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New Voting Rights Disclosure Obligations for Security Rights in Shares in Listed Companies

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Under the recently tightened voting rights disclosure rules in Germany, banks and collateral agents, as well as other lenders and security holders, may now be required to disclose their security rights over shares in companies listed on the regulated markets in Germany. UniCredit, for instance, recently disclosed its pledges over shares in Hugo Boss that are held as collateral for the financing of Permira's acquisition of Hugo Boss in 2007.

The new voting rights disclosure rules came into force on 1 February 2012 (please also see our alert of December 6, 2011). It requires persons directly or indirectly holding any financial or other instrument that could facilitate the acquisition of voting shares in companies listed on a regulated market in Germany ("**Listed Shares**"), to disclose that instrument without undue delay to both the issuer and the German Financial Supervisory Authority ("**BaFin**").

With a similar aim as the proposal by the European Commission for an amendment of the Transparency Directive 2004/109/EC, the new voting rights disclosure rules aim at preventing attempts to gain control over listed companies by way of secret stake building. For this purpose disclosure may have to be made, notably for contracts for difference, cash settled equity swaps, cash settled call-options, put-options and other arrangements that may eventually facilitate the acquisition of the underlying Listed Shares.

As such, it is arguable whether also appropriation rights commonly agreed in respect of security rights over Listed Shares constitute similar arrangements as they entitle the security holder, in the case of an enforcement event, to realize its security right by way of appropriation, i.e. acquisition, of the Listed Shares in settlement of the secured obligations and thus gain control over the respective listed company.

Even though not officially, BaFin has informally confirmed that the new voting rights disclosure rules might also be applicable in the case of appropriation rights. In fact, both BaFin and the legal advisory practice are still in the process of defining the exact scope of the rather broad new voting right disclosure rules. Taking into account the high level of transparency required by the new law (which according to BaFin may even require the disclosure of letters of intent or memoranda of understanding regarding the acquisition of Listed Shares), it is only consistent to extend the disclosure obligations to security rights with appropriation rights. However, the new voting rights disclosure rules entail substantial administrative burdens for security holders given the complex filing requirements. In particular, as security rights are not known to be used as instruments for secret stake buildings, it would be desirable that BaFin made use of its authority to exempt security rights taken in the ordinary course of business from the new voting rights disclosure rules. As long as there are no official guidelines by BaFin, though, security holders are well advised to coordinate potential voting rights disclosure obligations with BaFin in each individual case.

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In any event, the new voting rights disclosure rules do not extend to security rights over shares in companies that are listed in an unofficial market (*Freiverkehr*) in Germany and thus exclude most shares of foreign issuers traded on German stock exchanges. Pledges over shares in non-listed entities and partnerships are similarly not subject to disclosure requirements.

If the disclosure obligations apply, pledges or other security rights over Listed Shares are required to be disclosed if the aggregate number of voting rights and any other voting rights held by or attributed to a notifying party reaches or exceeds the threshold of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % or 75 % of the aggregate voting rights of the relevant issuer. Likewise, disclosure obligations will apply if the aggregate number of voting rights falls below any of these thresholds. This may, in particular, be the case if the security right expires or is otherwise released. Further disclosure obligations may apply if an enforcement event actually occurs or if the appropriation right is exercised.

Failure to comply with the new voting rights disclosure obligations will not affect the validity of the security rights themselves or the rights attached to the Listed Shares such as voting rights or the right to receive dividends. It is considered an administrative offense (*Ordnungswidrigkeit*), though, which may entail a fine of up to EUR 1,000,000.

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