

Initial Public Offerings

2022

Sixth Edition

Contributing Editors: Ilir Mujalovic & Harald Halbhuber

Global Legal Insights

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Published by Global Legal Group

GLOBAL LEGAL INSIGHTS – INITIAL PUBLIC OFFERINGS

2022, SIXTH EDITION

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*We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Iilir Mujalovic & Harald Halbhuber of Shearman & Sterling LLP for all
of their assistance.*

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

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ISBN 978-1-83918-192-4
ISSN 2399-9594

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Printed and bound by TJ Books Limited
Trecerus Industrial Estate, Padstow, Cornwall, PL28 8RW
May 2022

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PREFACE

We are pleased to present the sixth edition of *Global Legal Insights – Initial Public Offerings*.

An initial public offering is a key way for companies to raise capital in the global capital markets and list their shares for public trading. Although IPOs are conceptually similar whether made to investors in New York, London or Hong Kong, or in other long-established or newer markets around the world, the regulatory frameworks, market practices, investor communities and subsequent public-company obligations are far from homogenous across jurisdictions.

The *Initial Public Offerings* book provides general counsels, investment bankers, lawyers, business professionals, the investing community and other advisers and interested parties with an overview of the key steps, legal issues and market practices involved in the initial public offering process by examining practices in 14 jurisdictions around the world, with one Expert Analysis chapter focusing on the United States and a Foreword from the SIFMA.

Leading practitioners from each jurisdiction provide their expertise and guidance on navigating their local market practices and regulatory framework. Each chapter follows a similar structure: introduction of the IPO market in the relevant jurisdiction; description of the IPO process and key parties; discussion of the relevant regulators and key regulations; public company responsibilities; and potential risks, liabilities and pitfalls.

We hope you find the book will equip you with an understanding of the legal and market fundamentals necessary for a successful IPO.

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Introduction

History and background of the ups and downs of public trading in Germany

Initial public offerings (IPOs) as well as listings, in some cases by way of de-SPAC transactions, continued to be highly visible in Germany in 2021. Germany was one of the countries trading on stock exchanges as early as the 16th century. It has thus always been at the forefront of public market activities. The Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*, FSE) gained relevance particularly at the start of the “Neuer Markt”, a market segment of the FSE introduced in the mid-1990s. This market segment focused on the public trading of “new economy” companies. The business model of these companies focused on the ever-increasing importance of the internet and the change of service providing in all markets based on the new technologies that the internet brought with it. The severe crash of the market at the end of 2002 brought the stock market trading of these companies to a temporary halt. What did not stop though, was the further development of the internet, technology and digitalisation markets, which in the meantime found financing through private equity and venture capital. Relevant IPOs in the US and the success of public companies such as Apple and Amazon have ignited a new appetite for this form of raising capital that is now popular around the world. Even the financial crisis in 2008/2009 caused only a short-term halt to the growth of the technology market.

Market developments

Over the last few years, companies in the “old economy” have recognised the need for digital transformation. Tech companies are some of the highest-valued companies worldwide when it comes to their market capitalisation. The COVID-19 pandemic pushed up the value of these companies even further. 2021 showed that there was a lot of money in the market, given that spending had been reduced in the first year of the pandemic. With the whole world being forced to rethink working environments within a few weeks or even days, whole markets were forced to implement and strengthen remote working solutions, including video conferencing, digital meetings, secured VPN connections to their networks from all over the world, and cloud-based infrastructures to enable access to their goods, services and solutions. After a very short and intense decline of the stock market at the start of the pandemic, publicly traded companies from the technology and digital fields have since achieved value growth in the hundreds and in some cases thousands of per cent over a short period of time. Many of these companies took advantage of this positive development and went public.

Since the financial crisis, young tech companies have been developing and strengthening their business models. To a large extent this was done with the help of venture capital

financing. This method of financing is meant to be exit-oriented due to the time-limited investment horizons of the funds that focus on fast company growth with high marketing spending, global market reach and M&A activities consolidating diversified branches. During this time, Germany has also become an interesting market for foreign investors. The investor base in an IPO is international. A significant number of the investors are from the US, introducing the American approach to company growth by thinking bigger and faster. The exit-orientation of these investors and the favourable market environment are just some of the reasons the public market has become buoyant again. Most of Germany's more prominent IPOs from the tech scene, such as Delivery Hero in 2016, TeamViewer in 2019 and Auto1 Group in 2021 have chosen the FSE as the stock exchange for their IPO. While exit-related provisions in corporate documents of such companies always consider stock exchanges such as NYSE, NASDAQ and LSE as potential places for the going public, the vast majority of German companies have so far chosen their home jurisdiction and, therefore, the FSE for this significant step. However, a larger number of companies in Europe chose Euronext in Amsterdam as their platform to go public.

Existing and expected trends

The rise in the number of SPAC (Special Purpose Acquisition Company) transactions in the US can now be observed in Germany. In a SPAC transaction, the SPAC which has raised money from investors is listed on the stock exchange. The vehicle itself does not conduct any business. The initiators of the SPAC, the sponsors, have two to three years from the listing to find a target company and merge it into the SPAC so that this target company as of the time of the merger, or de-SPAC, is publicly listed. In the course of this merger, the existing shareholders of the target company exchange their shares in the target company for shares in the SPAC. While such transactions are not IPOs, they may have similar effects. The target company raises the money that was initially invested by the investors in the SPAC. If, on top of that, the SPAC raises additional PIPEs (private investment in public equity), the financing needs of target companies can be met, even if the sums originally collected by the SPAC would not be sufficient to activate the business plans of the target companies in full. While SPAC transactions were performed during the era of the Neuer Markt in a low number of cases, we are seeing (re-)entries of SPACs to the German market. A certain number of venture capital fund managers have decided to raise SPACs and list them on several European stock exchanges, including the FSE. The vast majority of SPACs are listed at Euronext in Amsterdam. The reason for the preference for the Netherlands is related to the more favourable tax environment for companies whose business models rely on licence fees (which is the case for a lot of tech companies). The second implication of SPACs on the German market is German companies going public on international stock exchanges. The largest number of SPACs are listed on NASDAQ. With such transactions, German companies enter the desired international stock exchange parquets more efficiently, without having to go through the unknown, time- and cost-intensive processes of getting to know regulatory environments of foreign jurisdictions, but rather with some help and support of the SPAC to overcome any challenges. For German companies choosing this way of going public, the process is more comparable to a merger transaction. Four of these transactions took place throughout the year. While a larger number had been prepared, many of these have been put on hold given the slower market development towards the end of 2021. Irrespectively, 2021 was a record year for listings in Germany, with the highest number of listings and the issue volume since 2000.

While companies with digital and technological business models made up the majority of those going public, the market cooled down slightly towards the end of the year.

Nonetheless, companies with a strong business are still taking the steps and seeing the opportunities of being listed, particularly since the continued need for such business models cannot be denied.

Lastly, the further promotion of blockchain technology is opening German law to electronic securities. The *Gesetz zur Einführung elektronischer Wertpapiere* provides for the regulation of electronic securities on a technology-neutral basis, which will allow for their issuance and trading on the blockchain. German financial services providers and the stock exchanges have seen this development and participate significantly in the setup of distributed ledger technologies (DLTs). These developments are still in the early stages and it remains to be seen what impact they will have on public market trading and market participants.

The IPO process: Steps, timing, parties and market practice

Preparation phase

A regular IPO process requires a significant amount of preparation. For a large number of companies, it may start as early as two years prior to the intended start of trading. This is often due to the fact that a lot of companies still have to change their legal form to become IPO-ready. Most German companies are incorporated as German limited liability companies (GmbH). As such, it is not possible for their shares to be publicly traded. A change to a German stock corporation (AG), a European company (SE) or even a stock corporation from a different jurisdiction is necessary. This requires several legal steps starting with a proper corporate and tax analysis to find the preferred target structure, as well as transparent alignment with the shareholders ensuring the protection of the interests of all parties involved. The choice of legal form, as well as a potential change of the jurisdiction where the company is registered, is mostly driven by the business model, the resulting tax structure of the company and sometimes by the potential investors that the company and the underwriters intend to convince with respect to their investment in the IPO. The challenges in this part of the process stem mainly from finding the right balance between preparation for IPO readiness and safeguarding for the unintended case where an IPO might not happen. Due to the possibility of outcomes relating to the market environment beyond the company's control, companies should always have alternative financing strategies as a back-up option.

Once the proper legal form is put in place and the company is stabilised in its new legal form, shareholders kick off the IPO process officially with their respective resolution that allows the management to engage its IPO advisors. Often, potential investment banks have a long-lasting relationship with companies. Particularly in the tech environment, investment banks often invest at an earlier stage in such companies to get an early insight into those companies, build a relationship and thus increase the likelihood of being engaged for the IPO itself.

The next relevant decision to be made by the company is the potential place of listing, including the listing segment. Both will be decisive for the regulatory requirements to be met by the company.

Choosing advisors and first steps

Irrespective of the place of listing, an IPO process has become a more international process over recent years. This is mainly due to the fact that more international investors participate in German IPOs either immediately prior to an IPO, or because the underwriters introduce German companies to their more international investor base or because companies already have a more international shareholder base that attracts investors from other countries

looking to diversify their portfolios. A company that is seeking global reach may therefore, when selecting its advisors, focus on their global access to investors and the quality and reputation of the aforementioned.

The main decision to be made concerns the global coordinators. They are the lead underwriting banks. Whereas most companies engage a large consortium of bookrunners following a “beauty contest”, it is the global coordinators that develop the further equity story of the company, prepare the PR plan, structure the offering by deciding together with the company if only a primary offering is sought after, in which the company sells newly issued shares and thus raises capital, or if and to what extent secondary offerings are also part of the IPO in which existing shareholders may also be able to liquidate a part of their positions. It is at this point that global coordinators will also determine whether to implement greenshoe options in an initial phase shortly after the first day of trading. In preparation for such decisions, the pricing process is discussed and set up, the potential IPO investor market is analysed and the trading market is prepared for the time after the IPO.

The global coordinators prepare the IPO roadshow together with the company.

In preparation for the prospectus and for the marketing of the company to the potential IPO investors, the global coordinators conduct the due diligence of the company.

The independent auditors of the company review and verify the financial information, which forms the basis of the information to be provided in the prospectus. Together with the legal advisors to the company that are advising on the regulatory framework and preparing the prospectus, the auditors assist with the drafting of certain prospectus sections.

The counsels to the company undertaking the IPO provide legal advice on the whole transaction. It is common for the company to engage several legal advisors. There needs to be a focus on the corporate legal work to be done in preparation for the IPO, including structuring to prepare the company for IPO readiness, coordinating with the management, the members of the supervisory board and the shareholders, preparing the respective resolutions that are relevant for the share issuance of the primary offering, as well as potential amendments to the corporate documents, namely the articles of association and the shareholders’ agreement to provide for its proper termination at the time shortly before the IPO, but while maintaining a solid basis for the improbable case that the IPO does not happen. Additionally, the company engages specialist advisors for the regulatory framework. Together with the corporate legal advisors they prepare the legal due diligence, draft the prospectus and guide the company through the approval process with the regulator, which in Germany is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin). Throughout the IPO preparation process, they negotiate the underwriting agreement with legal advisors of the bookrunners and ensure that all regulatory requirements are fulfilled. They provide disclosure letters regarding the company to the underwriters and coordinate both with the company and with the legal advisors of the shareholders the provision of legal opinions to the extent necessary. Most companies start early to prepare for the IPO. When money is raised in the private market at a time when an IPO might be the preferred and even a realistic exit scenario for such companies, the investors focus on supporting the company to become compliant for the IPO and the time thereafter. In Germany, companies shall comply with the recommendations of the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). Therefore, they often start implementing respective measures sufficiently ahead of time.

When the company prepares the last steps for the IPO, several amendments to the articles of association may become necessary. The company often changes its existing form of

shares from registered shares to (dematerialised) bearer shares. Where a private company has different share classes of common and preferred, all of its shares are converted into common shares, usually on a 1:1 basis, unless otherwise agreed between the shareholders beforehand. If not already done so, the shareholders set up custody accounts to be able to receive bearer shares shortly before the listing. The existing shareholders of the company also resolve on capital increases to provide for a sufficient number of shares to be issued in the IPO, as well as the creation of authorised or contingent capital within the limits set by law to enable the company to raise further capital and implement additional incentive plans for its management and employees at the time after the IPO. Preparing such steps ahead of the IPO has the advantage that the company can implement these steps later on without the need to gain the approval of the general meeting of shareholders.

The underwriters engage legal advisors as well. They conduct the legal due diligence from the perspective of the investment banks and advise on, review and provide comments on the prospectus. The underwriting agreement is prepared and negotiated by them. Similar to the legal advisors to the company, they also review public announcements and press releases, and provide legal opinions as well as disclosure letters to the extent necessary. Together with the legal advisors of the company and the legal advisors of the shareholders, the lock-up agreements are prepared and negotiated. Generally, all shareholders of a company are restricted from selling their shares for a period of time, usually 180 days, after the first day of trading. Such lock-ups help to stabilise the share price immediately after the IPO and ensure the company's control over its shareholder base in the immediate aftermath of going public.

In order to support the pre-marketing of the IPO, companies often engage special public relations advisors. They focus on communicating the equity story and set up the communication in line with the expectations of the company with respect to the goals of the IPO. In that context, it needs to be ensured that the public information about the company in press releases as well as media coverage is aligned with the information provided in the prospectus.

Financial conditions

Companies often have a pre-defined equity story before the IPO. Based on their business model, companies know the market conditions and their competitors, have plans for actionable measures to grow and an understanding of the trends in their markets. They will also have assessed potential M&A targets that would enable growth both before and after the IPO and prepared steps for the entry to the market in other countries as well as for the entry in supporting business lines. A convincing strategy that has proven to enable topline growth in the few years before the IPO, the market size from a global perspective, the strength of the management team as well as the belief of investors in the success story are all key factors for the company to reach its valuation and pricing goals in the IPO. Companies therefore need to be prepared to be challenged on their financing models and their bottom-line results. This is even more relevant in those cases where the companies that intend to go public are not profitable at the time of their IPO. Key performance indicators (KPIs) that have been determined by the management together with its main shareholders and board members have to be reviewed and adjusted to the size and plans of the company at the time of the IPO. If the company was able to attract investors with a strong appetite of public listings as an exit scenario, the financial reporting, annual, interim and management accounts, but also public announcements will often already be adjusted to reflect and report the achievement of KPIs that will be of interest to the investors that are approached in the IPO process.

Often German companies have to adjust their accounting principles from German GAAP to the International Financial Reporting Standards (IFRS) and International Accounting Standards (IAS). Particularly, if the company intends to attract non-EU investors in the IPO, it may consider making such changes well in advance of an IPO. The prospectus must include the audited financial information for the last three financial years prior to the IPO. Often, the change of the accounting principles leads to significant differences in the yearly results of companies, particularly for those whose revenues rely to a large extent on self-developed intellectual property, which is treated differently under IFRS compared to GAAP.

Also, from a financial perspective, IPO candidates must implement accounting and controlling functions and set up specific audit, risk and compliance committees, particularly when their business models revolve around regulated markets, which is most often the case for FinTech and InsurTech companies.

Irrespective of the fact that such companies provide innovative solutions to their customers, they themselves have to implement IT structures to prepare for the financial reporting requirements as well as the investor relations processes for the time after the IPO. In this context, companies often raise capital in the private market ahead of the start of the IPO process in order to be able to meet all the requirements and still have a long enough runway in case market conditions change and the IPO needs to be postponed.

Due diligence and prospectus

The due diligence process is one of the most important steps in the preparation of an IPO. The global coordinators, their advisors as well as the company's legal and financial advisors review all aspects of the company, assess risks given in the setup and conditions of the company and determine their factual and reputational impact on the company for the IPO. The more detailed the due diligence, the better the risk assessment can be made in the prospectus. The due diligence also helps to decide if a company still needs to work on certain matters before actually starting the process of going public. Where the findings of the due diligence show a robust company with manageable risks, a transparent description of the situation in the prospectus mitigates the risk of prospectus liability lawsuits and reputational damages for all parties involved.

The securities prospectus is a key element of the IPO transaction. It provides at length and in detail the key information about the issuing company, the securities offered as well as the offering itself. In this context, the prospectus explains the risk factors related to the relevant markets, the respective business activities of the company, its financial situation, the regulatory, legal and tax situation as well as to the capitalisation of the company. It describes in detail the structuring of the offering, whether and to what extent secondary offerings and greenshoe options are intended, which stabilisation measures are intended after the IPO, to what extent the transferability and disposal of shares from existing shareholders are restricted and potential interest of parties participating in the offering as well as information on eventual cornerstone investors for the IPO. The intended use of proceeds from the IPO and the future plans of the company in respect of its dividend policy are described. The prospectus provides detailed information on the capitalisation, indebtedness, liabilities and working capital of the company. In the management's discussion and analysis of the company's assets, liabilities, financial position and financial performance, the prospectus provides insights into key financial information of the company. It describes the profit estimates and explains the market environment in which the company is already active, as well as the competitive field. The results and findings of

the commercial and legal due diligence are described in the explanation of the business of the company, focusing on market solutions, the strategy and operations of the company, its compliance management as well as its employee base. Information on insurance coverage, litigation and agreements material for the business of the company is also given. The regulatory and legal environment of the company is described in detail with a particular tailor-made view on the key products, services or intellectual property of the company. The prospectus also provides information on the existing shareholders of the company, a broader description of the general information that can also be found in the articles of association of the company regarding, among others things, the corporate purpose, auditors, governing law and registration of the company including historical information about it. The share capital and the governance of the company are described and information on share and employee incentive programmes are given and described in the legal context that is relevant to the company. Apart from more detailed information on the framework for taxation in Germany, which is relevant for German as well as non-German investors when deciding whether they want to invest in the company, the prospectus also provides specific information on the underwriting agreement and the structuring, restrictions and options, as well as the costs of the IPO.

While the prospectus can support the marketing, its main goal is to fulfil statutory disclosure requirements to provide investors with the information basis for their investment decision. If prospectuses contain insufficient or even wrong information, prospectus liability claims may arise.

The draft of the prospectus is prepared by the issuer's counsel on the basis of information provided by the company, gathered in the due diligence process and provided by the company's auditors. The draft is then reviewed by the underwriter's counsel and the global coordinators and they provide comments. The prospectus is filed with the regulator several times. It can take six to eight weeks from the first filing until the final approval by BaFin. The regulator reviews in general up to three drafts and provides its comments before the final prospectus is filed shortly before the IPO for approval. The approval itself is normally a time-efficient process given that the regulator is already familiar with the prospectus.

Legal documentation

The global coordinators enter into an engagement letter with the company that determines, *inter alia*, the services to be provided, costs, break-up fees, liability and confidentiality. It does not create an obligation for the underwriters to underwrite and place the shares of the company in the IPO. Since the engagement letter sets out the legal framework of the services to be performed by the investment banks, it will have an impact on the provisions of the underwriting agreement. The underwriting agreement provides for the contractual framework between the underwriters, the company and, if the IPO contains a secondary offering, the selling shareholders. It typically contains terms for a maximum number of shares to be placed by the underwriters, although this is usually not agreed on as a guaranteed performance-based obligation, but rather on a best-efforts basis by the underwriters. The parties of the underwriting agreement determine the liability of the issuer and the underwriters as well as the underwriters' fees, commissions and costs. While the underwriting agreement may be prepared well in advance, it is usually executed only shortly prior to the publication of the prospectus and the beginning of the offer period.

Apart from the corporate measures that include shareholder and supervisory board resolutions, the other customary IPO documentation is in line with international market standards. It includes publicity and research guidelines, the pricing agreement, agreements

governing the underwriters' internal relationship, lock-up agreements, a cost-sharing and indemnification agreement between the company and the selling shareholders, a listing agreement and the certificates issued by the company's management as well as the global share certificates.

The company usually keeps its shareholders duly informed about the developments and the response it gets from the market. This allows the shareholders to understand whether the valuation of the company in the IPO is as expected and to make their mind up as to whether to finally approve the IPO.

Marketing and offering

With the help of the investment bankers, companies often contact selected investors early in the IPO process. This can go as far as detecting cornerstone investors that may even invest in a private capital raise immediately prior to the IPO and ensuring a significant stake in the IPO itself. Such information is material and has to be included in the prospectus (see Art. 22 para. 4 Prospectus Regulation). Around two months prior to the envisaged day of trading, the management of the company conducts an analyst presentation for the analysts of the underwriters. This helps the analysts to prepare research reports which are made available to institutional investors. Around four weeks prior to the envisaged first day of trading, the company publishes the "intention to float" (ITF). The ITF notifies the public about the IPO plans of the company. The research reports are provided to potential institutional investors and give price indications for pre-marketing purposes. In this process it has to be ensured, by means such as Chinese walls, that the recommendations given in the research reports are not disclosed to the company.

Shortly prior to the IPO, the underwriting agreement is executed and legal opinions, disclosure letters and comfort letters are issued on behalf of the company as well as the selling shareholders, if any. The final prospectus is filed with BaFin for approval. On the approval date, the prospectus is published, a press conference is held, and the offer period begins. The prospectus usually contains a price range for the issue price of the shares in the IPO. The offer price is then determined in a bookbuilding process that the investment banks conduct. During the bookbuilding period, the company's management is on an intensive roadshow for around two weeks to inform investors about their company and increase their appetite to participate in the IPO. While, in the past, roadshows involved a lot of travelling of the company's management, the particularities of the COVID-19 pandemic in 2020 made this process more efficient and less time-consuming as the roadshows are now being conducted in online meetings and through video conferences. At the end of the offer period the company, the underwriters and the selling shareholders enter into a separate pricing agreement where the offer price is finally determined. The shares to be issued in the primary offering are then allocated to investors. The allocation is discussed mainly between the company and the underwriters, with the involvement of the larger existing shareholders of the company. If a prospectus does not contain a price range, the offer period is much shorter.

Listing, settlement and stabilisation

In order for the shares of a company to be admitted to trading on the Regulated Market, a listing application has to be filed by the company with the FSE. In order to ensure the maintenance of the statutory period for the granting of the admission to trading of one business day, companies going public and their advisors often reach out to the FSE at an earlier point in time to discuss and agree on the details of the listing application. Such a procedure enables the company to more effectively control the process with many parties involved. In order to enable the listing of the shares of the company, their corporate legal

advisors have to take care of an amendment of the articles of association of the company to exclude the right of the shareholders of the company to receive individual share certificates. Global share certificates are executed and, if the company going public is a German company, delivered to Clearstream Banking AG, Frankfurt am Main. In this context, each shareholder gets their number of shares booked into their custody account. While the admission to trade and its publication are the basis of the listing of the shares on the Regulated Market of the FSE, the first day of trading is usually the first business day thereafter.

Immediately after the listing, the settlement occurs by way of book-entry delivery of the company's shares and payment of the purchase price within two or three business days. The group of underwriters usually determines one of them to act as a stabilisation manager. The stabilisation manager is allowed to make overallocments and take stabilisation measures in order to avoid high volatility in the price development of the company's shares once trading has started. The stabilisation manager acts in accordance with the EU Market Abuse Regulation No. 596/2014 ("MAR") and the regulatory technical standards issued. Such measures support the stability of the market price of the company's shares and provide control over any selling pressure. The stabilisation period ends 30 days after the first day of trading at the latest.

Regulatory architecture: Overview of the regulators and key regulations

Authorities

BaFin is the competent supervising regulator in Germany. As described, it reviews and approves prospectuses of German companies. The competent regulator for companies from other EU/EEA Member States that intend to go public in Germany is the respective financial supervisory authority of the Member State. These financial supervisory authorities align with BaFin and where they approve a prospectus, BaFin must approve it as well. Where a prospectus is "passported" into Germany it may be used for a public offering or stock exchange listing in Germany. For these purposes, the foreign regulator, at the issuer's request, notifies both BaFin and the European Securities and Markets Authority (ESMA) within one working day following approval and submits an electronic prospectus copy. In these cases, BaFin only reviews the completeness, consistency and clarity of the prospectus. BaFin does not verify the accuracy of the information included in the prospectus. Where BaFin considers specific information necessary for the protection of investors, it can require the company to include such information in the prospectus in addition.

The FSE is the competent authority for granting admission to trading on the Regulated Market, but it may neither challenge nor reject a prospectus that was approved by BaFin or another EU/EEA regulator.

Legal framework for prospectuses

The EU-wide harmonised legal framework for prospectuses is laid out in the Prospectus Regulation as well as the Commission Delegated Regulation (EU) 2019/979 and the Commission Delegated Regulation (EU) 2019/980 (the "Delegated Regulations"). The Delegated Regulations are directly applicable in each EU Member State. When preparing a prospectus, ESMA's "Guidelines on risk factors under the Prospectus Regulation" and "Questions and Answers on the Prospectus Regulation" should also be considered, together with ESMA's previous guidance relating to the EU Prospectus Directive 2003/71/EC (to the extent it is compatible with the Prospectus Regulation as the Directive is no longer in force).

The German Securities Prospectus Act (*Wertpapierprospektgesetz*, WpPG) determines the legal framework of the provisions regarding prospectus liability and sanctions in case of

violations. In general, prospectuses must contain the necessary information that is material to an investor for making an informed assessment of (i) the issuer's assets and liabilities, profits and losses, financial position and prospects of the issuer, (ii) the rights attaching to the securities, and (iii) the reasons for the issuance and its impact on the issuer. The WpPG requires that information in the prospectus shall be presented in an easy to analyse, concise and comprehensible form. Prospectuses may be drawn up in English but must include a German translation of the prospectus summary.

Listing

The German Stock Exchange Act (*Börsengesetz*, BörsG), the German Stock Exchange Listing Regulation (*Börsenzulassungsverordnung*) and the FSE's Exchange Rules (*Börsenordnung*) lay out the requirements for a listing on the Regulated Market of the FSE. A company intending to list its shares must file the application for the admission to trading together with a credit or financial institution or another enterprise operating within the meaning of Sections 53 para. 1 sentence 1 or 53b para. 1 sentence 1 of the German Banking Act (*Kreditwesengesetz*) that fulfils the requirements set forth in Section 32 para. 2 BörsG. The approved prospectus as well as certain other documents must be handed in together with the application. The minimum requirements for an admission to the Regulated Market of the FSE are as follows: (i) the expected market value of the shares to be admitted must amount to at least EUR 1.25 million; (ii) the issuer must have been in legal existence for a minimum of three years (exceptions may be granted); (iii) the shares must be freely tradable; and (iv) a minimum free float of 25% following admission must be secured (subject to certain exceptions; however, there must be at least 100 individual shareholders).

Public company responsibilities

After the IPO, listed companies are subject to specific post-admission obligations:

MAR

Regulation of inside information and *ad hoc* notifications (i.e., the disclosure of material non-public information that is expected to have a significant effect on the share price), insider trading and managers' transactions as well as market manipulation is found in the MAR. Each company that has requested the admission to trading on the Regulated Market has to ensure compliance with the MAR. Therefore, its provisions already apply prior to the admission to trading. The legal framework is supplemented by the German Securities Trading Act (*Wertpapierhandelsgesetz*, WpHG) and the German Securities Trading Reporting and Insider List Regulation (*Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung*).

WpHG

Sections 33 *et seq.* WpHG contain information obligations of shareholders to be provided immediately and within four trading days at the latest both to the company and BaFin, if shareholder voting rights (directly or indirectly) reach, exceed or fall below the statutory thresholds of 3, 5, 10, 15, 20, 25, 30, 50 or 75%. These requirements already have to be maintained in the time period shortly before the IPO. While several provisions of shareholders' agreements may have to remain in place until the very moment of admission to trading, certain provisions may be seen as voting agreements, leading to the assumption of an acting in concert, which in turn may result in information obligations. To prevent these, the respective provisions have to be terminated for a point in time before the legal framework of the WpHG becomes applicable. In addition, German companies are required to publish annual and semi-annual financial reports (see Sections 114 *et seq.* WpHG).

Prime Standard

Issuers whose shares are listed in the Prime Standard must, *inter alia*: (i) submit quarterly financial statements within two months of the end of the reporting period; (ii) hold at least one analyst conference per year; (iii) continuously update and publish a financial calendar; and (iv) fulfil all post-admission obligations in both German and English.

Other laws

Section 161 AktG requires domestic issuers to publish a declaration of compliance with the corporate governance recommendations set forth by the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). The AktG and the German Commercial Code (*Handelsgesetzbuch*) set forth several provisions that apply for listed companies and the requirements for the financial reporting of listed companies. Such provisions include, *inter alia*, the obligation to increase the share of female members in a company's management and supervisory boards and currently undergo several public initiatives to further enable gender equality in governing bodies of public companies.

Potential risks, liabilities and pitfalls

Prospectus liability

There are risks involved in the preparation of the prospectus. The information contained therein must be correct and complete. If any material information is incorrect or incomplete, the purchaser of shares may have a claim for reimbursement of the purchase price in exchange for any shares acquired. The parties that have assumed responsibility for the prospectus or who have initiated the preparation of the prospectus (see Section 9 para. 1 sentence 1 no. 1 and 2 WpPG) bear the responsibility. Those parties are mentioned in the responsibility statement in the prospectus. Normally, this relates to the company and the underwriters. Selling shareholders should carefully consider their involvement in the prospectus drafting process if they do not want to expose themselves to such liability.

Cost-sharing and indemnification agreements, IPO insurances

If a company includes primary and secondary offerings in an IPO, the liability risks and costs involved in such an IPO have to be shared between the company and the selling shareholders. The German Federal Court ("BGH") ruled in its "Telekom III" decision of 31 May 2011 that the assumption by the company of the prospectus liability risk *vis-à-vis* the underwriters in connection with a secondary offering of existing shares held by shareholders constitutes an illegal distribution of share capital to such shareholders (see Section 57 para. 1 sentence 1 AktG), unless they indemnify the company from any prospectus liability. For the same reason, the selling shareholders have to participate in the costs of such an offering. Therefore, it is customary that the issuer and the selling shareholder(s) enter into cost-sharing and indemnification agreements. In case of a combined (i.e., primary and secondary) offering, the IPO costs must be shared *pro rata* between the company and the selling shareholders, and the latter must assume the prospectus liability risk accordingly. Often, the prospectus liability risk can be insured through the purchase of a "Public Offering of Securities Insurance".

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