

# Insider Trading Laws Complicate the Distribution of Research Reports in German IPOs

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Under German law, the preparation and distribution of predeal research reports — a common practice for German initial public offerings — raises certain insider trading law issues that recently have changed the manner in which analyst presentations are prepared and published. These reports typically are distributed to institutional investors following a press release by the issuer announcing its IPO (a so-called intention to float or ITF).



## German Securities Trading Act

Pursuant to Section 12 of the German Securities Trading Act (GSTA), so-called "insider securities" are securities that, among other features, are admitted to trading on a German stock exchange. Under Section 12, securities will be deemed admitted to trading on a German stock exchange if the application for such admission or inclusion has been made or publicly announced.

Whether or not an ITF triggers a public announcement within the meaning of Section 12, which goes beyond European law requirements in this area, may depend on the wording of the specific ITF. In most cases, however, the ITF will be interpreted as the "announcement" of the contemplated IPO and stock exchange listing, which means that the German insider trading laws may apply as of the date of its publication.

Additionally, Section 13 of the GSTA provides that "inside information" is any specific information relating to one or more issuers of insider securities that is not publicly available, or to the insider securities themselves, which, if publicly known, would likely have a significant effect on the stock exchange or market price of the insider security.

## Application to Analyst Presentations and Research Reports

Under these definitions, an analyst presentation, if not made publicly available, could constitute inside information within the meaning of the GSTA. This would prevent the recipient of such information — and the recipient of research reports prepared on the basis of this information — from (1) making use of the information to acquire or dispose of insider securities for its own account or for the account or on behalf of a third party, (2) disclosing or making the information available to a third party without the authority to do so, or (3) recommending on the basis of such information that a third party acquire or dispose of insider securities, or otherwise inducing a third party to do so (Section 14 of the GSTA).

Consequently, if the ITF were to constitute a public announcement within the meaning of Section 12, the distribution of the research reports, which generally occurs immediately after the publication of the ITF, would happen when the shares in the IPO already qualify as insider securities. In this case, information contained in the research reports, including the valuation developed by the research analyst, could constitute inside information with the consequences set forth in Section 14 of the GSTA. The same issue presents itself, irrespective of the ITF and the analysis of Section 12, in re-IPO transactions in which the shares to be offered or other securities of the issuer (or potentially of its parent or another affiliate), such

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as high-yield debt, already are trading on a regulated or unregulated market.

## **Publishing Analyst Presentations to Avoid Insider Trading Violations**

As a result of the foregoing, and depending on the structure of the transaction and capital markets history of the issuer involved, it has become market practice in Germany — especially in re-IPO transactions or other transactions in which securities of an issuer or its parent trade on an exchange prior to the IPO — to make the information in the analyst presentation publicly available before research reports are distributed by the syndicate banks. Such publication avoids potential concerns about selective disclosure and provides syndicate banks involved in German IPOs with the ability to rely on the safe harbor set forth in Section 13, which provides that a valuation prepared exclusively on the basis of publicly available information is, in and of itself, not inside information, even if it could significantly influence the price of insider securities.

In practice, the contents of an analyst presentation can be made publicly available in two ways. First, the issuer can post the presentation in its entirety on the issuer's website. This approach may be particularly advisable in re-IPOs or other transactions for which an increased concern exists regarding selective disclosure of the valuation, forecasts or other material information contained in the related research report. Alternatively, the issuer may decide to structure its website so that all substantive information about the issuer contained in the analyst presentation (but not the analyst presentation as such) is made available and easily accessible. Regardless of which approach the issuer follows, to avoid insider trading concerns, the issuer should ensure that the public is informed of the fact that new substantive information about the issuer is available and where the information may be found, e.g., by specific reference to its webpage in an official announcement or in the ITF.

In order to avoid potential securities laws liability, an analyst presentation for a German IPO should contain information that is substantially consistent with the information that will be contained in the subsequently published IPO prospectus. That concept is not new. However, the fact that analyst presentations (or their material content) need to be made publicly available at the time the issuer announces the intention to go public to avoid insider trading violations subjects analyst presentations to significant additional scrutiny, adding complexity and liability concerns to the overall IPO process.

## **Outlook**

The new EU Regulation on Market Abuse (which will apply beginning in mid-2016) should clarify the applicable legal framework — specifically, by requiring that the respective insider trading laws only apply to issuers of previously nonlisted securities if and when a formal request for admission to trade securities on a regulated market has been made, and not upon a mere informal announcement of a future listing in an ITF. When that happens, it will be an important step toward further harmonizing European capital markets laws and practice.