

GERMANY

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1. REGULATORY FRAMEWORK

1.1. Principal Regulators

Germany currently has no principal regulator of its securities markets; it also lacks a central or federal securities supervisory body.¹

Depending on the circumstances, the securities markets are supervised either by the German Central Bank (*Bundesbank*) or, to the extent listed securities are concerned, by one of the eight German stock exchanges, the most important of which is the Frankfurt Börse (*Börsen*).²

In addition, German courts have the power, upon complaint by a security holder, to hold the issuer liable pursuant to a variety of laws dealing with different kinds of securities and

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¹ Germany is a federal republic. The Stock Exchange Act, discussed *infra*, is a federal law, but is enforced by the German states (*Länder*). Amendment of the Stock Exchange Act to become a more comprehensive securities and exchange law, and the creation of a central securities regulatory body in Germany, are currently topics that engender considerable debate. It is unclear whether a regulatory body would take the form of a federal body, a committee of representatives of the states where the eight exchanges are located, or some other organization. As discussed *infra* section 4.2., the European Community ("EC") Insider Directive requires Germany to designate an "administrative authority" by the end of 1992. See Council Directive 89/592, 1989 O.J. (L 334) 30. On January 16, 1992, the German Ministry of Finance proposed adoption of comprehensive legislation that was aimed at establishing an "effective and internationally recognized" supervisory system of German securities markets by the end of 1992. It was contemplated that the supervisory system would be empowered with the authority to regulate securities and, if necessary, impose sanctions.

² In order to centralize the trading on the Frankfurt Stock Exchange and the seven regional exchanges under the umbrella of the Frankfurt Exchange, the German Exchanges AG were created in December, 1992.

their public distribution. For example, the Stock Exchange Act (*Börsengesetz*) provides that the issuer and the financial institutions, typically major banks, sponsoring the admission of the issuer's securities to a German stock exchange are liable to investors if they know, or due to their gross negligence fail to know, that material information contained in the disclosure documents is misleading or, due to their recklessness, incomplete.³

1.2. Principal Statutes, Regulations and Rules

No single coherent body of securities regulations currently exists in Germany. The principal laws and regulations relevant for securities issues conducted in Germany, or having a connection with Germany, and for the listing of such securities on a German stock exchange are as follows:

(i) the Stock Corporation Act (*Aktiengesetz*), which contains provisions regarding the issuance of securities by German stock corporations;⁴

(ii) the Stock Exchange Act (*Börsengesetz*), which governs the listing of securities on the official market (*Amtlicher Markt*), the top segment of the market on a stock exchange. Specifically the Act regulates prospectus delivery and certain ongoing disclosure requirements using liability provisions to police misleading or inadequate disclosure in the prospectus;⁵

(iii) the Stock Exchange Admission Regulation (*Börsenzulassungsverordnung*), which governs the content of the prospectus and describes the mandatory ongoing disclosure requirements;⁶

(iv) the Stock Exchange Regulation (*Börsenordnung*), which along with the Stock Exchange Act, governs the admission for listing of securities to the semi-official market (*Geregelter Markt*), the second segment of the market on a stock exchange;⁷

(v) the OTC guidelines, which, along with the Stock Exchange Act, govern the admission for trading of securities

³ Stock Exchange Regulation, BGBI I, §45.

⁴ See Stock Corporation Act, BGBI I, § 8 *et seq.*, 1089 (as amended).

⁵ Stock Exchange Act, BGBI I, 1412 (as amended).

⁶ Stock Exchange Admission Regulation, BGBI I, 2478.

⁷ See Regulation, *supra* note 3, at 1412.

on the over-the-counter market (*Freiverkehr*), the lowest segment of the market on a German stock exchange;⁸

(vi) the rules of the Central Capital Market Committee, which coordinate the issuance of domestic DM-denominated debt securities;⁹

(vii) the guidelines of the German Central Bank (*Bundesbankrichtlinien*), which govern the issuance of DM-denominated debt securities by domestic and foreign issuers;¹⁰

(viii) the Prospectus Act (*Verkaufsprospektgesetz*), which governs the primary public offering of securities that are either unlisted, or are admitted only to trading on the over-the-counter market;¹¹ and

(ix) the Banking Act (*Kreditwesengesetz*) which governs distribution, trading, and brokerage by financial intermediaries.¹²

1.3. Regulatory Philosophy

Regardless of the nationality of the issuer, no comprehensive body of rules for the issuance, offering and sale of debt securities exists in Germany.¹³ Other than the guidelines of the German Central Bank relating to domestic and foreign DM-denominated debt securities and the approval requirement of the Central Capital Market Committee relating to domestic DM-denominated debt securities (each described in more detail below), there are no specific legal rules for the issuance, offering and sale of DM-denominated debt securities. In particular, there are no requirements for government approval or registration. And, except for the rules of the Prospectus Act

⁸ VEREINIGUNG FRANKFURTER EFFEKTEHÄNDLER E.V., OTC GUIDELINES (1988).

⁹ GERMAN CENTRAL BANK, RULES OF THE CENTRAL MARKET COMMITTEE (Apr. 1986).

¹⁰ GERMAN CENTRAL BANK, BUNDESBANKRICHTLINIEN (July 1992).

¹¹ Prospectus Act, BGBI I, 2749.

¹² Banking Act, BGBI I, 1472 (as amended Dec. 29, 1992).

¹³ Because of the relatively small number of public companies in Germany, and the existence of mandatory subscription rights of the existing shareholders, private placements of equity securities are not very common in the domestic market and are not the focus of this summary. This chapter also does not focus on the distribution of shares in investment funds (domestic and foreign) pursuant to the Investment Companies Act and the Foreign Investment Companies Act.

relating to the primary public offering of securities that are not listed on one of the top two segments of the market on a German stock exchange, there is no legislation protecting investors.¹⁴

Disclosure, such as the delivery of a prospectus containing certain information regarding the issuer and the securities, is only required if the securities are either: (1) to be listed on one of the two top market segments on a German stock exchange, or (2) are the subject of a primary public offering to which the Prospectus Act applies.¹⁵ Therefore, different sets of rules apply for the public offering and the private placement of debt securities, depending upon whether the securities are to be listed or unlisted. In addition, a distinction must be made between domestic and foreign issues. The term "private placement," used by United States practitioners as a means to avoid registration, disclosure requirements (such as the preparation of a prospectus), or other government regulations by limiting the size of the offering or the class of investors to which the offering is made, has no direct counterpart under German law and can be appreciated only in relation to the types of German public and private offerings. The next part of this Article will discuss the different kinds of offerings that exist in Germany.

¹⁴ The relative absence, heretofore, of government supervision of German securities markets as compared to the U.S. experience is probably related to the very strong credit intermediation, securities distribution, and perceived role of German universal banks as market disciplinarians. Many German corporations have tended to finance their short and long-term borrowing needs through bank loans or bond issuances, not stock issuances (which, as noted, would be subject to preemptive rights). Even when bonds are issued, the banks, which are highly regulated, are the traditional distribution channels. The importance of the banks as a funding source, as well as their influence, due to a variety of other relationships, has arguably made them a greater vehicle of corporate governance and market discipline than the public securities markets. In the United States, by contrast, the securities markets serve this role since the scope of permissible bank powers in the United States tends to be limited by a fear of large concentrations of economic influence.

¹⁵ See Prospectus Act, *supra* note 11, § 1.

2. PUBLIC OFFERINGS

2.1. *DM-denominated Debt Securities by Domestic Issuers*

Until the end of 1990, the approval of the Ministry of Finance was required for the issuance, in Germany, by domestic issuers, of DM-denominated debt securities in bearer form.¹⁶ This requirement afforded retail investors a degree of protection, as approval was granted only to issuers with strong credit standings.¹⁷ However, on January 1, 1991, the approval requirement was repealed. Consequently, domestic DM issues of bearer debt securities are no longer subject to any restriction, aside from their issuance which is regulated by the guidelines of the German Central Bank and the approval of the Central Capital Market Committee (operating under the auspices of the German Central Bank) which is charged with ensuring orderly market conditions in the domestic bond market.

2.1.1. *Listed Securities*

a. Primary Listing: Official and Semi-Official Markets

If the debt securities are to be listed on one of the two top segments of one or more of the German stock exchanges, formal disclosure requirements (such as the delivery of a prospectus which is subject to a review procedure of the Admission Board of the relevant stock exchange) and ongoing reporting requirements (such as interim reports¹⁸ and ad-hoc reports regarding special events¹⁹) are required under the Stock Exchange Act and the Stock Exchange Admission

¹⁶ German Civil Code, BGB, § 795.

¹⁷ Debt securities issued by the Federal Republic or any of its states (*Länder*) and debt securities issued by domestic borrowers and registered in the name of the holder (*Namenschuldverschreibungen*) were, however, exempt from the approval requirement. Since German law imposes certain transfer procedures that complicate the trading of registered debt securities, they are not very common and, therefore, not the focus of this chapter.

¹⁸ Ongoing requirements regarding the filing of periodical interim reports apply only in the case of debt securities to be listed on the official market.

¹⁹ Reporting requirements regarding special events apply in the event of listings on the official and the semi-official markets.

Regulation.²⁰ An application for admission to listing of the securities must be filed by the issuer together with a sponsoring financial institution that is a member of the stock exchange.²¹ The issuer, as well as the sponsoring bank, are liable to investors for material information contained in the disclosure document that to their knowledge, or due to their failure to know, is either based on gross negligence, is misleading or, due to their recklessness, is incomplete.²² The disclosure requirements for the listing on the semi-official market are, however, not as strict as those applying to the listing on the official market. The preparation of a simplified form of a prospectus called a business report (*Unternehmensbericht*) is sufficient for such listings.²³

b. Primary Listing: OTC Market

If securities are admitted to trading on the over-the-counter market, no disclosure document is required; all that is required is an informal application of the sponsoring bank requesting the inclusion of the securities in the list of securities that may be traded on the over-the-counter market of the exchange.²⁴ The stock exchange only publishes its decision to admit the securities to the over-the-counter market. Because disclosure is not required in such instances, the Stock Exchange Act and the Stock Exchange Admission Regulation do not hold the issuer liable to investors for misleading or inadequate information concerning securities traded on the over-the-counter market. However, as described below, the Prospectus Act may require disclosure.

c. Secondary Listing: The Prospectus Act

Debt securities to be admitted to one of the three markets after the primary public offering has been completed are,

²⁰ One German peculiarity is the obligation to have the entire prospectus published, after approval by the admission board, in a newspaper designated for such purposes by the relevant stock exchange. This mandatory stock exchange paper is known as the *Börsenpflichtblatt*.

²¹ See Stock Exchange Admission Act, BGBI I, § 48.

²² See Regulation, *supra* note 3.

²³ See Stock Exchange Act, *supra* note 5, § 71.

²⁴ See OTC Guidelines, *supra* note 8, § 2.

however, from the beginning of such offering, subject to the provisions of the Prospectus Act (unless an exemption applies), which requires the publication of a prospectus containing the type of information that is usually published in a company business report (*Unternehmensbericht*).²⁵ The prospectus must be filed in advance of the offering with the relevant stock exchange.²⁶ This procedure enables prospective investors to receive information regarding the issuer and the securities. The issuer of these securities is liable under the same standards of the Stock Exchange Act for any misleading or incomplete disclosure as an issuer of securities with a primary listing on one of the two top segments of a stock exchange.²⁷

2.1.2. *Unlisted Securities: The Prospectus Act and its Exceptions*

Even if securities are not to be admitted to any of the top two segments on a German stock exchange, they are subject to the provisions of the Prospectus Act if they are placed by means of a public offering and there is no applicable exemption from the Prospectus Act.²⁸ The relevant stock exchange does not review the offering materials delivered by the issuer, but instead relies on the liability provisions of the Prospectus Act to ensure accurate disclosure of information regarding the issuer and the securities.

Therefore, with respect to listed securities, the Prospectus Act provides for broader investor protection than the laws and regulations governing disclosure. It requires the delivery of a prospectus in connection with (a) any primary public offering of unlisted securities or securities admitted to the over-the-counter market or (b) any offering of securities to be admitted to an exchange after the primary offering has been completed (in each case at least three business days before the public offer²⁹ commences), and imposes certain ongoing disclosure

²⁵ See Prospectus Act, *supra* note 11, § 1.

²⁶ See *id.* § 6.

²⁷ See *id.* § 13.

²⁸ See *id.* § 1.

²⁹ As to the three-business-day period, it is important to note that the Prospectus Act permits the publication of a prospectus which does not contain the final terms of the offer as long as it is published before, but not necessarily three business days before, the offer commences.

requirements, unless one of the following exemptions relevant to domestic issuers of DM-denominated debt securities applies:

- offer of securities to a limited group of investors;
- offer of securities to investors that purchase or sell securities for their own or third party accounts in the course of their business;
- offer of securities restricted to employees of the issuer or the issuer's affiliate;
- offer of securities with a minimum denomination of DM 80,000 or in minimum trading size of DM 80,000;
- offer of securities that qualify as a portion of an issue for which a sales prospectus within Germany has previously been prepared;
- offer of securities issued by sovereign, sovereign-related entity or an international organization, of which at least one member qualifies as a member state of the EC;
- offer of debt securities issued by a domestic bank or by the *Kreditanstalt für Wiederaufbau* (Bank for Recovery and Reconstruction) where such debt securities have been repeatedly issued during last twelve months (at least three public offerings within the EC are required);
- offer of securities in connection with a public exchange offer or a merger of corporate entities;
- offer of debt securities with a maturity of less than one year; and
- Euro-securities that are not publicly advertised or promoted and will not be sold to small investors. The term "Euro-security" is defined in the Prospectus Act as a security that (a) is underwritten and distributed by a syndicate, the members of which do not all have their registered office in the same country, (b) will be offered for the most part outside the country where the issuer has its registered office and (c) can be purchased only through a bank or another financial institution. The advertising prohibition does not prevent the publication of tombstone advertisements after the end of the offering period.³⁰

³⁰ See Prospectus Act, *supra* note 11, § 1.

Similar to the rationale of the private placement exemption of the U.S. securities laws, the Prospectus Act's exemptions are, at least partially, based on the theory that certain investors do not need the protection of legally imposed requirements for their investment decisions. Thus, large classes of offerings in Germany are exempt from the Prospectus Act. Consequently, the prospectus requirement of the Prospectus Act basically covers only domestic and foreign debt securities that are either (1) admitted to the over-the-counter market of a stock exchange; (2) unlisted or not yet listed; and (3) typically sold to retail investors. This is an extension of the previously existing protection for holders of debt securities listed on one of the top two segments of the German stock exchanges. Such holders were protected by the listing requirements of the Stock Exchange Act and the Stock Exchange Admission Regulation, such as the prospectus delivery requirement and certain ongoing disclosure requirements.

2.2. *DM-denominated Debt Securities by Foreign Issuers*

2.2.1. *Bundesbank Guidelines*

The German Central Bank recently implemented new guidelines for foreign issuers of DM-denominated debt securities.³¹ Although these guidelines are not legally binding, the German Central Bank expects banks and borrowers to comply with them. As of August 1, 1992, all requirements for such transactions, except those requiring the involvement of a German bank (German branches of foreign banks), have been eliminated. Foreign issuers are no longer required to employ German law, use the German clearing system, appoint a principal German paying agent, or list DM-denominated debt securities on a German stock exchange.³² Additionally, unless the foreign issuers are banks or other

³¹ See *Bundesbankrichtlinien*, *supra* note 10.

³² Most recently, German legal practitioners expressed their legal concerns with regard to whether the issues of DM-denominated debt securities that are not governed by German law comply with the German Consumer Protection Act if such notes are principally placed with German retail investors.

financial institutions conducting a business that constitutes "banking activity" under German law, they are not subject to the former. The new guidelines of the German Central Bank apply regardless of whether the issue is classified as a public offering or a private placement.

2.2.2. *The Prospectus Act*

The public offering of DM-denominated debt securities foreign issuers is also subject to the Prospectus Act, because the listing on one of the two top segments of the market on a German stock exchange, required by the guidelines of the German Central Bank, typically occurs after the completion of the public offering. Customarily, the exemption for Euro-securities from the Prospectus Act described above applies to the public offering of such securities. Furthermore, the Prospectus Act provides for the additional exemptions (listed above) and includes exemptions for the following foreign DM-denominated debt securities:

- debt securities issued by a bank located outside of Germany that (i) is doing banking business as defined in Section 1 of the German Banking Act; (ii) publishes annual reports on a regular basis; (iii) has been set up or is controlled pursuant to legislation from a member state of the EC or is subject to governmental supervision for the protection of its investors; and (iv) has publicly offered at least three issues of debt securities within the last twelve months; and
- debt securities issued by a corporate borrower or a legal entity located within the EC that (i) are subject to a government monopoly and have been set up or are controlled pursuant to legislation; or (ii) are securities whose principal and interest payments are guaranteed by one of the member states of the EC or one of its political subdivisions.³³

Even if a security qualifies under one of these exemptions, it does not mean that it is necessary to deviate from the common practice because, if the market requires, an offering

³³ See Prospectus Act, *supra* note 11, § 3.

document is often prepared on a voluntary basis. Issuers of debt securities ordinarily release prospecti where one has already been prepared for use in another jurisdiction as part of a multi-jurisdictional offering, or if it is thought that such disclosure may reduce liability risks. In the case of Euro-securities, however, distribution of the offering document must be limited since public promotion is not permitted.

2.2.3. Public Offerings in More than One EC Member State

If a foreign issuer wants to publicly offer debt securities in several member states, the Prospectus Act, if applicable, provides for an automatic recognition procedure.³⁴ This procedure allows the public distribution of the securities in Germany together with a German translation of the prospectus that has received approval by the other EC members. It applies to non-EC issuers as well as to those EC issuers that seek approval of the prospectus in a member country other than that of their principal place of business. If non-EC issuers wish to offer the securities in different countries of the EC, they may choose the member country whose appropriate authority will review and approve the prospectus.

3. PRIVATE PLACEMENTS

As mentioned above, the term "private placement" as used by the U.S. financial community has no direct equivalent under German law. In Germany, the principal source of regulation of disclosure requirements for the issuance of debt securities has been the appropriate stock exchange and its corresponding listing requirements. Unlike the U.S. system of securities regulation, Germany does not have a governmental body such as the Securities and Exchange Commission (the "SEC") to police the issuance of debt securities.³⁵

Although, the term "private placement" is not legally defined in Germany, the concept (*Privatplazierung*) is recognized in several contexts. For example, the German Central

³⁴ See *id.* § 14.

³⁵ Recently, however, the German Ministry of Finance has proposed to establish a German Securities Market Supervisory Authority. Yet, at this point, it is unclear when such an authority will be set up and when the legislation related thereto will be implemented.

Bank has adopted the position that privately placed DM-denominated debt securities need not be listed on a German stock exchange. Moreover, it is generally understood that only initial placements with a predefined group of purchasers qualify as private placements for this purpose. There is, however, no requirement regarding the sophistication, number or institutional status of the investors in that group. In this sense, the placement is "private" only because it cannot be said to be "public."

The Prospectus Act also embodies a concept of "private placements," albeit without actually using the term.³⁶ This concept of "private placements" is more akin to the usage of the term in the U.S. securities laws parlance in that it applies to certain types of placements, primarily those with large sophisticated investors, which do not need the protection of the disclosure requirements imposed by the Prospectus Act.

3.1. DM-denominated Debt Securities by Domestic Issuers

Before the approval requirement of the Ministry of Finance was repealed in 1991, it hindered the development of a true domestic private placement market in bearer debt securities. Requiring approval involved a time-consuming administrative process and was fairly rigid. Corporate issuers were subject to adverse trade tax rules for interest payable on long term debt. Responding to the inflexibility of the process, companies issued "certificates of indebtedness" (*Schuldscheine*) which under German law are transferable loans, not negotiable bearer securities, and were therefore not subject to the approval requirement.³⁷ Following the repeal of the approval requirement, a substantial domestic private placement market has developed for DM-denominated commercial paper ("CP"). This market is exempt from the requirements of the Stock Exchange Act, the Stock Exchange Admission Regulation and the Prospectus Act.³⁸

Under U.S. practitioners' standards, debt securities that

³⁶ See discussion *supra* section 2.1.2.

³⁷ *Schuldscheine* are not considered notes under German law. The *Schuldscheine* market is expected to continue to be an important market for a variety of government financing.

³⁸ See Prospectus Act, *supra* note 11, § 4(1), No. 8.

are (a) not listed on one of the two top segments of the market on a German stock exchange; and (b) are either exempt under the Prospectus Act³⁹ or not publicly offered pursuant to the Prospectus Act (as discussed below), may be considered “privately placed.”

The German definition of the term “private placement” for purposes of the Prospectus Act considers a placement of securities “private” if, at the time of the offer (or the solicitation of an offer), a relationship between the issuer or its representative and the investor already exists or will be established without the offeror appealing to the public, regardless of the investor’s financial sophistication.⁴⁰ This definition is based on the German legislature’s understanding that third parties who would qualify as such purchasers do not require protection against an offer that is made without a prospectus. If the offer is, however, made to an unidentified number of persons, for example, by advertising in the media or through direct mail solicitations, the German legislature’s intent is to protect investors by imposing disclosure requirements upon the issuer.

3.2. *DM-denominated Debt Securities by Foreign Issuers*

Because the new guidelines issued by the German Central Bank no longer require the listing of DM-denominated debt securities on a German stock exchange, a private placement of such securities is only subject to the requirements of the Prospectus Act, unless the offering qualifies as a “non-public” offering pursuant to the Prospectus Act, or an exemption of the Prospectus Act applies.⁴¹ In the event a listing on the semi-official market in Germany is sought, a prospectus must be prepared pursuant to the Stock Exchange Act and the Stock Exchange Admission Regulation.⁴² If admission to trading on a German over-the-counter market or another form of regular price quotation is sought, a prospectus is only required if (a) the securities are to be publicly offered for purposes of the

³⁹ See discussion *supra* section 2.1.2.

⁴⁰ See Prospectus Act, *supra* note 11, § 2, No. 2.

⁴¹ See *id.* §§ 2-4.

⁴² See Stock Exchange Admission Regulation, *supra* note 6, § 36; see also Stock Exchange Act, *supra* note 5, § 36.

Prospectus Act,⁴³ or (b) no exemption applies (i.e. neither the Euro-security exemption nor any of the other exemptions described above applies).

As discussed above, the German definition of "private placement" is quite different from that under U.S. securities laws. For example, an institutional investor is not *per se* qualified to be a purchaser of a privately placed security, unless a relationship⁴⁴ exists between the investor and the issuer at the time of the offering.

4. SECONDARY MARKET TRANSACTIONS

The German preference for minimal government intrusion in the operation of the securities market extends to secondary market transactions. Securities that are placed with institutional investors and qualify as "private" under German or U.S. standards may be resold without any restrictions similar to those under the private placement rules of the U.S. securities laws.

4.1. *DM-denominated Debt Securities by Domestic Issuers*

Prior to January 1, 1991, the resale of privately placed domestic debt securities triggered a stock exchange transfer tax of between 0.20 and 0.25% per transaction.⁴⁵ The imposition of this tax inhibited development of secondary market activities in domestic private placements. Since the repeal of this tax, a significant domestic CP market has quickly developed.

4.2. *DM-denominated Debt Securities by Foreign Issuers*

Because of the repeal of the stock exchange transfer tax, there are presently no restrictions that exist with regard to secondary transactions of privately placed foreign DM-denominated debt securities.

⁴³ See discussion *supra* section 3.1.

⁴⁴ See *id.*

⁴⁵ Stock Exchange Transfer Act, BGBI I, § 1.

5. MARKET REGULATION ISSUES

The German securities markets are regulated both through regulation of market intermediaries and through regulation of the markets themselves.

5.1. Regulation of Financial Intermediaries

In Germany, the regulation of financial intermediaries essentially refers to the regulation of the banks' investment activities. The German Banking Act provides that securities, investment funds and custody businesses are part of the business of banking and as such require a banking license from the Federal Banking Supervisory Authority.⁴⁶ The Banking Act defines the "securities business" in terms of purchasing and selling securities for others (i.e. brokerage).⁴⁷ Personal account transactions and underwriting activities do not constitute a part of the "securities business" and therefore are not regulated. However, those who are engaged in the securities business in the broader sense of the term obviously need distribution channels for the placement of securities; this results in brokerage activities, which is the exclusive province of the banks. Firms which deal and underwrite without a banking license are at a competitive disadvantage because their ability to execute customer orders is restricted.⁴⁸ When approving banking licenses, the Federal Bank Supervisory Authority carefully scrutinizes capital adequacy and the integrity and professional qualifications of the applicant's managers.

5.2. Regulation of Market Operations

5.2.1. Insider Trading

Currently, there is no explicit legal prohibition against insider trading; however, voluntary stock exchange guidelines apply to these transactions.⁴⁹ The guidelines consist of the

⁴⁶ See Banking Act, *supra* note 12, § 1.

⁴⁷ See *id.*

⁴⁸ As a result, this system is sometimes criticized as perpetuating the dominance of the major universal banks in the securities business.

⁴⁹ ARBEITSGEMEINSCHAFT DEUTSCHER BÖRSEN, INSIDER GUIDELINES

Insider Trading Guidelines, Rules for Dealers and Advisers (designed to protect customers from self-interested advice) and the Procedure Code followed by the stock exchanges when making investigations.⁵⁰ These rules apply to insiders of an issuing company, to an issuing company's agents and advisers, and to banks which may have material non-public information. These rules do not apply to "tippees" and other secondary insiders, but they do prohibit the passing of confidential information to outsiders (thus, they apply to the primary "tipper"). If they choose to accept them, these rules become binding upon companies and their employees. By and large, the business community has accepted these rules. These rules do not apply to private offerings and their violation carries no penal sanction. Instead, civil sanctions, based on contractual claims, are available. These sanctions may include disgorgement of profits, employer sanctions (e.g., termination), notification to the government and publication of the findings of the stock exchange investigation commission.⁵¹ This voluntary system has been criticized, particularly for its weaknesses in situations where international cooperation and enforcement are sought.⁵² Due to increasing internationalization and the impending implementation of the EC Insider Directive⁵³ the system will be reformed. Although the EC Insider Directive was to take effect by June 1, 1992, as of the end of 1992 the terms of the Directive have not yet been implemented in Germany. Compliance with the Directive would ensure, at a minimum, the creation of a statutory system that would cover both primary and secondary insiders. Moreover, it is inevitable that more changes will ensue as section 8 of the Directive calls for each member state to designate an "administrative authority." There is considerable speculation that this will lead to the creation of a national securities regulatory body on a federal or inter-Länder level.⁵⁴

(June 1988).

⁵⁰ *Id.*

⁵¹ *Id.* § 4.

⁵² BÖRSENZEITUNG, Jan. 27, 1993, at 3.

⁵³ See EC Insider Directive, *supra* note 1:

⁵⁴ See BÖRSENZEITUNG, *supra* note 52.

5.2.2. Market Making and Stabilization

Distinguishing legitimate stabilization from market manipulation during a distribution has not been considered a major problem under German law. As long as it occurs after distribution, market making (*Kurspflege*) is permitted as a usual part of a syndicate's business and the business of dealing.⁵⁵

6. SUMMARY

The protection of investors under German law is quite different from that found under U.S. law. Whereas U.S. securities laws generally require all public offers and sales of securities to be registered with the SEC, in Germany there are no such general registration requirements because no comparable authority currently exists. Therefore, the term "private placement," as used by U.S. practitioners, as an exemption from registration requirements, has no direct equivalent under German law. Disclosure standards do exist in certain cases, however, and it is in this respect that the term "private placement" finds its meaning.

German law provides for the protection of investors once the securities are to be listed on a German stock exchange, unless the securities are subject to the Prospectus Act as described above. However, even where disclosure requirements exist, the liability for incomplete or incorrect disclosure is much less harsh than under U.S. securities laws standards. Exemptions for domestic and foreign issuers from disclosure requirements are granted for debt securities that (a) are "privately placed" which is, as defined by the German Central Bank, placed with a "defined group of purchasers," (b) will not be listed on one of the markets of a stock exchange, and (c) are exempt from the Prospectus Act, either pursuant to a specific exemption or because they are not "publicly offered" for purposes of the Prospectus Act.⁵⁶

The reason for the lower level of protection of investors in Germany compared to U.S. standards is most likely due to the

⁵⁵ The concept of a German Security Market Supervisory Authority would also include the supervision of market making activities to forbid such activities as "frontrunning."

⁵⁶ See Prospectus Act, *supra* note 11, § 2.

fact that private persons do not participate in the German securities markets to as great an extent as in the United States. In completing the EC internal market through the harmonization of legislation, protection of investors is becoming more widespread; evidence of this burgeoning protection is found in the implementation of the EC directive which led to the adoption of the Prospectus Act. Further standards mandated by the EC Insider Directive are forthcoming. Whether the increasing number of investment opportunities available in a single EC capital market, and the substantial capital needs that have resulted from the modernization of the former German Democratic Republic, will result in expanded individual participation in the German securities markets remains to be seen.