



Junior Capital Markets

Imprint

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Introduction

The Alluris Group

Medium sized companies in Europe are faced with ever increasing competition. They therefore need to develop their skills and strengths and their connections in the European and worldwide markets. ALLIURIS members can greatly assist companies in their cross-frontier business.

The ALLIURIS Group is composed of independent, medium sized law firms in Europe, who specialise in European and international business law. The experience of the firms covers all areas of civil and commercial law to enable them to fulfil all the requirements of the medium sized company.

Member firms are conversant with the requirements of international clients; the partners are experienced in understanding the differing approach of foreign clients to legal matters and are able to respond to their needs and questions; lawyers often speak several languages and many have undergone their legal education in several countries.

Clients with interests outside Europe receive similar support. ALLIURIS enjoys widespread professional connections within its global network.

Today ALLIURIS counts for more than 30 offices and 450 lawyers in Europe and other major markets in the world.

Junior Capital Markets

Capital markets are financial markets where securities and debts are sold and bought. Money is usually provided for periods longer than a year. They are usually hosted on computer-based trading systems nowadays. There are many thousands of these systems, serving different parts of the market.

The Alluris Advantage

Alluris One

One point of contact for your cross border deals. Alluris will give you a single point of contact who will be a partner in a member firm. That lawyer will manage your work and report to you – ONE e-mail address, ONE telephone number and the full range of Alluris members are at your service.

Alluris Local

You need a lawyer with knowledge local to the place you are doing business in and who can deliver in a way you can understand by reference to the place you know. Representation in the jurisdiction you are doing business in from trusted lawyers delivered to you in your language by your lawyer.

Alluris Excellence

One lawyer cannot be excellent everywhere. Alluris provides a centre of excellence in every jurisdiction.

Alluris Information

What is going on in your sector where you want to do business? Alluris can source the market information you need.

Alluris Contacts

How do you know who you need in the country you are operating in and how do you get to them? Alluris can source the trusted local contacts you need.

Junior Capital Markets in Germany

Dr. Jürgen Machunsky, Herfurth & Partner

English by Anne Knodel

- A. Preparation and maturity to go public**
 - 1. Legal form and characteristics according to stock corporation law**

 - 2 Prospectus**
 - 2.1. Information about the issuer
 - 2.2. Information about the bond
 - 2.3. Exemptions of the Prospectus requirements

 - 3. Pre-IPO – before-hour dealings**
 - 3.1. Venture-Network – Deutsche Bank AG
 - 3.2. VentureZphere – Börse Stuttgart

 - 4. IPO – Selection of stock market and exchange segment**
 - 4.1. Regulated Market
 - 4.2. General Standard
 - 4.3. Prime Standard

 - 5. Open Market**
 - 5.1. Prerequisites for trading in the Regulated Unofficial Market
 - 5.2. Scale
 - 5.3. Basic Board
 - 5.4. Quotation Board

 - 6. Follow-up duties – obligation of transparency/ market abuse**

Within the so-called European capital markets union the capital market based financing especially of small and medium-sized companies should be supported and supplement the classical bank financing. Considerable legislative work at European and national level should be completed by the end of 2019. However, a consistent and concise legislative framework does not exist yet.

The whole legislation tries to find the right balance between the requirements of economic growth, corporate financing and investor protection. Overriding credo (and design criterion) is that no financial instrument and no market player should be uncontrolled and unregulated. Informing the investor through Prospectus, information sheets and ongoing information is thereby of crucial importance.

The following is intended to provide an overview of the essential financing options on the German capital market. The structure follows the fundamental division between securities (shares, bonds) and asset investment (for example subordinated loans, participation rights, silent participation) which are subject to different laws in Germany. The field of mutual fund and closed-end funds according to the investment law (Kapitalanlagegesetzbuch - KAGB) is excluded, since this is not touching the direct corporate financing. Furthermore, the following is not giving a deepened demonstration of individual financial instruments, their advantages and disadvantages, but rather the regulatory environment.

Classical and most original form of capital market based financing is the issuance of shares and bonds. With the help of share issue the company can enlarge his equity and liquidity basis in order to finance growth and preserve independence. However, the share issue places high demands on the company.

A. Preparation and maturity to go public

It has to be checked initially, if the company fulfils the requirements of going public (IPO). This is about in-house economic and organisational requirements (subjective criteria/inner maturity to go public) on the one hand. This includes the equity story, operating figures, organisational structure, accounting and so on, meaning the commercial management. On the other hand it is about formal requirements stipulated by the legislator and stock exchange (objective criteria) and which is the following about.

1. Legal form and characteristics according to stock corporation law

Reference: Mock, Aktiengesellschaften mit Inhaberaktien nach neuem Recht, AG 2016, p. 261; Schäfer/Hoffmann, Die gesetzlichen Anforderungen an die Ausgabe und Verwahrung von Aktien durch Aktiengesellschaften, GWR 2016, p. 478.

Single Negotiable legal form in Germany is the public limited company (plc) besides the commercial partnership limited by shares or equal international legal forms such as the Societas Europaea (SE).

The Amendment of corporate law in 2016 made profound changes to share issue (founding, increase in share capital) in a relative unnoticed manner. There has been an accounting option between registered share and bearer share, whereas now the issuance of bearer shares is severely restricted or rather subject to conditions (comparable to British Small Business, Enterprise and Employment Act 2015 – abolition of share warrants to bearer).

According to the new legal situation shares are issued in principle as registered share (section 10 (1) Stock Corporation Act [AktG]). Bearer shares can only be issued, if

- the public limited company is listed (section 10 (1) sentence 2 Nr. 1 Stock Corporation Act [AktG])
- or the claim for individual evidencing is excluded and the global certificate is deposited at a qualified entity (section 10 (1) sentence 2 Nr. 2 Stock Corporation Act [AktG]).

Only the quotation on the Regulated Market, not in the Open Market is considered as listed, section 3 (2) Stock Exchange Act (BörsG).

Stock market listing – as well as in the Open Market – assumes on the other hand the securitization in a global certificate, so that the requirement of collective securitization is already fulfilled.

2. Prospectus

Anybody who wants to offer bonds publicly, for example in connection with the increase in share capital (share) or the issuance of debenture bonds, has to compile and publish a Prospectus. A Prospectus has to be compiled too, if these securities should be admitted to trading on the Regulated Market (stock market).

The Prospectus must contain all relevant information about the issuer and the offered bonds. It should enable the investor to get an idea of the offer and make an autonomous capital spending decision on this basis.

Legal basis on national level is the Securities Prospectus Act (WpPG). Content and presentation of the Prospectus are determined by the European Prospectus Regulation Directive (Nr. 809/2004). The following information have to be included in the Prospectus:

2.1. Information about the issuer

- basic information about the company, such as legal form, date of foundation, business purpose, shareholder, subsidiary, employees
- basic information about executive and supervisory bodies, such as members of the bodies, salaries, conflicts of interest, Corporate Governance
- business activities of the issuer
Description and discussion of historical financial information, so called “Management Discussion and Analysis“, “Operating and Financial Review“
- investments done, existing and future
- considerable contracts
- litigation done, existing and impending

- working capital and business prospects
- capitalisation and indebtedness
- checked historical financial information of the last three financial years as well as interim financial information if necessary

2.2. Information about the bond

- basic information about the share, such as ISIN/WKN (securities code number), currency, limitation of the negotiability, dividend rights
- reasons for the offer
- use of issue proceeds and issue costs
- offers' conditions
- dilution
- lock-up agreement.

Furthermore, a separate section should describe risk factors, which are of importance for the issuer as well as for the bonds being offered and approved. Relativizations such as the simultaneous description of chances are inadmissible.

Finally, the Prospectus must prefix a summary which follows directly the obligatory table of contents.

2.3. Exemptions of the Prospectus requirements

The obligation to publish a Prospectus does not apply inter alia to an offer of securities which are addressed to fewer than 150 non-qualified investors per EEA signatory state or if the sale price for all securities offered in the EEA is less than EUR 100,000 (section 3 Securities Prospectus Act [WpPG]).

3. **Pre-IPO - before-hour dealings**

3.1. Venture Network – Deutsche Börse AG

Launched in 2015, Deutsche Börse AG offers a platform for young companies to present themselves to investors and to be recommended for financing on an off-market level named "Venture Network". In doing so, Deutsche Börse aims to "create a working ecosystem for growth in Germany and Europe which supports companies closely in all growth stages up to the quotation at stock market so that more stock market launches are produced". The networks' focus is on financing from the early- to growth- and later stages.

The network offers direct access to Europe's largest network of national and international investors from venture capital, private equity, business angels and high-net-worth individuals.

Nevertheless, this off-market practice ground is not open to all young companies; certain minimum acceptance criteria must be fulfilled. See following the eligibility check of Deutsche Börse.

Eligibility check: does your company meet the acceptance criteria?

Please take a look at the list of acceptance criteria before you apply for membership (see below). If your company meets three of the criteria listed, you can proceed to the online application.

	Early Select Post-Seed – Pre-Series B	Prime Select Pre-Series C – Pre-IPO
Annual revenue*	> EUR 1 Mio.	> EUR 10 Mio.
Annual growth or specific KPIs	Annual revenue growth rate* > 100 % or business specific KPIs**	Annual revenue growth rate* > 30 %
Annual net profit*	–	> EUR 0.5 Mio.
Equity	–	> EUR 5 Mio.
Cumulated capital raised	> EUR 1 Mio.	> EUR 10 Mio.
Lead-Investor***	Yes	Yes
Bootstrap financing	No external financing	< EUR 1 Mio. aggregated long term debt and equity funding volume

* Based on the last 12 months or alternatively on the run rate

** E.g., high number of daily new users or strong growth of customer base

*** Company is proposed by a renowned investor, with a history of successful venture investments, who has already made significant investments.

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3.2. VentureZphere - Börse Stuttgart

Since April 2017, Börse Stuttgart also offers a platform for start ups on before official hours-level named “VentureZphere”. This platform is more regional oriented: more than 70 % of the users come from Baden-Württemberg, followed by Hesse with 9 % and Berlin as well as Bavaria with 6 % each. Special acceptance criteria are not implemented yet.

4. IPO – Selection of stock market and exchange segment

Securities trading take place at stock markets and multilateral trading systems. Frankfurt Stock Exchange is the central stock exchange in Germany. Besides there are regional stock exchanges which are of minor importance serving niche markets. Following details are limited to Frankfurt Stock Exchange. There – as well as at other stock exchanges – you have to distinguish between Regulated Market and the over-the-counter-market/Open Market.

4.1. Regulated Market

Regulated Market is a public organised market. Listing and follow-up requirements are regulated by law and comply with European Law. Relevant national laws can be found in Stock Exchange Act (BörsG), Exchange Admissions Regulation (BörsZulV), Securities Prospectus Act (WpPG) and Securities Trading Act (WpHG). The Regulated Market with its EU-wide consistent requirements addresses mainly large and mid-sized companies that mainly appeal to national and international investors. Legal provisions governing admission of trading of securities in the Regulated Market can be found in sections 32-43 Stock Exchange Act (BörsG). The Regulated market is divided into the exchange segments „General Standard“ and „Prime Standard“, which have different licensing requirements.

4.2. General Standard

General Standard's admission requirements comply with legal requirements of the Regulated market.

Essential admission requirements

- valid and audited securities
- reporting history dating back least 3 years
- probable total price value of at least EUR 1.25 million
- number of shares admitted to trading to be at least 10.000
- free float to be at least 25 %

The admissions procedure is initiated by a written application for admission that shall be submitted by the company together with the so-called issue underwriter, a bank or financial service provider that is authorized to trade at an exchange in Germany. The securities must be eligible for delivery by Clearstream.

Key follow-up obligations

The follow-up obligations attendants upon admission to the Regulated Market are applicable. The responsible authority for monitoring compliance with those follow-up obligations is the German Federal Financial Supervisory Authority (BaFin).

- The annual financial report must be published within four months after the end of each financial year

- The half-yearly financial report must be published within three months of the end of the reporting period
- Disclosure obligations: ad hoc reports, directors' dealings, lists of insiders and the total number of voting rights
- Follow-up obligations are to be fulfilled in English or in German

Fees

Admission fee	EUR 3,000
Launch fee	EUR 2,500
Quotation fee	EUR 11,700 p.a. plus EUR 0.10 for each mil. Euro of market capitalisation commenced

4.3. Prime Standard

The follow-up duties required in the Prime Standard exceed those of the General Standard and have to be fulfilled in addition to the latter. Insofar there is no difference between the segments.

Key follow-up obligations

Issuers in the Prime Standard must fulfil substantial follow-up obligations and set by the Exchange Rules for the "Frankfurter Wertpapierbörse".

- Transmission of the annual financial report at the latest by four months after the end of a given financial year
- Transmission of the half-yearly financial report within three months of the end of the reporting period
- Transmission of the quarterly statement within two months of the end of the reporting period
- At least once a year an analysts meeting outside the media conference in order to announce the figures from the annual accounts
- Continuous updating, publication and transmission of a financial calendar with the most important corporate action events of the issuer
- Follow-up obligations can be fulfilled in English and in German
- Publication and notification of inside information shall be in English
- All reports and documents shall be transmitted to Deutsche Börse AG via the Exchange Reporting System (ERS®)

Fees

Fees in Prime Standard differ only slightly from those in General Standard. However, a burden not to be underestimated is the additional information and transparency obligation and the supplying of bilingual documents.

Admission fee	EUR 3,000
Launch fee	EUR 2,500
Quotation fee	EUR 12,700 p.a. plus EUR 0.10 for each mil. Euro of market capitalisation commenced

5. Open Market

Legal basis for the Open Market is section 48 Stock Exchange Act (BörsG). Admission to the Open Market is possible for securities that are neither admitted to trading on the Regulated Market nor included in trading on the Regulated Market. Trading is regulated by the trade regime (Handelsordnung), admission or rather inclusion by the Terms and Conditions of Deutsche Börse AG. According to section 48 (2) Stock Exchange Act (BörsG) the stock exchange can prohibit trading in the Open Market, if proper trading no longer appears to be guaranteed.

The Open Market is not part of the stock exchange but rather subject to private law.

Segments of the Open Market are Scale, Basic Board and Quotation Board.

5.1. Prerequisites for trading in the Regulated Unofficial Market

Prerequisites for trading in the Unofficial Market are governed by § 7 of the General Terms and Conditions of Deutsche Börse AG for the Regulated Unofficial Market. Shares may be included, if

- they are neither admitted to nor included in the Regulated Market
- they possess an International Securities Identification Number (ISIN)
- they are freely tradable
- the orderly fulfilment of the transactions is guaranteed
- there are no regulatory prohibitions against the Exchange trading

5.2. Scale

The Entry Standard has been replaced by the Scale segment in March 2017. Target groups are small and medium-sized companies seeking capital for growth. Scale applies to German and European small and medium-sized companies (SME) and offers the entry of financing through the stock market.

After investors' bad experiences on the "new market" and the Entry Standard, minimum requirements for admission have been exacerbated.

All shares of Scale are summed up in the Scale All-Share Index.

Essential elements of Scale are Research Reports, being commissioned by Deutsche Börse AG and already included in the fees. There are two reports, a quantitative and a qualitative one. The reports contribute significantly to improving companies' transparency and visibility among investors. This takes into account that small and medium-sized companies are not being considered by analysts.

The qualitative research report is created by Edison Investment Research. The report will contain a qualitative description and assessment of the enterprise's business model based on a personal meeting, an analysis of the company's data as well as that of the competitive and market environment. The initial research report will be eight to ten pages long. An update of around four pages will be published twice a year.

Edison is an investment research and advisory company with offices in North America, Europe, the Middle East and Asia Pacific. They focus in particular on their equity research platform and deep multi-sector expertise.

Morningstar's qualitative research report is based on the work of 120 Morningstar analysts who follow a qualitative approach. By means of a mathematical method, the work of the analysts is transferred to the small and medium-sized companies of the new segment. This process is based on the balance sheets and cash flow statements of the issuers. Each company is evaluated by means of 12 key indicators and updated daily.

Morningstar is a leading provider of independent financial services in North America, Europe, Australia and Asia with operations in 27 countries.

Another characteristic of Scale is the sufficiency of at least 2 years company history. Apart from that, admission conditions are by no means lower than on the Regulated Market. Scale is most likely a supervised and service-oriented flotation for small and medium-sized companies to bypass pitfalls.

- A Deutsche Börse Capital Market Partner is of central importance. A consulting contract with a supporting Deutsche Börse Capital Market Partner, which has to confirm the issuer's suitability for Scale, is mandatory.

a) Overview of key admission conditions

Companies

Fulfilment of at least three of the following criteria:

- Turnover of at least EUR 10 million
- Earnings of the year at least EUR 0
- Equity capital more than EUR 0
- Number of employees of at least 20 people
- Cumulated, equity capital before IPO of at least EUR 5 million
- Company history of at least 2 years

Accounting

- National accounting for issuers based in EU or another state within the EEA
- or
- International Reporting Standards (IFRS)

Shares and market capitalization

- Estimated minimum market capitalization of EUR 30 million at the time of the inclusion into trading
- Ordinary shares or preference shares, certificates representing shares
- Par value of at least EUR 1.00
- At least 20 per cent free float or at least 1 million free float shares
- Shares must be eligible for delivery by Clearstream.

Prospectus/inclusion documents

- valid and approved Prospectus for a public offer
- apart from that: inclusion documents

Research Report

- Two research reports submitted by selected Research Providers. Documents required for the report have to be provided by the issuer.

Application/support by Deutsche Börse Capital Market Partner

- Contract with a supporting Deutsche Börse Capital Market Partner

b) Key follow-up inclusion obligations

- annual financial statement and business information
- Submission of the half-yearly financial statements including the interim management report within 4 months after the expiration of the reporting period
- Submission of the audited annual financial statements including the management report within 6 months after the expiration of the reporting period
- Continuous updates and submission of the corporate calendar
- Conduct of an information event for analysts and investors at least once a year
- Periodic Research Report Updates

Further obligations

- Ad hoc disclosures
- Directors' Dealings
- Insider lists

c) Deutsche Börse Capital Market Partner

- Contract with a supporting Deutsche Börse Capital Market Partner throughout inclusion in Scale

d) Fees

Inclusion fees

- At least EUR 20,000 plus variable inclusion fee dependent on market capitalization (maximum EUR 69,000)

Quotation fee

- EUR 20.000,00 per calendar year (EUR 5,000.00 per calendar quarter)

5.3. Basic Board

The Basic Board is the basic segment below Scale which is not forming an own segment. The Basic Board allows issuers of the former Entry Standard which do not fulfil the inclusion requirements of Scale to remain listed at stock exchange.

5.4. Quotation Board

The Quotation Board acts as a segment of the Open Market below Scale. In addition to bonds and funds, only shares are included in the Quotation Board as are already admitted to another exchange trading venue recognised by Deutsche Börse AG inside or outside Germany.

6. **Follow-up duties – obligation of transparency/market abuse**

Applicable law:

- „Market Abuse Regulation, MAR“ – Marktmissbrauchsverordnung – Verordnung EU 596/2014, effective from 03.07.2016
- „Market Abuse Directive, MAD“ Marktmissbrauchsrichtlinie
- WpHG

References:

- Scholz, Ad-hoc-Publizität und Freiverkehr, NZG 2016, pp. 1286.
- Rubner/Pospiech, Die EU-Marktmissbrauchsverordnung – verschärfte Anforderungen an die kapitalmarktrechtliche Compliance auch für den Freiverkehr, GWR 2016, pp. 228.

Overview

Issuers of financing instruments have to fulfil various publication requirements according to the European Market Abuse Regulation (MAR). It is especially about ad hoc publicity, insider trading and market abuse. Until now, they only applied to issuers of those financing instruments, which have been admitted to the Regulated Market. From now on, even those market players in the range of “multilateral trading systems” such as the Open Market and other trading platforms have this duty if the financing instruments are approved there or have been included upon the issuer’s approval. Differences between Regulated Market and Open Market continue to decrease by this.

Ad hoc Publicity

According to Art. 17 (1) Market Abuse Regulation (MAR), the issuer of financing instruments has to publish immediately those insider information which substantially

influence the price of the particular instrument. This aims at preventing information imbalance and insider trading.

Directors' Dealings

According to Art. 19 (1) Market Abuse Regulation (MAR) the management such as board and supervisory board member, have to publish their proprietary trading.

Other information requirements

Other information requirements involve the drawing up of lists of insiders (Art. 18 I a European Market Abuse Directive [MMVO]) and the disclosure of major voting stakes.

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Herfurth & Partner is an independent law firm with offices in Hannover, Göttingen and Brussels. We specialise in national and international commercial and corporate law. Our law firm advises family-owned companies as well as companies within multi-corporate enterprises, both in Germany as well as abroad. Our consultation encompasses all legal issues relating to corporate structuring, finance, technology, business and products, marketing and sales, labour, real property and assets. Our 20 German and international lawyers possess vast experience and competence, which has been gathered from work in law firms as well as in companies in Europe, America and Asia. A total of 12 languages are spoken within the firm.

Herfurth & Partner was established in 1990 as a partnership and since 2009 it takes the form of a Rechtsanwaltsgesellschaft mbH (limited liability company).