Law requirements.

In addition to the Prospectus Law, admission to trading on the LSE is subject to the Grand-Ducal Regulation of 13 July 2007 on the keeping of an official list (the Official List Regulation) and the LSE's own rules and regulations, the LSE Rules and Regulations (together, LSE Listing Rules). The LSE Listing Rules set out the requirements for admission to a Luxembourg regulated market and regulate the conduct of listed companies.

Specific regulations also apply to public offerings pursuant to public takeover bids (ie, the Law of 19 May 2006 implementing European Directive 2004/25/EC).

The CSSF is the authority primarily responsible for the supervision and enforcement of the statutes and regulations governing public offerings of securities in the Grand Duchy of Luxembourg (Luxembourg). In particular the CSSF is responsible for approving prospectuses under the regime covered by the Prospectus Directive (First Regime) and the simplified prospectuses relating to securities that are outside of the scope of the Second Regime. The CSSF regularly issues and promulgates instructions and guidelines under the form of administrative circulars that implement these statutes and regulations. Further to the creation of the ESA, the CSSF cooperates with the ESA, pursuant to the requirements of the Regulation 1095/2010 in matters of exchange of information and proceeds to the necessary reporting to enable the ESA to carry out its mission.

The LSE is the sole institution authorised to administer one or several securities markets situated or operating in the Luxembourg market. It has the residuary competence for approving offers of securities admitted to trading under the Second Regime, namely, which are not covered by the Community harmonisation for the offering of securities and admitted to trading on the LSE or the Euro MTF (the Luxembourg alternative regulated market). The LSE has been operating the Euro MTF since 18 July 2005. This second market, which is not included in the list of regulated markets of the European Commission, is an alternative for issuers that wish to benefit from a certain regulatory framework, but do not require a European passport for prospectuses.

The LSE is responsible for administering and enforcing the LSE Listing Rules as well as approving the admission of an entity to the official list and the quotation of the entity's securities on the LSE.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Pursuant to the Prospectus Law, any issuer intending to make a public offering or an admission to trading of securities (equity or debt) on a regulated market situated or operated within the territory of Luxembourg must, subject to certain exemptions, publish a prospectus. The issuer must notify the competent authorities (the CSSF or the LSE) of such intention in advance. An 'offer of securities' to the public is 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. Securities include shares in companies and their equivalent, but also bonds or other forms of securitised debt, depositary receipt in respect of such securities and other securities giving the rights to sell or acquire any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Certain types of offers are exempt from the obligation to publish a prospectus, and consequently the obligation to notify the CSSF or the LSE. These are as follows:

- offers of securities addressed solely to qualified investors;
- offers of securities addressed to fewer than 150 natural or legal persons other than qualified investors, per member state;
- offers of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
- offers of securities whose denomination per unit amounts to at least €100,000; and
- offers of securities with a total consideration in all member states of the European Union of less than €100,000, which limit must be calculated over a period of 12 months.

Qualified investors are defined by article 2 of the Prospectus Law in a consistent manner with the definition of professional investors for purpose of the MIFID Directive 2004/39/EC of 21 April 2004 (MIFID Directive). Qualified investors are those listed under category I of Annex II of the MIFID Directive including those persons or entities who are deemed as professional investors on request, in compliance with Annex II of the MIFID Directive, or who are recognised as an eligible counterparty pursuant to article 24 of this directive, unless they have opted to be treated as non-professionals.

In addition, the offering of certain types of securities are exempt from the obligation to publish a prospectus. These types of securities are the following:

- shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information that is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on exchange offers;
- securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information that is regarded by the regulatory authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on mergers;
- shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer;
- dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; this obligation applies also to a company established outside the European Union whose securities are admitted to trading either on a regulated market or on a third- country market. In the latter case, the exemption applies provided that adequate information, including the document referred thereto, is available at least in a language customary in the sphere of international finance and provided that the European Commission has adopted an equivalence decision regarding the third-country market concerned; and
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that the company has its head office or registered office in the European Union and provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

As regards information to be disclosed in prospectuses, the Prospectus Law refers explicitly to the Annexes of the European Commission Regulation 809/2004/EC as amended, which deal with the level of information required to be disclosed, depending on the prescribed category of issuer and the type of securities to be offered. In general, the prospectus must contain all information necessary for investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and future prospects of the issuer and of any guarantor of the securities to be listed, as well as the rights attaching to such securities and any conditions under which they are issued. In particular, the prospectus should include disclosures of applicable risk factors, business and market descriptions, the financial statements of the issuer and a management discussion and analysis (MD&A) section. The prospectus must also include a summary section (key information), which conveys, in plain language, appropriate information relating to the securities offered including risks associated with the issuer, any guarantor and the securities in order to aid investors when considering whether to invest in such securities. This summary must be drawn up in a common format in order to facilitate comparability of the summaries of similar securities. This summary is not required for non-equity securities having a denomination of at least €100,000.

The issuer may decide to issue the prospectus as a single document or as separate documents. A prospectus composed of separate documents must split the required information into a registration document, a securities note and a summary note. The registration document contains the information relating to the issuer. The securities note contains the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

Issuers who offer securities under the Second Regime are only required to publish a simplified prospectus. The compulsory content of the simplified prospectus is listed in Annexes I and III to VI of the LSE Rules and Regulations. Alternatively, reference may be made to the Annexes of Regulation 809/2004 of the European Commission dated 29 April 2004.

Issuers who offer securities intended to be traded on the LSE under the Second Regime are required to publish a prospectus, which must be approved by the LSE. The compulsory content of the simplified prospectus is listed in sub-chapter 1 of Chapter XI of the LSE Rules and Regulations.

Issuers who offer securities on the Euro MTF under the Third Regime are required to file a prospectus with the LSE in accordance with the requirements of the LSE Rules and Regulations.

Prospectuses can be drafted in Luxembourgish, French, German or English and other languages deemed acceptable to the CSSF or the LSE. Once approved the prospectus must be filed with the CSSF (www.e-file.lu). The official submission of the prospectus must be made securely through the CSSF internet platform (e-file). Every significant new fact, material mistake or inaccuracy relating to the information included in the prospectus, which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, must be mentioned in a supplement to the prospectus. Such a supplement must be approved in the same way within a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published.

To the extent the securities offered to the public are also intended to be listed on the LSE, an additional request for being admitted to the LSE must be filed with the LSE. An application for admission to trading in securities on one of the securities markets operated by the LSE is also deemed to be an application for admission to the official list. Therefore, an application for admission to the official list without an application for admission to trading on one of the securities markets operated by the LSE will not be accepted. For debt and derivative programmes, the decision of listing is effective for one year and may be renewed annually in order to allow new listings.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

According to the Prospectus Law, no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a prospectus approved by the CSSF or the LSE.

To the extent that no prospectus may be published unless it has been approved beforehand by the CSSF or the LSE, the public offering process is therefore a two-step process that entails first, the approval of the prospectus, and second, its publication.

This approval, however, does not guarantee the economic and financial soundness of the offering or listing, nor the quality or solvency of the issuer. The authorities require that a specific disclaimer be inserted in the prospectus in this respect. The draft prospectus is initially submitted for review purposes to such relevant authorities. They have 10 working days to notify their decision to approve the prospectus. This time limit is extended to 20 working days if the securities are offered by an issuer who has not issued securities admitting to trading on a regulated market and has not previously offered securities to the public. The time limit runs from the working day following that of the official submission.

If, at the time of the receipt or processing of the submitted file, the file is not complete or additional information is needed, the issuer will be advised that the file is incomplete, and the time limit then starts to run only from the working day following that on which the requested information has been provided by the issuer in accordance with the provisions of the Prospectus Law. The CSSF has 10 days from the submission date to notify the issuer that the file is incomplete or that supplementary information is needed.

The authorities may still validly notify their approval after the expiry of the above-mentioned time limit. In particular, this enables the issuer to ask the CSSF to approve the prospectus on a date, which, due to the timetable of the transaction, falls beyond the prescribed time limits provided in the Prospectus Law as regards the notification of the decision of approval. The same principles apply to applications for approval of supplements to the prospectus within the time limit for approval of seven days.

It should be noted that prior to the official submission, the issuer must notify its intent to proceed to the public offering or the listing of securities on the LSE. He or she would also be well advised to solicit from the relevant authorities their preliminary view, in particular when the contemplated offering or listing is unusually complex. Communication with the CSSF or the LSE is easy and straightforward and is usually made by electronic communication.

Issuers intending to list their securities on the LSE must also file a request form for admission of securities to trading and a letter of undertaking whereby they commit to maintain their entity in good standing, comply with applicable regulations and report adequately to the authorities as needed.

Once approved and submitted to the CSSF or the LSE, the prospectus must be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as is practicable or at a reasonable time before, and at the latest, at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

The Prospectus Law rules that the prospectus is deemed available to the public when published:
- by insertion in one or more newspapers circulated throughout, or widely circulated in Luxembourg;
- in printed form made available to the public, free of charge, at the offices of the LSE, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
- in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including those agents in charge of the financial service;
- in electronic form on the website of the LSE; or
- in electronic form on the website of the CSSF.

The Prospectus Law does not require, as proposed by the Prospectus Directive, publication of a notice stating that the prospectus has been made available and where it can be obtained. It is noteworthy that prospectuses are published by the CSSF on the website of the LSE for a period of at least 12 months, and this is sufficient to fulfil the obligation to publish imposed on the issuer.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Any advertisements must state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it. The mention of the decision of approval of the prospectus by the Commission does not constitute an appreciation of the opportuneness of the transaction proposed to investors.

Advertisements must be clearly recognisable as such and the information contained therein must not be inaccurate or misleading. They also must be consistent with the information contained in the prospectus, if already published, or with the information required to be in the prospectus, if the prospectus is published afterwards. All information concerning the offer to the public or the admission to trading on the LSE disclosed in an oral or written form, even if not for advertising purposes, must always be consistent with that contained in the prospectus.

The CSSF has the power to exercise control over the compliance of advertising activity, relating to a public offer of securities within the territory of Luxembourg or an admission of securities to trading on the LSE. The provisions of the Prospectus Law do not provide for the prior communication and formal approval of advertisements. However, the issuer may submit their draft advertisement via electronic mails with the view to obtaining a CSSF opinion as to their compliance with legal and regulatory requirements.

The preparation and distribution of research reports should be made in accordance with the provisions of Luxembourg law, in particular the Law of 9 May 2006 (Market Abuse Law) transposing Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse) and Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

According to the Market Abuse Law persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public must specifically ensure that the recommendations are presented fairly, that they clearly mention conflicts of interests and that they include all the other references provided for by the law.

In particular, the entity producing these reports must at least ensure that:

- the material sources are indicated including the relevant issuer, together with confirmation as to whether the investment recommendation has been disclosed to that issuer and amended following this disclosure before its dissemination;
- the basis of valuation or methodology used to evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument, is adequately summarised;
- the meaning of the investment recommendation made, which may include the time horizon of the investment to which the investment recommendation relates, is adequately explained and any appropriate risk warning (including a sensitivity analysis of the significant assumptions) is indicated;
- the date on which the investment recommendation was first released for distribution is indicated clearly and prominently, as well as the relevant date and time for any financial instrument price mentioned;
- where an investment recommendation differs from an investment recommendation concerning the same financial instrument or issuer, issued during the 12-month period immediately preceding its release, this change and the date of the earlier investment recommendation are indicated clearly and prominently; and
- reference is made to the planned frequency, if any, of updates of the recommendation and to any major changes in the coverage policy previously announced.

Finally, it should be noted that the 'simple communication of information on a security or an issuer without securities being offered for purchase or subscription cannot be considered as an offer to the public'. It is necessary that the communication of information is made in relation to an offer of securities. Thus, in principle, the availability of information or advice to invest in certain securities does not in itself constitute an offer to the public.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary offerings of securities through public offering are subject to the same requirements as primary offerings. However, a secondary offering can be exempted from the prospectus obligations inasmuch as the obligations do not apply to the admission to trading on a regulated market of shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market.

Any subsequent resale of securities is to be regarded as a separate offer and the conditions of the Prospectus Law apply for the purposes of deciding whether or not that resale is an offer to the public. In this respect, the placement of securities through financial intermediaries remains subject to publication of a prospectus if none of the exemption conditions for a public offering are met for the final placement.

A primary offering of shares or equity-linked securities, namely, warrants, securities convertible into shares of a Luxembourg company wholly for cash, requires that such securities be first offered to the existing shareholders on a pro rata basis, unless the statutory pre-emption right is disapplied. The statutory pre-emption right may be disapplied by resolution of the shareholders resolving in a duly convened meeting of shareholders or by the board of directors if such a power has been granted to them by the shareholders pursuant to the authorisation granted to the board to issue equity and equity-linked securities (authorised capital).

Pre-emption rights can be restricted to certain classes of shares in the articles of incorporation of the Luxembourg company.

6 What is the typical settlement process for sales of securities in a public offering?

The LSE relies on the following clearing and settlement entities: LCH Clearnet SA, Clearstream Banking SA or Euroclear Bank SA.

Generally, the settlement-delivery of securities occurs on the third trading day following the end of their placement. Upon issue, the securities are registered in the books of the settlement entities, which will credit the accounts of the financial intermediaries on the settlement-delivery date.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements of securities fall outside the scope of public offerings and, accordingly, are exempted from the obligation to publish a prospectus. See question 2 for a list of offers that are exempt from the obligation to publish a prospectus. There are no specific rules governing the private placing of securities. However, general principles of laws would apply and issuers should endeavour to deliver accurate and not misleading information on the securities issuance and the private placing process. Their liability could be involved on grounds of general principles of contractual and civil law or liability in tort (see questions 8 and 19).

8 What information must be made available to potential investors in connection with a private placing of securities?

There are no specific regulations or legal provisions governing private placement of securities.

General principles of law must, however, apply. This involves investors being treated equally and fairly and having access to the same information when subscribing to the securities. Article 17 of the Prospectus Law sets out that 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, must be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed.

It is also advisable that the persons who carry out a private placement in Luxembourg inform potential investors that: any prospectus relating to the offering of securities has not been submitted to the clearance procedures of the CSSF. They should also take the necessary measures to avoid the placement qualifying as a public offering and require the necessary undertaking from investors that they act for their own account and do not intend to resell the securities under the terms of a public offering. Finally, they should provide accurate and complete information in respect of the placed securities in order to enable the investors to make an informed assessment of the securities.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no particular restrictions on the transferability of securities acquired in a private placement, except that any resale to the public of such securities must be made in accordance with the rules on public offerings (see question 1).

The new law of 6 April 2013 on dematerialised securities has modernised the Securities Law by creating a third category of securities alongside securities in bearer or registered form and introduces a general regime for them, thereby providing Luxembourg capital companies the option to issue shares in dematerialised form and for all other issuers to issue dematerialised debt securities governed by Luxembourg law. Generally, the law on dematerialised securities introduces a comprehensive and complete regime covering the issue, conversion, pledging, transmission and conditions required for the issue of dematerialised securities. The Luxembourg legislator took the opportunity to implement certain principles arising from the Unidroit Convention on Substantive Rules for Intermediated Securities dated 9 October 2009 and has taken into account preliminary work on the draft EU directive on the legal certainty of securities holding and transactions. The law provides that the issuance of dematerialised securities (equity and debt) must be registered in an issue account held with one single securities settlement system or one single central account holder. The holding of dematerialised securities may be realised through a chain of holdings involving one or more intermediaries between the security settlement system or central account holder and the ultimate holders of the dematerialised securities. Transfer of dematerialised securities is effected by book entry transfer between accounts. Payments by the issuer to a securities settlement system or central account holder discharge the issuer. The law offers some additional guarantees to the acquirers of securities against any earlier defective book entry and impose the obligation for an intermediary to hold sufficient securities equal to the aggregate number of securities credited to the securities accounts maintained for its account holders and for itself.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Following the implementation of the Prospectus Directive, in order to carry out an offering of securities in another member state of the European Economic Area (EEA), a Luxembourg issuer must obtain the approval of the CSSF on the prospectus and make an application for the delivery of a certificate of approval to the ESA and the competent authority of the EEA member state in which the public offering is contemplated. Within three trading days following such application or, within one trading day after approval of the prospectus by the CSSF (if the application has been submitted at the same time on the first filing of the prospectus), the CSSF issues a certificate of approval to the competent authority of the other jurisdiction, specifying that the prospectus has been drawn up in accordance with the Prospectus Directive and is valid for any public offerings carried out in any member state of the EU.

When an offer of securities is carried out in a jurisdiction other than Luxembourg and restricted to foreign subscribers, the Luxembourg issuer needs to comply only with the securities laws of such jurisdiction.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Offerings of exchangeable or convertible bonds, warrants, depositary shares or rights, fall within the scope of the Prospectus Directive and the Prospectus Law. In this respect, the issuer or offeror must comply with the disclosure requirements contained in the relevant Annexes of the European Commission Regulation 809/2004/EC and therefore must follow the process described further under question 2.

Under the LSE Rules and Regulations, convertible bonds, exchangeable bonds and bonds with warrants may only be admitted to the official list if the shares or units to which they relate have previously been admitted to this list or admitted to trading to another market, that operates in a legitimate, recognised and open manner or are admitted at the same time.

By derogation these securities may, however, be admitted to the official list provided that the LSE is satisfied that the holders of the bonds have at their disposal all the necessary information to form an opinion concerning the value of the shares or units related to such bonds.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

No standard form of underwriting agreement or guidelines exist that are provided by the Luxembourg financial authorities or professional bodies.

Underwriting agreements in the Luxembourg market usually comply with the prevailing international practice in equity or debt offerings, in particular with the International Capital Market Association (ICMA) standards. The LSE is an associate member of the ICMA. Underwriting agreements are several rather than joint-and-several.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnity

Underwriting agreements for Luxembourg equity securities offerings usually contain an indemnity clause, for the purpose of indemnifying and protecting the underwriters and their directors, officers and employees, or controlled interests against any loss or damages resulting from untrue or misleading statements of material fact or material omissions contained in the prospectus, or any breach of the representations, warranties and agreements contained in the underwriting agreement. Underwriting agreements for debt securities also feature very similar indemnity clauses. Greenshoe shareholders can also agree to indemnify the underwriter under certain circumstances. This indemnity obligation is normally guaranteed by the assignment for security purposes of the proceeds of the offering.

Force majeure

Force majeure clauses in equity underwriting agreements generally cover any event that could affect financial markets, such as any change in general economic conditions or currency exchange, any suspension or material limitation in trading in securities on the main stock exchanges and other events that could prevent or have an adverse effect on the success of the offering. Debt underwriting agreements follow the ICMA's rules and recommendations relating to force majeure.

Success fees

Underwriting agreements relating to equity offerings frequently provide for incentive and success fees, which are paid at the issuer's discretion. Incentive fees apply to the gross proceeds of the offering while success fees are paid if a certain threshold of gross proceeds is reached.

Over-allotment

It is market practice for equity securities offerings to have underwriting agreements providing for an over-allotment option in connection with the 30-day stabilisation activities that underwriters may perform during the stabilisation period following the listing of the shares, in accordance with the provisions of the Market Abuse Directive. Any stabilisation action usually ends no later than 30 days after the issue date of the relevant securities or 60 days after the date of the allotment, whichever is earlier.

This over-allotment option is typically granted by the company on newly issued shares or by the selling shareholders on existing shares. Article 11(a) of the Stabilisation Regulation (see question 18) restricts the extent of over-allotment, such that over-allotments not covered by a greenshoe should not exceed 5 per cent of the original offer. The regulation implementing the Prospectus Directive does not require that the prospectus disclose information on the size of the 'over-allotment facility' and therefore this additional information is not required in cases where the offer falls within that regulation. Typical forms of subscription agreement and agreements among managers used for euromarket offerings do not explicitly limit the amount of over-allotment, but may only authorise the stabilising manager to over-allot securities in accordance with the applicable law or to the extent permitted by the applicable law.

14 What additional regulations apply to underwriting arrangements?

There are no specific Luxembourg regulations applying to underwriting arrangements. The provisions of the European Regulation relating to buy-back programmes and the stabilisation of financial instruments (2273/2003/EC) apply directly to underwriting agreements in the Luxembourg territory. This regulation restricts the time-related conditions for stabilisation and sets the limit for over-allotment of securities and greenshoe options (not exceeding 15 per cent of the original offer). The Luxembourg Law on Market Abuse (transposing Directive 2004/72/EC of 29 April 2004) is also likely to govern certain provisions of underwriting arrangements.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Any issuer whose securities (equity or debt) are admitted to trading on the LSE is subject to ongoing reporting obligations (see question 16) according to the LSE Rules and Regulations and the Transparency Rules.

The Luxembourg Law of 11 January 2008 relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Law) and its implementing regulation (the Transparency Regulation) apply to issuers of securities for whom Luxembourg is the home member state. The Transparency Law does not apply to securities issued by collective investment undertakings other than the closed-end type, or to securities acquired or disposed of in such collective investment undertakings.

Issuers admitted to the Euro MTF market are not subject to the Transparency Law and Transparency Regulation but are subject to the reporting requirements set out by the LSE Rules and Regulations.

Shareholders, acting alone or in concert, of an issuer acquiring 95 per cent of the issuer capital and its voting rights must notify the CSSF when they reach this limit or cease to reach it. This notification is required in order to trigger the compulsory withdrawal or redemption of the securities held by other shareholders (Luxembourg Law of 21 July 2012).

16 What information is a reporting company required to make available to the public?

Annual financial reports

Issuers for whom Luxembourg is the home member state must make public their annual financial reports, at the latest, four months after the end of each financial year and must ensure that they remain publicly available for five years. These annual financial reports must comprise the audited financial statements; the management report and management statements that the financial statements are prepared in accordance with the applicable set of accounting standards; a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer; and a description of the principal risks and uncertainties that they face.

Half-yearly financial reports

Issuers of shares or debt securities for whom Luxembourg is the home member state must also make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest, two months thereafter. The issuers must ensure that the half-yearly financial report remains available to the public for five years.

Interim management statements

Issuers whose shares are admitted to trading on a regulated market and for whom Luxembourg is the home member state must make public a statement by their management during the first six-month period of the financial year and another statement during the second six-month period. Each statement must be made in a period between 10 weeks after the beginning and six weeks before the end of the relevant six-month period. It shall contain information covering the period between the beginning of the relevant six-month period and the date of publication of the statement. Such a statement must provide an explanation of material events and transactions that have taken place during the relevant period, their effect on the financial position of the issuer and its controlled undertakings, a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period.

Issuers whose home member state for Transparency Law purposes is Luxembourg must disclose the regulated information through a specialised company and store it with the LSE through the central storage of regulated information (OAM, Officially Appointed Mechanism).

Several exemptions are provided by the Transparency Law such as for certain sovereign issuers and issuers of debt securities with a denomination per unit of at least €100,000.

The Transparency Law also requires certain notifications regarding the acquisition or disposal of major holdings. These requirements apply to the direct or indirect shareholders who acquire or dispose of shares who must notify the issuer of the proportion of voting rights held as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33.33 per cent, 50 per cent and 66.66 per cent. Notifications are also required in the case of specific circumstances of major proportions of voting rights.

The Euro MTF market does not fall into the scope of the European Union Directives and the Transparency Law. Issuers whose securities are admitted to the Euro MTF market are only subject to the specific publication requirements of the LSE Regulations. Reporting obligations on the Euro MTF are less stringent than those required by the Transparency Law. Issuers on the Euro MTF must disseminate the following information:

- information or events or decisions affecting the security holders;
- information on material changes to the issuer's shareholders structures;
- audited annual financial statements and management reports, prepared in accordance with the issuer's national law; and
- semi-annual financial statements to be published with four months of the issuer's half year and comprising information on revenues and profit or loss for the period together with a commentary on any material factor having had an effect on the financial or trading position of the issuer during this period.

Issuers of debt securities with a denomination per unit of at least €50,000 are exempted from the publication of financial information.

In the case of a takeover bid of a Luxembourg company's securities or securities admitted to trading on the LSE, the Law of 19 May 2006 implementing Directive 2004/25/EC on takeover bids (the Takeover Law) will apply and impose disclosure requirements of specific information on the issuer.

Every issuer whose securities are admitted to trading on a securities market of the LSE must ensure the provision in Luxembourg of equivalent information to that made available to the market of any other stock exchange or stock exchanges situated or operating outside the member states of the European Union, to the extent that this information may be important for evaluating the securities in question.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Luxembourg Law of 9 May 2006 transposing the Directive on Market Abuse (Market Abuse Law) aims at combating insider dealing and market manipulation (market abuse) in order to ensure the integrity of financial markets, enhance investor confidence in those markets and thereby ensure a level playing field for all market participants. It sets out a framework for the prevention, detection and efficient sanction of market abuse, imposes new obligations on market participants, entrusts the CSSF with specific competences and missions, and sets down preventive measures.

The Market Abuse Law applies to all securities admitted to trading on at least one regulated market or for which a request for admission to trading on such a market has been made. Prohibitions of market abuse also apply to all financial instruments admitted to trading on at least one MTF or for which a request for admission to trading on an MTF has been made. This obligation applies whether or not the transaction was carried out on such a regulated market or such an MTF.

The Market Abuse Law lays down a set of requirements for market participants with the major aim of preventing market abuse, namely:

- credit institutions and the other professionals of the financial sector established in Luxembourg are required to notify the CSSF without delay if they reasonably suspect that a transaction might constitute market abuse;
- the regulated markets, credit institutions, investment firms and market operators of an MTF must adopt structural provisions aimed at preventing and detecting market manipulations;
- issuers of financial instruments are required to disclose to the public inside information that directly concerns them as soon as possible;
- issuers or persons acting on their behalf and for their account must establish a list of persons who have access to inside information;
- persons discharging managerial responsibilities within an issuer that has its registered office in Luxembourg and persons closely associated with them, must notify to the CSSF and to the issuer all operations conducted on their own account related to the issuer's shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to these shares and the issuer must make these operations public; and
- persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public must ensure that the recommendations are presented fairly, that they clearly mention conflicts of interest and that they include all the other references provided for by the law.

Circular CSSF 07/280 on the implementation rules of the Market Abuse Law provides explanations and guidelines concerning the elements that could be indications of market manipulation: the arrangements and format for suspicious transaction reports, the lists to be drawn up by issuers, or persons acting on their behalf or for their account, including those persons having regular or occasional access to inside information and the notifications relating to operations conducted by persons discharging managerial responsibilities within an issuer and persons closely associated with them, as well as the modalities for public disclosure of such operations.

Luxembourg Company Law also imposes fines and imprisonment on any person who, by fraudulent means, causes or attempts to cause the price of company shares, bonds or other securities to rise or fall (article 165 of Company Law of 10 August 1915).

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The provisions of the European Regulation relating to buy-back programmes and stabilisation of financial instruments (2273/2003/EC the Stabilisation Regulation) have a direct binding effect in the Luxembourg territory. Any price stabilisation programmes and buy-backs aimed at supporting the price of securities must comply with article 9 of the Stabilisation Regulation and the Second European Company Directive that prohibits an EU entity from redeeming its own shares beyond certain limits.

It is worth noting that Luxembourg permits stabilisation transactions prior to the commencement of trading on a regulated market. Under the present terms of the Stabilisation Regulation, over-allotment with the view to support the price of the securities is authorised provided:

- the securities are over-allotted only during the subscription period and at the offer price;
- a position resulting from the exercise of an over-allotment facility by an investment firm or credit institution that is not covered by the greenshoe option may not exceed 5 per cent of the original offer;
- the greenshoe option may be exercised by the beneficiaries of such an option only where relevant securities have been over-allotted;
- the greenshoe option may not amount to more than 15 per cent of the original offer;
- the exercise period of the greenshoe option must be the same as the stabilisation period required; and
- the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of relevant securities involved.

Disclosure requirements imposed by the Stabilisation Regulation do not apply to offerings of securities that fall under the Prospectus Directive.

Update and trends

With the new MiFID II (Markets in Financial Instruments Directive), the European Commission aims at making financial markets more efficient, resilient and transparent and strengthening the protection of investors. The Luxembourg securities framework will therefore be strongly affected.

MiFID II is expected to introduce a market structure framework that will close loopholes and ensure that trading, wherever appropriate, takes place on regulated platforms. It will also increase equity market transparency and, for the first time, establish a principle of transparency for non-equity instruments such as bonds and derivatives.

To meet the G20 commitments, MiFID II should provide for strengthened supervisory powers and a harmonised position-limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse. Under this system competent authorities will impose limits on persons' positions in accordance with a methodology for calculation set by the ESMA. A new framework will improve conditions for competition in the trading and clearing of financial instruments. For this purpose, MiFID also establishes a harmonised EU regime for non-discriminatory access to trading venues and central counterparties (CCPs). MiFID II will introduce trading controls for algorithmic trading activities that have dramatically increased the speed of trading and can cause systemic risks. These safeguards include the requirement for all algorithmic traders to be properly regulated and to provide liquidity when pursuing a market-making strategy. Stronger investor protection would also be expected to be achieved by introducing better organisational requirements, such as client asset protection or product governance, which also strengthen the role of management bodies.

Circular CSSF 07/280 also details buy-back and stabilisation activities falling under the safe harbour exemptions as laid down by the Stabilisation Regulation. In particular, it specifies that within one week of the end of the stabilisation period, the following information must be adequately disclosed to the public by issuers, offerors, or entities undertaking the stabilisation: whether or not stabilisation was undertaken; the date at which stabilisation started; the date at which stabilisation last occurred; and the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out.

Issuers, offerors or entities undertaking the stabilisation must record each stabilisation order or transaction with, as a minimum, all related relevant information and data (in particular, the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm) extended to financial instruments other than those admitted or going to be admitted to the regulated market.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Liability arising from inaccurate or misleading information or untrue representations made in the prospectus is the most common liability. This liability is based on the general principles of liability in tort set out in the Luxembourg Civil Code (articles 1382 and 1383). This liability relies on the issuer, the offeror, the person asking for the admission to trading or the guarantor. These persons must be clearly identified in the prospectus. They must also state in the prospectus that to the best of their knowledge it does not contain any incorrect facts or omissions that are likely to affect its import. This statement increases the likelihood that they must assume the direct responsibility for any damages resulting from any inaccuracy in the prospectus. These statements do not release the other contributors to the prospectus from their liability, if it is evidenced that they have been providing false or misleading information. The summary note does not entail any civil liability unless it is misleading, inaccurate or inconsistent with the main prospectus.

Where the security transaction is based on a contractual relationship, the liability would be assessed on the basis of the general principles of contract law. This would be the case in the event of an underwriting agreement with the issuer or direct contractual relationship between the issuer and the subscriber of securities. The liability will be triggered at the occurrence of a negligence or fraud, as this will be further set out in the contractual agreement governing the security transaction and the general principles of contract law.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies and sanctions for improper securities activities can be brought in three basic ways: civil litigation, administrative proceedings and criminal prosecutions. None of these remedies are exclusive.

Civil litigation

Civil litigation may be brought by private parties who would generally seek to recover losses suffered. The damage would be generally assessed in respect of the liability in tort contained in the Luxembourg Civil Code. However, the occurrence of a specific damage to the investor is unlikely to be recognised to the extent that courts would usually refuse to consider the loss of value of shares as a prejudice distinct from the prejudice suffered by the issuer.

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Administrative proceedings

Administrative proceedings may be brought by the CSSF or the LSE, pursuant to the Prospectus Law, the LSE Rules and Regulations or other applicable and relevant regulation. In addition, the CSSF has investigative powers and the capacity to suspend or prohibit a public offer or admission to trading on a regulated market if it has reasonable grounds for suspecting that legal provisions have been infringed. It may also impose cease-and-desist orders for any improper activities that are contrary to the Prospectus Law. The CSSF may render these decisions public and impose financial administrative sanctions of a pecuniary nature with the view to enforce its decisions.

An appeal to a court of unlimited jurisdiction may be made before the administrative court against decisions taken by the CSSF. Decisions taken by market operators are subject to a right of appeal before the ordinary jurisdictions.

Criminal prosecutions

Criminal prosecutions are instituted by the public prosecutor, acting independently and on its own initiative or on request of CSSF. Various improper securities activities are deemed as criminal offences. For instance, anyone who knowingly carries out an offer of securities to the public within the territory of Luxembourg without a prospectus in accordance with the provisions of the Prospectus Law may be subject to a fine ranging from €250 to €125,000. Company Law also sets out diverse criminal offences for breach of its provisions such as the manipulation of the price of securities. Any interested party may lodge a complaint with the public prosecutor against the person or company deemed to be liable, accompanied by a request for compensation of loss, if any. Defendants subject to such criminal actions may face substantial fines, corporate dissolution and, in the case of individuals, imprisonment.

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