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Deals & Cases

The New Rules on Delisting in Practice

Reference: CapLaw-2014-22

On 1 March 2014, SIX Exchange Regulation's revised Directive on Delisting came into force. The introduction of a shareholders' right to challenge the period set between the delisting announcement and the last day of trading is probably the most significant change. Such period may be set by the SIX Exchange Regulation between 3 and 12 months with a view to providing shareholders the possibility to sell their stock on-exchange prior to delisting. The issuer is no longer obliged to provide for off-exchange trading after the delisting. A few months after entering into force, the revised Directive on Delisting has been tested in three instances which provide insight into how SIX Exchange Regulation intends to apply the rules.

By Mariel Hoch/Thomas Reutter

1) Introduction

The revised Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products (Delisting Directive) governing the delisting of equity securities (as well as derivatives and exchange traded products) from the principal Swiss stock exchange, the SIX Swiss Exchange, became effective on 1 March 2014. The Delisting Directive sets out the procedure and requirements an issuer must fulfill in order to delist its equity securities.

Delistings initiated by the issuer (i.e. all cases other than delistings under SIX Exchange Regulation's sanctions regime) can be divided into two main categories: (i) delistings where an issuer decides to forego the benefits of an arguably easier access to capital markets provided by a listing and to save the cost of being listed (Ordinary Delistings) and (ii) delistings which occur once an issuer has no or very few shareholders left, which is usually the case following a public tender offer, a merger or liquidation (Qualified Delistings). Ordinary Delistings have a greater impact on a shareholder's position than Qualified Delistings given that the actions preceding Qualified Delistings typically provide for special protections of shareholders' financial position and/or exit rights (e.g. the right to tender the shares into a public tender offer and/or the right to a fair price and/or the requirement of shareholder consent). In Ordinary Delisting situations shareholders of Swiss issuers do not benefit from specific protection, but the board of directors of an issuer who delists must observe certain principles of corporate law (i.e. act in the best interest of the company).

2) The delisting decision under increased scrutiny

The Delisting Directive stipulates and has always stipulated that, except for cases where SIX Exchange Regulation may delist an issuer by way of a sanction for noncompliance with the Listing Rules, the decision to delist rests with the issuer (article 3 para 1 Delisting Directive). The question which body corporate is competent to decide on an

issuer's delisting is, however, not governed by the Delisting Directive. Swiss corporate law (the Swiss Code of Obligations) applies if the issuer has its registered seat in Switzerland. Swiss corporate law provides for the competence of the board of directors on delisting matters. Corporate law would, however, allow Swiss issuers to shift such competence to the shareholders' meeting by introducing a respective provision in the articles of association or by seeking shareholders' approval to the board of directors' plans to delist. Regarding foreign issuers with a SIX listing, the applicable law to define the competent corporate body must be determined according to international private law.

In the recent past, minority shareholders have become more vocal in their objections to delisting decisions. For example, certain shareholders of Edisun Power Europe AG have expressed their discontent with the board's decision to delist at the shareholders' meeting of 11 May 2014. In certain instances, shareholders have tried to challenge decisions to delist before SIX Exchange Regulation's Appeals Board and Arbitral Tribunal as well as before ordinary courts. For example, a shareholder of Petroplus Holdings AG tried to appeal the SIX Exchange Regulation's delisting decision in 2012 and in 2010 the Swiss Federal Court had to decide on a question of jurisdiction raised by a shareholder of delisted Lenzerheide Bergbahnen AG.

3) Key changes in the revised Delisting Directive

Against the background of this increasingly contentious environment for delistings the SIX Exchange Regulation has enacted the following principal changes to the Delisting Directive:

a) Content of delisting request

The revised Delisting Directive requires the issuer to motivate its request in particular with respect to the requested period between announcement and last trading day (see below section 3)c)). A declaration of the issuer that the competent body corporate (board of directors or shareholders' meeting respectively) has approved the delisting must be included in the exhibits to the request.

b) Publication of delisting decision

Under the previous rules, SIX Exchange Regulation did not publish its delisting decisions and provided a motivation to the issuer only upon the issuer's express request against a fee.

Under the revised Delisting Directive, SIX Exchange Regulation publishes its decisions on delistings, including its motivation, on its website and in a media release (article 4 para 2 Delisting Directive). Such publication is necessary to allow shareholders to make use of their new appeal right (see below section 3)d)). Since the revised regime came into force on 1 March 2014, SIX Exchange Regulation has approved the delistings of

the equity securities of Weatherford International Ltd (decision of 2 May 2014), PG&E Corporation (decision of 19 May 2014) and Absolute Invest AG (decisions of 15 and 19 May 2014). The motivations of the decisions so far issued are rather short.

The issuer must publish relevant information on the delisting in an official notice (article 4 para 2 Delisting Directive) and, if applicable, an ad hoc statement (article 53 et seq Listing Rules). A delisting advertisement is no longer required.

c) Period between announcement and last trading day

Under the revised rules, the period between the delisting announcement and the last trading day may be no less than three and no more than 12 months for Ordinary Delistings. When determining the exact length of the period, SIX Exchange Regulation will take into account various aspects such as timing, free float, liquidity, trading volume or shareholders' approval, if applicable.

In situations of Qualified Delistings, SIX Exchange Regulation may shorten such period to as little as five trading days (i.e. following mergers, public tender offers, statutory squeeze outs, etc). This possibility has remained unchanged compared to the previous rules.

Given the possibility of SIX Exchange Regulation to extend the period between the delisting announcement and the last trading day to up to 12 months, the obligation of the issuer to provide for off-exchange trading of up to six months following delisting has been abolished. The key difference between the previous obligation to provide for off-exchange trading and the newly introduced longer period between announcement of the delisting and the last trading day is that under the new rules the issuer will continue to be bound by the Listing Rules (such as regular reporting obligations, ad hoc publicity rules, reporting of management transactions etc.) and other statutory provisions applicable only to listed companies (such as say on pay rules) until the period ends.

Should SIX Exchange Regulation start to routinely set the period at the longer end of the three-to-twelve-months range, this would mean a significant prolongation of the delisting process (even if one includes the six months period of off-exchange trading under the previous rules).

d) Shareholders' right to appeal

Shareholders have the right to challenge the delisting decision of SIX Exchange Regulation regarding the duration between the delisting announcement and the last day of trading. Such appeal must be brought before the Appeal Board (article 62 para 3 Listing Rules). Shareholders need to demonstrate that they have an interest worthy of protection in having the decision amended. Shareholders have no right to challenge other aspects of SIX Exchange Regulation's delisting decision such as the fundamen-

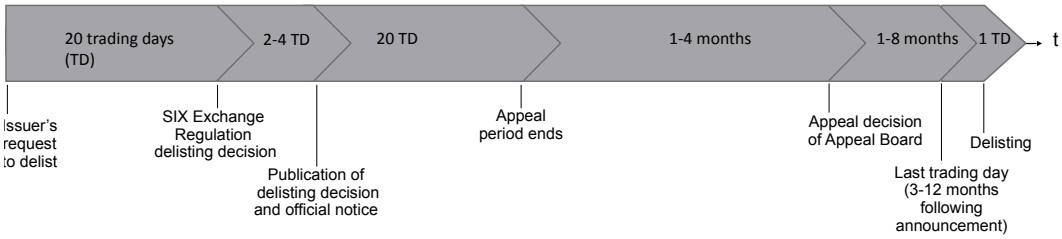
tal question whether or not a delisting is in the interest of the company or its shareholders. Depending on the circumstances of the case, such discontent can potentially be the subject matter of a liability claim against members of the board of directors.

The appeal period ends 20 trading days following the publication of SIX Exchange Regulation's delisting decision. The appeal decision of the Appeal Board may not be challenged before the Board of Arbitration.

In situations of Qualified Delistings, i.e. where the period between the announcement and the last trading day may be reduced to as little as five trading days, a shareholder must immediately request that his appeal be granted suspensive effect in order not to frustrate the requested outcome of his appeal, i.e. a longer trading period before delisting takes effect. If the Appeal Board grants such suspensive effect, the timing of such Qualified Delistings will be significantly extended as appeals procedures may take several months. Issuers may request a conditional delisting decision early on to have the appeals procedure start as soon as the transaction (i.e. a public tender offer or a merger) is announced.

4) Summary of timeline

The provisions of the revised Delisting Directive lead to the following summary timeline if an appeal is lodged:



5) Outlook

With the exemption of the abolishment of the requirement to warrant offexchange trading following delisting, the revised rules are more restrictive on the issuer and significantly reduce predictability of the delisting process since shareholders are granted the right to appeal the delisting decision and to so potentially stretch the delisting date by several months.

For issuers and bidders for SIX Swiss Exchange listed targets, the new appeal right of shareholders leads to increased uncertainty regarding the issuer's ability to effectively

plan and implement the delisting process because it allows shareholders to derail such process, which under the previous regime enjoyed a high level of predictability.

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Extension of Resolution Authority of FINMA to Bank Holding Companies

Reference: CapLaw-2014-23

In connection with the current overhaul of the Swiss financial market laws, the Federal Government has determined that it seeks an extension of the resolution authority of FINMA to bank holding companies and other important group companies, which are not currently subject to FINMA's resolution powers. With this move, Switzerland accords to stipulations from the Financial Stability Board to bring all relevant members of a banking group under a sole resolution authority.

By René Bösch

In connection with the publication in late 2013 of a proposal for a Financial Market Infrastructure Act, the Swiss Federal Council has attached a proposed amendment to the Swiss Banking Act to that law seeking the extension of the resolution authority of the Swiss Financial Market Supervisory Authority FINMA (FINMA) to bank holding companies of a financial group that are domiciled in Switzerland in relation to resolution and liquidation proceedings. The same shall apply to those Swissdomiciled group companies which shall be declared important by FINMA.

This proposed amendment to the Banking Act must be understood against the background of the current debate about the improvement of the resolvability of large systemically relevant banking groups. The Financial Stability Board (FSB) in October 2011 published recommendations to the national legislators and regulators under the title "Key Attributes of Effective Resolution Regimes for Financial Institutions". These "Key Attributes" shall provide guidance how the resolution of systemically relevant financial conglomerates may be improved. The recommendations include *inter alia* the request that the resolution and/or liquidation of an internationally active bank shall lie within the competence of one single resolution authority. In Switzerland, FINMA currently has only the resolution power on regulated banks as well as Swiss regulated branches of foreign banks, but not in relation to bank holding companies that do not have the status of a regulated bank. As a consequence, this would currently mean, that while a bank belonging to a financial group would be subject to the resolution author-

ity of FINMA, its parent company, if domiciled in Switzerland, would be subject to the ordinary bankruptcy and liquidation procedures set forth in the Swiss Bankruptcy Act.

While the Federal Government has just announced its plans for a major overhaul of the Banking Act and its transformation into a socalled Financial Institutions Act, it is likely that this major legislative effort will take a number of years towards implementation. Therefore, the Federal Government decided that in a first step, an amendment to the Banking Act shall be attached to the Financial Market Infrastructure Act, which shall be submitted to Parliament within the next few months and according to the hopes of market participants should be passed by Parliament rather quickly, hopefully with an implementation and entering into force by the summer or fall of 2015. The Financial Institutions Act would be enacted later and, if so, would then simply transform that provision in the Banking Act into the new legislative framework.

The now proposed amendment to the Banking Act has been welcomed by the industry as it closes a gap in current Swiss regulation. It refers to the Too Big To Faillegislation that was entered into the Banking Act as of 1 March 2012, and for the first time made explicit reference to the submission of bank holding companies to the Banking Act outside of themes relating to consolidated supervision. And it goes beyond and seeks to submit to the resolution authority of FINMA those Swissdomiciled Kgroup companies that are not regulated as banks but exercise important functions within the group. These "important functions" shall include, according to the recommendations of the FSB, services in the areas of treasury, risk management, accounting, human resources, information technology, trading and settlement and legal and compliance. The draft also contemplates that FINMA will determine the important group companies on the basis of these criteria per financial group and name them in a public register.

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The New Draft Swiss Code of Best Practice

Reference: CapLaw-2014-24

The draft revised Swiss Code of Best Practice published for public consultation on 5 June 2014, does not bring a change of scene. The changes are mainly related to the new Minder rules against excessive pay. Not unexpectedly, the draft retroactively implements the new realities instead of setting own standards.

By Matthias Rey

Corporate governance in Switzerland is only marginally regulated in Swiss corporate and stockexchange laws. Apart from the new Ordinance against excessive compen-

sation in listed companies of 2014 (ExCompO) that implemented the provisions of the Minder initiative into Swiss law, the topic of corporate governance in Switzerland is rather governed by selfregulatory rules, such as the Directive On Information Relating To Corporate Governance by the SIX Swiss Exchange of 2008 (the Corporate Governance Directive), which obliges issuers to comply with certain rules regarding top management or substantially explain and publish.

Apart from that, one of the most observed set of rules of selfregulation is the Swiss Code Of Best Practice for Corporate Governance (the Swiss Code) by economiesuisse, the Swiss business umbrella association. It was initially issued in 2002 and last revised in 2007, and is based on the specific situation in Switzerland. The recommendations of the Swiss Code are targeted on publicly listed companies and also provide guidelines for nonlisted companies of economic significance, but in each case apply on a voluntary basis only. On 5 June 2014, economiesuisse published a revised draft of its Swiss Code for public consultation which is, however, only available in German language. Any interested parties could provide input on the draft revised Swiss Code by the end of June. Publication of the final revised version of the Swiss Code is scheduled for September 2014.

1) ExCompO Rules against Excessive Pay

Most material changes proposed by the draft Swiss Code are driven by the ExCompO against excessive pay which have been enacted on 1 January 2014. Firstly, this includes the implementation of the hard rule topics such as approval of the compensation for board members and management, direct election of the chairman and the members of the compensation committee as well as the independent proxy representative, and one year terms for the board members. Secondly, appendix 1 of the Swiss Code was fully amended to reflect the new ExCompO. In certain aspects it even goes beyond and mentions payback obligations and breakup clauses in case of major noncompliance (claw backs). Also, the draft Swiss Code provides for explanations why compensations have declined or been increased (payforperformance relation).

2) Comply or Explain

Another change relates to the introduction of the "comply or explain" principle. According to this principle, companies have to either comply with the rules of the Swiss Code or substantially explain why they do not adhere to it. This principle was initially introduced in Switzerland with the Corporate Governance Directive by the SIX Swiss Exchange in 2002, last revised in 2008, and is therefore an old story. However, since the Swiss Code contains many recommendations and broad guidelines, the "comply or explain" concept seems a bit odd in certain contexts, *e.g.* if a company should explain why it does not follow the company's sustainable interests or why the board does not influence the corporate governance of company. The Swiss Code was never intended

to follow this principle, and its introduction does challenge the distinction of scope between the Corporate Governance Directive to provide transparency and the Swiss Code to provide content.

3) Board composition

Other changes include that the board of directors should consist of male and female members and ensure an adequate diversity. Also, it should work towards having different persons as chairman and as CEO, which principle was not contained in this strict form in the existing version of the Swiss Code. Further, the draft Swiss Code now provides for a majority of the board members being independent directors.

4) Corporate Social Responsibility and other changes

The revised draft Swiss Code starts with an amended definition of corporate governance: "Corporate governance encompasses the full range of principles directed towards *companies' sustainable interest* seeking a good balance between direction and control and transparency at the top company level while maintaining decisionmaking capacity and efficiency". The small difference to the current version is that "shareholders' interest" was replaced by "companies' sustainable interest". This change should reflect the new principle of corporate social responsibility which is stressed in the corresponding press release. However, content wise this principle does not seem to have much influence on the draft Swiss Code.

Further changes relate to the reference to a risk management for financial, operational and reputational risks, and the cross reference to other economiesuisse frameworks such as the Guidelines For Institutional Investors of 2013, and the Basic Principles Of An Effective ComplianceManagement of 2010 (for which another amendment seems to be planned for 2014 as well). The draft Swiss Code also mentions the usage of electronic means in different context (partly due to the Minder Rules), *e.g.* in connection with the general meeting of shareholders or that the outline of the organizational regulations should be publicly electronically available.

5) Conclusion

The adoption of the Minder initiative seems to have caught economiesuisse on the wrong foot. Instead of leading the discussion on corporate governance topics and setting own standards, it has to follow the developments and reflect the *status quo* in its new draft Swiss Code. Innovative or controversial topics are carefully avoided if not already provided for by the Minder Rules or other mandatory law. It would be surprising if the public consultation can create lots of feedback or earn compliments.

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ABN AMRO Bank NV v Bathurst Regional Council Rating Agencies' Duty of Care to Investors

Reference: CapLaw-2014-25

In the recent case of *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, the Federal Court of Australia confirmed the first instance finding in *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 that, as a matter of Australian common law, a rating agency owes a duty of care to investors in a rated financial product. The principal basis on which the Federal Court reached this conclusion was that the rating agency knew that potential investors would rely on the agency's opinion when making investment decisions.

By Thomas Werlen/Yasseen Gailani

1) The Facts

In 2006, ABN AMRO created two series of bespoke constant proportion debt obligations (CPDOs) which were known as the Rembrandt Notes. The Notes were denominated in Australian dollars and were marketed to Australian local authorities. As part of the structuring process, ABN engaged the ratings agency, S&P, to evaluate the Notes' creditworthiness. S&P gave the Notes a AAA rating, but shortly after issuance the Notes suffered heavy losses as a result of mismatches between the mark to market value of CDS contracts that underpinned the structure and the premium income those contracts were generating.

2) The First Instance Judgment

At first instance Jagot J found that S&P owed the claimants a duty to exercise reasonable care and skill in issuing its rating. The Judge went on to find that S&P had breached that duty and that S&P's breach had caused the claimants' loss. This was because S&P's rating was flawed, had been based on a number of unreasonable assumptions in relation to the Notes' default risk, and had been relied upon reasonably by the claimants when making their investment decisions.

3) The Appeal

On appeal S&P accepted that its rating had been flawed. Accordingly, the focus of the appeal was on Jagot J's finding that S&P had owed the claimants a duty of care.

In pursuing its appeal, S&P's main argument was that it was not reasonably foreseeable that its conduct could cause loss to the claimants. This was because the composition of the class of investors in the Notes had not been determined when S&P issued its rating. Accordingly, if a duty of care had been owed, the scope of that duty would have been potentially indeterminate. S&P also argued that the claimants should

have evaluated the Notes' risk of default independently and that the absence of a contractual relationship between S&P and the claimants meant that a duty should not be recognised.

4) The Federal Court's Findings

The Federal Court gave short shrift to S&P's arguments. In particular:

- As to the issue of indeterminate liability, the Federal Court found that although S&P may not have known the precise identity or number of investors, the class of investors to whom a duty was owed was limited because the investors would all by definition have been purchasers of the Notes. On the facts S&P knew the size of the issue and the minimum level of subscription. It would therefore have been able to establish that there would be no more than 80 investors. S&P also knew that its potential liability would be limited temporally by reference to the duration of its rating and ultimately by the term of the Notes.

- As to the issue of independent valuation, because of the complexity of the structure, the Federal Court found that the claimants were in practice unable to replicate or "secondguess" S&P's rating. The reliance on S&P's rating was therefore reasonable in the circumstances.

- As to the absence of a contractual relationship, S&P's submission was robustly rejected. In circumstances where ABN AMRO had engaged S&P to issue an AAA rating to an ascertainable class of investors, a contractual nexus was not required for liability to ensue.

5) Wider Impact of the Decision

The *Bathurst* case is noteworthy because it is the only common law case in which a ratings agency has been found liable to compensate investors for losses suffered as a result of investments in rated products that performed poorly in the financial crisis. However in key respects the case appears to have turned on its own facts, and overall it may be questioned if the decision will be of wider significance in other common or civil law jurisdictions. By way of example, one point that was central to the findings at first instance and on appeal was the evidence that, owing to the complexity of the products, the claimants were unable to analyse the Notes' ratings independently. It was therefore reasonable for the claimants to have relied on the ratings, but in other cases this type of evidence may well be unavailable. As a number of years have now passed since investors first began to suffer losses on rated products in the financial crisis, it is also likely to be increasingly difficult for new claims to be commenced on statute of limitation grounds.

In any future case where an EU investor suffers loss as a result of investing in rated products, Regulation 462/2013/EU on Credit Rating Agencies will provide a statutory cause of action in circumstances where a rating agency has, intentionally or with gross negligence, committed a breach of the standards prescribed by the Regulation and the investor has acted reasonably in relying on the rating. Viewed purely as a case study, however, the decision in *Bathurst* is a telling reminder that defective ratings played a key part in causing the financial crisis and that the financial and regulatory community must make every effort to ensure that the agencies' failings do not occur again.

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Initial Public Offering by SFS Group AG

Reference: CapLaw-2014-26

On 23 April 2014, SFS Group AG, a global precision engineering group, launched its initial public offering (IPO). The final offer price was set on 6 May 2014 at CHF 64 per share. Following the completion of the IPO, SFS Group AG had a market capitalization of CHF 2.4 billion, making this the largest IPO on SIX Swiss Exchange in the past 5 years in terms of market capitalization. SFS Group AG shares started to trade on SIX Swiss Exchange on 7 May 2014.

SFS Group AG is a global precision engineering group focused on developing, manufacturing and supplying precision formed components, engineered fasteners and application specific fastening systems for a range of applications to customers in various industries with headquarters in Switzerland and a workforce of approximately 7,000 people worldwide.

Initial Public Offering by HIAG Immobilien

Reference: CapLaw-2014-27

On 6 May 2014, HIAG Immobilien launched its IPO on SIX Swiss Exchange, and the final offer price was fixed on 15 May 2014 at CHF 76 per share. Following the completion of the IPO, HIAG Immobilien had a market capitalization of CHF 608 million, making it the largest IPO on SIX Swiss Exchange of a Swiss real estate company of the past 10 years. The shares of HIAG started to trade on SIX Swiss Exchange on 16 May 2014.

HIAG Immobilien Holding AG is a leading player in the reuse and redevelopment of commercial sites and properties in Switzerland. As of 31 December 2013, HIAG Immobilien Holding AG's property portfolio was located across 38 sites consisting of 105 properties valued at CHF 1.065 billion.

Pentair Ltd.'s CrossBorder Merger into Pentair PLC

Reference: CapLaw-2014-28

On 3 June 2014, NYSE listed Pentair Ltd. announced the completion of its cross-border merger into Pentair PLC and the associated change of its place of incorporation from Switzerland to Ireland and the change of legal form from a Swiss stock corporation to an Irish public limited company.

Final Settlement by Credit Suisse AG

Reference: CapLaw-2014-29

On 20 May 2014, Swiss bank Credit Suisse AG announced a comprehensive and final settlement regarding all outstanding U.S. crossborder matters. This final settlement included the entry of a guilty plea by Credit Suisse AG in connection with the former Swiss based crossborder banking business to one count of conspiracy to assist U.S. customers in presenting false income tax returns as well as Credit Suisse AG's agreement to pay a total of approximately CHF 2.5 billion. The settlement was reached with the Department of Justice, the New York State Department of Financial Services, the Board of Governors of the Federal Reserve System and the SEC. Credit Suisse AG's global regulators have confirmed that there is no adverse impact on its key bank licenses.

Dufry AG acquires The Nuance Group AG

Reference: CapLaw-2014-30

On 4 June 2014, Dufry AG (Dufry), a Swiss corporation listed on the SIX Stock Exchange, announced that it has signed an agreement to acquire 100% of The Nuance Group AG, a global travel retailer based in Zurich, for a consideration of CHF 1.55 billion. While the transactionrelated funding was fully secured through a committed bridge financing, the acquisition is ultimately being financed through a combination

of equity and debt financing, including through a rights offering and the issuance of mandatory convertible notes and high yield notes. In addition, Dufry has refinanced its existing bank debt facilities and extended their maturity profile to further facilitate the acquisition. The transaction is expected to close in the third quarter of 2014, subject to customary regulatory approvals and other customary closing conditions. Following completion of the acquisition, Dufry will be a leader in the global duty free and travel retail market, with global and geographically diversified operations across all continents.