

New German Delisting Rules Aim to Protect Investors

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On October 1, 2015, the German Parliament amended the German Stock Exchange Act to provide more protection to investors in delistings, remediating the perceived lack of protection that the German Supreme Court created through its *Frosta* decision in 2012. Rules established by *Frosta* did not require that shareholders of a company being withdrawn from a stock-market listing be offered any compensation for their shares. The amended law requires that a delisting be accompanied by an unconditional tender offer in which all shareholders are offered the same price per share that is equal to the weighted average share price over the preceding six months. The new law went into effect on November 27, 2015, but is retroactive to September 7, 2015, in certain cases.

Background

In 2002, the German Supreme Court stipulated in the *Macrotron* case three requirements in order to delist a company for reasons other than a merger or similar event:

- the approval of stockholders by simple majority;
- a public purchase offer, by the company or the major shareholder, to all shareholders in order to ensure that stockholders received adequate compensation reflecting the fair value of the company; and
- the option for shareholders to request a review of the purchase price through a special court proceeding.

The German legislature amended the Stock Exchange Act to address what it perceived was inadequate investor protection.

According to the Supreme Court, these stipulations were necessary in light of the requirements under the German Constitution to protect the tradability of shares at a stock exchange. But 10 years later, the Federal Constitutional Court ruled in the *Frosta* case that the tradability of shares was not in fact protected by the constitution. Thus, the requirements established by the *Macrotron* decision were eliminated. Contrary to expectations, the Supreme Court abandoned its prior case law in favor of the *Frosta* decision in 2012. As a result, investor protection was reduced to only those protections that stock markets established

themselves. For example, the Dusseldorf Stock Exchange continued to require stockholder approval and a purchase offer, while the Munich and Frankfurt stock exchanges only required an announcement six months in advance of a delisting.

In the wake of the *Frosta* decision, the number of delistings increased significantly, and once an announcement of an intention to delist was made, the company's share price generally dropped precipitously. As a result, shareholders were forced to dispose of their shares at a lower price if they wanted to avoid holding shares in a private company.

Legislative Action

On October 1, 2015, the German legislature amended the Stock Exchange Act to address what it perceived was inadequate investor protection. Under the amendment, a delisting requires that a tender offer be made to all shareholders and that the consideration paid not be lower than the weighted average stock price over the six months prior to publication of the intent to launch the offer. The tender offer materials also must make reference to the intended delisting and be published prior to submitting the application for delisting to the relevant stock exchange. Unlike the *Macrotron* requirements,

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approval by a company's stockholders is not required. A listing may be withdrawn without a tender offer only if the shares are still expected to be listed on a domestic regulated market or organized market in the European Union. The fair value of a company has to be used to determine the consideration to be offered rather than the weighted average stock price if: (i) the issuer did not properly inform capital markets about any insider information, (ii) the issuer or offeror violated rules regarding market manipulation or (iii) the stock price was not properly fixed in the relevant six-month period.

Additionally, the tender offer must not be subject to any conditions, such as antitrust clearance or a requirement to acquire a minimum percentage of shares. Thus, as currently drafted, the tender offer may not be used in most, if not all, cases where a party is seeking to acquire control over the listed company (as would be the case in "customary" takeover offers). This is because attaining control will normally trigger the need to obtain antitrust clearance.

Conclusion

The new legal framework for delistings may be considered a compromise between *Macrotron* and *Frosta*. Although the standard for investor protection has improved, many German legal authorities are critical of the fact that stockholder approval is not required under the amended law and that the consideration paid in the tender offer is calculated based on average stock price instead of actual company value. We expect delistings will occur less frequently under the amended rules, as the process will not be considered very attractive by parties contemplating a company takeover. Whether this will change in the future remains to be seen.