

# COUNTRY GUIDE – Germany

(20 December 2013, updated in April 2014 and August 2015)

**Important notes:** *This guide does not override the Rules and is not a substitute for legal, regulatory, tax, financial or any other advice from qualified professional advisers. If there is any conflict or inconsistency between this guide and the Rules, the Rules prevail. You may consult the Listing Department on a confidential basis for an interpretation of the Rules, or this guide.*

*The information contained in this guide on foreign laws, regulations and market practices is based on that provided to us by potential listing applicants, listing applicants, listed issuers, their respective advisers or officials from the relevant jurisdiction. We have not separately verified this information nor have we updated this information since its receipt. We will revise this guide to reflect changes in this information only when notified of these changes.*

***A new applicant for listing that is incorporated in Germany must confirm to the Exchange, with its initial application for listing, that the German laws, regulations and market practices contained in this guide are still applicable, or provide us with details of any changes, and inform us of any other German laws, regulations and market practices that are relevant to its circumstances.***

## **Purpose of this Guide**

This guide is one of a series that gives guidance on our treatment of listing applications from overseas issuers incorporated in a particular jurisdiction. The aim of this guide is to enhance applicants' understanding of our expectations, practices, procedures and the criteria we consider when applying the Rules for overseas issuers.

**This guide should be read in conjunction with the Joint Policy Statement Regarding Listing of Overseas Companies (27 September 2013)<sup>1</sup>. All issuers incorporated in Germany can apply for one or more “common waivers” and those with, or seeking, a secondary listing<sup>2</sup> do not need to apply for waivers of certain Rules which are automatically waived for them<sup>3</sup>.**

### **Summary of our Approach**

Subject to Germany incorporated companies meeting the conditions set out in this guide, we do not consider German shareholder protection standards to be materially different to our own.

We will consider a listing of depositary receipts on the Exchange for Germany incorporated companies.

Germany meets our international regulatory co-operation requirements because it already has adequate measures in place with Hong Kong's Securities and Futures Commission.

We are prepared to accept financial statements that conform to International Financial Reporting Standards as endorsed by the European Union. These must contain a statement of the financial effect of the material differences (if any) from either Hong Kong Financial Reporting Standards or International Financial Reporting Standards.

We expect a Germany incorporated issuer to prominently and fully disclose in its listing document details of the German taxation regime and how it is applicable to Hong Kong shareholders, including capital gains tax and withholding tax on dividends.

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<sup>1</sup> Available on the HKEx website at:

[http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/Documents/new\\_jps\\_0927.pdf](http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/Documents/new_jps_0927.pdf)

<sup>2</sup> JPS, Section 5.

<sup>3</sup> JPS, paragraph 88.

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## 1. Background

- 1.1 The German equivalent to the Hong Kong Companies Ordinance (Cap. 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) is the German Stock Corporation Act, which sets requirements for Germany incorporated stock companies (“company” or “companies”) (*Updated in April 2014*).

## 2. Application of this Country Guide

- 2.2 This Country Guide applies to primary and secondary Main Board listing applicants and primary GEM listing applicants incorporated in Germany. We do not accept applications for secondary listing on GEM.

## 3. International Regulatory Co-operation Measures

- 3.1 Our Joint Policy Statement Regarding the Listing of Overseas Companies (27 September 2013) (“JPS”) states that the statutory securities regulator of an overseas issuer’s jurisdiction of incorporation must have adequate arrangements with the Securities and Futures Commission (“SFC”) for regulatory co-operation<sup>4</sup>. This requirement is met for issuers incorporated in Germany as the Federal Financial Supervisory Authority (“BaFin”), the statutory securities regulator in Germany, is a full signatory of the IOSCO MMOU<sup>5</sup>. In addition, the BaFin has signed a Memorandum of Understanding concerning investigatory assistance and exchange of information with the SFC<sup>6</sup>.
- 3.2 If a listing applicant is incorporated in Germany but its place of central management and control<sup>7</sup> is elsewhere, similar international co-operation arrangements must generally also be in place with that jurisdiction.

## 4. JPS Shareholder Protection Standards

- 4.1 Subject to Germany incorporated issuers demonstrating<sup>8</sup> how their practices, as set out below, conform to the JPS requirements, we do not consider Germany’s shareholder protection standards to be materially different to our own<sup>9</sup>. We have set out below details of the differences between these practices and the JPS requirements, save for ‘Right to speak and vote at general meetings’, since this is a new JPS requirement and we have not yet received any submissions describing the

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<sup>4</sup> JPS, paragraphs 42 to 44.

<sup>5</sup> International Organisation of Securities Commission’s Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.

<sup>6</sup> [http://www.sfc.hk/web/doc/EN/aboutsfc/cooperation/germany\\_980301.pdf](http://www.sfc.hk/web/doc/EN/aboutsfc/cooperation/germany_980301.pdf)

<sup>7</sup> JPS, paragraph 45.

<sup>8</sup> We list the key shareholder protection standards with which applicants must demonstrate equivalence in Section 1 of the JPS.

<sup>9</sup> Notes to Main Board Rules 19.05(1) and 19.30(1) and JPS, paragraphs 27 and 28.

differences. Where we have in the past accepted a practice, we have stated this below.

***Matters requiring a super-majority vote***

- 4.2 A super-majority vote of members required for a change to the rights attached to a class of shares: Under the JPS, changes to the rights attached to any class of shares of an overseas company must be approved by a super-majority vote of members of that class<sup>10</sup>, or by a simple majority vote of members of that class plus a significantly higher quorum<sup>11</sup>. Under German law, variations of class rights which are prejudicial to the holders of preferred shares or variations involving capital increases and other changes in the share capital require a special majority vote of that class of shareholders. However, other changes to class rights do not require a special resolution of shareholders of the specific class, but only a resolution of the entire general meeting.
- 4.3 A super-majority vote of members required for a material change to constitutional document: Under the JPS, material changes to an overseas company's constitutional documents, however framed must be approved by a super-majority vote of members<sup>12</sup>, or by a simple majority vote of members plus a significantly higher quorum<sup>13</sup>. German law requires a three-quarter majority vote of member for passing amendments to the constitutional documents, but only a simple majority without a significantly higher quorum for minor amendments where contemplated by German law or a company's constitutional documents. The scope of the minor amendments is unclear.

***Individual members to approve an increase in members' liability***

- 4.4 Under the JPS, there should not be any alteration in an overseas company's constitutional documents to increase an existing member's liability to the company unless such increase is agreed by such member in writing<sup>14</sup>. Under German law, no shareholder is bound to take or subscribe for more shares, or increase his liability to contribute to the share capital of, or otherwise pay money to, the company without his consent. There is, however, uncertainty as to whether such consent must be given in writing.

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<sup>10</sup> JPS, paragraph 31(a).

<sup>11</sup> JPS, paragraph 33.

<sup>12</sup> JPS, paragraph 31(b).

<sup>13</sup> JPS, paragraph 33.

<sup>14</sup> JPS, paragraph 34.

### *Proceedings at general meetings*

- 4.5 Timing of an annual general meeting: Under the JPS, an overseas company is required to hold a general meeting each year as its annual general meeting, and generally no more than 15 months should elapse between the date of one annual general meeting and the next<sup>15</sup>. Under German law, a company must hold its general meeting in the first eight months of each fiscal year, and a fiscal year must not last longer than 12 months. There is no statutory requirement on the time interval between annual general meetings.
- 4.6 Notice of general meetings: Under the JPS, an overseas company must give its members reasonable written notice of general meetings<sup>16</sup>. Under German law, all annual general meetings shall be convened on at least 30-days' prior written notice provided that shareholders in general meeting may pass resolutions by way of written resolutions of all shareholders notwithstanding the failure to provided 30-days' notice period, if all the shareholders having the right to attend and vote at the meeting attend and cast their votes.

In determining the “reasonableness” of the notice period for general meetings, the Exchange will take into consideration (i) the provisions under the Hong Kong Companies Ordinance (Cap. 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) as from time to time in force as applicable to Hong Kong incorporated companies, (ii) the shareholding structure of the company, and (iii) company and transaction specific facts and circumstances (*Updated in April 2014*).

The Exchange has previously accepted the notice requirement for convening general meetings under German law.

- 4.7 Right to speak and vote at general meetings: The JPS requires that all members must have the right to speak and vote at a general meeting, except in cases where members having a material interest in a transaction or arrangement are required, by the Rules, to abstain from voting to approve the transaction or arrangement<sup>17</sup>. Germany incorporated applicants must address whether they are able to comply with this requirement, which may necessitate an amendment to their constitutional documents.

## **5. Practical and Operational Matters**

- 5.1 Reference is made to Section 4 of the JPS which contains guidance on an overseas issuer's ability to comply with Hong Kong's rules and regulations; the eligibility of securities; cross-border clearing and settlement; Hong Kong depositary receipts;

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<sup>15</sup> JPS, paragraph 36.

<sup>16</sup> JPS, paragraph 37.

<sup>17</sup> JPS, paragraph 38.

taxation; and stock name identifications. Applicants are encouraged to notify the Listing Department if they envisage difficulties in complying with such matters, where applicable.

- 5.1A Paragraph 69 of the JPS provides that all listing applicants must make arrangement with Hong Kong Securities Clearing Company Limited (“**HKSCC**”) to ensure their securities are accepted as eligible for deposit, clearance and settlement in Central Clearing and Settlement System (“**CCASS**”) in accordance with the General Rules of CCASS.

Under HKSCC’s existing model, HKSCC, in its capacity as central securities depository, holds the legal title to shares of a company listed on the Exchange as the shareholder on record in a branch register held in Hong Kong. HKSCC’s clearing participants hold the beneficial interest in such shares in their CCASS stock accounts opened with HKSCC in its capacity as central securities depository. When a sale/purchase transaction in respect of such shares is made on the Exchange, a transfer of title in such shares amongst HKSCC’s clearing participants is effected by way of book entry transfer amongst CCASS stock accounts.

- 5.1B German law does not explicitly recognise the concept of beneficial title in shares of Germany incorporated companies. Based on HKSCC’s existing model, HKSCC clearing participants would not acquire proprietary rights as shareholders of Germany incorporated companies if the shares of such companies were to be listed on the Exchange.

#### Our Approach

- 5.1C The Exchange expects a Germany incorporated company seeking a listing in Hong Kong will list by way of depositary receipts (“**DRs**”). As GEM does not currently accept listings of DRs, Germany incorporated companies seeking listings in Hong Kong can only seek listings of DRs on the Main Board. (*Added in August 2015*)

#### ***Conflicts with Hong Kong’s rules and regulations***

- 5.2 The JPS states that overseas companies are strongly encourage to consult the Exchange where there is a potential conflict between the laws and regulations of its home jurisdiction and the Rules, for example, those that require a management or supervisory body of a company to approve matters that under the Rules require shareholders’ approval<sup>18</sup>. See also paragraphs 4.2 and 4.3 above.
- 5.3 The German Stock Corporation Act provides for a three-tier governance structure of a company, i.e. the management board, the supervisory board and the shareholders in general meeting, and certain corporate matters which are reserved for shareholders’ approval under Hong Kong law are delegated to a company’s

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<sup>18</sup> JPS, paragraph 67(b).

supervisory board. Matters that are within the delegated functions of the supervisory board cannot be made conditional on approval by the shareholders' meeting. To do so would contravene German law.

### Our Approach

- 5.4 We do not regard these differences as deficiencies in shareholder protection standards given that shareholder protection measures under German law include the following features:
- (a) the supervisory board members are appointed by the shareholders in a general meeting and they may be removed by shareholders without providing reasons. Also, they must be independent, act in the shareholders' best interests, disclose any conflict of interest and abstain from voting on matters giving rise to conflicts of interest;
  - (b) the management board must refer to the shareholders in a general meeting to decide on material matters of fundamental importance. According to German case law and legal literature, the materiality of a matter is based on:
    - (i) whether the company's structure is affected;
    - (ii) whether the general meeting's core competency to decide a company's constitutional document is affected;
    - (iii) whether the matter has an effect similar to amending the company's constitutional documents; and
    - (iv) whether approximately 80% of the company's assets are affected<sup>19</sup>; and
  - (c) the management board may voluntarily refer to the shareholders in general meeting for decision such matters that do not affect 80% or more of the company's assets ("**Voluntary Referrals**"). These Voluntary Referrals are subject to the comments and scrutiny of the supervisory board.

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<sup>19</sup> We understand that the threshold percentage is flexible and some German legal literature and case law recognise a 75% threshold based on other criteria such as turnover, fixed/total/net assets.



- 5.5 To reduce the need for applicant seeking a primary listing to obtain Rules waivers<sup>20</sup>, we are of the view that the Voluntary Referrals should include the following matters:

Main Board Rules <sup>21</sup>	Matter
14A.13	approval of connected transactions with any of the applicable percentage ratios reaching 5% or above
14A.14	approval of continuing connected transactions with any of the applicable percentage ratios reaching 5% or above calculated on an annual basis
Chapter 14	approval of notifiable transactions with any of the applicable percentage ratios reaching 25% or above

***Restrictions on Hong Kong investors' right to attend the applicant's general meetings to vote and/or to appoint proxies***

- 5.6 The JPS states that an overseas issuer must notify the Exchange of any restrictions on a Hong Kong investor's right to attend general meetings and to vote and/or to appoint proxies<sup>22</sup>.
- 5.7 Although German law provides that a shareholder is entitled to appoint in writing one or more person(s) as proxy to attend and vote in general meetings, the chairman has the right to restrict the entry to the general meeting to only one such proxy if more than one is appointed. In this case, the proxies have to agree on which one of them should attend and vote at the meeting.
- 5.8 We understand that it is not legally possible under German law to amend a company's constitutional documents to exclude the right of a chairman to restrict the entry to the general meeting to only one proxy.

**Our Approach**

- 5.9 Germany incorporated issuers must ensure that Hong Kong investors holding shares through HKSCC Nominees enjoy the right to vote, attend (personally or by proxy) and speak at general meetings<sup>23</sup>. In a previous case, we accepted an issuer amending its constitutional documents to provide that a clearing house (or its nominee) which is a member of the company may authorise any person(s) as its representative(s) to attend general meetings of the company and to exercise the same powers on behalf of the clearing house (or its nominee). If more than one person is so authorised, the authorisation or proxy form would specify the number and class of shares in respect of which each such person is so authorised and the person so authorised would be entitled to exercise the same power on behalf of the

<sup>20</sup> These Rules are automatically waived for applicants seeking a secondary listing that meet criteria set out in paragraph 88 of the JPS..

<sup>21</sup> The same requirements for Main Board and GEM companies.

<sup>22</sup> JPS, paragraph 70(f).

<sup>23</sup> JPS, paragraph 41.

recognised clearing house as that clearing house could exercise if it were an individual shareholder or company.

### ***Appointment of independent non-executive directors (“INEDs”)***

- 5.10 Main Board Rule 3.10 requires an issuer’s board of directors to include at least three INEDs. German law does not have the concept of non-executive directorship. As such no INEDs may be appointed to a Germany incorporated company’s management board.

#### Our Approach

- 5.11 We have previously accepted, as an alternative, the appointment to the supervisory board of three independent supervisors which satisfy the independence requirements of Main Board Rule 3.13 to take up the principle duties and obligations of INEDs and have granted a waiver from strict compliance with Main Board Rule 3.10 on this basis.

## **6. Constitutional Documents**

- 6.1 German laws and regulations do not have equivalent provisions for all of our Rules on the contents of constitutional documents<sup>24</sup>. We set out in the Appendix our approach on each of the items required to be included in a Germany incorporated issuer’s constitutional documents in order for it to meet our requirements.

## **7. Accounting and Auditing Related Requirements**

- 7.1 We normally require the accountants’ reports and financial statements of overseas issuers seeking a primary or secondary listing to conform to the Hong Kong Financial Reporting Standards (“**HKFRS**”) or the International Financial Reporting Standards (“**IFRS**”)<sup>25</sup>.

#### Our Approach

- 7.2 As set out in the JPS, IFRS as endorsed by the European Union (“**EU-IFRS**”) are acceptable to the Exchange for use by European Union companies<sup>26</sup>. In a previous case, we allowed a Germany incorporated issuer to use EU-IFRS for its accountants’ reports and all subsequent financial statements to be audited to a standard comparable to that required by Hong Kong Institute of Certified Public Accountants or the International Auditing and Assurance Standards Board. However, this is on

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<sup>24</sup> Appendix 3 to the Main Board Rules.

<sup>25</sup> Main Board Rules 4.11 to 4.13, 19.13, 19.39 and Notes 2.1 and 2.4 to paragraph 2 of Appendix 16. See also JPS, paragraphs 56 to 62.

<sup>26</sup> JPS, paragraph 59.

the condition that the issuer includes a statement of the financial effect of the material differences (if any) from HKFRS or IFRS, in its accountants' reports and subsequent financial statements.

## **8. Taxation**

8.1 Withholding tax on distributable entitlements<sup>27</sup>: A Germany incorporated issuer's shareholders are generally subject to a withholding tax on dividends paid by the issuer at a rate of 25% and a solidarity surcharge thereon at a rate of 5.5% (total rate of 26.375%).

8.2 Capital gains tax: In certain circumstances, a Germany incorporated issuer's non-resident shareholders may become subject to a capital gains tax on the sale of shares/subscription rights at a rate of 25% and a solidarity surcharge thereon at a rate of 5.5% (total rate of 26.375%).

### Our Approach

8.3 We expect a Germany incorporated issuer to disclose the following prominently in its listing document:

- (a) the rate of tax investors in its securities will have to pay;
- (b) details of any treaty between Germany and Hong Kong that may affect the tax payable;
- (c) the effect of holding the issuer's shares through CCASS or outside CCASS on any tax payable (where applicable); and
- (d) the procedures for claiming any tax relief or exemptions.

8.4 We expect appropriate disclosure of taxation in at least the "Summary" and "Risk Factors" sections of the issuer's listing document and any sections summarising German laws and regulations.

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<sup>27</sup> JPS, paragraph 79.

*Please note the important notes on the front page of this country guide regarding German laws, regulations and practices.*

**Our Approach to Differences between Our Constitutional Document Requirements and German Laws, Rules and Practices**

<b>Rule Paragraph</b>	<b>Rule Requirement</b>	<b>German Laws, Regulations and Practice</b>	<b>Our Approach</b>
Appendix 3, 4(2)	Any person appointed by the directors to fill a casual vacancy on or as an addition to the board shall hold office only until the next following annual general meeting of the issuer, and shall then be eligible for re-election.	Under German law, a company shall not limit the discretion of the supervisory board in determining the terms of office of any members of the management board, who are entitled to stay in office for up to five years.	<p>In a previous case, it was submitted that as any replacements to the management board of a company is appointed by the supervisory board rather than shareholders in an annual general meeting, their term of office should not be decided by shareholders in an annual general meeting. Instead, the replacement director should be entitled to serve his full term of office as allowed under German law.</p> <p>We granted a waiver from this articles provision, subject to the disclosure of the procedure of appointments as well as the relevant terms of office upon appointment by the supervisory board as permitted under German law.</p> <p>Under the JPS, an eligible secondary listing applicant is entitled to an “automatic waiver” for this item.</p>
Appendix 3, 6, 8 and 10	Paragraphs 6, 8, and 10 of Appendix 3 to the Rules contain requirements for the	German law does not restrict the issue of preference shares, non-voting or restricted voting shares. However, a company is not	Noting that a company is not permitted to issue redeemable shares under German law rendering the corresponding Rules not applicable, we have granted a

## APPENDIX

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Rule Paragraph	Rule Requirement	German Laws, Regulations and Practice	Our Approach
	issuer's articles concerning preference shares, redeemable shares, non-voting and restricted voting shares.	allowed to issue redeemable shares.	<p>waiver from this articles provision.</p> <p>Where a company has preference, non-voting or restricted voting shares, we expect its constitutional documents to be amended to comply with the relevant requirements of Appendix 3.</p> <p>Under the JPS, an eligible secondary listing applicant is entitled to an "automatic waiver" for this item.</p>
Appendix 3, 12	No powers shall be taken to freeze or otherwise impair any of the rights attaching to any share by reason only that the person or persons who are interested directly or indirectly therein have failed to disclose their interests to the company.	<p>Under German law, a shareholder of a company is under an obligation to give notice to the company, if it has acquired a certain percentage of shareholding in that company. German law further provides that, until such time when such shareholder has discharged his obligation by making appropriate disclosure to the company, it is not entitled to exercise certain of its shareholder's rights, including voting rights attaching to the shares in the company held by it.</p> <p>The restriction of shareholders' right under this circumstance is mandatory under German law and cannot be waived or otherwise avoided by a company. Such restriction under German law is not generally</p>	<p>In a previous case, we considered that the restriction under German law does not materially prejudice the interests of the shareholders. A waiver of this articles provision was granted.</p> <p>Under the JPS, no "automatic waiver" is available to a secondary listing applicant for this item.</p>

## APPENDIX

Please note the important notes on the front page of this country guide regarding German laws, regulations and practices.

Rule Paragraph	Rule Requirement	German Laws, Regulations and Practice	Our Approach
		applicable to all shareholders as it only applies to substantial shareholders holding not less than a 25% interest in the company.	
Appendix 3, 14	Where any shareholder is, under these Exchange Listing Rules, required to abstain from voting on any particular resolution or restricted to voting only for or only against any particular resolution, any votes cast by or on behalf of such shareholder in contravention of such requirement or restriction shall not be counted.	Under German law, a shareholder entitled to vote in a general meeting cannot be restricted from voting solely because it is interested in the transaction the subject of the vote.	<p>In a previous case, we granted a waiver from this articles provision provided that the issuer could adopt a mechanism to ensure that the votes of shareholders, who would otherwise need to abstain from voting under the Rules, would not be counted.</p> <p>The applicant proposed that any transaction requiring interested shareholders to abstain from voting under the Rules would require counting the votes of shareholders twice and ensure that the two majority requirements are met:</p> <ul style="list-style-type: none"> <li>(i) the first count would involve all votes cast, including those cast by interested shareholders, if any; and</li> <li>(ii) the second count would include all votes cast, excluding interested shareholders' votes. Both counts must result in a simple majority before the resolution is considered approved.</li> </ul>

## APPENDIX

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<b>Rule Paragraph</b>	<b>Rule Requirement</b>	<b>German Laws, Regulations and Practice</b>	<b>Our Approach</b>
			<p>We granted a waiver of this articles provision and other related Rules<sup>28</sup> on this basis.</p> <p>Under the JPS, no “automatic waiver” is available to a secondary listing applicant for this item.</p>

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<sup>28</sup> Principle in Main Board Rule 2.15 applied specifically in Main Board Rules 6.12(1), 6.13, 7.19(6)(a), 7.19(7), 7.19(8), 7.21(2), 7.24(6), 7.24(7), 7.26A(2), 13.36(4)(a), 13.36(4)(b), 17.04(1) and certain Chapter 14 and 14A of the Main Board Rules.