Initial Public Offerings

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Germany

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Introduction

The decision for a private company to go public and to list their shares on a stock exchange provides a number of advantages. The company may raise a large volume of capital and get broader access to further equity funding; it diversifies its range of financing options and might become less reliant on bank financing; it might use its shares as acquisition currency and to incentivise employees; increased transparency may have positive effects on the perception of the company by its customers, suppliers and prospective employees, and an Initial Public Offering ("IPO") may allow a business to grow faster and thrive in a competitive international environment. In addition, an IPO provides an exit strategy for private equity sponsors and other shareholders. In sum, an IPO, securing a long-term source of financing less reliant on banks, forms a key element in a sustainable corporate strategy and could lay the foundations for future success.

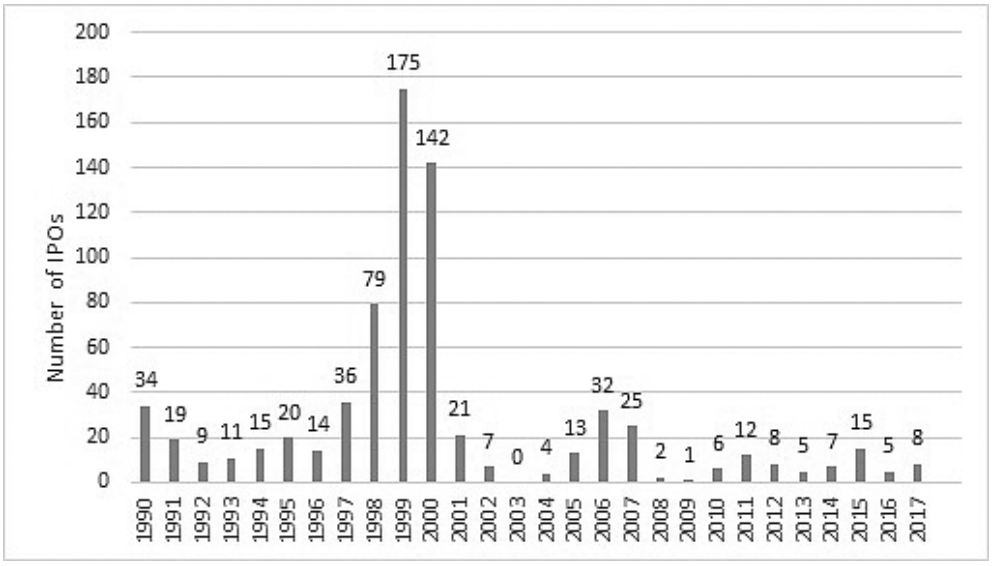
In Germany, companies may trade their shares at nine stock exchanges, which are the regional stock exchanges in Berlin, Düsseldorf, Hamburg, Hannover, Munich and Stuttgart in addition to the most important stock exchange, being the Frankfurt stock exchange ("FSE"). Trading platforms at the FSE, which are Xetra and Börse Frankfurt, comprise more than 95% of all German shares and around 85% of all foreign shares. Founded in the 16th century, the FSE became one of the leading international stock exchanges for securities and bonds and it is a pre-eminent location for companies of all different industries.

At the FSE, issuers may choose between admission to the regulated market and the open market. For admission at the regulated market, issuers may choose between the sub-segments General Standard and Prime Standard, with the Prime Standard bearing additional admission follow-up obligations and setting the highest transparency requirements, which also have to be complied with in the English language. The Prime Standard is therefore tailored to suit companies wishing to position themselves specifically towards international investors. The Management Board of FSE will decide upon application on the admission to the Prime Standard, which gives access to the selected indices DAX®, MDAX®, TecDAX® and SDAX®. Issuers in the General Standard segment meet the high transparency requirements of the Regulated Market without being specifically focused on international investors. Thus the General Standard is primarily meant for medium-sized and large companies who focus on mainly domestic investors.

The particular access requirements for the Frankfurt stock exchange, as well as the follow-up obligations, are set forth in the German Stock Exchange Act (*Börsengesetz*, "BörsG"), the German Stock Exchange Admission Regulation (*Börsenzulassungs-Verordnung*, "BörsZlVO") as well as in the Exchange Rules for the FSE (*Börsenordnung für die Frankfurter Wertpapierbörse*, "BörsO FWB").

Admission to the open market and the related standard "Scale", which was introduced in March 2017, is rather suitable for small and medium-sized enterprises (SMEs). The open market provides for lower listing requirements and ongoing obligations as well as low transparency standards. The new standard scale, which replaced the Entry Standard, offers an efficient equity financing option tailored to the needs of SMEs. It provides access to investors, both domestic and international.

Even though the regulatory framework is highly supportive of IPOs, the number of successful IPOs in Germany on the regulated market (Prime Standard) has varied over the years, as can be seen in the following table:



After three extraordinary years in 1998 to 2000, which reflects the new economy boom, and except for the financial crisis in 2008 and 2009, the average number of IPOs recently amounts to eight to 10 successful IPOs per year. It can be assumed that the number of IPOs which have been prepared, but not been launched, is two to three times as high. The reason for this discrepancy is twofold. On the one hand, the so-called IPO windows which allow for a launch, depending on the recorded date of the financial statements of the company wishing to go public, are quite limited. Sometimes the company and the accompanying banks focus on a time period of two to three weeks, which are, due to the lengthy preparation schedule, fixed and only to a certain extent flexible. If the market is insecure due to economic tendencies, global crises or industry-specific developments, the envisaged IPO window might fall apart.

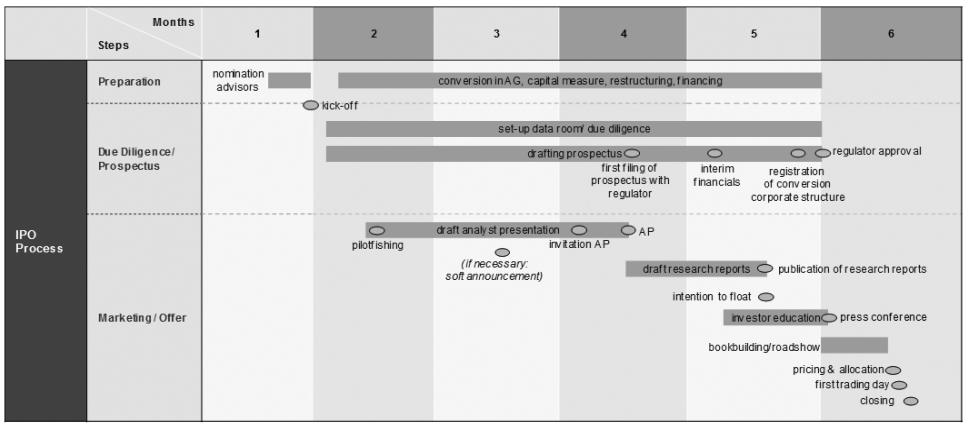
On the other hand, the high number of aborted IPOs is partly due to dual-track exits. Given the high evaluations of listed peer companies, many sponsors prepare an exit for portfolio companies through a trade sale and an IPO simultaneously (so-called dual-track exit). The IPO track serves as a floor for the pricing and determines a strict timeline for the preparation of both tracks. Due to the IPO discount, the fact that the IPO track does not allow an exit in one go and/or special circumstances that might occur, such as, for example, a drop in the share prices of peer companies, sponsors finally often opt for the trade sale exit.

The IPO process: Steps, timing and market practice

An IPO offers a world of opportunities; however, the step of going public must be prepared thoroughly. The IPO process starts long before the first day of trading. From the decision to go public until the initial listing, issuers must undergo a number of processes. Among other steps, these include: recruiting appropriate advisors and banks; assessing whether the requirements for going public are met; elaborating the issuing concept and the equity story; preparing the IPO vehicle to be IPO-ready; preparing the required documentation; and successfully offering the shares.

Timeline

The typical timeline for an IPO process looks as follows:



Preparation time for an IPO requires usually five to six months. In case the company has already set up a data room, for example, for a preceding bond or M&A process, and/or has issued a bond with a respective comprehensive bond prospectus, preparation time can be shortened, respectively. The setting of the launch date is generally driven by the 135-Day Rule, which stipulates that settlement of the IPO must be no later than 135 days after the date of the last financial statement included in the prospectus.

Step 1: Preparation phase

Starting with the preparation phase means, first of all, selecting the right advisors. For companies envisaging a listing at the regulated market, they will need to appoint a credit institution, financial services institution or a company that performs its business activities pursuant to sec. 53 para. 1 clause 1 or sec. 53 b para. 1 clause 1 of the German Banking Act (*Kreditwesengesetz*, KWG). The credit institution will act as the accompanying bank and usually as the global coordinator who supports the issuer in preparing the IPO, i.e. define the equity story, draft the analyst and road show presentation, approach investors, advise the issuer as to timing and pricing, sign the prospectus, underwrite the offered shares, and apply for listing at the stock exchange.

Depending on the size of the IPO and the issuer, additional banks might join and support the IPO as joint and co-bookrunners. Accountants will assist to ensure that the financial statements to be disclosed in the prospectus meet the accounting standards and are in line with the requirements under the prospectus regulation. Legal advisors are usually mandated for the issuer (issuer's counsel) as well as the underwriter(s) (underwriter's counsel). They will set up the corporate governance structure of the IPO vehicle required for the IPO, assist

with the due diligence, prepare all relevant documentation, in particular the prospectus, and advise on the implications and obligations in connection with the IPO and the listing. Depending on the size of the IPO and the industry of the issuer, communications advisors might establish and/or increase the relevant publicity of the issuer. The authoritative party to the IPO will be the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin"), which approves the prospectus as well as the management of the German stock exchange, which decides on the admission of the company to trading on the stock exchange, as well as its inclusion into the respective sub-segment.

The right corporate, capital and financing structure of the issuer is key in the preparation of an IPO.

Right from the beginning, the issuer, together with its advisors, should focus on the corporate IPO-readiness of the issuer. This refers to the change of legal form into a stock corporation (*Aktiengesellschaft*) and the amendment of the articles of association to reflect the standard for public companies. In addition, the right composition of the supervisory board (gender quota, independent member, etc.) needs to be implemented and the management contracts, in particular the compensation, should be in line with the German Stock Corporation Act (*Aktiengesetz*, "AktG") and the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). In addition, the issuer might want to set up employee participation programmes, stock option or phantom stock programmes for the management and key employees. Even though the appropriate corporate governance needs only to be implemented shortly before the launch of the IPO, preparation time should not be underestimated.

The capital structure of the issuer has to allow the share price to be in the normal range (€10 to €30). This might require the conversion of reserves or a shareholder loan into share capital, or even the merger of shares in order to reduce the current number of shares. Even though the implementation of the capitalisation can be delayed until the end of the offer period, the company should discuss these issues upfront. In addition, the financing structure of the company should be addressed right at the beginning in case existing financing arrangements need to be amended or extended.

Step 2: Due diligence and prospectus

In parallel, the issuer will set up a data room and the parties will commence due diligence and drafting the securities prospectus. Due diligence and the drafting of the securities prospectus are the most time-consuming steps in the IPO preparation and may require up to four months. The prospectus is an information document and has to contain the legally regulated information which is necessary to put the investors in a position where they can form a true opinion about the securities they are offered and, above all, about the risks connected to these securities. The prospectus shall, on the one hand, exclude a potential prospectus liability of the issuer and, on the other hand, serve as a marketing document for the IPO. It will form the basis for the analyst presentation to be drafted by the underwriter(s) and for the investor's decision to invest in the securities or not. Approval of the prospectus by BaFin requires a review process which needs to be agreed with BaFin upfront. The approval process with BaFin usually takes six to eight weeks from the first submission until approval.

It is not possible to launch an IPO without a prospectus unless it is exempted under the German Securities Prospectus Act (*Wertpapierprospektgesetz*, "WpPG"). An exemption is stipulated, *inter alia*, for a private placement to only qualified investors or to fewer than 150 non-qualified investors. In addition, the new prospectus regulation, which came into force in July 2017, contains further exemptions related to small IPOs which have a volume below

€1m and stipulates simplified prospectus requirements for issuers which can be considered SMEs and which will not be listed on the regulated market.

Step 3: Marketing and offer

In parallel with the review process of the prospectus, the underwriter(s) starts with so-called pilot fishing in order to get initial feedback from selected investors on a potential IPO of the issuer. If the investors communicate interest to invest in the shares, the underwriters continue with preparing and distributing the analyst presentation in order to provide analysts and researchers with the relevant information. Research reports will be published hand-in-hand with the company's first official publication to the market of its so-called "intention to float" ("ITF").

Approaching approval and publication of the prospectus, the "underwriting agreement" will be finalised, determining the agreement between the issuer, the selling shareholder(s), if any, and the underwriters, *inter alia*, as to the terms of the offering, the placement of the shares, the termination rights of the underwriters, indemnity clauses and representations and warranties from the company. It usually also contains lock-up obligations of the company, its directors and any selling shareholder, which are standard for a period of 6–12 months but not obligatory.

After having received approval by BaFin, the prospectus needs to be published immediately whereupon the public offer starts. During the subsequent subscription period, which usually lasts for two weeks, the company will present itself accompanied by the banking syndicate at various finance venues to give interested investors an opportunity to collect information regarding the securities and the company. These so-called "road shows" focus on potential investors by means of professional marketing and individual contacts to certain investor groups. At the end of the subscription period, the amount of securities that will be sold can be determined and, unless the price has been fixed at the beginning of the subscription period, which is rather unusual, the underwriter(s) and issuer agree on the final offer price.

The placement of the securities is among the most important functions of the banking syndicate and is critical for going public successfully. In the offering process it is the company's objective to sell the complete amount of stock to be placed at a price attractive to both company and investors. In case of a private placement, as opposed to a public placement, the stock to be placed is offered for sale exclusively to a limited circle of investors, and the offering will not be published. This has become quite common in recent years since it allows the company to remain on a confidential basis as long as possible and to disclose its intention only shortly before listing. If appropriate, the private placement may be complemented by a short official public placement immediately before settlement.

Price determination is among the most important steps in the course of a securities issue, as the price will determine the proceeds and, thus, the success of the issue. The offering price can be determined as a fixed price, through a so-called tender or auction procedure, or as part of a book building procedure.

When the fixed price procedure is chosen, the company and the syndicate members will fix an offer price which forms the base for the public offering and will be communicated to the market together with the prospectus. This method of price determination bears the disadvantage that company and syndicate members will not be in a position to react to a changing market environment in the course of the offering. For placing a securities issue through the so-called tender or auction procedure, the offer is based on a minimum price as a lower limit. During the subscription period, interested investors may enter a purchase bid at minimum price or above. However, investors are required to have sufficient knowledge

of the capital market and the current market situation in order to submit an adequate bid for the securities, which makes it more difficult for the syndicate members to successfully place the securities. The most common procedure is the book building procedure, which is based on a price range to be published by the company at the beginning of the offer period. The price range will be ascertained in advance by the syndicate members, based upon the due diligence performed in combination with a targeted investors' survey.

During the road show, all bids received within the price range are entered into a central order book. After the period's expiration, the offer price is determined according to the existing bids. In case the number of purchase bids should exceed the number of stock to be issued by the company, allocation criteria will be determined. Thus, this kind of price determination leaves the company with the option to influence the kind and spread of their future shareholders in the course of deciding on the offer price. In the course of the allocation, the company and the syndicate manager decide if and how many stock an investor shall receive based on the bid it has submitted. For the final allocation decision, the intended shareholder structure as well as the achievement of a sufficient free float of the securities will be the central criterion. The latter is not only a requirement for the securities' admittance for stock exchange trading on the regulated market, but also for well-functioning stock trading in general.

As a variation of the classic book building procedure, so-called "decoupled book building" has developed. For this method, the subscription period is shortened to a few days and the price range is published only shortly prior to opening the order book. At this time, usually the road show has ended. Therefore, the marketing of the securities is decoupled from the determination of the price range and the offer price. In doing so, the risk that the offer price might be put under pressure, e.g. from public opinion, is limited to the stage of the shortened subscription period.

Some companies use the option to reserve part of the securities offered to the public for employees of their company, or of affiliated or partner companies of the issuer, and to allocate stock preferably to these investor groups in the scope of "friends and family" programmes.

Generally, the allocation takes place on the evening of the last day of the placement period directly following the closing, and is published through electronic media on the same day.

Prior to the start of trading, the securities have to be admitted to the stock exchange. In order to safeguard the formation of a liquid market in the stock to be admitted and, thus, to guarantee orderly trading, the following minimum listing requirements should be considered for the regulated market: (a) reporting history dating back at least three years; (b) minimum market value: €1.25m; (c) minimum issuing volume: 10,000 shares; and (d) minimum free float: 25% (exemption possible). As a general requirement, the company shares have to be held by at least 100 shareholders. Admission to trading on the open market requires a minimum share capital of €250,000 and a minimum free float of at least 30 initial shareholders.

Regulatory architecture: overview of the regulators and key regulation

The regulatory framework for an IPO in Germany is harmonised with the regulations of the European Union (EU). The main regulatory acts are the German Securities Prospectus Act (WpPG) and the German Stock Exchange Act (BörsG). Admission to trading is further regulated by the German Stock Exchange Admission Regulation (BörsZlVO) as well as in the Exchange Rules for the FSE (BörsO FWB).

The central part of the IPO is the prospectus, which must be drafted in accordance with the WpPG and Commission Regulation (EC) No. 809/2004 of 29 April 2004 (last amended by delegated regulation (EU) No. 2016/301) implementing Directive 2003/71/EC of the European Parliament and of the Council, last amended by (EU) No. 2016/301 (the "Prospectus Directive"). Further details as to the layout and content of the prospectus are laid out in the ESMA recommendations and Questions & Answers published by ESMA. On 30 November 2015, the European Commission, as part of its Capital Markets Union action plan and its commitment to simplify and harmonise EU laws, adopted a proposal for a new prospectus regulation, intended to replace the Prospectus Directive, along with its corresponding implementing measures. The new regulation (EU) 2017/1129 of the European Parliament and of the Council came into force in July 2017 and will apply from 21 July 2019, except for Art. 1 para. 5 subpara. 1 lit. a to c and subpara. 2 (20 July 2017) as well as Art. 1 para 3 and Art. 3 para. 2 (21 July 2018), which are immediately applicable. The new regulation amends the disclosure requirements for the prospectus and aims at simplifying the rules for companies wishing to issue shares or debt on the market and reduces the costs of preparing a prospectus. However, it does not generally change the current disclosure obligations of the issuer in accordance with the Prospectus Directive.

Pursuant to the general provision in sec. 5 para. 1 WpPG, the prospectus has to be written in an easily analysable and comprehensible manner. The order of the different chapters of the prospectus, and the content to be addressed, are laid out in the Prospectus Directive and quite standardised.

However, certain issues need to be addressed in advance in order to be able to insert the relevant information in the prospectus. This refers in particular to the financial information required in accordance with the Prospectus Directive. Regular financial disclosure obligations refer to the audited historical financial information covering the latest three financial years of the issuer to be prepared according to the International Financial Reporting Standards ("IFRS"). If the issuer has published quarterly or half-yearly financial information, this must be included as well. If the prospectus is dated more than nine months after the end of the last audited financial year, it must contain interim financial information covering at least the first six months. In case of a significant gross change, for example due to a transaction, the issuer has to present *pro forma* financials which need to be examined by an auditor. German issuers are usually obliged, in addition to the consolidated financial statements prepared in accordance with IFRS, to also insert unconsolidated financial statements prepared in accordance with the German Commercial Code (*Handelsgesetzbuch*, "HGB") in order to meet the requirements regarding information for the assessment of dividend distribution.

The competent authority for the approval of the prospectus is the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin).

The approved and published prospectus is also the legal basis for the admission of securities to trading on a Regulated Market (sec. 32 para. 3 BörsG). The written application to the Deutsche Börse for admission for trading needs to be filed by the company together with the syndicate bank. The syndicate bank as co-applicant must be a credit institution, financial services institution or a company that performs its business activities pursuant to sec. 53 para. 1 clause 1 or sec. 53 b para. 1 clause 1 of the German Banking Act (KWG) and must be admitted for trading on a German securities exchange. The documents to be submitted are listed in sec. 48 para. 2 BörsZulV. Companies submitting an application for admission to the regulated market (General Standard) can simultaneously apply for admission to the sub-segment Prime Standard.

Public company responsibilities

An IPO results in several continuing responsibilities and obligations, which need to be carried out and respected by the issuer post-IPO. These obligations and responsibilities include insider trading restrictions, *ad hoc* disclosure and publication and notification requirements. In Germany, these obligations are governed by the Market Abuse Regulation (*Marktmissbrauchsverordnung*, "MAR"), which came into force on 3 July 2016, and the German Securities Trading Act (*Wertpapierhandelsgesetz*, "WpHG").

The provisions of the MAR apply for companies listed on the regulated market as well as the open market, whereas notification obligations under the WpHG only apply for companies listed on the regulated market.

Pursuant to Art. 17 MAR, issuers are obliged to disclose inside information, i.e. information of a precise nature, which has not been made public, relating directly to the issuer, and which, if it were made public, would be likely to have a significant effect on the prices of its financial instruments or on the price of related derivative financial instruments. Insider information must be disclosed as soon as possible, in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, by the officially appointed mechanism as well as on the website of the issuer for a period of at least five years (*ad hoc* disclosure). The disclosure may be delayed under very limited circumstances, such as not to prejudice the issuer's legitimate interests or in order to preserve the financial stability of the issuer or the stability of the financial market. Regarding the decision to delay the disclosure, the company is required to comprehensively record such decision, including information about who was responsible for the decision and how the conditions of delaying the disclosure were satisfied. The inside information must be disclosed without undue delay, when the conditions of the temporary delay are no longer fulfilled. The obligation to publish may already be triggered by certain specific rumours; if the non-disclosure can no longer be guaranteed, the source of the rumours is irrelevant.

The issuer is further obliged to keep records, so-called "insider lists" (Art. 18 MAR). These lists must include details of every person who has been provided with inside information and is working for the issuer, such as executives bodies or employees as well as external advisors like auditors and legal advisors.

According to Art. 19 MAR, the issuer is obliged to disclose any subsequent transaction(s) once a total amount of EUR 5,000 has been reached within a calendar year relating to purchases of shares or debt instruments of the issuer or to derivatives or other financial instruments linked thereto, of persons discharging managerial responsibilities and persons closely associated with them (directors' dealings). The transaction must be disclosed no later than three business days after the date of the transaction. Dealing of such persons is, in any case, not permitted during a 30-day "closed period" prior to the announcement of an interim financial report or a year-end report by the company.

As far as these responsibilities concern SMEs, the Commission started a consultation process to discuss ways of easing the burdens imposed on SMEs in order to simplify market participation for them.

Beside the obligations under the MAR, the WpHG determines further post-IPO obligations of the issuer.

According to sec. 33 *et seq*. WpHG, shareholders are obliged to notify the issuer in case their voting rights in the issuer, or financial instruments with regard to voting rights in the issuer (or voting rights attributable to the shareholders), exceed, reach or fall below

certain thresholds (3% (only with regard to voting rights), 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%). The issuer must publish the voting right notifications received from its shareholders no later than three business days after the receipt of such information and inform BaFin as well as the companies register (*Unternehmensregister*).

Additionally, the issuer is obliged to publish and to inform BaFin and the companies register about any change in the total number of voting rights, including the decrease and increase of voting rights, without undue delay and no later than two business days after the issuer has received the information (sec. 41 WpHG).

Issuers are further obliged to publish the convening of the shareholders' meeting in the federal gazette (*Bundesanzeiger*). This publication must include the agenda, the total number of shares and voting rights at the time of the convening, and the shareholders' rights regarding the participation of the shareholders' meeting (sec. 49 para. 1 sentence 1 no. 1 WpHG).

Furthermore, details of distribution and payment of dividends, issue of new shares, and exercise of conversion, subscription and cancellation rights must be published in the federal gazette without undue delay (sec. 49 para. 1 sentence 1 no. 2 WpHG).

Finally, all changes in the rights attached to the admitted securities and information published in other countries must be published without undue delay and BaFin and the companies register must be informed (sec. 50 para. 1 sentence 1 no. 1, 2 WpHG).

In addition to the regulations mentioned above, the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) presents essential statutory regulations for the management and supervision of German listed companies and contains, in the form of recommendations and suggestions, internationally and nationally acknowledged standards for good and responsible corporate governance. The recommendations and suggestions are not mandatory. Through the declaration of conformity pursuant to sec. 161 AktG, the issuer has to disclose and explain any deviation from the recommendations – not the suggestions – in the form of an annual declaration of conformity (comply or explain).

Potential risks, liabilities and pitfalls

Under the WpPG (sec. 21 WpPG), those who assumed liability for the prospectus (i.e. the issuer and the underwriters), as well as those persons who ordered the issuance of the prospectus, will be held liable if material information for the assessment of the securities is incorrect or incomplete. Pursuant to sec. 21 para. 1 WpPG, the incorrect or incomplete information has to be of significant importance for the evaluation of the securities. However, the prospectus liability does not apply if the incorrectness or incompleteness of the prospectus was not caused by wilful intent or gross negligence. In order to prevent any potential risk, underwriters focus on the submission of legal and disclosure opinions by the legal counsels, officers' certificates, due diligence documentation and comfort letters by the accountants, which might help in building a legal defence and contribute to a discharge from liability.

The relevant event causing liability pursuant to sec. 21 WpPG is the purchase of securities, which are admitted to stock trading, based upon an incorrect or incomplete prospectus. The contractual purchase transaction has to be concluded within six months following the publication of the prospectus and the initial listing of the securities, irrespective of whether it is a first or a subsequent purchase.

The purchaser is entitled to reimbursement of the purchase price plus the usual costs connected to such purchase in turn for reassignment of the securities. If the purchaser does not hold the securities any longer, it may demand the difference amount between the purchase price and sales price, including the costs usually connected with securities transactions. In both cases, the purchase price is limited by the initial offering price of the securities, sec. 21 para. 2 clause 1 WpPG.

The new prospectus regulation further provides for administrative sanctions in case of an infringement of provisions of the new prospectus regulation related to the content of the prospectus.

In addition to the prospectus liability resulting from the WpPG, prospectus liability might exist based upon the German Investment Act (*Vermögensanlagegesetz – Kapitalanlagegesetz*), the prospectus liability resulting from investment-related regulations and the prospectus liability provided by civil law.

In order to protect the issuer and banks from a prospectus liability, so-called IPO insurances cover all claims based on wrong statements or materials made or distributed in connection with the IPO as well as other actions made in connection with the preparation and implementation of an IPO. This also covers any indemnity claims by the underwriters against the issuer as well as costs of defence against claims. Insured persons are the issuer, selling shareholders, board members of the issuer, employees of the issuer as well as the underwriters (optional).

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