JONES DAY

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# EQUITY CAPITAL MARKETS Q&A GUIDE 2013
# GERMANY

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# EQUITY CAPITAL MARKETS Q&A GUIDE 2013

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# MAIN EQUITY MARKET/EXCHANGES

**1. WHAT ARE THE MAIN EQUITY MARKETS/EXCHANGES IN YOUR JURISDICTION? OUTLINE THE MAIN MARKET ACTIVITY AND DEALS IN THE PAST YEAR.**

## MAIN EQUITY MARKETS/EXCHANGES

There are eight stock exchanges (Berlin, Dusseldorf, Frankfurt a.M., Hamburg, Hannover, Munich, Stuttgart and Tradegate Exchange) on which equities are traded. Among these exchanges, the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*) (FSE) is the most important (for more information, see *www.boerse-frankfurt.de*). A listing at the other stock exchanges is in particular preferred by smaller companies located in the respective region. Trading at these (local) stock exchanges tends to be preferred by retail investors.

The FSE is operated by Deutsche Börse AG (*www.deutsche-boerse.com*). Most trading at German stock exchanges (over 90% in German issuers' shares) takes place through the electronic trading system Xetra of FSE. In May 2011 FSE abandoned the floor trade which was replaced by a specialist model. Since then the trading of each instrument is supported by specialists. Each specialist covers a certain number of instruments. Less liquid securities require a designated sponsor (market maker).

At the FSE, there are different market segments.

**The regulated market.** This is divided into the:

- Prime standard.
- General standard.

**The open market.** This is divided into the:

- Entry standard (qualified open market segment).
- Quotation board for secondary listings in the unqualified open market.

In the first half of the year 2012, Deutsche Börse AG announced it would change the rules for the open market in its existing form. As part of these changes stricter rules apply to the qualified open market segment entry standard since 1 July 2012. This includes, among other things, that access to the entry standard always requires a prospectus. However, the prospectus requirement for listings in the entry standard does not apply to companies that were already listed in the entry standard prior to 1 July 2012 (grandfathering) and to companies which move from the regulated market to the entry standard (provided that these companies met their ongoing reporting obligations in the regulated market).

Moreover, Deutsche Börse AG closed the first quotation board for primary listings in the unqualified open market on 15 December 2012. Since then, besides bonds, only shares which are listed at another domestic or foreign exchange-like trading place recognised by Deutsche Börse AG will be included in the (remaining) quotation board (as was previously the case in the second quotation board). With effect from 15 December 2012, Deutsche Börse AG terminated the inclusion of all securities in the quotation board (with the exception of funds) for which no application for inclusion in the quotation board was made.

## MARKET ACTIVITY AND DEALS

As at 31 December 2012, 580 companies were quoted on the regulated market of FSE (prime standard and general standard). 524 of these companies were domestic companies with a total market capitalisation of EUR1,127 billion. At this time, 184 companies (of which 28 were foreign companies) were listed in the entry standard of the open market and 9,603 companies (of which 9,331 were foreign companies) were included in the (unregulated) open market (quotation board).

In 2012 there were eight IPOs on the regulated market of FSE, with a total offer volume of EUR2.349 billion (three additional companies were newly listed in the regulated market of FSE due to a move from the first quotation board to the general standard). The two largest of these were the IPOs of:

- Telefónica Deutschland Holding Aktiengesellschaft (offer volume EUR1.449 billion).
- Talanx Aktiengesellschaft (offer volume EUR0.817 billion).

While the IPO of Telefónica Deutschland Holding Aktiengesellschaft was a 100% secondary offering of existing shares held by the majority shareholder, the Talanx IPO was almost a 100% offering of newly issued shares from a capital increase (plus a certain number of existing shares in connection with a greenshoe option). In case of the Talanx IPO the stake of the majority shareholder, however, still remained at a high level (more than 80%).

Other IPOs that were planned for 2012 (for example, the IPOs of Osram and Evonik Industries) were postponed due to the high volatility in the market and the difficulties of realising the envisaged market capitalisation in the market environment in 2012. Instead of an IPO, Osram's sole shareholder Siemens AG now pursues the distribution of the majority of the Osram shares to the Siemens' shareholders by way of a spin-off and a listing of the Osram shares in the regulated market (prime standard) of the FSE.

When the announcement of the intention to float has been made, the postponement is usually published in a press release (as was the case for Evonik in 2012). However, the information on a postponement is often not publicly available, as usually an IPO project is pulled before the publication of the IPO plans.

**2. WHAT ARE THE MAIN REGULATORS AND LEGISLATION THAT APPLIES TO THE EQUITY MARKETS/EXCHANGES IN YOUR JURISDICTION?**

### REGULATORY BODIES

**Regulated market.** The main regulator is the German Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin) (*www.bafin.de*), although certain functions lie with the stock exchange.

**Open market.** The main regulator is the FSE (*http://www.boerse-frankfurt.de/en/start*).

### LEGISLATIVE FRAMEWORK

**Regulated market.** The main legislation is the:

- Stock Exchange Act (*Börsengesetz* (BörsG).
- Securities Trading Act (*Wertpapierhandelsgesetz* (WpHG).
- Securities Prospectus Act (*Wertpapierprospektgesetz* (WpPG).
- European Prospectus Regulation.
- Stock Exchange Admission Regulation (*Börsenzulassungsverordnun* (BörsZulVO).
- Exchange Rules for the Frankfurt Stock Exchange (*Börsenordnung für die Frankfurter Wertpapierbörse*).

**Open market.** The main legislation is the:

- Exchange Rules for the Frankfurt Stock Exchange.
- General Terms and Conditions of Deutsche Börse AG for the Open Market on the Frankfurter Wertpapierbörse (*Allgemeine Geschäftsbedingungen der Deutsche Börse AG für den Freiverkehr an der Frankfurter Wertpapierbörse*).

## EQUITY OFFERINGS

**3. WHAT ARE THE MAIN REQUIREMENTS FOR A PRIMARY LISTING ON THE MAIN MARKETS/EXCHANGES?**

### MAIN REQUIREMENTS

**Regulated market.** The following requirements apply:

- The issuer must publish an approved prospectus.
- The issuers' shares must be freely transferable.
- An application for listing must be filed with the stock exchange management (*Geschäftsführung*) by the issuer, together with a bank or financial services institution admitted for trading at a German stock exchange.

One business day after the securities are admitted to listing, they can be introduced to trading. The introduction to trading must be applied for by the issuer in an application addressed to the stock exchange management. The stock exchange management of the FSE publishes its decision on the internet following the application for introduction to trading.

**Open market:** entry standard. The following requirements apply:

- Since 1 July 2012 the inclusion in the entry standard will only take place if a securities prospectus is available. The prospectus requirement does not apply to issuers which were included in the entry standard prior to 1 July 2012 (grandfathering) and for securities of issuers which move from the regulated market of the FSE to the entry standard (provided that these issuers have fulfilled their ongoing reporting obligations).
- The issuers' shares must be freely transferable.
- The issuer must have disclosed its latest audited consolidated financial statements (prepared in accordance with internationally recognised accounting standards such as IAS/IFRS, or the generally accepted national accounting principles of an EU member state, or in the case of non-EU member states the generally accepted national

accounting principles of that third country provided that these accounting standards are deemed equal to IAS/IFRS), including the consolidated management report.

**Open market:** quotation board. The following requirements apply:

- The issuers' shares must be freely transferable and already listed at another domestic or foreign exchange-like trading place recognised by Deutsche Börse AG.
- If the listing is not accompanied by a public offer, no prospectus is required but an issuer data form is still necessary.
- The application for listing must be filed by an FSE trading participant.

### MINIMUM SIZE REQUIREMENTS

**Regulated market.** The total market value of all shares to be listed must be at least EUR1.25 million, except where shares of the same class are already listed on the same stock exchange. Exemptions can be granted by the stock exchange if it is convinced that there is a satisfactory market for the securities. For the admission of shares the minimum number is 10,000 if the shares are no-par value shares.

**Open market:** entry standard. Companies seeking a listing in the entry standard must have a paid-in share capital of at least EUR750,000. For the quotation board no specific requirements exist.

### TRADING RECORD AND ACCOUNTS

**Regulated market.** The issuer must have existed as a business for at least three years and must have published its annual accounts under the applicable accounting principles (IFRS) for the previous three fiscal years. Exemptions can be granted by the stock exchange if it is in the issuer's and the investors' interest, for example, for startups.

**Open market.** Issuers seeking a listing in the entry standard must have existed as a business for at least two years. For the quotation board no specific requirements exist.

### WORKING CAPITAL

Issuers that are required to publish a prospectus for the offer and/or the admission to the regulated market or the entry standard must have sufficient working capital for at least the next 12 months.

### MINIMUM SHARES IN PUBLIC HANDS

**Regulated market.** Admission to trading requires a free float of at least 25%. Exceptions exist for shares that are already listed on another stock exchange or if, in light of the volume and the existing free float, a due trading is guaranteed (as was the case in 2012 for the Talanx IPO). For an IPO it will suffice if the stock exchange is convinced that the threshold will be met shortly after the commencement of trading.

**Open market**. Issuers seeking a listing in the entry standard must have a free float of at least 10%. For an inclusion in the quotation board there are no requirements to comply with, except that an orderly trading must be ensured by having at least 30 initial shareholders.

## 4. WHAT ARE THE MAIN REQUIREMENTS FOR A SECONDARY LISTING ON THE MAIN MARKETS/EXCHANGES?

For a secondary listing on the FSE in general the same requirements apply as for a primary listing. This means in particular that a prospectus is usually required for the admission of the shares for trading in the regulated market and the entry standard of the FSE (see Question 3). A prospectus approved by BaFin is valid for a period of 12 months after the prospectus approval provided the requirements for potential supplements to the prospectus are observed.

An exemption from the prospectus requirement may apply for securities that have been admitted to trading on another organised market for more than 18 months if a prospectus was approved for these securities, which meets certain requirements.

## 5. WHAT ARE THE MAIN WAYS OF STRUCTURING AN IPO?

An IPO can be structured either as:

- An offer of new shares resulting from a capital increase.
- An offer of existing shares from selling shareholders.

The usual structure in Germany is a combination of both. If only an exit of the existing shareholder(s) is pursued, the "Telekom III" ruling by the German Federal Court of Justice must be considered, which says that the selling shareholder must indemnify the issuer from its prospectus liability if the IPO is only for the benefit of the selling shareholder without

a corresponding, measurable advantage in the issuer's balance sheet.

It is common practice to place shares with institutional investors as well as with private investors through a public offering in Germany, accompanied by a private placement with institutional investors abroad (which may include an offering to US investors under Rule 144A of the US Securities Act of 1933).

When structuring the IPO the following main points must be considered:
The capital need of the issuer.

- To what extent an exit is desired by the existing shareholder(s).
- The equity story with and without fresh money.

**6. WHAT ARE THE MAIN WAYS OF STRUCTURING A SUBSEQUENT EQUITY OFFERING?**

In a subsequent equity offering by means of an ordinary capital increase, existing shareholders of German stock corporations generally have subscription rights (pre-emption rights) in proportion to their holdings in the current share capital. However, the pre-emption rights may, under certain circumstances, be limited or excluded in the resolution on the capital increase with a majority of three quarters of the share capital represented in the general meeting. Such limitation or exclusion could also be provided in the case of an authorised capital. The German Federal Court of Justice ruled that the exclusion of pre-emption rights needs to be justified by specific facts. If the capital increase against cash contribution does not exceed 10% of the current registered share capital and the issue price is not substantially below the price on the stock exchange, the exclusion of pre-emption rights is deemed permitted (known as a facilitated exclusion of pre-emption rights). Moreover, an exclusion of pre-emption rights could, under court precedents, be justified in the following cases:

- To service convertible bonds or bonds with warrants.
- To issue shares in connection with employees' stock option programmes.
- In the case of an intended listing at a stock exchange (including a dual listing abroad).
- In the case of a restructuring of the company (for example, if the potential investor claims a majority share in the company).
- To avoid the creation of fractional shares.

**7. WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF RIGHTS ISSUES/OTHER TYPES OF FOLLOW ON EQUITY OFFERINGS?**

The exclusion of pre-emption rights is often challenged by shareholders who object to a dilution of their stake in the company.

In the case of debt for equity swaps, in particular it should be checked whether the same effect could not be achieved in the same way by means of a rights issue (see Question 12), as the exclusion of the pre-emption rights might otherwise not be justified (see Question 6). In practice, a rights issue and a subsequent rump placement against contribution in kind (receivables vis-à-vis the company) is therefore often seen.

In order to avoid the time-consuming process of conducting a general meeting every time a capital increase is required or desired, the articles of association of German listed stock corporations often provide for an authorised capital which enables the management (usually subject to the approval of the supervisory board) to increase the share capital within a short period of time, provided that no prospectus is required for the offering (see Question 10). An authorised capital therefore provides some more flexibility, although the authorisation must not exceed five years and the total amount of all authorised capital of the company must not exceed 50% of the registered share capital.

**8. WHAT ARE THE MAIN STEPS FOR A COMPANY APPLYING FOR A PRIMARY LISTING OF ITS SHARES? IS THE PROCEDURE DIFFERENT FOR A FOREIGN COMPANY AND IS A FOREIGN COMPANY LIKELY TO SEEK A LISTING FOR SHARES OR DEPOSITARY RECEIPTS?**

## PROCEDURE FOR A PRIMARY LISTING

The principal steps for German as well as for foreign companies when applying for a listing on the regulated market include:

- Appointment of advisers and investment bank(s).

- Restructuring (if necessary).
- Preparation of business plan and equity story.
- Due diligence.
- Preparation and filing of the prospectus with, and approval by, BaFin.
- Negotiation and execution of the underwriting documents.
- Legal opinions and comfort letter.
- Printing and publication of the prospectus.
- Marketing (including a road show).
- Bookbuilding and pricing.
- Registration of the capital increase in the commercial register.
- Admission to listing by the stock exchange.
- Allocation of shares, settlement and commencement of trading.
- Stabilisation period and exercise of greenshoe option, if any.

Whether a listing for shares or depositary receipts is being sought depends on the individual facts, not least the rules applicable under the national law of the foreign company.

### PROCEDURE FOR A FOREIGN COMPANY

See above, *Procedure for a primary listing*.

## ADVISERS: EQUITY OFFERING

**9. OUTLINE THE ROLE OF ADVISERS USED AND MAIN DOCUMENTS PRODUCED IN AN EQUITY OFFERING. DOES IT DIFFER FOR AN IPO?**

### INVESTMENT BANK(S)

Investment banks play a central role in co-ordinating and managing the equity offering. One or more investment banks can assume, on their own or jointly, the following tasks:

- **Global co-ordinator.** Advising the issuer and co-ordinating on a global basis where there are offerings (including private placements) on more than one market.
- **Bookrunner.** Maintaining the order book for the shares.
- **Underwriter.** Underwriting the shares to be offered (usually as part of an underwriting syndicate led by the lead manager).
- **Stabilising manager.** *See Question 19.*
- **Research analyst.** Research reports are usually prepared by research analysts employed by the lead manager(s).
- Research reports represent the analyst's independent view of the issuer.
- **Settlement agent.** Managing the settlement.

### LAWYERS

Lawyers have the following roles:

- **Issuer's counsel.** Advising the issuer on all legal aspects of the transaction (for example, restructuring, capital increase and admission to trading), conducting legal due diligence, assisting the issuer in the preparation of the prospectus, negotiating the underwriting documentation and issuing a legal opinion and disclosure letter to the underwriters.
- **Underwriters' counsel.** Advising on all legal aspects of the transaction relevant for the underwriter (for example, underwriting agreement), conducting legal due diligence, preparing and negotiating the underwriting documentation, co-ordinating the admission procedure, and issuing legal opinions and disclosure letters to the underwriters.
- **Selling shareholders' counsel.** Advising the selling shareholders (if any) on the underwriting documentation and lock-up agreements (if any).

### AUDITORS AND ACCOUNTANTS

Auditors and accountants have the following roles:

- **Issuer's auditors.** Verifying that the financial information in the prospectus corresponds to the audited annual accounts and issuing comfort letters to the underwriters.
- **Underwriters' accountants.** Conducting financial and tax due diligence and assisting in drafting of the prospectus.

### FINANCIAL ADVISER

The financial adviser advises the issuer on the business plan, capital structure and other business and financial matters. At an early stage, an adviser may advise on the selection of underwriters.

### PUBLIC RELATIONS CONSULTANTS

Public relations consultants advise the issuer on public relations matters, including dealing with media, investors and shareholders.

### IPO ADVISERS (IF APPLICABLE)

IPO advisers provide general advice to management in preparing the IPO including the development of the equity story

and the preparation of fact books for the selection of investment banks.

### PRINCIPAL DOCUMENTS

The principal documents produced for an equity offering are:

- Global co-ordinator and/or lead manager engagement letter.
- Underwriting agreement, and, if not included in the underwriting agreement, a separate agreement among underwriters and a separate lock-up agreement with selling shareholders (if any).
- Pricing agreement.
- Prospectus (and supplements, if any).
- Publicity and research guidelines.
- Analyst presentation and road show presentation.
- Legal opinions, disclosure letters and comfort letters.
- Corporate resolutions (for example, those required for the capital increase).

In general, the main documentation is not different for an IPO.

## EQUITY PROSPECTUS / MAIN OFFERING DOCUMENT

**10. WHEN IS A PROSPECTUS (OR OTHER MAIN OFFERING DOCUMENT) REQUIRED? WHAT ARE THE MAIN PUBLICATION, REGULATORY FILING OR DELIVERY REQUIREMENTS?**

A prospectus is generally required where either:

- Shares are offered to the public in Germany.
- Shares are to be admitted to trading on a German regulated market and the entry standard.

In this context it must be observed that since 1 July 2012 BaFin and the FSE regard rights issues as offerings to the public, which principally require a prospectus (see Question 12 as regards the reduced content of the prospectus in the case of rights issues).

For issuers incorporated in Germany, the prospectus must be approved by BaFin. For issuers incorporated in another EU or European Economic Area (EEA) member state, the prospectus must be approved by the competent authority of the issuer's home state and the authority of the home state must notify BaFin.

For issuers incorporated outside the EU and EEA, the competent regulatory authority is the authority of the EU/EEA state in which the shares are offered to the public within the EU/EEA for the first time, or where the first application for admission to trading on a regulated market is filed.

The prospectus must be published on the website of the issuer, the underwriter, the paying agent or of the organised market where the admission to trading was applied for. In addition, printed versions of the prospectus must be made available free of charge.

**11. WHAT ARE THE MAIN EXEMPTIONS FROM THE REQUIREMENTS FOR PUBLICATION OR DELIVERY OF A PROSPECTUS (OR OTHER MAIN OFFERING DOCUMENT)?**

Separate exemptions apply to the obligation to publish a prospectus on both:

- The offer of securities to the public.
- The admission to listing on a regulated market.

When a public offer is being made at the same time as an admission to trading on a regulated market is sought, a prospectus is required unless an exemption to both obligations exists.

### OFFER TO THE PUBLIC

An offer is not deemed to be an offer to the public (and therefore no prospectus is required) where it is only made to certain categories of persons.

The key exemptions (some of which may be combined) include offers:

- Solely addressed to qualified investors (which is now defined as professional clients within the meaning of Directive 2004/39/EC on markets in financial instruments (MiFID)).
- Addressed to fewer than 150 natural or legal persons (other than qualified investors) in each EU/EEA state.
- Addressed to investors who acquire securities for a total consideration of at least EUR100,000 per investor, or where the denomination per unit is at least EUR100,000.
- Where the total consideration for all in the EU/EEA offered securities is less than EUR100,000 over 12 months.

- Where securities are issued by credit institutions licensed for deposit taking business or by issuers, the shares of which are already listed at an organised market and the subscription price for all securities offered does not exceed EUR5 million.

### ADMISSION TO TRADING

An issuer is not required to publish a prospectus for admission to trading if the securities being issued are exempt. The main categories of exempt securities are:

- Shares representing, over 12 months, less than 10% of the number of shares of the same class already admitted to trading on the same regulated market.
- Shares issued to employees as part of an employee share scheme (if a document is available which sets out the details of the employee share scheme).
- Under additional requirements, shares offered to existing shareholders by way of a dividend or issued on the exercise of pre-emption or conversion rights from other securities.
- Under additional requirements, securities already admitted to trading on another regulated market (*see Question 4*).

## 12. WHAT ARE THE MAIN CONTENT OR DISCLOSURE REQUIREMENTS FOR A PROSPECTUS (OR OTHER MAIN OFFERING DOCUMENT)? WHAT MAIN CATEGORIES OF INFORMATION ARE INCLUDED?

As a general rule, the prospectus must contain all information necessary to enable investors to make an informed assessment of the issuer's assets and liabilities, financial situation, profits and losses and future prospects, and the rights attached to the securities.

Regulation (EC) 809/2004 implementing Directive 2003/71/EC as regards prospectuses and dissemination of advertisements (Prospectuses Regulation), as recently amended by the Commission Delegated Regulation (EU) 486/2012 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements, applies. Under the Prospectuses Regulation, the content requirements vary according to the nature and circumstances of the issuer and the type of security to be offered or listed. In practice, BaFin regularly applies the recommendations for the consistent implementation of the Prospectus Regulation published by the European Securities and Markets Authority (ESMA). In addition to the statutory requirements and the ESMA recommendations, international and German market practice determines the content and, in particular, the format and structure of a prospectus.

### MAIN CONTENT

The main categories of information included in a prospectus are:

- A summary containing key information and risks of the offering.
- Presentation of risk factors.
- Information on the issuer (for example, a business overview and executive bodies).
- Annual financial statements (including auditor's report).
- Quarterly or half-yearly reports.
- Review of the financial condition and the operating results of the issuer.
- Pro forma information and other key financial data.
- Forecasts (optional in principle).
- Working capital statement.
- Information on the shares to be offered and the terms and conditions of the offer.

### SUMMARY

The amended Prospectus Regulation stipulates the specific structure and content of the summary, which must provide the investors with key information in a concise manner and in non-technical language. The length of the summary should take into account the complexity of the issuer and of the securities offered, but must not exceed 7% of the length of a prospectus or 15 pages (whichever is the longer). Furthermore, it must not contain cross-references to other parts of the prospectus.

### FINANCIAL STATEMENTS

The financial statements to be included in the prospectus must be in accordance with IFRS. However, financial statements prepared in accordance with certain third country national accounting standards that are considered in the EU to be equivalent to IFRS are also accepted (for example, the GAAP of the USA, Japan, the People's Republic of China, Canada and South Korea). Financial statements for financial years ending on 31 December 2014 at the latest that are prepared in accordance with the Indian GAAP will also be permitted.

## PROPORTIONATE DISCLOSURE REGIMES FOR RIGHTS ISSUES, SMES AND SMALL CAPS

For rights issues (that is, offerings that are exclusively directed to the existing shareholders) a proportionate disclosure regime applies since 1 July 2012, provided that the issuer has shares of the same class already admitted to trading on a regulated market, or a multilateral trading facility that meets specific minimum standards. The main change is that for those rights issues the prospectus does not need to contain the description of selected financial information, the operating and financial review (that is, management discussion and analysis (MD & A)) and the description of the capital resources. In addition, the historical financial information to be included in the prospectus is limited to the last financial year of the issuer.

Since 1 July 2012 a proportionate disclosure regime also applies for small and medium-sized enterprises (SMEs) and companies with reduced market capitalisation (small caps). This includes, among other things, that the prospectus does not need to contain audited historical financial information but must contain a statement that audited financial information has been prepared, a statement of where such information is available and the auditor's certificate. For the definition of SMEs and Small Caps BaFin refers to the thresholds of the Prospectus Directive. SMEs are companies which, according to their last annual or consolidated accounts, meet at least two of the following criteria:

- An average number of less than 250 employees.
- A total balance sheet of a maximum of EUR43 million.
- An annual net turnover of a maximum of EUR50 million.

Small Caps must have an average market capitalisation of less than EUR100 million on the basis of end-year quotes for the previous three calendar years.

BaFin also requires a summary in prospectuses for which the proportionate disclosure regimes for SMEs, Small Caps and rights issues apply.

Due to marketing reasons, particularly in the case of international offerings, practitioners are currently unsure whether a prospectus with a proportionate disclosure will have any significant relevance in practice.

### 13. HOW IS THE PROSPECTUS (OR OTHER MAIN OFFERING DOCUMENT) PREPARED? WHO IS RESPONSIBLE AND/OR MAY BE LIABLE FOR ITS CONTENTS?

## PREPARATION

The prospectus is usually prepared by the issuer's legal advisers with input from the issuer, the issuer's auditor(s), the global co-ordinator(s)/lead manager(s) concerned with the equity offering and their legal advisers.

## VERIFICATION

The draft is then discussed by all parties. While there is no formal verification process, the issuer reviews and checks each statement in the draft prospectus to avoid prospectus liability. All financial data is reviewed by the auditor who is issuing the comfort letter.

BaFin reviews whether the prospectus is complete and that the information provided is comprehensible, that is, it checks for consistency but not accuracy. It is common practice to hold discussions with BaFin before formal submission for approval (*Billigung*). BaFin often requests changes to the prospectus after submission.

## RESPONSIBILITY/LIABILITY

The following persons have statutory liability for the prospectus:

- Anyone who has taken on responsibility for the prospectus (that is, is named in the prospectus as such).
- Anyone who has caused the issue of the prospectus.

Usually, this includes the issuer, the underwriters, in particular the global co-ordinator(s) and, under certain circumstances, the selling shareholders (in a most recent judgment the Federal Court of Justice confirmed a prospectus liability of the controlling enterprise in the underlying case of a public offering of bonds).

Statutory liability arises if the prospectus is incorrect or incomplete as to any matter material to the assessment of the securities. Investors who buy securities within six months of the securities' first trading date can claim a refund which is limited to the offer price of the securities.

There are a number of statutory defences to a prospectus liability claim, in particular if the respondent is able

to demonstrate that he was not aware of an error or omission and that this unawareness was not caused by gross negligence.

Statutory liability for the prospectus is joint and several. However, under the underwriting agreement, the issuer usually takes on responsibility for the content of the prospectus and agrees to indemnify each other party from claims arising from this content, except to the extent other parties were solely responsible for a particular part of the prospectus.

## MARKETING EQUITY OFFERINGS

### 14. HOW ARE OFFERED EQUITY SECURITIES MARKETED?

In addition to the publication of the prospectus, marketing can include:

- Pilot fishing. Meetings of the lead manager with potential key investors to discuss the business model of the issuer before publication of a prospectus.
- Analyst presentations. These are done by the leading investment bank(s) about six to ten days before the start of the road show.
- Pre-marketing. Meetings of the leading investment bank(s) with potential investors and retailers before publication of the prospectus, but after release of the analyst's research reports.
- Road show presentation. These are done by the issuer's management and the leading investment bank(s) after publication of the prospectus.
- Advertising and other publicity. This could include radio and TV-spots, image brochures, flyers, press releases and website of the issuer, in particular when an offer is aimed at retail investors.

All advertising must be clearly identified as marketing. It cannot contradict the information given in the prospectus and there must be a clear reference to the prospectus and where it can be obtained. All investors must have access to equivalent information.

### 15. OUTLINE ANY POTENTIAL LIABILITY FOR PUBLISHING RESEARCH REPORTS BY PARTICIPATING BROKERS/ DEALERS AND WAYS USED TO AVOID SUCH LIABILITY.

While specific statutory liability for research reports is limited to a number of administrative offences, civil and criminal liability might, in particular, arise under insider legislation, rules on market manipulation, civil law prospectus liability and under general civil and criminal law.

Standards that must be observed in the preparation of research reports include:

- Persons preparing financial analysis must exercise the requisite degree of expertise, care and diligence. Information on which the report is based must be verified and sources must be disclosed.
- Communication between research analysts and employees working on the offering must be prevented or controlled (using Chinese walls) and analysts cannot perform other tasks related to the transaction.
- The payment of the research analyst cannot be connected to the offering in a way which would undermine his independence.
- The issuer cannot be promised a positive research report and if the research report has been reviewed by the issuer before publication and subsequently amended, this must be disclosed.
- Possible conflicts of interest must be disclosed, in particular if an investment bank which provides a report is advising the issuer on the offering.

Research reports that do not fulfil these requirements must be labelled as marketing communication (*Werbemitteilung*).

Further measures to avoid liability can include:

- Disclaimers.
- Limitations on distribution, in particular relating to the US.
- Distribution only to institutional investors.
- Imposing a blackout period before publication of the prospectus, during which research reports are not published or distributed. In practice, this period typically lasts from two weeks before the publication date of the prospectus until 30 days after listing.

Details regarding the standards to be observed are usually outlined in research guidelines.

## BOOKBUILDING

**16. IS THE BOOKBUILDING PROCEDURE USED AND IN WHAT CIRCUMSTANCES? HOW IS ANY RELATED RETAIL OFFER DEALT WITH? HOW ARE ORDERS CONFIRMED?**

The bookbuilding procedure is frequently used in offerings.

In traditional bookbuilding, a price range is determined by the investment bank(s) based on their own valuation of the issuer and, in particular, feedback from investors during pre-marketing. The price range is published in the prospectus.

Both institutional as well as private investors are then invited to order shares and to specify a price limit for their order, usually for a period of seven to ten days. Based on these orders, a price is set by the issuer, selling shareholders (if any) and the investment bank(s). Apart from looking for maximum proceeds, pricing is often also adjusted to ensure that investors with a long-term investment horizon are allotted shares.

In the recent past, decoupled (or accelerated) bookbuilding has also become popular. In this case, no price range is published in the prospectus. However, the feedback from the road show is subsequently used to determine the price range, which is then published in a supplement (*Nachtrag*) to the prospectus, which is followed by an offer (bookbuilding) period of only two to three days.

## UNDERWRITING: EQUITY OFFERING

**17. HOW IS THE UNDERWRITING FOR AN EQUITY OFFERING TYPICALLY STRUCTURED? WHAT ARE THE KEY TERMS OF THE UNDERWRITING AGREEMENT AND WHAT IS A TYPICAL UNDERWRITING FEE AND/OR COMMISSION?**

### STRUCTURE

In a typical underwriting for an equity offering, underwriters subscribe to the new shares, usually at EUR1 for each new no-par value share. After the shares have been sold to investors for the offer price, the underwriters forward the proceeds minus their fees and expenses to the issuer. Any shares of selling shareholders are purchased by the underwriters and sold to investors for the offer price.

Parties to the underwriting agreement are the issuer, the selling shareholders (if any) and the banks as underwriters. Typically, the underwriting agreement is signed by the lead manager(s) on behalf of the other members of the syndicate.

### KEY TERMS

These are:

- Details on the underwriting as well as on the admission to listing and the respective obligations of the parties.
- Details on over-allotment, greenshoe option and stabilisation measures.
- In the case of secondary offerings, the issuer's and the selling shareholders' commitment to a lock-up period.
- Representations, warranties and undertakings of the parties as well as indemnification clauses.
- Conditions precedent and the bank's right to terminate the contract.
- Provisions on fees and expenses.

### FEE

The fees of the underwriting syndicate, including the fees for their role as global co-ordinator(s) and for other roles, usually vary between 3% and 5% of the total volume of the offer. A success fee of about 1% of the total volume of the transaction payable at the issuer's discretion is usually also agreed on.

## TIMETABLE: EQUITY OFFERINGS

**18. WHAT IS THE TIMETABLE FOR A TYPICAL EQUITY OFFERING? DOES IT DIFFER FOR AN IPO?**

The following is a timetable for a typical equity offering or an IPO of new shares from a capital increase in which the bookbuilding method is used and the price range is included in the prospectus ("A" is the date on which the shares are allocated):

- **A minus 4 to 7 months (depending on size of transaction).** Appointment of advisers, start of due diligence and drafting of prospectus.
- **A minus 6 to 8 weeks.** Shareholder resolution on capital increase is passed (if no authorised capital is available).

- **A minus 6 to 8 weeks.** Submission of prospectus to BaFin (including financial statements).
- **A minus 3 to 4 weeks.** Start of pre-marketing (after receipt of initial comments by BaFin).
- **A minus 3 to 4 weeks**. Submission of admission documents to stock exchange.
- **A minus 17 days**. Signing of underwriting agreement.
- **A minus 16 days.** Approval of prospectus by BaFin (and publication of prospectus on the internet).
- **A minus 15 days.** Availability of print versions of the prospectus.
- **A minus 14 days.** Start of public offering and bookbuilding. Road show.
- **A minus 1 day to A.** The following takes place:
  - end of public offering and bookbuilding;
  - signing of the underwriting agreement (if not signed earlier);
  - subscription of shares by underwriters;
  - registration of capital increase with commercial register (effective date); and
  - admission to trading on the stock exchange (if not earlier).
- **A.** Pricing and allocation of shares and publication of the offer price.
- **A plus 1 to 2 days.** First day of trading.
- **A plus 2 days.** Settlement.
- **A plus 1 to 32 days.** End of stabilisation period.

In a decoupled bookbuilding process, the initial prospectus does not include a price range and, in some cases, there is no specific offer period or number of offered shares (*see Question 16*).

## STABILISATION

### 19. ARE THERE RULES ON PRICE STABILISATION AND MARKET MANIPULATION IN CONNECTION WITH AN EQUITY OFFERING?

Regulation (EC) 2273/2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments (Buyback and Stabilisation Regulation) provides a safe harbour from market manipulation. Under the Buyback and Stabilisation Regulation, stabilisation measures are restricted to a period of 30 calendar days after the start of trading. The fact that stabilisation may be undertaken as well as further details must be publicly disclosed before the offer period and after the end of the stabilisation. Stabilisation cannot be executed above the offering price.

## TAX: EQUITY ISSUES

### 20. WHAT ARE THE MAIN TAX ISSUES WHEN ISSUING AND LISTING EQUITY SECURITIES?

The pre-IPO phase may require a re-organisation (such as group-internal mergers, outsourcings, unwinding of profit and loss absorption or domination agreements), refinancings, share transfers or other structural measures, each of which usually requires particular attention relating to tax consequences.

Existing shareholders disposing of shares in the IPO may be subject to tax on any gains realised through the disposal. In the post-IPO phase, taxation of dividends and of gains resulting from the exit becomes relevant for investors. In connection with the IPO itself, the following tax aspects relating to the transfer of shares must be taken into account.

#### TAX ISSUES FOR THE IPO COMPANY

Companies are subject to:

- Corporate income tax (*Körperschaftsteuer*) at 15% plus a solidarity surcharge (*Solidaritätszuschlag*) of 5.5% on it (in total 15.825%).
- Trade tax (*Gewerbesteuer*) on their profits generated in permanent establishments in Germany. The rates are usually between 7% and 17.5%, depending on where the relevant permanent establishment where taxable trade profit is generated is situated.

Tax losses or tax loss carry-forwards of the IPO company (or a subsidiary of the IPO company) can be extinguished in full or in part if, directly or indirectly, more than 50% or more than 25% of the stated capital or shares or voting shares are transferred to one acquirer or to affiliated persons or to a group of acquirers that have aligned their interests (subject to certain exceptions). This also applies if the shares are transferred to any such person or persons as a result of a share capital increase in connection with an IPO. However,

according to guidance from the German tax authorities, the (preliminary) transfer of any such shares to the underwriter or any other issuing bank responsible for the IPO should not be tax-detrimental.

In certain circumstances, IPO companies also need to take into account tax rules on the limitation of deductibility of interest expenses.

### TRANSFER TAXES

Transfers of shares as a result of an IPO or the issue of new shares are not subject to capital transfer taxes. The transfer of shares is not subject to/exempt from value added tax (with the possibility to opt for tax under certain conditions). Real estate transfer tax may be triggered under specific circumstances.

## CONTINUING OBLIGATIONS

**21. WHAT ARE THE MAIN AREAS OF CONTINUING OBLIGATIONS APPLICABLE TO LISTED COMPANIES AND THE LEGISLATION THAT APPLIES?**

### KEY AREAS

Statutory continuing obligations apply only to issuers whose shares are listed on the regulated market, whereas the prohibition on insider dealing and market manipulation also applies for companies included in the open market.

In the following, only continuing obligations for issuers listed at the regulated market are dealt with:

- Financial reporting. Issuers must publish yearly and half-yearly financial statements, and interim management statements in the middle of each financial year (or alternatively, quarterly reports). EU/EEA issuers whose shares are admitted to trading on the regulated market must prepare their consolidated financial statements in accordance with IFRS. Non-EU/EEA issuers can prepare financial statements in accordance with their respective national laws.
- Ad hoc publicity. Every listed company must promptly publish, in an ad hoc announcement, any new fact which has occurred in its field of activity and which is not publicly known, if it is likely to have a substantial influence on the exchange price of its shares.
- Voting rights notifications. Any person whose direct or indirect shareholding reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights in a listed German company is required to inform the issuer and the BaFin in writing when it has reached, exceeded or fallen below the relevant threshold. The issuer must publish the notification. If a threshold of 10% or more is reached, the acquirer is obliged to disclose his intentions behind the acquisition and the origin of the funds for the acquisition. Since 1 February 2012 additional instruments facilitating the acquisition of securities must be notified (for example, securities lending, repurchase agreements (repo), contracts for difference, cash settled equity swaps or cash settled options). A notification threshold of 5% applies for these (additional) instruments and they are counted up with other shareholdings which must be notified.
- Directors' dealings. Members of the executive or supervisory board and other individuals in a senior position (including their relatives, partners, and any entities in which they have a controlling, management or supervisory position that holds an interest in the listed company) of the issuer must notify the BaFin and the issuer of any transaction in securities of the issuer by them in excess of EUR5,000 per year. The issuer must publish the notification.
- Insider law and insider lists. Issuers whose shares are admitted to trading on the regulated market must prepare lists of persons who have access to inside information and BaFin is entitled to review these lists on request. General insider legislation applies to all issuers, including those issuers whose shares are included in the open market.
- Information on shares and shareholders' rights. In general, issuers must provide shareholders with all information necessary to exercise their rights. Specific publication obligations exist, for example, relating to information on shareholders' meetings, dividend payments, the issue of new shares and changes in the rights attached to the shares.
- German Corporate Governance Code. German stock corporations listed on the regulated market must publish a yearly declaration on whether they comply with the recommendations of the German Corporate Governance Code and explain any non-compliance with such recommendations.

Obligations for issuers whose shares are listed on unregulated markets may exist under the terms and conditions of the relevant stock exchange in special segments (for example, entry standard in Frankfurt or m:access in Munich). This includes in the case of the entry standard the disclosure of certain information comparable to the ad-hoc publicity obligations (de facto ad-hoc publicity), the publication of a yearly calendar as well as the publication of audited annual financial statements (and, if applicable, the consolidated annual financial statements) and half-yearly financial statements on the internet. The annual financial statements (and, if applicable, the consolidated annual financial statements) must be prepared either:

In accordance with IFRS.

- In the case of EU member states in accordance with local GAAP.
- In the case of a third country in accordance with other national accounting standards that are considered equivalent to IFRS (Question 12).
- If Deutsche Börse AG explicitly permits the accounting standards under the respective national GAAP.

### ADDITIONAL CONTINUING OBLIGATIONS: PRIME STANDARD

For issuers whose shares are listed on the prime standard segment of the FSE, additional obligations apply:

- Publication of quarterly financial statements.
- Publication of the financial statements and ad hoc disclosures in German and English.
- Publication of a yearly calendar that indicates all material dates of the issuer (for example, annual shareholders' meeting and press conference on annual accounts).
- At least one meeting with analysts each year.

### RELEVANT LEGISLATION

The following legislation for continuing obligations applies:

- Securities Trading Act, as complemented by the Securities Trading Notification and Insider List Regulation (Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung (WpAIV)), in relation to financial reporting and insider law.
- Stock Exchange Admission Regulation.
- Securities Acquisition and Takeover Act (for domestic stock corporations or companies with seat in the EU/EEA whose shares are listed at a domestic or EU/EEA regulated market).
- Certain specific provisions of the Commercial Code and the Stock Corporation Act which apply for German companies listed in a domestic or EU/EEA regulated market.
- Securities Prospectus Act.
- Corporate Governance Code (for German stock corporations whose shares are listed on a regulated market).

**22. DO THE CONTINUING OBLIGATIONS APPLY TO LISTED FOREIGN COMPANIES AND TO ISSUERS OF DEPOSITARY RECEIPTS?**

Unless otherwise indicated, the rules apply to domestic and foreign issuers (see Question 21). BaFin may grant exemptions from certain obligations to foreign issuers. However, foreign issuers may also be subject to obligations under their respective national laws.

A substantial part of the continuing obligations applicable to issuers whose shares are listed on a regulated market also apply to issuers of depositary receipts, if these securities are listed on the regulated market.

**23. WHAT ARE THE PENALTIES FOR BREACHING THE CONTINUING OBLIGATIONS?**

Violation of the continuing obligations can lead to:

- A suspension or revocation of the admission to trading.
- The imposition of penalties on the issuer and/or responsible directors.
- For certain violations of insider laws, individual criminal liability.
- The temporary loss of shareholders' rights in the case of the violation of the voting rights notification duties.

## MARKET ABUSE AND INSIDER DEALING

**24. WHAT ARE THE RESTRICTIONS ON MARKET ABUSE AND INSIDER DEALING?**

### RESTRICTIONS ON MARKET ABUSE/INSIDER DEALING

Market abuse is principally:

- Information based (this includes the publication of false or misleading information in financial reports, ad hoc

announcements, press releases, prospectuses or stock charts (painting the tape), the withholding of important information relating to financial instruments as well as the non-disclosure of conflicts of interest).
- Trade based (this includes fictional trades such as wash trades or matched orders, circular trading, or other actions that result in or secure stock prices at an abnormal or artificial level, which does not necessarily require a certain time span but could also be fulfilled if the manipulation occurs in high frequency trades. With respect to buy-backs certain safe harbour provisions apply (*see Question 19*)).
- Action based (this is not common in practice).

Insider dealing is principally:
- Making use of inside information to acquire or dispose of insider securities.
- Disclosing or making available inside information to a third party without the authority to do so.
- Recommending, on the basis of inside information, that a third party acquire or dispose of insider securities, or otherwise inducing a third party to do so.

Inside information means any specific information that, if it became publicly known, would likely have a significant effect on the stock exchange or market price of the issuer's shares (or other insider securities). Future circumstances may qualify as inside information if they are reasonably likely to occur. Inside information can include the knowledge of certain buy or sell orders (always provided that such order would likely have a significant impact on the stock price) and circumstances relating to derivatives traded on an organised market. In the case of a protracted process, the intermediate steps of that process which are connected with bringing about that (future) circumstance or event could qualify as inside information.

In the context of public takeovers the Market Abuse Directive provides some exceptions that allow the exercise of a due diligence and the use of inside information for the purposes of the contemplated acquisition, provided that the bidder does not change its bid and conduct "alongside purchases" after gaining access to inside information.

Share buy-back programmes and price stabilisation measures are exempt from the prohibition against insider dealings if and to the extent that they are conducted in accordance with the safe harbour rules of the Buyback and Stabilisation Regulation.

### PENALTIES FOR MARKET ABUSE/INSIDER DEALING

Violations of the prohibition on market abuse and insider dealing may both constitute an administrative offence (which may be punished with fines up to EUR1 million) or a criminal offence (which may be punished with imprisonment or a criminal fine). In the case of market abuses the qualification as administrative or criminal offence depends in particular on whether the exchange price was actually influenced by the offence, and whether the offender is found to have acted by wilful intent or only by gross negligence.

## DE-LISTING

#### 25. WHEN CAN A COMPANY BE DE-LISTED?

### VOLUNTARY DE-LISTING

To voluntary de-list a company, action may be required both under capital markets legislation and, if the company is a German stock corporation, under corporate law. The following only applies to a de-listing from the regulated market.

**Capital markets legislation.** The following is required:
- An application to the management board of the FSE.
- No conflict with investor protection, in particular, sufficient time to sell the securities in the regulated market after the revocation decision has been announced, if the securities are not admitted to trading at another regulated market.

**Corporate law.** The following is required under corporate law:
- Shareholders' resolution.
- Tender offer by the company or its main shareholder. The price offered under the tender offer must provide compensation for the full value of the shares, which may be higher, but must not be lower, than the stock exchange price.

However, the Federal Constitutional Court ruled in 2012 that these actions are not necessarily required under constitutional law. It is open to debate whether the civil courts will still consider these requirements necessary under civil law.

Recent case law by higher regional courts suggests that a tender offer and a shareholders' resolution may not be necessary if, subsequent to the de-listing from the regulated market, the securities continue to be traded in the unregulated market segments entry standard (Frankfurt) or m:access (Munich) (known as "downgrading").

### COMPULSORY DE-LISTING

The FSE management board can revoke the admission to trading of issuers on the regulated market if either:

- Trading or the transaction settlement of the securities can no longer be guaranteed on a permanent basis.
- The issuer does not comply with the continuing obligations arising from the listing on the regulated market.

In light of the above mentioned legal uncertainties in the case of voluntary de-listings a (compulsory) de-listing upon a previous squeeze-out has been the prevailing option in the past.

## REFORM

**26. ARE THERE ANY PROPOSALS FOR REFORM OF EQUITY CAPITAL MARKETS/EXCHANGES? ARE THESE PROPOSALS LIKELY TO COME INTO FORCE AND, IF SO, WHEN?**

In light of the numerous amendments to German capital market and prospectus law and the changes in the open market of FSE in 2012, there are currently no proposals for reform of equity capital markets/exchanges. Amendments to the German Stock Corporation Law are expected to enter into force in 2013, though these do not have a significant impact on equity capital raisings of listed companies.

## WEBLINKS

Stock exchanges and regulatory authorities by jurisdiction

| Jurisdiction | Exchange(s) | Regulatory authority |
|---|---|---|
| Germany | Frankfurt Stock Exchange (FSE)<br>(*Frankfurter Wertpapierbörse*)<br>(*www.boerse-frankfurt.de*)<br>(*www.deutsche-boerse.com*) | German Federal Financial Services Supervisory Authority (BaFin)<br>(*Bundesanstalt für Finanzdienstleistungsaufsicht*)<br>(*www.bafin.de*) |

## ONLINE RESOURCES

### LAWS ON THE INTERNET (GESETZE IM INTERNET)

**W** www.gesetze-im-internet.de

Description. Comprehensive compilation of German federal law. Some convenient translations in the English language are available on: www.gesetze-im-internet.de/Teilliste__translations.html.

### BAFIN

W www.bafin.de

Description. Convenient translations in the English language of certain Acts of German federal law relating to securities trading are available on: www.bafin.de/EN/DataDocuments/Dokumentlisten/ListeGesetze/liste__gesetze__node.html.

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**Recent transactions**

- Advising SoFFin on the contemplated capital increase of Commerzbank in 2013 (EUR2.5 billion).
- Advising SoFFin on the issue of contingent mandatory exchangeable bonds (CoMEN) by Commerzbank AG (EUR5.7 billion) and on the capital increase by way of rights issue of Commerzbank AG (EUR5.3 billion). This transaction was awarded the IFR EMEA Equity Issue of the Year 2011 Award.
- Advising M.M.Warburg & Co KGaA on the rights issue and debt-equity-swap of Conergy AG (EUR183.3 million).
- Advising a listed German software company on its rights issue.
- Advising Drägerwerk AG & Co KGaA on its EUR105 million IPO of ordinary shares through a rights issue.

**Languages.** German, English.

**Professional associations/memberships.** German-American Law Association (DAJV) and the Association for Corporate Law (VGR — Gesellschaftsrechtliche Vereinigung).

**Publications.** Dr. Karsten Müller-Eising is author of numerous publications in legal journals and handbooks.

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- Advising a listed German software company on its rights issue.

**Languages.** German, English, Spanish.

**Publications.**

- Impact of subsequent finalisation of notarised minutes on validity of resolutions of AGM.
- Domination of companies due to factual majorities in the AGM.
- Reporting duties in case of the exercise of authorised capital while excluding the shareholders' subscription rights.
- Minority shareholders' right to sue against squeeze-out resolutions and the legal validity of the registration in the commercial register.

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