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BALANCING BUSINESS OBJECTIVES AND SHAREHOLDERS' RIGHTS IN VOLUNTARY DELISTING: A COMPARATIVE ANALYSIS OF SELECTED LEGAL JURISDICTIONS

Abstract

Delisting a company from the stock market often negatively affects the interests of all related parties. For shareholders, the main detriment is their loss of the ability to trade and sell their shares on the open stock market. As voluntary delistings become a more prevalent market phenomenon worldwide, countries are seeking to implement regulatory protections during the process. The aim of this paper is to make a comparative analysis of the protection of shareholders during delisting across multiple jurisdictions including the United States, the UK, Germany, India, and Thailand that have adopted different regimes for protecting shareholders during a company's voluntary delisting. The goal is to answer the question of which shareholder protection instruments in the covered jurisdictions have adopted to protect shareholder and company interests during delisting, and also to question the effectiveness of investor protection in voluntary delisting. The paper offers potential ways to better protect the rights of shareholders during the voluntary delisting process to achieve a balanced regulation of different corporate actors' interests.

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Introduction

Voluntary delisting occurs when a company decides to exit the stock exchange and lose its eligibility to be traded on a stock exchange.[1] It is an area of law that is often governed by primarily securities regulations and to a less extent company law.[2] Delisting can take different forms; it can be voluntary or can be a consequence of a company's failure to adhere to listing rules.[3] Down-listing is a third category of delisting that

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[1] S.M. Kang, "Voluntary Delisting in Korea: Causes and Impact on Company Performance", *Journal of Applied Business Research*, 2017, Issue 2, p. 391.

[2] There are numerous reasons a company might choose to delist, such as listing costs being disproportionate to the size of the business. Listing costs reduce the company's ability to leverage financial visibility to attract the right investors. However, undervaluation of company stock in the market is the most common reason for voluntary delisting. If the market does not reflect the book value of the stock, the market loses its role as a platform for corporate financing. Another reason for delisting is the market disclosure rules and listing requirements that can expose sensitive company information to the public and competitors. Delisting ensures the firm can continue without being monitored by others. See: H. Mehran, S. Peristiani, "Financial Visibility and the Decision to Go Private", *Review of Financial Studies*, 2010, Issue 2, p. 519; F. Salzill, *Minority Shareholders and Empirical Evidences on Voluntary Delisting Phenomeno*, Thesis, Department of Business and Management - Chair of Advanced Corporate Finance, Roma: Luiss Guido Carli University, 2013/2014, p. 5; C. Doidge, G.A. Karoly, R.M. Stulz, "The US Listing Gap", *Journal of Financial Economics (JFE)*, 2015, Forthcoming Fisher College of Business Working Paper No. 2015-03-07, Charles A. Dice Center Working Paper No. 2015-07, p. 456. See also Y.K. Yiannoulis, "Delisting in Athens Stock Exchange", *Journal of Modern Accounting and Auditing*, 2019, Vol. 15, No. 7, p. 344.

[3] Involuntary delisting is considered to be a main enforcement tool at the hands of exchanges. Exchanges usually enjoy exceptional powers to delist companies. The economic rationales for an exchange to have a delisting framework in place vary. For instance, protecting its reputation is one reason an exchange might forcibly delist a company, usually because it is financially weak or otherwise troubled. Another reason is to assure investors that listed firms meet the minimum integrity standards by delisting firms that do not comply with such. See J. Macey, M. O'Hara, D. Pompilio, "Down and Out in the Stock Market: The Law and Economics of the Delisting Process", *Journal of Law and Economics*, 2008, Issue 4, p. 683.

refers to a company's move from one market, usually with strict listing rules, to a less restrictive market, although in all cases, it continue to be listed.[4] Voluntary delisting is considered to be a revolution in the classical life cycle of companies and not a natural evolution: listing is the natural evolution of a company's life cycle.[5]

In recent years, the practice of voluntary delisting companies has become an important phenomenon in many developed countries,[6] the United States, and prominent economies throughout Europe and Asia.[7] Since 1998, the number of companies listed on US stock exchanges has dropped by half,[8] and the numbers of delisted companies from European exchanges exceed the numbers of companies going public.[9]

Today, there are almost 41,000 listed companies around the world with a total market capitalisation of USD 85 trillion.[10] At the same time, the number of listed companies in OECD economies declined from 30,000 companies two decades ago to about 22,000 in 2020.[11] In Germany alone, 297 delistings were observed between 2009 and 2019.[12] Similarly, the number of listed companies in France declined from 1185 to 465, and

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[4] S. Almutairi, "What does Voluntary Delisting Tell us about Corporate Governance in Kuwait?", *Arab Law Quarterly* published online ahead of print, 2021, p. 4, available at: https://doi.org/10.1163/15730255-bja10092 [last accessed 13.4.2023].

[5] P. Maume, "The Parting of the Ways: Delisting under German and UK Law", *European Business Organization Law Review*, 2015, Issue 2, p. 257–258. See also Macey et al., *supra* note 3.

[6] I. Martinez, S. Serve, C. Djama, *Reasons for delisting and consequences: A literature review and research agenda*, p. 3, available at: http://ssrn.com/abstract=2591449 [last accessed 12.4.2023].

[7] E.Z. Pour, M. Lasfer, "Why Do Companies Delist Voluntarily from the Stock Market?", *Journal of Banking and Finance*, 2013, Issue 12, p. 4850.

[8] Doidge et al., *supra* note 2, p. 464.

[9] S. Thomsen, F. Vinten, "Delistings and the Costs of Governance: A Study of European Stock Exchanges 1996–2004", *Journal of Management and Governance*, 2014, Vol. 18, Issue 3, p. 793.

[10] OECD, *Understanding Delistings from the Portuguese Stock Market*, OECD Capital Market Series, Paris, 2020, p. 17.

[11] Ibid.

[12] D. Fockenbrock, *Der Rückzug von der Börse ist ein gefährlicher Trend* (*The retreat from the Stock Market Is a Dangerous Trend*), 2019, available at: https://www.handelsblatt.com/meinung/kommentare/kommentar-der-rueckzug-von-der-boerse-ist-ein-gefaehrlicher-trend/24526692.html [last accessed 17.11.2022].

the number of listed companies on the Portuguese stock market has decreased by two-thirds, from 148 to 55.[13]

Undoubtedly, voluntary delisting has a significant impact on the operations and status of a company.[14] A study shows that price drops post-delisting decision exceed 50% in some cases.[15] Shareholders of a delisted company lose the opportunity to sell their shares for fair market value, leaving them with few options for ridding themselves of the investment and recouping their capital.[16] This poses significant changes both economically and legally and entails distinct advantages and disadvantages that affect the interests of all related parties, especially shareholders.[17] Given these drastic consequences of voluntary delisting, exchanges have involved shareholders to varying degrees in decision making on delisting and other protections.[18] Another major outcome of delisting is that firms can "go dark". This means they are no longer subjected to mandatory disclosure regulations,[19] which undermines transparency,[20] and magnifies information asymmetry.[21]

Two major models govern investor and shareholder protections during voluntary delisting. The first model, the directors' primacy model,

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[13] OECD, *supra* note 10, p. 10.

[14] M. Morgenstern, P. Nealis, K. Kleinman, *Going Private: A Reasoned Response to Sarbanes-Oxley*, 3rd Annual Government-Business Forum on Small Business Capital Formation, Washington, DC, 2004, p. 4.

[15] Macey et al., *supra* note 3, p. 701.

[16] C. Leuz, A. Triantis, T.Y. Wang, "Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations", *Journal of Accounting and Economics*, 2008, Issue 2-3, p. 185.

[17] K. Krug, *Der Rückzug von der Börse - Widerstreitende Interessen von Groß – und Minderheitsaktionären beim Delisting* (*The retreat from the stock market – Conflicting interests of minority and majority shareholders during delisting*), Baden-Baden: Nomos, 2019, p. 87.

[18] See generally: J. Goh, M. Gombola, F.Y. Liu, D.W. Chou, *Going-private restructuring and earnings expectations: a test of the release of favorable information for target firms and industry rivals*, Working paper, Singapore Management University, 2002.

[19] See generally E. Rock, "Securities Regulation As Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure", *Cardozo Law Review*, 2002, Vol. 23, p. 675.

[20] B.R. Cheffins, B. Reddy, "Will Listing Rule Reform Deliver Strong Public Markets for the UK?", *European Corporate Governance Institute - Law Working Paper*, 2022, No. 653, p. 49, available at: https://ssrn.com/abstract=4028930 [last accessed 18.4.2023].

[21] P. Castor, C.L. Parker, *Going Private: Business and Procedural Considerations in Seeking Relief from Reporting and Corporate Governance Requirements*, Rutan & Rucker, LLP publication, 2004, p. 7.

evolved around the doctrine of directors' fiduciary duties as the basis for these protections.[22] The United States provides good examples of director models given that it is company directors who are authorised to make delisting decisions. The second model is the shareholders' primacy model: shareholders' approval is the basis of these models; England is an example of such a model.[23] Further, some jurisdictions have adopted a different approach to protecting shareholders during voluntary delisting: Germany protects investors during delisting with the compulsory buy-out/delisting offer.

Of the jurisdictions we studied, the US regime is considered among the weakest for investor protection in delisting, especially since the repeal of NYSE Rule 500, as we will discuss in this paper.[24] The German regime is beneficial in terms of compensating shareholders, but does not incentivise shareholder activism: these buyouts are available to shareholders who voted against the delisting and to those who did not even vote at all. The buy-out offers under the German approach are considered insufficient and do not provide full compensation for delisting company shareholders because the German legislature uses market prices to determine the price of the offer.[25] The shareholders will likely not receive a fair price if the company is undervalued,[26] and the goal of protecting shareholders during delisting will not be achieved. More importantly, a too-high market price can also pose a barrier to delisting.[27]

At the same time, although the UK delisting approach involving shareholder approval in delisting is gaining momentum in major jurisdictions, the supermajority approval requirement in voting through the general assembly is not sufficient to protect companies' shareholders.

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[22] J. Fisch, "Measuring Efficiency in Corporate Law, The Role of Shareholder Primacy", *Fordham Law Legal Studies*, 2005, No. 105, p. 28.

[23] L.A. Stout, "Bad and Not-So-Bad Arguments for Shareholder Primacy", *Southern California Law Review*, 2002, Vol. 75, p. 1191.

[24] See *infra* pp. 8-9.

[25] Section 39 para. 3 sentence 3 No. 1 German Stock Exchange Act (*Börsengesetz* – *BörsG*).

[26] D. Sandner, "The Protection of Minority Shareholders During Delisting in Germany and in the U.K", *RGSL Research Paper*, 2021, No. 24, p. 17; FCA Handbook (version as on February 2002), LR 5.2 Cancelling listing, available at: https://www.handbook.fca.org.uk/handbook/LR/5/2.html?timeline=True# [last accessed 17.11.2022].

[27] Krug, *supra* note 17, p. 146.

In our opinion, an effective shareholder-based regime requires meeting several preconditions. For instance, providing shareholders with a veto right in some regimes would be an obstacle to delisting and would overburden listed companies, and individual shareholders in general cannot be in the position to solely determine company management decisions in our opinion.

With this paper, we aim to introduce a comparative analysis of the legal framework for protecting shareholders during voluntary delisting across jurisdictions that have adopted different regimes to achieve a balanced regulation of different corporate actors' interests. For purpose of this comparison, we assess the effectiveness of the different legal and regulatory strategies the covered jurisdictions have adopted to protect shareholder and company interests during delisting. Specifically, we compare shareholder protection during voluntary delisting under United States, United Kingdom, and German laws, occasionally highlighting regulatory frameworks from other jurisdictions such as Korea and Thailand whenever they offer a unique and important aspect of protection. We aim at introducing a new hybrid regulatory regime for delisting that we believe would be more effective in governing the delisting regime.

The reason for selecting the United States legal regime is the fact that it has adopted a director's supremacy regime in voluntary delisting transaction triggers. The United States is a good example of such a category as boards of directors are authorized to make the delisting decision and the shareholders do not have the right to vote. The justification for selecting the United Kingdom regime is that delisting cannot be contingent on one single shareholder's approval because single shareholders will rule the company. Further, the single shareholder may abuse his right in approving the delisting decision and the remaining shareholders will be harmed, where the goal is to achieve a balanced regulation of different corporate actors' interests, where the justification for selecting the German regime is the fact that German law represents a stricter and inflexible solution in protecting shareholders during delisting. Additionally, German law has undergone many significant changes recently. This comparison will give a new outlook as it suggests a substantial re-thinking of the rules and practices of delisting around the world by adopting a hybrid model that governs voluntary delisting.

To achieve the paper's objective, we provide a comparative overview of investor protections in the voluntary delisting process in stock markets from leading economies. We combine these findings to provide a foundation for proposed amendments and possible international convergence in the regulations governing delisting. The challenge in designing voluntary delisting regimes is striking a balance between shareholders' interests, the exchange's interest, and the company objectives.

I. Directors Primacy Delisting Regimes

A number of markets empower boards of directors to make the decisions regarding voluntary delisting; the Toronto Stock Exchange in Canada and the exchanges in the United States are good examples of director primacy-based voluntary delisting regimes.[28] In the United States, the shareholders do not have the right to vote; the directors are authorised to make the delisting decisions.[29] Professor Bainbridge holds that directors are better informed than shareholders and should therefore make most of a corporation's decisions.[30]

To delist from NASDAQ, Rule 5840(j) of the NASDAQ Manual requires written notice to NASDAQ of intent to withdraw a class of securities from listing and/or registration at least 10 days before filing a Form 25 with the SEC. Further, the company has to issue a press release providing notice of the delisting and reasons for withdrawal. Finally, Form 8-K (or 6-K if the issuer is a foreign private issuer) announces the delisting.

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[28] Khort, *supra* note 32, p. 45.

[29] T. Farris, *Going Dark – The Simple Path to Exiting the U.S. Public Company Reporting System – delisting and deregistration under the U.S. Securities Exchange Act of 1934*, Dorsey and Whitney, 2012 available at: https://web.archive.org/web/20220303180805/; http://www.dorsey.com/files/upload/Farris_GoingDark_013012.pdf [last accessed 17.11.2022]. See also NYSE, Listed Company Manual § 806.02, available at: http://nysemanual.nyse.com/LCM/Sections/ [last accessed 17.11.2022]; NASD Marketplace § 4480(b), available at: http://nasdaq.cchwallstreet.com/NASDAQ/pdf/new_ listing_rules.pdf [last accessed 17.11.2022].

[30] *Should Shareholders Have a Voice in Corporate Strategy? The Dutch Case*, 2011, available at: https://bit.ly/f636tp [last accessed 17.11.2022].

The NYSE follows a similar framework for delisting governed by Rule 806.02 of the NYSE Listed Company Manual. First, a company must file notice to the NYSE of the intention of being delisted. The company must also then issue a press release announcing its intention and the reasons behind the decision, and the announcement must be made at least 10 days before filing Form 25.[31] A board of directors resolution is also required to initiate a delisting process. The delisting takes place automatically within 10 days of filing and fulfilling the requirements.

This relatively easy regime for delisting entrusts the entire process to the directors and does not take into consideration the interest of investors, a departure from the traditional regime that used to govern delisting in the United States. The new regime repealed New York Stock Exchange Rule 500, which required a vote of a two-thirds majority of outstanding shares in favour with no more than 10% of shares opposing it.[32] Rule 500 was introduced during the Great Depression as a tool to protect individual investors[33] but was criticised as an obstacle to change in the securities industry. Indeed, the Securities Exchange Act comment on Rule 500 posits that it functions as a deterrent to intermarket competition rather than protecting investors.[34] The SEC based its arguments on the fact that the NASDAQ did not require shareholder approval for delisting and exceeded the NYSE in annual share volume and in the number of the companies on the exchange.[35] The SEC stated that with the trade reports changing in NASDAQ, the possibility of shareholders being harmed by voluntary delisting greatly decreased.[36] Thus, the jus-

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[31] T. Kollar, B. Au, D. Bakst, *Going Dark in the USA: How to Exit the US Public Markets and Options for US-Listed Chinese Companies*, Mayer Brown, 2020, p. 7, available at: https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/07/going-dark-in-the-usa-how-to-exit-the-us-public-markets-and-options-for-us-listed-chinese-companies.pdf [last accessed 17.11.2022].

[32] J. Khort, "Protection of Investors in Voluntary Delisting on the U.S. Stock Market", *Uppsala Faculty of Law Working Paper*, 2014, Vol. 4, p. 22.

[33] Maume, *supra* note 5, p. 260.

[34] NASD Opposes SEC Approval of NYSE's Anti-Competitive Amendment to Rule 500, NASD, 1999.

[35] Ibid.

[36] SEC Division of Market Regulation, *Market 2000 – An Examination of Current Equity Market Developments*, 1994, pp. 30-31.

tification for the existence of Rule 500 was challenged, and it was abolished in 2003.[37]

One of NASDAQ's main arguments for its rules was that Rule 500 is "antithetical to the free and open competition that the Commission has consistently advanced and that is the bedrock of the US capital markets system".[38] Further, several US commenters argued that shareholder approval of delisting is a real impediment to competition on the US. stock market[39] and that shareholders' approval would put an exchange at a competitive disadvantage.[40]

However, the fact that delisting decisions shifted to the control of boards of directors and out of the shareholders' power does not necessarily mean that a company's shareholders are not protected: the directors do have a fiduciary duty to protect shareholder interests, and any decision that would harm the interest of the company and its shareholders would expose them to potential liability for breaching fiduciary duties.[41] Breaches of fiduciary duties when voluntarily delisting can be manifested in a number of ways. For instance, directors engaging in self-dealing transactions breach the duty of loyalty and cause an involuntary delisting.[42] A similar breach of loyalty occurs if the board approves a delisting and then initiates a cash-out merger transaction.[43]

In *Hamilton v. Nozko*, the Delaware Court of Chancery found a breach of the duty of loyalty towards shareholders when the board using delisting/deregistration sought to obtain personal economic benefits at the expense of the shareholders' financial welfare by forcing the share-

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[37] R. Ketchum, B. Weimer, "Symposium: Market 2000 and the NASDAQ Stock Market", *Iowa Journal of Corporate Law*, 1994, Vol. 19, pp. 559, 574.

[38] See NASDAQ petition requesting the SEC to Repeal NYSE Rule 500 in its entirety, 2003, available at: https://ir.nasdaq.com/news-releases/news-release-details/nasdaq-files-petition-requesting-sec-repeal-nyse-rule-500-its [last accessed 17.11.2022].

[39] Khort, *supra* note 32, p. 25.

[40] A.C. Pritchard, "Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers", *Vermont Law Review*, 1999, Issue 6, p. 925, 992.

[41] S.R. Cohn, "Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions through the Business Judgment Rule", *Texas Law Review*, 1983, Vol. 62, No. 4, p. 603.

[42] Khort, *supra* note 32, p. 10.

[43] J. Fried, "Firms Gone Dark", *University of Chicago Law Review*, 2009, Issue 1, pp. 135, 147.

holders to sell their shares at an unfair price.[44] The court in the same decision made it clear that "on the question of when a corporation's directors (and as here, its majority stockholder) may properly cause the corporation's stock to be deregistered and as a consequence, delisted under the Exchange Act, the authorities afford little guidance".[45] In addition, the court made it clear that although delisting is a legitimate and legal process, it will be considered unlawful if it was done for inequitable purposes. Nonetheless, the court stressed the fact that Delaware law does not make delisting illegal, even if it impacts the market for the firm shares, because avoiding expense is considered sufficient reason for delisting.[46]

The fact that the US delisting regime empowered boards of directors meant that corporate law and directors' fiduciary duties have become central foundations for legally challenging delisting decisions. The effectiveness of fiduciary duties as a safeguard in the case of voluntary delisting is less effective in practice than was suggested, especially in the absence of any self-interest in the process: US courts infrequently find either the directors or controlling shareholders liable for breaching their fiduciary duties in delisting decisions. Having said that, there are some applicable exceptions. In *Pure Resources, Inc. v. Shareholders Litigation*, the court held that the directors had breached their duty of loyalty because the controlling shareholders used the voluntary delisting to obtain a lower price after a tender offer transaction.[47]

An essential point to keep in mind is that there is no precedent for finding directors liable for breaching the duty of care during a delisting. One reason could be that such actions are justified by the business judgment rule assumption that the directors are fully informed and act in good faith in the best interest of the company.[48] This presumption makes proving a breach of the duty of care very difficult for sharehold-

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[44] *Hamilton v. Nozko*, No. 13014, 1994 WL 413299, at 18-21 (Del. Ch. 1994).

[45] G.J. Bradshaw, *Going Dark: Board of Directors' Fiduciary Duties when Public Companies Voluntarily Go Dark without Going Private*, The Bradshaw Law Group, 2015.

[46] Ibid.

[47] *Pure Res., Inc. Shareholders Litigation*, 808 A2d 421, 453 n26 (Del. Ch. 2002).

[48] B. Black, "The Core Fiduciary Duties of Outside Directors", *Asia Business Law Review*, 2001, pp. 3-16.

ers.[49] It should also be noted that some scholars are advocating for the adoption of a shareholder veto approach similar to the rules governing delisting in England to empower shareholders act in their interests.[50]

II. Shareholders' Primacy Model in Delisting Regimes

The protection of shareholders in voluntary delistings in the United Kingdom deserves special attention because the model offers a good example of shareholder primacy. In 2005, the Financial Conduct Authority Handbook section LR 5.2.4/5.2.5, paragraph No. 2 governing the voluntary delisting process was amended in favour of empowering shareholders by requiring the approval of 75% of voting shareholders to delist a company.[51] The framework that was introduced addressed the possibility of a majority/controlling shareholder's abuse or control of shareholder's abusing the voting process: the rules stipulate that if there is a controlling shareholder, the approval of the majority of the independent shareholders is required as well.[52] Under the rules, any shareholder who holds 30% of votes at the general assembly is a controlling shareholder, and all others are qualified as independent shareholders.[53] One final note is that the 75% does not represent the entirety of the shareholders, but rather those who cast their votes; critics have raised some doubts as to the effectiveness of this protection given how few shareholders participate in general meetings.

This amendment was introduced as a result of the spread of negative practices in companies post-delisting, that is, once they became private companies. For instance, shareholders were forced to sell their shares at unreasonably low prices because there was no longer a market

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[49] S. Cohn, "Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions through the Business Judgment Rule", *Texas Law Review*, 1983, Issue 591, p. 591.

[50] Fried, *supra* note 43, p. 157.

[51] Sandner, *supra* note 26, p. 17; FCA Handbook. LR 5.2, *supra* note 26.

[52] Ibid., p. 18.

[53] Ibid., p. 17.

for them.[54] Furthermore, there was no longer the requirement that controlling shareholders offer to purchase shareholder interests at fair value, i.e. mandatory offers are no longer a regulatory requirement. However, we did not find any evidence that empowering shareholders in delisting decisions had had negative impacts on the number of listed companies on the London Stock Exchange.[55]

In terms of disclosure and transparency, a company's delisting request submission should include the background and reasons for the cancelation/delisting.[56] The company must also include in its circular to the shareholders a detailed explanation of the request to delist and identify the risks and benefits of the delisting. This includes all relevant information that would enable the shareholders to make informed decisions; if any particular document guided the decision to delist, that document must be included. The date on which the delisting will be effective must be no less than 20 business days from the passing of the shareholder resolution.[57]

The Financial Conduct Authority introduced a number of exceptions to delisting requirements including those regarding shareholders' approval. Rules LR 5.2.7, LR 5.2.5 para. 2, i.e., the requirement for general meeting approval, does not apply in the case of restructuring measures. The main exception relates to cases when a reorganisation or restructuring of a company is essential to avoid going to informal insolvency, and delisting is a requirement of that rescue plan.[58] In such a case, under LR 5.2.7 para. 1 and 2, it is necessary to inform RIS that the issuer's position is so precarious that bankruptcy cannot be forestalled, and pursuant to para. 3, the issuer must explain why the cancellation is in the best interest of creditors as well as shareholders and why shareholder approval should not be sought.

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[54] Ibid., p. 26.

[55] Financial Conduct Authority, *Feedback on CP12/25: Enhancing the effectiveness of the Listing Regime and further consultation*, Consultation Paper CP 13/15, 2013, p. 72, available at: https://www.fca.org.uk/publications/consultation-papers/cp13-15-enhancing-effectiveness-listing- regime-feedback-cp12-25-and [last accessed 17.11.2022].

[56] Sandner, *supra* note 26, p. 17.

[57] FCA Handbook LR 5.3.1 *supra* note 26.

[58] FCA Handbook LR 5.2.5 *supra* note 26.

The shareholder primacy model is grounded in the notion of empowering shareholders in making strategic decisions at the company level.[59] This model offers better protection from arbitrary or abusive delisting decisions. However, Leuz, Triantis, and Wang found that shareholders view delisting as being primarily in directors' interests.[60] In our opinion, the design of any delisting regime that is based on shareholder primacy must take into account a number of potential pitfalls, the first being the potential for controlling or majority shareholders to abuse the process. The reality is that a board of directors would usually not initiate delisting without the consent of the controlling shareholders, and therefore, a separate shareholder primacy model that would require majority approval in many cases would fail to deliver the desired shareholder protection.[61] This is why the UK adopted a two-threshold shareholder requirement.

Other jurisdictions have adopted safeguards against the risk of controlling shareholder abuse in the form of a grievance process at the regulator level. On the Hong Kong Stock Exchange, for instance, a shareholder that owns 10% of the company stock can veto the voluntary delisting proposal if the company does not have an alternative listing on other stock exchanges.[62] The approach is similar in Argentina: delisting cannot take place if 10% of the company shareholders voted against the decision.[63] This right of veto aims at ensuring true protections for shareholders during a company's delisting.[64]

In addition, Thailand provides shareholders with a veto right if the shareholders can vote on the voluntary delist proposal. The nominal value of the shares held by the shareholders present should not exceed 10%.[65] It is worth paying attention to the fact that in some countries

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[59] M. Friedman, "The Social Responsibility of Business Is to Increase Its Profits", *New York Times Magazine*, 1970, p. 122-126.

[60] Leuz et al., *supra* note 16, p. 185.

[61] Morgenstern et al., *supra* note 14, p. 12.

[62] Hong Kong Stock Exchange, Listing Rules and Regulations, art 9.20(3).

[63] S. Luegmayer, C.M.B. Varela, E. O'Farrell, *Equity Capital Markets in Argentina: Regulatory Overview*, Practical Law UK, 2015, available at: https://uk.practicallaw.thomsonreuters.com/2-518-9076?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a1012737 [last accessed 4.7.2022].

[64] Ibid.

[65] Regulations of the Stock Exchange of Thailand, Delisting of Securities, 1999, Art. 5.

which are young, developing, or characterized by small markets (Italy,[66] Spain, Kazakhstan Stock Exchange, Prague Stock Exchange, Budapest Stock Exchange, and Russia), shareholders have the existing right in addition to the veto right.[67]

Notably, there is always the risk of apathy because this veto mechanism requires positive participation from shareholders.[68] Apathy is to a large extent a global phenomenon especially among retail investors: researchers found the trend that these investors routinely abstain from voting and that retail investors who do vote represent only 30% of the shares.[69] Exiting and selling shares is the classical action for retail investors shareholders who are dissatisfied with the company and experiencing what is known as "rational apathy", and this behaviour is expected with this category of shareholders.[70] In other words, such investors tend to "vote with their feet".

The Shanghai Stock Exchange has adopted an alternative strategy to protect shareholders during delisting: shareholders who own 5% or more of the shares are barred from the calculation of the votes required for the two-thirds approval present at the shareholders meeting, as are directors, supervisors, and senior officers, whose votes are not counted as part of the two-thirds approval requirement.[71] The main distinction from the UK system is that the UK threshold for a presumptively controlling/majority shareholder is 30%, whereas it is only 5% on the Shanghai exchange, which is more favourable for retail investor empowerment.

Returning to the United Kingdom, critics have argued that the two-threshold requirement for minimising possible controlling and majority shareholder abuse has only limited effectiveness given the lack of

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[66] M. Tuttino, I.C. Panetta, E. Laghi, "Going dark in Italy: Evidence from last decade", The 13th IAMB International Conference, 2012, p. 4.

[67] Regulation of Public M&A in Europe, Legal Guide, Third Edition, 2015, p. 45, available at: https://www.herbertsmithfreehills.com/file/4941/download?token=UqzGRH3g [last accessed 28.7.2022].

[68] Khort, *supra* note 32, p. 31.

[69] D. Solomon, "The Voice: The Minority Shareholder's Perspective", *Nevada Law Journal*, 2017, Vol. 17, p. 741.

[70] Ibid., p. 755.

[71] Rules Governing the Listing of Stocks on the Shanghai Stock Exchange, 2019, Rule 14.4.2.

participation of shareholders in general meetings. Some UK studies show that on average, only 1 in 1,000 shareholders attends the general assembly of the listed company.[72] Shareholders' voting rights are, in fact, often compromised, and their ability to influence the corporation's policies and courses of action is limited. Thus, noncontrolling shareholders lack the ability to prevent delisting decisions, and some find it preferable to sell their shares rather than be actively involved in decision-making.[73]

III. The German Twist in Shareholders Primacy Model

Germany took a different approach from England and the United States to protecting shareholders during voluntary delisting.[74] The German legislature approached the issue from the perspective of capital market law by mandating that companies offer shareholders a compulsory buy-out/delisting offer under § 39 para. 2 sentence 3 No. 1 BörsG. Notably, German law has undergone many significant changes, some caused by judgments from both the Federal Supreme Court (BGH) and the Federal Constitutional Court (BVerfG) prior to the legislative intervention.[75] Thus, it is fundamental to explain how companies' shareholders are protected under German law, which has been addressed twice by the federal court.

In 1998, Germany introduced a framework that allowed companies to request the permission of the stock exchange to delist, but it was limited and lacked detailed rules to govern this process.[76] In response, mul-

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[72] C. Villiers, "Chapter13", in J. Birds, A. Boyle (eds.), *Boyle & Birds' Company Law*, Jordan Publishing: Bristol, 5th edition, 2004, p. 373.

[73] Solomon, *supra* note 69, p. 755.

[74] C. Becker, L. Pospiech, *Delisting and Downgrading in Light of the German Federal Constitutional Court's Decision dated 11th July 2012 – Recommendations for Action in Practice*, 2013, pp. 12-13, available at: http://www.goerg.de/en/news/newsletter/newsletter_corporate_and_tax_merger s_acquisitions_01/2013.37550.html [last accessed 17.11.2022].

[75] Ibid., pp.12-13.

[76] D. Zetzsche, *Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting*, Center for Business and Corporate Law Research Paper 0053/2013, p. 4.

tiple questions arose regarding, for instance, which organ within the company would be empowered to make the request, that is, whether the decision requires shareholder approval or is a simple board decision, and whether it is necessary to offer shareholders a buy-out option.[77] In 2002, the *Macrotron* judgment held that a delisting was allowed only if it had been previously approved by a majority shareholder resolution because, without such a vote, the shareholders' constitutional private property rights would be infringed.[78] *Macrotron* held that the shareholders in a company undergoing a voluntary delisting enjoy an appraisal right (similarly to squeeze-out transactions) to purchase their stock at an adequate price and that a judge could set that price in a special court proceeding.[79] In other words, the court acknowledged that buy-out/delisting offer prices are subject to judicial review in terms of the fairness of the price. The court based this decision on the basis that shareholders' ability to sell their stocks on the market is a part of their constitutional private property right.[80]

The German Federal Court of Justice (FCJ) argued that the doctrine of a constitutional property right of investments flows from constitutional law because a share is covered by the guarantee of property in Art 14 of the Basic Law (Grundgesetz, the German constitution). However, this judgment has been criticised as burdensome because of the costs of granting shareholders appraisal rights.[81] In 2013, the FCJ in its *Frosta* judgment had the opportunity to reconsider the *Macrotron* principles in the light of the Constitutional Court's ruling and issued a landmark ruling concerning the requirements for delisting a public company from the regulated stock market in Germany.[82] The Federal Supreme

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[77] *Delisting Reloaded – German Supreme Court Abandons Cumbersome Restrictions*, Gibson Dunn, 2013, available at: https://www.gibsondunn.com/delisting-reloaded-german-supreme-court-abandons-cumbersome-restrictions/ [last accessed 23.4.2021]..

[78] Federal Court of Justice, 25 November 2002, File Number II ZR 133/01, reported in BGHZ 153, p. 47 – *Macrotron;* BGH, Urteil v. 25.11.2002, II ZR 133/01, BGHZ 153, 47, 50 ff. = DB 2003, 544.

[79] Ibid.

[80] Ibid.

[81] S. Dietsche, P. Martinius, *Back to Square One? German Constitutional Court Rewrites Delisting Rules*, Gibson Dunn, 2012.

[82] Federal Court of Justice, 8 October 2013, File Number II ZB 26/12.

Court had held that neither the appraisal right nor shareholder voting on voluntary delistings was required by corporate law.[83]

Furthermore, the federal court held that Section 39 of the Stock Exchange Act regulating the delisting afforded sufficient protection to investors,[84] citing among other reasons that a commissioned study by the Federal Constitutional Court did not reveal any pattern of price or volume trading; thus, no additional protection was needed.[85] Further, the court believed that the grace period rule also offered sufficient protection; this rule allows an investor to sell their shares within a specified period. After this decision in 2014, more than 35 publicly traded companies decided to delist.[86] That Constitutional Court decision substantially reduced the costs associated with delisting and introduced incentives for reluctant companies to go ahead with their plans.

As discussed above, under this decision and new regime, delistings in Germany are governed by Section 39 of the Stock Exchange Act BörsG., which was introduced in its current form in 2015 as a response to the *Frosta* decision.[87] The German Parliament amended the German Stock Exchange Act to ensure more protection to investors in delistings, which *Frosta* had weakened. The amendment introduced a carve-out for the tender offer requirement in the cases of delisting. In other words, no tender offer is required in a delisting provided that the shares will be listed on a domestic stock exchange market or an organised market in the European Union. However, the approval of a company's stockholders is not required.

The final delisting decision in lies with the stock market administration, which has the discretion to accept or reject a request to delist. The administration balances the interests of the company and the shareholders in reaching its final decision provided that it is not contrary to investor protection.[88] This protection is satisfied if the request to delist

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[83] Clifford Chance Newsletter, *Amendments to the German Securities Trading Act and New Regulation of Delisting*, 2015, p. 5.

[84] Khort, *supra* note 32, p. 14.

[85] Maume, *supra* note 5, p. 265.

[86] P. Nordhues, "Activism Breaks into Germany", *International Financial Law Review*, 2015, Vol. 34, p. 46

[87] Sandner, *supra* note 26, p. 9.

[88] Ibid.

is accompanied with a buy-out offer, usually presented by the majority shareholders. The buy-out offer, also known as a delist offer, must satisfy a number of conditions: the offer must be made to all shareholders;[89] it cannot contain any conditions unless mandated by statute such as the case of competition law requirements;[90] and it must also be published in accordance with the rules of the WpÜG.[91]

In terms of offer price, the delist offer must not be less than the weighted average stock price of the firm that intends to delist in the last six months before the announcement of delisting, and it must be in cash and in Euro.[92] This relatively new mechanism dropped the compensation review procedure that used to mandate the regulator with the power to scrutinise the offer.

Nevertheless, buy-out offers are subjected to company valuation to check that the offer represents the fair value of the company, and that the company is not manipulating the market manipulation rules. Company value becomes the applicable determinant of the delist offer price in the case of "market narrowness", i.e. the shares of the delisted company are relatively illiquid.[93] Exceptions to the compulsory buy-out offers do exist, especially if the company pursuing delisting is going to be listed in an another regulated domestic or EU market; then, a buy-out offer becomes voluntary because shareholders will not be financially affected by the decision.

Other jurisdictions also have less stringent delisting requirements that relate to down-listing (listing in other markets). India is a good example of such a jurisdiction. If a delisting company will be listed on an-

89 Section 39 para. 2 sentence 3 No. 1 German Stock Exchange Act (*Börsengesetz – BörsG*).

90 Section 39 para. 3 sentence 3 No. 1 German Stock Exchange Act (*Börsengesetz – BörsG*).

91 Section 39 para. 2 sentence 3 No. 1 German Stock Exchange Act (*Börsengesetz – BörsG*).

92 U. Binder, K.W. Riehmer, M. Brown, *Public Takeovers in Germany: How to Acquire a Publicly Listed Company in Germany*, White paper, Mayer Brown, 2020, p. 14.

93 Clifford Chance Newsletter, *supra* note 83, p. 4-5.

other stock exchange,[94] then the decision to delist can be approved by only the board of directors without involving shareholders.[95]

IV. Towards a More Effective Delisting Regime Model

The above illustrations of major markets' delisting regimes show that the shareholder primacy model is gaining momentum in major jurisdictions. In this section we propose an evaluation matrix that can be used to assess the effectiveness of any delisting regime from a shareholder perspective. We also propose a blueprint for what we believe can be an effective and efficient voluntary delisting regime; however, an effective shareholder-based regime does require that a number of preconditions be satisfied. The first is that corporate law and/or corporate governance must include rules that will ensure the overall effectiveness of general assemblies. The second is that boards of directors must not be in a position to manipulate or influence the shareholders' decisions. Finally, there must be an effective capital markets regulator that can ensure proper oversight of the delisting process. We address these conditions below.

1. Shareholders' Approval

Shareholders' approval is the bedrock of the shareholder primacy model governing delisting.[96] Having said that, the process for gathering shareholder approval must ensure their protection while ensuring against potential controlling/majority shareholder abuse. Even with a supermajority approval requirement, voting through the general assembly is not sufficient to protect the company's shareholders when the board

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[94] Khort, *supra* note 32, p. 18.

[95] Securities and Exchange Board of India, Delisting of Equity Shares Regulations art 5(A) (2021), available at: https://www.sebi.gov.in/legal/regulations/jun-2009/sebi-delisting-of-equity-shares-regulations-2009-last-amended-on-march-6-2017-_34625.html [last accessed 17.11.2022].

[96] Fried, *supra* note 43, p. 141.

of directors issues a recommendation to delist. This requires first that shareholders receive the information they will need to make informed votes, which requires company transparency; governance rules should include provisions for making available to shareholders a minimum set of information regarding the delisting to be available to the shareholders prior to the general assembly meeting in order to enable them to make informed decisions.

Many jurisdictions such as the UK and the United States require detailed disclosures that include the reasons for pursuing delisting, but these do not particularly support informed shareholder decision-making because the disclosures tend to just be high-level justifications by the actual decision-makers.

In our opinion, rules governing shareholders' approval in any delisting process must aim at achieving three broad objectives. The first objective is to ensure that the rules will address the inherit asymmetry of information that exists in any voluntary delisting process between the shareholders and the company's management. Governance rules should include a requirement for full disclosure from the company to the shareholders. Most of the jurisdictions we covered in this paper require certain disclosures from companies that wish to voluntary delist.

The second objective is to minimise managers' or directors' inherent bias toward delisting given that they are undertaking the process voluntarily. One way to ensure the objectivity of the board in the process is to follow the same rules that govern takeover transactions, which require boards to seek outside opinion from an independent financial adviser, prior to issuing any recommendation of voluntary delisting. This adviser should present findings and recommendations at the shareholders' meeting. The Shanghai Stock Exchange presents a good model of achieving this objective. Their current voluntary delisting rules mandate that companies that wish to delist appoint an independent financial adviser and lawyers to offer their professional opinions and present these opinions to the shareholders prior to making a decision.[97]

Similarly, in Thailand, the board of directors is obliged to appoint an independent financial adviser who will provide consulting service and

[97] Rules Governing the Listing of Stocks on the Shanghai Stock Exchange (2019), Rule 14.4.2.

give advice to the shareholders.[98] An additional safeguard to address the bias problem is by giving independent directors a bigger role in the process. Again, the Shanghai Stock Exchange presents a viable model in that its voluntary delisting rules require independent directors to issue an independent opinion as to whether voluntary delisting is in the long-term interests of the company and its shareholders.

The third and final objective of an effective voluntary delisting regime is to ensure that the rules empower shareholders and protect them from potential abuse by controlling/majority shareholders. Markets that have adopted a simple majority or a two-thirds unqualified majority such as the Kuwaiti market are considered to be the least effective regimes in terms of protecting shareholders and investors.[99]

As discussed in more detail earlier in the paper in Section II, jurisdictions such as the UK and Shanghai have adopted a two-threshold approval requirement aimed at better protecting the universe of shareholders from being hijacked by the controlling shareholders. Furthermore, more liberal definitions of what constitutes a controlling shareholder also make a regime more effective from a noncontrolling shareholder's perspective: for instance, Shanghai's requirement for only 5% to constitute controlling ownership in contrast with the 30% threshold in the UK. The main benefit of a low threshold is that the minority shareholders' separate approval truly reflects shareholders who are a minority. It also sets up effective incentives for minority shareholders to engage with company dealings because they believe that their vote will make a difference and not be a mere formality.

The final rule to ensure the empowerment of minority shareholders is to grant them qualified veto rights. The Hong Kong Stock Exchange, as stated above, empowered shareholders who own 10% of shares to veto voluntary delisting proposals. The best practice is to qualify this unprecedented veto power as applying only to cases where the company intends to delist from the market and is not intending to be listed in another market. The reason for advocating for such unusual empowerment of minority shareholders is that investor liquidity of shares

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98 Regulations of the Stock Exchange of Thailand Re: Delisting of Securities B.E. 2564 (2021).

99 The Executive Bylaws of the Kuwaiti Capital Market Authority Law 7 of 2010, mod 12, art 2-5-1 (2021).

is at stake: the possibility of a lucrative exit from an investment is one the main drivers of such investments and delisting automatically erodes that liquidity.

2. Appraisal Rights for Shareholders

It is well established that appraisal rights, also known as exit rights as a remedy in corporate law,[100] are well structured to address fundamental and structural company changes.[101] Exit rights represent a very powerful tool for protecting shareholders from negative fallout that can result from delisting; this tool increases the costs associated with delisting and ensures that shareholders are protected. This is especially true in markets that have concentrated ownership structures such as in Kuwait[102] and around Europe.[103]

Appraisal rights are the cornerstone of the German delisting regime, as we discussed above in the context of the required buy-out/delisting offer. However, the potential shortcoming of this remedy is that it fails to incentivise shareholder activism because it is available to shareholders who voted against the delisting or did not even vote. We emphasise that the proposed appraisal right is not a squeeze-out mechanism in terms of its enforceability. Shareholders can still reject the offer, but the company will have satisfied the requirement.

Despite these benefits, appraisal rights in voluntary delisting have attracted the criticism that they make delisting expensive. In our view, this criticism is not well founded; as we discussed above, companies pursuing voluntary delisting are usually perceived as based on commercial and economic rationales. For instance, most of the jurisdictions in this paper exempt companies that are seeking voluntary delisting as

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100 B.M. Wertheimer, "The Shareholders' Appraisal Remedy and How Courts Determine Fair Value," *Duke Law Journal*, 1998, Vol. 47, No. 4, p. 618.

101 For more on this topic see: H. Kanda, S. Levmore, "The Appraisal Remedy and the Goals of Corporate Law", *UCLA Law Review*, 1984, Vol. 32, p. 429.

102 O.A. Fouly, "Global Governance and Financial Society in Light of the Capital Markets Authority Law of Kuwait", *Kuwait International Law School Journal*, 2016, Issue 15, p. 79.

103 Khort, *supra* note 32, p. 21.

a result of a restructuring or acquisition from their requirements. Further, to minimise the economic cost of appraisal rights, we argue that the right must be qualified and only available in certain instances rather than an absolute right.

The first qualification we would place on appraisal rights is that they should not be available to shareholders if the company is delisting for the purpose of being listed in an alternative market; Germany is a good prospect for adopting this qualification. The second qualification is that appraisal rights should be available only for dissenting shareholders who have participated in the decision-making process. For example, shareholders in Russia lose their appraisal rights if they did not vote,[104] and a similar approach can be found in Kazakhstan as well.[105] Limiting the availability of mandated buy-out offers to shareholders who participate in general meetings will encourage shareholders' activism and reduce the costs of appraisal rights while at the same time as it will be limited to the dissenting shareholders that have attended, finally it will address the main criticism that dissenting shareholders should not benefit from their apathy in the delisting decision making process.

In turn, after delisting, the remaining shareholders are often forced to sell to the largest shareholders at a price that does not reflect the fair market value.[106] Thus, although shareholders lose their ownership in the company when the controlling shareholders are obligated to purchase their shares, such a purchase provision ensures a fair exit opportunity if the company goes private.[107] The Korean Stock Exchange presents a good model of achieving such an objective. In Korea, the largest shareholder is obligated to purchase shares of investors who did not participate in the tender offer within a certain period after delisting, allowing them to sell their shares after the delisting at the same price.[108]

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[104] Art. 75 (1) paragraph 3 of Federal Law "On Joint-Stock Companies".

[105] Art. 27 (1) subsec. 1-1 Law No. 415-II of 13th May 2003 of the Republic of Kazakhstan on Joint-Stock companies.

[106] J.R. Lyons Jr, "Fairness in Freezeout Transactions: Observations on Coping with Going Private Problems", *Kentucky Law Journal*, 1980, Vol. 69; see also DeAngelo and others (n 14).

[107] E.G. Kroft, "Further Reflections on Going Private—Towards a Rational Scheme of Regulating Minority Squeeze-Out Transactions", *Ottawa Law Review*, 1981, Vol. 13.

[108] S.M. Kang, "Voluntary Delisting In Korea: Causes And Impact On Company Performance", *The Journal of Applied Business Research*, 2017, Vol. 33, No. 2, p. 392.

The key issue for most jurisdictions that adopted appraisal rights related to delisting has been how to determine the fair price of a stock.[109] As we demonstrated, the German model represents an ineffective model for doing so. Similarly, the Philippine Stock Exchange (PSE) presents a good model of achieving that objective. The PSE amended voluntary delisting rules now require that:

The minimum tender offer price shall be the higher of:

(a) The highest valuation based on the fairness opinion or valuation report prepared by an independent valuation provider in accordance with Rule 19.2.6 of the Implementing Rules and Regulations of the Securities Regulation Code, or

(b) (b) the volume; or volume-weighted average price of the listed security for one year immediately preceding the date of posting of the disclosure of the approval by the Company's Board of Directors of the Company's delisting from the Exchange.[110]

3. Regulatory Approval/Oversight

According to the International Organization of Securities Commission, securities and capital market regulations aim to achieve three main objectives: protecting investors; ensuring that markets are fair, efficient, and transparent; and reducing systemic risk.[111] Given their goal of protecting investors, these capital markets regulators do play a role in the voluntary delisting process from the perspective of the protection of investors. Their role can be classified into two categories. In some jurisdictions, the regulator is restricted to ensuring that the original requirements have been satisfied before granting the approval to be delisted, for instance the UK and the United States and other jurisdictions fall under this category.

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[109] E.G. Kroft, "Further Reflections on Going Private—Towards a Rational Scheme of Regulating Minority Squeeze-Out Transactions", *Ottawa Law Review*, 1981, Vol. 13, p. 360.

[110] PSE Memorandum CN-No. 2020-0104 dated December 21, 2020 (PSE Amended Voluntary Delisting Rules), Section 2(a), Annex A, available at: https://www.pse.com.ph/resource/rulesAndRegulations/Supplemental%20Rules/CN%20No.%202020-0104%20-%20Amended%20Voluntary%20Delisting%20Rules.pdf [last accessed 20.6.2021]..

[111] OICU-IOSCO, *Objectives and Principles of Securities Regulation*, 2017, p. 3.

Conversely, other jurisdictions empower capital markets regulators to act as the last defence for shareholders, by allowing a certain number of shareholders to submit grievances to regulators that include asking them to be the final arbiters of delisting decisions. Kuwait is a good example of such a jurisdiction in that its Capital Market Authority has the final say in approving delistings.[112] Since 2010, when the capital market law was enacted, companies have faced inconsistent decisions in factually similar cases when seeking this protection in the voluntary delisting process in the absence of any applicable standards for approval versus rejection.[113]

The SEC in the United States also has the ability to impose additional terms on a company voluntarily delisting from the stock market to ensure the proper protection of investors, including requiring that the application be postponed.[114] However, even when delisting would adversely affect shareholder interests, the SEC has been reluctant to impose additional conditions. For example, in 2005, the Commission received 16 application for delisting from the stock market and imposed additional conditions on only two.

To illustrate when and how the SEC can impose additional terms on a delisting company, we will consider the case of shareholders in the Ohio Art Company who challenged the company's application to withdraw from the AMEX. The shareholders requested that the SEC reject the application because there was a discrepancy in the number of record holders.[115] The SEC rejected the shareholders request for two primary reasons: the Commission held that the company was not obligated to remain listed on the stock market and the shareholders had had sufficient time to sell their shares at a fair market value.[116] Other regulators

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[112] The Executive Bylaws of the Kuwaiti Capital Market Authority Law 7 of 2010, mod 12, art 3-5-1-1.

[113] "A Second Grievance Before the Markets Authority for HumanSoft's Withdrawal from the Exchange", *Alqabas News Paper*, 2016, available at: https://alqabas.com/15761/ [last accessed 30.7.2021].

[114] Khort, *supra* note 32, p. 51.

[115] SEC. Issuer Delisting; Order Granting the Application of the Ohio Art Company to Withdraw its Common Stock, $1.00 Par Value, from Listing and Registration on the American Stock Exchange LLC, File No. 1-07162, 2004, available at: http://www.sec.gov/rules/delist/1-07162-o.htm [last accessed 30.7.2021]..

[116] Ibid.

such as NASDAQ OMX Stockholm and its neighbour in Denmark will not grant delisting permission before evaluating the impacts of such action on creditors and shareholders.[117] In other words, these stock markets play a big brother role and reserve for themselves the final say as to whether a company can delist or not. The advantage of empowering regulators with the right to impose conditions or the mere right to reject voluntary delisting requests is a critical mechanism of ensuring the effective protection of shareholders. Needless to say, such powers must be subjected to judicial or quasi-judicial review to ensure against any possible abuse from the regulator side when it comes to rejecting voluntary delisting requests.

Conclusion

With this paper, we have explored voluntary delisting regimes in different jurisdictions from the shareholder protection perspective. We classified existing jurisdictions into three broad categories. The first category is jurisdictions whose voluntary delisting regimes give boards of directors primacy (e.g. United States, Canada); the second is jurisdictions with voluntary delisting rules based on shareholder primacy (e.g. the UK); and the third is jurisdictions that have adopted a hybrid model that aims at balancing the interests of directors and shareholders. Germany is a good example of such a regime because it protects shareholders with the mandatory buy-out/delist offer and empowers boards of directors with the final decision of whether to delist. We assessed the effectiveness of each of the regimes and developed a structure that we advocate as a more efficient and effective voluntary delisting regime.

The proposed structure aims at addressing information asymmetry and insider bias by mandating the appointment of an independent adviser to study the delisting decision and give informed recommendations to the boards of directors and shareholders regarding the delisting proposal, as on the Shanghai Stock Exchange and in Singapore. We have also illustrated that empowering minority shareholders with veto rights if they reach a given threshold such as 10% is a good practice that

117 Khort, *supra* note 32, p. 18.

a number of exchanges have adopted. Further, a two-tiered approval requirement that separates and excludes controlling/majority shareholders from the decision making would minimize the possibility of controlling shareholder abuse.

To protect the economic interests of dissenting minority shareholders, we have outlined a regime that would ensure the fair treatment of dissenting shareholders via the appraisal right similar to the one adopted in Germany. However, to address the criticism and costs associated with this remedy, we propose that it be limited to those shareholders who have participated in the decision-making process and dissented. We also believe the appraisal right should not be available in down-listing cases. Finally, we believe that regulators can act as a last resort for a minority shareholder in case any given regime did not adopt an appraisal right remedy.