

**VOLUNTARY DELISTING AND
SHAREHOLDER PROTECTION FROM A
CORPORATE LAW PERSPECTIVE**

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Voluntary Delisting and Shareholder Protection from a Corporate Law Perspective

Abstract

While a delisting of its securities can be in the interest of the company, it is not necessarily in the interest of all corporate incumbents. Especially for small and minority shareholders the decision to leave the stock exchange can be detrimental. This paper focuses on the position of minority shareholders in a voluntary delisting transaction of a company listed on a main or regulated market. Depending on the jurisdiction, the board of directors, the general meeting of shareholders, a supermajority shareholder, promotor or acquiror and a market operator or supervisor are involved in the delisting process. The (in)voluntary exit of the minority shareholders and the consideration of the compensation for the transfer of the shares is discussed. The paper finds that balancing the interests of all parties involved in a voluntary delisting decision cannot be achieved by one harmonized approach and minority shareholders do not always receive an appropriate compensation when the company delists.

The author welcomes your comments at Christoph.vanderelst@ugent.be.

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I. Introduction

Companies often use the stock market to finance their activities, reduce their debt, transform their growth trajectory, offer exit opportunities for founders or other incumbent shareholders, thrust the company into the public spotlight and increase the credibility due to the pre-IPO screening.

However, not all initial public offerings end up being successful. Furthermore, the regulatory requirements of a stock exchange listing are burdensome and costly, and the market pressure for short-term results can be difficult to align with the company's strategy. In addition, the liquidity of the trading in the shares may be low, reducing the interest of market participants and putting the company in a negative light. In short, the interest in the securities of the stock exchange listed company can make it necessary to consider delisting. While the rules and procedures for listing are abundant, those for delisting are often not so clear, if they exist at all.

While a delisting of its securities can be in the interest of the company, it is not necessarily in the interest of all corporate incumbents. Especially for small and minority shareholders the decision to leave the stock exchange can be detrimental and mean 'the final nail in the coffin for a stock'¹. For example, in an older study of Sanger and Peterson the stock price drop on the day of the delisting announcement is approximately 8.5 per cent.² After the going private transaction, the shareholders are tied to the company and only have few options to transfer their shares. Shareholders are deprived of an easy exit mechanism at a market price and have to search for a purchaser that values the shares appropriately, which can be quite cumbersome, if possible at all.

Regulators all over the world have different levels of interest in the specific problems that delisting gives rise to, resulting in procedures for delisting transactions that are laid down in different regulatory frameworks in different jurisdictions. Those regulations are confronted with many different questions. First, while there is minor discussion whether a delisting should be facilitated, it is more debated which conditions should be complied with before a delisting can become effective and which corporate parties should be involved in the delisting process, especially for the protection of the (small) shareholders. The company is

¹ J Khort, 'Protection of investors in voluntary delisting on the U.S. stock market' (2014) *Uppsala Faculty of Law Working Paper 4/2014* 4. Note that although this study focuses on the US, it provides a detailed overview of a number of specific delisting issues in 25 jurisdictions, including many jurisdictions covered in this chapter, including Australia, France, Germany, Hong Kong, India, Italy, the Netherlands, Spain, Sweden, the UK and the US.

² GC Sanger and JD Peterson, 'An Empirical Analysis of Common Stock Delistings' (1990) 25 *The Journal of Financial and Quantitative Analysis* 261. Note that this study is about involuntary delistings. Economic literature points at significant shareholder gains for voluntary delistings, but these studies envisage the delisting that takes place after another transaction like a buy-out or freeze-out. For an overview see I Martinez and S Serve, 'Reasons for Delisting and Consequences: A Literature Review and Research Agenda' (2017) 31 *Journal of Economic Surveys* 740.



being run by a corporate body, commonly a board of directors, while the persons affected by the delisting are primarily the holders of the securities, although many others, like bondholders or employees can be influenced, too. Second, in addition to these corporate incumbents, there is also the market operator that monitors the market for securities trading, which is often a listed company itself, setting specific standards for its listed customers as well as a market supervisory agency. Do these parties have to be involved and if so, which interests do they have to consider?

In this chapter I focus on the position of minority shareholders in a voluntary delisting transaction of a company listed on a main or regulated market in a number of European Member States. 'Voluntary' indicates that the company takes the decision or agrees with the initiative to delist its securities with voting rights from the trading activities of the stock exchange, considering that some corporate incumbents do not necessarily support this delisting. I emphasise the delisting procedure largely from a company law perspective as other chapters address it from other legal angles. However, the structure of the acts on company law differs substantially between jurisdictions, obliging us to take into account other laws and rules for functional approach reasons. For example, the UK Companies Act does not address delisting of the securities of the company, but the rules can be found in the FCA Listing Rules, requiring a shareholders' special resolution, whereas the Companies Act does focus on the squeeze-out mechanism which follows a takeover bid and which is generally considered part of securities law. Moreover, the Euronext Amsterdam Announcement 2004-41 refers to an exit and delisting arrangement, which is further developed in Book 2:92a of the Dutch Civil Code. Also, the Columbian law for the financial sector and the securities market explicitly empowers the general meeting of the company to take the delisting decision.

The chapter is (largely) based on a questionnaire that legal scholars of eleven different European jurisdictions answered in 2023,³ and supplemented with an overview of the delisting processes in five other non-European jurisdictions. The jurisdictions are: Australia, Austria, Colombia, Cyprus, Finland, France, Germany, Greece, Hong Kong, India, Italy, Spain, Sweden, the UK and the US. For the references to the different legislative and regulatory frameworks I refer to the answers to the questions on voluntary delisting.

In the next section I briefly sketch the different scenarios within which a voluntary delisting takes place. I focus on a company that only has one class of securities, shares with voting rights, listed on the regulated or main market of the stock exchange and on the procedural elements including the valuation of the shares in a functional approach. The delisting can be the consequence of a transaction, trigger a transaction or stand alone. In the second section I illuminate which of the scenarios the different jurisdictions provide for. Section three examines the different corporate bodies that are engaged in the voluntary delisting as well as

³ See the Questionnaire.



third parties that can be involved and how this involvement protects the (minority) shareholders. Depending on the jurisdiction, the board of directors, the general meeting of shareholders, a supermajority shareholder, promotor or acquiror and a market operator or supervisor are involved in the delisting process. The (in)voluntary exit of the minority shareholders and the consideration of the compensation for the transfer of the shares is discussed in section four. Section five questions the efficiency of some of the choices in the procedures of voluntary delistings and concludes.

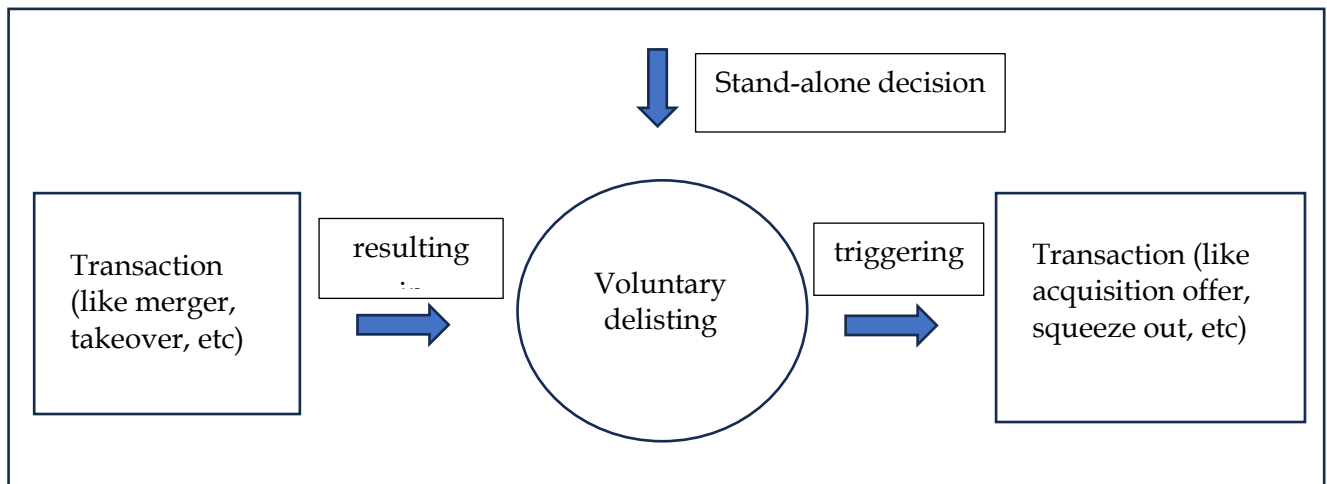
A. Voluntary Delisting Decision in a Transactional Perspective

A decision to voluntarily delist rarely stands alone, although now and then the voluntary delisting is indeed not preceded, accompanied, or followed by any other transaction or decision. Figure 1 presents the common scene in which a voluntary delisting decision takes place. In a large number of jurisdictions, a transaction like a successful takeover or some types of mergers result in the concentration of all (or as good as all) securities in the hands of one party, making the listing of those securities superfluous. In some of these processes, the ensuing delisting of the securities are referred to as a 'cold delisting'. These M&A and takeover transactions are heavily regulated in most jurisdictions, depending on the nature of the transactions, in company or securities laws. The regulatory frameworks within which these transactions take place, offers (more or less) instruments for (minority) shareholders to protect their interests. The delisting of the securities follows the transaction and accompanying protective mechanisms will not be addressed in this chapter.

In a number of jurisdictions, the voluntary delisting of its securities can be taken, independently from any preceding transaction, by the company's board of directors, the general meeting of shareholders or the (supermajority) shareholder(s acting in concert). In some jurisdictions the shareholders (and eventually other parties like the bondholders or creditors) are not offered any specific right when the company takes the decision to delist. It can be considered a stand-alone decision like many others that the company takes. When this decision is taken in compliance with the regulations – there are often specific conditions in the listing rules of the market operator envisaging the interest of the market participants, in particular the investors – there is limited room for the shareholders who disagree with the delisting decision to challenge it, but to exit the company and sell their shares before the delisting becomes effective.



Figure 1: Voluntary delisting in perspective



In a number of other jurisdictions, the regulators of the securities markets, company and/or securities laws provide for additional mechanisms protecting the interests of the shareholders. In those jurisdictions the decision to delist the securities triggers specific mechanisms like an acquisition offer to all or only the opposing shareholders or like squeeze out transactions resulting in the concentration of all securities ‘in one hand’. In the next sections I address the different ways in which the jurisdictions with developed stock exchanges offer protection to the shareholders of companies that take the decision to voluntarily delist, other than through a ‘cold delisting’ or a market migration.

B. The Voluntary Delisting Landscape

While most jurisdictions provide in their current approach for eternal life for companies,⁴ eternity is not expected as all jurisdictions provide for procedures for the (voluntary) liquidation of companies. Commonly, jurisdictions empower the general meeting of shareholders as the competent body to take a decision to dissolve the company. It can be argued that when a company can decide to end its corporate existence as a separate legal entity, it must also be possible to take the less far-reaching decision of delisting its securities from a stock exchange. However, whereas becoming a stock exchange listed company is decided at the company’s level, being exposed to the public is seen in all jurisdictions as a matter that transcends corporate law. Therefore, securities (exchange) law in most jurisdictions addresses issues related to stock exchange listing and also stock exchange delisting. It has a major effect on the procedural issues of a delisting. Contrary to a voluntary liquidation, a delisting is in many and even most jurisdictions not only an exclusive matter of the company itself but made dependent on another corporate action. It offers (minority)

⁴ Some jurisdictions provide for a fixed term. The French legislator determines in art L. 210-2 of the French Commercial Code that the term of a company cannot exceed 99 years.



shareholders protection that goes beyond the corporate law shareholder protection mechanisms.

In *Greece* and *Sweden* securities market law explicitly refers to a voluntary delisting of the securities. The Swedish Securities Market Act states in chapter 15, section 11 that 'Delisting of a financial instrument that has been admitted to trading must also take place at the request of the person at whose request the instrument has been admitted to trading'⁵, but Nasdaq as the market operator can postpone the delisting if it is considered appropriate from the public point of view. The same goes for Greece, but the Hellenic Capital Market Commission, and not the market operator, can set conditions for the delisting of securities.

Most jurisdictions are less explicit in their national securities law but refer for the delisting to the regulatory agency or the stock exchange listing rules. All facilitate delisting, but upon conditions the company (or other parties like a large shareholder or acquiror) must comply. *Cyprus* sets out the conditions for a delisting in a regulatory decision of the Council of the Cyprus Stock Exchange, which was authorised by the securities and Cypriot stock exchange laws. Similarly, the *Finnish* Act on Trading in Financial Instruments empowers the trading venue to set the rules for delisting, hence the Nasdaq providing the conditions in its Main Market Rulebook. This approach is found in non-European jurisdiction as well. The *US* Securities and Exchange Act empowers the Securities and Exchange Commission which, next to setting general standards of compliance with national rules, further refers to the Stock Market Rules. Similarly, although somewhat more complex, the *Australian* Corporations Act provides the stock exchange operator ASX Limited and the supervisory authorities with the powers to regulate delisting (which is especially to be found in chapter 17 of the ASX Listing Rules). In the *UK* The Financial Services and Markets Act 2000 allows the voluntary delisting in accordance with the Financial Conduct Authority Handbook. The company must apply for a delisting to the Financial Conduct Authority.

Other jurisdictions explicitly exclude the right of the company to a purely voluntary delisting, that is unilaterally decided by the company('s competent body). This is the case in *Austria* and *Germany* that combine a company's delisting request with a (preceding mandatory) takeover or a market migration. The Austrian securities law (s 38) further requires certain terms of listing ranging from one to three years depending on the type of preceding action (market migration or takeover). Both jurisdictions explicitly add to these limited options of delisting that a delisting must not contradict with the protection of the investors, signalling that the interests of the shareholders must be considered. In practice, the majority shareholder will take over the company, although it does not exclude other venues, like a hostile takeover bid. The *Spanish* approach is similar but reverses the steps. If the

⁵ The original version of the provision reads: 'Avnotering av ett finansiellt instrument som har tagits upp till handel ska även ske på begäran av den efter vars begäran instrumentet har tagits upp till handel'.



company's general meeting takes the decision to delist the shares from the market, the Spanish securities act (Article 65) obliges the company to promote a public acquisition offer. The *Columbian* Financial Law (Decreto unico 2555) provides in Article 5.2.6.1.3 that a company intending to cancel the registration of its shares in the National Registry of Securities and Issuers and trading on the stock exchange must inform its intention in a notice in two newspapers when and where the general meeting of shareholders will decide on the delisting. The general meeting's decision triggers an acquisition offer.

A similar approach is to be found in *India*. The company cannot voluntarily delist but the Delisting Regulations of the Securities and Exchange Board of India (SEBI) foresee that the acquiror or the promotor of the company can file a delisting procedure.

In two jurisdictions, *France* and the *Netherlands*, the Euronext stock exchange provides for a voluntary delisting procedure. In both countries Euronext Rule Book I gives the authority to the Relevant (local) Euronext Market Undertaking to delist *at the request of the relevant issuer*. In France, the Monetary and Financial Code refers to the removal from trading of a financial instrument in Article L. 420-10, but only by the market operator or by the chairman of the French securities and exchange commission (AMF, Autorité des marchés financiers), a voluntary delisting at the request of the issuer is not being provided for. However, the highest court, the Cour de Cassation rejected the proposition that a delisting on the initiative of the issuer is not possible. The delisting must be decided upon by the market operator, but this does not prevent a company from initiating this process by requesting such a decision to delist. Article L. 433-4 of the same Code empowers the French AMF to determine the procedure for a buy-out offer by a supermajority shareholder, leading to the delisting of the shares. The procedure is to be found in Article 236-1 to 236-7 of the AMF General Regulation. The 2019 Loi PACTE modified Article L. 433-4 of the Monetary and Financial Code substantially. Furthermore, chapter four of Euronext Rule Book II: Specific rules applicable to the French regulated markets, provides in its latest 2019 edition in the delisting procedure that Euronext Paris is the market authority that decides the delisting of the securities of an issuer that requested its delisting. In the Netherlands, the local Euronext Market Undertaking issued next to the general Euronext Rule Book I, already in 2004, Announcement 2004-41 that contains the delisting process, referring to the supermajority shareholder taking the initiative for the delisting, not the company. Case law is very scarce but the validity of this Euronext Amsterdam Announcement was never contested.

Italy is familiar with the absence of a legislative framework for voluntary delisting. The securities law provides in a procedure for market migration and the Civil Code refers to an exit right for certain shareholders upon delisting. There is no explicit provision for a voluntary delisting of the company's securities, which creates legal uncertainty. The delisting based on an issuer's request can be disputed, notwithstanding Euronext Rule Book I. Therefore, in Italian practice alternative schemes are being used which result in ending the conditions for being stock exchange listed.



This overview shows that there is a wide variety of regulations for securities delisting but also that an issuer is seldomly authorised to take a delisting decision unconditionally. In the few European jurisdictions where an issuer is empowered to do so, this commonly triggers a sell-out mechanism for the opposing shareholders. Almost all jurisdictions add requirements to a 'voluntary' delisting of the securities. The requirements may be that delisting is only possible in very specific and explicitly provided circumstances, often involving (some kind of) takeover or migration to another market, or depends on the discretion of the market operator or sometimes the supervisory agency. As the market operator is often itself a private entity, this kind of private ordering is common practice. The discretion of the operator or agency can be flexible, like in Sweden or strict, like in Austria, resulting in a very limited number of acceptable delisting reasons. The conditions could also be that it is not the issuer that decides to delist but an acquiror or promotor, like it is the case in India. Not many jurisdictions disclose the reasons for these limitations to voluntary delisting, but both Germany and Austria point at the interests of the investors (the delisting should not even be allowed when their interests would be violated in the latter countries). In short, when the securities market is involved, companies can seldom act completely autonomously, different from a voluntary liquidation decision.

C. The Actors in a Voluntary Delisting Procedure

When a voluntary delisting is not forbidden, which is seldom the case, the delisting transaction raises the questions as to which corporate body or bodies can initiate and decide on this transaction and which instruments the shareholders are offered or can use to protect their interests.

The previous section showed that the voluntary delisting of the securities of a company is approached differently in the various jurisdictions. The (process of) delisting is either triggered by another event (predominantly a takeover or a related transaction like a merger) or is (sometimes) triggering another event, like a takeover or exit rights for shareholders. A stand-alone delisting process is rarely found in legislative or regulatory frameworks. The event and process resulting in delisting, taking place either before or after the delisting, affect the protection of (minority) shareholders.

In the majority of the cases, a corporate body is involved in the decision to have the company's securities voluntarily delisted from the listing tables. In some jurisdictions it is a shareholder – in the position of an acquiror, promotor, or large shareholder – that is in charge of the delisting (whereby it is questionable whether this can be called a 'voluntary' delisting).

A large number of jurisdictions leave this voluntary delisting decision to the board of directors. This is the case in the US, but also in Australia, Austria, France, Germany, India,



Finland, the Netherlands and Sweden. In the latter three countries, the allocation of the right to decide on a delisting to the board of directors flows from the general company law rule that it is the board of directors that is in charge of the management of the company. There is some uncertainty due to the absence of a specific legal rule or case law of the jurisdictions' supreme courts. In Colombia, Cyprus, Greece, Hong Kong, Italy, Spain and the UK, the (extraordinary) general meeting is in charge of the delisting decision. Like for some countries where there is some uncertainty as to the power of the board of directors for taking this decision to delist, in Italy it is unclear if the (extraordinary) general meeting of shareholders must vote on the delisting.

The dichotomy between the powers of the board of directors and the right of the general meeting of shareholders should not be overemphasised, as a more balanced approach is de facto applied in many jurisdictions.

First, if the board of directors is responsible for the delisting decision, other corporate bodies, and especially the general meeting of shareholders, can also be involved. This is the case in Austria. Section 95(5)(no 15) and section 148(2a) of the Austrian *Aktiengesetz* explicitly engages both the supervisory board and the general meeting of shareholders in the delisting process. The board of directors can only decide a delisting with the approval of the supervisory board and support by a decision of the general meeting of shareholders taken with a 75 per cent majority of the votes. Similarly, in India the shareholders' approval, voting for this special resolution, must be obtained within 45 days after the board's approval according to section 11(1) of the SEBI Delisting Regulation 2021. Note that the board of directors must also appoint a peer review company secretary who must prepare a special due diligence report. The board of directors of Australian companies has to make a request to the ASX Limited stock exchange operator for the removal of the securities from the stock exchange list. In case of voluntary delisting which is not preceded by a successful control transaction, ASX Limited supports the practice that the company obtains the shareholders' approval through a special resolution according to its Guidance Note 33 (section 2.7) whereby the stock exchange can exclude certain shareholders from voting when the delisting is considered to confer benefits to the latter at the expense of the other shareholders including situations whereby some shareholders have an informational advantage over other shareholders after the delisting.

Second, some jurisdictions in which the board of directors must take the decision of the delisting, the board must comply with other requirements. For example, in *India* the board must certify its compliance with all securities laws provisions, that the delisting is in the



interest of the shareholders of the company⁶, and that also the acquiror acts in compliance with the securities laws provisions.

Third, when the board of directors is in charge of the delisting process, it can voluntarily address and engage the shareholders in the general meeting. This was for example the case for Geojunxion. This Dutch company was established in the 1980s as AND and originally developed navigation maps and later apps for signalling alerts (eco-alerts, health alerts and the like). The company had one major customer and three large shareholders holding 31 per cent, 11 per cent and 7 per cent of the shares, the other shareholders owning each less than 3 per cent of the shares. The company was listed on the Amsterdam Euronext stock exchange for more than 20 years and its shares were traded before the financial crisis of 2008 at more than EUR 16 but plummeted thereafter. Since early 2022, its stock price further dropped from EUR 2 to less than EUR 1. Like several other small companies listed on Euronext Amsterdam, the company failed to select and elect an external auditor and at its general meeting of 2022 it requested to authorise the board to elect the external auditor and announced all alternatives if no external auditor could be found of which one option was delisting the company.⁷ The company contacted all six Dutch external audit firms that are licensed to perform the external audit, but none of them accepted this invitation. As there is a mandatory external audit requirement to which the Euronext Rulebook explicitly refers for listed companies, the Euronext market operator is authorised to delist the shares when the company does not have an external auditor, which was during several years the case for Geojunxion. Euronext provided Geojunxion a timeframe for resolving the absence of an external auditor. In May 2023, Euronext informed that the delisting would become effective if no auditor was elected as of 6 November 2023. The absence of an external auditor also qualified as a breach of a bank covenant in a convertible loan agreement. During the annual meeting of 2023 the board of directors informed the shareholders (again) of the different options and the board's preference for a delisting of the shares, which will be the result of the sale of all activities to a third party followed by a liquidation of the company. The shareholders were also provided with a fairness opinion. At an extraordinary meeting attended by 65 per cent of the shares,⁸ this plan was approved with an overwhelming majority of more than 99 per cent for each of the agenda items related to this transaction: the sales transaction, the dissolution and the appointment of the liquidator. The approval rates of the disinterested shareholders, which the company voluntarily presented, were between 98 per cent and 99 per cent. According to the website of Euronext, the company is no longer

⁶ Note that the SEBI rules mention the requirement of an alignment with the interests of the shareholders explicitly.

⁷ GeoJunxion NV, *Presentation to the shareholders at the general meeting* (15 November 2022) available at www.geojunxion.com/wp-content/uploads/GeoJunxion_AGMS-Presentation_15Nov_2022_FINAL.pdf (on file with the author) 32.

⁸ Given the ownership structure of the company, also a number of small shareholders attended the meeting and, if all shareholders attended, could determine the outcome of the votes at the general meeting.



active (listed) since January 2024. Note that in the case of Geojunxion, the voluntary delisting was preferred over the involuntary delisting initiated by the market operator. At least for companies listed on the different Euronext markets (including Amsterdam, Brussels, Dublin, Lisbon, Milan, Paris and Oslo) the voluntary delisting which is combined with a transaction that results in a type of exit (in the case of Geojunxion a liquidation) is not suffering from the 'pure' involuntary delisting by Euronext in accordance with its rules 6905/1 and 6905/2 of Rulebook I which does, although understandable, not provide for any kind of exit route for the shareholders before or after the removal of the securities.

Finally, the governance structure of listed companies in a number of jurisdictions is such that the (executive) board of directors is being monitored by a supervisory board. This is the common case in the *Netherlands*, *Germany* and *Austria*, where in the latter country the law explicitly involves the supervisory board.

Conversely, in all jurisdictions where the general meeting is in charge of the delisting decision, it is the board of directors that is responsible for the organisation (and the agenda) of the general meeting of shareholders, and only if this responsibility is not taken in compliance with the companies acts, jurisdictions will offer alternatives for organising the meeting.⁹

The different organs that are in charge of the delisting decision affect the protection of the shareholders. When the board of directors triggers the delisting, it must take into account the directors' duties to act in the interest of the company, in many jurisdictions embedded in its fiduciary duties, also including the interests of all the shareholders. However, the interest of the company can and will overrule the interest of the minority shareholders when the listing does not offer the appropriate visibility and recognizability, amongst other advantages. An unlisted company (generally) offers minority shareholders less investor protection, disclosure and liquidity, the levels of which depend on the jurisdiction.

When shareholders are involved in the delisting decision, reliance on the responsibility of the directors shifts to the shareholders, holding the reins. In most jurisdictions, shareholders can take their own interest as guidance for their vote of the delisting resolution. However, minority shareholders are not necessarily (better) protected when the general meeting of shareholders holds this delisting decision right.

Some countries apply minimum quorum rights for validly holding a general meeting of shareholders. This is the case in Italy (20 per cent of the share capital with voting rights but the articles of association can opt for another (more stringent) threshold), Spain (25 per cent of the share capital, first call) and Cyprus (three members in person), all offering no real protection for minority shareholders who oppose a delisting, as in all the cases known to us,

⁹ Such as a shareholder's right to convene a meeting or to apply to a court to have a meeting convened.



the company counts in its shareholder base, shareholders owning large and controlling voting blocks. This is different in Hong Kong where, when a delisting is structured in a scheme of arrangement, 75 per cent of the voting rights must be present and in Greece where no quorum exists but a supermajority approval right serves as an important indirect quorum requirement (see next).

Minority shareholders can be better protected when the resolution to delist the (shares of the) company is set very high, which is the case in a number of jurisdictions. This is the case in Hong Kong, Cyprus and Greece. In the latter country, according to Article 17 of Law 3371/2005, more than 95 per cent of the total voting share capital is required for the delisting decision. In the former two countries 90 per cent of the voting securities must approve the scheme (Hong Kong) or resolution (Cyprus). In some other countries large minority shareholder(s) (possibly acting in concert) can vote down the resolution. This is the case in India¹⁰, Austria and the UK where shareholders with 75 per cent of the attending shares with voting rights in the latter two countries and two thirds of the votes in the former country must approve the delisting resolution. The UK FCA Listing rules offer minority shareholders further protection if the company has a controlling shareholder. In the latter case the cancellation of listing must be approved not only by 75 per cent of the attending shares with voting rights but also with a majority of the votes attached to the shares of the independent shareholders. A controlling shareholder is a shareholder who controls more than 30 per cent of the votes to be cast at the general meeting. The UK is the only country that provides this specific kind of veto right for minority shareholders in a voluntary delisting process.¹¹

Like for the quorum requirements, in some countries, like in Columbia, the minority shareholders are not offered any specific protection, as the decision to delist is taken with a regular majority of the votes attending the meeting.¹²

It is relevant to note that in some jurisdictions the decision on voluntary delisting is directly or indirectly taken outside the company. The Netherlands serves as an example. It follows from the Euronext Amsterdam Announcement 2004-41 that a shareholder(s) who hold(s) 95 per cent of (a certain type of) the shares or the depository receipts can request the delisting of this class of securities if the issuer agrees to the delisting. The general Euronext Rulebook does not provide for a request of the supermajority shareholder(s), only of the issuer (or competent authority or Euronext). The Announcement 2004-41 explicitly provides for the issuer's consent¹³, but the initiative for delisting is taken by the supermajority shareholder. The consent of the issuer refers to the involvement of the board of directors of the company.

¹⁰ As well as in Italy, but see *supra* regarding the uncertainties of the delisting procedure.

¹¹ See also the *Geojunxion* case (n 7), where the general meeting minutes disclose the voting results of the disinterested shareholders.

¹² Note that Colombian law offers opposing minority shareholders an exit mechanism.

¹³ With the exception of the delisting request when the shares or depository instruments are also listed on another regulated and liquid market.



In practice, and although this old Announcement 2004-41 does only provide for a delisting started by the issuer in case the company's shares or receipts are listed on another exchange, it is common that the delisting is the result of an acquisition or takeover resulting afterwards in a squeeze-out process and the termination of the listing and the listing agreement, which is approved by Euronext Amsterdam. Hence, the company publicly announces that it addresses the stock exchange to end the listing of its financial instruments, rather than the shareholder who holds more than 95 per cent of those financial instruments. Similarly, in other European Members States it is common that an acquiror or current shareholder launches a takeover bid, which after a successful outcome is followed by a squeeze-out procedure resulting in the delisting of the shares (as the acquisition and squeeze-out results in the presumption of the legal ownership of all shares in the hands of the acquiror and consequently making an end of trading of the shares on the market (and the delisting (or at least the involved class of financial instruments)). Similarly, in India the SEBI Delisting Regulation explicitly refers to the acquiror initiating the delisting: Regulation 8(1) starts with 'On the date when the acquirer(s) decides to voluntarily delist the equity shares of the company, it shall make an initial public announcement to all the stock exchanges'¹⁴. The delisting rules related to the takeover are further discussed in the next chapter.

When the shareholders are empowered to take part in the voluntary delisting process of the company, the resolution thereto can differ in the different jurisdictions. Spain provides a good example. According to Ley 6/2003, Article 65 grants the general meeting of shareholders the approval right for the delisting. Further, the law requires that a takeover offer must be launched – an exit right, see next – and that the meeting must approve the price of the shares. Therefore, the shareholders must be provided with a report that justifies in detail this price. Also, in India where a delisting is initiated by the acquiror, shareholders are explicitly involved in the determination of the price of the shares: 'Public shareholders holding the equity shares of the company, which are sought to be delisted, shall be entitled to participate in the reverse book building process'¹⁵. Also, in Colombia the vote for delisting the company triggers another right or duty. Article 5.2.6.1.3 of the Decreto Unico 2555 of 2010 states that the shareholders that do not take part in the general meeting or vote against the delisting obtain an exit right and the shareholders that vote for the delisting must make the public acquisition offer.

Note that in some jurisdictions the securities of the companies must remain listed for a minimum term after the initial public offering. The Austrian *Börsengesetz* makes a term of at least three years mandatory in case the delisting is initiated with a takeover bid and one year

¹⁴ Reg 8 para 1 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations.

¹⁵ Reg 19 para 1 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations.



in case the shares are traded or will be traded on another regulated market (or an equivalent outside the European Union).¹⁶

D. Delisting and the Financial Position of the (Minority) Shareholders

In a number of countries an exit right of the shareholders resulting from or related with the delisting decision and the consideration of the compensation for the securities flow from another transaction. In Austria the delisting is a result of an offer aiming at the acquisition of all shares admitted to trading and the price must be at least the average stock market price of the securities weighted according to the respective trading volumes of at least five trading days before the intended day of ending the trading of the securities was announced. When this price is obviously below its actual value, the price must be set appropriately. In that case it should be done with the use of other means, like the discounted cash flow-method.

Shareholders can challenge this offer price unless shareholders holding more than 50 per cent of the securities that are subject to the offer have already accepted. Also, the Takeover Commission can apply for a review of the offer price. Similarly, the German delisting follows the request of the management after a takeover to acquire all the securities for which the delisting is requested, has been made. According to section 39(3) of the German *Börsengesetz*, the consideration shall at least be the weighted average domestic stock exchange price during the six months before the announcement of the takeover. There are three exceptions: in case of illiquidity, a violation of the requirement to publish insider information or a violation of the market manipulation rule during the aforementioned six months period. Contrary to Austria, Germany does not provide for any other exception, resulting in the debate whether this list is exhaustive. In India the acquiror will provide an indicative price which must be higher than the floor price for which a reference is being made to the SEBI takeover regulations of the Securities and Exchange Board of India. In that regulation the acquiror must determine this floor price depending on the regime that is applicable. For example it will be the volume weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement of the acquisition or the volume weighted average price paid or payable for acquisitions, whether by the acquiror or by any person acting in concert with him during the 52 weeks immediately preceding the date of the public announcement.¹⁷

Voluntary delistings that are not the consequence of a control transaction (frequently a takeover) but are independent decisions taken by a company organ or a third party (like a supermajority shareholder) question whether and if so under which conditions the shareholder can exit the company. Especially when the decision is taken by the general meeting and the shareholder oppose the delisting which was approved with the appropriate

¹⁶ Section 38, §6 of the Austrian *Börsengesetz*.

¹⁷ See Reg 8 of SEBI's Substantial acquisition of Shares and Takeovers Regulation 2011.



majorities, the shareholder suffers from the reduced liquidity of the trading in the shares of the unlisted company.¹⁸ Therefore a number of jurisdictions offer additional protection rights to the shareholders, like an appraisal or exit right as it was already illustrated in the previous section of this chapter.

In Spain the voluntary delisting is accompanied by an offer of the company to all the holders of shares (as well as subscription right owners and convertible bondholders), except those shareholders that approved the delisting resolution (and immobilised the securities according to Article 10(2) of Real Decreto 1066/2007).¹⁹ The offer price must be approved by the general meeting. This price must be based on different methods: the theoretical accounting value based on the latest financial statements, the net asset value of the company, the weighted average price of the securities during the six months period preceding the announcement of the exclusion proposal, the value of the consideration in a public acquisition offer that has been made in the year preceding the date of the exclusion request, other valuation methods that are commonly accepted in the international financial community (like discounted cash flow or a multiple). The accompanying valuation report must justify the relevance of the different methods.

The Colombian delisting process starts with calling a general meeting of shareholders with the resolution to delist the company. When the majority of the attending shareholders approve the delisting, the supporting shareholders must start the acquisition offer within three months after the general meeting, pro rata of their participation. An independent expert acknowledged by the Colombian SFC (Superintendencia Financiera de Colombia) determines the offer price. The company must pay the expert's appraisal costs.

In the Netherlands the voluntary delisting not being the result of a preceding takeover bid in combination with a squeeze-out procedure in accordance with book 2:359c of the Dutch Civil Code, will either start with a request for delisting as part of a squeeze-out procedure under Article 2:92a Civil Code, either as a delisting request in compliance with Euronext Amsterdam Announcement 2004-41. Both mechanisms start with a request of a supermajority shareholder (or shareholders) holding (in concert) more than 95 per cent of the share capital. Under Article 2:92a Civil Code the shareholder addresses the Enterprise Court of Amsterdam requesting the other shareholders to transfer their shares to the plaintiff. The Court will appoint one or three experts to prepare a report of the value of the shares on a specific date, set by the Court. The experts are entitled to inspect all books, records and other data of the company. The Court will (based on the reports) determine the consideration for the compensation. The plaintiff will publish the day, place of payment and price in a national daily newspaper and inform in writing the shareholders of whom he knows the address. If

¹⁸ This is similar in jurisdictions where the decision to delist rests with the board of directors. However, in these cases, a shareholder is aware of this risk when entering the company.

¹⁹ There are a number of exceptions to this rule, like when the shareholders decide unanimously for the delisting (see art 11 letter b of the Real Decreto 1066/2007).



the delisting follows the procedure of Euronext Amsterdam Announcement 2004-41, the supermajority shareholder must offer an exit arrangement to the remaining shareholders. The request for delisting will provide for the terms and conditions of the offer. The Announcement identifies four different admissible exit arrangements of which an offer of the issuer to buy the remaining shares in the market is the most likely to occur.²⁰ In that case it is the company's board of directors (and supervisory board) that determines the consideration of the compensation. Euronext Amsterdam monitors the exit arrangement in its approval of the request for delisting. In recent history there is only one example of this type of delisting. The shareholders were offered a share price which was 6.5 per cent higher than the price that was known to the company at which the supermajority shareholders acquired the shares that passed the threshold of 95 per cent of the shares, a premium of 4.4 per cent compared to the weighted average market price of these shares in the preceding period of three months as well as a premium of 4.8 per cent compared to the weighted average market price of these shares in the preceding period of six months.

France also provides for a squeeze-out procedure as an exit route for delisting the shares, which was not preceded by a (recent) takeover offer.²¹ Article 236-3 of the AMF General Regulation offers the majority shareholder(s) holding at least 90 per cent of the shares or voting rights in a French listed company admitted to trading on a regulated market the right to file a buyout offer for the remaining equity securities as well as securities giving access to the capital or voting rights. The price at which the offer must take place must be higher than the price determined by calculating the average stock market prices, weighted by trading volume for sixty trading days prior to the publication of the notice of the offer to the AMF who informs the market. Note that France also offers a sell-out route for the minority shareholders in Article 236-1 of the AMF General Regulation. Thereafter the company can apply for a delisting of its securities with Euronext Paris in accordance with Article P.1.4.2 of Euronext Rulebook II with the specific rules applicable to the French regulated markets. When the delisting decision has been taken by the general meeting of shareholders, the delisting of a Cypriot company can take place 15 days thereafter. As the decision requires the approval of more than 90 per cent of the represented securities, the Cypriot regime does not offer an automatic exit right, but the minority shareholders can file a case and if the decision is to be considered an oppression of the minority shareholders, the court can, under Article

²⁰ The other three refer to a public offer for listed shares which will take place in the regime of takeovers and squeeze-outs (see Book 2:259c) or the buyout arrangement of book 2:92a Civil Code, which was aforementioned, or an arrangement that meets the requirements of Euronext Amsterdam Authority which will result in a public offer (TM Stevens, 'Listing and Delisting' in MCA van den Nieuwenhuijzen (ed), *Financial Law in the Netherlands* (Alphen aan den Rijn, Kluwer Law International, 2010) 171, 193 f.

²¹ Here the situation of a French company listed on Euronext Paris is addressed. The Euronext Rule Book II also provides for a specific delisting procedure in case of a foreign company listed on Euronext Paris.



202 of the Cypriot Companies Act order the company to acquire the shares of these shareholders. An expert or auditor will determine the consideration of the compensation.

Shareholders of Italian companies that delist – taking into account the aforementioned legal uncertainties – have a specified exit right. According to Article 2437 quinquies of the Civil Code a shareholder who did not participate in the resolution resulting in the delisting has a withdrawal right. Shareholders who did not participate include the shareholders who opposed the resolution or abstained from voting. The shareholder must inform the company of its intention to exit the company by offering its shares. The shareholder opposing the resolution will know the consideration when exiting the company. It is the arithmetic average of the closing process in the six months preceding the publication of the notice convening the meeting. The articles of association can provide for different criteria but it cannot result in a consideration that is lower than the aforementioned arithmetic average. Article 2437 ter of the Civil Code continues to state that this value needs to be available at least 15 days before the date of the general meeting.

In light of the uncertain status of delisting there is also ambiguity. The shareholder must inform the company within 15 days after the resolution that leads to delisting. According to the Euronext market rules the Milan Euronext Market Undertaking shall set the date when the delisting becomes effective. This date will be more than likely more than 15 days after the resolution of the company that results in the delisting. Shall the shareholder exiting the company assess which consideration offers the best return, taking into account that the request of exiting the company blocks the shares, which must be deposited at the registered office?

Some jurisdictions do not offer shareholders any exit right. This is the case in the UK. The shareholders receive a circular with extensive information related to the proposal for delisting and vote on the special resolution for delisting taking into account the dual majority in case there is a controlling shareholder: 75 per cent of the shares must support the resolution and 50 per cent of the attending independent shareholders ('votes') must approve the delisting. When the resolution is approved the company will be delisted not less than 20 business days following the passing of the resolution. Therefore it is considered that shareholders have sufficient time to exit the company via selling the shares on the stock exchange. As there can be a significantly higher supply of shares from exiting shareholders compared to the demand for shares from interested investors, the stock price can fall significantly. Only when the company also passed a resolution to reregister as a private company, minority shareholders can address the court to cancel the resolution in accordance with section 98 of the Companies Act 2006 and the court can take any order including the purchase of the shares of its members. However, this action is not available in case of a 'pure' voluntary delisting. Delistings in other common law countries like Australia and the US seem to proceed in the same way. Neither the US nor Australian delistings offer the minority shareholders exit rights. Minority shareholders that want to exit the company before the



delisting must do so in the time between the announcement of the delisting and the day of delisting. In Australia, minority shareholders will have at least one month, in the US it can be less. When the company decides to delist its securities, it has four business days to file a Form 8-K. Next, the company must submit a written notice to the stock exchange and inform the public, and it must file an SEC Form 25 to delist. The former notice to the exchange must be sent at least 10 days before filing the Form 25. The delisting becomes effective 10 days after filing the Form 25. The delisting must be seen separately from the requirement of registration with the SEC, for which other rules apply. Therefore, companies that have delisted their securities, but are still registered with the SEC, must still comply with a list of disclosure requirements. The delisting from the Swedish, Finnish or Greek stock exchange does not offer the shareholders another exit right than the option during the time between the announcement of the delisting and the last trading day, to sell the shares in the market. Note that other jurisdictions also offer a minimum period of time after the announcement of the delisting and the date when the delisting becomes effective. Euronext Amsterdam offers 'in principle 20 trading days after publication of the decision', similar to the UK date of delisting of securities 'which must be not less than 20 *business days* following the passing of the resolution', although the latter results de facto in four weeks.

II. Assessment and Conclusion

Voluntary delistings of securities are not harmonised and many different systems co-exist. In some countries – predominantly common law countries – it is a strategic decision of the board of directors, in others the general meeting must approve the delisting. The former group of countries let the interest of the companies prevail, hence leave it to the board, while the latter jurisdictions, among which many civil law countries, endorse the shareholder interest more openly. It seems at odds with the law and finance theory. Note that in some countries where the board of directors is in charge to take the delisting decision, the market operator or market supervisor has some discretionary power to guide the delisting decision, sets conditions and takes into account the interests of the (minority) shareholders.

In the latter countries where the general meeting of shareholders votes on the delisting, there remain also some peculiarities that are harder to explain from a legal or law and economics perspective. First, some jurisdictions set a minimum term during which the securities of the company must remain listed. Those jurisdictions set requirements for liquidation and dissolution that are less stringent, which does not seem very logic. Second, some jurisdictions combine the right of delisting with a mandatory bid or squeeze out. The offer can be in the common interest of the minority shareholders, the majority shareholder (who in some countries is required to offer this exit route to the shareholders) and the company, if sufficient resources are available for this buy-out and the squeezed-out shareholders receive an appropriate compensation. There are large differences in the determination of this



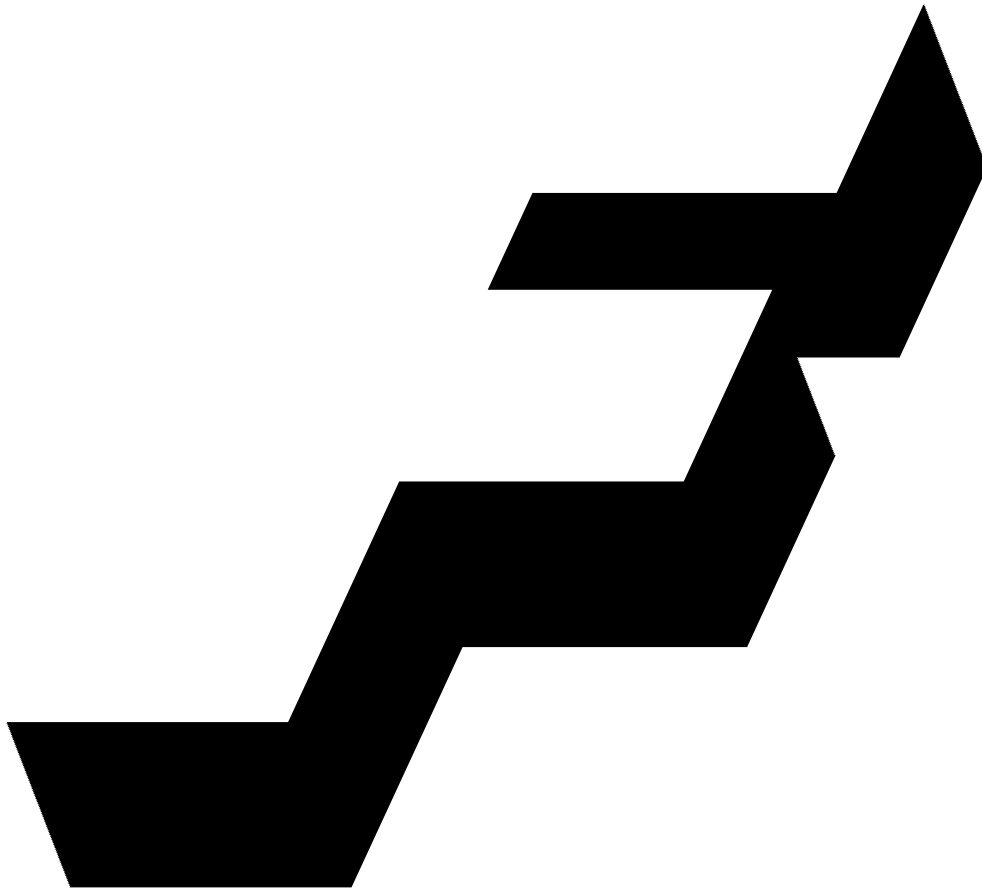
consideration: in some jurisdictions the price is set by an independent expert, in some others, courts determine the price, while other jurisdictions take the weighted average stock price over a certain period preceding the delisting or a combination of different valuation techniques. This shows that there is no optimal mechanism to protect the interests of the minority shareholders in this process triggered by the delisting decision. Third, in some jurisdictions the subsequent offer only addresses the shareholders that voted against the delisting (or abstained from voting). If not all information is in the market at the time of the meeting²², the shareholder who voted for, are locked in. This problem can be aggravated in Columbia where the shareholders that vote for the delisting must participate in the takeover bid potentially creating numerous collaboration and financial issues and problems.²³

How to conclude? In short, this assessment shows that balancing all interests of all involved parties in a voluntary delisting decision cannot be captured in one harmonised approach.

²² Consider for example a pandemic.

²³ Some of these issues are addressed in Colombian law (see for example art 5.2.6.1.4 of the Decreto Unico 2555/2010).





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