Update Capital Market Law

04 November 2015

New Delisting Legislation

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By introducing statutory *delisting* provisions, the German legislator is finally about to end the wave of *delistings* which occurred since the *Frosta* ruling of the German Federal Court of 8 October 2013.

Legal situation since the *Frosta* ruling of the BGH

Since the so-called *Frosta* ruling of the German Federal Court of Justice (*Bundesgerichtshof* – BGH) of 8 October 2013, according to which a regular delisting requires neither a resolution of the general meeting nor a compensation offer to external shareholders, more than 60 companies took advantage of the possibility to delist their shares from the German stock markets. Such approach was criticised by concerned minority shareholders as the liquidity as well as the stock price of the affected shares decreased significantly following the announcement of a *delisting* and, after the *delisting* came into effect, an adequate sale of the shares for adequate compensation was almost impossible.

Amendment to sec 39 BörsG

On 1 October 2015, the German *Bundestag* resolved on introducing statutory delisting provisions in sec 39 para 2 to 6 German Stock Exchange Act (*Börsengesetz* – BörsG). Originally, the new provisions were intended to be part of the so-called 2014 stock corporation law amendment (*Aktienrechtsnovelle 2014*) but have now been introduced by way of an informal amendment application as part of the Act on the Implementation of the Amendment Directive to the Transparency Directive. The new act enters into force upon its promulgation. As the implementation period for the implementation of the Transparency Directive Amending Directive ends on 27 November 2015, the promulgation and therefore the entry into force of the new regulations can be expected to occur shortly.

Entering into force of the amendment

Offer obligation

Sec 39 para 2 sentence 3 no 1 BörsG (new version) stipulates that an offer for the purchase of all shares has to be made together with the application for the revocation of the admittance to trading on the stock market. Such offer must be

unconditional and provide for a compensation payment in Euro. Share exchange offers are, hence, not sufficient. The same applies to partial offers. An offer is only dispensable if the shares either continue to be admitted to trading on the regulated market of another domestic stock exchange or on an organized market in another member state of the EU or the European Economic Area provided such markets provide for delisting requirements similar to the new German provisions. The new provisions, thus, also apply to a so-called downlisting, *i.e.* for the transfer from the regulated market (Prime or General Standard) to the unregulated market (Open Market) including the Entry Standard of the Frankfurt Stock Exchange.

In general, stock market price decisive for the calculation of the compensation payment

Pursuant to sec 39 para 3 BörsG (new version), the compensation payment must correspond to at least the weighted average domestic stock market price during the last *six* months prior to the publishing of the decision to make an offer according to sec 10 para 1 sentence 1 German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* – WpÜG) or the gaining of control according to sec 35 para 1 sentence 1 WpÜG. By way of exception, the company value may be decisive:

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- If, during a period of six months prior to the publishing of the decision to make an offer or the gaining of control, a stock market price was determined on less than a third of the trading days and several market prices determined consecutively deviated from each other by more than 5%, the compensation payment must be calculated on the basis of the company value.

- The issuer is obliged to pay the difference between the compensation payment determined in the offer and the compensation calculated by way of a company valuation if, during the aforementioned period, the issuer did not publish an insider information without undue delay or published an incorrect insider information. This does not apply if the infringement of sec 15 German Securities Trading Act (*Wertpapierhandelsgesetz* - WpHG) had only minor effects on the calculated average market price.

The aforementioned payment obligation does also not apply in case of a lawful self-exemption from the ad hoc notification requirements pursuant to sec 15 para 3 WpHG.

- If the issuer infringed sec 20a WpHG during the relevant period, it is also obliged to pay the differential amount, provided that such infringement had not only a minor effect on the average market price calculated as set out above.

Applicable also to downlistings

The new provisions apply to delistings in the narrower and broader sense: The term delisting is also used to describe a downlisting, i.e. the transfer from the regulated market to the unregulated market (including the Entry Standard). The provisions, however, do not apply to the mere shift from one market segment to another within the regulated market, e.g. from the Prime Standard to the General Standard.

Retroactive effect of the new provisions

Pursuant to sec 52 para 9 BörsG (new version), the provisions apply if an application for the revocation of the admittance to trading on the stock market has been made after 7 September 2015 but prior to the day on which the new law enters into force if the application has not been decided on at the latest on the day on which the new law enters into force. According to the new legal situation, the purchase offer has generally to be made together with the application for the revocation of the admittance to trading on the stock market. As an exception, issuers, which have made an application without simultaneously publishing the offer documents during the transitional period starting 7 September 2015, may and must publish the purchase offer after filing the application to delist.

Need for improvement

Conclusion: the new legislation appears to be suitable to stop the wave of delistings, which followed the *Frosta* ruling. While a resolution of the general meeting will still not be required for a delisting, a compensation offer will now become mandatory. Nevertheless, certain questions regarding a withdrawal from the stock market, which have been awaiting an answer since the *Macrotron* ruling of the BGH, still remain open. One of those issues in question is who precisely is obliged to make the offer for the purchase of the shares if no

majority shareholder exists and the company itself is not authorised to buy back own shares, which authorisation is in principle in any event limited to a maximum of 10% of the company's share capital. In practice, a delisting will therefore not be possible in such cases even if the company no longer has any benefits – but only costs – as a result of its stock market listing.

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