

## CAPITAL MARKETS GERMANY

# UPDATE

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## NEW LEGAL DEVELOPMENTS

### Prospectus Directive - Amendment

The Prospectus Directive has been reviewed. The amendment recently resolved upon includes the following:

- ▶ the broadening of the **private placement exemption** from the prospectus requirement if an offer is directed at less than 150 unqualified investors (currently 100);
- ▶ new minimum requirements for key information to be contained in the **summary** of the prospectus;
- ▶ a **proportionate disclosure regime** for rights issues of shares by listed issuers;
- ▶ the removal of the obligation of issuers to publish a **yearly information document**.

### New Investor Protection Act II

The German Federal Ministry of Finance has proposed for discussion a new investor protection act, complementing the existing investor protection act. The draft bill contains, *inter alia*, a **new notification requirement** for holders of financial or other instruments which allow their holder to acquire existing shares with voting rights attached to issuers for which Germany is the country of provenience (*Herkunftsstaat*), if such voting rights reach, exceed or fall below 5, 10, 15, 20, 25, 30, 50 or 75% of the voting rights of the issuer. Other than

in the existing notification requirements under the German Securities Trading Act (*WpHG*), instruments already allow for such acquisition if:

- ▶ the counterparty of the holder could reduce or limit its risk position under the instrument by holding shares carrying voting rights, or
- ▶ the instrument gives a right to acquire such shares or contains an obligation of its holder to acquire such shares.

The new proposal aims at recognizing **cash-settled instruments** used in the past for the (silent) build-up of control over issuers, such as in the prominent cases of Porsche/Volkswagen and Schaeffler/Conti.

### New Act on the Prevention of Abusive Securities and Derivatives Transactions

On July 2, the German Bundestag adopted a bill by that contains, *inter alia*, **prohibitions of uncovered ("naked") short selling transactions** and prohibitions with regard to certain credit derivatives and currency derivatives.

These prohibitions would in particular be:

- ▶ a prohibition of uncovered short-selling transactions in **debt securities** issued by certain bodies of EU Member States whose currency is the euro, and are admitted for trading on a German stock exchange in the regulated market (intraday transactions excluded);

- ▶ a prohibition for the protection buyer to enter into or to join **Credit Default Swaps (CDS)** in Germany if the underlying liability is at least also a liability of a body of an EU Member State whose currency is the euro (as long as the CDS transaction is not entered into for hedging purposes and leads to an effective reduction of credit risks);
- ▶ a general prohibition of uncovered short-selling transactions in **shares** admitted for trading on a German stock exchange in the regulated market (intraday transactions excluded);
- ▶ an authorization for BaFin to prohibit as an ad hoc measure:
  - entering into or joining certain **currency derivatives** whose value derives directly or indirectly from the currency value (*Devisenpreis*) of the euro, provided that the derivatives do not hedge own currency risks; and
  - transactions in **derivatives linked to the price of shares or debt securities** issued by certain bodies of EU Member States whose currency is the euro, and are admitted on a German stock exchange in the regulated market where these transactions correspond economically to a short sale.

Furthermore, the draft bill establishes a **transparency system with regard to net short selling positions** (i.e., “covered” positions in other financial instruments that correspond economically to a short sale position in shares (e.g., sale of futures, CFDs and Swaps, irrespective of whether a physical or cash settlement occurs)). The draft bill contains in particular the following notification and disclosure obligations, which are intended to implement CESR’s recommendations for a pan-European transparency system for short-selling transactions published in March 2010:

- ▶ obligation of the holder to notify net short selling positions vis à vis BaFin that reach, exceed or fall below 0.2 % of the company’s issued shares, admitted for trading on a German stock exchange on the regulated market;
- ▶ further notification by the holder required vis à vis BaFin if the net short selling position reaches, exceeds or falls below the 0.2% threshold plus 0.1% or a multiple thereof (e.g., 0.3 %, 0.4 %, 0.5 %);
- ▶ in addition to the notifications mentioned, a publication via electronic federal gazette (publicly available) has to be made by the holder, if the net short-selling position reaches, exceeds or falls below 0.5 %.

## SELECTED RECENT TRANSACTIONS

### Share Issuances

- ▶ Willkie advised the joint lead managers **Commerzbank** and **Morgan Stanley** on the rights issue of RHÖN-KLINIKUM AG (€460 million). It was the first capital increase for growth (rather than rescue) in 2009.
- ▶ Willkie also advised **Credit Suisse** on the 10% capital increase of Roth & Rau AG (€35.9 million). The capital increase, under exclusion of pre-emptive rights, was a follow-up mandate to the company’s previous rights issue and Prime Standard listing.
- ▶ Adding yet another structure, Willkie was further involved in the prospectus-free rights issue of DIC Asset AG (€47 million), advising underwriters **Commerzbank** and **Morgan Stanley**. DIC increased its share capital by offering 7,837,499 new shares through a rights issue to existing shareholders only.
- ▶ **Munich Re** on its placement of 13 million shares in Admiral plc.

### Equity-linked

- ▶ Willkie advised **Salzgitter AG** on its convertible bond issue (€296 million), issued through Salzgitter Finance B.V., its wholly owned Dutch subsidiary. The bonds, guaranteed by Salzgitter AG, have a maturity of seven years.
- ▶ Willkie advised **UBS** on the prospectus-free rights issue of Colonia Real Estate AG’s convertible bond (€11.4 million). This transaction was one of the few convertible bonds issues in the German market during that period.

### Other Recent Transactions

- ▶ **Commerzbank** in its role as biggest lender among a syndicate of five banks on the restructuring of the loans granted to Schaeffler KG (€12 billion), in particular with a view to evaluation of capital market options. The Willkie team also included restructuring expert Dr. Andreas Hautkappe, tax partners Dr. Patrick Meisel and Dr. Bettina Bokeloh and finance specialist Jan Wilms.
- ▶ **Globus Group** on its €200 million revolving credit facility. In the financial year 2008/2009, GLOBUS’ turnover amounted to € 5.7 billion. The capital markets team and finance specialist Jan Wilms advised.

## OUR TEAM



**Prof. Dr. Michael Schlitt,**  
Head of the German Capital Markets Practice



**Dr. Susanne Schäfer, LL.M.**



**Dr. Christian Ries**

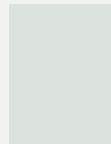
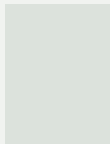


**Dr. Thorsten Becker**



**Dr. Cornelia Ernst**

Dr. Cornelia Ernst has several years of experience in domestic and international capital markets transactions such as IPOs, capital increases, block trades and bond issues in Germany, Austria and Switzerland.



Dr. Roman Kasten, Tanja Ziriakus and Franziska Neumann joined as junior associates.

The team works closely with tax experts Dr. Patrick Meißel and Dr. Bettina Bokeloh. U.S. law matters are handled by our London-based partner Jon Lyman and his team.



**Jon J. Lyman**

The Capital Markets team works seamlessly with the Private Equity/M&A team, including partners Jochen Winter, Mario Schmidt, Dr. Michael Bernhardt and Dr. Stefan Jörgens; the commercial team including Rolf Hünemann; the employment law practice headed by Dr. Christian Rolf; restructuring partner Dr. Andreas Hautkappe; and finance specialist Jan Wilms.

## QUOTES AND RECOMMENDATIONS

### THE TEAM IS

- ▶ *"compact but excellent"* – Chambers Global 2010
- ▶ a *"committed, well-rehearsed team"* – JUVE Handbook 2009/2010
- ▶ a *"high-quality and responsive outfit"* and *"always goes the extra mile"* with a *"goal-oriented and communicative approach"* – Chambers Global 2009
- ▶ recommended for IPOs and capital increases by JUVE Handbook 2009/2010

### PROF. DR. MICHAEL SCHLITT IS

- ▶ described by clients as *"a very talented lawyer, dedicated to his work,"* clients also highlight his *"strong team approach"* – Chambers Global 2010
- ▶ *"extremely service-oriented"* – client quote, JUVE Handbook 2009/2010
- ▶ described by clients and peers as *"a top-class lawyer, with an impressive academic background"* – Chambers Global 2009
- ▶ *"highly recommended"* – PLC Which Lawyer Yearbook 2009
- ▶ *"considered as one of the leading experts in capital markets law in Germany"* – Börsenzeitung, September 24, 2008
- ▶ *"one of the leading experts in capital markets law in Europe"* – Handelsblatt, September 24, 2008
- ▶ *"one of the most famous and highly-regarded German lawyers in capital markets law (ECM)"* – JUVE, September 23, 2008
- ▶ recommended as leading lawyer in capital markets (equity) and ranked in the 1st tier of 4 by Chambers Global 2010 and 2009
- ▶ recommended as leading lawyer by PLC Equity Capital Markets Handbook 2008/2009 and PLC Which Lawyer? Yearbook 2009
- ▶ mentioned as leading lawyer (capital markets) in Who's Who Legal 2009

### DR. SUSANNE SCHÄFER IS

- ▶ *"prominent in her own right — she is very intelligent and on top of legal developments and regulatory hurdles"* – Chambers Global 2010
- ▶ *"100% reliable and has excellent negotiation skills"* – Chambers Global 2009
- ▶ is recommended as leading lawyer in capital markets (equity) by Chambers Global 2010 and 2009

## PUBLICATIONS

### Recently Published

#### June 2010

article "convertible bonds with warrants – current topical issues" in the legal magazine Corporate Finance Law

#### May 2010

article "reducing underwriting risks via private placements" in legal newspaper Going Public Magazine

#### February 2010

article "exit of financial sponsors via stock exchange" in the legal magazine Corporate Finance Law (co-authored)

#### January 2010

article "with belt braces" in legal newspaper Juve

#### August 2009

interview "pricing flexibility for German rights issues" in newspaper Börsen-Zeitung

#### July 2009

interview "Willkie has done its homework" in newsletter Platow Brief

#### July 2009

article "the restructuring of bonds under the new German Bond Act" in the legal magazine Die Aktiengesellschaft

#### June 2009

article "debt equity swap" in the legal magazine Der Konzern (co-authored)

#### May 2009

article "movement in the market issuance, buy back and restructuring of convertible bonds" in legal newspaper Going Public Magazine

#### April 2009

book "Introduction to Capital Markets Law", 2nd edition (co-edited with Prof. Dr. Barbara Grunewald)

#### April 2009

article "pricing mechanism in equity issuances" in the festschrift for Eberhard Schwark

#### February 2009

article "limited risks in a debt-equity-swap" in newspaper Börsen-Zeitung

#### January 2009

IPO-Box (co-authored)

## DATES FOR YOUR CALENDAR

### Starting in September

MORE UPDATES - INCLUDING AMENDMENT OF PROSPECTUS DIRECTIVE

### Securities Offerings Series

A series of presentations on equity, equity-linked and debt transactions, including, *inter alia*, IPOs, rights issues, 10% capital in-creses, secondary offerings, equity-linked instruments, bonds and U.S. securities laws.

The seminars will be conducted by Prof. Dr. Michael Schlitt, Dr. Susanne Schäfer and Dr. Christian Ries, with Dr. Patrick Meisel and Dr. Bettina Bokeloh covering tax issues and Jon Lyman speaking on U.S. securities laws.

The seminars will be held from 7:30 p.m. to 9:00 p.m. at our offices. Informal cocktail reception to follow. To register please contact Yvonne Adler ([yadler@willkie.com](mailto:yadler@willkie.com)).

### Program

- ▶ **20 September 2010** IPOs I
- ▶ **18 October 2010** IPOs II (Spin-Off, Equity Carve-Out, Tracking Stocks, REITs, SPACs etc.)
- ▶ **15 November 2010** Rights Issues
- ▶ **24 January 2011** 10% Capital Increases
- ▶ **21 February 2011** SPOs, Block Trades
- ▶ **21 March 2011** Equity-Linked Instruments (Convertible Bonds, Bonds with Warrants, Exchangeables)
- ▶ **11 April 2011** Bonds (Hybrids, High-Yields, Straight Bonds, Programs, Restructuring of bonds)
- ▶ **16 May 2011** U.S. Legal Aspects
- ▶ **20 June 2011** Tax Aspects

## CONTACT

If you require advice on any capital markets matters raised in this document, please call

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Head of Capital Markets Germany

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