Going Private in Germany

Dr. Sebastian Mock, LL.M. (NYU)
Attorney-at-Law (New York)
Overview

A. Structure of Capital Markets in Germany

B. Compulsive Delisting

C. Complete (Voluntary) Delisting

D. Downgrading

E. Cold Delisting
A. Structure of Capital Markets in Germany

- listing on a regulated market
  (Art. 4 no. 14 MiFID)

- listing on an open market
  (Freiverkehr)

- no listing

Going Private in Germany
Going Private in Europe: Different Rules, Similar Goals?
Dr. Sebastian Mock, LL.M. (NYU)
B. Compulsive Delisting

stock corporation

admission to a regulated market

permanent lack of proper stock trading on the market

($ 39 subs. 1 alt. 1 Stock Exchange Act)

permanent non-compliance with legal requirements based on admission

($ 39 subs. 1 alt. 2 Stock Exchange Act)

stock exchange management board (ex officio)

Going Private in Germany

Going Private in Europe: Different Rules, Similar Goals?

Dr. Sebastian Mock, LL.M.(NYU)
C. Complete (Voluntary) Delisting

I. Overview

stock corporation

management board

shareholder meeting

application
(Sec. 39 subs. 2
Stock Exchange Act)

stock exchange

requirements of
corporate law

requirements of
capital market law

Going Private in Germany
Going Private in Europe: Different Rules, Similar Goals?
Dr. Sebastian Mock, LL.M.(NYU)
C. Complete (Voluntary) Delisting

II. Requirements of Capital Market Law

- application of the stock corporation (§ 39 subs. 1 sent. 1 Stock Exchange Act) to the stock exchange

- no conflict with aspects of investor protection (§ 39 subs. 1 sent. 2 Stock Exchange Act)
  - consideration of individual or collective aspects of investors?
  - severe disadvantages of investors by delisting
    - no officially controlled market after delisting
    - less information by the issuer
    - less legal requirements for the issuer and other market participants
    - higher costs for trading on foreign markets
  - **but:** no guarantee of a permanent listing on a stock exchange for investors

- other criteria
  - duration of listing (principle of "venire contra factum proprium")
  - structure of shareholders ➔ cold delisting
  - low free-float or low turn-over ratio
  - no consideration of the interest of brokers or the stock exchange itself

- downgrading as an alternative

➔ usually further determination of the criteria in the exchange rules of the respective stock exchanges
C. Complete (Voluntary) Delisting

III. Requirements of Corporate Law

- separate (internal) requirements of the applicable corporate law
- no explicit rule in German corporate law - competence of the management to decide for a delisting → collision with two overriding principles in German law
  - problem of the constitutional guarantee of property (Art. 14 GG) → possibility of a shareholder to transfer his shares
  - so called Holzmueller doctrine (BGHZ 83, 122) → mandatory competence of the general meeting in the case of fundamental decisions of the corporation
    → discussion of both aspects in German law
- **DAT/Altana decision** of the Constitutional Court of Germany - 27/4/1999 (BVerfGE 100, 289 ff.)
  - squeeze out merger of a listed corporation with another (non listed) corporation
  - compensation of the minority shareholder determined by the market value or by (separate) valuation procedure?
    → market value as determining factor in the evaluation of shares
    → possibility of the achievability of the market value as a determining factor
    → both aspects guaranteed by the constitutional guarantee of property (Art. 14 GG)
C. Complete (Voluntary) Delisting

III. Requirements of Corporate Law

Macrotron decision of the Federal Court of Justice - 25/11/2002 (BGHZ 153, 47 ff.)

- stock corporation listed on the Frankfurt stock exchange with a free float of 1% regular shares and 8.5% preferred shares

- no sufficient protection of minority shareholder by capital market law

- resolution of the shareholder meeting necessary → constitutional guarantee of property requires competence of the shareholder meeting (no application of the Holzmueller doctrine!)

- compensation for the minority shareholder by the
  - corporation (in the limits of capital maintenance)
  - controlling shareholder

- determination of the compensation in the Spruchverfahren → no challenge of the shareholder resolution because of the amount of compensation

- but no further
  - requirements for the resolution of the shareholder meeting
  - reporting requirements for the management (simple announcement)
C. Complete (Voluntary) Delisting

IV. Corporate Law - Open Questions

- **majority requirements** for the resolution (simple or qualified majority)

- consequences of the application by the corporation’s management to the stock exchange in the **absence of a shareholder resolution** → liability of management?

- **debtor of the compensation** for the shareholders
  - joint and separate liability of the corporation and/or controlling shareholder?
  - only the corporation, with an additional right of the controlling shareholder to buy out?
  - definition of the controlling shareholder (30%, 50%+X or 95%? at which point of time?)
  - period to accept or reject the offer
  - offer in cash or shares?
  - obligation to obtain a bank guarantee?

- application to **downgrading cases**?
D. Downgrading

• change of the listing from a regulated market to an open market (Freiverkehr - § 48 Stock Exchange Act)

• decision of the Higher Regional Court Berlin (Kammergericht) - 30/4/2009 (ZIP 2009, 1116) and of Higher Regional Court Munich (OLG München) - 21/5/2008 (ZIP 2008, 1137)
  o no violation of the rights of the shareholders due to the existing alternative exit option on the open market
  o investor protection on the regulated market and on the open markets is equivalent
    - creation of prices almost the same
    - application of insider trading prohibition and market abuse prohibition on both markets
    - financial reporting requirements are almost the same
    - private structure of the open markets not relevant
  o so far decided for two open markets in Munich and Berlin

• no final decision by the Federal Court of Justice so far

exemption for „sophisticated“ open markets
E. “Cold” Delisting

- restructuring or merger of a listed corporation to a corporate form not listed on a stock exchange or being able to do so
- Not codified in German corporate or capital market law
- but application of the respective special provisions of the merger and restructuring regulations requiring usually:
  - resolution of the shareholder meeting
  - compensation for minority shareholders
- different scenarios
  - integration of a corporation into another company (§§ 319 ff. German Stock Corporation Code) → problem of compensation by means of shares of the other corporation
  - Squeeze out (§§ 327a ff. German Stock Corporation Code)
  - Merger, Splitting, Change of Form (German Merger and Restructuring Code)

no interaction between general rules and “delisting principles”
F. Summa

- explicit regulation only for compulsive delisting in capital market law

- corporate law issues of the voluntary delisting only addressed by case law

- voluntary delisting requires
  - resolution of the shareholder meeting
  - offer for compensation for the minority shareholders by the corporation and/or by the majority shareholder
  - no challenge of the shareholder resolution concerning the amount of compensation

- no application of the delisting principles in cases of downgrading to “sophisticated” open markets

- no application of the delisting principles in cases of a cold delisting