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Delisting of German Companies – Impact of a new Ruling by the German Federal Court of Justice

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Landmark Ruling of the II. Civil Chamber of the German Federal Court of Justice: Delisting of German listed Companies now substantially easier.

In a recent ruling the II. Civil Chamber of the German Federal Court of Justice (BGH) expressly overturned its prior judgement dating from 2002 in the Macrotron case which only allowed a delisting of a German listed company if the shareholders' meeting had voted in favor of such delisting and if the company or its major shareholder made an offer to the minority shareholders to buy them out. As a consequence, also the cumbersome and lengthy legal proceedings to court-determine the adequacy of the offer price which so far normally followed a delisting and often resulted in an increase in the offer price by the court, will have to vanish.

In the case which triggered the new BGH ruling a company listed in the regulated market down-listed to the Entry Standard of the unregulated market of the Frankfurt stock exchange. Various lower instance courts had already ruled that in such cases of a down-listing no shareholder approval nor a buy-out offer would be required. This is now expressly confirmed by the BGH but its statements in the new ruling go further and relate also to a full delisting.

In the absence of any specific German law to base its ruling on in the Macrotron case, the BGH took recourse to the constitutional ownership guarantee in order to establish the requirement for shareholder approval and a buy-out offer in favor of the minority shareholders.

Prior Legal Situation
(BGH Ruling dated 25 November 2002 – II ZR 133/01; BGHZ 153, 47, 53 ff)

New Court Ruling
(BGH Ruling dated 8 Oktober 2013 – II ZB 26/12)

This approach, which has been questioned by legal experts, was practically rendered baseless when the German Constitutional court ruled (BVerfG, ZIP 2012 1402ff) that a delisting from the regulated market of the stock exchange does not affect the protection granted by the German constitutional property guarantee. Accordingly, the BGH now states in his new ruling that the constitutional property guarantee only relates to the legal fungibility but not the actual tradability of stocks which only constitutes a potential profit opportunity.

Decision of the Federal Constitutional Court
(BVerfG Ruling dated 11 July 2012 - 1 BvR 3142/07)

Practical Impact of the new BGH Ruling?

The BGH ruling cannot be interpreted as a carte blanche for the executive and supervisory board of a listed company to start a delisting. In each case the executive board and the supervisory board have to carefully analyze whether a delisting is indeed in the best interest of the company. This could be the case if in light of the shareholder structure, the capitalization and the net cash position of the listed company the transparency and cost requirements associated with a listing are not in proportion with the future capital requirements of the respective stock corporation.

No carte blanche for the Executive and Supervisory Board

Against this background a delisting authorized by the executive board and supervisory board of a listed company could in particular be considered if the majority of the shares in the company are held by a controlling shareholder – e.g., as a result of a take-over offer – and the company has no longer an interest and an advantage in maintaining its stock exchange listing, for instance because of its integration into a group structure and alternative financing options without the need of capital increases through public offers. In such cases, a delisting can now be much easier implemented as a result of the new BGH ruling: For one there will not be lengthy delay in the delisting process through the challenge of a shareholder resolution anymore and there does not have to be buy-offer for the minority shareholders as a consequence of a delisting.

While mandatory buy-out offers according to various other legal requirements (e.g., according to sec. 35 WpÜG in case of obtaining a controlling stake in a company listed on the regulated market or in case of a „cold“ delisting through a merger according to sec. § 29 UmwG, according to sec. 305 AktG in case of a domination or profit/loss transfer agreement or in case of a squeeze out according to sec. 327a AktG)

Delisting now easier if Stock Exchange Listing is no longer required

remain unaffected by the new BGH ruling, it is nevertheless to be expected that various German listed companies will now examine in detail whether they shall make use of the easier delisting possibility.

New strategic Options in case of Take-Overs

In summary, for the reasons stated above the new BGH ruling also results in take overs of German listed companies being more attractive than under the old Macrotron ruling and paves the way for new strategic options for such a take-over. However, it needs to be taken into account that new legal requirements for a delisting might be implemented as a result of the new BGH ruling which overturned the previous Mactrotron decision. In the past, there was no need for a specific law requiring a shareholder resolution or a buy-out offer because of the Macrotron ruling being in place. It is therefore not surprising that in light of the new BGH ruling shareholder rights activist already call for the legislative to become active in this regard.

Call for Legislator by Minority Shareholder Representatives

Conclusion: A delisting has in any case been made much easier and more cost effective by the new BGH ruling which offers interesting new options both for listed companies for which a stock exchange listing is no longer attractive and for strategic and financial investors pursuing take-over investments. Such options can be utilized with competent legal advice addressing all relevant stock corporation and capital markets law aspects. In light of the calls for the implementation of a law substituting the Macrotron ruling it is recommend to initiate respective steps in a timely manner.

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