

New German Prospectus Rules applying to Rights Issues

Capital Markets Update

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Speed Read

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- As from 1 July 2012 German rights issues require a prospectus regardless of whether subscription rights are publicly traded or not.
- Reduced content requirements apply to prospectuses for rights issues on regulated markets.
- According to *BaFin* issuers admitted to trading on the regulated unofficial market segments (*Freiverkehr* - including Entry Standard) of the German stock exchanges currently do not qualify for such reduced disclosure.

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No Rights Issue without Prospectus

The issuance of statutory pre-emption rights to existing shareholders which issuance allows for the subscription of new shares was considered **not to constitute a public offer** of securities within the meaning of the German prospectus regime **in case there was no stock exchange trading of the subscription rights**. Such former interpretation leading to an exemption from the prospectus requirement under the German Securities Prospectus Act (*Wertpapierprospektgesetz – WpPG*) was shared by the German Regulator *BaFin* in the past.

As yet the undocumented rights offer was common practice and widely used in Germany. It was further facilitated by the fact that neither *BaFin* nor the Board of Admissions of the Frankfurt Stock Exchange required a prospectus for the admission to trading of the newly issued shares regardless of whether the issue was limited to 10 % of the issued share capital or not. In 2011 22 of the total 36 rights issues were implemented without publishing a prospectus. In the first six months of 2012 6 of the total 11 rights issues were implemented without a prospectus.

Due to recent changes in the European Prospectus Directive (Directive 2010/73/EU of 24 November 2010) and the European Prospectus Regulation (Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012) the German qualification of rights issues without public trading of the subscription rights not to constitute a public offer cannot be upheld for the future and a respective **prospectus exemption is refused by the German Regulator *BaFin* as from 1 July 2012**.

According to the new European settings **all types of rights issues** in particular including

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- rights issues to existing shareholders accompanied by a stock exchange trading of the subscription rights
- rights issues to existing shareholders **not accompanied by a public trading of the subscription rights**, as well as
- rights issues to existing shareholders accompanied by a private placement or a public offer of new shares to investors other than existing shareholders

will trigger the prospectus requirement under German securities laws.

Reduced Content Requirements (Proportionate Disclosure Regime)

The inevitable prospectus requirement is somehow moderated by the fact that the revised European Prospectus Regulation provides for a **reduced list of information to be contained in the prospectus (so called “proportionate disclosure regime”)** in case the prospectus addresses a rights issue and the issuer has shares of the same class already admitted to trading on (i) a regulated market or (ii) a qualified multilateral trading facility (MTF).

The **major relaxations** granted by the proportionate disclosure regime refer to:

- historical financial information to cover only the last financial year;
- no operating and financial review (OFR);
- no information on capital resources (cash flows, funding structure);
- only short description of principal activities and principal markets;
- no information on tangible fixed assets;
- no information on research and development;
- information on material contracts only for the last year preceding the publication of the prospectus.

Scope of Application

As to the question who will benefit from such new proportionate disclosure regime only few clarifying statements can be made yet:

- Rights issues to existing shareholders accompanied by a public offer of new shares to investors other than existing shareholders do not qualify for the proportionate disclosure regime.

- Rights issues to existing shareholders accompanied by a private placement of those shares where the respective subscription rights have not been exercised (**rump placement**) **do qualify** for the proportionate disclosure regime.
- The revised Prospectus Regulation requires specific criteria to be met by MTFs in order to allow issuers listed there to use the proportionate disclosure regime. According to a statement made by a *BaFin* representative **no German MTF trading platform (including the Entry Standard of the Frankfurt Stock Exchange) currently meets such criteria** and, therefore, currently only issuers listed on the regulated markets in Germany qualify for rights issues under the proportionate disclosure regime.
- The proportionate disclosure regime is **not available** for instruments other than shares, in particular not **for convertible bonds (Wandel-schuldverschreibungen)**.
- As from 1 July 2012 *BaFin* will approve prospectuses based on the new rules set out above regardless of whether the prospectus was filed prior to such date.

Useful links:

Directive 2010/73/EU of 24 November 2010 amending the Prospectus Directive (English):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>

Directive 2010/73/EU of 24 November 2010 amending the Prospectus Directive (German):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:DE:PDF>

Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending the Prospectus Regulation (English):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:150:0001:0065:EN:PDF>

Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending the Prospectus Regulation (German):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:150:0001:0065:DE:PDF>

German Securities Prospectus Act (Wertpapierprospektgesetz – WpPG) as amended (German):

<http://www.bundesgerichtshof.de/DE/Bibliothek/GesMat/WP17/B/BoersenG.html>

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