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Germany

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Squire Sanders

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 Germany are governed by several relevant statutes and regulations, in particular:

- the Act Aimed at Hindering Unfair Securities and Derivatives Transactions;
- the Act for the Restructuring and Orderly Liquidation of Credit Institutions, for the Establishment of a Restructuring Fund for Credit Institutions and for the Extension of the Limitation Period for Corporate Law Management Liability;
- the Act on the Implementation of a Package of Measures to Stabilise the Financial Market;
- the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets;
- the Bond Act;
- the Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buy-back 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 Commission Regulation (EC) No. 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board;
- the Commission Regulation (EU) No. 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC;
- the Commission Regulation (EC) No. 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC;
- the Exchange Rules of the Frankfurt Stock Exchange;
- the General Terms and Conditions of Deutsche Börse AG for the Regulated Unofficial Market on the Frankfurt Stock Exchange;
- the German Banking Act (KWG);
- the German Civil Code (BGB);
- the Securities Trading Act (WpHG);
- the Ordinance for the Ascertainment of the Prohibition of Manipulation Practices (MaKonV);
- 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 Sales Prospectus Act (VerkProspG);
- the Securities Prospectus Act (WpPG);
- the Stock Corporation Act (AktG);
- the Stock Exchange Act (BörsG); and
- the Trading Regulations for the Regulated Unofficial Market on the Frankfurt Stock Exchange.

Furthermore, various EU directives must be implemented in the aforementioned German rules and regulations, including Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities; Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) (Market Abuse Directive); 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 and amending Directive 2001/34/EC (Prospectus Directive); Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (amending Council Directives 85/611/EC and 93/6 EEC and Directive 2000/12/EC, and repealing Council Directive 93/22/EEC – MiFID); Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and amending Directive 2001/34/EC; and Directive 2011/61/EC8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC (AIFMD).

The European Securities and Markets Authority in Paris (ESMA) (see Commission Regulation (EC) No. 1095/2010 of 24 November 2010) shall ensure the functioning of the internal market by ensuring a high, effective and consistent level of regulation and supervision, taking into account the varying interests of all member states. Such regulation and supervision shall, inter alia, protect investors; ensure the integrity, efficiency and orderly functioning of financial markets; safeguard the stability of the financial system; and strengthen international supervisory coordination for the benefit of the economy at large including financial market participants and other stakeholders, consumers and employees. The ESMA's tasks also include promoting supervisory convergence and providing advice to the EU institutions in the areas of securities and markets regulation and supervision, as well as related corporate governance and financial reporting issues.

Since 2002, there have been two public supervisory bodies jointly in charge of regulating and supervising the financial industry in Germany. 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 the day-to-day supervision of the business of banks and financial institutions in particular.

In addition, the Exchange Supervisory Authorities of the Federal German States are responsible for the supervision of the respective stock exchanges established in such states 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, also containing key features and risks of the offering;
- annual financial statements (including auditor's report);
- financial quarterly, semi-annual or annual reports (if applicable 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 (eg, 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 have occurred. Commission Regulation (EC) No. 211/2007 amended the Prospectus Directive 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 should determine the information required on a case-by-case basis (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.

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 in any nationwide 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 (see question 20). 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 WpPG 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 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 the filing of the admission application. The securities are allowed to be traded one trading day after the publication of the prospectus. 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 the 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. There are various stock exchanges in Germany (Berlin, Düsseldorf, Frankfurt, Hamburg, Hannover, Munich, Stuttgart and Tradegate) on which securities are traded but Germany's main stock exchange is the Frankfurt Stock Exchange operated by 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 segments) and the regulated unofficial market (the Open Market segment).

In general, the issuer has to file the application for admission to the exchange together with a bank, a financial service institution or a designated listing partner 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 institution, financial institution or a listing partner);
- 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 initial public offering (IPO), ie, minutes of the annual general meeting and 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 (actually divided into a First Quotation Board, Second Quotation Board and Entry Standard) 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 terms and conditions of Deutsche Börse AG for the regulated unofficial market last modified on 23 May 2011. Besides German shares, mainly international shares, bonds of German and international issuers, certificates and warrants are traded on the Open Market. In principle, a registered trading member of the Frankfurt Stock Exchange files the application for inclusion in exchange trading. As the organising body of the Open Market, Deutsche Börse AG makes the decision about inclusion and issuers must fulfil only a few formal inclusion requirements and no follow-up obligations. For example, the issuer must provide detailed information in the form of an approved prospectus or by an issuer data form, which allows for better assessment. The issuer must also inform Deutsche Börse AG immediately and in writing about essential circumstances concerning the included securities and itself.

On 5 April 2012 Deutsche Börse AG announced to all companies listed on the First Quotation Board that this market segment might be closed on 15 December 2012. In the Open Market segment the Entry Standard will be the remaining platform for a cost-effective admission to exchange trading and only shares which are listed at another domestic or foreign exchange-like trading platform recognised by Deutsche Börse AG will be included in the remaining quotation board from 1 October 2012.

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. 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 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 or corporations are also covered. In this respect, it is irrelevant whether the securities are in certified form or not.

The term public offering is defined in section 2, No. 4 of the WpPG as '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 'roadshows', fall short of an offer within the meaning of the WpPG since the actual opportunity to purchase or subscribe is lacking. 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 the actual inclusion establishes a definite opportunity to purchase, consequently a public offering is not made. 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 make 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 European Economic Area (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 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 that the WpPG is applicable. Secondary equity offerings are regularly used to diversify shareholdings 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 an exemption rule comes into play. Such an exemption from the duty to provide a prospectus may be considered in 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 AktG, 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 AktG, 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 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.

However, 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 overindebtedness of the company.

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

The introduction of the securities – eg, 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 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 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, which means an offer that targets an unlimited number of potential investors. In contrast, a private placement of securities (debt and equity) requires, for example, 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 of the 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 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 document 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, Commission Regulation (EC) No. 211/2007, and section 5 of the 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 of the WpPG and prepares an informational document, such a document will be regarded as a prospectus and the WpPG, BörsG and other rules will apply.

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 are not yet implemented worldwide. To date, EU or EEA member states have implemented a passport regime under the Prospectus Directive. Accordingly, 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 a prospectus with BaFin 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 vice versa – ie, if a prospectus has been approved by a supervisory authority in another EU or EEA member state, BaFin has been notified and certain further language requirements have been met.

If an offer of securities is made outside 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, an exchangeable convertible is a bond that pays periodic coupons and is callable at preset prices, whereby ordinary 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 with the right to participate in dividends to the shareholders.

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 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 insurance companies or pension 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 with 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 and other issues.

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 of the 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 licence in accordance with section 1, clause 1, sentence 2, No. 10 of the 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 of the KWG. In addition, best-efforts underwriting as an 'agency syndicate' would constitute contract brokering activities requiring a licence in accordance with section 1, clause 1a, sentence 2, No. 2 of the 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) 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 with a yearly update 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.

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 (ie, an EU-regulated 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;
- if it is not public knowledge;
- if it has the potential to influence the market price; and
- if it relates directly to the issuer.

An exemption from this reporting requirement is defined in section 15, clause 3 of the WpHG. However, if the information qualifies as insider information and no exemptions apply, 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 promptly publish 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 obligations with respect to voting rights

Pursuant to section 21, clause 1 of the WpHG, anyone whose share of a domestic listed company's voting rights equals, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent as a result of a purchase or sale, or by any other means, is obliged to inform the listed company and BaFin that he or she has achieved, exceeded or fallen below the aforementioned thresholds. In addition to direct holdings of voting rights, with effect from 20 January 2007, capital market participants also have to file notifications when they hold certain financial instruments with which shares can be acquired. In this case, however, the opening threshold has been set to 5 per cent. Ultimately, any change in voting rights must be reported to the listed company and BaFin without undue delay – ie, within four trading days at the latest (section 21 of the WpHG). The listed company must also pass on the notification without undue delay – within three trading days at the latest – to 'a combination of media for Europe-wide dissemination' and to the company register which stores the data.

On 1 February 2012, the German parliament passed the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets. Existing notification obligations under section 25 of the WpHG for financial instruments, unconditionally entitling their holders to acquire existing shares which carry voting rights, are extended to 'other instruments'. These other instruments include, inter alia, claims for the return of shares pursuant to securities lending agreements and repurchase agreements. Under the new section 25a of the WpHG, the notification obligation is extended to all financial and other instruments that are not already subject to notification under other provisions and which, based on their legal structure, entitle the owner to purchase issued shares carrying voting rights from the listed company. Such holdings of financial instruments must be reported to the listed company and BaFin even if the listed company of the instrument does not have any influential right on the buying of such voting rights or even if a purchase is not being considered at all. In this case, the threshold for notification is also 5 per cent.

Further, pursuant to section 26 of the WpHG, an issuer whose home state is Germany 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:

- achieving, exceeding or falling below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights of the issuer;
- holding 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
- 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, 10, 15, 20, 25, 30, 50 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 information about and inform BaFin of 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 addition, pursuant to section 27a of the WpHG, 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 this 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 whose home member state is Germany 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.

Furthermore, 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 approximately 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 knowledge of the legal representatives of the issuer) and imposes on issuers the obligation to publish a notice as to the online 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

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 include 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
- the 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 within five business days. 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 of the WpAIV and BaFin's Issuers' Guidelines. Such insider lists are confidential and will not be published.

Market manipulation

Rules regarding the 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 providing 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 accepting 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 MaKonV, BaFin has outlined its view on such accepted market practices. In particular, if an entity trades its own shares in the course of buy-back 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 as implemented in section 20a, clause 3 of the WpHG. Further, German law is also applicable to buy-back programmes or stabilisation measures occurring outside 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, under section 20a, clause 3 of the WpHG in connection with Commission Regulation (EC) No. 2273/2003 price stabilisation shall not be regarded as market manipulation. For the application of this exemption for price stabilisation measures and share repurchases, several requirements must be met. First, 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 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 buy-back 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, the following 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 on 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 1, 2 of the VerkProspG, the

Update and trends

Amending directive to the Prospectus Directive
The German parliament published a draft bill on 12 February 2012 regarding the implementation of Directive 2010/73/EC which is expected to come into force on 1 July 2012. To implement Directive 2010/73/EC amendments have to be made to the AktG, WpPG and the WpHG. The main amendments to the WpPG are:

- modified exemptions from the obligation to publish a prospectus:
  - the increase of the total amounts for small issues and permanent issuers;
  - the increase of threshold amounts; and
  - improved exemptions for employee and stock-option programmes.
- the definition of qualified investors in the Prospectus Directive will be aligned with that of professional clients, as defined in Directive 2004/39/EC on markets in financial instruments (MiFID);
- permission to update a registration document in accordance with the procedure for supplementing prospectuses;
- abolishment of the requirement to publish an annual document; and
- inclusion of certain 'key information' in the summary (essential characteristics and risks of the issuer, any guarantor, and the securities offered or admitted to trading on a regulated market).

Amendment to the Stock Corporation Act
On 20 December 2011, the Federal government published a draft bill of an act to amend the AktG. Any stock corporation may continue to issue either ordinary bearer or registered shares. However, the issuance of bearer shares by non-listed companies would require the deposition of a global note. This would allow public authorities to identify individual shareholders to observe money laundering in particular.

prospectus must contain information with respect to persons who assume liability for the content 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 filing (ie, section 5 clause 1 VerkProspG). 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.

There are a number of statutory defences 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, liability under section 44 BörsG and section 13 VerkProspG cannot be excluded.

Civil law liability
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 of 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.

Further, the assumption of liability in the prospectus is mandatory for natural persons or entities responsible for its content in accordance with section 5, clause 4 of the WpPG. In the case of any improper security activities, BaFin may initiate administrative proceedings against the respective parties.

Furthermore, BaFin issued a guideline dated 1 November 2010 which sets out its supervisory practice on investment advice offered by banks or financial institutions for new clients. BaFin expects a protocol on the investment advice pursuant to section 34, clause 2a of the WpHG to be drafted and handed over even in the case of investment advice offered to persons who are not yet customers but who demonstrate that they are interested in such a client relationship. This applies also if the client relationship finally fails to be solicited. As a consequence, the financial institutions are required to implement appropriate and effective organisational internal measures, which include monitoring and control aspects. To enable monitoring procedures, not only shall the offered investment advice be documented, but also discussions on investments in financial instruments even if no investments were recommended. Further, the respective documentation must, if applicable, contain evidence that no investment advice was offered.

Criminal prosecution might even be initiated based on the activities of the parties pursuant to the German Criminal Code and other applicable criminal rules and regulations.

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