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The protection of minority shareholders during delisting in Germany and in the U.K.

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) 

Abstract:

The thesis seeks to compare the protection of minority shareholders during delisting in Germany and in the UK. Delisting refers to a publicly traded company leaving the stock market. In order to compare the protection afforded by the relevant legislator the thesis first seeks to give an overview of the interests touched upon by delisting, finding the main risk for minority shareholders is unlike often assumed not a loss of value but the loss of the share's tradability. The thesis then compares the approach taken towards the problem and the instruments utilized by both legislators. Here the thesis finds that the German law represents a stricter and inflexible solution, while the British law grants the parties far reaching freedom. The thesis finds that German law in theory offers a higher level of protection. The thesis then considers the different shareholder structure in the UK, concluding that in practice the difference in protection is not as stark as often assumed. As some gaps remain, and since due to their financial interests the freedom offered by British law is of little benefit to minority shareholders, the thesis concludes that regarding the protection of minority shareholders the German law is preferable.

Summary (for the purpose of later publications):

This thesis seeks to compare the protection awarded to minority shareholders during delisting in Germany and in the UK. The thesis does not consider involuntary delistings, downlistings, the delistings of stocks traded outside of the premium segment of regulated markets or delistings in relation with take-overs or mergers.

The thesis first seeks to establish the reasons and risks of delisting and with that the main interests of the parties involved. The thesis finds that the main reason for undertaking a delisting from the point of view of the issuer are the significant expenditures related to maintaining the delisting, notably stemming from duties to report and disclose information. For the majority shareholder, as he bears the brunt of these costs while not benefiting from the listing as much as minority shareholders, these motives are applicable as well. Additionally, for him the possibility to strengthen his control of the company and a possible undervaluation of the stocks on the market compared to their real value may also be relevant motives.

From the point of view of the minority shareholder the thesis finds that the risks will by far outweigh any benefits. With the indications for a loss of value due to the announcement of the delisting are less clear the main concern here will be the loss of the main trading platform. This loss directly impacts the ability of minority shareholders to reach their primary goal, to generate a profit through their investment.

Hence the thesis concludes that delistings represent a conflict of interests between the issuer and the majority shareholder and the minority shareholder on the other side.

The thesis then considers the question whether delistings may have been harmonized under European Union Law or whether any specific requirements or boundaries to the protection of minority shareholders could result from European Union Law. Here the thesis finds that the question to what degree minority shareholders can and must be protected has not been regulated by the European Union and remains therefore for the individual national legislator to decide.

Afterwards the thesis details and analyses the instruments used by German and British legislators respectively. Here the thesis finds that the buy-out offer, as implemented by the

German legislator, offers a fitting remedy for minority shareholders, as it perfectly accommodates the economic nature of their interests. Yet from the point of view of the issuer and the majority shareholder it causes significant costs and might not always be feasible, especially when the company is threatened by bankruptcy.

With regards to the British law the thesis finds that the requirement of the general-meetings approval chosen by the British legislator to protect minority shareholders focuses more on minority shareholders' membership rights and only offers protection for his economic interests as a reflex. Additionally, the thesis finds that there are some indications that minority shareholders are less likely to participate in general meetings, which further draws into question the effectiveness of the British approach. Notably in some constellations a significant number of minority shareholders might be cast aside and left unable to influence the decision-making process.

Lastly the thesis compares the instruments used with regards to the protection they offer minority shareholders and to the burden they represent for the company and the majority shareholder, while considering the previous findings.

Here the thesis finds that while the British approach does offer the parties more freedom and therefore is better able to adapt to the individual circumstances, as minority shareholders usually pursue the single and uniform goal to generate a profit from their investment these advantages will regularly be of little interest to them. Contrary, for the German approach the thesis finds that while it lacks the flexibility and adaptability of the British approach it avoids the gaps in the protection that plague the British approach. As it offers a higher and notably steady degree of protection the thesis concludes that under the aspect of protecting minority shareholders it is preferable. The costs it imparts on the issuer and the majority shareholder do not change this outcome, as they are justified.

Additionally, besides these theoretical legal arguments the thesis considers the factual situation on each market, i.e. the average composition of shareholders of listed firms. In this regard the thesis finds that a significantly higher number of free-floating shares exist in British companies. Taking this result into account the thesis concludes that the gaps in the protection offered to minority shareholders by the British law are somewhat less pressing considering the average composition of shareholders.

Furthermore, the thesis finds that there is a lack of an exception from the buy-out offer in German law for companies facing bankruptcy, which is especially troubling given the high costs and low flexibility that characterize the German law from the issuers and the majority shareholder's point of view.

Considering these findings, the thesis concludes that, even when the factual circumstance's and their divergence between Germany and the UK are considered, situations where the British approach awards only insufficient protection remain, although less likely, still possible. Therefore, the thesis concludes, that under the aspect of minority shareholders' protection the German solution still presents itself as preferable.

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INTRODUCTION:

This thesis aims to compare the protection awarded to minority shareholders during delisting in Germany and in the UK. To do so the thesis will seek to answer the question which instruments each legislator has chosen to protect minority shareholders during delisting, how he has balanced the interests of the involved parties in choosing said instruments, and lastly, how these instruments compare regarding the protection they award minority shareholders, especially considering the restrictions they impose on the majority shareholder.

Subject matter:

Delisting refers to the process of a company listed on a stock market leaving said market. This leads to significant changes in both legal and economic terms, which can severely impact the interests of minority shareholders, among other consequences depriving them of their main trading platform. From the issuers and its majority shareholder's perspective there may be valid reasons for a delisting, such as the significant costs that are associated with listing. As a result delisting represents a conflict of interests between the minority shareholders and the majority shareholder and the company. Thus, when regulating delistings legislators are faced with the task to balance the conflicting interests, namely to allow the company and the majority shareholder to delist as freely as possible while ensuring that the interests of minority shareholders are protected during this process.

Significance:

Between 2009 and 2019 in Germany alone 297 delistings were observed.¹ Globally delistings are becoming more frequent,² and due to the economic slowdown after the COVID-outbreak numbers may increase further as companies are forced to reduce costs.

As delisting constitutes the counterpart to the Initial Public Offering and entails grave consequences for minority shareholders it forms an important part of any capital market law. The protection afforded to minority shareholders during this process is not only part of a complicated system of connected and conflicting interests, it has also been the subject of much discussion and dispute, with numerous contrary solutions formulated on how to resolve this conflict of interests. Additionally, in recent years, namely after the global financial crisis in 2008, there has been an increased focus on consumer protection, which at times correlates to the protection of minority shareholders.

As the two largest stock markets in Europe, the Frankfurter Börse (Frankfurt Stock Exchange) and the London Stock Exchange, are domiciled in Germany and the UK respectively, these two jurisdictions are especially relevant. Nonetheless, so far only a

¹ D. Fockenbrock „Der Rückzug von der Börse ist ein gefährlicher Trend“ (The retreat from the stock market is a dangerous trend) Available at <https://www.handelsblatt.com/meinung/kommentare/kommentar-der-rueckzug-von-der-boerse-ist-ein-gefaehrlicher-trend/24526692.html> Accessed June 10th 2020.

² Ibid.

very small number of academic works exist that compare the two, and even fewer have taken into account the significant changes that German law underwent in recent years.

Therefore the protection of minority shareholders during delisting deserves to be examined in detail.

Delimitations:

While delistings may take place with or against the will of the issuer only in the case of the former, also referred to as going-private, a conflict of interest necessarily exists, creating the need for the protection of minority shareholders. Therefore, involuntary delistings are not considered in this thesis.

Equally downlisting, i.e. when an issuer chooses not to leave the stock market entirely but instead seeks to transfer his listing to another market segment, faces different challenges and is much more depended on the available segments, hampering comparability. As a result, downlistings shall not be considered either.

For the same reason this thesis will limit its comparison to the delisting of stocks listed in the premium segment of a regulated market in the sense of Art. 4 para. 21 directive 2014/65/EU.³

Likewise, delistings related to take-overs or mergers are subject to different circumstances and differ in terms of the involved interests. For that reason, delistings related to take-overs or mergers shall not be considered in this thesis either.

Methodological issues:

As the thesis takes a comparative approach the main challenge lays in identifying the factors relevant for the comparison. This is greatly complicated by the lack of sources for the British law. Another challenge lays in identifying and correctly assessing the implications of certain economic and factual circumstances that render some aspects incomparable, namely the different structure of shareholders.

Structure:

The thesis in its first chapter seeks to establish the reasons and risks of delisting, and with that the main interests of the parties involved.

The second chapter seeks to consider the question whether delistings may have been harmonized under European Union Law, or whether any specific requirements or boundaries to the protection of minority shareholders could result from European Union Law.

³ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), in the following: MIFID II directive.

Note: All legislative acts and treaties referenced in the following refer, unless stated otherwise, to the version in force as of the 10th of June 2020.

In chapter three and four the instruments used by German and British legislators respectively are detailed and analysed.

Lastly in chapter five the instruments used are compared with regards to the protection they offer minority shareholders and to the burden they represent for the company and the majority shareholder.

1 CHAPTER ONE: REASONS FOR AND RISKS OF DELISTING

To compare the protection afforded to minority shareholders and the restrictions correspondingly put on majority shareholders and companies it is first necessary to establish the interests of these parties during delisting.

Delisting constitutes a major shift both in economic as well as in legal terms. Just like an Initial Public Offering, which marks an important step in a company's development, delisting represents a crucial moment for a company.⁴ And just like the initial listing it carries distinct benefits and disadvantages, which affect the interests of the company itself and its shareholders.

As some reap benefits while others only bear the disadvantages, delisting could also be characterized as a conflict between the interest of the parties involved.

In theory this conflict of interest takes place between the company's interest of leaving the regulated stock market at its own discretion and the shareholders' interests of being able to sell their shares quickly and for an adequate price.⁵ Yet factually this conflict of interests takes place between the company as well as the majority shareholders on one side and the minority shareholders on the other side.⁶

1.1 Reasons:

As delisting eliminates the disadvantages the listing brings with it the decision to undertake such a transaction may serve legitimate interests and may not only be economically viable but even necessary.

1.1.1 For the company:

In general, a company will decide to delist if the benefits of the continued listing are outweighed by the costs of said listing.⁷

⁴ Phillip Maume, "The Parting of the Ways: Delisting Under German and UK Law" *European Business Organization Law Review* (2015), p. 260.

⁵ Krug, Kirsten, *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.

⁶Ibid.

⁷ Krug, *Der Rückzug von der Börse*, p. 96; Martinez, Isabell and Serve, Stephanie and Djama, Constant "Reasons for delisting and consequences: A literature review and research agenda", p. 3.

Available at <http://ssrn.com/abstract=2591449> Accessed April 10th 2020

1.1.1.1 Eliminating Costs of Listing:

One major factor contributing to the costs of the listing are the obligations the listing entails, namely duties to report and disclose certain information.⁸

1.1.1.1.1 Obligations on a European level:

Such duties stem both from European directives as well as from national law.

For example, according to Art. 2 para. 1 lit. a and Art. 17 Regulation 596/2014 (Market Abuse Regulation - MAR)⁹ listed companies are obliged to disclose insider information, maintain a list of insiders according to Art. 18 MAR, and disclose directors' dealings according to Art. 19 MAR.

In addition to these obligations Regulation 2017/1129¹⁰ contains a number of obligations related to the prospectus, which according to Art. 1 para. 1 lit. a Regulation 2017/1129 has to be produced for all financial instruments which are traded on an organized market in the European Union. Beyond being forced to disclose a large amount of information, defined by Art. 13 Regulation 2017/1129, an issuer is also liable for any mistakes in the prospectus under Art. 11 para. 1 Regulation 2017/1129.

1.1.1.1.2 Obligations on a national Level:

Furthermore, there are several provisions of British and German national law that deal only with listed companies.¹¹

1.1.1.1.3 Evaluation:

These duties demand the dedication of considerable resources, both in terms of time and money.¹²

⁸ Pfüller, Markus and Anders, Dietmar "Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen" (Motives for delisting in light of the background of new legal developments), *Neue Zeitschrift für Gesellschaftsrecht* (2003), p. 460; Walz, Susanne „§ 50 Going Private – Rückzug von der Börse“ (§ 50 Going Private - retreat from the stock market) in *Münchener Anwaltshandbuch Aktienrecht* (Munich lawyers handbook to stock law), edited by Matthias Schüppen, and Bernhard Schaub, Munich: C.H. Beck, 3rd edition 2018, recital 11;

Holzborn, Timo and Hilpert, Christian „Wechsel in den Freiverkehr als Rückzug aus dem regulierten Markt ohne Delisting – Eine effektive Möglichkeit zur Kostensenkung für Mittelständler? –“ (Downlisting as a retreat from the regulated market without delisting – an effective possibility for SMEs to decrease costs?-), *Zeitschrift für Wirtschafts- und Bankrecht* (2010), p. 1347.

⁹ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

¹⁰ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

¹¹ Walz, Susanne „§ 50 Going Private – Rückzug von der Börse“ (§ 50 Going Private - retreat from the stock market) in *Münchener Anwaltshandbuch Aktienrecht* (Munich lawyers handbook to stock law), ed. Matthias Schüppen and Bernhard Schaub, Munich: C.H. Beck, 3rd edition 2018, recital 11.

¹² Pfüller, Markus and Anders, Dietmar "Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen" (Motives for delisting in light of the background of new legal developments), *Neue Zeitschrift für Gesellschaftsrecht* (2003), p. 461.

Additionally, as these duties are regularly expanded, companies might be faced with rising costs of a listing, that go beyond what they initially expected and that are no longer justified by the benefits of the listing.¹³

The influence of these costs for a company's decision to delist is evidenced by the development in the numbers of delistings after the introduction of extensive reporting and disclosure duties.

In 2002 in the United States such duties were introduced or expanded through the Sarbanes-Oxley Act (SOX), leading to an increase in delistings from just four in 2002 to 101 in 2003.¹⁴ Similarly, in 2005 the European Union adopted the International Financial Reporting Standards, increasing the costs of maintaining a listing, and again leading to a raise in the numbers of observed delistings.¹⁵

1.1.1.2 Lack of benefits:

Another component of a company's decision to delist are the benefits that the listing brings the company. If these are no longer sufficient, as the listing no longer fulfils its function as intended at the time of the Initial Public Offering, the company may decide to delist.

As the primary function of the listing is the procurement of capital this may be the case once the further influx of capital is no longer needed, either because the company sees no need or opportunity to expand, or because the company is able to satisfy its needs from its own cashflow.¹⁶

The listing may also lose its function in the eyes of the company if a low stock price prevents a sufficient capitalization through the stock market.¹⁷

Similarly, the ability to attract investors for an Initial Public Offering requires a certain visibility, which is dependent on the coverage of the company by relevant analysts.¹⁸ Therefore, if the company lacks sufficient coverage it may not be able to efficiently attract investors on the stock market.¹⁹

On the other end of the spectrum, as the potential for growth is smaller if the company is closely monitored, a non-listed company may be more attractive to private equity investors.²⁰

¹³ Pfüller and Anders, *supra* note 12.

¹⁴ Martinez, Isabell and Serve, Stephanie and Djama, Constant "Reasons for delisting and consequences: A literature review and research agenda", p. 7. Available at <http://ssrn.com/abstract=2591449> Accessed June 10th 2020

¹⁵ Martinez *et al*, *supra* note 14.

¹⁶ Walz, *supra* note 11, § 50 Rn. 12.

¹⁷ Pfüller and Anders, *supra* note 12.

¹⁸ *Ibid*, p.461.

¹⁹ Martinez *et al*, *supra* note 14, p.5.

²⁰ Maume, "The Parting of the Ways: Delisting Under German and UK Law" *European Business Organization Law Review* (2015), p. 258; Tuttino, M. and Panetta, I.C. and Laghi, E. "Going dark in Italy. Empirical evidence on last decade", p. 4. Available at <http://ssrn.com/abstract=2179058> Accessed April 10th 2020.

1.1.1.3 Enhanced Control:

Related to the listing as well is the question of control over the company, both in direct terms through the sale of shares on the stock market and the corresponding controlling rights, as well as in less direct terms through market pressure on the company and its management.

While a company bears the above-mentioned costs, it is also subject to a certain pressure from the capital market, which materializes itself in the development of the stock prices.

As a result, a company may feel pressure to prioritize short term earnings and corresponding dividends over investments which pay off only in the long term, so delisting may be undertaken to avoid such pressure and enable long-term investments.²¹

Furthermore, the availability of a company's stocks on the stock market, as it gives the possibility to acquire shares up to certain thresholds anonymously, can facilitate a hostile takeover.²² In order to prevent such an attempt a company may decide to remove its shares from the open market, thereby limiting their sale to individual public offerings.²³

Lastly according to some authors delisting may be employed as a remedy to interagency conflicts.²⁴ For companies with a diffuse ownership structure there can be a separation of control and ownership as the owners are unable to exert effective control, de facto empowering management to exert control.²⁵ Delistings, through leveraged buy-outs, provide a possibility to consolidate ownership, thus eliminating or at least alleviate interagency conflicts.²⁶

This primarily affects U.S. and British companies, as companies' ownership in continental Europe is typically more concentrated.²⁷

1.1.1.4 Restructuring measures:

As restructuring measures of publicly listed companies attract significant attention, which may be of detrimental effect, a company may decide to cancel its listing in order to carry out restructuring or remedial measures.²⁸

1.1.2 For the majority shareholder:

1.1.2.1 Costs and Lack of benefits:

²¹ Walz, „§ 50 Going Private – Rückzug von der Börse“ in *Münchener Anwaltshandbuch Aktienrecht*, ed. M. Schüppen and B. Schaub, recital 12; Pfüller and Anders “Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen”, *Neue Zeitschrift für Gesellschaftsrecht* (2003), p. 461.

²² Pfüller and Anders, *supra* note 12, p. 461.

²³ *Ibid.*

²⁴ Martinez *et al*, *supra* note 14, p. 8.

²⁵ Tuttino *et al*, “Going dark in Italy. Empirical evidence on last decade”, p. 7; Martinez *et al*, *supra* note 14, p. 8.

²⁶ Tuttino *et al*, “Going dark in Italy. Empirical evidence on last decade”, p. 3.

²⁷ Tuttino *et al*, “Going dark in Italy. Empirical evidence on last decade”, p. 3; Martinez *et al*, “Reasons for delisting and consequences: A literature review and research agenda”, p. 16.

²⁸ Pfüller and Anders, *supra* note 12, p. 462.

One major consequence of a listing for shareholders is the ability to quickly and easily sell their shares.

However, as a majority shareholder will often pursue strategic and long-term goals the shares liquidity is not a primary concern for him.²⁹ Additionally, large blocks of shares are by nature less liquid and are frequently traded outside the stock markets regardless of the company's listing.³⁰

Beyond that the majority shareholder may be unable to use the listing to sell his stocks without risking losing his control over the company or impairing the markets trust in the company, which could decrease stock prices, devaluating his majority share in the company.³¹

Regarding the listing's other benefits, as the majority shareholder typically has a closer connection to the company and its management than other shareholders, the benefits he draws from the obligations for reporting and disclosure entailed by the listing are limited.³² At the same time the majority shareholder bears most of the costs of the listing through his majority share.³³

Furthermore, the majority shareholder will frequently pursue a delisting if the stock's price is below the value of the share.³⁴

1.1.2.2 Enhanced control:

As delisting impacts the minority shareholder negatively it may be used as a tool to push out minority shareholders and solidify the majority shareholders control.³⁵

1.1.3 For the minority shareholder:

In general benefits reaped by the company are passed on to the shareholders in the form of dividends. Therefore, minority shareholders theoretically could profit from a delisting decision. Yet in reality from the perspective of a minority shareholder the risks of delisting will outweigh the benefits.

Still, there may be certain cases in which the minority shareholder might have an interest in delisting, namely when delisting is intended to support remedial measures.

²⁹ Krug, *supra* note 5, p. 90.

³⁰ *Ibid.*

³¹ Zetzsche, Dieter "Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting –", Center for Business and Corporate Law Research Paper 0053/2013, p. 4.

³² 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.

³³ *Ibid.*

³⁴ Bayer, Walter „Aktionärsschutz beim Delisting: Empfehlungen an den Gesetzgeber“ (Investors protection during delisting: recommendations for the legislator), *Zeitschrift für Wirtschaftsrecht* (2015), p. 857.

³⁵ 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; Pfüller and Anders, "Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen", *Neue Zeitschrift für Gesellschaftsrecht* (2003), p. 462.

Nonetheless, even in such cases, the minority shareholder might find that his interests are best served by selling his shares.³⁶

1.2 Risks:

The negative consequences of delisting mainly spring from two factors, the loss of the visibility of the listing and the decrease in the share's value and liquidity.

1.2.1 For the company:

In addition to providing capitalization the listing also brings other benefits. In particular listing leads to greater overall visibility for the company, and can boost the company's image, facilitating the acquisition of both new clients and new employees.³⁷

1.2.2 For the majority shareholder:

As mentioned above, a majority shareholder will often be less concerned with the share's liquidity.³⁸ In combination with the fact that large blocks of shares are by nature less liquid and are frequently traded outside the stock markets regardless of the company's listing this limits the risks of delisting for the majority shareholder.³⁹

Furthermore, given the majority shareholder's influence it is highly unlikely that a company's management would decide to delist against the will of the majority shareholder.⁴⁰

In conclusion, the assumption of risks particularly affecting the majority shareholder seems far-fetched.

1.2.3 For the minority shareholder:

With regards to the interests of minority shareholders during delisting it should be noted that minority shareholders are only united by the fact that they own a share of theoretically up to 49 percent of the company and are otherwise not a homogenous group.⁴¹ Hence the attribute minority shareholder conveys no information whether the shareholder in question is a private individual, an employee, an institutional or professional investor.

Therefore, the interests of minority shareholders in this situation may diverge significantly. For example, an institutional investor might be bound by his terms and conditions to invest only in listed stocks.⁴² Thus delisting would effectively force him to sell his shares, while other shareholders might still hold on to them.

³⁶ Solomon, Dov "The Voice: The Minority Shareholder's Perspective," *Nevada Law Journal*, (2017), pp. 755 *et seq.*

³⁷ Krug, *supra* note 5, p. 40.

³⁸ Krug, *supra* note 5, p. 90.

³⁹ *Ibid.*

⁴⁰ Krug, *Der Rückzug von der Börse* p. 91; Gegler, Felix "Die Neuregelung des Delistings – Angemessener Aktionärsschutz oder „Dolchstoß“?“ (The new rules for Delisting – Adequate protection for shareholders or “backstabbing”?), *Zeitschrift für Bank- und Kapitalmarktrecht* (2016), p. 276.

⁴¹ Krug, *supra* note 5, p. 88.

⁴² *Ibid.*

Due to their smaller, non-controlling share, their influence on the company's decision-making process is, at best, limited.⁴³ Therefore the economic aspects of their share are of central importance to minority shareholders.⁴⁴

While some institutional and professional shareholders might pursue strategic goals, these goals are likely to either be directed towards acquiring a controlling stake in the company, or to be related to the company's policy with regards to dividends.

For the average minority shareholder however, the share is primarily a tool for investment.⁴⁵ Regularly this means that minority shareholders will acquire shares in order to sell them at a later point when their price has risen.⁴⁶

In order for them to successfully do so the shares have to both increase or at least hold their value and remain easily tradeable.

Both of these characteristics may be influenced by delisting.

1.2.3.1 Prices:

At first glance the value of a certain share seems like a clear and object circumstance, that is easy to trace. Yet, with regards to delisting this task is complicated by the fact, that share prices can no longer be derived from the stock market and that companies are also no longer subject to the various reporting and disclosure obligations. Hence, the exact development of a shares price after delisting can be hard to measure.⁴⁷

The main tool deployed to assess the effects of an event on stock prices are event studies.⁴⁸ These studies compare a stock's expected normal performance without the event in question with the actual performance following the event.⁴⁹ A prerequisite for these studies to be accurate is the assumption that the capital markets efficiently, i.e. immediately, process the available information.⁵⁰ This assumption has been confirmed in the past.⁵¹ Through this approach general market influences are automatically accounted for and do not influence the study's outcome.⁵²

However, a reliable conclusion can only be reached if the effect shown by the study is statistically significantly different from the expected performance, as otherwise the divergence in performance may be due to random chance.⁵³

As delisting eliminates a number of costs it enables the company to increase its value creation after completion. As a result, an increase in share value might be expected as

⁴³ Ibid.

⁴⁴ Ibid, p. 89.

⁴⁵ Krug, *supra* note 5, p. 89.

⁴⁶ Ibid.

⁴⁷ Maume, *supra* note 4, p. 261.

⁴⁸ Krug, *Der Rückzug von der Börse*, p. 57; Martinez *et al*, "Reasons for delisting and consequences: A literature review and research agenda", p. 15.

⁴⁹ Krug, *supra* note 5, p.57.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid, p. 59.

⁵³ Ibid.

potential investors could expect a higher return in the future, motivating them to pay a premium on the shares.⁵⁴

This assumption is backed by some studies, which found that delisting lead to a premium of up to 40 percent.⁵⁵ While these studies primarily observed companies delisting from U.S. markets, they also included observations of British and continental European markets.

On British and continental European markets, the expected premium was found to be lower, at 29 and 20 percent respectively, diverging considerably from the situation on U.S. markets.⁵⁶

It should be noted, that these studies were no event-studies, and therefore are, as explained above, less reliable.

However, their findings have also been somewhat duplicated in number of event studies.⁵⁷ Taking the same geographical bases as the above studies, event studies showed the influence of a delisting announcement to be on average an increase in price by 12,5 percent in continental Europe and 14,9 percent in the UK.⁵⁸

Notably, while they show a lower increase in stock price, these event studies also support both the general tendency of an increase in stock prices, as well as the difference between the stock prices reaction in the United States, and to a lesser degree in the UK, and in continental Europe.

On the other hand, if the liquidity of stocks is an important factor, the loss of that factor could lower the share's value in the eyes of potential investors, weighing on the prices.⁵⁹

This idea has been supported by a number of studies on delisting's in Germany.⁶⁰

In this regard it has to be noted that. before the German Supreme Courts FroSTA-judgement, rendered on 08.10.2013, delistings in Germany were subject to a mandatory offer by the issuer. This offer stabilized prices, and with that distorted the results of studies carried out before said judgement.⁶¹

A study conducted by the *Solventis Wertpapierhandelsbank* (Solventis Stock-trading bank) in 2014, based on 37 delistings, found the average loss in share prices to be 25 percent, in individual cases reaching up to 80 percent.⁶² Removing those delistings, which had been announced together with a buy-out offer, the average loss in share prices stood at -9,58 percent on the day following the announcement.⁶³

⁵⁴ Martinez *et al*, *supra* note 14, p. 15.

⁵⁵ Ibid.

⁵⁶ Martinez *et al*, *supra* note 14, p. 15.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Maume, *supra* note 4, p. 261.

⁶⁰ Krug, *supra* note 5, pp. 63 *et seq.*

⁶¹ Ibid, p. 62.

⁶² Bayer, Walter and Hoffmann, Thomas „Die Folgen von Frosta: Zur vorläufigen empirischen “Schadensbilanz“ von BGH v. 8.10.2013 – II ZB 26/12, AG 2013, 877“ (The consequences of Frosta: on the preliminary empirical balance of the damage of BGH v. 8.10.2013 – II ZB 26/12, AG 2013, 877), *Die Aktiengesellschaft* (2015), p. 55.

⁶³ Ibid, p. 56.

As this study simply compares prices on the day before and after the delisting announcement it is not an event study, notably the results are also not adjusted for general market effects and other interferences.⁶⁴

Nonetheless the findings of the *Solventis*-study are supported by a number of subsequent event studies, which found divergences in performance by an average of minus ten percent one day after the delisting-announcement.⁶⁵

These negative reactions were also shown to still be present after 20 days in around 75 percent of cases and can therefore be considered significant.⁶⁶

However, some authors note the impact of a small number of extreme cases on the overall outcome.⁶⁷ After assessing the spread, others conclude, that two thirds of all cases do not show economically significant, meaning a divergence of more than five percent, negative reactions.⁶⁸

These results seem contrary to each other, can however be explained by a number of factors.

First, as delisting is not a mass phenomenon these studies often include a relatively small number of samples, mostly around 30 to 40.⁶⁹ This could result in the distortion of results by a small number of extreme and possibly abnormal cases, a possibility which has to some extent been observed by some of the authors themselves.⁷⁰

Second, due to the different shareholder structure U.S. and European stock markets are not comparable, as delisting offers more benefits in the U.S due to the higher possibility of interagency conflicts.⁷¹

Third, it needs to be noted, that the studies showing an increase in share prices were conducted before the FroSTA-Judgement,⁷² therefore including cases where a buy-out offer was made, distorting the results.

In conclusion, the effects of delisting on a stock's price depend on the general circumstances, such as a company's ownership structure, leading to possible divergences between continental Europe and the UK.⁷³

⁶⁴ Krug, *supra* note 5, p. 65.

⁶⁵ Krug, *supra* note 5, p. 67.

⁶⁶ Doumet, Markus and Limbach, Peter and Theissen, Erik "Ich bin dann mal weg: Werteffekte von Delistings deutscher Aktiengesellschaften nach dem Frosta-Urteil" (And Im off: Value related effects of delistings of German stock companies after the Frosta-judgment) *Schmalenbachs Zeitschrift für betriebswirtschaftliche Forschung* (2016), p. 267.

⁶⁷ Karami, Behzad and Schuster, Rene „Eine empirische Analyse des Kurs- und Liquiditätseffekts auf die Ankündigung eines Börsenrückzugs am deutschen Kapitalmarkt im Lichte der »FRoSTA«-Entscheidung des BGH“ (An empirical analysis of the effects of a delisting announcement on share value and liquidity in light of the FRoSTA-decision of the BGH), p. 35. Available at: <https://bewertung-im-recht.de/working-papers/eine-empirische-analyse-des-kurs-und-liquiditaetseffekts-auf-die-ankuendigung-eines> Accessed June 10th 2020

⁶⁸ Thomale, Chris and Walter, Andreas „Delisting als Regulierungsaufgabe“ (Delisting as a regulatory task) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2016), p. 718.

⁶⁹ Krug, *supra* note 5, pp. 63 *et seq.*

⁷⁰ Karami and Schuster, *supra* note 66.

⁷¹ Martinez *et al*, *supra* note 14, p. 16.

⁷² *Ibid.*

⁷³ *Ibid.*

However, considering that those event studies which did not include delistings including buy-out offers, and can therefore be considered most reliable, found a negative impact on stock prices, it seems reasonable to assume that delisting usually leads to a loss of share value, with the precise extent of that loss subject to the individual company's characteristics. This especially affects minority shareholders, which focus more on a share's economic rights than on its control rights.⁷⁴

1.2.3.2 Liquidity:

An even more consequential effect of delisting for minority shareholders could however be a decrease in the stock's liquidity, i.e. its factual ability to be traded.

As described above, minority shareholders' main goal is to realize economic gains by selling their shares once their price has increased. Independently of how share prices are affected by delisting this goal requires minority shareholders to have the continued ability to sell their stock, making the shares liquidity an important characteristic in the minority shareholders' eyes.

In order to determine a share's liquidity several indicators are used, namely the volume of trade, the number of days on which the share is actively traded and the bid-ask-spread.⁷⁵ The bid-ask-spread attests to costs of an immediate trade, from which the market's breadth can be determined.⁷⁶

By measuring these indicators several studies found a decrease in liquidity for shares.⁷⁷ However, there was no clear indication of a systematic drop in all indicators that persisted until the delisting took effect.⁷⁸

These findings however concern only the timespan between the announcement and the taking effect of the delisting.

Once the delisting takes effect the stock market as a venue for selling shares is no longer available and with it a significant part of the share's liquidity.⁷⁹

As the ability to react to the development of a stock's price is a prerequisite to be able to realize any potential increase in the share's value this significantly affects minority shareholders.⁸⁰ Beyond the organized stock market there are no comparable alternatives in this regard.⁸¹ Notably, outside the stock market the shareholder has to find a buyer and negotiate an appropriate price for his shares himself, which increases transaction

⁷⁴ Krug, *supra* note 5, p. 89.

⁷⁵ Krug, *supra* note 5, p. 76.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 77.

⁷⁸ *Ibid.*, p. 78.

⁷⁹ Casper, Matthias, „Delisting – das Ende einer unendlichen Geschichte?“ (delisting – The end of a neverending Story?) in *Festschrift für Johannes Köndgen zum 70. Geburtstag* (Congratulatory publication for the 70th birthday of Johannes Köndgen), ed. Matthias Casper *et al.*, Cologne: RWS Verlag, 2016, p. 133; Maume, „The Parting of the Ways: Delisting Under German and UK Law“ *European Business Organization Law Review* (2015), p. 261.

⁸⁰ Casper, Matthias, „Delisting – das Ende einer unendlichen Geschichte?“ in *Festschrift für Johannes Köndgen zum 70. Geburtstag*, ed. Matthias Casper *et al.*, p. 134.

⁸¹ *Ibid.*

costs, impacting the minority shareholders' main goal of reaping economic benefits from his shares.⁸²

Another consequence of a delisting announcement tied to the tradability of shares is the minority shareholder's freedom to freely reach their decision on a possible disinvestment. As they are dependent on the tradability the listing entails, after the delisting announcement minority shareholders will be compelled to sell their shares.⁸³ However, as other investors will be cautious about investing at this moment, the circle of potential buyers may be reduced to the majority shareholder, which could use the situation to dictate undue terms to the minority shareholders.⁸⁴

1.2.3.3 Other:

Additionally, minority shareholders, who lack the majority shareholder's influence on and insight into the company, profit from the stock markets requirements for disclosure and reporting.⁸⁵

Notably, the aspect of the stock market as a provider of information and the price of the share can also intersect. As minority shareholders lack insight into the company the shares price on the stock is an important indicator for them. After delisting this indicator is no longer available, further complicating any potential sale and increasing transaction costs.⁸⁶

1.3 Conclusion:

In terms of the interests involved delisting presents itself as a conflict of the interests of the company and the majority shareholder on one side and the minority shareholders on the other side.⁸⁷

In this situation the main interest on the side of the company and the majority shareholder, motivated by the desire to cut the costs associated with the listing in order to increase the potential for value creation, to be able to delist the company as easily as possible. This interest conflicts with minority shareholders' interest in being able to sell their shares quickly and with minimum effort at an adequate price in order to utilize them effectively as a means of investment.⁸⁸

2 CHAPTER TWO EUROPEAN FRAMEWORK:

⁸² Krug, *supra* note 5, p. 90.

⁸³ Gessler, Felix "Die Neuregelung des Delistings – Angemessener Aktionärsschutz oder „Dolchstoß“?“ (The new rules for Delisting – Adequate protection for shareholders or “backstabbing”?), *Zeitschrift für Bank- und Kapitalmarktrecht* (2016), p. 273.

⁸⁴ Casper, *supra* note 80, p. 117 and p. 135.

⁸⁵ Krug, *supra* note 5, p. 92.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 87.

⁸⁸ Zimmer, Lutz and v. Imhoff, Julian „Die Neuregelung des Delisting in § 39 BörsG“ (The new rules for delisting in § 39 BörsG), *Neue Zeitschrift für Gesellschaftsrecht* (2016), p. 1056.

As European Union Law enjoys precedence over national law in its application any European regulation dealing with delistings would shape a member states national legislator possibility to regulate delistings.⁸⁹

2.1 Primary Union Law:

Neither the Treaty of the European Union (TEU) nor the Treaty on the Functioning of the European Union (TFEU) contain specific provisions regarding delisting.

In theory the free movement of capital, granted by Art. 63 TFEU, could limit member states legislator's freedom in regulating delisting. Nonetheless, no obligation to pass regulation offering financial compensation can be based on Art. 63 TFEU.⁹⁰

The question whether a national regulation is compatible with Art. 63 TFEU depends on that national regulation. Notably in this regard Art. 63 TFEU is subject to the justifications of Art. 65 TFEU and the cassis-formula of the Court of Justice of the European Union,⁹¹ according to which an infringement is justified, if it serves necessary public interests.⁹² The minority shareholders' interests affected by delisting, notably the right of disposal and the significant loss of value, constitute such a necessary public interest, and would justify a restriction of the free movement of capital.⁹³

2.2 Secondary Union Law:

So far neither a regulation nor a directive dealing directly with delisting has been passed.

However, Art. 21 of the directive 2012/30/EU formulates the principle of equal treatment of shareholders in the same situation. Such a principle could in theory necessitate a buy-out offer by the majority shareholder.⁹⁴ This interpretation has however been denied by the Court of Justice of the European Union in the past.⁹⁵

2.3 EU Charta of fundamental rights and ECHR:

2.3.1 EU Charta of Human Rights:

Art. 17 of the Charta protects the possession, usage, disposal and inheritance of legally acquired ownership. According to Art. 6 TEU the Charta has the same weight as any norm of the TEU or TFEU, meaning it would enjoy precedence in its application over national law. However, as per Art. 51 para. 1 s. 1 of the Charta it only binds member states with regards to the implementation of Union law. As explained above, union law

⁸⁹ Krug, supra note 5, p. 108.

⁹⁰ Krug, supra note 5, p. 107.

⁹¹ Court of Justice, ruling in *Veronica*, C-148/91, ECLI:EU:C:1993:45, para. 9 *et seq.*

⁹² Court of Justice, ruling in *Rewe/Brantweinmonopol*, C-120/78, ECLI:EU:C:1979:42, p. 652 *et seq.*

⁹³ Hornung, Christian and Westermann, Benjamin „Vereinbarkeit der Delisting-Neuregelung mit der europarechtlichen Kapitalverkehrsfreiheit“ (Compatibility of the new delisting rules with the european free movement of capital) *Zeitschrift für Bank- und Kapitalmarktrecht* (2017), p. 409 *et seq.*

⁹⁴ Slagter, Jan Maarten „The Protection of Minority Shareholders: One More Principle Denied?“ *European Company Law*, no. 3 (2010), p. 89.

⁹⁵ Court of Justice, ruling in *Bertelsman*, C-101/08, ECLI:EU:C:2009:626, para. 32 *et seq.*

does not regulate delistings, so that the Charta does not influence the national regulation of delistings.⁹⁶

2.3.2 ECHR:

Ownership is protected under Art. 1 para. 1 of the additional protocol to the European Convention on Human Rights (ECHR).

Although to Art. 6 para. 2 TEU envisages the European Union's accession to the ECHR this has not yet taken place. Therefore, the ECHR is not (yet) relevant.

Additionally, the protection of ownership under the ECHR does not include the realization of economical chances, which, unlike the ownership itself, are impacted by delisting.⁹⁷

2.4 Conclusion:

Although the need for harmonization of delistings has been discussed, as of now, no uniform European legal framework exists. The member states national legislators are therefore not obliged to regulate delisting.⁹⁸ Should they choose to regulate the matter there are no restrictions through European Law with regards to the *if* and *how* of delisting.⁹⁹

3 CHAPTER THREE: GERMANY

In Germany delisting is regulated by § 39 Stock Exchange Act (Börsengesetz – BörsG). The details of which will be presented and analysed in the following.

3.1 Historical overview:

In the past the German law has undergone many significant changes, some caused by judgements from both the Federal Supreme Court (BGH) and the Federal Constitutional Court (BVerfG).

3.1.1 Original Situation:

The possibility to cancel the listing at the issuers' request was introduced in Germany in 1998 with § 43 para. 4 BörsG in its original version. Before that the possibility of such a transaction was disputed. The lack of a clear option to apply for the cancellation of the listing lead some companies to choose to violate their obligations to provoke an involuntary delisting.¹⁰⁰ § 43 para. 4 BörsG a.F. only stipulated that the cancellation

⁹⁶ Krug, *supra* note 5, p. 108.

⁹⁷ Kastl, Stephanie, *Der Rückzug kapitalmarktfähiger Unternehmen von der Börse* (The retreat of market-admissible companies from the stock market), Baden-Baden: Nomos 2016, p. 220.

⁹⁸ Krug *supra* note 5, p. 109.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 48.

may not be contrary to the investor's protection, with the stock markets empowered to regulate the question of when that was the case in their administrative rules. For example, until 2002 the Frankfurt stock exchange demanded a buy-out offer before in 2002 switching to a six-month grace period.¹⁰¹

3.1.2 Macrotron:

Clarification was first brought about by the BGH with its decision in *Macrotron*.¹⁰² The BGH held that delisting would impact the factual tradability of shares,¹⁰³ especially impacting minority shareholders and carrying grave economic disadvantages for them.¹⁰⁴

With reference to past decisions of the BVerfG the BGH argued, that the tradability of shares was an important component of ownership of a share, and therefore protected under Art. 14 para. 1 of the German Basic Law (Grundgesetz – GG).¹⁰⁵

Furthermore, the BGH stated, that delisting was to be seen as a question of the memberships assets, and therefore would fall under the competence of the general meeting.¹⁰⁶

As the general meetings' involvement alone however was insufficient in the eyes of the BGH to adequately protect minority shareholders' rights it interpreted the prerequisite of “*not running contrary to the investors' protection*” in § 43 para. 4 BörsG a.F. as only being satisfied if the request for a decision of the general meeting was combined with a buy-out offer.¹⁰⁷

In order to ensure the functioning of the buy-out offer as a means of protection of minority shareholders' economic rights the BGH argued, that the offer should be subject to a judicial review under expedited shareholder action (*Spruchverfahren*¹⁰⁸).¹⁰⁹

3.1.3 MVS/Lindner:

In 2012 the BVerfG was confronted with the question of whether delisting could indeed be seen, as the BGH had argued in *Macrotron*, as interfering with the constitutional right to ownership under Art. 14 para. 1 GG.¹¹⁰

The BVerfG argued that the tradability of the shares, connected to the listing, only constituted an economic chance, and was therefore not protected under Art. 14 para. 1 GG.¹¹¹

¹⁰¹ Ibid.

¹⁰² BGH, 25.11.2002, II ZR 133/01, NJW 2003, 1032.

¹⁰³ Ibid, p. 1034.

¹⁰⁴ Ibid.

¹⁰⁵ BGH, 25.11.2002, II ZR 133/01, NJW 2003, 1032, p. 1034.

¹⁰⁶ Ibid.

¹⁰⁷ BGH, 25.11.2002, II ZR 133/01, NJW 2003, 1032, p. 1035.

¹⁰⁸ The *Spruchverfahren* is a specialized, expedited action for the review of compensatory payments granted to minority shareholders through the courts. Notably as per § 13 para. 2 *Spruchverfahrensgesetz* (expedited shareholder action law, enacted on 12th of June 2003, BGBl. I S. 838) a ruling in such an action is binding in regard to all impacted shareholders.

¹⁰⁹ BGH, 25.11.2002, II ZR 133/01, NJW 2003, 1032, p. 1035.

¹¹⁰ Federal Constitutional Court, 11.06.2012, 1 BvR 3142/07 and 1 BvR 1569/08, NJW 2012, 3081.

¹¹¹ Ibid, p. 3082 *et. seq.*

With this assessment the BVerfG withdrew the dogmatic reason for *Macrotron*.¹¹² The BVerfG, however did not answer the question whether that could be different if the shareholders suffered economic losses due to delisting.¹¹³

Notably, the BVerfG also mentioned the possibility of an overall analogy to other norms of company law governing measures with structural consequences for the company.¹¹⁴

3.1.4 FroSTA:

The BGH reacted to *MVS/Lindner* in the *FroSTA*¹¹⁵ decision by abandoning the principles laid out in *Macrotron*. With regards to the possibility of an overall analogy, opened by the BVerfG in *MVS/Lindner*, the BGH argued that, as delisting introduced no changes to the internal structure of the company, it was not comparable to other structural measures.¹¹⁶ Referring to the grace periods demanded by several stock markets in their administrative rules the BGH stated that there was no lack of protection, and therefore no need for further requirements.¹¹⁷ Additionally, the BGH argued that there was no indication for a decrease in the stock's price.¹¹⁸

Due to these considerations the BGH ruled that there were no grounds to pose special requirements for delisting from a company law perspective, resulting in the prerequisite of the cancellation not being “*contrary to the protection of investors*” under the BörsG being the sole rule, with the details to be regulated by the stock markets in their administrative codes.¹¹⁹

3.1.5 Stock markets administrative codes:

The stock markets took different approaches in ensuring that the cancellation was not “*contrary to the protection of investors*”. In reaction to the new regulatory framework, a sharp increase in delistings was observed.¹²⁰

3.2 Current legal framework in Germany:

3.2.1 § 39 Börsengesetz:

Nowadays delistings in Germany are governed by § 39 BörsG. § 39 BörsG was introduced in its current form in 2015 in reaction to the FroSTA decision.¹²¹

While paragraph one of § 39 BörsG deals with involuntary delistings paragraphs two to six govern voluntary delistings.

¹¹² Federal Supreme Court, 08.10.2013, II ZB 26/12, NJW 2014, 146, p. 147.

¹¹³ Federal Constitutional Court, 11.06.2012, 1 BvR 3142/07 and 1 BvR 1569/08, NJW 2012, 3081, 3084.

¹¹⁴ Federal Constitutional Court, *supra* note 113, p. 3085.

¹¹⁵ Federal Supreme Court, 08.10.2013, II ZB 26/12, NJW 2014, 146.

¹¹⁶ Federal Supreme Court, *supra* note 112, pp. 147 *et. seq.*

¹¹⁷ *Ibid.*, p. 149.

¹¹⁸ *Ibid.*

¹¹⁹ Federal Supreme Court, *supra* note 115, p. 147.

¹²⁰ Bungert, Hartwin and Leyendecker-Langner, Benjamin E. „Die Neuregelung des Delisting“ (The new rules for delisting) *Zeitschrift für Wirtschaftsrecht* (2016), p. 49.

¹²¹ Beschlussempfehlung und Bericht des Finanzausschusses, Bundestages-Drucksache. 18/6220 (Voting recommendation and report of the financial committee, German parliament publication 18/6220), p. 84.

3.2.1.1 Issuer's request:

According to §39 para. 2 sentence 1 BörsG upon the issuer's request the stock markets administration can cancel the listing.

The request to cancel the listing constitutes an administrative measure and as such under § 77 para.1 Stock market law (Aktiengesetz - AktG) falls under the sole competence of the issuer's board of directors.¹²²

Due to the restrictions for the possible content of the articles of association laid out by § 23 para. 5 AktG the articles of association may not require the inclusion of the general meeting into the decision.¹²³ Under § 111 para. 4 AktG the articles of association, however, may require the supervisory boards consent.¹²⁴

3.2.1.2 Stock market administration's discretion:

As the wording of § 39 BörsG "*the administration may*" indicates the decision whether or not to cancel a listing is at the stock markets administration's discretion.¹²⁵ In exercising their discretionary power the administration must balance the issuers and the shareholders' interests.¹²⁶

However, this discretionary power is curbed in both directions. On one hand, the issuer has a right to the cancellation.¹²⁷ On the other hand with regards to allowing the cancellation the stock markets administration's discretionary power is narrowed by the prerogative that the cancellation may not run contrary to investors' protection, laid out by § 39 subparagraph 2 sentence 2 BörsG.¹²⁸

With regards to all financial instruments that fall within the scope of § 2 para. 2 Stock Acquisition and Takeover Law (Wertpapiererwerbs- und Übernahmegesetz - WpÜG), notably also for equity shares,¹²⁹ § 39 para. 2 sentence 3 BörsG clarifies this condition. Under § 39 para. 2 sentence 3 No. 1 BörsG the cancellation may only be granted if the request includes a buy-out offer. Alternatively, under § 39 para. 2 sentence 3 Nr. 2 BörsG the cancellation may as well be granted if the stocks in question will continue to be listed either on a domestic organized market, or on an organized market in the EU or the EEA,

¹²² Heidelberg, Anna „BörsG § 39 Widerruf der Zulassung bei Wertpapieren“ (BörsG § 39 the cancellation of the admission to trade of securities) in *Kapitalmarktrechts-Kommentar* (Commentary to capital market law), ed. E. Schwark and D. Zimmer, Munich: C.H. Beck, 5th edition 2020, recital 35; Groß, Wolfgang, *Kapitalmarktrecht* (Capital market law) Muenchen: C.H. Beck, 7th edition 2019, § 39 BörsG recital 24.

¹²³ Groß, Wolfgang, *Kapitalmarktrecht* (Capital market law) Muenchen: C.H. Beck, 7th edition 2019, § 39 BörsG recital 24.

¹²⁴ Heidelberg, *supra* note 122.

¹²⁵ Krug, *supra* note 5, p. 294.

¹²⁶ Groß, *supra* note 123, recital 15.

¹²⁷ Kumpan, Christoph „BörsG § 39 Widerruf der Zulassung bei Wertpapieren“ (BörsG § 39 the cancellation of the admission to trade of securities) in *Handelsgesetzbuch: HGB* (Commercial code: HGB), ed. Klaus Hopt, Munich: C.H. Beck, 39th edition 2020, recital 10.

¹²⁸ Kumpan „BörsG § 39 Widerruf der Zulassung bei Wertpapieren“ in *Handelsgesetzbuch: HGB*, ed. Hopt, recital 6; Heidelberg, „BörsG § 39 Widerruf der Zulassung bei Wertpapieren“ in *Kapitalmarktrechts-Kommentar*, ed. Schwark and Zimmer, recital 38.

¹²⁹ Kumpan, *supra* note 127, recital 8.

if the requirements for delisting on that market are equal to § 39 para. 2 sentence 3 No. 1 BörsG.

As a result, the stock markets' administrations are not granted free discretion in their decision, but only wield a dutiful discretionary power within the limits of § 39 para. 2-6 BörsG. Notably, should the mandatory prerequisites laid out there not be met, the discretionary power to allow a cancellation is reduced to zero.¹³⁰

Further limitations of the stock market's discretionary power result from § 39 para. 6 BörsG, according to which an insufficient price offered in the buy-out offer does not influence the validity of the cancellation. This has to be interpreted as removing the question whether the buy-out offer is adequate from the administration's decision-making process.¹³¹

Therefore, regarding the *if* of the cancellation the administration's discretionary power is strongly restricted.¹³² However, regarding the modalities of the cancellation, they may exercise their discretion by delaying the entry into force of the cancellation up to two years, as per § 39 para. 5 sentence 2 BörsG.¹³³

3.2.1.1 Buy-out offer:

As § 39 BörsG does not specify who can make the buy-out offer either the issuer, the majority shareholder, or even a third party may make the offer.¹³⁴ As the issuer would have to comply with § 71 AktG, which regulates the buying of a company's own shares, in reality, the majority shareholder will most often make the offer.¹³⁵

In order for the buy-out offer to be sufficient, it has to satisfy a number of conditions.

3.2.1.1.1 Preconditions:

According to § 39 para. 2 sentence 3 No. 1 BörsG the offer has to encompass all stocks that are subject to the delisting request and it has to have been published in accordance with the rules of the WpÜG.

This means that according to § 14 WpÜG the offeree has to submit the relevant documentation to the Federal Financial Supervisory Authority (BAFin). The mandatory information of an offer is laid out by § 11 WpÜG. Notably, as stipulated by Art. 2 Nr. 7 Stock Acquisition and Takeover Law-Acquisition Regulation (Wertpapierübernahmegesetz-Angebotsverordnung - WpÜG-AngV) the offer has to contain additional information regarding the future request for the cancellation of the listing, including a mandatory reference to the possible restrictions of the stocks

¹³⁰ Kumpan, *supra* note 127, recital 6.

¹³¹ Heidelberg, *supra* note 123, recital 38.

¹³² Krug, *supra* note 5, p. 296.

¹³³ Kumpan „BörsG § 39 Widerruf der Zulassung bei Wertpapieren“ in *Handelsgesetzbuch: HGB*, ed. Hopt, p. 297; Krug, , *Der Rückzug von der Börse -Widerstreitende Interessen von Groß- und Minderheitsaktionären beim Delisting*, p. 297.

¹³⁴ Bungert and Leyendecker-Langner, *supra* note 120, p. 50.

¹³⁵ *Ibid.*

tradability as a result of the cancellation and the corresponding possible decrease in price.

3.2.1.2.1 Characteristics of the offer:

According to § 39 para. 3 sentence 1 BörsG the offer may not be conditional.

Furthermore, § 39 para. 3 sentence 2 BörsG stipulates that § 31 WpÜG is applicable to the offer with the exception that the offer under § 39 para. 2 sentence 3 No. 1 BörsG has to offer an exchange in the form of a monetary payment in Euro. The amount offered may not be lower than the average price of the stocks on domestic stock markets during the last six months before the publication of the delisting under § 10 para. 1 sentence 1 or § 35 para. 1 sentence 1 BörsG.

Should the issuer have violated Art. 17 MAR or a similar rule of applicable foreign law by not publishing insider information, or by publishing false information, or have violated the prohibition of market manipulation under Art. 15 MAR, the offeree is obliged under § 39 para. 3 sentence 3 BörsG to pay the difference between the amount offered and the amount that is calculated from the company's value.

However, this is only the case if the above-mentioned violations had a significant impact on the stock's price. As a single strong fluctuation in price may not be significant if viewed in the context of a six-month time period, the term "significant" under § 39 para. 3 sentence 3 BörsG has to be interpreted independently of Art. 7 para. 1 lit. a MAR.¹³⁶ The legislator has however in § 39 para. 3 sentence 4 BörsG attached special consequences to a fluctuation of five percent or more. Therefore, this five percent value can be taken as a starting point in determining the significance of a violation for a stock's price under § 39 para. 3 sentence 3 BörsG.¹³⁷

According to § 39 para. 3 sentence 4 BörsG if the stocks that are subject to the offer formed a market price on less than a third of the stock markets working days during the last six months before the publication of the delisting under § 10 para. 1 sentence 1 or § 35 para. 1 sentence 1 BörsG, and several of these market prices diverge from one another by more than five percent, the offeree is obliged to pay a sum determined by the company's value as well.

3.2.1.2.2 Foreign issuers:

Under § 39 para. 4 BörsG the offer of a foreign issuer is subject to the requirements laid out by § 39 para. 3 BörsG as well.

3.2.1.2.3 Publication of the offer:

According to § 39 para. 5 sentence 1 BörsG the stock markets administration has to publish a notice of the cancellation on the internet immediately.

¹³⁶ Kumpan, *supra* note 127, recital 9.

¹³⁷ *Ibid.*

3.2.1.3 Exception to the mandatory buy-out offer:

Under § 39 para. 2 sentence 3 Nr. 2 lit. a BörsG if the stock in question will be continually listed on a regulated domestic market the buy-out offer is not mandatory. Under § 39 para. 2 sentence 3 No. 2 lit. b BörsG if the stock in question continues to be listed on a regulated market in the EU or the EEA, if the requirements for delisting on that market are equal to § 39 para. 2 sentence 3 No. 1 BörsG, the buy-out offer is not necessary as well.

Although the term “*regulated market*“ is not defined in the BörsG, it is defined in § 2 para. 11 Stock Trading Law (Wertpapierhandelsgesetz - WpHG), where the definition is based on the MIFID II directive. Therefore, this definition can be utilized with regards to both § 39 para. 2 sentence 3 Nr. 2 lit. a and lit. b BörsG.¹³⁸

Additionally, the regulated market under § 39 para. 2 sentence 3 No. 2 lit. b BörsG must have equal requirements to § 39 para. 2 sentence 3 No. 1 BörsG in place, i.e. require a mandatory buy-out offer according to rules equal to those of the WpÜG.¹³⁹

3.2.1.4 Entry into force of the cancellation:

Furthermore, according to § 39 para. 5 sentence 2 BörsG the cancellation has to enter into force within two years after the notice of cancellation under § 39 para. 5 sentence 1 BörsG is published.

3.2.1.5 Judicial review:

As a stock market, when cancelling a listing under § 39 para. 2 BörsG, performs a public duty, the cancellation constitutes an administrative action and is therefore subject to the legal protection against administrative procedures.¹⁴⁰ The initial public offering creates trust, which forms the base of an investor’s decision to acquire a certain share.¹⁴¹ Therefore § 39 BörsG has to be qualified as a norm with protective effect towards third parties.¹⁴² Hence the individual investor may initiate administrative procedures against the cancellation.¹⁴³

According to § 39 para. 6 BörsG the cancellation, however, may not be challenged in administrative courts if the price offered in the mandatory buy-out offer is argued to be insufficient.

Instead, should a dispute arise over the height of the buy-out offer the shareholders may file suit in civil courts,¹⁴⁴ basing their action on § 31 WpÜG and § 39 para. 3 BörsG, which gives the shareholders a claim to the prescribed price.¹⁴⁵ The Spruchverfahren is no longer available, however investors may launch a

¹³⁸ Heidelberg, *supra* note 122, recital 17.

¹³⁹ Ibid.

¹⁴⁰ Groß, *supra* note 123, recital 27.

¹⁴¹ Ibid, recital 29.

¹⁴² Ibid.

¹⁴³ Heidelberg, *supra* note 122, recital 40.

¹⁴⁴ Walz, *supra* note 11, recital 25.

¹⁴⁵ Beschlussempfehlung und Bericht des Finanzausschusses, Bundestages-Drucksache. 18/6220, p. 86; Bungert and Leyendecker-Langner „Die Neuregelung des Delisting“ *Zeitschrift für Wirtschaftsrecht* (2016), p. 50.

Musterverfahren¹⁴⁶ (exemplary action) under § 1 para. 1 No. 3 Investor-Exemplary Action Law (Kapitalanleger-Musterverfahrensgesetz - KapMuG).¹⁴⁷

3.2.2 Stock markets administrative rules:

§ 39 para. 5 sentence 3 BörsG enables the stock markets to include further regulations for the cancellation of listings into their administrative rules. Yet as according to § 12 para. 2 sentence 1 No. 1 BörsG these administrative rules have the status of bylaws, and are therefore hierarchically below the BörsG, it is commonly held, that the stock markets may not go beyond the detailed material prerequisites laid out in § 39 BörsG and may only regulate formal or technical aspects.¹⁴⁸

In practice, the stock markets have adopted by referencing the rules laid out by § 39 para. 2-6 BörsG in their administrative rules.¹⁴⁹

3.3 Analysis of the current German Legal Framework:

To compare the protection of minority shareholders in Germany and in the UK, it first needs to be established how the respective legislator has balanced the interests involved in delisting, and how effective the utilized instruments are in achieving the goal set out by the legislator.

3.3.1 Balancing of interests:

The previously existing legal framework, through the undefined legal term of “*the cancellation not running contrary to investors protection*”, gave the stock markets administrations discretion in its decision, enabling and obliging them to consider the issuer’s interests as well.¹⁵⁰ The *FroSTA*-judgment represented a significant cut to the level of protection shareholders enjoyed. As a reaction to the *FroSTA*-judgment and the wave of delistings that followed it the current German legislation was passed.¹⁵¹ Consequently, it mainly focuses on restoring the level of protection granted to shareholders to an adequate level.¹⁵² As evidenced by the interests a stock market’s administrations has to consider in making its decision,¹⁵³ the current German legislation is aimed at taking into account both the legitimate interest a company and its shareholder might have in delisting, as well as granting the necessary protection to minority shareholders. Therefore, it constitutes a balanced approach to the conflict of interests that delisting poses.

3.3.2 Effectiveness of the instruments used:

¹⁴⁶ Under the KapMuG impaired investors are offered a type of action in which the relevant proof only is assessed once for all cases by the court. As a result the action is both faster and more cost-effective.

¹⁴⁷ Walz, *supra* note 11, recital 25.

¹⁴⁸ Groß, Wolfgang, *Kapitalmarktrecht*, § 39 BörsG recital 17; Krug, *Der Rückzug von der Börse - Widerstreitende Interessen von Groß- und Minderheitsaktionären beim Delisting*, pp. 286 *et. seq.*; Bungert and Leyendecker-Langner, Langner „Die Neuregelung des Delisting“ *Zeitschrift für Wirtschaftsrecht* (2016), p. 50.

¹⁴⁹ Krug, *supra* note 5, p. 285.

¹⁵⁰ Groß, *supra* note 123, recital 15.

¹⁵¹ Zimmer and v. Imhoff, *supra* note 88.

¹⁵² Beschlussempfehlung Finanzausschuss, *supra* note 121.

¹⁵³ Groß, *supra* note 123, recital 15

The German legislator has taken the stance that delistings are to be viewed purely as a transaction under capital market law, and not as a structural measure under company law, consequently regulating the matter in the BörsG.¹⁵⁴

This decision was influenced by the assessment that the main risks for shareholders in delistings are the loss of tradability of the stock and the corresponding decrease in value.¹⁵⁵ In light of the specific, financial,¹⁵⁶ interests of minority shareholders this assessment seems reasonable.

3.3.2.1 Buy-out Offer:

The main instrument employed by the German legislator to protect minority shareholders from these risks is the mandatory buy-out offer under § 39 para. 2 sentence 3 No. 1 BörsG.

As it offers minority shareholders the opportunity to sell their shares at an adequate price the mandatory buy-out offer, in general, fits the idea of protecting minority shareholders' financial interests.¹⁵⁷

This poses the question what constitutes an adequate price and how that price should be determined.¹⁵⁸ If the price of the buy-out offer is too low it can no longer fulfil its function to protect minority shareholders' financial interests. On the other hand, if the price is too high the buy-out offer shifts the economic calculation that drives the delisting decision,¹⁵⁹ factually becoming a barrier to delistings.¹⁶⁰

The adequate price may either be found through the stock's market price or in reference to the company's value. A determination of the adequate price from the company's value could be significantly more costly, impacting the calculus of the issuer, and therefore the main shareholder.¹⁶¹ Yet, it also offers a more accurate picture of the share's real value.¹⁶² On the other hand, the market price constitutes an easier and cheaper way of determining the adequate price, although due to the comparatively lower liquidity of stocks before delisting the market price may not always be an adequate representation of the shares real price.¹⁶³

With § 39 para. 3 sentence 2 BörsG the German legislator has opted to determine the adequacy of the buy-out offer by utilizing the market price. As the German legislator has adopted the prerogative that delisting does not impact shareholders' membership but only the tradability of their share,¹⁶⁴ this is the logical and stringent choice.¹⁶⁵

¹⁵⁴ Beschlussempfehlung Finanzausschuss, *supra* note 121.

¹⁵⁵ Beschlussempfehlung Finanzausschuss, *supra* note 121.

¹⁵⁶ See Chapter One.

¹⁵⁷ Krug, *supra* note 5, pp. 144 *et seq.*

¹⁵⁸ *Ibid.*, p. 145.

¹⁵⁹ *Ibid.*, p. 146.

¹⁶⁰ *Ibid.*

¹⁶¹ See Chapter One.

¹⁶² Gegler, *supra* note 83, p. 275

¹⁶³ *Ibid.*

¹⁶⁴ Beschlussempfehlung Finanzausschuss, *supra* note 121.

¹⁶⁵ *Ibid.*

Yet, if the limit for the price offered is determined by the average price on the stock market for the last six months, this might lead to an insufficient offer in those cases where the company is undervalued, i.e. where the price of the company's stocks does not correspond to the value of the company itself.

Notably, this is one of the possible causes for delisting,¹⁶⁶ so that this possibility cannot be simply dismissed as an unlikely fringe occurrence. In these cases, the buy-out offer as envisaged by § 39 para. 3 BörsG would not provide a full compensation for the loss of their shares. Nonetheless, based on their primary financial interests minority shareholders are more accurately characterized as investors than as shareholders.¹⁶⁷ Hence, the fact that such excess value is not compensated does not constitute an irredeemable fault. When the increase in costs the only remedy to this fault, a valuation based on the company's real value, would impose on the majority shareholder and the issuer are considered, this drawback has to be qualified as justifiable.

As the issuer is free to pose his request to cancel the listing at any time he might choose to do so at a time when the stock's price is significantly lower than usual.¹⁶⁸

In order to provide adequate protection to minority shareholders and to prevent such circumventive manoeuvres § 39 para. 3 sentence 2 BörsG stipulates that the offered price is to be fixed according to the average stock price over the relatively long period of the last six months, where such manipulations are likely to have only a smaller effect and not be significant.¹⁶⁹

Minority shareholders are granted further protection against manipulations of the market price by § 39 para. 3 sentence 3 BörsG, which determines the use of the company's real value for fixing the minimum price of the buy-out offer in case of significant manipulations of the market price. However, due to the relatively long reference period, it again is unlikely that any manipulation would pass the threshold for significance.¹⁷⁰

If the stock is traded so infrequently that no reliable market price is formed, i.e. if the stocks lack sufficient liquidity for the market price to be an indication of the adequate price,¹⁷¹ § 39 para. 3 sentence 3 BörsG takes recourse to the company's real value.

In order to ensure that the conditions § 39 para. 3 BörsG formulates towards the offer are met in practice the offer as per § 14 WpÜG is to be submitted to BAFin prior to its publication. The BAFin then reviews the offer with regards to the adequacy of the offered price and the ability of the offeree to finance the offer.¹⁷² Should the BAFin find any of the preconditions lacking it may prohibit the offer under § 15 WpÜG.

As the German legislator has tasked the BAFin with verifying the offer with regards to the more complex substantial requirements towards the offer the stock markets

¹⁶⁶ See Chapter One.

¹⁶⁷ See Chapter One.

¹⁶⁸ Gehler, *supra* note 83, p. 277.

¹⁶⁹ Bungert and Leyendecker-Langner, *supra* note 120, p. 51.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Beschlussempfehlung Finanzausschuss, *supra* note 121, p. 86.

administrations are relieved of this burden, facilitating an easy and legally certain procedure.¹⁷³

One concern that was brought forward against the mandatory buy-out offer was the possibility for parties interested in taking over a company to make a buy-out offer under § 39 para. 2 sentence 2 No. 1 BörsG without ever carrying out a delisting or even intending to do so.¹⁷⁴ Here the delisting offer might be used to undercut the regular take-over offer, which is determined according to the average stock price of the last three months.¹⁷⁵ As these two preconditions to the offers are by now understood to be cumulative this concern has lost its basis.¹⁷⁶

3.3.2.2 Exceptions:

As detailed above, under § 39 para. 2 sentence 3 No. 2 BörsG there are two cases in which a buy-out offer is not required.

In the case of § 39 para. 2 sentence 3 No. 2 lit. a BörsG as the listing is sustained on a regulated domestic market, there are no changes to the legal and economic circumstances and therefore no risks for shareholders.¹⁷⁷

In the case of § 39 para. 2 sentence 3 No. 2 lit. b BörsG the listing is sustained, but on a foreign stock market. This theoretically opens up the possibility for issuers to move their listing to a market with a lower level of obligations, thereby cutting costs.

In order to prevent such circumventive manoeuvres, the German legislator has limited the exception of § 39 para. 2 sentence 3 No. 2 lit. a BörsG to regulated markets in the EU or EEA, where the rules for disclosure and publication are likely similar, or, through EU harmonization, equal.¹⁷⁸

This restriction to markets in the EU or the EEA has been criticized with the argument that American stock markets provide a similar, if not a higher level of investor protection.¹⁷⁹ However, under the aspect of the increasing frequency of changes to capital market law and the continuing harmonization inside the EU and EEA this restriction has to be qualified as reasonable.

To prevent circumvention of § 39 para. 2 sentence 2 No. 1 BörsG the German legislator has included the requirement of equal prerequisites for delisting on that market in § 39 para. 2 sentence 3 No. 2 lit. b BörsG.¹⁸⁰

¹⁷³ Beschlussempfehlung und Bericht des Finanzausschusses, Bundestages-Drucksache. 18/6220, p. 86; Zimmer and v. Imhoff, „Die Neuregelung des Delisting in § 39 BörsG“, *Neue Zeitschrift für Gesellschaftsrecht* (2016), p. 1057.

¹⁷⁴ Wackerbarth, Ulrich „Das neue Delisting-Angebot nach § 39 BörsG oder: Hat der Gesetzgeber hier wirklich gut nachgedacht?“ (The new delisting offer under § 39 BörsG or: has the legislator really thought this through?) *Zeitschrift für Wirtschafts- und Bankrecht* (2016), p. 387.

¹⁷⁵ Ibid.

¹⁷⁶ Bungert and Leyendecker-Langner, *supra* note 120, p. 54.

¹⁷⁷ Ibid, p. 52.

¹⁷⁸ Zimmer and v. Imhoff, *supra* note 88.

¹⁷⁹ Bungert and Leyendecker-Langner, *supra* note 120, p. 52.

¹⁸⁰ Klepsch, Oliver and Hippeli, Michael “Update Delisting”, *Recht der Finanzinstrumente* (2016), p. 195.

While the idea that otherwise issuers might try to circumvent the mandatory offer seems sensible, in practice it needs to be noted that such a mandatory buy-out offer fixed according to the rules of the WpÜG is uncommon outside of Germany.¹⁸¹ This practically prevents the application of § 39 para. 2 sentence 3 No. 2 lit. b BörsG with regards to transfers of listings.¹⁸²

It has been argued that this restriction represents a violation of EU Law.¹⁸³ In light of the fact that investor protection is a valid justification for infringements of Art. 63 TFEU,¹⁸⁴ and the fact that four years after the addition of this part to § 39 BörsG the Court of Justice of the European Union has not ruled on the matter however render these arguments unconvincing.

3.3.2.3 Stock markets administrations discretion:

As detailed above, the discretionary power of the administration in deciding whether to cancel a listing or not is significantly restricted by the detailed regulation the matter has found in § 39 para. 2-6 BörsG. Still, there remains some room for the administrations to balance the interests involved and ensure the necessary protection of minority shareholders. One major possibility to do so is the ability to delay the entry into force of the cancellation under § 39 para. 5 sentence 2 BörsG. In choosing to delay the entry into force the administration can provide investors with the possibility to prepare themselves for the cancellation and to possibly restructure their portfolio.¹⁸⁵

3.3.2.4 Judicial Review:

How effective these rules can be in practice also depends on the possibilities awarded to shareholders for legal protection against any violations. As such action would entail the involvement of experts and therefore be quite costly, especially compared to the potentially small amount each shareholder could sue for, the risk exists that shareholders might opt not to pursue their rights.¹⁸⁶ Through granting investors the ability to pursue their claims under the Musterfeststellungsverfahren the German legislator seeks to offset these risks, ensuring the practical effect of § 39 para. 2 and 3 BörsG.¹⁸⁷

Especially in comparison to the previously employed Spruchverfahren the level of protection granted by the KapMUG has been criticized as insufficient, notably due to the facts that decisions will no longer act *inter omnes* and that claimants in the Musterverfahren will have to accurately state the height of their claim.¹⁸⁸

3.3.3 Conclusion:

By opting for a buy-out offer as the main requirement for delisting the German legislator has, as explained above, created a regulatory framework that is tailored ideally towards protecting the minority shareholders' interests. The downside to this high level

¹⁸¹ Heidelberg, *supra* note 122, recital 17.

¹⁸² *Ibid.*

¹⁸³ Heidelberg, *supra* note 122, recital 17.

¹⁸⁴ *See* Chapter 2.

¹⁸⁵ Heidelberg, *supra* note 122, recital 15.

¹⁸⁶ *Beschlussempfehlung Finanzausschuss, supra* note 121, p. 86.

¹⁸⁷ *Beschlussempfehlung Finanzausschuss, supra* note 121, p. 86.

¹⁸⁸ Gegler, *supra* note 88, p. 278.

of protection is the significant financial effort a delisting under German law requires of the company or its majority shareholder. Yet, should they be able to afford it under the current German regulatory framework they are mostly free to undertake a delisting without being forced to undergo a lengthy or complicated process.

In Conclusion with § 39 para. 2-6 BörsG the German legislator has struck a fair balance between the minority shareholders' mostly financial interests and the company's and its majority shareholder's interest in leaving the stock market as freely as possible.

4 CHAPTER FOUR: UK

In thw UK the cancellation of the listing is regulated by the Financial Conduct Authorities (FCA) Listing Rules, the details of which will presented and analysed in the following.

4.1 Historical Overview:

The Financial Services and Markets Act 2000 (FSMA) in its Part 9A Sec. 137A para. 1 grants the Financial Services Authority the authority to pass the regulation it deems necessary for the protection of investors.

Up to 2005 the FCAs Listing Rules (LR) did not contain any information on what organ of a company would be competent to ask for a cancellation of the listing or under what conditions such a request could be posed.¹⁸⁹

With the aim of providing investors with adequate protection in 2005 LR 5.2.5 was introduced, and with it the requirement of a resolution of the general meeting, passed with a majority of three quarters of the votes.¹⁹⁰

The next major change to the LR 5.2.5 was made in 2014.¹⁹¹ In cases where a majority shareholder was present, the requirement of a resolution by the general meeting was further expanded from a simple three-quarter majority to a two-tier majority. The two tiers require both a three-quarter majority of all votes, as well as a simple majority of all votes not held by the majority shareholder.

Besides these two instances smaller changes to the Listing Rules have been made, however these were more of a corrective nature and do not represent important developments.

4.2 Current legal framework in the UK:

¹⁸⁹ Sander, Carl, *Anlegerschutz bei Delisting zwischen Kapitalmarkt- und Gesellschaftsrecht* (Investors protection during delisting between capital market and company law), Berlin: Duncker & Humblot, 2017, pp. 176 *et seq.*

¹⁹⁰ Financial Service Authority. Consultation Paper 203 (Review of the listing regime), October 2003, p. 53 recital 9.22 Available trough the UK Government Web Archive, https://webarchive.nationalarchives.gov.uk/*/http://www.fsa.gov.uk/ Accessed June 10th 2020.

¹⁹¹ A timeline containing all changes since 2005 is available on: <https://www.handbook.fca.org.uk/handbook/LR/5/2.html?timeline=True#>

The cancellation of a listing in the UK is governed by LR 5.2. While LR 5.2.1 deals with involuntary delisting, LR 5.2.4 governs the cancellation of the listing of stocks listed at a premium market at the issuer's request.

The British legislator neither uses any undefined legal terms, which would give room for any discretion of the FCA whether or not to cancel the listing following the issuer's request. Furthermore, Section 78A FSMA, which details the procedure does not give any other reason to assume such a discretionary power.

Combined with the wording of LR 5.2.4 "*the FCA will cancel the listing*", compared to the formulation chosen in cases where the FCA has discretionary power, such as LR 5.3.7 para. 2 "*the FCA may...if it considers it is necessary*", this makes it clear that the FCA holds no discretionary power. Instead its decision is entirely dependent on the fulfilment of the preconditions set out by LR 5.2.4 in conjunction with LR 5.2.5 until LR 5.2.11 and LR 5.3.

4.2.1 Request:

The conditions to be met by the request to cancel the listing are laid out in LR 5.3. Notably, under LR 5.3.1 the request must contain an explanation of the background and reasons for the cancellation. Under LR 5.3.1. para 4 the request must also contain the date, to be chosen by the issuer, on which the cancellation is to take effect. According LR 5.3.3 this date may not be within 24 hours of the request being formulated.

4.2.2 Circular:

Under LR 5.2.5 para. 1 the issuer is obliged to send a circular to the holders of its stocks. The contents of this circular are determined by LR 13.3.1, which is referenced by LR 5.2.5. para. 1 lit. a. Under LR 13.3.1 para. 1 the circular must provide a clear explanation of its subject matter, detailing the benefits and risks. Furthermore under 13.3.1 para. 3 it must contain all information necessary for the investor to make a properly informed decision. Under LR 13.3.1 para. 11 it must state whether it is the company's intention to apply for the cancellation of its listing. According to LR 5.2.5. para. 1 lit. b the circular is to be submitted to the FCA prior to its publication for approval.

Lastly, under LR 5.2.5 para. 1 lit. b the circular must contain the expected date of the cancellation, which may not be shorter than 20 business days after the adoption of a resolution by the general meeting to undertake the delisting.

4.2.3 Resolution of the general meeting:

According to LR 5.2.5 para. 2 no. 1 the issuer must obtain the approval of a majority of no less than three-quarters for the cancellation.

In Addition, under LR 5.2.5 para. 2 no. 2, if there is a controlling shareholder, the approval of the majority of the independent shareholders is needed as well. A controlling shareholder does not necessarily have to be a majority shareholder. Instead any shareholder that controls, on their own or in concert with others, at least 30 percent

of the votes at the general meeting is to be qualified as a controlling shareholder.¹⁹² On the other hand, all other shareholders are classified as independent shareholders.¹⁹³

As is indicated by the wording in both variants “*of the shares...voted on the resolution*”, the necessary number of votes is calculated not in relation to all votes, but to the votes cast at the general meeting. This way of calculation is also in line with the general rule for majorities at the general meeting, as stipulated in section 283 subsection 3 Companies Act 2006.

4.2.4 Notification of a RIS:

Under LR. 5.2.5 para. 3 the issuer has to notify a regulatory information service (RIS) of the convention of the general meeting, the intended cancellation and of the notice period. This has to take place at the same time as the circular demanded in LR 5.2.5 para. 1 is dispatched. Additionally, under LR 5.2.5 para. 4 a RIS needs to be informed of the passing of the general meeting’s resolution as well.

A RIS can either be a person approved by the FCA under section 89P FSMA or an information service, that is seated in an EU or EEA member state and complies with the minimum standards laid out in the Directive 2004/109/EC.¹⁹⁴

4.2.5 Exceptions:

Under LR 5.2.7 in cases of restructuring measures LR 5.2.5 para. 2, meaning the requirement of the general meetings approval, is not applicable.

In these cases, the issuer under LR 5.2.7 para. 1 and 2 needs to inform a RIS that his position is so precarious, that he cannot foreseeably avoid going into bankruptcy, but a proposal for a restructuring exists that could avoid such a fate, and that this proposal, necessary to the continued survival of the issuer, would be jeopardized by the continuation of the listing. Additionally, under LR 5.2.7 para. 3 the issuer needs to explain why the cancellation is in the best interests of the company’s shareholders as well as its creditors, and why it will not seek the approval of the shareholders.

Further exceptions from the requirements of LR 5.2.5 exist for cancellations in relation to take-over offers, LR 5.2.10, and cancellations as a result of schemes of arrangement, LR 5.2.12.

4.2.6 Judicial Review:

By Section 2 subsection 2 of the Transfer of Tribunal Functions Order 2010 all functions of the Financial Services and Markets Tribunal, which had previously been the competent instance for reviewing the FCAs decisions, were transferred to the Upper Tribunal. While in general only the addressee of a decision is authorized to lodge an appeal, the tribunal may also permit third persons who are affected by the decision to refer the matter to the tribunal.¹⁹⁵ Therefore individual shareholders are

¹⁹² FCA Handbook (version as on 2018-07-01). LR 5.2 Cancelling listing. Available on: <https://www.handbook.fca.org.uk/handbook/LR/5/2.html?timeline=True#>. Accessed June 10th 2020.

¹⁹³ Ibid

¹⁹⁴ FCA Handbook (version as on 2018-07-01). LR 5.2 Cancelling listing.

¹⁹⁵ Her Majesty’s Courts & Tribunals Service. Form FTC3 (Tax and Chancery Chamber): Notes for applicants, Available at https://www.lawsocni.org/DatabaseDocs/med_8091469_t399-eng.pdf Accessed June 10th 2020.

enabled to lodge an appeal against the decision of the FCA as well. Notably, referring a decision to the tribunal does not entail a fee.¹⁹⁶

Additionally, a shareholder could challenge the general meeting's resolution.

4.3 Analysis of the current British framework:

4.3.1 Balancing of interests:

When the current British legislation was passed, the declared intention of the Financial Service Authority (FSA)¹⁹⁷ was to increase the protection of investors.¹⁹⁸ At the same time, the FSA, as well as later on the FCA, explicitly sought to avoid a regulation that would give minority shareholders disproportionate power.¹⁹⁹ All things considered, the British legislator has aimed to strike a balance between the interests of the parties involved.

4.3.2 Effectiveness of the instruments used:

4.3.2.1 General meeting's approval:

At the core of the British system stands the requirement of the general meeting's approval. As a means of protecting minority shareholders this instrument faces some challenges.

4.3.2.1.1 Dogmatic concerns:

From a dogmatic point of view, the argument that delisting impacts the shareholder's financial interests and not his membership itself may speak against solving the problem through company law, i.e. against the requirement of the general meetings approval. While this line of reasoning is accurate in the case of German companies, British company law has a different system. Under Section 385 subsec. 2 Companies Act 2006 only companies listed at a regulated market are *quoted companies*. Through this definition *quoted companies* form a specific type of *public companies*.²⁰⁰

¹⁹⁶ Ibid

¹⁹⁷ On the 1st of April 2013 the FSA was replaced by the FCA, which took over all powers and responsibilities of the FSA.

¹⁹⁸ FSA Consultation Paper 203, *supra* note 187.

¹⁹⁹ Financial Conduct Authority. Consultation Paper CP 13/15 (Feedback on CP12/25: Enhancing the effectiveness of the Listing Regime and further consultation), November 2013, p. 72. Available at <https://www.fca.org.uk/publications/consultation-papers/cp13-15-enhancing-effectiveness-listing-regime-feedback-cp12-25-and> Accessed June 10th 2020.

²⁰⁰ Döge, Melanie and Jobst, Stefan "Aktienrecht zwischen börsen- und kapitalmarktorientiertem Ansatz" (Stock law between the approaches oriented towards stock- and capital markets) *Zeitschrift für Bank- und Kapitalmarktrecht* (2010), p. 139.

Therefore, although the *quoted company* is regulated largely identical to the public company,²⁰¹ delisting under British law leads to a change in the nature of the company. With that, delisting indeed represents a question of structural relevance under British law. Therefore, the dogmatic arguments brought forth against the regulation of the matter under company law in German literature are rendered at least partially invalid.

4.3.2.1.2 Practical challenges:

In practical terms, the fact that, the majority shareholders will almost certainly support the delisting,²⁰² and use its voting power in support of it means that a simple resolution cannot adequately protect the interests of minority shareholders as they have no possibility to take decisive influence on the outcome of the vote.²⁰³ Therefore, they are restrained to the possibility of voicing their dissent by voting against the resolution.

The British legislator has initially sought to remedy this fact by setting the threshold for the successful passage of the resolution of approval under LR 5.2.5 para. 2 no. 1 at 75 percent.²⁰⁴

Notably, under LR 6.14.1 a sufficient number of shares has to have been distributed to the public in order for the shares to be admitted to the list. LR 6.14.2 para. 2 clarifies that this is the case, when at least 25 percent of the shares are in public hands. As stipulated by LR 6.14.3 lit. e a majority shareholder's shares are not to be counted as public.

As a result, were the threshold of 75 percent the only requirement a controlling shareholder might list his firm, reap the benefits of the listing and then delist the company again without involving the minority shareholders.

To prevent such undertakings LR 5.2.5 para. 2 no. 2 stipulates that, if there is a shareholder with a share in the company larger than 30 percent, a simple majority of the votes of independent shareholders has to be cast in favour of the resolution.²⁰⁵

With this provision the above-mentioned problem is solved and the sufficient involvement of minority shareholders in the decision-making process is secured, at least in theory.

4.3.2.1.3 Discrepancy in the rate of participation in the general meeting:

However, it needs to be considered that the majority is not calculated from all votes, but, as explained above, only from the votes cast at the general meeting.

This leads to a significant practical problem. As the majority shareholder is interested in the passing of the resolution he will use the full weight of his shares. At the same time minority shareholders primarily pursue financial goals and are therefore less interested

²⁰¹ Ibid.

²⁰² See Chapter One.

²⁰³ Maume, *supra* note 4, p. 264.

²⁰⁴ FCA LR 5.2.5 as enacted on 1st of July 2005.

²⁰⁵ Financial Conduct Authority. CP 15-28 Quarterly Consultation No.10, September 2015, p. 42. Available at <https://www.fca.org.uk/publication/consultation/cp15-28.pdf> Accessed June 10th 2020.

in taking part in the decision-making process.²⁰⁶ This could translate into a lower degree of involvement and with that into a lower likelihood of participation.

Notably, especially private investors unfamiliar with the stock market may not be aware of the consequences of delisting or may simply assess that the potential influences on their investment are not worth the effort to participate in the general meeting. Additionally, their lack of individual influence may leave them with the feeling that they cannot influence the outcome, and that participating in the general meeting would therefore be futile.²⁰⁷

Some studies have found that in the UK on average only one in a thousand shareholders participates in the annual general meeting.²⁰⁸

If minority shareholders would refrain from voting on the delisting, their influence in the general meeting would be decreased. At the same time the votes of the majority shareholder would in practice account for a larger share of the votes than he should be able to cast. This would further diminished the protection the requirement of the general meeting's approval, passed with a two-tier majority, offers minority shareholders.

Yet, the studies mentioned above only analysed the participation for ordinary annual general meetings. Hence the question whether these observations on the participation of minority shareholders at the annual ordinary general meeting can be applied to the extraordinary general meeting during a delisting as well poses itself.

There are several factors that speak in favour of such an applicability. First of all, some of the arguments mentioned above, for example the feeling on the side of minority shareholders that they lack the weight to influence the outcome of the general meeting, are applicable to the extraordinary general meeting as well. This is especially true in light of the assumption that selling of their shares might be preferable to minority shareholders compared to actively getting involved in the decision-making process.²⁰⁹

With the announcement of the intention to delist towards the shareholders, i.e. the calling of the extraordinary general meeting, minority shareholders might hastily decide to sell their shares without waiting for the resolution of the general meeting on the matter. In this case they would not expect to remain shareholders for much longer, and therefore would not expect the outcome of the general meeting to affect them. Therefore, this may make their participation in the general meeting less likely. Notably, an averagely informed private investor is unlikely to be familiar with these questions, and may even be inclined to sell his shares as a reaction to a decrease in stock prices, fearing a further devaluation. Therefore, this assumption does not stand in contradiction to the findings regarding the possibility of a decrease in share prices immediately after the delisting-announcement.

On the other hand, the extraordinary general meeting, called in order to decide whether or not to delist the company, has a fundamentally different significance than an annual ordinary general meeting. Under LR 5.2.5 para. 1 lit. b the issuer is obligated to issue a circular to all shareholders, in which as per LR 13.3.1 para. 1 both a clear explanation of

²⁰⁶ Solomon, *supra* note 36, p. 742.

²⁰⁷ *Ibid.*

²⁰⁸ Villiers, Charlotte "Chapter 13" in Boyle & Birds' Company Law, edited by John Birds and Anthony Boyle, Jordan Publishing: Bristol, 5th edition 2004, p. 373.

²⁰⁹ Solomon, *supra* note 36, p. 742.

the cause of the circular, as well as of the assorted risk and benefits has to be given. Hence at least in theory the shareholders should be aware of the significance of this particular general meeting, which should translate into a higher rate of participation.

Moreover, due to the requirement of a two-tier majority the influence of minority shareholders is boosted in this matter. This could lessen the likelihood that minority shareholders assess their participation in the general meeting as pointless.

Additionally, through Directive (EU) 2017/828²¹⁰ a number of steps were taken to strengthen the shareholder's rights and facilitating exercising these rights.

Namely in Art. 3c of said directive intermediaries, such as banks, holding stocks on behalf of their customers, were required to enable shareholders to exercise their rights through a third person.

Beyond that under Art. 8 para. 1 Directive 2007/36/EC²¹¹, implemented through Section 360A subsec. 1 Companies Act 2006, shareholders may participate in, and exercise their rights during, general meetings electronically. As this significantly reduces the cost and effort required from shareholders to cast their votes it encourages their participation.²¹²

Therefore, the applicability of the observations regarding the participation of private shareholders made on ordinary general meetings on the extraordinary situation of a delisting-related general meeting seems questionable.

Nonetheless, even if, thanks to the information provided under LR 13.3.1 para. 1 and the recent steps taken by the European legislator to facilitate the exercise of shareholder's rights, minority shareholders participate at a higher rate than usual, it remains likely, that not all shares owned by minority shareholders are voted on.

On the other hand, the majority shareholder is likely to back the delisting and commit all votes he has available.²¹³

Therefore, the first tier of the two-tier majority, the requirement of the approval of at least 75 percent of all votes, only represents a relatively low hurdle. As a result, the protection of minority shareholders largely hinges on the second tier, the necessity of the approval of the majority of the votes cast by independent shareholders.

4.3.2.1.4 Potential gaps in the protection awarded:

Nonetheless and beyond these considerations, the approach to protect minority shareholders by requiring their approval to delisting faces a grave and inherent systemic problem.

²¹⁰ Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

²¹¹ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

²¹² De Luca, Nicola *European Company Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2017, pp. 312 *et seq.*

²¹³ *See* Chapter One.

Through the requirement of the general meeting's approval, issued by a two-tier majority, minority shareholders are not so much protected from the consequences of the delisting as they are enabled to prevent the delisting taking place.

Minority shareholders intend to invest in a certain stock hoping to sell this stock at a later point with a profit.²¹⁴ Compared to this primary financial interest the interest in the membership rights, that owning the stock conveys, is secondary for them. Minority shareholders are typically not interested in exercising control, nor do they have a strategic vision for the company. As such their bond to a certain company is weak, and in general during delisting their interests are best served if they sell their shares and reinvest in another company.²¹⁵

Therefore, protecting their interests in their membership at the expense of their financial interests would be misguided.

This means that the requirement of the general meetings approval, issued by a two-tier majority, in itself does not ideally accommodate the interests of minority shareholders.

Even if they succeed in preventing a delisting, they will remain tied to a company whose majority shareholder has fundamentally different goals than they have. Should the majority shareholder choose not to abandon his plans after failing to attain the general meetings approval under LR 5.2.5 para. 2 the reasonable course of action for the majority shareholder would be to seek to create conditions, in which the minority shareholders are likely to leave the company. To achieve this goal, he could take a number of steps exerting his controlling influence on the company, ranging from reducing dividends or using his large number of shares to push down the stock price to strengthening his majority through an increase of the company's capital. In any event, after successfully fending off a delisting attempt the minority shareholders will find themselves in conflict with the controlling shareholder. This is an undesirable outcome for them in general, and one that, given their primarily financial interests, would be avoidable.

As a result, the membership rights of minority shareholders are protected through the requirement of the general meetings approval, while their financial interests are given insufficient consideration.

Yet, as the delisting can only take place if the majority of the votes cast by independent shareholders are in favour, the parties pursuing a delisting are forced to convince at least a significant part of the minority shareholders of their undertaking.

Through LR 5.2.5 para. 2 no. 1 the minority shareholders are given a de-facto veto, elevating them into a position of power. Where the two-tier majority required by LR 5.2.5 para. 2 no. 1 works as intended, the balance of power between the majority shareholder and the minority shareholder should be levelled. From this position of power, minority shareholders should in theory be able to defend their interests and extract concessions from the parties pursuing the delisting. Whether or not a buy-out offer is made, a grace period set or any other consideration is given to minority shareholders' interests is up entirely to the parties.

²¹⁴ See Chapter One.

²¹⁵ Solomon, *supra* note 36.

In theory through the flexibility it grants the British law offers a very elegant solution, as it reduces the legislator's involvement to a minimum and grants the parties far reaching freedom to defend, further and balance their own interests as they see fit.

In this regard the British approach depends on the minority shareholders practically utilizing the power their involvement under LR 5.2.5 para. 2 no. 1 grants them. While in theory they are put in a position where they can stop the delisting, in practice their ability to utilize their position to protect and further their interests is questionable.

Minority shareholders in general do not pursue strategic goals besides their own financial gain.²¹⁶ This gain materializes itself through an increase in the share's prices over time, which does not require any active participation of the shareholder. As a result, minority shareholders usually are unaccustomed to shareholder activism and lack formal or informal networks that would facilitate coordinated action.

As they are likely to be unfamiliar with such coordinated action they will struggle to coordinate their voting power on the spot. A notable exception to this are professional investors such as hedgefunds who might be more experienced and able to exert influence through shareholder activism.

Without coordination between all minority shareholders however the majority shareholder is free to accommodate only those shareholders whose votes he needs, leaving the others to fend for themselves. As minority shareholders each pursue their individual financial gain they have no incentive to resist such attempts of dividing them by the majority shareholder.

As a result, should a company for example have a majority shareholder of 60 percent, two large minority shareholders of 11 percent each and a larger number of small-time investors accounting for the remaining 18 percent, were the majority shareholder able to strike a deal with the large minority shareholders, under British law the small-time investors were deprived of all protection.

The likelihood of such a scenario is increased by the fact that while some professional investors like funds might be obliged only to invest in listed companies others, particularly those with a high tolerance for risks like hedgefunds, might be open to the prospect of a delisting as the potential for value creation is higher in less tightly controlled unlisted firms.²¹⁷ The situation is further aggravated by the fact that these professional minority shareholders will regularly be more likely to actively seek out a deal with the majority shareholder and the company, while smaller private minority shareholders will be more likely to remain passive, further increasing the odds of an outcome in which they are passed over.

This is especially problematic as these inexperienced small-time private investors are also the group of investors which is least capable of protecting its own interests and therefore most dependent on protection by the legislator.

4.3.2.1.5 The protection awarded in relation to the restrictions imposed:

²¹⁶ Krug, *supra* note 5, p. 89.

²¹⁷ Tuttino *et al*, *supra* note 16, p. 4.

Additionally, the requirement of the general meetings approval, issued by a two-tier majority, leads to another problem regarding the protection granted to the interests of minority shareholders and the restrictions that are correspondingly placed on the company and the majority shareholder.

In this context the requirement of an approving resolution by the general meeting, passed with a two-tier majority, in itself constitutes a barrier. As the majority shareholder is forced to gain the support of at least half of all independent shareholder the usual balance of power is turned upside down. Some minority shareholders are rendered expandable by the two-tier majority prescribed by LR 5.2.5 para. 2 no. 2, while others are elevated into a position of far outsized importance. Should in the above-mentioned example only one large minority shareholder exist instead of two the entire delisting process would de-facto be decided on by him alone. As he only holds a 22 percent share this gives him an undeserved and unjustified influence which he might utilize to extort disproportionate concessions from the majority shareholder and the company.

4.3.2.2 Circular:

The circular stipulated by LR 5.2.5 para. 1 ensures that shareholders are adequately informed, especially with regards to the reasons, potential benefits and potential risks of the delisting. As only a sufficiently informed shareholder will be able to understand the question posed to him and weigh the risks and benefits this is crucial for the requirement of the general meetings approval to be able to function. Additionally, as mentioned above, the information provided by the circular may boost the turnout of minority shareholders, further supporting the effectiveness of the requirement of the general meeting's approval in protecting their interests. Therefore the circular is less of an individual instrument and more of a complement to the requirement of the general meetings approval, aimed at ensuring its effectiveness.

4.3.2.3 Grace period:

A very interesting aspect of the British law is the additional stipulation of a 20-day grace period in LR 5.2.5 para. 1 no. 3. The idea of a grace period is that shareholders are able to sell of their shares as long as they are still listed, and can thus avoid being locked in or suffering financial losses. As shareholders regularly struggle to find a buyer for them soon to be delisted shares other than the majority shareholder this instrument has in practice proven to be ineffective.²¹⁸ This general malady is amplified by the short timeframe of just 20 days. As a result, if this grace period is supposed to grant dissenting shareholders a way out, it is insufficient.

Another aspect under which the grace period may be viewed is the possibility of the influx of new shareholders after the general meeting's resolution. A shareholder who has acquired his shares after the general meetings approval would be subject to the effects of the delisting without the usually mandated involvement. While in general it can be argued, that he has freely subjected himself to this situation by voluntarily acquiring the shares, in the immediate period after the resolution there might be a lack of available information on the resolution. In these cases, the 20-day grace period ensures the necessary dissemination of the relevant information.

²¹⁸ Krug, *supra* note 5, p. 143.

4.3.2.4 Exceptions:

One area where this freedom granted by British law could be universally beneficial are those cases where there is an objective need for delisting, for example to avoid bankruptcy. Here the minority shareholders should be ready to agree to the undertaking without seeking to extract a compromise, hence without the need for lengthy negotiations. Under German law even in those cases a buy-out offer would be required, delaying the delisting and imposing significant costs.

Yet, especially here the practical flaws of the British law become apparent. Should minority shareholders abuse their de-facto veto right or should lengthy negotiations ensue between the parties, the survival of the company would be threatened.

The British legislator himself seems to have reckoned the limitations of his approach in exempting such cases from the requirement of the general meetings approval in LR 5.2.7.

In light of the special circumstances, and the fact that in such circumstances not only the interests of the company itself and its shareholders, but also the company's creditors interests have to be considered, an exception for restructuring measures is a reasonable choice. Yet, the execution chosen by the British legislator is questionable.

The first problem arises out of the fact that in order to be exempted from the requirement of the general meetings approval under LR 5.2.7 the issuer is obliged to notify an RIS, not the FCA. If he however notifies an RIS of the circumstances of his delisting he will attract substantial attention to them, the avoidance of which is likely to be one of the motives of his delisting. Additionally, under LR 5.2.7 para. 3 no. 2 he needs to explain why the continued listing would jeopardize a proposal necessary to ensure his survival. However, if the issuer is in such a dire situation, that his immediate survival is threatened attracting additional attention to this situation and revealing the details and possible risks to the future restructuring proposal might be counterproductive.²¹⁹

4.3.2.5 Judicial review:

While there are no special procedures specifically intended to protect minority shareholders, due to the clarity and relative simplicity of the British law the options for recourse open to minority shareholders have to be considered adequate.

4.4 Conclusion:

While in theory the framework constructed by the British regulator contains some interesting aspects, in light of the considerations detailed above, questions regarding its effectiveness at protecting minority shareholders remain.

²¹⁹ Richter, Johannes *Verschleppte Eröffnung von Insolvenzverfahren: Zur unzulässigen Verlängerung von Insolvenzeröffnungsverfahren unter besonderer Berücksichtigung der Insolvenzgeldvorfinanzierung* (delayed opening of insolvency procedures: on the inadmissible continuation of the opening of insolvency proceedings with special regards to insolvency pre-financing), Tübingen: Mohr-Siebeck, 2018, p. 270.

It could be argued, that these potential gaps in the protection which it affords in practice are a necessary downside of the freedom granted to the parties. This reasoning neglects that under British law, as laid out above, only those shareholders who actively exercise their freedom are granted protection. Therefore, if not all shareholders are equally capable of utilizing the freedom the British law grants them, the protection awarded by British law has to be qualified as insufficient. This is especially true as the gaps in protection do not necessarily result in a less restrictive regulation from the point of view of the company and the majority shareholder.

On the other hand, the British law constitutes a very clear regulation, that sets out easily determinable preconditions and gives no room to disputes, thereby providing a high degree of legal certainty. The non-existence of court rulings and literature on the matter in the UK speaks to this fact.

5 CHAPTER FIVE: COMPARISON

Compared side by side, the German and British legislators have developed very different solutions to the problem. Given these differences, the question of how the regulations they opted for compare to each other and how effective they are at protecting minority shareholders, especially in relation to the restrictions they impose on the issuer and the majority shareholder, poses itself.

5.1 Comparison of the main instruments used:

The most obvious difference between the regulatory system in Germany and in the UK derives from the approach taken towards the problem. The German legislator viewed the problem from the perspective of capital market law and consequently choose a buy-out offer as the main means to protect minority shareholders' interests. The British legislator instead opted to employ company law to this regard, requiring the general meetings approval.

5.1.1 Protection under capital market law or under company law:

The different structure of British company law does render the dogmatic arguments brought against a solution through company law in German literature at least partially invalid.

Nonetheless, the British law still faces the problem that the primary interest of minority shareholders is financial in nature,²²⁰ while their interest in the membership rights the ownership of a certain share conveys is much lower. Of course, minority shareholders do not form a monolithic bloc, and some minority shareholders, especially professional ones, might indeed pursue strategic aims, and therefore might be interested in having their membership rights protected. Yet, these shareholders are more of an exception,²²¹

²²⁰ See Chapter One.

²²¹ See Chapter One.

and crucially are far better positioned to protect their interests through shareholder activism than the average minority shareholder.

Hence, as minority shareholders pursue financial aims and value their share more as a stock, than for the membership rights it conveys, capital market law is both closer to the problem, and therefore concurrently better able to offer an effective remedy.

That is not to say that a solution through company law is inherently incapable of providing the necessary protection to minority shareholders' interests. However, as these interests are financial in nature they are likely only protected as a side effect to the protection of minority shareholders' membership rights.

5.1.2 The instruments in detail:

The approach taken by the British legislator, can be characterized as the attempt to offset the usual power divide between the minority shareholders and the majority shareholder.²²² In theory this creates a situation where the minority shareholders are involved in the decision-making process, enabling them to protect their own interests.

The German law on the other hand sets out very detailed preconditions for the delisting, which leave little to no room for the parties involved to negotiate their own solution. Instead of demanding sufficient approval at the level of the general meeting, thus ensuring the involvement of minority shareholders in the decision-making process, the German legislator has chosen to require a buy-out offer in § 39 para. 2 sentence 3 No. 1 BörsG.

With that minority shareholders are denied any say in the decision-making process and are instead only protected through financial compensation. The aspects of this compensation, namely the price offered in the buy-out offer, are determined according to the law, irrespective of the parties' wishes. Compared to the British approach this represents a much more static solution. As minority shareholders have no say in the decision, their only remedy for an offer they deem insufficient is refusing said offer or take the matter to court. This means they would potentially suffer a decrease in value as well as lose their trading platform and find themselves stuck with their stocks. Given the financial nature of their interests, such a cause of action is likely unappealing to them. Therefore, this constitutes an undesirable outcome. Notably in those cases where the company is undervalued, the German approach will not provide adequate compensation.²²³

In these cases, under British law minority shareholders would be able to leverage the influence, that the necessity of the two-tier majority approval under LR 5.2.5 para. 2 lit. b gives them, to force the majority shareholder or the company to consider such an excess value in a potential offer. However, there are a number of concerns regarding their practical ability to do so,²²⁴ especially if minority shareholders are viewed not individually but as a group.

²²² See Chapter Four.

²²³ See Chapter Three.

²²⁴ See Chapter Four.

Another aspect to be considered is that the German legislator does not view delisting as a structural measure.²²⁵ Therefore, a compensation for the entire value of the share is not intended. While this approach may be criticized as too narrow,²²⁶ given their economic goals and the relationship towards the company whose shares they hold, which is more that of an investor than a shareholder in the sense of a member, this is not entirely unjustified.

Notably, due to the practical constraints the British approach faces, it still offers a much higher level of protection. In particular, the challenges faced by the British approach relate to its ability to grant any form of protection to the financial interests of minority shareholders.²²⁷ On the other hand, the challenges facing the German approach only relate to the question of whether an excess value of the membership against the stock is sufficiently considered, not against the ability of the German approach to protect the financial interests of minority shareholders in general.

One group of minority shareholders for which the freedom granted by British law may be preferable to the strict regulation adopted by the German legislator could be institutional investors. Where these are bound by their own terms and conditions to only invest in listed companies they might value the ability to influence the decision process, and avert the delisting altogether, higher, than the compensation offered under German law.

The same is likely to be true for those investors who pursue long-term strategic goals and are willing and capable to take high risks, for example hedgefunds. Nevertheless, it should be taken into account that these groups are exceptions, and neither their interests nor their capabilities are an accurate representation of the average minority shareholder.

As a result, if the protection offered by each approach is considered in theory, the German approach offers a higher level of protection, notably avoiding similar gaps like those that British law suffers from. Additionally, the protection offered by German law is much better tailored to those areas that are of primary importance to most minority shareholders, i.e. their economic interests and their characteristics, namely their usually passive nature and lack of experience with shareholder activism.

5.1.2.1 The protection awarded in relation to the restrictions imposed:

Even so the interests of minority shareholders do not exist independently, but are connected to, and in conflict with, the interests of the company and the majority shareholder. Therefore, the cost that the protection afforded to minority shareholders imports on the company and the majority shareholder should be considered as well.

From their point of view the necessity of a buy-out offer under § 39 para. 2 no. 1 BörsG can, especially if a notable number of shares is held by minority shareholders, result in said buy-out offer requiring significant funds. This could constitute a significant obstacle. In extreme cases, where neither the majority shareholder nor the company is able to finance a buy-out offer, this hurdle could even be insurmountable.²²⁸ Compared

²²⁵ Beschlussempfehlung und Bericht des Finanzausschusses, *supra* note 121, p. 84.

²²⁶ Gegler, *supra* note 88, p. 276.

²²⁷ See Chapter Four.

²²⁸ Krug, *supra* note 5, p. 146.

to that, obtaining an approving resolution of the general meetings, as demanded in LR 5.2.5 para. 2, para could represent much less of an obstacle.

Still, in this regard two additional aspects besides the costs themselves need to be considered.

First, as far as the buy-out offer is considered, these costs also result in the acquisition of additional shares. As these shares are bought at market prices there is no financial loss for the offeree. This is especially true, if the fact that the company and the majority shareholder will pursue a delisting if they see a long-term financial benefit by cutting the costs associated with the listing is considered.²²⁹

Second, while the costs associated with obtaining an approving resolution of the general meetings, passed with a two-tier majority, as demanded by LR 5.2.5 para. 2 may be lower in general, in those cases where a single minority shareholder holds a de-facto veto they could still be significant. Besides the financial expenditure, the British solution could also prove to be time consuming, as in addition to carrying out the general meeting the company or the majority shareholder would have to secure the necessary majority, which could require complex and lengthy negotiations.

Compared to that the German law offers a relatively fast process.²³⁰

Furthermore, the costs of a delisting under British law are impossible to accurately calculate upfront, as the demands of minority shareholders and the difficulties of securing the necessary majorities will usually not be accurately predictable.

As the costs of a delisting under German law are overwhelmingly attached to the buy-out offer they can be determined beforehand either from the publicly known stock price or, where § 39 para. 3 BörsG makes an exception and instead relies on the company's actual value, from that value, which is likely known to the issuer and the majority shareholder.

A second aspect closely related to the costs is the predictability of the outcome under each approach. Only where the results are reasonably foreseeable potential costs and benefits of such an undertaking can be weighed, and unnecessary costs through stillborn attempts can be avoided. Therefore, from the point of view of the issuer or the majority shareholder the predictability of the likelihood that an attempt to delist the company is extremely important.

Under British law the success of a delisting depends on the votes of the other shareholders, be it because there is no controlling shareholder or because a two-tier majority is required. However, the way the votes will be cast at the general meeting will be almost impossible to predict, especially if there is a large number of uncoordinated small-scale shareholders. On the other hand, while German law lays out detailed conditions to be met, the key condition, the buy-out offer is tied to the stock's price over

²²⁹ Gegler, *supra* note 88, p. 276.

²³⁰ Gegler, *supra* note 88, pp. 277 *et seq.*

the last six months, making not only the potential costs but also the possibility of an unsuccessful attempt much more predictable.

5.1.2.2 Preliminary conclusion:

In light of these considerations the German approach in theory offers much more complete and better fitting protection. While it imposes higher costs on the parties pursuing the delisting from their point of view it may also be preferential as these costs are not necessarily equal to a financial loss and are beyond that predictable. Compared to that under British law the costs might be lower overall, yet neither they nor the probability of success can be accurately predicted.

Therefore, in terms of the protection offered to minority shareholders and their interests, especially if that protection is put in relation to the restrictions it imposes on majority shareholders, the buy-out offer as implemented by the German legislator seems to be the preferable option.

5.1.2.3 The Situation in light of economic realities:

In German literature the general idea of protecting minority shareholders through mandating the general meetings approval has been discussed and criticized widely.²³¹ The aforemade arguments and considerations to some extent reflect this critique. However, where such criticism is brought forward in German literature the economic realities are rarely explicitly considered.

Most likely however, most German authors instinctively take the average shareholder structure in Germany as the basis for their considerations. Should the average British shareholder structure diverge from that basis these criticisms would need to be reconsidered and might possibly even be rendered inaccurate.

Therefore, a final assessment needs to consider the possibility that there are differences in the average shareholder structure between Germany and the UK, which could affect the ability of the instruments chosen by each legislator to protect the interests of minority shareholders.

5.1.2.4 Possible differences:

A possible difference in the typical shareholder structure could be the number of shares that are free-floating. Free-floating shares in general refers to those shares that are not held by a controlling shareholder. While there is no uniform definition of when that is the case, free-floating is commonly assumed, where the shareholder holding the share holds 5 percent or less of all shares.²³² Some authors observe that compared to continental Europe the shareholder composition of companies in the Anglo-American sphere is characterized by a greater number of free-floating shares.²³³

²³¹ Krug, *supra* note 5, pp. 139 *et seq.*

²³² FCA LR 6.14.3 para. 1 lit. 3; Ding, Xiaoya and Ni, Yang and Zhong, Ligang “Free float and market liquidity around the world” *Journal of Empirical Finance* 38 (2016), p. 239.

²³³ Martinez *et al.*, “Reasons for delisting and consequences: A literature review and research agenda”, p. 16; Tuttino *et al.*, “Going dark in Italy. Empirical evidence on last decade”, p. 3.

Yet, from the observation of such a divide between continental Europe and the Anglo-American sphere it cannot be derived with the necessary certainty that such a divide exists as well specifically between Germany and the UK.

There are however a number of indications that such a divide exists between Germany and the UK, as well. For example, studies conducted in 1999 and 2001 found that 90 percent of all companies listed on the London Stock exchange did not have a major shareholder holding a share of 25 or more percent,²³⁴ while 85 percent of all listed German companies were found to have such a shareholder.²³⁵ Additionally at the stage of the Initial Public Offering major shareholders of German companies were found to hold 76 percent of shares compared to just 63 percent for British companies.²³⁶

Furthermore, the British law itself hints at a different structure of shareholders in the UK. Under LR 5.2.1 the FCA may cancel a listing of securities if there are special circumstances that prevent normal trade in them. According to LR 5.2.2 para. 2 such special circumstances exist when the percentage of shares in public hands, i.e. in free-float, falls below 25 percent. The fact that a free-float of less than 25 percent is seen as an extraordinary circumstance justifying the cancellation of the listing against the issuers will speak to the prevalence of free-floating shares in the UK.

In Germany on the other hand, the presence of a majority shareholder is, at least during delistings, to be expected.²³⁷

Lastly, a study conducted between 2003 and 2011 of 3577 German and 6629 British companies found the average percentage of shares in free-float, i.e. held by a shareholder holding 5 percent or less of all shares, to be 63,1 percent in Germany compared to 79,4 percent in the UK.²³⁸

Therefore, the existence of a divergence in the shareholder's structure, i.e. a higher number of free-floating shares in British listed companies compared to German listed companies can safely be assumed.

5.1.2.5 Consequences:

This poses the question how this divergence between the average shareholder composition in German and British companies affects the assessment of the approach chosen by the British legislator. Unlike the German approach, the British approach is connected to the company's shareholder's composition. Therefore, the higher number of

²³⁴ La Porta, Rafael and Lopez-De-Silanes, Florencio and Schleifer, Andrei "Corporate Ownership Around the World" *The Journal of Finance* Vol. LIV No. 2 (1999), pp. 492 *et. seq.*

²³⁵ Becht, Marco and Meyer, Colin "Introduction" in *The Control of Corporate Europe*, ed. Fabrizio Barca and Marco Brecht, Oxford: Oxford University Press, 2002, p. 4.

²³⁶ Goergen, Marc and Renneboog, Luc „Why Are the Levels of Control (So) Different in German and U.K. Companies? Evidence from Initial Public Offerings“ *The Journal of Law, Economics and Organization* vol. 19 (2003), p. 144.

²³⁷ Brellochs, Michael „Der Rückzug von der Börse nach »Frosta«, Rechtsdogmatische Einordnung, Durchführung und Rechtsschutz in zukünftigen Fällen“ (The retreat from the stock market after »Frosta«, dogmatic classification, implementation and legal protection in future cases), *Die Aktiengesellschaft* (2014), p. 645.

²³⁸ Ding, Xiaoya and Ni, Yang and Zhong, Ligang "Free float and market liquidity around the world" *Journal of Empirical Finance* 38 (2016), p. 242.

free-floating shares in British companies could affect the protection it offers minority shareholders.

At first glance a free-float of 79,4 percent may be taken as an indication that the presence of majority shareholder is more of an outlier than the norm.

In cases where there is no majority shareholder the impulse to undertake a delisting would likely come from the company's managers. Here the conflict of interests laid out in Chapter One and with it the question of the protection of minority shareholders in this form does not present itself.

Still, in interpreting these numbers two factors need to be considered:

First, larger companies exhibit a much higher average of free-floating shares, for example the average share of free-floating shares of companies listed in the DAX, as of the 31.12.2013, stood at 81 percent and therefore significantly higher than the 63,1 percent observed for the larger sample during previous studies.²³⁹

As the share of free-floating shares did not increase significantly in subsequent years, standing at 82 percent in 2017,²⁴⁰ respectively 84 percent in 2018,²⁴¹ this divergence cannot be attributed to a sudden increase in the share of free-floating stocks. This in turn means that smaller and medium sized companies will exhibit a somewhat lower share of free-floating shares.

Second, delisting benefits the majority shareholder to a much greater extent than the minority shareholders,²⁴² hence companies with a majority shareholder will be more likely to pursue a delisting on the initiative of said majority shareholder. Additionally, as under British law a two-tier majority is required, companies where due to the presence of a majority shareholder attaining these majorities will be easier, will again be more likely to undertake a delisting.

Therefore, the numbers mentioned above cannot be taken as an indication that the presence of a majority shareholder is an improbable assumption, particularly with

²³⁹ Köhler, Kristin *Investor Relations in Deutschland* (Investor Relations in Germany), Berlin: Springer 2015, p. 141.

²⁴⁰ Ernst & Young Deutschland, *Wem gehört der DAX? Analyse der Aktionärsstruktur der DAX-Unternehmen im Jahr 2017 – Kurzfassung* (Who owns the DAX? Analysis of the shareholders structure of DAX-companies in the year 2017 – short version) April 2018, p. 3.

Available at: http://docs.dpaq.de/13676-ey-wem-gehoert-der-dax_1_.pdf

²⁴¹ Ernst & Young Deutschland, *Wem gehört der DAX? Analyse der Aktionärsstruktur der DAX-Unternehmen im Jahr 2018 – Kurzfassung* (Who owns the DAX? Analysis of the shareholders structure of DAX-companies in the year 2018 – short version) June 2019, p. 3.

Available at: https://assets.ey.com/content/dam/ey-sites/ey-com/de_de/news/2019/06/ey-wem-gehoert-der-dax-2019.pdf?download

²⁴² See Chapter One.

regards to delistings. However, they do indicate that a majority shareholder wielding a supermajority of more than 75 percent is a relatively rare occurrence.

5.1.2.5.1 Influence on the first tier:

Where this is the case, the first tier, the majority of 75 percent of all votes, can indeed work as a barrier and force the majority shareholder to win over at least some of the minority shareholders.

5.1.2.5.2 Influence on the second tier:

Furthermore, if only shares held by shareholders holding no more than 5 percent of all shares are counted as free-floating, the likelihood that a second large minority shareholder besides the majority shareholder exists decreases as well.

This assumption is evidenced by the fact that for two thirds of the 200 largest British listed companies no shareholder holding a share larger than ten percent is present,²⁴³ while on average the five largest shareholders hold an average combined share of between 25 and 30 percent of all shares.²⁴⁴

This may be the most influential change, as it deprives the majority shareholder of the possibility of cooperating with just one or two minority shareholders while ignoring the remainder. Instead, the majority shareholders will, at least in most cases, find himself in a position where he is forced to construct a broad coalition with other shareholders to attain the necessary majorities at the general meeting and reach his goal.

The same is true for the second tier. If the majority shareholder cannot rely on only one or two larger minority shareholders, as in the examples provided above, he is forced to rely on a broad coalition of minority shareholders instead. As a result, it would become much harder and costlier for him to accommodate only the particular interests of the members of this coalition. Faced with such high costs, and the difficulty of assembling a larger coalition, he would likely result to attempt to bring as many minority shareholders on board as possible by accommodating the interests of minority shareholders in general.

5.1.2.5.3 Effectiveness in the average case:

Thus, where the composition of shareholders does not deviate from the average the criticism of the British solution laid out above would in practice not be relevant. In these cases, the British solution could fully develop its strengths, namely the freedom it gives to the parties and its flexibility.

Where a clear benefit for delisting is given, for example where further capitalization is no longer needed, and the company suffers from the costs associated with the listing, the majority shareholder should find it easy to convince minority shareholders of his plans. Here a delisting could be carried out quickly and, especially compared to the German buy-out offer, cheaply. Where the situation is not that clear the majority shareholder will have to convince minority shareholders to support him, either by bringing forward convincing arguments or by incentivizing them, for example by promising to increasing

²⁴³ Yavasi, Mahmut „Shareholding and board structures of German and U.k. companies” *The Company Lawyer* vol. 22 (2000), p. 50.

²⁴⁴ Ferran, Eilis, *Company Law and Corporate Finance*, Oxford: Oxford University Press, 1999, p. 261.

future dividends. Notably, one possibility for the majority shareholder to attain a sufficient majority would be to make a buy-out offer.

As a result, at least for those companies where shares are distributed relatively equally between shareholders, which as laid out above can be assumed for the average British listed company, the requirement of a two-tier majority should provide adequate protection for minority shareholders, while offering the benefit of being much more flexible and adaptive than the buy-out offer implemented by the German legislator.

5.1.2.5.4 Effectiveness in non-average cases:

However, the higher average percentage of free-floating shares observed for British companies is only an average number.

Even if it implies that situations, where in addition to a majority shareholder, one or two large minority shareholders are present might be less likely it by no means can be interpreted as rendering such constellations entirely improbable.

The British law therefore has to be seen as a trade-off: it offers flexibility and adaptability for most cases, while in those cases where the shareholder's composition diverges from the average it only offers incomplete protection and may fail entirely.²⁴⁵

The German approach on the other hand offers a steady level of protection, which comes at the cost of a very inflexible regulation, that offers almost no consideration to the individual circumstances.

5.1.2.6 Comparison in light of these considerations:

Consequentially, the question that poses itself is whether the advantages the British approach offers are able to outweigh or at least counterbalance its drawbacks.

From the point of view of the majority shareholder the mandatory buy-out offer under German law means that any delisting entails significant costs. Therefore, unless a large minority shareholder holds a de-facto veto, like in the examples provided in Chapter Four, and can thus extort an undue compensation for his votes, from his point of view this might well be the case.

For the minority shareholder however, the situation is different. As the overwhelming majority of minority shareholders pursues purely financial goals, for which they are dependent on the stock market as a trading platform, a buy-out offer, that compensates them for the value of their stocks, will be a well-fitting remedy.

While there may be some minority shareholders, particularly those with experience on the stock market and a high tolerance for risks, that could benefit from the freedom the British law offers, for most minority shareholders, as they pursue the single uniform aim of generating a profit through their investment, the flexibility and adaptability of British law will be of little benefit.

²⁴⁵ See Chapter Four.

Additionally, as it is up to the shareholder whether he accepts the buy-out offer under § 39 BörsG, those who have no interest in leaving the company, for example because they believe that the share's value exceeds the price offered for their stocks, are able to remain, while for all others a relatively convenient exit is secured.

As for the lack of flexibility, this drawback is most relevant where the company is no longer capable of sustaining the costs of the listing and the majority shareholder is unable to finance a buy-out offer. However, these cases could also be dealt with through an exception.

5.1.3 Conclusion:

In conclusion, although the British solution, the requirement of the general meetings approval passed with a two-tier majority, might deliver a satisfactory result in most cases, in the remaining cases it suffers from substantial gaps in the protection it offers. At the same time, it is questionable whether the advantages of the British solution justify this drawback. Compared to that the much more detailed and less flexible German law ensures the protection of the interests of minority shareholders at a steady level. Hence even with the divergences in the average shareholder composition between Germany and the UK considered, under the aspect of minority shareholders' protection, the German approach remains preferential.

5.2 Comparison of the practical application:

The main drawback of the German solution is a lack of flexibility. However, this drawback might be balanced out in the law's practical application. This practical application differs substantially between Germany and the UK. While in the UK the procedure is carried out centralized through the FCA, in Germany the procedure is carried out through the individual stock markets administrations.

In the UK the FCA centrally maintains the official list, while each stock market individually maintains the admission to trade.²⁴⁶ In Germany the individual stock markets administration holds the competence for both the listing and the admission to trade. Considering this, the divergence in competence is more of a necessary consequence of the listings structure, than a conscious decision by the respective legislators.

However, the divergence in the practical procedure is amplified by the FCAs strict fixation in its decision, which stands in contrast to the discretionary power the German legislator has granted the stock exchanges administrations in their decision.

In theory through the decentralization of the competence under German law and this discretionary power the individual stock exchanges could be put in competition to each other, which might motivate them to extend the protection they grant to investors in order to attract investors.²⁴⁷

Upon closer inspection this possibility seems less likely. First, investors, especially smaller ones, which are especially dependent on protection, are unlikely to consider the

²⁴⁶ Sander, *supra* note 189, pp. 172 *et seq.*

²⁴⁷ Thomale and Walter, *supra* note 68, p. 724.

rules regarding delistings in their choice of stock markets. They will instead look to the traditional quality indicators of stock markets, namely transaction costs and accessibility.²⁴⁸ Companies considering an Initial Public Offering on the other hand are far more likely to calculate the long-term consequences of such a transaction, among them the conditions of a future delisting.²⁴⁹ As a result, stock markets might indeed end up in competition to each other, however not in terms of raising the level of protection to attract investors, but in lowering the level of protection in order to attract Initial Public Offerings.

While delistings would be relatively rare occurrences at all but the largest stock markets, not justifying employing dedicated personnel, a central authority handling all delistings could collect both expertise and experience on the matter, decreasing the likelihood for errors in the application of the law and therefore increasing legal certainty. Therefore, referring all delistings to a single centralized authority is preferable. Under these aspects the German legislator has decided to transfer the check of the buy-out offer to the BaFin.²⁵⁰

Besides removing the central instrument of § 39 BörsG from the stock markets administrations competence, the German legislator has constructed a very detailed regulation, which leaves little room for the stock markets administrations to exercise their discretionary power. The notable exception being their ability under § 39 para. 5 sentence 2 BörsG to determine the date on which the delisting takes effect.

Therefore, the lack of flexibility from which the German solution suffers is not remedied in the practical application of the German law.

Hence, especially if the very different structure of the listing in Germany and in the UK is considered, there are surprising parallels in both German and British law in regards to the competence for overseeing the delisting process.

These parallels are likely due to the need to ensure a uniform and predictable application of the law, as well as to prevent a competition between stock markets, which could harm the protection investors are granted in practice.

5.3 Comparison of the exceptions:

Another aspect related to the ability of each approach to accommodate extraordinary circumstances are the exceptions built into each law.

5.3.1 The transfer of the listing to a foreign stock market:

Under § 39 para. 2 no. 2 BörsG the buy-out offer is not required if the stock will continue to be traded on a domestic stock market or a stock market in the EEA and if equal requirements exists on that market.

²⁴⁸ Lüdecke, Torsten, *Struktur und Qualität von Finanzmärkten* (Structure and quality of financial markets), Wiesbaden: Deutscher Universitätsverlag, 1996, p. 17.

²⁴⁹ v. Berg, Catharina, *Der Marktrückzug des Emittenten* (The issuers retreat from the market), Tübingen: Mohr-Siebeck, 2018, p. 2.

²⁵⁰ Zimmer and v. Imhoff, *supra* note 88, p. 1057.

In light of the trend of the continuing harmonization of capital market law in Europe the level of protection awarded to shareholders is likely to be similar on these markets,²⁵¹ which, especially under the aspect of the single unified European market, renders this exception a sensible, if through the demand of an equal requirement currently practically irrelevant option.

Yet simply removing this requirement cannot be the solution, as this would open the doors for evasive manoeuvres, eroding the protection granted to minority shareholders. Notably British law contained a similar exception in LR 5.2.6,²⁵² although without the requirement for equal protection, which was abolished in 2010.

5.3.2 Restructuring measures:

Even though theoretically the flexibility of the British law should allow for a quick and easy answer to cases where restructuring measures necessitate delisting the British legislator has decided to include a special exception from the necessity of the general meetings approval in such cases in LR 5.2.7.

Especially in these cases the costs associated with the mandatory buy-out offer under § 39 BörsG are especially problematic, as in such a situation the majority shareholder might be hesitant to invest his capital in additional shares, while the company itself lacks the funds needed for the buy-out offer. Notably, in these cases the success of the delisting is in the interest of the minority shareholders as well. Nonetheless under German law even in those cases a buy-out offer would be required, delaying or possibly even preventing the delisting altogether. This may represent one of the most serious downsides of the German law when compared to the British law. This downside is especially concerning due to the fact that restructuring measures are one of the reasons for delisting.²⁵³

5.4 Comparison of the timeframe:

Interestingly both legislators have included some form of restriction regarding the time of entry into force of the delisting.

Under LR 5.2.5 para. 1 lit. b the delisting may not take effect within two weeks after the passing of the general meeting's resolution. As outlined above this ensures that the information is disseminated on the market before the delisting takes effect. Besides from that the date is determined by the issuer himself.

Under German law on the other hand the date is determined by the relevant stock exchanges administration and may be up to two years in the future. This provides an added layer of protection as it allows the stock markets administration to enable shareholders to adjust to the imminent delisting where such adjustments are necessary due to the circumstances.

5.5 Comparison of the possibilities for judicial review:

²⁵¹ See Chapter Three.

²⁵² LR 5.2.6, as enacted on 06.08.2007

²⁵³ Pfüller and Anders, *supra* note 12, p. 462.

While German law envisages a special procedure for judicial review British law does not. Nonetheless, as the British regulation is far clearer and provides no point so prepositioned to dispute like the price of the buy-out offer, this cannot be taken as an indication that there is a lack of protection in this regard under British law.

5.6 Conclusion:

The British law, while it offers more freedom to the parties, and is more readily able to adapt to extraordinary circumstances, such as an excess of the share's value over the stock price or restructuring measures, suffers from gaps in the protection it offers. While the significance of these gaps is reduced when the average shareholder structure in the UK is considered, they are not fully eliminated. The German law, while much stricter and less flexible, offers a continuous level of protection in all situations, and therefore represents the preferable option, at least as far as the protection of minority shareholders is concerned.

As the German law, while offering a greater degree of predictability, results in higher costs, from the perspective of the majority shareholder and the issuer the preference is less clear, and will depend on the individual situation. Still, in this regard the higher protection awarded to the minority shareholders by German law does not result in prohibitive restrictions on the issuer and the majority shareholder.

An additional increase in the divergence of the level of protection of minority shareholders' interests granted by each law results from the, albeit small, discretionary power the administrations of German stock exchanges wield.

A notable shortcoming of the German law reveals itself when the exceptions are compared. While British law has recognized the special needs arising out of restructuring measures the German legislator, whose solution is especially ill fitted to these situations, has failed to do so.

Therefore, in conclusion, when compared, the British laws flexibility renders it a more versatile solution, which however only functions properly, where the shareholder's composition is close to or equal to the British average. On the other hand, the German law offers a higher, and crucially better fitting, protection for minority shareholders.

CONCLUSION:

In summary, the main reason for delisting from the point of view of the issuer are the significant expenditures related to maintaining the listing, notably stemming from duties to report and disclose information. For the majority shareholder, as he bears the brunt of these costs, while not benefiting from the listing as much as minority shareholders, these motives are true as well. In addition, for him the possibility to strengthen his control of the company, and a possible undervaluation of the stocks on the market compared to their real value may also be relevant motives. From the point of view of the minority shareholder, although there may be situations where there is a common interest of all shareholders in delisting, such as for the purpose of allowing restructuring measures, the risks will usually outweigh the benefits. While the indications for a loss of value due to the delisting-announcement are less clear, the main concern here will be

the loss of the main trading platform. This loss directly impacts the ability of minority shareholders to reach their primary goal, to generate a profit through their investment. Therefore, delisting threatens to frustrate the entire reasoning of the minority shareholder's presence on the stock market.

Hence delisting represents a conflict of interests between the issuer and the majority shareholder and the minority shareholder on the other side.

Notably, the subsequent question, to what degree minority shareholders can and must be protected has not been regulated by the European Union and remains therefore for the individual national legislator to decide. While regulations governing delistings theoretically touch upon Art. 63 para. 1 TFEU, as possible restriction would be justified due the need for minority shareholder's protection, this does not result in practical boundaries for the national legislator.

The German legislator has chosen to protect minority shareholders by mandating a buy-out offer be made prior to the delisting. The buy-out offer, as implemented in § 39 BörsG, offers a fitting remedy for minority shareholders, as it perfectly accommodates the economic nature of their interests. Yet, from the point of view of the issuer and the majority shareholder it causes significant costs and may not always be feasible, especially when the company is threatened by bankruptcy.

The requirement of the general-meetings approval, chosen by the British legislator to protect minority shareholders, on the other hand focuses more on minority shareholders' membership rights and only offers protection for his economic interests as a reflex. Additionally, there are some indications that minority shareholders are less likely to participate in general meetings, further drawing into question the effectiveness of the British approach. However, as there so far has been no research considering the special circumstances of delisting, a final assessment of this argument would require additional research. Notably in some constellations a significant number of minority shareholders might be cast aside and left unable to influence the decision-making process.

When both solutions are compared with regards to the protection they offer minority shareholders the flaws of the British approach become even clearer. It does offer the parties more freedom, and therefore is better able to adapt to the individual circumstances, especially in cases involving an undervaluation of the stocks by the market or restructuring measures. Yet, as minority shareholders in general pursue a single and uniform goal, to generate a profit from their investment these advantages will regularly be of little interest to most of them. Although the German approach lacks the flexibility and adaptability of the British approach, it avoids the gaps in the protection from which the British approach suffers. As it offers a higher, and notably steady, degree of protection it is preferable under the aspect of the protection of minority shareholders. Even when the costs it imparts on the issuer and the majority shareholder are considered this conclusion stands, as these costs are justified. If besides these theoretical legal arguments, the factual situation on each market, i.e. the average composition of shareholders of listed firms, is considered, these imbalances in the protection offered to minority shareholders is somewhat less pressing. In this regard a substantial divergence exists, with a much higher degree of free-floating shares in the UK. As a result, the criticism of the British approach is somewhat blunted, as due to the higher level of free-floating shares the problems arising out of the de-facto veto a large minority shareholder would hold are less likely to become practically relevant.

Therefore, British approach in practice will likely deliver satisfactory results in most cases.

Another aspect, that becomes clear during the comparison of the German and British law is the lack of an exception from the buy-out offer for restructuring measures in German law, which is especially troubling given the high costs and low flexibility that characterize the German law from the issuers and the majority shareholders point of view. Nonetheless, as even when the factual circumstances and their divergence between Germany and the UK are considered, situations where the British approach awards only insufficient protection remain, although less likely, still possible, the German solution still presents itself as preferable under the aspect of minority shareholders' protection.

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