



Update Capital Markets

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EU Recovery Prospectus – Planned facilitation of the equity issuance through an abridged se- curities prospectus

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In order to tackle the effects of the Corona crisis, it is planned at EU level to temporarily facilitate the raising of equity capital for companies. This will enable certain issuers to publish a shortened prospectus with only 30 pages instead of a full prospectus to issue shares. Through this, issuers will have the option to issue shares at short notice, without bureaucracy and inexpensively, thereby improving the debt-to-equity ratio in their balance sheets.

On July 24, 2020, the EU Commission adopted a package of measures, including an amendment to the EU Prospectus Regulation (EU-2017/1129) for the introduction of an "*EU Recovery Prospectus*" as a transitional measure. The Recovery Prospectus is meant as an additional measure to support companies in coping with the Corona-related effects. It aims specifically at promoting the raising of equity capital by companies in order to enable them to improve the debt-to-equity ratio on their balance sheets. The EU Commission deemed this necessary because, in an initial reaction to the Corona crisis, in many cases companies have taken out debt capital to secure short-term liquidity and thereby raised the already high level of corporate debt even further. In order

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to ensure the companies' sustainable recovery, the strengthening of the equity base, especially for small and medium-sized companies, is considered necessary.

In detail, the requirements and content of the Recovery Prospectus are designed as follows:

Recovery Prospectuses can only be published for so-called secondary issuances of shares. The Recovery Prospectus is therefore only available to issuers whose shares have been continuously, and for at least 18 months;

- 1) admitted to trading on a regulated market; or
- 2) traded in an SME Growth Market, provided that an offering prospectus has been published for these already traded shares.

The above referenced "SME Growth Market" is a new category of trading venues created by the EU legislator to provide small and medium-sized enterprises ("**SMEs**") with access to capital, in particular through regulatory facilitation. In Germany, only the Scale segment of the Open Market of the Frankfurt Stock Exchange is currently registered as an SME Growth Market.

However, in our opinion it is unclear whether issuers can currently already use a Recovery Prospectus even if their shares have already been listed in the Scale segment for 18 months. That is because, even though it has already been in existence since March 1, 2017, the Scale segment has only been registered as an SME Growth Market since December 16, 2019. This time period would at the earliest end on June 16, 2021, if the time of registration as a SME Growth Market would be used as the earliest possible date for the beginning of the 18-month period. Consequently, issuers listed in the Scale segment would not (yet) be able to use the Recovery Prospectus, even if their shares have already been traded in the Scale segment for 18 months or if this will be the case until July 16, 2021. However, in our opinion, it seems obvious that not the first registration of Scale as an SME Growth Market, but the first trading of the shares of the issuer in Scale should be decisive for the beginning of the period, provided that Scale had already met the content requirements for an SME Growth Market at

Who can use the option of publishing a Recovery Prospectus?

that time. This is because, in our opinion, the formal act of registering as an SME Growth Market should not be relevant, it is instead the status of the company being listed on a marketplace that meets the content requirements of an SME Growth Market that should be decisive. If one were to oppose this view, the EU legislator would have created a regulation that would not apply for a considerable period of time. This result would, however, oppose to the urgency of the legislative measure. However, in the end, it would be advisable to clarify this issue with BaFin (German Federal Financial Supervisory Authority), unless the further EU legislative process provides clarification.

By restricting the circle of potential issuers, the EU legislator wants to ensure that the transparency requirements required for investors have already been met otherwise. That is because issuers whose shares are already admitted to trading on the regulated market or are traded on a SME Growth Market are already subject to transparency obligations to inform the capital market, in particular with regard to the obligation to publish annual and semi-annual financial information as well as ad hoc information.

The Recovery Prospectus can only be used for a public offering or admission to a regulated stock market of shares. Thus, the Recovery Prospectus cannot be used for the issuance or admission to trading for bonds. In addition, it is required that the new shares to be offered/admitted to trading must be fungible with the issuer's shares already admitted/traded.

The Recovery Prospectus must not exceed 30 pages and must have a two-page summary. However, it is possible to refer to information already published otherwise ("*incorporation by reference*"), whereby the referenced documents are not taken into account when determining the number of pages.

The specific content of the Recovery Prospectus is determined in a new Annex Va to the EU Prospectus Regulation. According to said Annex, the Recovery Prospectus must contain, inter alia, the following information:

- **Risk factors:** The most material risks that are specific to the issuer and the shares.

Why is the circle of potential issuers restricted?

For which transactions can the Recovery Prospectus be used?

What is the content of the Recovery Prospectus?

- **Annual financial statements:** Annual financial statements are required to cover the period of 12 months prior to the approval of the Recovery Prospectus.
- **Trend information:** Business developments since the last balance sheet date and foreseeable developments/risks;
- **Working capital statement:** A statement as to whether the working capital is sufficient for the issuer's present requirements or, if not, how the issuer proposes to close the expected coverage gaps by raising additional working capital.

In accordance with the objective to enable the issuer to raise equity capital as quickly and with as little bureaucracy as possible, the Recovery Prospectus is reviewed and approved in an abbreviated procedure. A time limit of only five working days is allowed for the review and approval by the respective financial supervisory authorities (BaFin in Germany).

The option to publish a Recovery Prospectus is restricted to a period of 18 months after the amendments to the EU Prospectus Regulation enter into force. After this period expires, a review of the success of the measure is intended at EU level, taking into consideration the number of published Recovery Prospectuses and other effects.

Technically, the Recovery Prospectus will be implemented, inter alia, by including an exception to Article 6 of the EU Prospectus Regulation and by including a new Article 14a and a new Annex Va, which lists the information required in the Recovery Prospectus.

The proposed amendments still require the approval of the European Parliament and the European Council. However, no timeline is presently foreseeable for the further procedure.

Issuers that fall within the above explained scope of the Recovery Prospectus and who intend to raise equity capital should seriously consider the option of a Recovery Prospectus. This will create significant facilitation, so that a faster and less expensive issuance of shares can in fact be expected. The hope remains that the EU Parliament and the EU Council will address the matter in the short term due to the urgency of the measure.

How is the procedure for the examination and approval of the Recovery Prospectus designed?

How long can an issuer use the option of a Recovery Prospectus?

How will the Recovery Prospectus be implemented into law?

What is the further procedure until the amendments come into force?

Conclusion

We will continue to monitor the matter and inform you about the course of the procedures in additional capital market updates.

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