



RIGA  
GRADUATE  
SCHOOL OF  
LAW

David Sandner

THE PROTECTION OF MINORITY  
SHAREHOLDERS DURING DELISTING  
IN GERMANY AND IN THE U.K.

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This publication is based on a distinction-awarded Master's thesis.

## **Abstract**

The article seeks to compare the protection of minority shareholders during delisting in Germany and the U.K.. Delisting refers to a publicly traded company leaving the stock market. In order to compare the protection afforded by the relevant legislator the article 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 article then compares the approach taken towards the problem and the instruments utilized by both legislators. Here the article finds that the German law represents a stricter and inflexible solution, while the British law grants the parties far reaching freedom. The article finds that German law in theory offers a higher level of protection. The article then considers the different shareholder structure in the U.K., 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 article concludes that regarding the protection of minority shareholders the German law is preferable.

**Key words:** delisting, protection of minority shareholders, shareholders rights, conflict of interests during delisting, Germany, United Kingdom

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## **INTRODUCTION:**

Delisting refers to the process of a company listed on a stock market leaving said market. This constitutes a major shift both in economic as well as in legal terms. It carries distinct benefits and disadvantages, which affect the interests of the company itself and its shareholders. As some reap benefits while others bear the disadvantages, delisting could also be characterized as a conflict between the interest of the parties involved. 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.<sup>1</sup>

This article aims to compare the protection awarded to minority shareholders during delisting in Germany and the U.K. For the purpose of this comparison, the article 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.

### **1 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.

#### **1.1 Reasons:**

##### **1.1.1 For the company:**

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. In general, a company will decide to delist if the benefits of the continued listing are outweighed by the costs of said listing.<sup>2</sup>

One major factor contributing to the cost of the listing is the obligations the listing entails, namely duties to report and disclose certain information.<sup>3</sup>

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<sup>1</sup> Kirsten Krug, *Der Rückzug von der Börse -Widerstreitende Interessen von Groß- und Minderheitsaktionären beim Delisting* (The retreat from the stock market – Conflicting interests of minority and majority shareholders during delisting) (Baden-Baden: Nomos 2019), p. 87.

<sup>2</sup> Krug, *supra* note 1, p. 96; Isabell Martinez, Stephanie Serve, Constant Djama, "Reasons for delisting and consequences: A literature review and research agenda", p. 3. Available at <http://ssrn.com/abstract=2591449> Accessed 10 April 2021.

<sup>3</sup> Markus Pfüller and Dietmar Anders, "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; Susanne Walz, „§ 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; Timo Holzborn and Christian Hilpert, „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

Another component of a company's decision to delist, is the benefits that the listing brings the company. If these are no longer sufficient 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 cash flow.<sup>4</sup> 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.<sup>5</sup> Similarly, the ability to attract investors for a Public Offering requires certain visibility, which is dependent on the coverage of the company by relevant analysts.<sup>6</sup> Therefore, if the company lacks sufficient coverage it may not be able to efficiently attract investors on the stock market.<sup>7</sup> On the contrary, 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.<sup>8</sup>

Equally related to the listing is the question of control over the company. While a company bears the above-mentioned costs, it is also subject to a certain scrutiny from the capital market. 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.<sup>9</sup>

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.<sup>10</sup> In order to prevent such an attempt, a company may decide to remove its shares from the open market, thereby limiting the sale of shares to individual public offerings.<sup>11</sup>

Lastly according to some authors delisting may be employed as a remedy to interagency conflicts.<sup>12</sup> For companies with a diffuse ownership structure, there can

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delisting – an effective possibility for SMEs to decrease costs?), *Zeitschrift für Wirtschafts- und Bankrecht* (2010), p. 1347.

<sup>4</sup> Walz, „§ 50 Going Private – Rückzug von der Börse“, recital 12.

<sup>5</sup> Markus Pfüller 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.

<sup>6</sup> *Ibid.*

<sup>7</sup> Isabell Martinez and Stephanie Serve, and Constant Djama, “Reasons for delisting and consequences: A literature review and research agenda”, p. 7. Available at <http://ssrn.com/abstract=2591449> Accessed 10 April 2021.

<sup>8</sup> Philip Maume, “The Parting of the Ways: Delisting Under German and UK Law” *European Business Organization Law Review* (2015), p. 258; M. Tuttino and I.C. Panetta and E. Laghi, “Going dark in Italy. Empirical evidence on last decade”, p. 4. Available at <http://ssrn.com/abstract=2179058> Accessed 10 April 2021.

<sup>9</sup> Walz, „§ 50 Going Private – Rückzug von der Börse“, recital 12; Pfüller and Anders “Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen”, *Neue Zeitschrift für Gesellschaftsrecht* (2003), p. 461.

<sup>10</sup> Pfüller and Anders, *supra* note 5, p. 461.

<sup>11</sup> *Ibid.*

<sup>12</sup> Martinez et al, *supra* note 7, p. 8.

be a separation of control and ownership as the owners are unable to exert effective control, de facto empowering management to exert control.<sup>13</sup>

Delistings, through leveraged buy-outs, provide a possibility to consolidate ownership, thus eliminating or at least alleviate interagency conflicts.<sup>14</sup> This primarily affects U.S. and British companies, as companies' ownership in continental Europe is typically more concentrated.<sup>15</sup>

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.<sup>16</sup>

### **1.1.2 For the majority shareholder:**

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 and will trade outside the stock markets the liquidity of the shares is not a primary concern for him.<sup>17</sup> 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 market's trust in the company, which could decrease stock prices, devaluating his majority share in the company.<sup>18</sup>

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.<sup>19</sup> At the same time, the majority shareholder bears most of the costs of the listing through his majority share.<sup>20</sup>

As delisting impacts the minority shareholder negatively it may be used as a tool to push out minority shareholders and solidify the majority shareholder's control.<sup>21</sup>

### **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, rendering selling off his shares the preferable option.<sup>22</sup>

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<sup>13</sup> Tuttino *et al*, *supra* note 8, p. 7; Martinez *et al*, *supra* note 7, p. 8.

<sup>14</sup> Tuttino *et al*, *supra* note 8, p. 3.

<sup>15</sup> *Ibid*; Martinez *et al*, *supra* note 7, p. 16.

<sup>16</sup> Pfüller and Anders, *supra* note 5, p. 462.

<sup>17</sup> Krug, *supra* note 1, p. 90.

<sup>18</sup> Dieter Zetsche, "Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting", Center for Business and Corporate Law Research Paper 0053/2013, p. 4.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

<sup>21</sup> Zetsche, "Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting", p. 4; Pfüller and Anders, "Delisting-Motive vor dem Hintergrund neuerer Rechtsentwicklungen", p. 462.

<sup>22</sup> Dov Solomon, "The Voice: The Minority Shareholder's Perspective" *Nevada Law Journal*, (2017), pp. 755 *et seq*.

## 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. As mentioned above, a majority shareholder will often be less concerned with the share's liquidity.<sup>23</sup>

This limits the risks of delisting for the majority shareholder.<sup>24</sup> 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.<sup>25</sup>

Due to their smaller, non-controlling share, their influence on the company's decision-making process is, at best, limited.<sup>26</sup> Therefore the economic aspects of their share are of central importance to minority shareholders.<sup>27</sup> Regularly this means that minority shareholders will acquire shares with the intention to sell them at a later point when their price has risen.<sup>28</sup> 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.

### 1.2.1 Prices:

While a large number of studies examining the effects of delisting on the stock price have been conducted these studies have not come to a unanimous conclusion. On the contrary, some studies, mainly conducted in the U.K. and the U.S., discovered positive effects,<sup>29</sup> while others, mainly concluded in Germany, found negative effects.<sup>30</sup>

As delisting eliminates several costs it enables the company to increase its value creation after completion. As a result, an increase in share value might be expected as potential investors could expect a higher return in the future, motivating them to pay a premium on the shares.<sup>31</sup>

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.<sup>32</sup>

These results that seem contrary to each other, can however be explained by a number of factors. First, delisting is not a mass phenomenon. Therefore, studies often

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<sup>23</sup> Krug, *supra* note 1, p. 90.

<sup>24</sup> Krug, *supra* note 1, p. 90.

<sup>25</sup> Krug, *supra* note 1, 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.

<sup>26</sup> Krug, *supra* note 1, p. 88.

<sup>27</sup> *Ibid*, p. 89.

<sup>28</sup> *Ibid*.

<sup>29</sup> Martinez *et al*, *supra* note 7, p. 15.

<sup>30</sup> Walter Bayer and Thomas Hoffmann, „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; Markus Doumet and Peter Limbach, and Erik Theissen, "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.

<sup>31</sup> Martinez *et al*, *supra* note 7, p. 15.

<sup>32</sup> Maume, "The Parting of the Ways: Delisting Under German and UK Law", p. 261.

include a relatively small number of samples, mostly around 30 to 40.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup>

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 U.K.<sup>36</sup>

Considering that event studies, which did not include delistings combined with 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.<sup>37</sup>

### **1.2.2 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 share's liquidity an important characteristic in the minority shareholders' eyes.

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.<sup>38</sup>

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.<sup>39</sup> Beyond the organized stock market there are no comparable alternatives in this regard.<sup>40</sup> Notably, outside the stock market, the shareholder has to find a buyer and negotiate an appropriate price for his shares himself, which increases transaction costs, impacting the minority shareholders' main goal of reaping economic benefits from his shares.<sup>41</sup>

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<sup>33</sup> Krug, *supra* note 1, pp. 63 *et. seq.*

<sup>34</sup> Karami and Schuster, *supra* note 66.

<sup>35</sup> Martinez *et al*, *supra* note 7, p. 16.

<sup>36</sup> *Ibid.*

<sup>37</sup> Krug, *supra* note 1, p. 89.

<sup>38</sup> 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”, p. 261.

<sup>39</sup> Casper, *supra* note 38, p. 134.

<sup>40</sup> *Ibid.*

<sup>41</sup> Krug, *supra* note 1, p. 90.

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.<sup>42</sup>

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.<sup>43</sup>

### **1.2.3 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.<sup>44</sup> 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.<sup>45</sup>

### **1.3 Conclusion:**

With regards to delisting, 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 to increase the potential for value creation, is 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 to utilize them effectively as a means of investment.<sup>46</sup>

## **2 EUROPEAN FRAMEWORK:**

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.<sup>47</sup> Should they choose to regulate the matter there are no restrictions through European Law with regards to the *if* and *how* of delisting.<sup>48</sup>

## **3 GERMANY:**

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<sup>42</sup> Felix Gessler, "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.

<sup>43</sup> Casper, *supra* note 39, p. 117 and p. 135.

<sup>44</sup> Krug, *supra* note 1, p. 92.

<sup>45</sup> *Ibid.*

<sup>46</sup> Lutz Zimmer and Julian v. Imhoff, „Die Neuregelung des Delisting in § 39 BörsG" (The new rules for delisting in § 39 BörsG), *Neue Zeitschrift für Gesellschaftsrecht* (2016), p. 1056.

<sup>47</sup> Krug *supra* note 1, p. 109.

<sup>48</sup> *Ibid.*

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 Current legal framework in Germany:**

#### **3.1.1 § 39 Börsengesetz:**

Voluntary delistings are regulated under paragraphs two to six of § 39 BörsG.

##### **3.1.1.1 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 Law (Aktengesetz - AktG) falls under the sole competence of the issuer's board of directors.<sup>49</sup>

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.<sup>50</sup> Under § 111 para. 4 AktG the articles of association, however, may require the supervisory board's consent.<sup>51</sup>

##### **3.1.1.2 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.<sup>52</sup> In exercising their discretionary power the administration must balance the issuer's and the shareholders' interests.<sup>53</sup>

However, this discretionary power is curbed in both directions. On one hand, the issuer has a right to the cancellation.<sup>54</sup> 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.<sup>55</sup>

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,<sup>56</sup> § 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

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<sup>49</sup> Anna Heidelberg, „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; Wolfgang Groß, *Kapitalmarktrecht* (Capital market law) Muenchen: C.H. Beck, 7<sup>th</sup> edition 2019, § 39 BörsG, recital 24.

<sup>50</sup> Groß, Wolfgang, *Kapitalmarktrecht*, recital 24.

<sup>51</sup> Heidelberg, *supra* note 49.

<sup>52</sup> Krug, *supra* note 1, p. 294.

<sup>53</sup> Groß, *supra* note 50, recital 15.

<sup>54</sup> Christoph Kumpan, „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.

<sup>55</sup> Kumpan, *supra* note 54, recital 6; Heidelberg, *supra* note 49, recital 38.

<sup>56</sup> Kumpan, *supra* note 54, recital 8.

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, 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 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.<sup>57</sup>

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.<sup>58</sup>

Therefore, regarding the *if* of the cancellation the administration's discretionary power is strongly restricted.<sup>59</sup> 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.<sup>60</sup>

### **3.1.1.3 Buy-out offer:**

As § 39 BörsG does not specify who can make the buy-out offer.<sup>61</sup> 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.<sup>62</sup>

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

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

#### **3.1.1.3.2 Characteristics of the offer:**

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

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<sup>57</sup> Kumpan, *supra* note 54, recital 6.

<sup>58</sup> Heidelberg, *supra* note 49, recital 38.

<sup>59</sup> Krug, *supra* note 1, p. 296.

<sup>60</sup> Kumpan, *supra* note 54, p. 297; Krug, *supra* note 1, p. 297.

<sup>61</sup> Hartwin Bungert and Benjamin E. Leyendecker-Langner, „Die Neuregelung des Delisting“ (The new rules for delisting) *Zeitschrift für Wirtschaftsrecht* (2016), p. 50.

<sup>62</sup> *Ibid.*

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.<sup>63</sup> 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.<sup>64</sup>

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.

#### **3.1.1.4 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.

#### **3.1.1.5 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.

#### **3.1.1.6 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.

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<sup>63</sup> Kumpan, *supra* note 54, recital 9.

<sup>64</sup> *Ibid.*

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.<sup>65</sup>

Notably, 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.<sup>66</sup>

#### **3.1.1.7 Entry into force of the cancellation:**

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.

#### **3.1.1.8 Judicial review:**

The cancellation of a listing under § 39 para. 2 BörsG constitutes the performance of a public duty, and therefore is subject to the legal protection available against administrative acts.<sup>67</sup> The initial public offering creates trust, which forms the base of an investor’s decision to acquire a certain share.<sup>68</sup> Therefore § 39 BörsG has to be qualified as a norm with protective effect towards third parties.<sup>69</sup> Hence the individual Investor may initiate administrative procedures against the cancellation.<sup>70</sup>

According to § 39 para. 6 BörsG the cancellation 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,<sup>71</sup> basing their action on § 31 WpÜG and § 39 para. 3 BörsG, which gives the shareholders a claim to the prescribed price.<sup>72</sup>

#### **3.1.2 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.<sup>73</sup>

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<sup>65</sup> Heidelberg, *supra* note 49, recital 17.

<sup>66</sup> *Ibid.*

<sup>67</sup> Groß, *supra* note 50, recital 27.

<sup>68</sup> *Ibid.*, recital 29.

<sup>69</sup> *Ibid.*

<sup>70</sup> Heidelberg, *supra* note 49, recital 40.

<sup>71</sup> Walz, *supra* note 4, recital 25.

<sup>72</sup> Beschlussempfehlung und Bericht des Finanzausschusses, Bundestages-Drucksache. 18/6220 (Voting recommendation and report of the financial committee, German parliament publication 18/6220), p. 86; Bungert and Leyendecker-Langner „Die Neuregelung des Delisting“ *Zeitschrift für Wirtschaftsrecht* (2016), p. 50.

<sup>73</sup> Groß, *supra* note 50, recital 17; Krug, *supra* note 1, pp. 286 *et seq.*; Bungert and Leyendecker-Langner, p. 50.

In practice, the stock markets have adopted by referencing the rules laid out by § 39 para. 2-6 BörsG in their administrative rules.<sup>74</sup>

### **3.2 Analysis of the current German Legal Framework:**

To compare the protection of minority shareholders in Germany and the U.K., 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.

#### **3.2.1 Balancing of interests:**

As evidenced by the interests a stock market's administrations has to consider in making its decision,<sup>75</sup> 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.

#### **3.2.2 Effectiveness of the instruments used:**

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.<sup>76</sup> 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.<sup>77</sup> In light of the specific, financial,<sup>78</sup> interests of minority shareholders this assessment seems reasonable.

##### **3.2.2.1 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, fits the idea of protecting minority shareholders' financial interests.<sup>79</sup>

This poses the question, what constitutes an adequate price and how that price should be determined.<sup>80</sup> If the price of the buy-out offer is too low it can no longer fulfill its function to protect minority shareholders' financial interests. On the other

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<sup>74</sup> Krug, *supra* note 1, p. 285.

<sup>75</sup> Groß, *supra* note 50, recital 15.

<sup>76</sup> Beschlussempfehlung und Bericht des Finanzausschusses, p. 84.

<sup>77</sup> *Ibid.*

<sup>78</sup> See Chapter One.

<sup>79</sup> Krug, *supra* note 1, pp. 144 *et seq.*

<sup>80</sup> *Ibid.*, p. 145.

hand, if the price is too high the buy-out offer shifts the economic calculation that drives the delisting decision,<sup>81</sup> factually becoming a barrier to delistings.<sup>82</sup>

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 would be significantly more costly, impacting the calculus of the issuer, and therefore the main shareholder. Yet, it also offers a more accurate picture of the share's real value.<sup>83</sup>

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 share's real price.<sup>84</sup>

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,<sup>85</sup> and therefore their financial interests, this is the logical and stringent choice.<sup>86</sup>

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, 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 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. Hence, the fact that such excess value is not compensated does not constitute an irredeemable fault. The only remedy to this fault, a valuation based on the company's real value, would impose significant costs on the majority shareholder and the issuer. If these costs are considered, this drawback to the buy-out offer as envisaged by § 39 para. 3 BörsG 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.<sup>87</sup> 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.<sup>88</sup>

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<sup>81</sup> *Ibid*, p. 146.

<sup>82</sup> *Ibid*.

<sup>83</sup> Gegler, *supra* note 42, p. 275

<sup>84</sup> Gegler, *supra* note 42, p. 275.

<sup>85</sup> Beschlussempfehlung Bericht des Finanzausschusses, *supra* note 76.

<sup>86</sup> *Ibid*.

<sup>87</sup> Gegler, *supra* note 42, p. 277.

<sup>88</sup> Bungert and Leyendecker-Langner, *supra* note 61, p. 51.

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.<sup>89</sup>

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,<sup>90</sup> § 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.<sup>91</sup> 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 administrations are relieved of this burden, facilitating an easy and legally certain procedure.<sup>92</sup>

### **3.2.2.2 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.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> 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.

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Beschlussempfehlung Bericht des Finanzausschusses, supra note 76, p. 86.*

<sup>92</sup> *Ibid*; Zimmer and v. Imhoff, *supra* note 46, p. 1057.

<sup>93</sup> Bungert and Leyendecker-Langner, *supra* note 61, p. 52.

<sup>94</sup> Zimmer and v. Imhoff, *supra* note 46.

<sup>95</sup> Bungert and Leyendecker-Langner, *supra* note 61, p. 52.

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.<sup>96</sup> However, in practice such a mandatory buy-out offer fixed according to the rules of the WpÜG is uncommon outside of Germany.<sup>97</sup> This practically prevents the application of § 39 para. 2 sentence 3 No. 2 lit. b BörsG with regards to transfers of listings.<sup>98</sup> It has been argued that this restriction represents a violation of EU Law.<sup>99</sup> In light of the fact that investor protection is a valid justification for restrictions of Art. 63 TFEU, 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.

### **3.2.2.3 Stock markets administrations discretion:**

As detailed above, the discretionary power of the administration 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 noteworthy 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.<sup>100</sup>

### **3.2.3 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 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.

## **4 U.K.:**

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

### **4.1 Current legal framework in the U.K.:**

The cancellation of a listing at the issuer's request in the U.K. is governed by LR 5.2.4.

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<sup>96</sup> Oliver Klepsch and Michael Hippeli, "Update Delisting", *Recht der Finanzinstrumente* (2016), p. 195.

<sup>97</sup> Heidelberg, *supra* note 49, recital 17.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Heidelberg, *supra* note 49, recital 15.

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 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 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.

#### **4.1.1 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 to LR 5.3.3 this date may not be within 24 hours of the request being formulated.

#### **4.1.2 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 LR 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.

#### **4.1.3 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.

Additionally, 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 at least 30 percent of the votes at the general meeting is to be qualified as a controlling shareholder.<sup>101</sup> On the other hand, all other shareholders are classified as independent shareholders.<sup>102</sup>

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<sup>101</sup> 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 10 June 2021.

<sup>102</sup> *Ibid.*

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.

#### **4.1.4 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 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.<sup>103</sup>

#### **4.1.5 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.

### **4.2 Analysis of the current British framework:**

#### **4.2.1 Balancing of interests:**

When the current British legislation was passed, the declared intention of the Financial Service Authority (FSA)<sup>104</sup> was to increase the protection of investors.<sup>105</sup> 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.<sup>106</sup> All things considered, the British legislator has aimed to strike a balance between the interests of the parties involved.

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<sup>103</sup> FCA Handbook (version as on 2018-07-01). LR 5.2 Cancelling listing.

<sup>104</sup> On the 1<sup>st</sup> of April 2013 the FSA was replaced by the FCA, which took over all powers and responsibilities of the FSA.

<sup>105</sup> FSA Consultation Paper 203, *supra* note 187.

<sup>106</sup> 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 10 June 2021.

## **4.2.2 Effectiveness of the instruments used:**

### **4.2.2.1 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.

#### **4.2.2.1.1 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*.<sup>107</sup> Therefore, although the *quoted company* is regulated largely identical to the public company,<sup>108</sup> 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.

#### **4.2.2.1.2 Practical challenges:**

In practical terms, the majority shareholders will almost certainly support the delisting and use its voting power in support of it. Therefore, 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.<sup>109</sup> 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.<sup>110</sup>

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.

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<sup>107</sup> Melanie Döge and Stefan Jobst, "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.

<sup>108</sup> *Ibid.*

<sup>109</sup> Maume, *supra* note 32, p. 264.

<sup>110</sup> FCA LR 5.2.5 as enacted on 1<sup>st</sup> of July 2005.

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.<sup>111</sup>

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.

#### **4.2.2.1.3 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 in taking part in the decision-making process.<sup>112</sup> 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 feeling that they cannot influence the outcome and that participating in the general meeting would therefore be futile.<sup>113</sup>

Some studies have found that in the U.K. on average only one in a thousand shareholders participates in the annual general meeting.<sup>114</sup> 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 diminish the protection offered by the requirement of the general meeting's approval, passed with a two-tier majority, to 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 their shares might be preferable to minority shareholders compared to actively getting involved in the decision-making

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<sup>111</sup> 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 10 June 2021.

<sup>112</sup> Solomon, *supra* note 22, p. 742.

<sup>113</sup> *Ibid.*

<sup>114</sup> Charlotte Villiers, "Chapter 13" in *Boyle & Birds' Company Law*, edited by John Birds and Anthony Boyle, Jordan Publishing: Bristol, 5th edition 2004, p. 373.

process.<sup>115</sup>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. 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.

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 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, Directive (EU) 2017/828<sup>116</sup> strengthened shareholder's rights. Namely in Art. 3c of said directive intermediaries, 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/EC<sup>117</sup>, 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.<sup>118</sup>

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.

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,

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<sup>115</sup> Solomon, *supra* note 22, p. 742.

<sup>116</sup> 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.

<sup>117</sup> 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.

<sup>118</sup> De Luca, Nicola *European Company Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2017, pp. 312 *et seq.*

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.

#### **4.2.2.1.4 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.

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 from taking place.

Minority shareholders intend to invest in a certain stock hoping to sell this stock at a later point with a profit. 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.<sup>119</sup>

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 meeting's 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. This is an undesirable outcome for them in general, and one that, given their primary financial interest, 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.

The British law 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 theory offering a very elegant solution.

Yet, 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. In

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<sup>119</sup> Solomon, *supra* note 22.

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.<sup>120</sup> 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 is 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 delisting as the potential for value creation is higher in less tightly controlled unlisted firms.<sup>121</sup> 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 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.

#### **4.2.2.1.5 The protection awarded in relation to the restrictions imposed:**

Additionally, the requirement of the general meeting's 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,

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<sup>120</sup> Krug, *supra* note 1, p. 89.

<sup>121</sup> Tuttino *et al*, *supra* note 8, p. 4.

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.

#### **4.2.2.2 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.

#### **4.2.2.3 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. Theoretically this enables shareholders to sell of their shares as long as they are still listed, avoiding being locked in or suffering financial losses. As shareholders regularly struggle to find a buyer for these soon to be delisted shares other than the majority shareholder this instrument has in practice proven to be ineffective.<sup>122</sup> This general malady is amplified by the short timeframe of just 20 days. As a result, as a way put for dissenting shareholders, this grace period 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.

#### **4.2.2.4 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.

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<sup>122</sup> Krug, *supra* note 1, p. 143.

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 meeting's approval under LR 5.2.7 the issuer is obliged to notify a RIS, not the FCA. If he, however, notifies a 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.<sup>123</sup>

### **4.3 Conclusion:**

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 U.K. speaks to this fact.

## **5 COMPARISON:**

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<sup>123</sup> Johannes Richter, *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.

Compared side by side, the German and British legislators have developed very different solutions to the problem.

## **5.1 Comparison of the main instruments used:**

The most obvious difference between the regulatory system in Germany and in the U.K. is 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 meeting's approval.

### **5.1.1 Protection under capital market or 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, 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 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. 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.

Hence minority shareholders are denied any say in the decision-making progress 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. Such a cause of action will be unappealing to them. Notably, in those cases, where the company is undervalued, the German approach will not provide adequate compensation.

In these cases, under British law minority shareholders would be able to leverage the influence, 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 some concerns regarding their practical ability to do so, especially if minority shareholders are viewed not individually but as a group.

Another aspect to be considered is that the German legislator does not view delisting as a structural measure.<sup>124</sup> Therefore, a compensation for the entire value of the share is not intended. While this approach may be criticized as too narrow,<sup>125</sup> 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, it 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. 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

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<sup>124</sup> Beschlussempfehlung und Bericht des Finanzausschusses, *supra* note 76.

<sup>125</sup> Gegler, *supra* note 42, p. 276.

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.<sup>126</sup> Compared to that, obtaining an approving resolution of the general meetings, as demanded in LR 5.2.5 para. 2, could represent 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.<sup>127</sup>

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.<sup>128</sup>

Furthermore, the cost of delisting under British law is impossible to accurately calculate upfront, as the demands of minority shareholders and the difficulties of securing the necessary majorities are usually not be accurately predictable. Under German law, the costs are overwhelmingly attached to the buy-out offer and can be determined beforehand.

Another 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

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<sup>126</sup> Krug, *supra* note 1, p. 146.

<sup>127</sup> Gegler, *supra* note 42, p. 276.

<sup>128</sup> *Ibid*, pp. 277 *et.seq.*

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 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, especially if that protection is put in relation to the restrictions imposed on majority shareholders, the buy-out offer as implemented by the German legislator seems to be preferable.

#### **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.<sup>129</sup> 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 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 this criticism would have 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 U.K..

#### **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 refer 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.<sup>130</sup> Some authors observe that compared to

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<sup>129</sup> Krug, *supra* note 1, pp. 139 *et seq.*

<sup>130</sup> 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.

continental Europe the shareholder composition of companies in the Anglo-American sphere is characterized by a greater number of free-floating shares.<sup>131</sup>

There are several indications that such a divide exists specifically between Germany and the U.K. 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,<sup>132</sup> while 85 percent of all listed German companies were found to have such a shareholder.<sup>133</sup> 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.<sup>134</sup>

Furthermore, the British law itself hints at a different structure of shareholders in the U.K.. 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 U.K..

In Germany on the other hand, the presence of a majority shareholder is, at least during delistings, to be expected.<sup>135</sup>

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 U.K..<sup>136</sup>

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

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<sup>131</sup> Martinez *et al*, *supra* note 7, p. 16; Tuttino *et al*, *supra* note 8, p. 3.

<sup>132</sup> Rafael La Porta and Florencio Lopez-De-Silanes and Andrei Schleifer, "Corporate Ownership Around the World" *The Journal of Finance* Vol. LIV No. 2 (1999), pp. 492 *et. seq.*

<sup>133</sup> Marco Becht and Colin Meyer, "Introduction" in *The Control of Corporate Europe*, ed. Fabrizio Barca and Marco Brecht, Oxford: Oxford University Press, 2002, p. 4.

<sup>134</sup> Marc Goergen and Luc Renneboog, "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.

<sup>135</sup> Michael Brellocks, "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.

<sup>136</sup> Xiaoya Ding and Yang Ni and Ligang Zhong, "Free float and market liquidity around the world" *Journal of Empirical Finance* 38 (2016), p. 242.

of 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 a 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 31.12.2013, stood at 81 percent and therefore significantly higher than the 63,1 percent observed for the larger sample during previous studies.<sup>137</sup>

As the share of free-floating shares did not increase significantly in subsequent years, standing at 82 percent in 2017,<sup>138</sup> respectively 84 percent in 2018,<sup>139</sup> 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, 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 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.

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<sup>137</sup> Kristin Köhler, *Investor Relations in Deutschland* (Investor Relations in Germany), Berlin: Springer 2015, p. 141.

<sup>138</sup> 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](http://docs.dpaq.de/13676-ey-wem-gehoert-der-dax_1.pdf).

<sup>139</sup> 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](https://assets.ey.com/content/dam/ey-sites/ey-com/de_de/news/2019/06/ey-wem-gehoert-der-dax-2019.pdf?download).

### **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 beside 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,<sup>140</sup> while on average the five largest shareholders hold an average combined share of between 25 and 30 percent of all shares.<sup>141</sup>

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 increase 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.

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<sup>140</sup> Mahmut Yavasi, „Shareholding and board structures of German and U.k. companies“ *The Company Lawyer* vol. 22 (2000), p. 50.

<sup>141</sup> Ellis Ferran, *Company Law and Corporate Finance*, Oxford: Oxford University Press, 1999, p. 261.

#### **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.

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 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 pursue 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 risk, 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.

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, 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. Hence even with the divergences in the average shareholder composition between Germany and the U.K. 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 U.K.. While in the U.K. the procedure is carried out centralized through the FCA, in Germany the procedure is carried out through the individual stock markets administrations.

In the U.K. the FCA centrally maintains the official list, while each stock market individually maintains the admission to trade.<sup>142</sup> In Germany, the individual stock market's 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 structure of the listing, 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, the decentralization of the competence under German law and this discretionary power would put the individual stock exchanges in competition with each other, which might motivate them to extend the protection they grant to investors in order to attract investors.<sup>143</sup>

Upon closer inspection, this seems less likely.

Investors, especially smaller ones, which are especially dependent on protection, are unlikely to consider the rules regarding delistings in their choice of stock markets. They will instead look to other quality indicators, namely transaction costs and accessibility.<sup>144</sup> 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.<sup>145</sup> As a result, stock markets might indeed end up in competition with each other, however not in terms of raising the level of protection to attract investors, but in lowering the level of protection 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.<sup>146</sup>

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<sup>142</sup> Carl Sander, *Anlegerschutz bei Delisting zwischen Kapitalmarkt- und Gesellschaftsrecht* (Investors protection during delisting between capital market and company law), Berlin: Duncker & Humblot, 2017, pp. 172 *et seq.*

<sup>143</sup> Chris Thomale, and Andreas Walter, „Delisting als Regulierungsaufgabe“ (Delisting as a regulatory task) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2016), 679 728, p. 724.

<sup>144</sup> Torsten Lüdecke, *Struktur und Qualität von Finanzmärkten* (Structure and quality of financial markets), Wiesbaden: Deutscher Universitätsverlag, 1996, p. 17.

<sup>145</sup> Catharina v. Berg, *Der Marktrückzug des Emittenten* (The issuers retreat from the market), Tübingen: Mohr-Siebeck, 2018, p. 2.

<sup>146</sup> Zimmer and v. Imhoff, *supra* note 46, p. 1057.

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 market's 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.

### **5.3 Comparison of the exceptions:**

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

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.<sup>147</sup>

### **5.4 Comparison of the possibilities for judicial review:**

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.

### **5.5 Conclusion:**

In conclusion, when compared, the flexibility of the British law 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.

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<sup>147</sup> Pfüller and Anders, *supra* note 5, p. 462.

## **CONCLUSION:**

In summary, the main reason for delisting from the point of view the majority shareholder are the significant expenditures related to maintaining the listing, notably stemming from duties to report and disclose information. From the point of view of the minority shareholder, the risks will usually outweigh the benefits. 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.

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, so far no research has considered the special circumstances of delisting, so that a final assessment of this argument would require additional research. Notably, in some constellations, some 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 are somewhat less pressing. In this regard, a substantial divergence exists, with a much higher degree of free-floating shares in the U.K..

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, the 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 U.K. 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.