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IPOs in Germany: Post-IPO Considerations for Public Companies and Shareholders

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The German stock market has become increasingly attractive to foreign investors. By the end of 2018, non-German investors held approximately 55% of shares among companies comprising the DAX Index, which measures performance of the 30-largest and most liquid companies, in terms of free-float and market capitalization. Out of the 55%, U.S. investors owned 22% of the shares.

This article discusses the German capital market and its key legal differences compared to the U.S. Part 1 gave an overview of the German capital market and the prerequisites and process of an IPO in Germany, as well as key differences from U.S. IPOs. Part 2 focuses on the disclosure and transparency obligations of a company that is listed on the stock exchange, the role of shareholders of a publicly listed company, and public takeover considerations that might bring the public company back into private ownership.

Disclosure and Transparency Obligations

Listing a company on the stock exchange results in comprehensive ongoing disclosure and transparency obligations for the company and, to a certain extent, its shareholders. These obligations and responsibilities include ad-hoc disclosure, publication of financial statements, reporting of share capital and voting rights, and reporting and disclosure obligations under the German Corporate Governance Code.

Statutory disclosure obligations imposed on the company and its shareholders are mainly set out by the Market Abuse Regulation, or "Marktmissbrauchsverordnung," the German Securities Trading Act, or "Wertpapierhandelsgesetz," and the German Corporate Governance Code, or "Deutscher Corporate Governance Kodex." The most important disclosure and transparency obligations are discussed below.

Ad-Hoc Notification

A publicly listed company is obliged to immediately publish so-called inside information that is related to the publicly listed company in the form of an ad-hoc notification pursuant to Article 17 of the Market Abuse Regulation. Inside information is information of a precise nature, which has not been made public, relating directly to the issuer, and which, if it were made public, would likely have a significant effect on the price of its financial instruments or on the price of related derivative financial instruments.

Material mergers and acquisition transactions are one example of information that must be disclosed in an ad-hoc notification. These transactions must be disclosed if they exceeded the stage of preparatory actions. For example, the submission of a binding bid in a bidder auction. However, if only one interested party exists, the conclusion of a letter of intent may already constitute inside information requiring immediate publication by the publicly listed corporation.

Further, the conclusion, amendment, or termination of agreements material to the business of the issuer (such as agreements with key customers or suppliers or cooperation agreements), as well as significant adjustments to the annual financial statements or interim financials compared to preliminary results or market forecasts, must be disclosed as inside information. Substantial extraordinary income or expenses (for example, major losses or the discovery of criminal activities) may constitute inside information as well. The same applies if the management board resolves that it has to adjust its full-year guidance set out in the annual financial statements.

In addition, significant developments and events in the business, significant product liability or environmental damages, legal disputes, personnel changes in key positions, and capital measures or the issuance of notes may require disclosure.

Timing and Delay of Disclosure

Inside information must be disclosed as soon as possible, which needs to be interpreted as an obligation to immediately publish the information, and not only within the next day(s) of the occurrence as may be sufficient with regard to material events in the U.S.

Publication needs to take place in a manner that enables fast access and complete, correct, and timely assessment of the information, which has to be realized through a European-wide electronic news provider, news agencies and the most important national and European print media, as well as a publication on the website of the issuer for a period of at least five years.

The publication of inside information may be delayed under very limited circumstances. This might be the case if legitimate interests of the issuer for a delay exist, the delay of the disclosure is not likely to mislead the public, and confidentiality of the information during the postponement is guaranteed. A postponement may be considered, for example, in case of a threat of deterioration of the position of the issuer in ongoing negotiations, in particular in case of M&A transactions. Also, preservation of the issuer's financial stability or the stability of the financial market might justify delaying an ad-hoc disclosure. Protection of intellectual property rights in case of a new product development or invention may also be a justification for delay.

The German Financial Supervisory Authority, "Bundesanstalt für Finanzdienstleistungsaufsicht," or BaFin, may pursue and highly sanction any failure to (correctly) publish inside information. As such, German-listed companies are extremely keen on complying with this regulation.

Publication of Financial Statements

By law, the issuer is obligated to publish annual financial statements within the first four months after the end of its financial year. They must also publish semi-annual reports within three months after the end of the first half of its financial year.

Companies listed in the Prime Standard segment of the Frankfurt Stock Exchange are further required to publish quarterly financial information within two months after the end of the respective quarter. In addition, these companies are obliged to publish all financial information in both the German language (as required by law) and in English.

Unlike in the U.S., chief executive officers and chief financial officers are not legally obliged to certify that the annual financial statements comply with applicable law and that the information contained in the annual financial statements fairly presents the financial condition and results of operation of the company as required under the Sarbanes-Oxley Act. Only the auditor of the company audits and certifies the annual financial statements.

As part of the annual financial statements, the company must publish a comprehensive management report to the financial statements. The management report includes an overview of the operations and the market environment of the issuer, and a comprehensive description of the material operational matters and developments that occurred in the reporting period. A short- and mid-term outlook for the upcoming financial year(s), a risk management report, and a description of the capital structure of the issuer are also included.

The annual financial statements contain a corporate governance report comprising, inter alia, the compliance declaration with the German Corporate Governance Code, a description of the working methods of the management board and the supervisory board, and the composition and working methods of their committees. The financial statements further include a comprehensive report on the remuneration of the management board and the supervisory board and the individual remuneration of their members. The remuneration report must include details on fixed and variable compensation, including stock option grants.

The delayed or omitted publication of financial statements is pursued and sanctioned by the German authorities as well as the German Stock Exchange and requires publication of a notice of deviation from the German Corporate Governance Code by the issuer. Any decisions and sanctions from BaFin are officially published on the website of BaFin (name and shame).

Share Capital and Voting Rights Reporting

Under the German Securities Trading Act, a company with shares listed on the regulated market is obliged to comprehensively inform about its share capital and the rights of the shareholders. This includes official reporting about the number of outstanding shares, upcoming annual general shareholders' meetings, share buy-back programs, details of distribution and payment of dividends, issuance of new shares, and exercise of conversion, subscription, and cancellation rights, as well as all changes in the rights attached to the admitted securities.

An important part of the reporting obligations for the company and its shareholders refers to voting rights notifications. Natural persons and legal entities are obligated to disclose its direct or indirect shareholding of voting rights in the company subject to reaching, crossing or falling below certain thresholds (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75%) of the overall voting rights in the issuer. This also applies to the holding of certain financial instruments relating to voting rights of an issuer, with the reporting threshold in this case starting at 5%. Financial instruments in this context mean, for example, call and put options, futures, and securities loans relating to voting rights in an issuer.

Different from the reporting obligations in the U.S., the reporting requirement under German law is not related to the beneficial ownership of the notifying party but only ties to the attribution of the voting rights to the ultimate controlling person. The ultimate controlling person must submit the voting rights notification, which discloses, in case of a group structure, the entire chain of subsidiaries and persons down to the legal entity or person directly holding the voting rights in the issuer. Voting rights of third parties might also be attributable and consequently disclosed.

The shareholder must report any reaching, crossing or falling below of certain thresholds immediately to the issuer and BaFin, at the latest within four trading days. The issuer must also publish the information on its website. BaFin will strictly pursue any failure to correctly report the voting rights.

German Corporate Governance Code Obligations

The German Corporate Governance Code presents essential statutory regulations for the management and supervision of German-listed companies and contains, in the form of recommendations and suggestions, internationally and nationally acknowledged standards for good and responsible corporate governance.

The recommendations and suggestions are not mandatory. However, through the declaration of conformity pursuant to the German Stock Corporation Act, or "Aktiengesetz," the issuer has to disclose and explain any deviation from the recommendations—not the suggestions—in the form of an annual declaration of conformity (comply or explain).

The German Corporate Governance Code is revised from time to time. The most recent amendment was adopted in May 2019. The amendments focus in particular on the remuneration structure of the management board, the independence of shareholder representatives who are elected to the supervisory board, and the qualification of members of the supervisory board.

Companies try to comply with the German Corporate Governance Code to the utmost extent in order to be perceived by analysts and in research reports as operating with a high standard of corporate governance. The number of deviations from the recommendations, if any, are therefore usually limited.

Role of Shareholders

The impact of shareholders of a publicly listed company on the business and corporate decisions of the company is rather limited compared to the role of shareholders in a private company.

Unless a domination agreement, which provides for the ability of one entity to issue binding instructions to the governing body of the other entity and which requires approval of 75% of the votes cast in the shareholders' meeting, is in place, shareholders are not allowed to instruct the members of the management board. The management board runs the operating business of the company independently from its shareholders. Shareholders may impact the operations and the governance of the company only through the exercise of their voting rights in the shareholders' meeting. The competencies of the shareholders' meeting are limited and stipulated by law.

The shareholders' meeting is the competent body to elect the members of the supervisory board who in turn appoint, supervise, and advise the members of the management board. The shareholders' meeting makes decisions on capital increases and authorizations of the management board to increase the capital of the company. The conclusion of company agreements such as profit and loss transfer agreements, domination agreements, mergers, and the change of legal form also require approval of the shareholders' meeting, along with the discharge of the members of the management and the supervisory board.

Generally, the passing of a resolution by the shareholders' meeting requires simple majority of the votes cast. However, some measures by law require a qualified majority of 75% of the share capital presented at the shareholders' meeting. Prior to or during a shareholders' meeting, a shareholder may file countermotions or submit election proposals for the election of the members of the supervisory board and may propose an amendment of the agenda of the shareholders' meeting for supplementary items under certain requirements.

The direct influence of the shareholders on the business and operations of the company is rather limited. But recently, shareholder activism has been more prevalent both in the U.S. and Germany. In these cases, an activist shareholder takes a minority position in a listed company and tries to exercise influence on the management board with the goal of increasing the value of the company and to subsequently increase the share price.

Activists focus on changes in management and the composition of the supervisory board. They aim to improve the corporate governance and implement changes in management compensation and the strategy in general. They often focus specifically on pushing M&A activities of the company to immediately enhance its value. Activists seek to engage in meetings with the management board and to use their shareholder rights in the shareholders' meeting to implement their objectives. If required, they seek support from other shareholders, and use media campaigns to promote their objectives.

Besides seeking to enhance the value of the company, activist shareholders might also pursue completely different goals, such as improving corporate social responsibility of the issuer.

Public Takeovers of a Listed Company

Recent developments in Germany have not only shown a tendency by U.S.-based investors to pursue a minority investment in German public companies, but also to take it a step further by initiating a public takeover attempt. However, the public takeover process for companies listed on the regulated market of a German stock exchange is highly regulated and follows a clear process.

Voluntary Takeover Offers

If an investor decides to launch a takeover attempt, the investor or its holding company pursuing the bid, respectively, must communicate its intention to launch such offer to the shareholders of the target company. With this public announcement, the takeover process is officially initiated from a regulatory standpoint.

In case of a friendly takeover, the management of the target is contacted prior to the launch of the offer. Often a so-called investment or business combination agreement is entered into between the target, the bidder, and usually the parent of the bidder on the day of the announcement of the intention to launch the takeover offer. The investment agreement sets forth certain obligations of the investor with respect to the operations, strategy, corporate governance and the employees of the target following settlement of the takeover offer. Major shareholders of the target are often contacted and irrevocable tender agreements are concluded with them to ensure that the intended acceptance rate of the takeover offer is met.

Following the publication of the intention to launch the offer, the bidder has four weeks to submit an offer document to BaFin. The content of the offer document is set forth by law and includes, inter alia, an overview on the bidder and its shareholder structure as well as the intentions of the bidder with respect to the target company following the settlement of the takeover offer which may have been stipulated in the investment or business combination agreement with the management of the target. It further contains a description of the target company, a discussion of the offer price, the financing of the offer, conditions to the takeover offer, if any, and certain information to the shareholders.

The bidder must treat all shareholders of the target company equally and offer all shareholders the same consideration per share of the target. The minimum offer price per target share must be at least equal to the higher of the weighted average domestic stock exchange price during the last three months prior to the publication of the intention to launch the takeover offer, or the paid or agreed-upon consideration for the acquisition of target shares in the six months prior to the publication of the offer document. The bidder must treat all shareholders of the target company equally and offer all shareholders the same consideration per share of the target. The minimum offer price per target share must be at least equal to the higher of the weighted average domestic stock exchange price during the last three months prior to the publication of the intention to launch the takeover offer, or the paid or agreed-upon consideration for the acquisition of target shares in the six months prior to the publication of the offer document.

To the extent that the bidder acquires shares in the year following settlement of the takeover offer outside of the stock exchange and for a higher price than the price offered under the takeover offer, the consideration paid under the takeover offer must be matched and paid retroactively to all shareholders who tendered their shares into the offer. This does not apply to shares acquired on the stock exchange.

The takeover offer may be subject to conditions precedent, such as merger control approvals, approval under the foreign investment control regime, or a minimum acceptance rate of the tendering shareholders. The voluntary takeover offer under German law may not be subject to the condition of receiving third-party debt financing, which is allowed in the U.S. In Germany, the bidder launching the offer has to confirm in the offer document that it has taken the necessary measures to ensure that the funds necessary for complete fulfillment of the offer are available in due time.

After BaFin has approved the offer document, it is published and the acceptance period for the takeover offer begins. The acceptance period of a takeover offer must be open for acceptance for at least four weeks. If the takeover offer is successful after expiry of the acceptance period, e.g., a minimum acceptance rate has been met, a statutory additional acceptance period of two weeks follows in which shareholders who have not yet tendered their shares may accept the offer.

The takeover process is completed after the lapse of the additional acceptance period and occurrence of all offer conditions. Settlement of the takeover offer might occur significantly later than the expiry of the acceptance period. Necessary merger control or foreign investment control regime approvals could take several months and even up to a year.

Mandatory Takeover Offers

If a shareholder attains control of a company, the shareholder is obligated to make a mandatory takeover offer to the shareholders of the company and to offer to acquire their shares. Control over a company in this context means that the shareholder reaches or exceeds the threshold of 30% of the overall voting rights in a listed company. The reaching of this threshold must be communicated to the public without undue delay. Within four weeks after the announcement, the shareholder must submit an offer document to BaFin.

After BaFin has approved the offer document, it is published and the acceptance period of at least four weeks for the mandatory takeover offer begins. An additional acceptance period is not prescribed for a mandatory takeover offer.

Different from a voluntary public takeover offer, the settlement of the mandatory takeover offer may not be subject to conditions. Whether a merger control approval might be considered as a condition to the takeover offer is highly discussed among legal scholars.

Similar to a voluntary takeover offer, the minimum offer price per share must be at least to be equal to the higher of the weighted average domestic stock exchange price during the last three months prior to the publication of the intention to launch the takeover offer, or the paid or agreed consideration for the acquisition of target shares in the six months prior to the publication of the offer document.

If a shareholder already holds more than 30% in a company prior to its IPO, the shareholder is not obliged to launch a mandatory takeover offer after the IPO. The same applies if an investor reaches a 30% shareholding through a voluntary public takeover.

Result

Publicly listed companies in Germany are subject to a highly regulated framework of disclosure and transparency obligations. Investors can rely on a comprehensive public disclosure of the respective company. However, investors of publicly listed companies have to accept that their impact on the operating business of the company is significantly reduced compared to a shareholding in a private company. Nevertheless, shareholder involvement increases at the same time as transparency and disclosure regulations on a European-wide level become more comprehensive.

Foreign investors may have a greater appetite to fully take over public companies, which may result in a take-private scenario that brings the company back to the status of a private company. Thus, even though the IPO of a company is a landmark step in its history, it is no guarantee for a permanent existence as a publicly listed company. The life cycle of a publicly listed company might, after a successful takeover, end as a private company again.