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Association for Financial Markets in Europe

Financing growth – recommendations for strengthening the German capital markets

February 2025

Financing growth – strengthening the German capital markets

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Summary of recommendations

- Corporate law – streamline German corporate law to strengthen the functioning of the German capital markets
- Prospectus law – adapt German prospectus law to support smaller German businesses
- Structural factors – encourage retail participation and improve the German framework conditions for equities and bonds
- European framework - Germany should play a leading and proactive role in shaping the priorities of the European Commission, to ensure that the regulatory framework supports the competitiveness of the European economy and the German economy.

Economic context and German government initiatives

Government statistics and forecasts from leading economic institutes indicate that Germany is currently showing little (if any) economic growth and needs to strengthen its competitiveness.

Banks will not be able to provide the additional funds required for the decarbonisation and digitalisation of the economy entirely on their own in the future. It is therefore essential to further develop capital market-based financing in Germany.

The venture capital market successfully finances many small and growing German businesses. However, a significant challenge arises when businesses seek to raise 50-100m euros or more. At this level of funding, there are not many German (or European) Venture Capital funds or Private Equity firms with the necessary scale to meet these demands. This issue is commonly referred to as the "scale-up gap".

In contrast, the situation is different in the US, where US scale-ups have better access to finance (the market is around 10 times larger). As a result, German scale-ups are often dependent on investment from outside Europe, increasing the risk that they will later relocate their operations and/or choose to raise public equity outside Europe.

The German government has introduced several good initiatives aimed at providing capital to companies across all stages of their lifecycle:

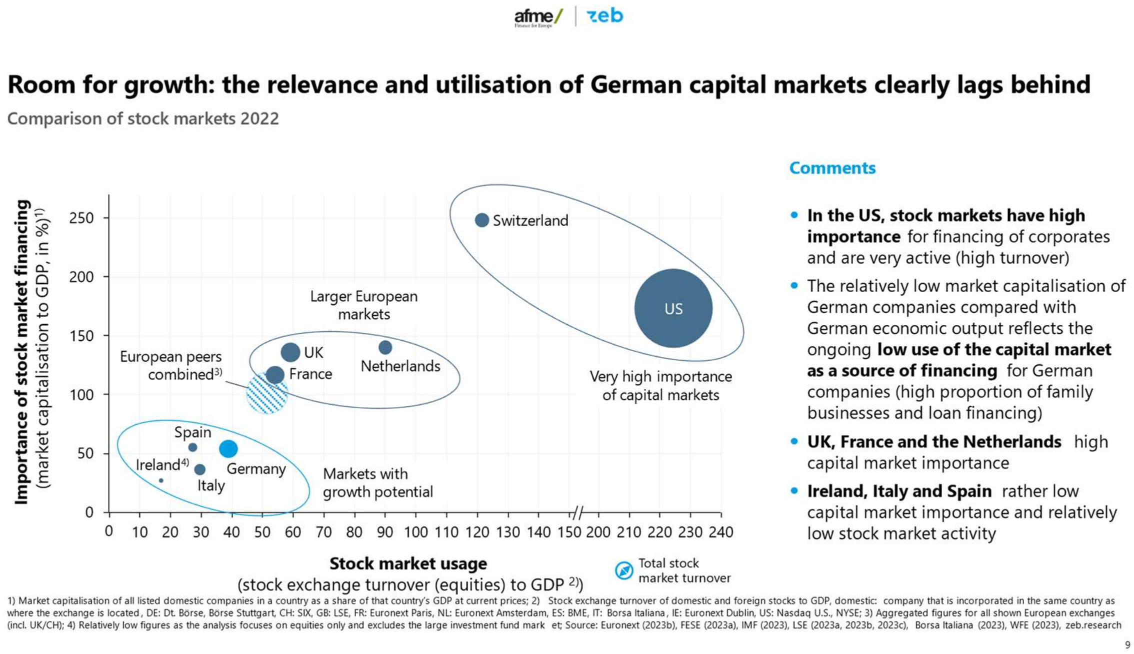
- The WIN Initiative (Wachstums- und Innovationskapital für Deutschland) is focused on the beginning of the lifecycle. It aims to further develop Germany as a leading location for innovation, and strengthen the financing of start-ups, scale-ups and innovative companies, which will contribute to a dynamic economy in the future. The initiative consists of a 10-point package of measures to improve the framework conditions for risk capital.
- The Future Financing Act (Zukunftsfinanzierungsgesetz) is focused on the companies which are sufficiently large to consider listing on the stock exchange. It aims to strengthen the performance of the German capital market and increase the attractiveness of Germany as a financial centre.
- ZuFinG 1 is already in force, and a government draft of ZuFinG 2 was published in November 2024[1], however the prospects of ZuFinG 2 becoming effective are uncertain, as the legislative process will likely need to be restarted after the formation of a new federal government following the federal election.

These initiatives need to be developed further.

The banking system and the capital markets

Germany has a strong banking system that has successfully financed SMEs for many years. By contrast, the importance of the capital markets in Germany lags behind other countries in many different respects. The market capitalisation of listed companies in Germany is around 50% of GDP, which is significantly less than in France (over 100% of GDP).

[1] https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2024/11/2024-11-27-zweites-zukunftsfinanzierungsgesetz.html



So far, there are no signs of a bottleneck with regard to the financing requirements of companies by banks. In a survey by the European Investment Bank, only 5% of German companies stated that they were suffering from financing bottlenecks.

However, the green transformation and digitalisation as well as the current macroeconomic and geopolitical changes will lead to a massive need for investment and financing in the future. In Germany, the green transformation alone will require over 300 billion euros per year from 2020 to 2030. Companies will be able to finance part of this from their balance sheets, but more than half (around 175 billion euros) will have to be raised through external financing[2].

Banks will face additional challenges in providing transformational funding with the new Basel regulations coming into force from 1 January 2025. In addition, the European supervisor limits how much banks can lend for transformational purposes, via their guidance on leveraged transactions. It remains unclear whether private debt funds might offer a reliable alternative for potential shortcomings of bank financing.

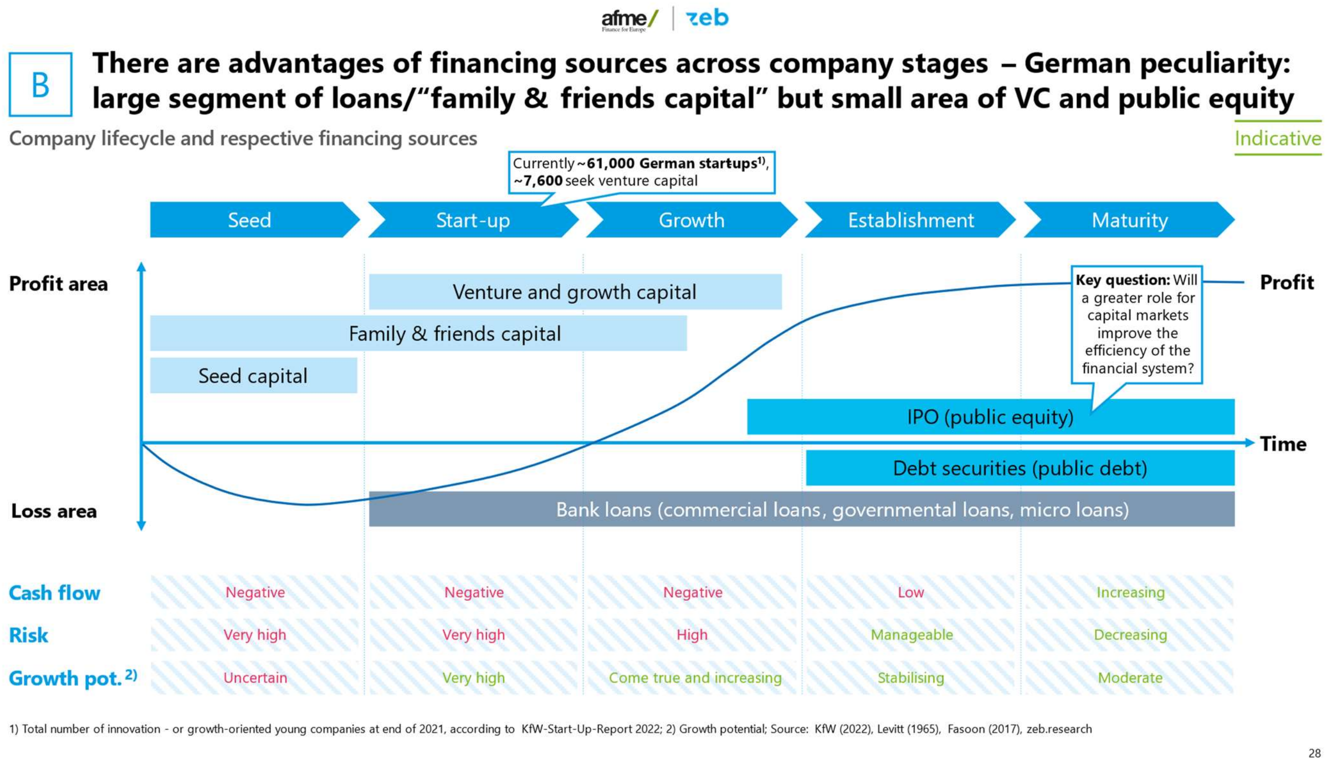
Zeb estimates confirm the above for the German market as a whole, i.e., banks will not be able to provide the additional funds required for the decarbonisation and digitalisation of the economy entirely on their own in the future. Capital market-based financing must therefore continue to develop.

[2] https://www.afme.eu/news/press-releases/details/new-afme--zeb-report-examines-role-of-capital-markets-in-germany

The lifecycle of a company and the financing sources – too little use of capital markets leads to exit of German companies

When a new business is set up, it will require investment in the form of risk capital (ie equity) before it becomes profitable. Similarly, when scale-ups want to expand, they will require additional investment in the form of risk capital.

The company lifecycle and the financing sources are shown in the table below. Initially the finance comes from family and friends, then from Venture Capital Funds, and then from Private Equity. More established businesses may then look for Public Equity and/or Public Debt to finance their expansion.

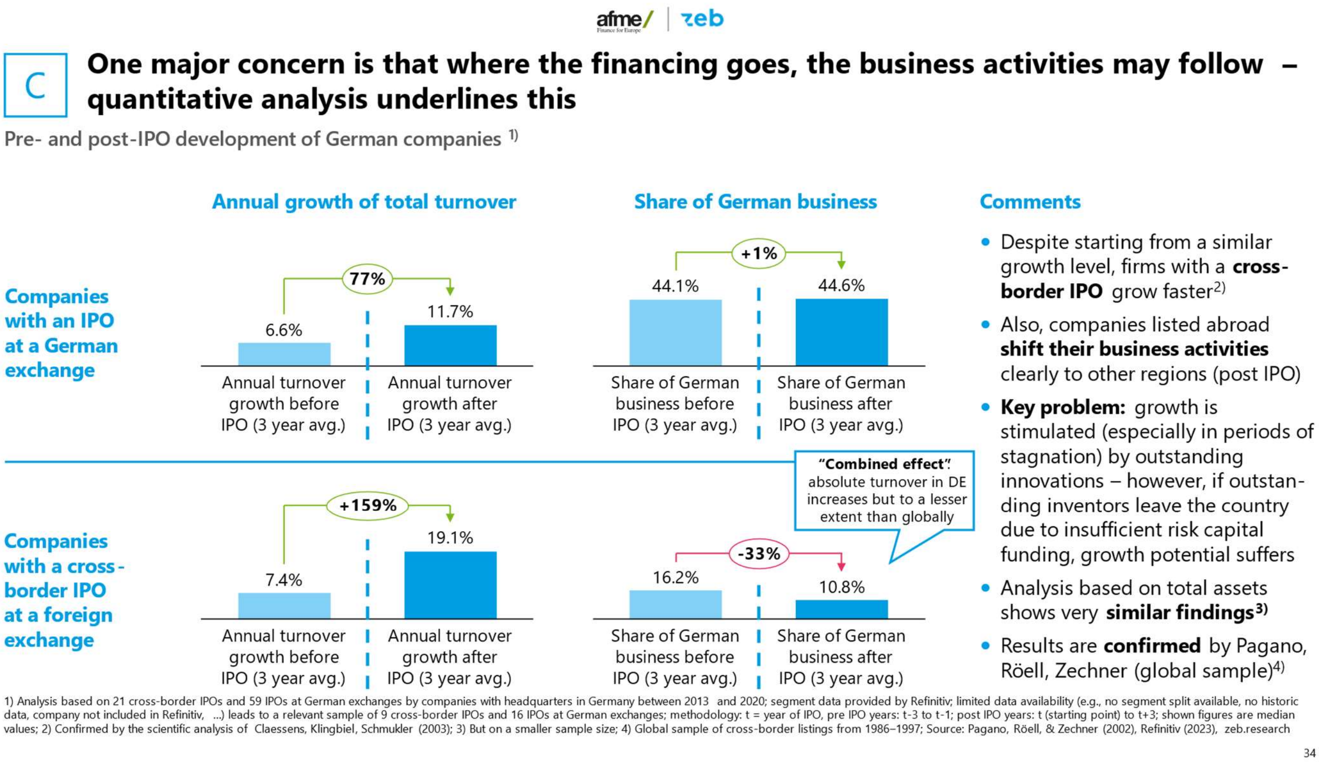


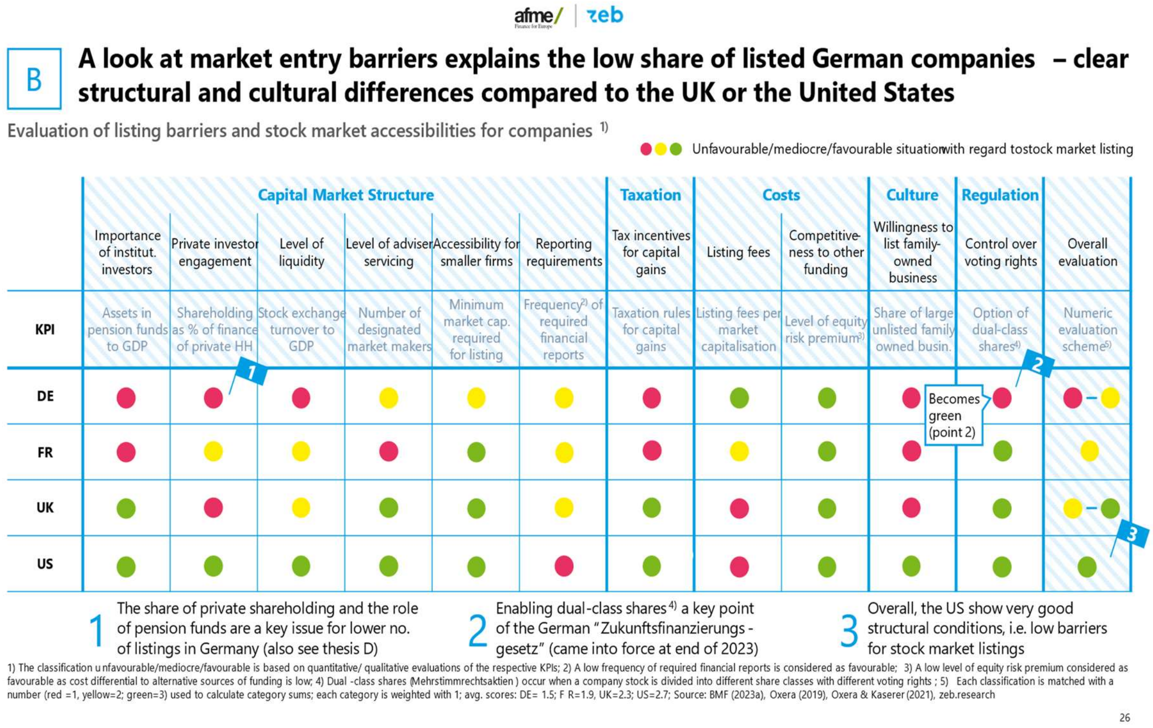
The venture capital market successfully finances many small and growing German businesses. The challenge arises when businesses are seeking to raise 50-100m euros or more. At this level of funding, the number of German (or European) Venture Capital funds or Private Equity firms which have sufficient financial resources or risk appetite for single company exposures is limited. The resulting funding shortfall is often referred to as the "scale-up gap".

The situation is different in the US, where US scale-ups have better access to finance (as the market is around 10 times larger). The result is that German scale-ups are often dependent on investment from outside Europe. This increases the risk that they will later move their operations and/or choose to raise public equity outside Europe.

In addition to this private funding scale-up gap problem, the current trend shows that since 2019, an increasing proportion of German companies have favoured foreign stock exchanges for their own IPOs - especially in the US. This may be characterised as the public funding problem in Germany (i.e., funding on public markets). There is a clear industry pattern here: companies from innovative and fast-growing sectors in particular - e.g. biotechnology or IT - are attracted to stock exchanges outside Germany.

The fundamental issue from a German perspective is that the business focus of some companies shifts with their stock market listing, as shown in the table [below]. The annual growth in total turnover of German companies listed abroad increased from 7.4% to 19.1% after their IPO, while the share of their German business fell from 16.2% to 10.8%. In comparison, the annual growth in total turnover of German companies listed in Germany 'only' increased from 6.6 % before their IPO to 11.7 % after their IPO, with the share of their German business remaining roughly the same.





Zeb has analysed the market structure in Germany. Both the number of companies and the market structure are similar in Germany and the UK, but the share of listed firms is significantly lower in Germany, and only around 56% of those shares can be traded freely (compared with 92% in the UK). Detailed analysis of the reasons for the low share of listing is shown in the table [above]. The German market has relatively low scores on investor-related factors (number of institutional and private investors, level of liquidity) and cultural factors (willingness to list family-owned businesses). Overall, the market is marginally less attractive than France or the UK, and significantly less than the US.

AFME analysis and recommendations

The German dimension – domestic improvements

The WIN Initiative and the ZuFinG are positive initiatives, which should work together to help companies as they progress through different stages of the lifecycle. While these initiatives are helpful, further measures should be taken to improve the domestic regulatory framework, in order to strengthen the performance of the German capital market.

AFME has developed further suggestions for improving the domestic regulatory framework conditions.

We have grouped our suggestions under three headings:

Corporate law

- Implement majority shareholder decisions efficiently
- Increase the chances of a successful public takeover offer
- Reduce unnecessary costs
- Facilitate the use of small denomination shares
- Streamline the process for capital raising
- Facilitate mergers where there is majority approval
- Clarify insolvency rights

Prospectus law

- Apply a proportionate approach to prospectus liability
- Encourage foreign companies to list depositary receipts in Germany
- Avoid unnecessary changes to supervisory rules

Structural factors

- Encourage retail participation
- Improve attractiveness of the German financial sector
- Encourage international equity trading in Germany
- Use international terms and conditions for bond issues
- Avoid gold-plating relating to collateral sales
- Avoid duplication of compliance procedures
- Bring in new investors through securitisation

Specific recommendations on these themes are set out in the Annex.

The European dimension – Germany benefits from deeper European integration

Germany can do much at home to support German businesses. What Germany also needs is scale. For this the success of Germany depends on further progress at European level as well.

According to AFME research[3], 2023 saw a decline in the international competitiveness of the EU's capital markets with the EU significantly behind the US and UK, particularly regarding access to market-based finance and market liquidity.

[3] https://www.afme.eu/news/press-releases/details/key-industry-report-tracks-european-capital-markets-performance-in-2024---unlocking-capital-markets-for-a-competitive-europe

In 2023 the European Commission asked Mario Draghi to investigate European competitiveness. The results of the investigation are set out in the report “The future of European competitiveness”[4]. The report states that “The Single Market is critical for all aspects of the strategy: for enabling scale for young, innovative companies and large industrials that compete on global markets; for creating a deep and diversified common energy market, an integrated multimodal transport market and strong demand for decarbonisation solutions; for negotiating preferential trade deals and building more resilient supply chains; for mobilising greater volumes of private finance; and as a result, for unlocking higher domestic demand and investment.”

During the next legislative cycle (2025-2029) the European Commission plans to create a “Savings and Investment Union” to take forward many of the ideas from the Draghi report.
While it is the Commission which proposes draft legislation, Member States have a key role to play.

Recommendation: Germany should play a leading and proactive role in shaping the priorities of the new European Commission, building on the ideas in the Draghi report, designing the Savings and Investment Union and ensuring that the regulatory framework supports the competitiveness of the European economy and the German economy.

[4] https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en

Annex - specific recommendations

1. Corporate law

1.1 Implementing majority shareholder decisions efficiently

In Germany shareholders with a small number of shares can block the implementation of transactions for months, even if these were approved by 99.9% at the Annual General Meeting. Some useful legislative measures were taken as part of ZuFinG 1, but it is still possible for transactions to be blocked, in particular by raising contestation actions This is a complex issue that has been heavily discussed among German legislators and legal professionals.

Recommendation: The regime of contestation rights and the legal consequences of contestations relating to shareholders resolutions should be re-shaped to address the concerns. A more flexible and nuanced regime could remove the legal/practical register blocking for the majority of contestation actions.

1.2 Increasing the chances of a successful public takeover offer

As part of the process of a public takeover offer, a minimum acceptance threshold is set at the outset of the process. If the minimum acceptance threshold is not met by the end of the acceptance period, then the question arises as to whether/how the process can continue. Under German law, it is not possible to waive the minimum acceptance threshold after the end of the acceptance period. There is no corresponding requirement under European law. This is therefore an example of gold-plating. As a consequence, a significant number of public offers in Germany fail due to this reason. It is noteworthy that several other Member States, as well as the UK and the US, have introduced the concept of a waiver of the minimum acceptance threshold after the end of the acceptance period. For example, in the US, such a waiver would lead to an extension of the acceptance period).

Recommendation: It should be possible to waive the minimum acceptance threshold after the end of the acceptance period, in order to increase the chances of a successful public takeover offer in Germany.

1.3 Reducing unnecessary costs

In the event of a capital reduction, there is generally a requirement for the company to provide a security deposits to protect creditors. In some cases, a capital reduction may be combined with a capital increase in such a way that at least the same amount of share capital is achieved as a result. In such cases, the creditors are not placed in a worse position. There is thus no need for protection by a security deposit. The requirement for a security deposit in such cases leads to an unnecessary cost for the company.

Recommendation: The requirement to provide a security deposit in the cases described above should be waived.

1.4 Facilitating the use of small denomination shares

The lower minimum denomination of the shares of an AG is generally positive. This will increase attractiveness for retail investors, enhance liquidity with small issue volume and increase equity financing of small and medium-sized companies. However, ZuFinG 2 also includes a requirement for an express authorisation in the articles of association. This appears to be too complicated and unnecessary. There is no "risk of misleading investors", as suggested in the explanatory memorandum. "One-eurocent shares" are widespread in corporate practice in other EEA countries.

Recommendation: The process should be streamlined – there is no need to introduce an express authorisation in the articles of association.

1.5 Streamlining the legal process for capital raising

Under German corporate law, when a German company needs to raise capital, it is required to file an application with the competent court, so that the capital raising can be registered in the commercial register by the competent judge.

In practice, such application is typically prepared by the company and lawyers, and collected and submitted by a notary. The registration with the commercial register is mandatory for the effectiveness of the capital increase. Under current law, the process entails a judge assessing and confirming that the relevant provisions and stipulations under corporate law have been followed. Only then can the constitutive entry in the commercial register be made. The court approval can typically be obtained within 1-2 days. It nevertheless introduces uncertainty, because there is no guarantee that a judge will be available at the required time. This can be important, for instance in the case of an accelerated book build.

Recommendation: The procedure should be streamlined. One approach would be to amend the law so that the implementation of the capital raising can be achieved simply by getting the approval of a notary. The entry in the commercial register would then be made after the completion of the transaction (ie the entry in the register would simply be for the record, not a requirement for the completion of the transaction). This is the approach followed in several EU Member States.

1.6 Facilitating mergers where there is 75% approval

Following a successful public takeover offer, the acquiring company typically holds less than 100% of the shares in the target company. There is the possibility of so-called second-step mergers in order for the acquiring company to acquire the rest of the shares. In Germany, this requires that the bidder holds 90% of the registered share capital. Such a high threshold can make it difficult for the acquiring company to gain full control of the company. In addition, there is a practical question as to how the price for the acquisition of the remainder of the shares is to be determined, which opens additional room for costly and time-consuming appraisal proceedings. The acquiring company currently bears the risk that the price increases above the takeover price.

Recommendation: The second step should only require the approval of 75% of the voting shares. The corresponding percentage under US law is 50%. In addition, the acquiring company should not have to bear the risk that the price set out in the public takeover offer. One solution would be for the price to be the same as the takeover price (in case of an all-cash offer), at least when the second step occurs within a short period of time after the takeover (e.g., within one year) and/or the acceptance rate of the public takeover offer has reached a certain threshold.

1.7 Clarifying insolvency rights in the case of participation in equity and debt

A bank may have exposure to both the debt and equity of a client. For example, the lending department of the bank may have advanced a loan to the client, and another department may have exposure to the equity of the client, for example as a manager of a private equity fund, or as an investor in a private equity fund, or as part of an equity trading business. Furthermore, a bank may be part of a syndicate of banks, and the other banks may also have exposure to the equity of the client. In the event of an insolvency, the rights of the creditors vary depending on whether the loans are treated as shareholder loans. Under current law, there is uncertainty, making it challenging for banks to effectively manage their risks, which may, in turn, limit their engagement with companies.

Recommendation: The provisions on the subordination of shareholder loans should be revised with regard to the lending business of banks. Provided that the equity or debt investment decisions are made independently of each other within the banks or between the syndicate banks, it should be clarified that the loans are not treated as shareholder loans.

2. Prospectus law

2.1 Applying a proportionate approach to prospectus liability

According to the draft ZuFinG 2, liability for the 11-page summary document should follow the same rules as those which apply for a (full) prospectus. This means, in particular, that the persons responsible for the summary document are liable if the summary is incomplete. In general, this approach is (and has been) unsatisfactory, as the standard for an 11-page summary document can hardly be the same as for a full prospectus.

Recommendation: Persons responsible for the summary document should only be liable if the summary is misleading or incorrect. This would be in line with the liability concept applicable to a securities information sheet in accordance with Section 11 WpPG (Securities Prospectus Law). The use of the 11-page summary document could also be incentivised by a statutory clarification that only the issuer (and not the banks) is subject to the corresponding WpPG prospectus liability.

2.2 Encouraging foreign companies to list depositary receipts on German exchanges

Depositary receipts representing shares help foreign issuers to achieve an indirect listing of their shares on a domestic stock exchange. They are used if the shares are not directly tradable on a domestic stock exchange. German prospectus liability law provides for a liability in relation to the whole of the prospectus and does not differentiate between the formal issuer of the depositary receipts (i.e., the depositary) and the issuer of the underlying shares. This results in a high liability risk for the depositary.

Recommendation: Section 8 WpPG should be amended to include a special provision for depositary receipts. This should clarify that in the case of prospectuses for depositary receipts, the depositary is not considered as the issuer within the meaning of Section 8 WpPG and, therefore, is not subject to prospectus liability pursuant to Sections 9 et seq. WpPG. The term issuer ("Emittent") should apply to the issuer of the underlying shares. This would make it easier for foreign issuers to have their shares listed on a German stock exchange via depositary receipts.

2.3 Avoiding unnecessary changes to supervisory rules

ZuFinG 2 includes a provision which would reduce the required level of suspicion for the (public) disclosure of possible violations of the WpPG (Securities Prospectus Law). The provision would allow the BaFin to publish a suspicion on its website if there are mere "indications" that the transactions are suspicious. The problem is that if the BaFin publishes a suspicion on the basis of mere indications, and if it turns out that in fact the suspicion was groundless, the reputational damage will already have been done. Under current law, the requirement is there should be "reasonable grounds for suspicion".

Recommendation: the current wording of the law should be retained.

3. Structural factors

3.1 Encouraging retail participation

In Germany nearly 60% of German households' financial assets are in cash deposits (42%) or life insurance (16%). The share of typical capital market-related investments (bonds, pension funds, investment funds or equities) is significantly lower than in other countries.

There is therefore an opportunity in Germany to increase retail participation. There is already some evidence that the population is starting to invest more in capital markets, especially in the younger generations; from 2015 to 2022, the proportion of equity holders tripled in the 20-29 age group (see table below).

Nevertheless, the overall share of capital market-related investments in the total assets of private investors is low, and the challenge for Germany is how to mobilise additional funds to finance the investment needs of the German economy.

The two levers for mobilising savings are financial education and access to attractive investment products.

The OECD has published a report entitled "Finanzkompetenz in Deutschland stärken[5]", which sets out measures for strengthening the financial education of adults and young people from different socio-economic backgrounds and for improving the effectiveness of financial education initiatives. The BMF and the BMBF have accepted the recommendations[6] and have published draft legislation to take this forward.

There are examples from other countries of how to design attractive investment products. The UK, for example, introduced an Individual Savings Account in 1999, which has become an important part of UK citizens' financial planning[7]. The returns on the investment are tax free. Japan introduced a similar product for its citizens in 2014. Building on the successful outcome, the product was expanded in 2024.[8]

Recommendation: Germany should help adults and young people to improve their competences on long-term financial planning, overall financial resilience and well-being. The joint initiative from the BMF and the BMBF is a very positive step in this direction. In parallel, Germany should design attractive investment products for citizens, drawing on the experience of other countries.

3.2 Improving attractiveness of the German financial sector

The German Banking Act (KWG) restricts the protection against dismissal for risk takers whose fixed remuneration exceeds three times the contribution assessment ceiling for pension insurance. Significant institutions are therefore able to dismiss risk takers without a reason for termination. However, the level of severance pay for bank employees, which is determined by the courts, remains an obstacle to banks deciding to relocate functions to Germany. For risk takers at major institutions (whose annual fixed remuneration exceeds three times the contribution assessment ceiling in the general pension insurance scheme), German labour law requires a severance payment of up to 18

[5] https://www.oecd-ilibrary.org/finance-and-investment/finanzkompetenz-in-deutschland-starken_77d40624-de

[6] https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2024/09/2024-09-24-oecd-vorschlag-finanzbildungsstrategie.html

[7] In 2023, around 12.4 million citizens opened an account https://www.gov.uk/government/statistics/annual-savings-statistics-2024/commentary-for-annual-savings-statistics-september-2024

[8] https://www.jsda.or.jp/en/activities/research-studies/html/2024nisa.html

months' income and the maximum possible severance payment is to be determined on the basis of the fixed and variable remuneration of the risk takers concerned.

Recommendation: Labour market laws should be adapted to provide more flexibility and attract top talent to the German financial sector. The severance payment for risk takers should be limited to 12 months' income and should be determined on the basis of the fixed remuneration only.

3.3 Encouraging international equity trading in Germany

Germany's current tax regime for capital gains tax and the lack of an efficient regime for offsetting foreign withholding taxes imposes significant administrative and tax burdens, both for the tax authorities and market participants. For example, § 36a EStG, which was introduced to counteract specific types of transactions, is not properly targeted, and leads to systematic overtaxation and puts Germany at a disadvantage relative in relation to international stock trading.

Recommendation: The system should be reformed to eliminate systematic overtaxation and thereby enable international equity trading in Germany.

3.4 Using standard international terms and conditions for bond issues

Based on court rulings, bond terms and conditions are subject both to the inclusion requirements of Section 305 para. 2 of the German Civil Code (BGB) (vis a vis consumers) and to a full review of the content of the general terms and conditions (AGB-Inhaltskontrolle).

The application of the AGB-Inhaltskontrolle is however perceived as a considerable legal risk for bond terms and conditions. The new law introduced with the ZuFinG has only addressed this problem for transactions between professional capital market participants. In the case of bonds that are held by non-financial companies or private investors, the legal uncertainties caused by a potential AGB-Inhaltskontrolle remain.

Recommendation: The ZuFinG 2 should exclude the AGB-Inhaltskontrolle for bond terms and conditions that are held by non-financial companies or private investors. Germany will only be attractive as a location for bond issues if standard international conditions prevail.

3.5 Avoiding gold-plating relating to collateral sales

When a bank provides a margin loan and receives collateral, it has certain rights relating to the collateral (for example, to sell the collateral in the event of the insolvency of the client). The collateral may take various forms, e.g., listed shares or non-listed shares.In the case of listed shares, it may be possible to sell the collateral on the stockexchange. However if large blocks of shares need to be sold in a short time, it might not be readily achievable on exchange. In that case the bank might also consider a private block sale. German law allows this, but there is some uncertainty as to the application of the law regarding the price -the relevant law contains a reference to the stockexchange price, whereas in reality there might not be such a price for a large block of shares. Other European countries do not have such a provision. This puts Germany at a disadvantage in businesses where the bank may need to sell collateral.

Recommendation: It would make sense to clarify that a private block sale outside the stock exchange is also possible for listed shares. This may be necessary if large blocks of shares need to be sold within a short period of time, which is not easily possible via the stock exchange.

3.6 Avoiding duplication of compliance procedures

BaFin consulted in 2024 on its Interpretation and Application Guidance supporting the German Money Laundering Act (GWG)[9]. The updated guidance document was published on 29 November 2024.

Section 5.1.2 of the guidance helpfully clarifies that certain natural persons need only be identified when the circumstances in question trigger the obligation to identify the contractual partner in accordance with Section 10 (3) of the GwG. Within a business relationship the relevant natural persons are typically legally appointed representatives in the case of establishing a business relationship for a represented party, or legal representatives who may be members of the management body (or similar governing body), or parents, guardians and/or trustees. The guidance further states that there is no legal obligation pursuant to the GWG to identify a person who is acting as a representative or messenger who deposits or transfers money on behalf of a customer to their account, because in these cases the transaction occurs within an existing business relationship.

At present, there is no specific guidance confirming that there is no GWG or AUA requirement to identify and verify internally authorised market traders employed as staff in institutions that are within an existing regulated business relationship. This creates a degree of uncertainty amongst firms. This in turn may lead to inefficient focusing of AML/CFT resources or operational delays to capital market activity between financial institutions active in Germany.

Recommendation: BaFin should provide additional guidance in relation to the person acting on behalf of the client when establishing a business relationship with a regulated financial services firm. It should be acknowledged that that these individuals are generally subject to vetting, checks and verification by their employing firm and that they present a low money laundering or terrorist financing risk which may warrant the use of alternative identification/verification approaches. We believe that a risk-based approach, which takes into account the controls exercised by regulated financial institutions over the natural persons working for them, would allow AML/CFT resources to be clearly focused on the identification and verification of other entities and individuals who may

[9] https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Konsultation/2024/kon_06_24_Konsultation_AuA_AT.html

pose a money laundering or terrorist financing risk under the German AML/CFT regulatory framework.

3.7 Bringing in new investors through securitisation

German businesses which sell their goods and services on credit have for a long time used their trade receivables as a way of financing their working capital. They do this by connecting with investors who are interested in investing in the receivables.

Financial institutions which provide consumer or corporate loans or leases in Germany have similarly used these assets as a way of financing loans to new customers. They do this by connecting with investors who are interested in investing in the corporate loans.

The technique which is used to make the connection is securitisation.

The EU securitisation framework was adopted in January 2019 with the key objective of reviving the European securitisation market which remained subdued after the Global Financial Crisis.

Recommendation: Germany should proactively support adjustments to the EU securitisation framework to reduce unnecessary regulatory complexity so that the market becomes more attractive for companies, banks and investors. Apart from these reforms which need to be endorsed collectively at EU level, Germany should also aim to address German law specificities in order to eliminate uncertainty and regulatory gaps in its national legislation, as such issues were identified in the recently published BdB/TSI report entitled "A strong, competitive Europe: unlocking the potential of securitisation".