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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?

Securities (debt and equity) offerings in the Federal Republic of Germany (Germany) are governed by several relevant statutes and regulations, in particular:
- the Securities Trading Act (WpHG);
- the Securities Prospectus Act (WpPG);
- the Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buyback programmes and stabilisation of financial instruments;
- the Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC regarding information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements;
- the Commission Regulation (EC) No. 211/2007 of 27 February 2007 amending Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment;
- the Sales Prospectus Act (VerkProspG);
- the Stock Exchange Act (BörsG);
- the Ordinance concerning the Admission of Securities to Official Listing on a Stock Exchange (BörsZulV);
- the Ordinance of Securities Trading Reporting and Insider List (WpAIV);
- the German Civil Code (BGB);
- the German Banking Act (KWG);
- the Stock Corporation Act (AktG); and
- the Bond Act.

Several European Union (EU) Directives were implemented in the aforementioned German rules and regulations, including the Prospectus Directive 2003/71/EC, the Takeover Directive 2004/25/EC, the Transparency Directive 2004/109/EC, the Acquisitions Directive 2007/44/EC and the Markets in Financial Instruments Directive 2004/39/EC (MiFID). The Committee of European Securities Regulators (CESR) has further issued several recommendations for the implementation of such directives, which have been taken into account in the drafting of the above.

Since 2002, there have been two public supervisory bodies jointly in charge of regulating and supervising the financial industry in Germany. On the one hand, Germany's Federal Financial Supervisory Authority (BaFin) was established within the Federal Ministry of Finance on 1 May 2002 as an integrated financial supervisory authority for the securities, banking and insurance sectors. The main responsibilities of BaFin regarding securities supervision are:
- combating insider dealing;
- tracking down market manipulations;
- enforcing transparency rules such as obligations relating to ad hoc announcements;
- making voting rights announcements;
- making notifications on directors' dealings and financial reporting; and
- reviewing securities prospectuses.

The second of the authorities, the Deutsche Bundesbank, whose core function is banking supervision, is in charge of, in particular, the day-to-day supervision of the business of banks and financial institutions.

In addition, the Exchange Supervisory Authorities of the Federal German States are responsible for the supervision of the respective stock exchanges and work in this regard together with BaFin. Finally, the management of the respective domestic stock exchange is responsible for admission for the trading of securities at such stock exchange.

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?

The WpPG requires every public offering of securities (debt and equity) in Germany to be based on a prospectus, if no exemption for this requirement as stated in the WpPG applies. According to the WpPG the content of the prospectus should, inter alia, contain the following:
- information on the issuer (eg, business overview and executive bodies);
- summary regarding issuer and securities that is comprehensible to the general public, containing also key features and risks of the offering;
- annual financial statements (including auditor's report);
- financial quarterly, semi-annual or annual reports (if applicable and/or available);
- explanation of the financial results;
- presentation of risk factors; and
- information on the securities to be offered and the terms and conditions of the offer.

Furthermore, where an issuer has a complex financial history, the entire business aspects of the issuer may not be covered by the historical financial information relating to the issuer, but will be covered instead by financial information drawn up by another entity (ie, significant acquisition, newly incorporated holding company composed of companies that were under common control or ownership, or separate legal entity following the division of an existing business). Further, an issuer might have made a significant financial commitment where it has entered into a binding agreement to acquire or

dispose of a significant entity or business, which is not yet completed at the date of the approval of the prospectus. In such cases, the corporate structure or the financial situation of the issuer has to be disclosed in more detail if such fundamental changes in the corporate or financial structure during the relevant financial period has occurred. Commission Regulation (EC) No. 211/2007 amended the EU Prospectus Regulation regarding the financial information that must be included in a prospectus where the issuer has such a 'complex financial history' or has made a significant financial commitment. Therefore, BaFin as competent authority should determine on a case-by-case basis the information required (if any) but should not apply a higher standard of scrutiny to that information, or to the prospectus in general, than that which may be derived from article 13 of the Prospectus Directive 2003/71/EC.

The prospectus must be published at least one working day before the start of the offering to enable investors to evaluate the securities offered. Such a publication may be made either in any nation-wide newspaper, in a printed format, by newspaper notice stating where the printed prospectus is available or electronically on the website of the issuer and the underwriter or the stock exchange. The public offering of securities without a prospectus is an offence subject to administrative fines. In the case of debt securities and other non-equity securities including warrants, which are issued under an offering programme, a 'base' prospectus may be used. Such a prospectus will be valid for 12 months after its publication for public offerings or admissions to trading, provided appropriate supplements are prepared and approved thereafter.

Further, the WpHG governs both the offering of securities to be admitted to trading on a stock exchange and public offerings without such a simultaneous admission to trading. Where admission to trading on a stock exchange has been applied for, the content of the prospectus and other required documents must further comply with requirements of the BörsZulV. Nevertheless, only one prospectus needs to be prepared for the purpose of the public offering and the stock exchange listing. Further, if an application for admission to trading on the regulated market of a domestic market has been filed, the admission office, or as the case may be the admissions committee of the relevant stock exchange, decides about the admission. According to the BörsZulV, the admission to trading may not be granted prior to one trading day after filing of admission application. The securities are allowed to be traded one trading day after the publication of the prospectus or if a prospectus does not have to be published, trading can start one working day after the admission decision has been published. The admission decision will be published at the cost of the issuer in the electronic official gazette.

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?

The filing of a prospectus relating to a public offering is governed by the WpPG. BaFin reviews the content of the prospectus to ensure its compliance with the applicable regulations (see question 2). In addition to filing with BaFin, if the securities are to be admitted to trading on a stock exchange an application must be filed with the relevant stock exchange. Germany's main stock exchange is the Frankfurt Stock Exchange operated by the Deutsche Börse AG. The equity capital market trading segment at the Frankfurt Stock Exchange is divided into the regulated market (prime standard and general standard segment) and the regulated unofficial market (consisting of entry standard and open market segment).

In general, the issuer has to file the application for admission to the exchange together with a bank or financial service institution that is approved for trading on the Frankfurt Stock Exchange. The following documents must generally be submitted:

- listing application (signed by the issuer and the credit or financial institution);
- prospectus that has been approved by BaFin and published (a preliminary prospectus is sufficient for filing an application);
- current certified articles of association;
- current certified excerpt from the commercial register;
- report on the company's formation (if it has not yet existed for three financial years);
- evidence of resolution in relation to the IPO, ie, minutes of the annual general meeting, resolution of the executive board and the supervisory board;
- proof of sufficient working capital for at least 12 months; and
- proof of a free float of at least 25 per cent, whereby exceptions exist for shares in large volumes.

The regulated unofficial market, named the 'Open Market' by the Frankfurt Stock Exchange, provides an alternative to the EU-regulated segment, the organised market, as a point of access to the capital market. Small and medium-sized companies, in particular, shall benefit from easy, fast and cost-effective admission to exchange trading. The Open Market (divided into a 'First Quotation Board' and 'Second Quotation Board') represents the second domestic market segment regulated by law after the regulated market. However, in contrast to the regulated market, the Open Market is not a recognised exchange and as such is governed by domestic as opposed to EU regulation. For example, the inclusion of securities on the Open Market is governed by the directive for the regulated unofficial market of Deutsche Börse AG. An issuer must fulfil some formal inclusion requirements and has no follow-up obligations.

The main German trading market for debt securities is also the Frankfurt Stock Exchange. The sub-segment prime standard of the regulated market, which provides additional obligations for issuers, applies to equity securities being admitted to trade. Therefore, debt securities are governed only by the general standard rules, implemented by law.

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?

As mentioned in question 2, every public offering of securities requires the publication of a prospectus. The basic terms 'public offering' and 'securities' are defined in the WpPG in conformity with MiFiD. Essential to the concept of a security by the standards of the WpPG is fungibility, ie, the marketability of the securities in the capital market. Registered bonds, promissory notes and fixed-term deposits are therefore excluded, as are non-transferable share options. Share certificates of a company with limited liability (GmbH), limited partnership or partnership organised under the BGB (BGB Gesellschaft) are treated likewise. Falling within the definition of a security in accordance with the WpPG are all tradable securities – in particular shares, certificates in place of shares (eg, ADRs), participation certificates, warrants and bonds from industrial undertakings and/or corporations are also covered. In this respect, it is irrelevant whether the securities are in certified form or not.

The concept of the public offering is defined in section 2, No. 4 of the WpPG. It means 'a notice to the public in whatever form and by whatever means, which contains sufficient information about the conditions of the offering and the securities to be offered to place an investor in a position to be able to decide whether to purchase or subscribe to these securities'. Accordingly, advertising measures in advance of going public, or so-called 'road shows', fall short of an offer within the meaning of the WpPG: the necessary concrete follow-up is lacking – in other words, for example, the actual opportunity to purchase or subscribe. The (public) invitation to make an application to conclude the subscription contract, for instance, is sufficient. This issue is important in particular for Open Market initial public offerings, such as the entry standard segment of the Frankfurt Stock Exchange or m:access on the Munich Stock Exchange. Neither

the application for inclusion in the Open Market nor actual inclusion establish a definite opportunity to purchase, and consequently neither does a public offering exist. The threshold of the public offering is crossed only in the event of additional promotional activities being undertaken. The term 'promotional activity' should be given a broad interpretation in this sense. All sources of information relate to the public – in contrast to individuals – if they are accessible to an undefined group of people. This naturally includes the internet, but also company journals used to make announcements or electronic systems such as Bloomberg or Reuters. The use of external investment intermediaries (tied agents) also regularly meets the 'public' criterion.

Exceptions to the duty to provide a prospectus apply in the case of certain types of offers and in relation to certain securities (see question 7).

If a prospectus is drawn up, it is not allowed to be published and distributed before being approved by BaFin. BaFin will approve the content of the prospectus and makes its decision within 10 working days after having received the prospectus in respect of completeness and conformity with WpPG. This period is extended to 20 working days if the public offering concerns securities that are not yet licensed to be traded on an organised market in an EEA member state. If the prospectus is incomplete, or if it requires supplementary information, the periods stated apply only from the time when this supplementary information is received. In the case of an IPO, the timing for supplementary information is very crucial and should be discussed with BaFin in advance. The approved prospectus is made available by BaFin on its website for 12 months. The offeror must publish the prospectus without delay, at the latest one working day before the start of the public offering. Each important new circumstance or significant inaccuracy that could affect the assessment of the securities must be stated in an addendum to the prospectus. The addendum also must be approved by BaFin, and it must be published in the same way as the original prospectus.

Research reports are not regarded as prospectuses under WpPG and within the meaning of the prospectus liability provisions under stock exchange law. There is no special legal basis of liability in respect of defective or incomplete reports. Nonetheless, liability on a purely civil basis is not excluded, in particular in the case of 'scalping'. In the case of larger public offerings, rules of conduct for marketing and capital markets communication are therefore customary in the market in order to minimise liability risks.

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?

In principle, secondary offerings of securities through a public offering are subject to the same requirements as primary offerings, so the WpPG is applicable. Secondary equity offerings are regularly used to diversify share holdings among the general public in order to create a (larger) free float. In respect of prospectus requirements, it should be proved whether the preconditions for a public offering exist and, if so, whether a exemption rule comes into play. Such an exemption from the duty to provide a prospectus may be considered in the case of subsequent tranches of a share offering if, over a period of 12 months, the new shares amount to less than 10 per cent of the shares of the same type that have already been admitted to trading in the same market.

According to the Stock Corporation Act, any offer by an issuer for subscription of new shares is subject to the subscription rights of the existing shareholders in proportion to their existing shareholding. Under the rules of the act, it is possible to exclude pre-emptive rights in whole or in part, but only if such exclusion is made in the same resolution as the one that decides on the capital increase. In addition, such an exclusion of pre-emptive rights must be approved by at least 75 per cent of the share capital represented at the general meeting (unless an even larger majority is required in the articles of association).

Furthermore, the selling shareholder is liable only for defects in the existence of the right embodied in the share, such as for the existence of the company, as well as the existence, content and scope of the features of the ownership rights (participation in profits, voting rights, freedom from investment arrears and any ancillary obligation). If a major shareholder sells shares to an underwriting syndicate, it is customary for additional assurances to be given extending beyond the principles of legal liability. The greater the 'proximity' of the selling shareholder to the issuer (eg, original shareholder or member of the company's executive body), the more likely the banks are to demand a non-liability-dependent guarantee. This relates in particular to the assurance that the selling shareholder does not know of any facts that are not in the public domain which could be relevant to the valuation of the business, the shares or both.

On the other hand, the selling shareholder is not liable for the value or the negotiability of the shares, for the level of the dividend, for defects in the business or for any over-indebtedness of the company.

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

The introduction of the securities – ie, the commencement of the listing – may take place (at the earliest) one working day after the prospectus has been published or, if none has been published, one working day after admittance to trading. This trading application can be made one working day prior to admittance to trading. The authority to settle the details of the listing's acceptance was transferred by the act implementing the MiFID (which came into force on 1 November 2007) to the respective stock exchange regulations.

The following settlement is the process whereby securities are delivered, usually against payment, to fulfil contractual obligations such as those arising under securities trades. As part of performing the delivery obligations entailed by the trade, settlement involves the delivery of securities and the corresponding payment. The clearing and settlement process in Germany is characterised by an integrated structure. Generally, every placed trading order follows the clearing and settlement chain provided by the Deutsche Börse AG, which means for example that after trading on the electronic trading platform, called 'Xetra', clearing will be operated by Eurex Clearing AG and settlement-delivery will be executed in the Clearstream Banking AG system, both of which are subsidiaries of Deutsche Börse AG.

Private placings

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

As a basic description, an offer to the public is an offer directed at the general public, ie, an offer that targets an unlimited number of potential investors. In contrast, a private placement of securities (debt and equity) requires a personal relationship between the issuer and the actual investor prior to the offer. Hence, Germany has broad exemptions from disclosure requirements for sales to sophisticated investors or to market professionals. An offer is not deemed to be an offer to the public (and therefore no prospectus is required) if it is made only to certain categories of investors. The key exemptions (some of which may be combined) in this regard are in accordance with section 3, clause 2 WpPG and include offers:

- solely addressed to qualified investors;
- addressed to fewer than 100 individuals or legal entities (other than qualified investors) per EEA state;
- addressed to investors who acquire securities for at least €50,000 per investor with respect to each separate offering of securities;
- where the minimum denomination per unit amounts to at least €50,000; or

- where the total consideration for all offered securities is less than €100,000 over a time period of 12 months.

Further, under section 4, clause 2 of the WpPG, an issuer is not required to publish a prospectus for admission to trading if the securities being issued are exempt, in particular:
- shares representing, over a 12-month period, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;
- shares being offered in exchange for shares of the same class already admitted in the same regulated market, provided that the issuance does not require a capital increase;
- shares being offered in connection with a takeover offer, provided that a documents is available containing information which is equivalent to that of a prospectus; and
- shares already admitted to trading that are offered to existing or former employees or directors, provided that certain information is supplied.

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

In the case of a private placement of securities there are no specific statutory requirements for any information to be provided to potential investors. However, if the issuer is providing potential investors with information, such private placement documents might be expected to contain in an understandable manner all information necessary to enable investors to make an informed assessment of the issuer's assets and liabilities, financial situation, profits, losses and future prospects, and the rights attached to the securities. In relation to minimum requirements, Commission Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC, Commission Regulation (EC) No. 211/2007 of 27 February 2007 amending Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC, and section 5 WpPG can therefore be used in an analogous manner. Furthermore, if an issuer does not make use of an exemption under section 3, clause 2 WpPG and prepares an informational document, such a document will be regarded as a prospectus and the WpPG, BörsG and other rules will apply.

Overall, effective investor protection requires not only a high degree of accurate and complete information in advance of the securities offering, but also effective sanctions for failures to comply with the duty to disclose information, since otherwise the parties responsible for the prospectus would have little incentive to meet their duty of disclosure. In addition to the statutory prospectus liability, the German courts have developed a civil law prospectus liability. This applies in cases where the information is not correct or a placement agent has acted for the issuer and could be regarded as an informed agent or adviser resulting in higher trust being accorded to the agent by inexperienced investors.

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 statutory provisions which apply especially to the transferability of securities (debt and equity) acquired by investors through a private placement. If the exceptions stated in WpPG (as outlined in question 7) apply and the securities are admitted to trading on the stock exchange, the related securities can be traded on the stock exchange in accordance with the applicable laws and regulations of such stock exchange. Where such securities are not admitted to trading, it should be noted that in the issuer company's articles of association, the transferability of securities may also be defined, and such articles may restrict the transferability of such securities.

Further, there are no mechanisms in place to enhance the liquidity of securities in a private placement.

Offshore offerings

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

In a fully internationalised securities market, issuers in public primary markets should be able to offer securities (debt and equity) to investors worldwide using one set of optimal distribution procedures and disclosure documents, and subject to one set of liability standards and enforcement remedies. Such a standardised issuance on internationally accepted rules would reduce the costs of issuing securities that are in international demand, a benefit that would be shared by both issuers and investors.

However, such international rules have yet to be implemented worldwide in the future. To date, EU or EEA member states have implemented a passport regime under the Prospectus Directive 2003/71/EC. Accordingly, in Germany the WpPG requires an issuer of a pan-European offering of securities to acquire a passport in most cases from its home member state authority. This means that a German issuer who wants to publicly offer securities not only in Germany as its home member state but also in one or more other EU or EEA member states must file with BaFin a prospectus for approval. As soon as the prospectus and any supplements thereof are approved by BaFin, the approval entitles the issuer to validly publicly offer the securities in one or more EU or EEA member states without needing further approval of the prospectus. A further requirement is the prior notification of the respective supervisory authority in the particular EU or EEA member state. The same applies if a prospectus has been approved by a supervisory authority in another EU or EEA member state, BAFin has been notified and certain further requirements as regards language requirements have been complied with.

If an offer of securities is done outside of Germany, the respective issuer must comply with the securities laws of such jurisdictions.

Particular financings

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

Exchangeable convertible bonds differ from 'ordinary' convertible bonds in that they are issued by a company (issuer) and can be exchanged for the securities of another company (entity). In contrast, 'ordinary' convertible securities can be exchanged for shares of the issuer. Typically, exchangeable convertible is a bond that pays periodic coupons and is callable at preset prices, whereby convertible bonds can be exchanged for a set number of the entity's shares at bond maturity or when the bond is called before maturity, if bondholders wish to do so. Moreover, participation bonds are issued by companies which provide investors the rights to participate in dividends to the shareholders. Concerning rights offerings, see question 5.

Under German corporate law the issue of convertible bonds, participation bonds and participation rights requires a resolution of the shareholder's meeting adopted by at least 75 per cent of the share capital represented at the shareholder meeting, unless there is a different majority provided in the articles of association. Further, in the case of a domestic stock corporation other certain statutory rules have to be observed.

Furthermore, the issuance of exchangeable or convertible bonds, warrants or rights offerings falls within the scope of the WpPG, so that the issuer has to observe the respective statutory requirements of the WpPG. Pursuant to the rules in the WpPG any issuer wishing to make a public offering or an admission to trading of such securities must, subject to certain exemptions, submit a prospectus to BaFin (see question 2).

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

In the German market the commonly used international standards – in particular the International Capital Markets Association (ICMA) standards – are applicable in debt and equity offerings. In a firm commitment underwriting agreement, the institutions participating in the underwriting agree that they will purchase securities being offered for resale to the public. The underwriters must pay for and hold the securities for their own account if they are not successful in finding public investors. This form of underwriting is mainly used by well-known underwriters and provides a greater assurance that the issue will be placed with the desired investors, like funds. The other common type of underwriting agreement is where the underwriters agree to use their best efforts to sell the issue as the issuer's agent. In such a case, to the extent that investors cannot be found, the issue will not be sold. Furthermore, a best-efforts agreement may provide that no securities will be sold unless buyers can be found for all securities, while others state that a lower minimum such as 50 per cent shall apply for a special type of securities.

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

Underwriting agreements in respect of German debt and equity securities offerings contain indemnity clauses, with the purpose of indemnifying and protecting the underwriters against any loss and damage resulting from untrue statements of material fact or material omissions in the issuance prospectus, or resulting from any inaccuracy in representations and warranties contained in such an underwriting agreement and the company or officers certificates. Such indemnity clauses apply only between the underwriters themselves and will not apply to the investors. The clauses also often include affiliates and parent companies of the underwriters and exclude damages and liabilities arising from information provided by the underwriters.

Further, force majeure clauses in equity underwriting agreements generally cover any event that could affect national or international financial markets overall, such as any change in general economic or political conditions of the issuer or currency exchange fluctuations, any suspension or material limitation in trading in securities on the main stock exchanges and any other related event which could have an adverse effect on the success of the offering. Additionally, in some underwriting agreements which relate to equity offerings, success fee clauses are implemented, which are paid at the issuer's discretion. Further, debt underwriting agreements follow mainly the ICMA's rules and recommendations relating to force majeure.

In Germany, it is market standard for equity securities offerings to have initial underwriting agreements providing for an over-allotment option in connection with the activities that underwriters may perform during the 30-day stabilisation period following the listing of the shares. This over-allotment option is typically granted by the company on existing shares ('greenshoe' shares) sold by one or more existing shareholders, instead of newly issued shares.

14 What additional regulations apply to underwriting arrangements?

There are no specific further requirements for underwriting agreements. However, in the case of transactions based on an underwriting agreement, it is important for foreign banks to observe the licensing requirements pursuant to section 32, clause 1 KWG. The decisive factor is whether the initiative was taken by the foreign entity or by the German issuer. If the foreign entity specifically targets the domestic market with its range of services, the underwriting of securities at the foreign entity's own risk would constitute underwriting activities, which requires a license in accordance with section 1, clause 1, sentence 2, No. 10 KWG. Alternatively, the 'issuing syndicate' will constitute principal brokering activities, which also requires a licence in accordance with section 1, clause 1, sentence 2, No. 4 KWG. In addition, best-efforts underwriting as an 'agency syndicate' would constitute contract brokering activities requiring a licence in accordance with section 1a, clause 1, sentence 2, No. 2 KWG.

Ongoing reporting obligations

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

Any issuer whose securities (debt and equity) are listed on a domestic stock exchange is subject to several ongoing reporting obligations (see question 16). Such obligations are mainly stated in the WpHG (amended in 2008 by the German Risk Limitation Act) and relate to issuers whose securities are admitted to trading on a domestic stock exchange on an organised market. Further, the WpPG requires, inter alia, an annual document to be issued with specific information for investors. This requirement might be deleted in the near future (see 'Update and trends'). Under the exchange rules of the Frankfurt Stock Exchange, an issuer with shares admitted to the 'prime standard' must fulfil additional reporting obligations.

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

On 20 May 2009, BaFin issued an update of its 'Issuers' Guidelines', which are designed to provide guidance for domestic and international issuers whose securities have been admitted to trading at a domestic exchange on the interpretation and execution of the various laws applicable to financial market participants, in particular under the WpHG, and to outline BaFin's administrative practice in monitoring the financial market. Almost four years after the release of the previous version, the newly issued Issuers' Guidelines cover some substantive changes and amendments in order to take into account changes in the European and German legal environment as a result of the European Transparency Directive (2004/109/EC), the European Market Abuse Directive (2003/6/EC), the European Insider Directive (1989/592/EC) and the German Risk Limitation Act.

Ad hoc notifications

Section 15 of the WpHG (see question 17) imposes a statutory requirement for an issuer of securities (debt and equity) who has applied for admittance to trading on an organised market on a domestic stock exchange, or who is admitted to trading, to immediately notify the market of any 'insider information' as defined in the WpHG. If issuers fail to disclose the insider information in time or if the information provided is false or incomplete, BaFin is entitled to intervene and to impose sanctions, and such issuer may become liable also to investors. Information is regarded as insider information and must be disclosed by the issuer immediately, that is, ad hoc:

- if it contains specific facts about the issuer;
- it is not public knowledge;
- if it has the potential to influence the market price; and
- if it relates directly to the issuer.

Several exemptions from this reporting requirement are defined in section 15, clause 3 of the WpHG. However, if the information qualifies as insider information and no exemption applies, the ad hoc disclosure must be published on a pan-European basis via electronic information platforms, posted on the website of the issuer and submitted to the company register (*Unternehmensregister*). In addition, BaFin and the management of the relevant stock exchange must be notified prior to the disclosure.

Notification on director's dealing

Section 15a of the WpHG requires persons who are members of the management and supervisory board, or who have regular access to insider information and are entitled to make important managerial decisions, of issuers whose securities are admitted to trading on an organised domestic stock exchange, or that have filed an application for admission to trading, to publish promptly information to both the issuer and BaFin about any dealings in the company's own shares within five working days. This also applies to associated persons, ie, spouses, registered civil partners, dependent children and other relatives living in the same household for at least one year. In order to prevent circumvention of section 15a of the WpHG, legal entities, such as establishments acting in a fiduciary capacity and partnerships that are dealing in the company's shares, may also be subject to the disclosure requirement. However, no reporting requirement is applicable if the total sum of all transactions conducted by such persons is below €5,000 by the end of a calendar year.

Furthermore, in accordance with section 15a, clause 4 of the WpHG, the issuer must forward the information immediately to the company register, inform BaFin about the publication and provide BaFin with the publication document.

Reporting obligation with respect to voting rights

Pursuant to section 26 of the WpHG, an issuer with Germany as its home state or from an EU or EEA member state with securities admitted to trading on a domestic stock exchange must immediately publish certain voting rights-related information received from third parties and inform BaFin and the company register no later than three trading days after receipt of such information. The requirements relate to:

- the achievement, exceeding or falling below of 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 75 per cent of the voting rights of the issuer;
- the holding of at least 3 per cent of the voting rights of the issuer, whose home state is Germany at the first time of admission to trading of the securities; and
- the direct or indirect holding of financial instruments, which provide entitlement to a one-sided acquisition of securities with voting rights in the issuer, whose home state is 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 75 per cent of the voting rights of the issuer.

The respective publication has to be done in line with requirements stated in the WpAIV.

Further, section 26a of the WpHG provides that any domestic issuer has to publish and to inform BaFin about the total number of voting rights of the above-mentioned thresholds at the end of each calendar month in the case of an increase or decrease of such voting rights in the respective month. In addition, pursuant to section 27a of the WpHG, which came into force on 31 May 2009, any issuer with Germany as its home member state has to publish information received from an investor who holds at least 10 per cent of its voting rights. Such investor has to disclose to the issuer his or her objectives with respect to the acquisition of the voting rights (eg, strategic goal, realisation of trading profits, exertion of influence in the management or change of capital structure) and the origin of the used funds (equity capital or borrowed funds) within 20 trading days after having reached or exceeded such 10 per cent threshold. If the investor's intention has changed, the investor also has to inform the issuer within 20 trading days. Alternatively, the issuer could publish the fact that the investor does not comply with the requirements stated in section 27a of the WpHG.

General reporting obligations

Under the detailed regulations of sections 30a to 30f of the WpHG any issuer with Germany as the home member state and whose securities are admitted to trading on a domestic stock exchange, as well as any issuer from other member states of the EU or EEA whose securities are admitted to trading on a domestic organised market and whose home member state does not provide for similar regulations of the domestic stock exchange, has to publish in electronic format information to allow investors to exercise their rights in connection with such securities. In the case of shares the reporting obligations relate, inter alia, to:

- the convening of the shareholders' meeting;
- the distribution and payment of dividends;
- the issuance of new shares or rights;
- any agreement or exercise with respect to the securities; and
- modifications to its articles of association.

Further, any issuer of debt securities admitted to trading can invite its creditors to participate in a creditor meeting in any EU or EEA member state, if the creditors have received all related information and the denomination of the bonds is at least €50,000.

Specific financial reporting obligations

Under section 37 of the WpHG, an issuer of securities (debt and equity) with a registered seat in Germany or an issuer with its seat in an EU or EEA member state whose securities are admitted to trading on a domestic stock exchange has to prepare annual financial statements and semi-annual financial reports as well as interim management statements that set out the development of business activities during the reporting period or, alternatively, quarterly financial reports. The WpHG states details on the content of the reports, the means of publishing such reports and respective publication deadlines. As a matter of principle, issuers must meet the following financial reporting requirements:

- publish an announcement on the internet stating the date and the exact address of the website on which the accounting documents are being made publicly available (according to BaFin, the documents must be posted directly on the indicated website or at least must be accessible by just one link);
- notify BaFin of the publication of the announcement and pass the announcement to the company register; and
- publish the complete accounting documents on the website and submit the documents to the company register in order to be stored there.

Publication of annual financial statements on the website must be made publicly available at the latest four months after the end of the financial year, whereas semi-annual financial statements must be published within two months after the end of the half year. BaFin recommends publishing the announcement about one week prior to the publication of the statements. The WpHG also provides details on deadlines and contents (eg, for annual and semi-annual reports, a 'true and fair view' statement made according to the best of knowledge of the legal representatives of the issuer), and imposes on issuers the obligation to publish a notice as to internet availability of the financial statements, which must also remain available to the public at the corporate register for at least five years.

Reporting obligations under the Rules of the Frankfurt Stock Exchange

In particular, pursuant to the stock exchange rules of the Frankfurt Stock Exchange, the reporting obligations of the 'General Standard' set out the minimum reporting requirements. In the case of a listing in the 'Prime Standard', listed companies must, in addition to the General Standard reporting obligations, comply with international reporting standards. Such additional obligations are in particular:

- consolidated financial statements and quarterly reports in German and English;
- internet publication of a financial calendar in German and English;
- ad hoc disclosures, also in English; and
- performance of an analyst conference each year.

Anti-manipulation rules

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

The main rules prohibiting manipulative practices in securities offerings and secondary market transactions are those related to insider dealing and market manipulation.

Insider dealing

The WpHG's insider dealing regulations relate to 'insider securities', 'insider information' and prohibition of 'insider dealing' by imposing publicity and reporting duties on issuers. In this regard, under section 12 of the WpHG insider securities are defined as all kinds of financial instruments including derivatives that are either admitted to trading on a regulated or regulated unofficial market at a domestic stock exchange or admitted to trading on an organised market in another member state of the EU or EEA. Securities which are not traded on such an exchange are also insider securities if their price depends on another financial instrument defined as insider security. Further, insider information is defined pursuant to section 13 of the WpHG as any information or facts which are not publicly known, relating to one or more issuers of insider securities or the insider securities themselves, and which may considerably influence the stock market price of the insider security if made publicly available. Consequently, section 14, clause 1 of the WpHG prohibits purchase or sale of insider securities on one's own account or the recommendation or influencing of other persons in purchasing or selling insider securities with knowledge of insider information. Additionally, the unauthorised transmission of insider information to other persons is prohibited.

Section 15 of the WpHG states that issuers of financial instruments (admitted for trading on a domestic stock exchange or an EU or EEA issuer whose financial instruments are admitted to trading on a domestic stock exchange) are obligated to promptly publish insider information that directly concerns their business or financial situation. Details of this publication requirement are defined in sections 4 et seq of the WPAIV and the BaFin Issuers' Guidelines. It should be noted that if issuers do not publish insider information or do not publish it correctly, sections 37b and 37c of the WpHG provide for investors' rights for compensation.

As outlined in question 16, pursuant to section 15a of the WpHG persons with management responsibilities for the issuer have to report their transactions in shares of the issuer or related financial instruments exceeding €5,000 per year to the respective issuer and to BaFin. The same obligations apply for relatives of such persons and legal entities with whom the relevant persons have close relationships. In addition, the issuer is also obliged to publish the respective notification. Finally, under section 15b of the WpHG issuers of financial instruments that have applied for admission to trading or are admitted to trading on a domestic regulated market are required to provide lists of persons who have regular access to insider information on the issuer. The same rule applies for third persons, especially advisers – in particular lawyers and investment bankers. Upon request by BaFin, the entities must provide their insider lists quickly and completely to BaFin, so that they can investigate suspicious transactions. The precise form and content of the insider lists are described in sections 14 to 16 WpAIV and BaFin's Issuers' Guidelines. Such insider lists are confidential and will not be published.

Market manipulation

Rules regarding manipulation of financial markets apply to persons abroad or persons domiciled in Germany whose action or omissions take place in Germany or abroad with respect to financial instruments traded on an exchange located in Germany or in organised markets located in member states of the EU or EEA. In particular section 20a, clause 1 of the WpHG contains a list of prohibited actions and omissions, such as the providing of untrue or misleading information concerning circumstances that are of crucial importance for the valuation of financial instruments or the withholding of such information if the provision or withholding of the information has the potential to influence the stock exchange or market price of a financial instrument or the price of a financial instrument on an organised market in another member state of the EU or the EEA. Further, it is forbidden to initiate transactions or issue purchase or sell orders that have the potential to generate untrue or misleading signals affecting supply and demand on the stock exchange or the market price of financial instruments or to create an artificial price level or execute any other misleading act that has the potential to influence the stock exchange or market price of a financial instrument. The aforementioned applies to financial instruments that are either admitted to trading on a domestic stock exchange or listed on the regulated market or the regulated unofficial market, or admitted to trading on an organised market in another member state of the EU or EEA. The same applies if the application for such admission or for such trading has been made or publicly announced.

However, actions or omissions that follow accepted market practices are not prohibited even if they could be regarded as market manipulation in accordance with section 20a, clause 1 of the WpHG. Such accepted market practices are those that may reasonably be expected and anticipated in the respective market. Criteria for the accepting of such a market practice by BaFin are, inter alia, that the market practice is sufficiently transparent for the entire market and does not impair the market efficiency. In the Ordinance for the Ascertainment of the Prohibition of Manipulation Practices of 1 March 2005 (MaKonV) BaFin has outlined its view on such accepted market practices. In particular, if an entity trades its own shares in the course of buyback programmes or for stabilisation purposes it does not breach the prohibition of market manipulation if these actions are carried out in line with the provisions of Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buyback programmes and stabilisation of financial instruments as implemented in section 20a, clause 1 of the WpHG. Further, German law is also applicable to buyback programmes or stabilisation measures occurring outside of Germany if such financial instruments are traded on a domestic stock exchange. In this regard BaFin is one of the competent supervisory authorities in such cases and foreign stabilisation rules are acknowledged only if they are identical to or in line with those of Commission Regulation (EC) No. 2273/2003 and the MaKonV.

Price stabilisation

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

Price-stabilisation measures in connection with an offering of securities will generally be undertaken by the lead underwriter in accordance with the over-allotment of securities. The respective underwriter, however, has to make sure that it does not contravene any applicable security regulations. In particular, section 20a, clause 1 of the WpHG states an offence of disseminating false information concerning circumstances of material importance to the valuation of a financial instrument or to withhold information where this 'has the potential to influence the stock exchange or market price of a financial instrument' (see question 17). The WpHG also makes it a criminal offence to effect transactions which generate false or misleading signals for the supply or demand or for the price of the financial instruments.

However, regarding section 20a, clause 3 of the WpHG in connection with Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buyback programmes and stabilisation of financial instruments, price stabilisation shall not be regarded as market manipulation under section 20a, clause 1 of the WpHG. For

Update and trends

In September 2009. the European Commission published its proposals (Commission Proposal) for amending the Prospectus Directive (2003/7l/EC) with the aim of reducing the administrative burdens on issuers without reducing the overall protection of investors. Since then the Council Presidency's compromise proposal (Council Proposal) and Draft European Parliament Legislative Resolution (Parliament Draft) referring to the Commission Proposal has been published in December 2009 and March 2010. The proposed modifications are in particular the following:

- The Commission Proposal suggests that securities which are placed or sold to private investors by intermediaries and not directly by the issuer (a 'retail cascade'), do not require such intermediary to publish a prospectus if a valid prospectus by the issuer exists and if the issuer accepts its use by the intermediary (amendment to article 3(2)). Similarly, both the Council Proposal and the Parliament Draft state that offers made to investors by anyone in a retail cascade will only benefit from the prospectus if the person responsible for the prospectus and if applicable, any other entity which, pursuant to national law, is liable for a specific part of such prospectus consents to its use by the offeror in such circumstances.
- Under the Commission Proposal employees shares schemes shall not be subject to any prospectus requirements (amendment to article 4(1) lit e). The Council Proposal states that an exemption only applies if employer securities are already admitted to trading on a regulated market or a Multilateral Trading Facility (MTF), provided that the employer is subject to disclosure requirements and the MTF also fulfils specific measures. The Parliament Draft proposes alternatively extending the current exemption to shares, or shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of 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 the said shares are of the same class as the shares already admitted to trading on the same regulated market and 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.
- Overall, the most significant changes proposed relate to the content of the prospectus summary. The Commission Proposal has stated that the mandatory summary of the prospectus must contain all 'key information' and shall not be restricted to any predetermined number of words (currently 2,500 words) to enable investors to make 'informed investment decisions' and to compare the security with other investment products (amendment to article 5(2)). Additionally, the Council Proposal contemplates a civil liability for the summary. The Parliament Draft contemplates that the prospectus shall also include a key information document. This key information document shall, in a brief manner and in nontechnical language, convey the essential characteristics and risks associated with the issuer and shall provide, in conjunction with the prospectus, appropriate information about the essential elements of the securities concerned in order to aid investors when considering whether to invest in such securities and details of the offer and the admission to trading.
- Under the Commission Proposal, the prospectus, base prospectus under an offering programme and registration document (containing information on the issuer as referred to in article 5(3)) shall be valid for 24 months, provided they are updated (amendment to article 9(l), (2) and (4)). The Council Proposal proposes that the 12-month period should start with the approval of the prospectus. In contrast thereto, the Parliament Draft states that a prospectus shall only be valid for 12 months after its publication for offers to the public or admissions to trading on a regulated market, provided that the prospectus is completed by any supplements required pursuant to article 16. In the case of an offering programme, the base prospectus shall be valid for a period of up to 12 months and a registration document shall be valid for a period of up to 12, months provided that it has been supplemented in accordance with article 16. The registration document, supplemented if necessary in accordance with article 16 and accompanied by the securities note and the summary note, shall be considered to constitute a valid prospectus.

Ultimately, the Council Proposal and the Parliament Draft have some common positions, for example:

- to align the definition of qualified investors or legal persons with that of professional clients or eligible counterparts defined by MiFID; and
- to permit a registration document to be supplemented pursuant to article 16 of the Prospectus Directive.

The apparent intention is to come to an agreement and enact an amending Directive later this year.

Further, CESR has published three consultation papers and has adressed areas of the MiFID legal framework where it has identified a need for improvement, including selling practices to investors and post rule transparency.

CESR has issued a consultation paper on its proposal to extend major shareholding notifications to financial instruments of similar economic effect as rights to acquire shares or the respective entitlements to acquire shares. CESR is considering extending the notification requirements in the Transparency Directive by including certain options, equity swaps and contracts by difference, because some of the instruments might be used for takeover reasons and therefore a notification requirement should be established.

the application of this exemptions for price stabilisation measures and share repurchases, several requirements must be complied with. There are in particular time-related conditions in article 8 of the Commission Regulation (EC) which state that stabilisation shall be carried out only for a limited time period. In respect of shares and other securities equivalent to shares, the time period in the case of an initial offer publicly announced shall start on the date of commencement of trading of the relevant securities on the regulated market and end no later than 30 calendar days thereafter. Regarding the aforementioned shares and other securities equivalent to shares, the time period in the case of a secondary offer shall start on the date of adequate public disclosure of the final price of the relevant securities and end no later than 30 calendar days after the date of allotment. In respect of bonds and other forms of securitised debt (which are not convertible or exchangeable into shares or into other securities equivalent to shares), the time period shall start on the date of adequate public disclosure of the terms of the offer of the relevant securities (ie, including the spread to the benchmark, if any, once it has been fixed) and shall end either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue or no later than 60 calendar days after the date of allotment of the relevant securities, whichever date is earlier.

Further, disclosure and reporting conditions for such buyback pursuant to article 4, clause 4 of the Commission Regulation (EC) and stabilisation measures pursuant to article 9 of the Commission Regulation (EC) require the specific information to be adequately publicly disclosed prior to the start of trading or the opening of the offer period of the relevant securities. In particular, regarding stabilisation measures, within one week of the end of the stabilisation period, information must be adequately disclosed to the public whether or not stabilisation was undertaken, the date at which stabilisation started, the date at which stabilisation last occurred, the price range within which stabilisation was carried out and the range of dates during which stabilisation transactions were carried out.

Liabilities and enforcement

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

Prospectus liability

Liability for a securities transaction arises in particular in connection with the information contained in the prospectus. In this regard section 44 BörsG (with respect to securities admitted to trading to a stock exchange) and section 13 VerkProspG (with respect

to securities not admitted to trading on a domestic stock exchange but publicly distributed) provide for a liability of persons who have assumed responsibility for the prospectus or who have a mandate for the issuing of the prospectus. The liability concerns incorrectness or incompleteness of relevant information with respect to the securities in favour of investors who have purchased such securities on the basis of the prospectus within six months after the first admission to trading or public offer of the securities. Details which have to be included in the prospectus are contained in the WpPG and VerkProspG respectively. In particular, pursuant to section 5, clause 4 of the WpPG and section 8g, clause 2 of the VerkProspG, the prospectus must contain information with respect to persons who assume liability for the contents of such prospectus. Further, such information has to be contained in the summary of the prospectus, which is a mandatory requirement for the preparation of a prospectus. Purchasers of such securities may make a claim for restitution of the purchase price as long as such price does not exceed the initial offer price and for the cost accrued in connection with the purchase. Statutory liability for the prospectus is joint and several.

Civil law liability

There are a number of statutory defenses to a prospectus liability claim – in particular if the respondent is able to demonstrate that he or she was not aware of an error or omission and that this unawareness was not caused by lack of knowledge or gross negligence. In addition, claims regarding the prospectus liability are under the statute of limitations for a period of one year after receiving knowledge of the incorrectness or incompleteness, but at the latest three years after the publication of the prospectus. Overall, the liability under section 44 BörsG and section 13 VerkProspG cannot be excluded. In addition, certain circumstances may lead to further civil law claims resulting from a contractual relationship (ie, culpa in contrahendo doctrine) or tort pursuant to the mandatory rules in the BGB.

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

Under German law there are no special or exclusive remedies and sanctions for improper securities activities. In line with general German Law principles, remedies and sanctions can be established in civil litigations, administrative procedures and criminal prosecution.

Civil litigation can be brought against the issuer and the underwriters pursuant to section 44 BörsG for securities listed on a regulated market and pursuant to section 13 VerkProspG for securities publicly sold but not listed. Further, the assumption of liability in the prospectus is mandatory for listing agents in accordance with section 5, clause 4 WpPG. Additionally, BaFin may initiate administrative proceedings and even criminal prosecution might be initiated based on the activities of the parties pursuant to the German Criminal Code (*Strafgesetzbuch*) and other applicable criminal rules and regulations.

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