The Initial Public Offerings Law Review

Editor
David J Goldschmidt

The Law Reviews

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URÍA MENÉNDEZ

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PREFACE

Welcome to the inaugural edition of *The Initial Public Offerings Law Review*. While it is largely agreed that the first 'modern' initial public offering (IPO) was by the Dutch East India Company (VOC) in 1602, IPOs now take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Several of the earliest exchanges are still at the forefront of the global IPO market, such as the NYSE and LSE, however, the world's major stock exchanges now are scattered around the globe, and many of them are now public companies themselves. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market. For example, markets in the Asia-Pacific region, including Hong Kong, Shanghai and Tokyo, have enjoyed a significantly stronger presence in the global IPO arena in recent years owing to economic growth in the Asian markets.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different between jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, is it important that the company and its management are aware of the requirements from the outset as well as potential pitfalls that may derail the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply.

Virtually all markets around the globe have experienced significant volatility in recent years. In 2016, the uncertainty surrounding the US presidential election, the unexpected outcome of the Brexit vote and numerous other geopolitical issues facing regions throughout the world furthered the general decline in both overall deal count and proceeds raised. Moving forward, however, many regions have a healthy IPO pipeline for the coming 12 months, including many household names.

The Initial Public Offerings Law Review seeks to introduce the reader to the global IPO regulatory environment and main stock exchanges in 16 different jurisdictions. Each chapter provides a general overview of the IPO process in the region, addresses regulatory and exchange requirements and presents key offering considerations. We hope this inaugural edition of *The Initial Public Offerings Law Review* introduces the reader to the intricacies of taking a company public in these jurisdictions and serves as a helpful handbook for companies, directors and managers.

David J Goldschmidt
Skadden, Arps, Slate, Meagher & Flom LLP
New York
March 2017

Chapter 15

UNITED KINGDOM

Danny Tricot and Adam M Howard[1]

I INTRODUCTION

The London Stock Exchange (LSE) has a long history that is intertwined with the development of industry and finance within the United Kingdom. The commercial revolution of the 17th century and the resulting proliferation of joint-stock companies[2] led to the creation of the Stock Exchange Coffee-house in 1773.[3] Nearly 250 years later, the LSE has become one of the largest stock exchanges in the world, comprising 2,267 companies with a market value of nearly £4.6 trillion.[4] It is also the most international, with companies from over 70 countries admitted to trading.[5] The LSE attracts companies from a diverse range of sectors, from investment and finance to oil and gas to retail.

Since 1999, the UK regulatory environment has been extensively shaped by the European Union's Financial Services Action Plan, a harmonisation movement with the aim of integrating financial services within the EU. EU directives throughout the early 21st century imposed minimum regulatory requirements, resulting in a split of the Main Market of the LSE into standard and premium segments. Standard listings comply with EU harmonised minimum standards, while premium listings comply with higher, UK-specific standards, designating the premium segment the 'gold standard' of LSE listings. In addition, the LSE has various smaller markets for specialist and emerging growth companies.

Applicants to the Main Market must apply first to the Financial Conduct Authority (FCA), acting through the UK Listing Authority (UKLA), for admission of securities to the Official List,[6] and secondly, to the LSE itself for admission of securities to trading. This two-part process is often collectively referred to as 'listing' or 'floating'. The FCA is the primary regulator in the UK, determining the criteria governing listing and publishing rules and regulations for listed companies.

As the LSE is a key international stock exchange, initial public offerings (IPO) activity in the UK is dictated by international as well as national economic and political factors.

1 Danny Tricot is a partner and Adam M Howard is an associate at Skadden, Arps, Slate, Meagher & Flom (UK) LLP.

2 CF Smith, The Early History of the London Stock Exchange, *The American Economic Review*, Vol. 19, No. 2, 1929, pp. 206–216.

3 FW Hirst, *Stock Exchange: A Short Study of Investment and Speculation*, New York, H Holt and Co. Print, 1911, pp. 46-47.

4 As at 30 December 2016: London Stock Exchange: Companies and Securities. Available at: www.londonstockexchange.com/statistics/companies-and-issuers/companies-and-issuers.htm.

5 Ibid.

6 A list of securities maintained by the FCA under Part 6 of the Financial Services and Markets Act 2000.

Fluctuating commodity prices, alongside recent global uncertainty caused by factors such as the UK electorate's decision to leave the EU in the 2016 referendum and the US presidential election result, slowed activity in 2016, with IPO proceeds down 52 per cent compared to 2015.[7]

II GOVERNING RULES

i Main stock exchanges

The Main Market of the LSE is the UK's flagship market. A variety of instruments can be listed on the standard segment of the Main Market, including depositary receipts, debt securities and securitised derivatives, whereas the premium segment of the Main Market accepts only equity securities. The Main Market is designated a 'regulated market' by the Markets in Financial Instruments Directive,[8] placing it within the EU regulatory sphere and thereby requiring issuers to comply with EU law such as the Transparency Directive[9] and the Prospectus Directive (PD).[10] Securities are admitted to the Official List by the FCA. The requirements imposed on Main Market issuers, particularly in the premium segment, are more onerous compared to the LSE's smaller markets. However, this is counterbalanced by benefits such as greater liquidity, increased public profile (particularly due to published analyst research) and the ability to attract capital more easily due to the international community's confidence in the market.

For companies seeking a lighter regulatory regime, there are two key options. The first is the Alternative Investment Market (AIM), designed for smaller, emerging companies without a trading history, looking to raise capital or be acquired by larger companies. Such companies include, among others, start-up companies in the technology sector and exploration companies in the oil and gas sector. It is exchange-regulated, meaning that it is the LSE that primarily oversees its activities, and shares admitted to trading are not eligible for admission to the Official List. As a result of lower admission requirements and less onerous continuing obligations, along with substantial tax reliefs, being admitted to AIM offers comparative cost and management time savings. The second option is the UK's newest market, the High Growth Segment (HGS), constituting a launch pad for European Economic Area (EEA)-incorporated companies with long-term aspirations to join the premium segment of the Main Market but that are not yet capable of fulfilling its more onerous listing requirements. As with AIM, shares on the HGS are not eligible for admission to the Official List; however, the HGS is a regulated market.

The LSE also offers specialist markets, such as the Specialist Fund Segment, which is open to highly specialised investment funds looking to attract capital investment from experienced institutional investors and professionals.

The Financial Times Stock Exchange (FTSE) share indices act as an important instrument for gauging the worth of premium-listed companies. The FTSE 100 indexes the

7 EY, EY Global IPO Trends: 2016 4Q, EYGM Limited 2016, p.14. Available at: www.ey.com/Publication/vwLUAssets/ey-global-ipo-trends-report-4q16/$FILE/ey-global-ipo-trends-report-4q16.pdf.

8 Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

9 Directive 2004/109/EC of 15 December 2004 on harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

10 Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

share price of the largest 100 companies by market capitalisation on the LSE; the FTSE 250 indexes the largest 250 companies. Inclusion in the FTSE indices has significant corollary benefits, including global media exposure and investment through tracker and benchmark funds.

In early 2017, the structure of the UK market, in particular the division between standard and premium listings, became the subject of a FCA discussion paper regarding the efficiency and effectiveness of primary markets.[11] The discussion paper suggested that standard listings are not sufficiently utilised or valued by issuers and investors, particularly those from overseas, and raised the possibility of revising the current bifurcated structure of the Main Market.

ii Overview of listing requirements

Applicants to the Main Market must comply with the FCA's Listing Rules (LRs) for admission to the Official List and the LSE's own Admission and Disclosure Standards for admission of securities to trading.

Firstly, applicants to the premium segment of the Main Market must have sufficient legal status. The applicant must be duly incorporated, validly established and operate in conformity with its constitution, and have shares that are freely transferable, fully paid, free from any liens or restrictions on the right of transfer, duly authorised by the applicant's constitution and that conform with the law of the applicant's place of incorporation.[12] The application must relate to the whole class of shares[13] and the shares must be eligible for electronic settlement.[14]

Secondly, and more commercially, the applicant must have a market value of at least £700,000[15] and 25 per cent of shares in public hands in one or more EEA states (the 'free-float' requirement),[16] to ensure sufficient liquidity in the market. The 25 per cent threshold may be modified by the FCA in certain limited circumstances if it considers the market will operate properly with a lower free float, in view of the large number of shares of the same class and the extent of their distribution to the public.[17]

Thirdly, in terms of financial information, the applicant must have published or filed historical financial information that covers at least 75 per cent of its business over the past three years, have a balance sheet date that is not more than six months before the date of the prospectus published in connection with the IPO, include the consolidated accounts for the applicant and all of its subsidiary undertakings, and be audited without modification.[18] The applicant must also satisfy the FCA that it and its subsidiary undertakings have sufficient

11 FCA Discussion Paper. Review of the Effectivness of Primary Markets: The UK Primary Markets Landscape (DP17/2), February 2017. Available at: www.fca.org.uk/publication/discussion/dp17-02.pdf.

12 LR2.2.1–2.2.4R.

13 LR2.2.9R(1).

14 LSE Admission and Disclosure Standards, 3 July 2016, Section 2, Part 1, paragraph 2.7.

15 LR2.2.8R(1).

16 LR6.1.19R, which outlines when shares are not in public hands, for example, if held directly or indirectly by a director of the applicant, a person connected to a director, the trustees of any employees' share scheme or persons acting in concert who have any interest in 5 per cent or more the shares of the relevant class.

17 LR6.1.20AG.

18 LR6.1.3R.

working capital available for the next 12 months.[19] This is fulfilled by inclusion of an unqualified working capital statement in the prospectus, which is supported by a private working capital report prepared by the applicant's reporting accountant.[20]

Fourthly, the applicant must produce and publish a prospectus,[21] the key legal document providing details of the applicant and its shares, in compliance with the FCA's Prospectus Rules (PRs) and the relevant EU legislation. The prospectus must be approved by the FCA or relevant competent authority of an applicant's home Member State (if not the UK).[22] The requirement to produce a prospectus is triggered when an application is made for transferable securities to be admitted to trading on a regulated market, or when an offer of transferable securities is made to the public in the EEA.[23] An offer to the public will not require the preparation of a prospectus where the offer is extended only to a limited number of investors or only to certain categories of sophisticated investors.[24] Nevertheless, in the context of an IPO, even if the offer is limited in this way, a prospectus would still be required as a result of the application to list on a regulated market.

A prospectus must contain all information necessary to enable investors to make an informed assessment of the assets, liabilities, financial position, profits, losses and prospects of the applicant and the rights attaching to the applicant's transferable securities.[25] The PRs set out prescriptive requirements as to format, structure and content, utilising 'building blocks' found in the PD and the Prospectus Regulation's annexes to specify the necessary inclusions for different types of applicant and security.[26] Key contents include a summary, risk factors, business overview, historical financial information and an operating and financial review (comprising a detailed analysis of changes in the financial condition and results of operations of the applicant).

Lastly, the production of a prospectus triggers an obligation to appoint a sponsor.[27] A sponsor must assure the FCA that the applicant has met its LR obligations, as well as provide guidance to the applicant on the listing process and serve as the main contact point between the applicant and the FCA.[28]

Applicants to the standard segment of the LSE must comply with many of the same requirements. Key differences in the listing process include there being no obligation to appoint a sponsor[29] and flexibility to provide shorter audited historical financial information if the applicant has not been in existence for three years.[30]

AIM-quoted companies must comply with a discrete set of AIM rules, an important component of which is the requirement to appoint a nominated adviser (Nomad) who assesses the suitability of the company for admission,[31] alleviating the need to lay down

19 LR6.1.16R.

20 Along with the sponsor's declaration to the FCA.

21 PD Article 3(1).

22 LR2.2.10R(2) and PR3.1.7.

23 Section 85(1)-(2) FSMA.

24 Section 86(1) FSMA.

25 Section 87A(2) FSMA and PR3.1.2AR.

26 PR2.3.1 and PR Appendix 3, Ch II PD, Articles 3–23 and Annexes Prospectus Regulation.

27 LR8.2.1R.

28 LR8.3.1-8.3.2R.

29 LR8 applies only to applicants for a premium listing.

30 PR Appendix 3.1.1 and PD Regulation Annex I, paragraph 20.1.

31 AIM Rule 1.

prescriptive requirements regarding free float or market capitalisation. An AIM admission document must be submitted to the LSE.[32] Certain sections of the PRs are incorporated into the AIM Rules and are thereby applicable to the admission document, determining its contents.[33] However, unlike prospectuses, the FCA does not approve admission documents.

The separation of the LRs and AIM Rules means that there is no fast track to moving from AIM to the Main Market; AIM companies must follow the same application process as a new applicant with no existing listing. In contrast, the HGS rules overlap with those imposed on Main Market applicants, bolstering its role as a stepping stone to a Main Market listing.

The FCA acknowledges that some companies' operations, due to their specialist nature, are not compatible with the prescriptive requirements of the listing regime. Carve-outs, alternative and additional obligations are thereby provided for mineral, scientific research, property, start-up and shipping companies. For example, although mining companies applying for a premium listing are granted an exemption from the three-year historical financial information obligation if they have been operating for a shorter period,[34] they are expected to produce a mineral expert's report to be included in the prospectus.[35] Recommendations published by the European Securities and Markets Authority (ESMA)[36] outline the increased disclosure requirements imposed on specialist companies, as well as the mode of preparation and content of any expert reports.[37]

The technical aspects of the LRs are continually under review to ensure they remain appropriate and clear. For example, a FCA consultation paper in early 2017 proposed clarifications to the LRs applicable to premium listings and invited responses on a new exception for certain applicants to the requirement to produce three years of historical financial information.[38]

iii Overview of law and regulations

The law and regulations applicable to UK IPOs comprise a patchwork of domestic statutes, EU legislation, FCA-issued rules (set out in the FCA Handbook) and guidelines published by institutional bodies and investor groups. The Financial Services and Markets Act 2000 (FSMA) delivers the legal architecture that enables the FCA and Prudential Regulation Authority to collectively regulate the financial services industry, including the IPO market.[39]

32 AIM Rule 5.

33 In particular, PR Appendix 3 / Prospectus Regulation Annex I, II and III.

34 LR6.1.8R.

35 ESMA update of the CESR recommendations: the consistent implementation of Commission Regulation (EC) No. 809/2004 implementing the Prospectus Directive, ESMA/2011/81, 20 March 2013, paragraph 133.

36 See Section II.iii, *infra*.

37 ESMA update of the CESR recommendations: the consistent implementation of Commission Regulation (EC) No. 809/2004 implementing the Prospectus Directive, ESMA/2011/81, 20 March 2013, paragraphs 128–145.

38 FCA Consultation Paper. Review of the Effectiveness of Primary Markets: Enhancements to the Listing Regime (CP17/4), February 2017. Available at: www.fca.org.uk/publication/consultation/cp17-04.pdf.

39 FSMA Explanatory Notes, Summary. Available at: www.legislation.gov.uk/ukpga/2000/8/notes/division/2.

The FCA's role is to ensure markets operate effectively so that consumers are treated fairly.[40] When overseeing the admission and listing process, the FCA acts through the UKLA, the UK's securities regulator.

Specifically from an IPO perspective, the FSMA lays down when a prospectus is required, its high-level disclosure requirements and the civil liability and applicable sanctions for those responsible for the prospectus.[41] The FSMA also outlines broader civil market abuse offences, which go hand in hand with the criminal misleading statement and fraud offences under statutes such as the Financial Services Act 2012 and the Fraud Act 2006.[42] Furthermore, the FSMA regulates financial promotions,[43] which are generally prohibited in the UK unless they are made or approved by a person who is authorised or otherwise exempt.

The FCA Handbook is often a practitioner's first port of call, as it sets out the day-to-day mechanics of listing and trading on the LSE. The LRs outline the requirements for listing shares and the continuing obligations imposed on issuers post-admission. The Disclosure Guidance and Transparency Rules (DTRs) relate to dissemination and control of information by issuers, in particular the notification of transactions in the issuer's listed securities by persons discharging managerial responsibilities (PDMRs) and major shareholders. The PRs outline when a prospectus is required and the applicable content requirements, as well as imposing broader restrictions on advertisements relating to an offer or an admission to trading. The PRs implement the EU Prospectus Directive and incorporate parts of the EU Prospectus Regulation.[44]

The EU Market Abuse Regulation (MAR) is the most important development in recent years, coming into effect on 3 July 2016 and replacing the Market Abuse Directive. The scope of the market abuse regime has been expanded by the new regulation, which introduced more prescriptive requirements to keep insider lists, new rules on permissible actions when carrying out market sounding (gauging prospective investor interest) and extended disclosure requirements applicable to PDMRs.

ESMA, an independent European supervisory body, issues recommendations and Q&A guidelines that supplement EU legislation. The FCA, acting through the UKLA, also issues non-legally binding technical notes to assist issuers in interpreting the FCA Handbook.

Other legal regulations include the AIM Rules for Companies, issued by the LSE to regulate AIM, and the UK Corporate Governance Code, issued by the Financial Reporting Council, which lays down principles of good governance and best practice. Foreign issuers should also consider additional local law requirements and any requisite approvals.

III THE OFFERING PROCESS

i General overview of the IPO process

The UK IPO process generally takes 16–20 weeks, although this can vary considerably depending on an applicant's readiness for listing, the size and complexity of the offering and

40 FCA, About the FCA, 9 January 2017. Available at: www.fca.org.uk/about/the-fca.

41 Sections 87A and 90 FSMA.

42 Sections 89–92 (Part 7) Financial Services Act 2012 and Sections 1–3 Fraud Act 2006.

43 Defined as an invitation or inducement to engage in an investment activity by Section 21(1) FSMA.

44 Commission Regulation 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

prevailing market and regulatory conditions. The pre-IPO planning stage involves assessing the applicant's business, its growth trajectory and its suitability for an IPO, along with any internal reorganisation necessary to ensure it can function effectively as a listed company.

At the outset, advisers are appointed, including lawyers, reporting accountants, financial advisers, financial PR agents and investment banks, to undertake the roles of sponsor (in the case of a premium listing), underwriter and bookrunner. For a premium listing, the sponsor, in addition to ensuring compliance with the LRs and acting as a contact point for the UKLA,[45] will often take on the role of global coordinator, project managing the IPO and advising the applicant on the structure and timetable of the offering. The sponsor must be chosen from a list of those approved by the FCA. It is worth noting that the roles of the investment banks are often duplicated and overlap, resulting in, for example, multiple global coordinators, sponsors and underwriters.

At the kick-off meeting, all involved parties are familiarised with the proposed transaction and timetable. Management and business due diligence, financial modelling, valuation and capital structure discussions, drafting of the prospectus and preparation of financial information will all be commenced.

The due diligence process is critical in order to ensure that the information contained in the prospectus is accurate and complete in all material respects. A first draft of the prospectus will be submitted confidentially to the UKLA for review once the draft is substantially complete.[46] The UKLA then has 10 working days to respond (five days for each subsequent submission). The UKLA's response and comments are also confidential. Review by the UKLA is a key determinant of the IPO timetable, as it can take approximately eight weeks. In conjunction with drafting the prospectus, the lawyers will also verify it by substantiating or fact-checking all of the material statements contained therein.

Concurrently, the accountants will carry out financial due diligence in order to produce supporting reports. The long-form report is a detailed confidential report analysing the issuer's entire business, while the working capital report focuses on the sufficiency of the issuer's working capital for the next 12–18 months. Both are used for private comfort to reassure directors and the investment banks as to the viability of the issuer post-IPO. The long-form report facilitates analysis of the issuer's historical financial information in the prospectus, while the working capital report forms the basis of the working capital statement. Finally, the accountants prepare a Financial Position and Prospects Procedures report, which determines whether the reporting procedures the issuer has in place enable the directors to make appropriate judgments on the financial position and prospects of the issuer going forward.

Once all material due diligence has been completed, there will be a presentation to research analysts employed by the bookrunner, enabling them to prepare research reports. When the issuer is ready to publicly announce its intention to float, the analysts will publish their research reports. This commences a two-week 'investor education' phase, during which time the market is briefed about the issuer and the upcoming IPO by the analysts and their sales colleagues. Institutional investors' reaction to the offer will be fed back to the issuer and used to determine the price range within which the offer can be marketed.

45 As explained in Section II.ii, *supra*.

46 UKLA Procedural Note: Review and approval of documents, Ref: UKLA/PN/903.2, July 2013, p. 3. Available at: www.fca.org.uk/publication/ukla/pn-903-2.pdf.

The issuer itself will subsequently undertake a marketing campaign, labelled a 'roadshow', typically consisting of two weeks of intensive meetings with prospective institutional investors. Senior management of the issuer will present the investment case and answer questions about the issuer and the IPO. A 'pathfinder prospectus', a near-final version of the prospectus omitting the final price, is used as a key marketing document. While the roadshows are ongoing, the bookrunner will gauge market appetite for the listing by 'building a book' of revocable bids from investors, which is used to determine the final price and size of the offer.

Shares are allocated according to the orders investors place with the bookrunner. The market risk in the period between pricing and payment for the shares (typically three business days) is partially offset by entry into an underwriting agreement. An underwriter or syndicate of underwriters (usually the same investment bank or banks as the bookrunners) undertakes to subscribe for or purchase any shares not taken up or paid for by investors. The underwriting agreement will be conditional on admission of the securities to the Official List and to trading on the LSE.

Once the shares have been allocated, 'grey market' or 'when issued' trading can occur. Shares are traded prior to, but conditional on, admission to the Official List. If admission does not occur, the trades must be unwound.

The final steps in the IPO process are pricing and formal approval of the prospectus by the UKLA, allowing the prospectus to be published. At least 48 hours before the intended admission of the shares to trading, a formal application is submitted to the UKLA and the LSE.[47] The UKLA and the LSE will publicly announce approval of the application, at which point shares are credited to CREST accounts (the UK's electronic securities depositary and settlement system), unconditional dealings commence and the IPO is complete.

ii Pitfalls and considerations

A key area of contention in the UK market is the availability of information throughout the IPO process to potential investors, prompting the FCA to publish a consultation paper in early 2017.[48] Under the current process, after the publication of research reports by analysts, a 'blackout' period is imposed for approximately two weeks, during which time no further new information on the issuer is given to investors. The blackout period aims to separate publication of the research reports and the pathfinder prospectus, thereby reducing the risk of an investor claiming that his or her investment decision was based on the research report rather than on the issuer's prospectus. However, the concern is that, as the process is currently configured, investors do not gain access to information in the issuer's prospectus until late in the IPO timeline, meaning that they have insufficient time to undertake a thorough analysis. Moreover, all published analyst research is connected, in the sense that it is carried out by analysts who work at the same investment banks as those advising the issuer on the IPO itself, raising the risk of bias in their research with no opportunity for corroboration through unconnected research. In order to restore the primacy of the prospectus, the FCA has proposed a series of new rules to open analyst presentations to unconnected analysts and to ensure that an approved prospectus is published before any connected analyst research is released.

47 LR3.4.4R and LSE Admission and Disclosure Standards, 3 July 2016, Schedule 1, Part B, paragraph 2.1.

48 FCA Consultation Paper Availability of information in the UK Equity IPO Process (DP17/5), March 2017. Available at: www.fca.org.uk/publication/consultation/cp17-05.pdf.

An increasingly common practice on IPOs is for the issuer to engage early on in the IPO execution process with a select and limited number of investors on a confidential basis with a view to establishing whether there is likely to be sufficient investor appetite for the IPO. This is commonly known as 'pilot-fishing'. Regardless of the fact that the official IPO process has not yet begun, issuers must be careful not to contravene restrictions on financial promotions[49] and to ensure that all information communicated is accurate and not misleading and consistent with what will be disclosed in the prospectus in due course. Moreover, throughout the process, issuers should be aware of far-reaching US securities laws,[50] which can require offers to be registered with the Securities and Exchange Commission despite the fact that no US public offering is contemplated. In order to be exempt, issuers should ensure that there are no 'directed selling efforts' in the US that could reasonably be expected to have the effect of conditioning the market for the securities in the US.[51]

In general, issuers should be cautious about issuing profit forecasts prior to and throughout the IPO process. Generally, issuers disclose historical financial information, rather than profit forecasts, to potential investors to allow them to make an informed assessment of the issuer. Issuers are able to ensure such information is complete, accurate and not misleading. The projected future performance of the issuer, on the other hand, is much more difficult to verify and its inclusion would constitute a significant risk for the issuer, considering the wide scope of legal responsibility for a prospectus (including all of the issuers' directors at the time of publication)[52] and the potentially serious civil and criminal liabilities that arise if incorrect information is included in it. If an issuer has publicly made a profit forecast or estimate that is still outstanding at the time of publication of the prospectus, it is required to be included in the prospectus along with a statement explaining whether or not it is still considered valid.[53] Any forecast included in the prospectus must comply with prescriptive requirements as to its compilation, including a statement of the assumptions used, and must be reported on by the issuer's accountants.[54]

Between the time of publication of the prospectus and completion of the IPO, it is important to note that if a significant new factor, material mistake or inaccuracy relating to the information contained in the prospectus arises, there is an obligation to produce a supplementary prospectus.[55] 'Significant' means significant for the purposes of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and the rights attaching to the shares to be issued.[56] Examples of triggering events include discovery of a material inaccuracy in the financial information included in the prospectus or the occurrence of an event that will materially impair the issuer's future prospects (such as the loss of a key customer or destruction of a major plant or facility).

There are also a number of specific requirements under the listing regime that are challenging for issuers with certain characteristics. Firstly, an applicant to the premium

49 Under Section 21 FSMA.

50 US Securities Act 1933.

51 Under Regulation S – Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933.

52 PR5.5.3R.

53 PR Appendix 3, Annex 1, paragraph 13.4.

54 PR Appendix 3, Annex 1, paragraphs 13.1–13.2.

55 Section 87G FSMA.

56 Sections 87G(4) and 87A(2) FSMA.

segment of the Main Market must demonstrate that it will be carrying on an independent business as its main activity.[57] For issuers with a controlling shareholder (someone who holds 30 per cent or more of the voting power either individually or in concert with other persons),[58] supplementary obligations are imposed to ensure that independence is achieved. The issuer must enter into a relationship agreement with its controlling shareholder, including specific terms to ensure that any transactions with its controlling shareholder are conducted at arm's length.[59] The sanction for non-compliance with the relationship agreement is that all transactions with the controlling shareholder will be subject to prior independent shareholders' approval.[60] An issuer with a controlling shareholder must also make provision in its constitution for the election and re-election of independent directors to be approved by separate resolutions of both the shareholders as a whole and the independent shareholders.[61]

Secondly, issuers that have grown by acquisition may not be able to comply with the requirement to produce historical financial information that represents at least 75 per cent of the issuer's business over the past three years.[62] The LRs and the PRs anticipate this and allow issuers with 'complex financial histories' to produce separate historical financial information relating to entities that have been acquired (or entities that will be acquired shortly), in addition to historical financial information relating only to the issuer.[63] The starting point is that any additional information should be in the same form and prepared on the same basis as the issuer's historical financial information. However, the FCA has discretion to modify these requirements, in view of factors such as the nature and range of the information already in the prospectus and the economic substance of any relevant acquisitions or disposals.[64] *Pro forma* financial information may also be required to illustrate the impact of recent transactions on the issuer's financial position.[65] The purpose of these rules is to ensure that investors are presented with financial information that is sufficiently representative of the full group being listed and on which they can base their investment decision.[66]

A final point to note is the restriction, known as a 'lock-up', that the underwriters will impose on the issuer's major shareholders and members of senior management, preventing them from selling any shares they may hold in the issuer for a period of six to 12 months following completion of the IPO. The lock-ups are intended to assure new investors that the issuer's major shareholders and members of senior management are confident of the business and have no intention of divesting their interest in the business in the short term following the IPO.

57 LR6.1.4R.

58 LR6.1.2AR.

59 LR6.1.4BR and LR6.1.4DR.

60 LR11.1.1AR–11.1.ER.

61 LR6.1.4BR(2) and LR9.2.2ER.

62 LR6.1.3R.

63 LR6.1.3DR, PR2.3.1, which incorporates Article 4A of the Prospectus Regulation and Article 5(1) PD.

64 PR2.3.1, which incorporates Article 4A Prospectus Regulation.

65 Prospectus Regulation Annex I, paragraph 20.2 and Annex II.

66 LR6.1.3EG.

iii Considerations for foreign issuers

The size and prestige of the LSE attracts companies from all around the world. Dual listings are possible; however, compliance with foreign listing requirements does not result in any dispensation from the UK listing requirements, meaning the issuer may have to comply with two regulatory regimes.

While UK incorporated issuers must be listed solely in the UK to be considered for the FTSE UK Indices, the eligibility of non-UK incorporated companies will be determined by factors such as the location of its headquarters and company meetings, the composition of its shareholder base and the perception of investors.[67] Furthermore, non-UK incorporated issuers must have a free float of not less than 50 per cent and must publicly acknowledge adherence to the principles of the Corporate Governance Code (as far as is practicable) to be included in the FTSE indices.[68]

To be eligible for an LSE Main Market listing, shares must be eligible for CREST, the UK's electronic settlement system.[69] Only shares issued by issuers incorporated in the UK, Ireland, Jersey, Guernsey or Isle of Man can be traded through CREST. Issuers incorporated in other jurisdictions will instead need to arrange for depository interests in respect of their shares to be issued, which can in turn be settled in the CREST system.

The procedure for the approval of prospectuses differs depending on the issuer's country of incorporation. Within the EEA, the Prospectus Directive provides that the regulator in the issuer's Member State of incorporation should approve the prospectus,[70] which is then passported into the UK. For non-EEA incorporated issuers, a prospectus produced in accordance with the laws of the non-EEA country can be submitted to the FCA once certain additions are made to ensure the incorporated disclosures are equivalent to those required under the PRs and FSMA.[71] ESMA assesses the relevant regulatory framework in certain non-EEA countries and issues guidelines on the additional information that must be included in the prospectus to satisfy EEA standards.[72]

There are two key further points to note in relation to foreign issuers and the listing regime. Firstly, historical financial information included in the prospectus must be prepared in accordance with EU-endorsed International Financial Reporting Standards or with the issuer's national accounting standards as long as these have been accepted as equivalent.[73] The Generally Accepted Accounting Principles of the US, Japan, China, Canada and South Korea have so far been granted equivalence status.[74] Secondly, the free-float requirement demands

67 FTSE UK Index Series Ground Rules v12.8, May 2016, paragraphs 4.4.2–4.4.4.

68 Ibid, paragraph 4.4.3.

69 LSE Admission and Disclosure Standards 3 July 2016, Section 2, Part 1, paragraph 2.7.

70 PD Article 13.

71 See ESMA Opinion: Framework for the assessment of third country prospectuses under Article 20 of the Prospectus Directive, ESMA/2013/317, 20 March 2013.

72 See, for example, ESMA statement on Israeli laws and regulations on prospectuses, ESMA/2011/37, 23 March 2011. Available at: www.esma.europa.eu/sites/default/files/library/2015/11/11_37.pdf.

73 LR6.1.3R(d), which refers to paragraph 20.1, Annex I of Prospectus Regulation, which refers to the procedure set down in Article 3 Regulation (EC) No 1606/2002 on the application of international accounting standards.

74 UKLA Procedural Note: Public offer prospectus – drafting and approval, Ref: UKLA/PN/094.1, December 2012. Available at: www.fca.org.uk/publication/ukla/pn-904-1.pdf.

25 per cent of shares be held in public hands in one or more EEA states at the time of admission.[75] The FCA may consider shares held outside of the EEA in determining whether to grant a dispensation.[76]

Finally, where the LRs refer to UK legislation, the foreign issuer must comply with it so far as information available to it enables it to do so and compliance is not contrary to the law in its country of incorporation.[77]

IV POST-IPO REQUIREMENTS

The obligations imposed on a Main Market-listed issuer post-IPO can be broadly broken down into four categories: reporting, disclosure, corporate governance and transaction restrictions. In addition, issuers must adhere to the spirit of the listing and premium listing principles, if applicable.[78]

Firstly, the issuer must publish annual accounts no later than four months after the end of the financial year and half-yearly financial reports no later than two months after the end of the financial period.[79] Under the DTRs and MAR, an issuer must also draw up and maintain insider lists, to be provided to the FCA on request.[80]

Secondly, the issuer must comply with numerous disclosure obligations. The DTRs incorporate the obligation imposed by MAR to inform the public as soon as possible of 'inside information' that directly concerns the issuer.[81] 'Inside information' is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and that, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[82] Furthermore, under the DTRs a shareholder must notify the issuer and the FCA of the percentage of voting rights he or she holds if, as a result of an acquisition or disposal of shares, the percentage of those voting rights reaches, exceeds or falls below 3 per cent and each 1 per cent threshold above 3 per cent up to 100 per cent.[83] The issuer must then give details of such notification to the market by the end of the next trading day. These thresholds are modified to 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent and 75 per cent in the case of non-UK incorporated issuers.[84]

Thirdly, premium-listed issuers will be expected to adhere to the principles of good governance and best practice outlined in the Corporate Governance Code. The Corporate Governance Code applies on a 'comply or explain' basis,[85] meaning issuers have to state in their annual financial reports how they have applied the Corporate Governance Code or explain why they have not complied with its provisions. In practice, the market expects

75 LR6.1.19R.
76 LR6.1.20AG(2)(a).
77 LR1.4.2R.
78 Chapter 7 LR.
79 DTR4.1.3R and 4.2.2R.
80 DTR2.8 and Article 18 MAR.
81 Article 17(1) MAR.
82 Article 7 MAR.
83 DTR5.1.2R.
84 Ibid.
85 LR9.8.6R(6) and 9.8.7R.

compliance in full by premium-listed issuers. Standard-listed issuers, although technically only required to respect the EU minimum standards incorporated in the DTRs,[86] may also come under pressure from shareholders to follow the best practice norms outlined in the Corporate Governance Code.

The Corporate Governance Code outlines two key requirements as to the board of directors: a majority (including the chairman) must be independent non-executive directors and there must be a clear division of responsibility between the chairman and chief executive officer.[87] Moreover, it mandates the establishment of an audit committee (of at least three independent non-executive directors excluding the chairman)[88] and nomination committee (the majority of which should be independent non-executive directors),[89] and recommends the establishment of a remuneration committee (of at least three independent non-executive directors).[90] Issuers should also take into account non-legal guidelines by bodies that represent institutional investors (e.g., the National Association of Pension Funds).

Fourthly, there are a number of restrictions on the transactions that an issuer and its management can carry out. PDMRs[91] are restricted by MAR from carrying out transactions relating to shares or debt instruments of the issuer during a 'closed period'.[92] A closed period is the period of 30 calendar days before the announcement of an interim financial report or a year-end report, which the issuer is obliged to make public according to national law or the rules of the trading venue where the shares are admitted to trading.[93] This prevents PDMRs from trading on the basis of inside information not yet available to the market. Moreover, transactions conducted by a PDMR or a person closely associated[94] to them relating to shares, debt instruments or derivatives of the issuer must be notified to the issuer and FCA promptly, and no later than three business days after the transaction.[95] The issuer must then notify the market within the same time frame.[96] Although MAR sets down a *de minimis* threshold (€5,000 or more in a calendar year)[97] that must be crossed before the notification obligation is triggered; in practice, most UK-listed issuers require PDMRs to notify all transactions regardless of size.

If an issuer wishes to raise more capital through further equity issues, it must have regard to pre-emption rights contained in the LRs (for premium-listed companies), and the Companies Act 2006 (for all UK incorporated companies).[98] Pre-emption rights require that

86 The DTRs incorporate the Statutory Audit Directive (Directive 2014/56/EU on statutory audits of annual accounts and consolidated accounts) and the Company Reporting Directive (Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups).

87 Corporate Governance Code A.2.

88 Corporate Governance Code C.3.1.

89 Corporate Governance Code B.2.1.

90 Corporate Governance Code D.2.1.

91 Defined as a director or senior executive who has regular access to inside information relating to the company and the power to take managerial decisions affecting the company's future developments and business prospects.

92 Article 19 MAR.

93 Article 11 MAR.

94 Defined in Article 3(1)(26) MAR to include the PDMR's spouse, dependent child or legal person, trust or partnership directly or directly controlled by such a person.

95 Article 19(2) MAR.

96 Article 19(3) MAR.

97 Article 19(8) MAR.

98 Section 561 Companies Act 2006 and LR9.3.11R.

any new shares proposed to be issued are first offered to existing shareholders to subscribe or purchase in proportion to their existing holdings. These rights can be disapplied by a shareholders' special resolution (involving approval by 75 per cent of shareholders voting at a general meeting).[99] A Statement of Principles[100] published by the Pre-Emption Group (a body set up to provide issuers and investors with guidance in this area) outlines the acceptable size and duration of disapplication and, although not technically binding, is, in practice, followed by UK-listed issuers.

There are a number of additional restrictions imposed post-IPO on transactions carried out by premium-listed issuers. When an issuer enters into a transaction outside of the ordinary course of business, four percentage ratios or 'class tests' must be applied to determine the size of the transaction compared to the issuer (based on assets, profits, consideration and capital).[101] Class 1 transactions (i.e., where at least one percentage ratio equals 25 per cent or more)[102] and reverse takeovers (i.e., where at least one percentage ratio equals 100 per cent or more, or which in substance results in a fundamental change in the business or board or voting control of the issuer)[103] require an explanatory circular to be sent to shareholders and prior shareholder approval to be obtained.[104] Class 2 transactions (i.e., where at least one percentage ratio equals 5 per cent or more)[105] require public announcement as soon as possible after entering into the binding arrangement.[106] Reverse takeovers may trigger suspension of trading in the issuer's securities, unless there is adequate public information in the market about the proposed transaction,[107] and will always lead to cancellation of the listing.[108] In effect, the enlarged issuer will need to reapply for admission, satisfying the initial eligibility requirements as a new applicant. In early 2017, a FCA consultation paper sought responses to enhance the effectiveness of the current system, which included revising the profits tests calculations and relaxing the requirement to suspend trading in the event of a reverse takeover.[109]

An issuer wishing to enter into a transaction with a related party (such as a substantial shareholder or a director) that crosses a certain percentage threshold (5 per cent, calculated on the basis of the class tests outlined above), must publicly announce the transaction, send an

99 Sections 570 and 571 CA 2006. In the case of a foreign company, the disapplication must be authorised by shareholders in an equivalent manner in accordance with the law of its country of incorporation under LR9.3.12R(4).

100 Pre-Emption Group: Disapplying Pre-Emption Rights: A Statement of Principles, 2015. Available at: http://www.pre-emptiongroup.org.uk/getmedia/655a6ec5-fecc-47e4-80a0-7aea04433421/Revised-PEG-Statement-of-Principles-2015.pdf.aspx.

101 The metrics for calculating such ratios are: gross assets of the target divided by gross assets of the issuer; profits attributable to the transaction divided by profits of the issuer; consideration divided by aggregate market value of all the ordinary shares of the issuer; and gross capital of the target divided by gross capital of the issuer.

102 LR10.2.2R(1).

103 LR5.6.4R.

104 LR10.5.1R.

105 LR10.2.2R(2).

106 LR10.4.1R.

107 LR5.6.8G.

108 LR5.6.19G.

109 FCA Consultation Paper. Review of the Effectiveness of Primary Markets: Enhancements to the Listing Regime (CP17/4), February 2017. Available at: https://www.fca.org.uk/publication/consultation/cp17-04.pdf.

explanatory shareholder circular and obtain the approval of its shareholders.[110] Premium-listed issuers must also appoint a sponsor if they undertake certain specified transactions under the LRs,[111] especially if interactions with the FCA are required. Finally, premium-listed issuers must obtain shareholder approval to transfer between listing categories and cancel their listing.[112]

Less onerous obligations apply to AIM-quoted companies. For example, substantial and related party transactions meeting certain thresholds prompt a simple disclosure obligation rather than shareholder approval,[113] and the deadlines for publishing accounts are extended.[114] However, a Nomad, initially appointed for the AIM admission process, must be retained at all times to assist AIM companies in meeting their continuing obligations.[115]

V OUTLOOK AND CONCLUSION

The LSE is a cornerstone of London's role as a leading international financial hub, with a trusted regulatory framework that is respected around the world. However, it is not without its difficulties. A key area for reform in the coming years is the availability of information during the IPO process, which could lead to significant changes being made to the IPO process. Following Brexit, uncertainty surrounds the status of the UK's right to passport its financial services into the EU going forward, as the UK government begins the inevitably protracted process of negotiating an exit deal. Given the fusion of EU and UK legislation that currently regulates the IPO process, absolute divergence is unlikely, leaving the door open for the EU principle of 'equivalence' to take centre stage in granting the UK market access. In early 2017, a FCA discussion paper has shown a strong focus on the accessibility of UK markets for overseas issuers, questioning in particular the relevance of the division between standard and premium listings.[116] The discussion paper highlights the FCA's willingness to consider reforming the market framework to ensure the LSE maintains its global reputation.

110 LR11.1.7R.

111 LR8.2.1R.

112 LR5.2.5R and 5.4A.4R.

113 AIM Rules 12–13.

114 AIM Rules 18–19.

115 AIM Rule 1.

116 FCA Discussion Paper. Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape (DP17/2). Available at: www.fca.org.uk/publication/discussion/dp17-02.pdf.

Appendix 1

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Danny Tricot leads Skadden's European corporate finance practice and is based in the London office. His capital markets work includes acting for issuers and underwriters on a broad range of equity and debt transactions. Mr Tricot has advised on initial public offerings, rights offerings and private placings. He has been involved in equity listings in London and on various international exchanges. Most of the offerings that he has worked on have included a Rule 144A component. He has worked across several European jurisdictions, and also in growth markets, with extensive experience in the Middle East, Africa and Russia.

Chambers UK has described Mr Tricot as 'an incredibly hard-working lawyer' who displays 'a balance of commerciality and technical brilliance'. He also is listed in *Chambers Europe*, *Chambers Global*, *The Legal 500* and *IFLR1000*. He was named as one of only three lawyers in *Financial News*' Top 100 Rising Stars 2007, and in 2016 he was featured in *Financial News*' Hall of Fame. Mr Tricot's work has been repeatedly recognised for its quality and innovation in various international awards, including several commendations in the *Financial Times*' 'Innovative Lawyers' reports.

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