

NÖRR STIEFENHOFER LUTZ

RECHTSANWÄLTE STEUERBERATER WIRTSCHAFTSPRÜFER • PARTNERSCHAFT

Choice of Form and Jurisdiction for an Offering –
Listing on a German Stock Exchange
(Structures and Requirements for Ukrainian Companies)

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Introduction

- Challenge and opportunity for stock exchanges – globalization
- Globalization and technology lead to increased competition
- Different rules, regulations and fees exist in order to attract clients
- Before going public the Company shall decide on:
 - the listing venue
 - the type of placement (private vs. public)
 - the transaction structure

Choice of Listing Venue

- Selection of a particular Stock Exchange by a company depends on a number of factors:
 - the reputation and prestige of the stock exchange
 - market liquidity and transparency
 - existing (institutional) investor base
 - cost of listing
 - regulatory regime
 - the targeted markets
 - level of technology etc.
- More companies choose to list in their own jurisdictions or in neighboring jurisdictions

Choice of Type of Placement

Private Placement

- addressed to a limited number of sophisticated/institutional investors
- usually exempt from public registration
- requires placement memorandum
- lower cost

Public Offering

- addressed to an unlimited number of institutional and private investors
- usually requires public registration
- requires a prospectus
- higher cost (more parties involved)

“A good private placement is sometimes better than a bad public offering”

Admission to Trading on EU Regulated Market (1)

- Application for Admission to Trading to be made jointly by the issuer together with a banking institution admitted to trade on a domestic stock exchange (under German Exchange Act)
- Prospectus required that complies with the German Securities Prospectus Act which implements the EU-Prospectus Directive 2003/71/EG (November 4, 2003)
- Securities Prospectus Act constitutes obligation to publish a prospectus for public offers of securities and contains detailed description on the content of a prospectus. As a result, a prospectus may be required for two reasons: 1) Application for Admission to Trading on EU Regulated Market and/or 2) for a public offer

Admission to Trading on EU Regulated Market (2)

- Prospectus needs to be filed with and approved by the German Federal Financial Supervisory Authority (BaFin)
- Admission to Trading will be granted by the Admission Board of the Frankfurt Stock Exchange, in principle if certain criteria are fulfilled (under Stock Exchange Admission Ordinance):
 - issuer exists for more than 3 years (subject to exceptions)
 - minimum share capital EUR 250,000
 - free float of at least 25 per cent
- Alternative: Approval by other European regulatory authority under European Passport regime

Admission to Trading on EU Regulated Market (3)

- Foreign Issuers from third countries (non-EEA)
 - German regulatory authority (BaFin) may approve prospectus from third country issuers if drawn up (i) in accordance with the legislation of a third country, and (ii) in accordance with international standards set by international securities commission organisations, including IOSCO disclosure standards, and (iii) the information requirements are equivalent to the requirements under the Prospectus Directive
 - The German legislator may set up procedures for determining equivalence. However, not yet implemented

Inclusion of Securities in Exchange Regulated Market (1)

- Inclusion of Securities in Open Market (*Freiverkehr*)
- In general, exposé sufficient
- No additional costs for the preparation of a prospectus
- Potential liability (Sec. 13a Securities Sales Prospectus Act - VerkProspG) if a prospectus has not been published in violation of German Securities Prospectus Act (WpPG) – “public offer”

Inclusion of Securities in Exchange Regulated Market (2)

- The inclusion of securities in the Open Market in principle does not constitute a public offer. However, marketing activities could inadvertently lead to a public offer:
 - merely the publication of information on the trading of the shares in connection with general business information on the company could lead to a public offer (e.g. corporate news with reference to ISIN)
 - References to the details and possibilities to purchase shares at press conferences and corporate events should hence not be made
- The fact that a prospectus has not been published restricts investor relations communication and contains liability risks
- Pure Private Placements remain unaffected
- Clear tendency to prepare prospectus on Entry Standard segment

Content of Prospectus (1): Comprehensive Disclosure

- Risk Factors
- Capitalization and Indebtedness
- Management's Discussion and Analysis (M,D&A)
- Business Description (including information on material contracts, litigation etc.)
- General information on the Company (Issuer)
- Capital Structure of the Company
- Directors/Senior Management, Supervisory Board Members, Employees
- Major Shareholders of the Company and Related Party Transactions

Content of Prospectus (2): Financial Information

- Audited historical financial information covering the latest three financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year
- In the case of a significant gross change, a description of how the transaction might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the commencement of the period being reported on or at the date reported. This requirement will normally be satisfied by the inclusion of pro forma financial information
- If the issuer prepares both own and consolidated annual financial statements, at least the consolidated annual financial statements have to be included in the registration document
- If the issuer has published quarterly or half yearly financial information since the date of its last audited financial statements, these must be included in the registration document

Content of Prospectus (3): Financial Information

- The last year of audited financial information may not be older than one of the following:
 - (a) 18 months from the date of the registration document if the issuer includes audited interim financial statements in the registration document;
 - (b) 15 months from the date of the registration document if the issuer includes unaudited interim financial statements in the registration document
- If the registration document is dated more than nine months after the end of the last audited financial year, it must contain interim financial information, which may be unaudited (in which case that fact must be stated) covering at least the first six months of the financial year

Prospectus Liability in Germany

- Cause of the liability is the purchase of securities on the basis of an incorrect or incomplete prospectus (liability also, if issuer fails to publish a prospectus)
- Claims may be made by the purchaser of the securities, if acquired in the first six months after issue
- Both the Issuer and the Underwriters are liable towards the person who acquired the securities
- Gross negligence
- Generally, statute of limitations: one year after knowledge of the incorrectness or incompleteness of the prospectus; three years after publication of the prospectus at the latest

Transaction Structures (1): Direct Listings

- Direct initial public offerings or listings of shares in Ukrainian companies abroad are not possible
- The shares in Ukrainian companies can not be entered into the clearing system of Clearstream Banking
- Dual listing of shares is not allowed
- A permit from the State Securities and Stock Market Commission of Ukraine to list shares abroad (as a secondary public offering only) is required (a number of strict limitations – not more than 25% of the share capital can be listed, share capital volume, SSSMC can determine the venue and the price for listing etc.)
- Post-IPO reporting to the SSSMC is obligatory

Transaction Structures (2): Mergers

- Mergers between listed and non-listed operative companies took place in the past (e.g. mergers between ProSieben and SAT.1; United Visions Entertainment and Scholz & Friends in the media sector).
- No “shelf-companies” with stock exchange listing in Germany available due to various reasons (e.g. minimum free float requirements of FSE)
- Therefore, potential target companies for mergers have corporate history and potentially liabilities
- In principle, no tax benefits available in case of mergers (e.g. loss carry-forwards can not used)
- A Prospectus is required if admission to Regulated Market or public offering is contemplated

Transaction Structures (3): Holding Companies

- Access to capital markets through German holding companies is possible
- Implementation of holding structure with newly established holding company and contribution of assets as contribution in kind
- Listing of holding company with foreign assets
- Restrictions apply as to access to Entry Standard
- Examples: ZAAB Holding AG with Russian oil and gas exploration activities; ZhongDe Waste Technology with Chinese waste incinerator production facilities

Transaction Structures (4): GDRs

- Primary listing of Company in Ukraine in compliance with Ukrainian admission criteria
- Implementation of GDR (global depositary receipts) structure with depositary agent (e.g. BoNY, JP Morgan)
- Secondary listing of GDRs on FSE
- Sponsored DR programs vs. un-sponsored programs
- Level I, Level II, or Level III DRs
- A Prospectus is required if admission to Regulated Market or public offering is contemplated

Conclusion: Easy Access to German Capital Markets

- Regulatory Regime within EU Framework
- Positive Approach of German Federal Financial Supervisory Authority (BaFin) to foreign issuers
- We have made good experience with BaFin in solving problems by constructive dialogues
- Structures with English language in documentation possible (except for German summary)
- **However, difficult market situation at the moment!**

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