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## AFME recommendations for a Zukunftsfinanzierungsgesetz 2.0

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The Association for Financial Markets in Europe (AFME) understands that the German government is currently considering possible themes for draft legislation to follow the reforms of the Zukunftsfinanzierungsgesetz.

Supporting the growth potential of Germany and the European Union will require significant investments over the next years and decades. An essential requirement to help meet these investment needs is the further integration of European capital markets. Germany is well positioned to take a leading role in these discussions.

At national level, it is important to consider remaining barriers standing in the way of Germany developing its own national markets. Some of these relate to specific financial market activities, such as trading or listing, whilst others relate to the financial ecosystem itself, for example the tax system.

We welcome that Germany has addressed a number of such barriers through the Zukunftsfinanzierungsgesetz, and we support a further review of existing national legislation to support the German financial market ecosystem.

Below we summarise key themes that could form part of a legislative proposal to support stronger capital markets in Germany.

### Considerations for a Zukunftsfinanzierungsgesetz 2.0

#### 1. Enabling an attractive listings and “post-IPO” landscape

- Current German corporate law contains several provisions that complicate IPOs of German AGs and SEs, their subsequent life as a listed company, and also their recapitalisation in the event of a crisis.
- There is a growing interest in non-German legal entities as listing entities, driven by the much greater flexibility of non-German corporate law, e.g. in relation to capital structure, board representation and voting rights. We note for example the Netherlands and Luxembourg as more flexible jurisdictions.
- It is important to consider further changes to the German legal framework to ensure an attractive landscape for listing and the “post-IPO” landscape. Legal and procedural hurdles, such as the high minimum amount per share and restrictive employee incentives hinder capital market activities.

#### Recommendations:

- Reduction of minimum nominal value per share from EUR 1.00 to EUR 0.01 to facilitate pre-IPO reorganisations and rescue rights issues. This would increase attractiveness for retail investors, enhance liquidity with small issue volume, and increase equity financing of small and medium-sized companies, as done in Luxembourg.
- Removal of requirement to secure creditors if capital is reduced to give effect to lower nominal amount per share and reduction amount in the capital reserves (Section 225 of the German Stock Corporation Act, “Aktengesetz” - AktG).

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- Introduce ability to issue warrants and other call options on issuer shares (not just convertible bonds and bonds with warrants) (Section 221 AktG).
- Materially shortening of appraisal proceedings in the case of profit and loss absorption agreements or squeeze-out following successful takeover offers (Sections 304(3), 305(5) and 327f AktG) – these rules jeopardise takeover offers from being successful and therefore weigh on company valuations.
- Enable stock options for supervisory boards and allow re-pricing without a general meeting resolution.
- Modernise the Commercial Register to allow effective registration by notaries with subsequent non-constitutive registration to accelerate capital increase procedures.
- Consider abolishing the register block: In Germany, shareholders with a small number of shares can block the implementation of transactions for months, even if approved at the general meeting with 99.9%. The so-called register block (*Registersperre*) by appeal should be abolished in both takeover and corporate law, to align with most other EU member states. Whilst the “Freigabeverfahren” has in certain cases eased the overall process, transactions can still be blocked despite general meeting approval.
- Germany should also seek to encourage alternative listing routes including in the form of depositary receipts (DR) with a view to emulating the successful ADR market in the US. To date, there has been limited uptake of DR listings despite the possibility of using the China Stock Connect to enable Chinese A share issuers to issue DRs on German exchanges. This is due to the restrictive legal framework which imposes significant legal liability for prospectus disclosures on the DR bank. By aligning liability provision with other markets, Germany could stimulate greater uptake of alternative listing avenues such as DRs.

## 2. Facilitating investments in publicly traded companies

- The German Takeover Act (WpÜG) imposes unnecessary requirements which limit domestic acquisitions and foreign investment in Germany.

### **Recommendations:**

- Restriction of back-end speculations (speculating on a control agreement/squeeze-out): There are numerous cases where investors successfully speculate on the occurrence of a control agreement or a squeeze-out following a takeover in Germany.
- Enable Second-Step Mergers: Reduce the threshold from 90%, which must be achieved in Germany to carry out a so-called squeeze-out under merger law, to 75% to facilitate smoother corporate control transactions.
- Simplify Takeover Procedures via reform of the WpÜG:
  - (i). Many public offers fail because German law without this being a requirement under EU law) cannot waive the minimum acceptance threshold after the end of the acceptance period. This hinders an effective bidding process and is regulated differently in many European countries.

- (ii). According to the WpÜG, offer documents must continue to be prepared in German, although prospectuses for large IPOs can be prepared in English (with a German summary). This creates unnecessary costs and administrative effort.
- More generally, we also note that increasing FDI requirements in Germany and other jurisdictions prove increasingly onerous and difficult to navigate in cross border-takeovers. Germany could review these requirements in this context.

### **3. Facilitating business with institutional investors**

- German law sometimes exceeds EU minimum requirements and does not consider the special situation and role of institutional investors.
- For example, in the area of money laundering, Germany is placing an undue burden on institutional investors, including public sector entities such as EU Member States and EU institutions, and established financial institutions and large enterprises.
- As stipulated by the German Anti-Money Laundering Act (GwG), parties must collect certain personal data from the “acting person”, including sensitive personal data (full name, full date of birth, nationality, private residential address of employees of the customers) and verify this information in a comparable fashion as for natural persons opening an account. In the context of institutional investors, this role is often unrelated to the conduct of the business relationship (c.f. § 11 para. 4, GwG) and does not materially affect the risk exposure of the entity.
- Directive (EU) 2015/849 lays down requirements (inter alia) in relation to registration of, identification of, and checks on, senior management and beneficial owners of obliged entities. It does not make any specific specifications on the data set that must be collected for the identification of the acting persons. The GwG therefore appears to go beyond minimum EU requirements, and a risk-appropriate adjustment of the current regulations in the GwG would therefore be compatible with the requirements under European law.
- We note that the Financial Action Task Force (FATF) itself has explicitly advised against gold-plating, describing excessive or over-zealous implementation as counter-productive. EU requirements are close to FATF standards, and there is no legal or political need for Germany (or any member state) to exceed these.

#### **Recommendations:**

- Germany should align with practices in other EU member states and implement risk-appropriate waivers for collecting sensitive personal data for the acting persons of institutional clients.
- The specifications for verifying the identity of the acting person (§§ 12 and 13 GwG) should also be revised, as otherwise sensitive personal data would also have to be collected and processed.
- A risk-appropriate procedure should be determined based on the customer-specific risk by the respective obligated party (cf. § 10 para. 2 GwG).
- Leverage Digital Solutions: Utilise digital signatures and other technological solutions to simplify the identification process and enhance efficiency in a risk-appropriate manner.

#### 4. Encouraging stock trading in Germany

- Germany's current tax regime for capital gains tax and lack of efficient regime for offsetting foreign withholding taxes imposes significant administrative and tax burdens, both for the tax authorities and market players. National rules are in part inconsistent with the requirements of the international stock trading business.
- The failure to permit a credit for foreign tax in the German capital gains tax credit procedure (§ 36a EStG) leads to systematic overtaxation of the trading transaction with domestic shares.

##### **Recommendations:**

- Eliminating the capital gains tax on domestic dividends for commercial investors would help to simplify taxation and reduce administrative burdens.
- Introducing a streamlined regime for offsetting foreign withholding taxes would help Germany reduce administrative procedures, and also align with international best practice.

#### 5. Encouraging savings for wealth creation and pensions

- The Generationenkapital establishes a public fund invested on the capital markets. AFME supports the Generationenkapital as measure to stabilise the existing statutory pension insurance scheme. Given that the federal budget already contributes around 100bn EUR annually to the statutory pension system, paired with demographic change and an ageing population, measures which can diversify sources of funding can contribute to stabilising the pension levels in the long term.
- Additional private and occupational retirement schemes, as well as private saving mechanisms have proven to be crucial in creating wealth and securing employee's retirement, as well as a driver for national financial markets. For example, the US "401k" supports retirement savings via an occupational defined contribution personal pension account. In the UK, schemes like the "stocks and shares ISA" or the "lifetime ISA" allow consumers to chose whether to focus on wealth creation or pension savings, in addition to an auto-enrolment occupational pension scheme. We also note that Japan recently introduced the "NISA", a tax emption programme for retail investments.
- In addition to the Generationenkapital, specific schemes to support wealth creation and retirement savings (occupational or private) can help German savers participate in capital markets.
- In addition to such schemes, we welcome initiatives to increase financial literacy to support savers' decision making, such as the "Aufbruch Finanzielle Bildung" jointly launched by the Federal Ministry of Finance and the Federal Ministry of Education and Research in March 2023 to support financial education. We also note the [recommendations](#) recently outlined by the OECD on financial literacy in Germany.

**Recommendations:**

- Implement capital markets-based retirement schemes similar to the US, UK or Japanese model to support retirees, attract institutional funds and drive market growth.
- Incentivise private savings and wealth generation by allowing savers to convert a certain share of their income tax-exempt into an investment of their choice.
- More broadly, an option of “general” tax-exempt savings up to a yearly limit could be considered (in addition to tax-exempt pension contributions). The tax advantage nature of this measure would provide an incentive to save for retirement and also help lower the investment risk for investors, given that a potential delayed taxation during retirement would likely occur at lower tax rate. In Germany, such investments would result in private investors increasingly having a direct stake in how the capital markets and the overall German economy perform. Over time this would also support the development of an equity culture.
- Building on the positive initiative “Emergence of Financial Education”, we would recommend the swift establishment of a National Financial Literacy Strategy to be rolled out via effective initiatives in line with the recommendations by the OECD, incl. on (i) saving for the long-term and for retirement, (ii) participating in capital markets, (iii) using credit responsibly, (iv) using digital financial services safely, (v) meeting sustainability preferences.

**6. Finanzplatz Germany**

- Other EU Member States offer various incentives, including favourable labour market laws and tax incentives to attract foreign nationals. This has proven to be a disadvantage in attracting employees and financial institutions to move to Germany.
- For example, the French “impatriate tax regime” offers foreign nationals to reduce their taxable income for up to 9 years following relocation.
- The amount of the severance payment of bank managers determined by courts remains a barrier for banks to decide whether to establish functions in Germany. For risk takers at significant institutions (whose annual fixed remuneration exceeds three times the contribution ceiling in the general pension insurance), German labour laws require severance pay of up to 18 months’ earnings and the maximum possible severance pay must be determined based on the fixed and variable remuneration of the affected risk takers.

**Recommendations:**

- Introduce tax incentives similar to those in France and Italy to attract foreign financial professionals and institutions.
- Adjust labour market laws to offer more flexibility and attract top talent to Germany’s financial sector. Severance pay for risk takers should be limited to 12 monthly earnings and calculated on a fixed compensation basis only.