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# Protection of investors in voluntary delisting on the U.S. stock market

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## **Abstract**

In recent years we have witnessed a significant increasing in the number of voluntary delisted companies from the U.S. stock market. Delisting has primarily an adverse impact on the minority shareholders' interests. This study examines the effectiveness of the U.S. current system of investor protection in voluntary delisting. Legal analysis of legislation and court practice, historical overview of the U.S. regulation of delisting, comparative analysis of 28 leading stock markets permitted me to formulate policy implications. The author suggests a substantial re-thinking of the existing rules and practices of delisting stocks from the U.S. equity markets by means of the shareholders' approval of delisting on the issuer's request.

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## Introduction\*

During the last two decades we have witnessed a significant increasing in the number of companies in the United States interested in pursuing delisting<sup>1</sup>. An examination of delistings from major American stock exchanges shows that there were a few delistings before 1990s; but later during the period from 1990 to 2000 their number significantly increased to 158 and to 695 in 2001-2010 correspondingly<sup>2</sup>.

A delisting process usually has a negative influence on the interests of all the parties involved in it<sup>3</sup>. But it has the most negative impact on the minority investors' interests<sup>4</sup>. There is evidence that agency problems and insiders' interests play into the decision to go dark and that, at least for some firms, cost savings are not the only consideration<sup>5</sup>. For minority investors, delisting is "the final nail in the coffin for a stock". Once they are no longer publicly traded, the shares become practically worthless<sup>6</sup>. Many investors have argued that this rule is detrimental to shareholders since it makes it too easy for companies to withhold financial information<sup>7</sup>.

\* I would like to express my gratitude and thanks to Professor Bernard Black (Northwestern University), Professor Kate Litvak (Northwestern University) and Professor Daniel Stattin (Uppsala University) for helpful suggestions and comments, without which publication of this article would not have been possible. This paper benefited from the feedback of participants in the 2014 Meeting of the Canadian Association in Law and Economics in Toronto.

<sup>1</sup> This study examines public companies voluntary delisted their stocks from major American stock exchanges (NYSE, NASDAQ and NYSE MKT LLC) for reasons other than a merger, acquisition, liquidation, registration withdrawal, or going-private transaction.

<sup>2</sup> See Table 1.

<sup>3</sup> Stoddard D. Platt, *Delisting Securities under the Securities Exchange Act of 1934*, Corporate Management and Finance Division, March 1961. – Vol. 1. – at 14.

<sup>4</sup> See *Hamilton v. Nozko*, No. 13014, 1994 WL 413299, (Del. Ch. July 26, 1994) about different influence of voluntary delisting on the majority and minority shareholders.

<sup>5</sup> Jesse Fried, *Firms Gone Dark*, 76 U. Chi. L. Rev. 135, 157 (2009).

<sup>6</sup> Ernie B. Calucag, *Is There Life After Delisting?* Biz Daily (March 4, 2011), available at <http://bizdaily.com.sg/newsite/is-there-life-after-delisting/> (visited Sep 21, 2013).

<sup>7</sup> Christian Leuz, Alexander Triantis, Tracy Yue Wang, *Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC deregistrations*, 45 (2-3) *J. Account. Econ.* 185 (2008).

It is important to emphasize that even if the decision is driven entirely by efforts to maximize shareholder value, the stock market reaction to delisting can be negative<sup>8</sup>. According to Shumway & Warther the average effective return for stocks delisted from the NASDAQ for performance reasons is 55%<sup>9</sup>. Sanger & Peterson find that for firms with prior announcements, equity values decline by approximately 8.5% on the announcement day<sup>10</sup>. The similar results have been found in Leuz, Triantis and Wang's study, which showed that companies suffer a 10% drop in share price after the initial announcement and subsequent filing of deregistration, and Marosi and Massoud's research, which showed that going dark companies face more than a 12% drop in the share price on the first two trading days after the initial announcement<sup>11</sup>.

Previous researches of delisting showed causes and economic consequences of delistings<sup>12</sup>; influence of certain laws (Sarbanes-Oxley Act (SOX) of 2002, Australian Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004)<sup>13</sup> or corporate governance standards<sup>14</sup>, or some events (e.g. privatization)<sup>15</sup> on delisting; the effect of foreign delistings on the

<sup>8</sup> Leuz, Triantis, Wang, *supra* note 7, at 181, 185.

<sup>9</sup> Tyler Shumway, Vincent A. Warther, *The Delisting Bias in CRSP's Nasdaq Data and Its Implications for the Size Effect*, 54 (6) J. Financ. 2361, 2362 (1999).

<sup>10</sup> Gary C. Sanger & James D. Peterson, *An Empirical Analysis of Common Stock Delistings*, 25(2) J. Financ. Quant. Anal. 261, 265 (1990).

<sup>11</sup> Marosi András, Massoud Nadia, *Why Do Firms Go Dark ?* 42 (2) J. Financ. Quant. Anal. 421-442 (2007).

<sup>12</sup> Marosi, Massoud, *supra* note 11, at 421-442; Leuz, Triantis, Wang, *supra* note 7, at 181–208; Jonathan Macey, Maureen O'Hara, David, Pompilio, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*, 51 (4) J. L. Econ. 683-713 (2008).

<sup>13</sup> Susan Chaplinsky, Latha Ramchand, *What Drives Delistings of Foreign Firms from U.S. Exchanges?* 22 (5) J. Int. Finan. Markets, Inst. Money [1126-1148](#) (2012); William N. Goetzmann, Mark Garry, *Does Delisting from the S&P 500 Affect Stock Price?* 42 Financ Analysts J. 64-69 (1986); Nicholas Lew, Ian M. Ramsay, *Corporate Law Reform and delisting in Australia* 14 ([University of Melbourne Legal Studies Research Paper No. 202–2006](#)), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=47192](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=47192).

<sup>14</sup> Steen Thomsen, Frederik Vinten, *Delisting in Europe and Costs of Governance* 1-32, (Department of Economics, Copenhagen Business School Working Paper No. 12-2006), available at [http://swopec.hhs.se/cbsnow/abs/cbsnow2006\\_012.htm](http://swopec.hhs.se/cbsnow/abs/cbsnow2006_012.htm).

<sup>15</sup> Zuzana Fungáčová, Jan Hanousek, *Determinants of Firm Delisting on the Prague Stock Exchange*, 4 Prague Econ. Pap. 348-365 (2011).

domestic stock market<sup>16</sup>. However, only a few researches considered certain aspects of investor protection in delisting: they showed negative impact of going dark firms on stock price<sup>17</sup>, disclosure of information and investor protection<sup>18</sup>. Professor Fried, in particular, paid attention to the necessity of the adequate public investor protection and suggested giving them the right to veto a delisting<sup>19</sup>.

This study intends to extend the legal and economic analysis of delisting and to question the effectiveness of investor protection in voluntary delisting on the U.S. stock market, to give a new outlook at it and to suggest a substantial re-thinking of the rules and practices of delisting stocks from the U.S. stock market.

The dataset of the comparative analysis includes 28 stock exchanges. The objective of this comparison is dual; first, it will draw the main distinctions between the systems of investor protection in voluntary delisting in the U.S. and other countries and thereby provide a deeper understanding of the U.S. delisting regulation. Second, the comparison will serve as a reference system in considering potential developments of the current U.S. approach to the investor protection in voluntary delisting.

This paper is structured as following. Part I of this article describes current U.S. regulation of investor protection in voluntary delisting. I find that according to the securities legislation investors can protect their rights in two ways: (1) the SEC can impose additional terms on the issuer in case of delisting for the purpose of investor protection; (2) litigation against directors (who approved delisting) for breach of their fiduciary duties. I didn't find any cases when the SEC would impose additional terms for investor protection. The analysis of court practice showed that breach of duty of loyalty by directors in delisting has been proved only in one case, in

<sup>16</sup> Loredana Ureche-Rangau, Andrea Carugati, *Foreign Delisting and Domestic Stock Value: Multiple Frameworks, Different Views?* 4 Lect. Notes Bus. Inf. 112-135 (2008).

<sup>17</sup> Marosi, Massoud, *supra* note 11, at 421-442; P.R. Chandy, Salil K. Sarkar, and Niranjana Tripathy, *Empirical Evidence of the Effects of Delisting from the National Market System*, 28 J. Econ & Financ. 46-55 (2004); Gary C. Sanger, James D. Peterson, *An Empirical Analysis of Common Stock Delistings*, 25 J. Financ. Quant. Anal. 261-272 (1990); Kent H. Baker, Sue E. Meeks. *Research on Exchange Listings and Delistings: a Review and Synthesis*, 1 Financ. Practice Educ. 57, 66 (1991).

<sup>18</sup> Leuz, Triantis, Wang, *supra* note 7.

<sup>19</sup> Jesse Fried, *supra* note 5, at 157.

all others – the court dismissed the investors' lawsuits motivating the decisions by the lack of proof.

In Part II I examine investor protection in voluntary delisting on leading stock exchanges. I find that in the analyzed countries there is a different decision-making procedure of delisting (depending on which corporate body takes this decision). Some countries give additional shareholder remedies in voluntary delisting: exit rights to the minority shareholders and extend the term when delisting comes into force. In this context, special attention was given to the analysis of the reforms of investor protection in voluntary delisting in Germany and the UK. I also consider historical, political and economic determinants, which had an impact on the approach to the investor protection in voluntary delisting on different stock markets.

Part III gives a historical overview of investor protection in voluntary delisting in the USA. It shows that previously voluntary delisting from the NYSE required shareholder approval by the qualified majority of votes with giving veto rights to the shareholders but in 1997 under the pressure of NASDAQ this rule was abolished mainly due to its anticompetitiveness. 15 years have passed since the abolition of NYSE rule 500, so there are enough materials, which permit to assess the economic effectiveness of this legislative step. Taken together my results support two proposed explanations. Empirical data indicates that since 2003 a number of transfers from the NYSE to the NASDAQ have not been increased significantly; and it would be unreasonable to connect them exclusively with the disappearance of the anticompetitive factor - cancellation of NYSE Rule 500. At the same time delisting negatively affects on the constituency part of shareholders' property right - the right to sell shares (which is quite important for minority shareholders). It permits me to propose a new approach to regulation of investor protection, which requires shareholder approval of delisting. In this part I also analyze the possibility of introducing other shareholder remedies in voluntary delisting in the U.S. legislation.

## Part I. Regulation of investor protection in voluntary delisting on the U.S. stock market

U.S.-listed issuers have an absolute right to delist their securities voluntarily and to deregister them. The delisting decision should be taken by company's board of directors, which would generally need to conclude, in the exercise of its fiduciary obligations that such termination of listing would be in the best interests of the company and its shareholders<sup>20</sup>. None of the leading U.S. stock exchanges (NYSE, NASDAQ) <sup>21</sup> currently requires shareholder approval for delisting and there is no evidence of using this provision in the U.S. firm's corporate charter<sup>22</sup>.

Rule 12d2-1(b)(1)(C) requires that an application of an issuer (or an exchange) to the SEC should give a full statement of the reasons for submitting of this application. However, *the SEC lacks the power to deny an application to delist because the reasons offered in the application are insufficient (In the Teck-Hughes Gold Mines, Ltd, 3 SEC 462 (1938); in National Oats Co. 4 SEC 751 (1939); in Fireman's Fund Ins. Co, 15 SEC 30 (1943); Atlas Tack Corp. v New York Stock Exchange (1957, CA1) 246 F2d 311, 66 ALR2d 664)*<sup>23</sup>.

*Under the U.S. securities legislation there are two ways of investor protection in voluntary delisting: the right of the SEC to impose additional terms on the issuer in the case of delisting for investor protection; litigation against the directors (who approved the delisting decision) for breach of their fiduciary duties.*

The SEC may, by a written notice to the exchange and issuer, postpone the effectiveness of an application to delist and/or to deregister to determine whether the application on Form 25 to strike the security from registration under section 12(b) of the Act has been made in accordance with the rules of the exchange, or

<sup>20</sup> Ted Farris, "Going Dark" – The Simple Path to Exiting the U.S. Public Company Reporting System – Delisting and Deregistration under the U.S. Securities Exchange Act of 1934 [http://www.dorsey.com/files/upload/Farris\\_GoingDark\\_013012.pdf](http://www.dorsey.com/files/upload/Farris_GoingDark_013012.pdf)

<sup>21</sup> NYSE, Listed Company Manual § 806.02, available at <http://nysemanual.nyse.com/LCM/Sections/> (visited Sep 21 2013); NASD Marketplace § 4480(b), available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/new\\_listing\\_rules.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/new_listing_rules.pdf) (visited Sep 21 2013);

<sup>22</sup> Fried, *supra* note 5, at 141.

<sup>23</sup> Stoddard, *supra* note 1, at 14.

what terms should be imposed by the Commission to protect investors.

Although delisting may have an adverse effect on present investors, nevertheless these consequences are inherent in any delisting, and unusual circumstances must be shown to make such factors grounds for the imposition of the conditions (*Atlas Tack Corp. v New York Stock Exchange* (1957, CA1) 246 F2d 311, 66 ALR2d 664)<sup>24</sup>.

The SEC seldom receives comments on delisting applications. For example, thus far in 2005, it has received 16 delisting applications from the issuers and comments on two of them<sup>25</sup>.

In *Carmel Container Systems Ltd.* case public investors applied to SEC, stating that the resolution of Camel's board approving the proposed delisting from AMEX was passed unlawfully under the Israeli law<sup>26</sup> (breach of 240.12d2-1(b)(1)(C) General rules and regulation of Securities and Exchange Act of 1934 which provide compliance of an issuer with all applicable laws in effect in the state in which it is incorporated). Among other reasons, proponents of the resolution sought to justify it on the basis of perpetual reasons regarding cost savings and the company's business performance.

The same situation happened to *Ohio Art Company*, which withdrew its common stock from listing on the AMEX. Some shareholders believed that the SEC should reject the issuer's application because of the discrepancy in the number of record holders of the issuer's security<sup>27</sup>.

<sup>24</sup> 66 A.L.R.2d 676 (Originally published in 1959).

<sup>25</sup> SEC. 17 CFR Parts 232, 240, and 249. [Release No. 34-52029; File No. S7-25-04]. RIN 3235-AJ04. Removal from Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934 at 6, available at <http://www.sec.gov/rules/final/34-52029.pdf>

<sup>26</sup> Comment on File No.1-09274 SEC from February 20, 2005. Re: Notice of Application of Carmel Container System Ltd to Withdraw its Ordinary Shares from Listing on the American Stock Exchange LLC // [www.sec.gov/rules/delist/109274/ashenhav022305.pdf](http://www.sec.gov/rules/delist/109274/ashenhav022305.pdf); Securities and Exchange Commission. Issuer Delisting; Order Granting the Application of Carmel Container Systems Ltd. to Withdraw its Ordinary Shares, NIS 1.0 par value per share, from Listing and Registration on the American Stock Exchange LLC File No. 1-09274. April 6, 2005// <http://www.sec.gov/rules/delist/1-09274-o.htm>;

<sup>27</sup> SEC. Issuer Delisting; Order Granting the Application of the Ohio Art Company to Withdraw its Common Stock, \$1.00 Par Value, from Listing and Registration on

However, in both cases SEC noted that the issuers were not obligated to remain listing on stock exchange. The Commission believed that stockholders of the issuer's security and other interested parties had had enough time to sell their security or take any other similar action as permitted under the state and federal law. As a result, it didn't impose any additional conditions on delisting for the purpose of investor protection.

Where the SEC fully considers the matter of terms in delisting a registered security under §12(d) of the act, and decides that there is no basis for imposing the terms, the court should not ordinarily undertake to substitute its judgment as to what the appropriate terms should be, for the administrative judgment, the Commission having a wide discretion in the choice of the terms it should impose for the protection of investors (*Atlas Tack Corp. v New York Stock Exchange* (1957, CA1) 246 F2d 311, 66 ALR2d 664.).

*Another way of investor protection in delisting is a lawsuit against the directors (who approved the delisting) for breach of their fiduciary duties.* Corporate law imposes fiduciary duties on the directors of the corporation that constrain insiders' ability to engage in inefficient self-dealing transactions. But the threat of fiduciary duty litigation is unlikely to deter insiders from self-dealing<sup>28</sup>. The effectiveness of this doctrine as a shareholder remedy in delisting is doubtful which is confirmed by court practice.

It is possible to divide all court cases concerning delisting into three categories. In the first group of cases, which is a more numerous one, the subject of the lawsuit was breach by the directors of their fiduciary duties (the duty of loyalty) that caused involuntary delisting (e.g. *Feiner Family Trust v. Xcelera Inc.* Not Reported in F.Supp.2d, 2010 WL 3184482 S.D.N.Y., 2010).

In the second (quite small) category of court cases the subject of lawsuit was the breach by directors of their fiduciary duties (the duty of loyalty) - when the directors approved delisting or deregistration of stocks and in a short period after that they started the procedure of the "cash-out" merger as a result of which minorities shareholders had to sell their stocks at market prices (which fell

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the American Stock Exchange LLC, File No. 1-07162 (Aug. 23, 2004), available at <http://www.sec.gov/rules/delist/1-07162-o.htm>.

<sup>28</sup> Fried, *supra* note 5, at 147.

down significantly after delisting). It means that they kicked out minority shareholders from the corporation without giving them an adequate compensation for their stocks.

At first, in *Hamilton v. Nozko*, No. 13014, 1994 WL 413299, at 18-21 (Del Ch. July 26, 1994), the Court of Chancery found that directors breached their fiduciary duties because they undertook delisting for self-interested purposes - corporate machinery to serve personal economic ends inimical to the financial welfare of the public investors, which eliminated market for stocks and later directors forced minority shareholders to convey their stock at an unfair price. Similarly, In *Pure Resources, Inc. Shareholders Litigation*, the court found deregistration coercive because the context involved a controlling stockholder and an implicit threat to use deregistration as a tool to obtain a lower price after the tender offer<sup>29</sup>. But In *Wynnefield Partners Small Cap value L.P. v. Niagara Corporation* (2006) the court dismissed claims about violation of the duty of loyalty by using deregistration as a tool to purchase Niagara stock at a low price because of insufficient proof<sup>30</sup>. Similarly, the court withdrew the claim of unfair timing *Seagraves v. Urstact Property Co., Inc.* [Not Reported in A.2d, 1996 WL 159626](#) Del.Ch.,1996. April 01, 1996 Id. at 4. However, the plaintiff's purpose in all these cases was to enjoin the exchange offer (dispute about the fair price of stocks), not to seek relief against deregistration and delisting of the common stock.

However, there is only one court case where the plaintiff claimed for breach of duty of loyalty and sought damages and injunctive relief for breach of fiduciary duty based on the directors' decision to delist (*Berger vs. Scharf* 11 Misc.3d 1072(A), 816 N.Y.S.2d 693, 2006 WL 825171 (N.Y.Sup.), 2006 N.Y. Slip Op. 50519(U)). Plaintiff alleged facts showing that the decision to delist was taken for inequitable purposes and resulted in the personal benefit of the director who then had the power to engage in corporate activity that would be financially beneficial to himself and unfair to the plaintiffs. The court supported the side of the plaintiff.

But there is no one court case for breach by the directors of their duty of care in delisting. It can be explained by the fact that

<sup>29</sup> *Pure Res., Inc. Shareholders Litigation*, 808 A.2d 421, 453 n. 26 (Del. Ch.2002)).

<sup>30</sup> 2006 WL 1737862 (Del.Ch.)

American courts simply don't hold directors liable for business decisions, made without a conflict of interest, unless those decisions are completely irrational<sup>31</sup>. In brief, the business judgment rule runs: if the directors that acted in good faith and, as a reasonable person would have acted, they will not be held liable for unfavorable outcomes (*Aronson*, 473 A.2d at 812). E.g. in *Hamilton v. Nozko*, No. 13014, 1994 WL 413299, at 6 (Del Ch. July 26, 1994) "The Court of Chancery of Delaware recognizes the power of the issuing corporation's directors, in a proper exercise of their business judgment, to make the corporation to withdraw its securities listing even if, as an incidental matter, the delisting and deregistration might adversely impact the market for the corporation's securities."

Professor Bishop wrote that "the search for cases in which directors of industrial corporations have been held liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack<sup>32</sup>. Seven court cases for breach of duty care have been brought in total<sup>33</sup>.

This permits me to conclude that doctrine of fiduciary duties is not an effective tool of investor protection in delisting. A breach of the duty of care by directors is difficult to prove, and not only in delisting cases. A breach of the duty of loyalty by directors has been proved only in one delisting case, in all others - the court dismissed lawsuits of minority shareholders motivating this by the lack of proof. I think that the main reason, why there are only a few lawsuits against directors for breach of their fiduciary duties in delisting, is high litigation costs of attorneys' fees in the U.S.

<sup>31</sup> Bernard S. Black, *The Core Fiduciary Duties of Outside Directors*, Asia Bus. L. Rev. 3-16 (July, 2001).

<sup>32</sup> Joseph Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 Yale L.J. 1078, 1099 (1968).

<sup>33</sup> Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions through the Business Judgment Rule*, 62 Tex. L. Rev. 591 (1983).

## Part II. Comparative overview of investor protection in voluntary delisting on leading stock markets

It is quite important to give a short overview of *delisting regulation in Germany*. For the last decade it was reformed twice and both of times by court judgments.

Firstly, a mandatory shareholder approval of voluntary delisting by simple majority of votes and giving to shareholders appraisal rights were introduced by Macrotron judgment in 2002<sup>34</sup>.

The ground of the Federal Court of Justice of Germany (Bundesgerichtshof, BGH) in Macrotron judgment was based on Article 14 of the German Constitution. BGH argued that a shareholder's ability to sell its stock in a regulated market was an integral part of the ownership of listed stock and that a delisting would therefore adversely affect the shareholder's property right. The judges also gave shareholders appraisal rights in the case of voluntary delisting, applying analogy with squeeze-out transactions.

However, this court judgment was considered as burdensome and it was highly criticized for its costs<sup>35</sup>. As a result, a contradictory court practice existed in downgrading (in Munich Higher Regional Court, NZG 2008, 755 and Berlin Higher Regional Court, NZG 2009, 752)<sup>36</sup>.

Moreover, companies tried to avoid voluntary delisting (only 9.56% companies used this delisting) and it was widespread “cold” delisting (66.89% of all transactions)<sup>37</sup>.

As a result, the German Federal Constitutional Court on July 11, 2012<sup>38</sup> revised the 10-year-old remarkable judgment of the

<sup>34</sup> BGH-Urteil vom 25.11.2002 – [II ZR 133/01](#), BGHZ 153 S. 47 = DB 2003 S. 544)

<sup>35</sup> Stefan Dietsche, Philip Martinius. *Back to Square One? German Constitutional Court Rewrites Delisting Rules* (Jul. 2012), available at [http://www.gibsondunn.com/publications/pages/GermanConstitutionalCourt-RewritesDelisting Rules.aspx](http://www.gibsondunn.com/publications/pages/GermanConstitutionalCourt-RewritesDelistingRules.aspx)

<sup>36</sup> Christian Becker, Lutz Pospiech, *Delisting and Downgrading in Light of the German Federal Constitutional Court's Decision dated 11th July 2012 – Recommendations for Action in Practice*. Newsletter // Corporate and Tax, Mergers & Acquisitions 01/2013, at 12-13, available at [http://www.goerg.de/en/news/newsletter/newsletter\\_corporate\\_and\\_tax\\_mergers\\_acquisitions\\_01/2013.37550.html](http://www.goerg.de/en/news/newsletter/newsletter_corporate_and_tax_mergers_acquisitions_01/2013.37550.html)

<sup>37</sup> Dirk Zetzsche, *Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting*, IFS – Propter Homines Chair Working Paper 003/2013 at 5.

German Federal Supreme Court in the *Macrotron* case and completely changed earlier existed approach to the minority shareholder remedies in voluntary delisting.

The German Federal Constitutional Court took a judgment on two separate cases. In the first case, a plaintiff questioned a necessity of a shareholder voting in downgrading. In the second case the majority shareholder had challenged the obligation to make a purchase offer. This led to two major rulings.

In the first case the German Federal Constitutional Court stressed that delisting does not affect the property rights of shareholders as they don't lose their legal position embodied in the share, or if the substance of the legal position is altered (e.g. a squeeze-out of the shareholder). The only legal transferability of the shares is a part of the property acquired, which is protected under Article 14.1 of German Constitution.

In the second case, which questions giving to the minority shareholders appraisal rights, the German Federal Constitutional Court found that German Federal Supreme Court didn't breach the procedural rules and had the right to apply analogy of the law governing other structural changes (such as squeeze-out transactions) to voluntary delisting. But the German Constitutional Court doesn't agree completely with the interpretation of the law. It left to the further case-law to examine whether a mandatory offer to minority shareholders should apply<sup>39</sup>.

Frosta judgment of the German Federal Court of Justice from October 2013 finally confirmed that neither a shareholder approval, nor a purchase offer should be required in voluntary delisting<sup>40</sup>.

Thus, it is possible to observe a cardinal change of investor protection in voluntary delisting. Professor Zetszsche strongly criticized recent delisting reform in Germany, as it doesn't protect minority shareholders<sup>41</sup>.

*Delisting regulation in the UK deserves a special attention.* FSA started reforming listing rules almost at once after the similar reform in

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<sup>38</sup> Press release No. 53/2012 (July 11, 2012). Federal Constitutional Court Judgment of 11 July 2012, <http://www.bundesverfassungsgericht.de/pressemitteilungen/bv...>

<sup>39</sup> Dietsche, Martinius, *supra* note 35.

<sup>40</sup> Bundesgerichtshof Beschluss vom Oktober 2013 in dem Rechtsstreit // II ZB 26/12.

<sup>41</sup> Zetszsche, *supra* note 37 at 2.

Germany<sup>42</sup>. Initially, the FSA Listing Rules didn't consider which corporate organ should take delisting decision and usually board of directors did it. But in 2005 this rule was changed in favor of shareholder voting on it by 75% of votes<sup>43</sup>. The FSA motivated reconsidering of previous regulation by existence of negative court practice, which showed breach of minority shareholders' interests in delisting when they could be forced to sell their shares at unreasonably low price or they could be left with unlisted securities; especially when there has been no compulsory acquisition of the minority's shares or when there has been no formal offer<sup>44</sup>.

Reform of delisting regulation was one of the most investigated and it was accompanied by the publication of a great number of the FSA discussion papers<sup>45</sup>; every detail of delisting regulation had been highlighted in these documents in the proper way. FSA Listing Rules have been changed several times but these changes had rather corrective nature; shareholder voting on delisting was unchangeable.

A comprehensive cost-benefit of shareholder voting in delisting proceeded to introduction of this rule. FSA didn't find that such costs are too high. Currently, this rule works quite effectively. There is no evidence that shareholder approval of delisting has a negative impact on the number of listings on LSE.

Legal analysis of the delisting reform in the UK shows that shareholder approval of delisting has a different impact on German and British stock markets? In my view, the costs of Macrotron judgment in Germany are caused rather a mandatory offer to the

<sup>42</sup> The first FSA consultation document, which reviewed delisting decision-making, was dated by Oct. 2003 and Macrotron judgment was adopted at the end of Nov. 2002.

<sup>43</sup> See also Table 2. Chronology of Changes to the FSA Listing Rules concerning delisting.

<sup>44</sup> FSA Consultation Paper 203. Review of the Listing Regime (Oct. 2003) § 9.22.

<sup>45</sup> FSA Consultation Paper 05/7\*\*\*; 28 April 2005 [all high-profile consultations, and major policy changes affecting a large number of consumers or financial sectors. The Listing Review and Prospectus Directive Feedback on CP04/8 and CP04/16, near final text and supplementary consultation. FSA Policy Statement 07/8 from June 27, 2007. Perimeter Guidance relating to MiFID Feedback on CP06/17 and made rules; FSA Policy Statement for CP08/21 and further minor consultation (Oct. 2009); Feedback on CP04/8 and CP04/16, near final text and supplementary consultation 6 Cancellation of listing - draft feedback statement.

minority shareholders (which was envisaged simultaneously with shareholder approval of delisting; and UK doesn't give appraisal rights to the minority shareholders) than shareholder approval of delisting; and too broad scope of its application - to all stocks (in the UK it applies only to premium listing).

*Australian Securities Exchange (ASX) and New Zealand Exchange (NZX)* delisting regulation has an impact of the UK. Despite that fact that ASX doesn't specify which corporate organ takes delisting decision but empirical analysis of delisted companies from ASX shows that in practice in most of cases general meeting of shareholders approves it by its ordinary resolution. In fact, it can be explained by the position of ASX, which may require additional shareholder remedies in delisting<sup>46</sup>. ASX usually agrees to the issuer's request for delisting without having to provide an exit mechanism for the shareholders, providing that the approval of shareholders is obtained for it and that delisting doesn't take place until at least one month after shareholder approval has been obtained<sup>47</sup>. At the same time some corporations voluntarily announce selective buy-back programs as a result of delisting in order to buy-back ordinary shares for shareholders that hold less than a marketable parcel of shares (e.g., less than \$500).

*In Canada* there is a differentiated approach to delisting regulation. On Toronto Stock Exchange (TSX) (where the stocks of big companies are quoted) board of directors (or other similar body) takes delisting decision<sup>48</sup>. The TSX Rule also does not stipulate any discretion of the Securities Commission to verify reasons of delisting or in other way to check the due investor protection. However, some companies declared buy-back program of small shareholdings as a result of delisting voluntarily.

On TSX Venture Exchange (where the stocks of young and small companies are quoted), as a general rule, also board of direc-

<sup>46</sup> Australian Securities Exchange, *ASX Listing Rules* § 17.11, available at <http://www.asxgroup.com.au/asx-listing-rules-guidance-notes-and-waivers.htm> (visited Sep 21, 2013).

<sup>47</sup> Bryan Frith, *Minorities Have Faint Hope of Influencing Corporate Decisions*, *Austl. Financ* (Sep. 22, 2011), at 20.

<sup>48</sup> TSX, *Company Manual* § 720, available at [http://tmx.complinet.com/en/display/display\\_viewwall.html?rbid=2072&element\\_id=327&record\\_id=327](http://tmx.complinet.com/en/display/display_viewwall.html?rbid=2072&element_id=327&record_id=327) (visited Sep 21, 2013).

tors approves it; but if the Exchange is not satisfied that a satisfactory alternative market exists for the listed shares, it will require majority of the minority shareholder approval for the delisting application. Typically a class of listed shares will be delisted at the request of the issuer when it has redeemed its shares or a successful take-over bid for the shares has been completed<sup>49</sup>.

*In Japan* it is envisaged the opportunity of voluntary delisting<sup>50</sup>, however it is not specified which corporate organ takes it. In practice, only foreign companies used this method of delisting (See Table 3)<sup>51</sup>. While Japanese companies, which consider delisting its stocks from the stock exchange, usually make a tender offer to shareholders to buy-back their stocks. So companies, which are going to delist stocks, follow the same procedure as they would follow in going-private transactions. At my opinion, the main reason of this practice existence is strong business culture of Japanese companies.

A comparative analysis of delisting regulation in the range of countries permits me to designate *two major approaches to investor protection* (depending on the corporate organ that takes a delisting decision):

(1) in those countries where a board of directors (or other similar corporate organ (e.g. management)) must take a delisting decision (NYSE, Toronto Stock Exchange) or usually takes it (when it is not specified directly) (NYSE Euronext Paris, NYSE Euronext Amsterdam, NASDAQ, SIX Swiss Exchange), shareholders are protected by the *doctrine of fiduciary duties of directors*;

(2) in other countries - shareholders vote for delisting (Bolsa de Madrid, Borsa Italiana, Buenos Aires Stock Exchange, Bovespa Mais (Brazil), Hong Kong Stock Exchange, Kazakhstan Stock Exchange, MICEX-RTS (Russia), Prague Stock Exchange, Singapore Stock Exchange, Stock Exchange of Thailand).

<sup>49</sup> TSX Venture Exchange, *Corporate Finance Manual Policy 2.9*, available at [http://www.tmx.com/en/listings/venture\\_issuer\\_resources/finance\\_manual.html](http://www.tmx.com/en/listings/venture_issuer_resources/finance_manual.html) (visited Sep 21, 2013).

<sup>50</sup> Tokyo Stock Exchange, *Listing Regulation § 608*, available at [http://www.tse.or.jp/english/about/rules/b7gje600000044tu-att/securities\\_listing\\_regulations\\_2013-03-28-03-31.pdf](http://www.tse.or.jp/english/about/rules/b7gje600000044tu-att/securities_listing_regulations_2013-03-28-03-31.pdf) (visited Sep 21, 2013).

<sup>51</sup> Tokyo Stock Exchange, *List of Delisted Companies*, available at <http://www.tse.or.jp/english/listing/delisting/list.html> (visited Sep 21, 2013).

There are some countries, which occupy an intermediate position, - when the corporate organ, which approves delisting, is not specified but a stock exchange can require approval of delisting by an ordinary resolution of the shareholders for their protection (Australian Securities Exchange), its approval by the resolution of security holders of the class of securities proposed to be delisted (New Zealand Exchange) or approval by public investors (minority shareholders) (TSX Venture Exchange). On NASDAQ OMX Oslo exists the opposite situation when a general meeting of the shareholders usually approves delisting but in special circumstances the Stock Exchange may grant an exemption.

In Sweden (NASDAQ OMX Stockholm) and Denmark (NASDAQ OMX Copenhagen) it is not specified which corporate organ takes a delisting decision but before granting permission to delist stock exchange considers whether delisting will be detrimental to the stock market, creditors or minority shareholders. That's why in most of cases general meeting of shareholders takes a delisting decision.

Some countries envisage a different regulation of approval of *delisting depending on whether the company has an alternative listing on another stock exchange after delisting or not* (India: if it has an alternative listing – the board of directors takes a delisting decision; if it doesn't – in addition to the approval of delisting by the board of directors there should be shareholder approval; Hungary: if it just transfers its stocks to another trading venue – the management board takes delisting decision, in other cases – a general meeting of shareholders does it; the Hong Kong Stock Exchange: if it has an alternative listing – delisting should be approved by an ordinary resolution of shareholders, if it doesn't – it should be approved by a special resolution of shareholders). The Borsa Italiana and the London Stock Exchange<sup>52</sup> envisage a different delisting procedure for national and foreign issuers. Most of the countries envisage that shareholder approval of delisting only applies to equity shares, however some

<sup>52</sup> Borsa Italiana Listing Rules contain direct provisions for different delisting regulation of Italian and foreign companies. However, London Stock Exchange differentiates it indirectly (it has a different regulation of cancellation of premium (general meeting of shareholders should approve it) and secondary listing (corporate organ, which approves delisting, is not specified). But mostly foreign companies have secondary listing.

of them also require it for delisting of other securities – e.g. securities converted in stocks (Russian Federation).

*Shareholder voting for a delisting decision* can be exercised by all shareholders (in most of the analyzed countries) and/or public ones (in India approval of delisting by public shareholders is additional to approval by all shareholders (in the case of delisting from all stock exchanges); TSX Venture Exchange can require approval of delisting by public shareholders in some cases). The Hong Kong Stock Exchange can require in addition to the approval of delisting by the qualified majority of votes of shareholders it can be envisaged separate voting of different classes of shares (as a rule voting of those classes of shares which an issuer is planning to exclude from listing) and controlling shareholders should abstain from voting).

*Shareholders can approve delisting by ordinary* (taken by a simple majority of votes) (Hong Kong Stock Exchange, if a company has an alternative listing on other stock exchanges) or *special resolution* (taken by the qualified majority of votes in 2/3 of votes (NASDAQ OMX Oslo) or 75% from the majority of votes (Hong Kong Stock Exchange (if a company doesn't have an alternative listing on other stock exchanges), London Stock Exchange (for premium listing), Buenos Aires Stock Exchange, Singapore Stock Exchange, India (delisting from all stock exchanges), MICEX-RTS, Kazakhstan Stock Exchange, Budapest Stock Exchange).

A range of countries give to shareholders *veto rights as to a delisting decision*: no more than 10% in nominal value of the shares held by the shareholders present; and voting should be held against the delisting resolution (Buenos Aires Stock Exchange, Hong Kong Stock Exchange (if a company doesn't have an alternative listing on other stock exchanges), Singapore Stock Exchange, Stock Exchange of Thailand) or votes cast in favor of the resolution by public shareholders should be at least twice exceed the votes cast by public shareholders against the resolution (India (in the case of delisting from all stock exchanges)).

In other countries shareholders have not only the right to vote for a delisting decision but dissent shareholders also have *exit (appraisal) rights* (Bolsa de Madrid, Borsa Italiana, Budapest Stock Exchange, Buenos Aires Stock Exchange, India, Kazakhstan Stock

Exchange, MICEX-RTS (Russia), Prague Stock Exchange, Singapore Stock Exchange). It is worth paying attention to the fact that some legislators attach giving exit rights to shareholders depending on whether a company has an alternative listing after delisting or not. E.g. in India, Hungary, and Hong Kong Stock Exchange exit rights are given to shareholders only in the case of delisting from all stock exchanges. In India small companies are exempted from giving appraisal rights to the shareholders.

The important mechanism of shareholder protection is an appointment of an independent financial adviser who should advise to the issuer on the exit offer (Singapore Stock Exchange).

The key problem for most countries, which give appraisal rights to shareholders in delisting, is *how the price of stocks will be defined*. It is important that stocks should be redeemed on fair price, which shouldn't take into account fall in the price during the delisting. Special regulation of defining stock price exists in India<sup>53</sup> and Hungary<sup>54</sup>.

So, we can see a significant influence of the UK regulation on other countries of Anglo-Saxon legal family. Shareholder approval of a delisting decision is envisaged on the London Stock Exchange, the Hong Kong Stock Exchange, and the Singapore Stock Exchange and, however, it's not obligatory but most of companies delisted from the Australia Securities Exchange and the New Zealand Exchange also approved delisting by an ordinary resolution of shareholders. An exception is the Toronto Stock Exchange where the board of directors approves delisting, as it had been on the London Stock Exchange by 2005. The Singapore Stock Exchange and Hong Kong Stock Exchange give exit rights to shareholders (it's up to the company). At the same time the London Stock Exchange enacted shareholder cancellation of premium listing after the similar reform in Germany; however, it didn't go too far and has never given appraisal rights to shareholders as in the last one. The USA occupies a separate position from other countries of Anglo-Saxon legal family where (as you can see from the third part of

<sup>53</sup> Securities and Exchange Board of India (Delisting of Equity Shares) regulations of 2009, Art.15.

<sup>54</sup> Hungary Act on the Capital Markets No. CXX (2001), Art. 63A.

this article) NYSE for a long time had shareholder approval of delisting but under the pressure of NASDAQ removed it.

If to look at other countries, which don't require shareholder approval in delisting, it is possible to note that they have predominantly large stock markets (NYSE, NASDAQ, Frankfurt Stock Exchange, SIX Swiss Stock Exchange, Tokyo Stock Exchange) or maybe not so large ones but consolidated with the U.S. stock market (NYSE Euronext Paris, NYSE Euronext Amsterdam, NASDAQ OMX in Stockholm, NASDAQ OMX in Copenhagen (however, NASDAQ OMX Oslo requires shareholder approval of delisting)).

I find that most of countries, which give exit rights, are young, developing or small markets; where a concentrated ownership structure of issuers is predominant; without developed OTC markets (Argentina, Brazil, Thailand; Italy, Spain; most of Eastern and Central European (former post-socialistic) countries (Czech Republic, Hungary, Kazakhstan, Russian Federation)).

In the range of countries the right to sell one's stocks by means of the extending period, during which stocks should be traded after the delisting announcement, can be guaranteed. For example, on the Kazakhstan Stock Exchange, SIX Swiss Stock Exchange, NASDAQ OMX Stockholm it can be extended up to 6 months, on Hong Kong Stock Exchange it should be at least 3 months, on the Borsa Italiana - at least 3 months (for national issuers) and 45 days (for foreign ones), on the Frankfurt Stock Exchange - up to 3 months (if after being delisted the issuer will not be traded on another stock exchange), Budapest Stock Exchange - not fewer than 60 days, MICEX-RTS - from 14 days to 3 months. NASDAQ OMX Oslo, NYSE Euronext Paris, NYSE Euronext Amsterdam guarantee the right to sell stocks after delisting but don't specify a concrete period of stock trading after it. As a rule, the time to sell is given by those countries which don't envisage shareholders approval of delisting and exit rights to shareholders; as an exception, the Borsa Italiana, Budapest Stock Exchange, Kazakhstan Stock Exchange and MICEX-RTS, require shareholder approval of delisting, give exit rights to shareholders and envisage the opportunity to extend the period during which stocks should be traded after the announcement of delisting.

### Part III. Historical overview of the U.S. delisting regulation and policy proposals

For almost sixty years (since 1939 until 1997) Rule 500 of the NYSE Listing Rules required approval of delisting by two thirds of a company's outstanding shares with no more than 10% of shares opposing to it.

However, since 1990s this rule has been sharply criticized mainly on the reason of its anticompetitiveness as such, which prevents exchange-listed companies from withdrawing and transferring their securities to other stock exchanges.

According to the words of the National Association of Securities Dealers (NASD)<sup>55</sup>, Rule 500 was invented with a purpose to restrict delisting of issuers from NYSE from the beginning. In 1939 the Canadian company “Dominion Stores” voluntarily delisted its stocks from the NYSE over the objections of the last one. At that time, the NYSE didn't have any specific investor protection rule, which could prevent Dominion from leaving the exchange. After that event the NYSE proposed a new rule (NYSE Rule 500) to defend it against future voluntary delistings<sup>56</sup>, which was approved by the SEC.

Later the SEC also commented that with the rise of other established securities markets in the U.S (e.g. by some measures the NASDAQ surpasses the NYSE in number of companies and annual share volume), many of the concerns, that Rule 500 addressed, became obsolete. Motivating changes in the securities industry, the SEC stated that NYSE Rule 500 has been challenged as a deterrent to inter-market competition rather than a necessary investor protection provision. In the *Market 2000 Report*, the SEC mentioned that with the advent of the NASDAQ National Market and the accompanying system and trade reporting changes, the possibility

<sup>55</sup> Now it has a name - Financial Industry Regulatory Authority (FINRA).

<sup>56</sup> Press Release of NASD from July 22, 1999. “NASD Opposes SEC Approval of NYSE's Anti-Competitive Amendment to Rule 500, <http://www.finra.org/Newsroom/NewsReleases/1999/P010305>.

of shareholders being disadvantaged by a voluntary delisting has diminished greatly<sup>57</sup>. It also reported that over the past 60 years, only one issuer, MacMillan Bloedel Ltd., in 1986 delisted from the NYSE. By contrast, in 1998 alone, 66 companies voluntarily delisted from the NASDAQ and 17 companies delisted from the AMEX<sup>58</sup>.

Another reason, which sounded against NYSE Rule 500, was that it doesn't protect investors anymore. Some commentators pointed that initially, when there was no division between delisting and deregistration, shareholder approval of delisting protected them from stopping of reporting requirements by the company under the securities regulation. But since sec.12 (g) of Securities and Exchange Act of 1934 was enacted in 1964, the basis for such statutory justification has not been valid. This section requires all companies, which meet certain thresholds of size and share ownership, to comply with identical regulatory requirements regarding registration, reporting, proxy, and insider trading provisions of the Act. So, section 12(g) of Securities and Exchange Act of 1934 makes it impossible for a company to avoid reporting requirements merely by means of delisting<sup>59</sup>.

Professors Macey and Haddock found that delisting of an issuer's securities from a stock exchange due to its failure to maintain listing requirements was detrimental to both the issuer and its security holders. These requirements make it particularly difficult for those institutions with large stock holdings to obtain delisting. Also, even if institutional investors wish to delist a corporation in which they have large holdings, a minority of small shareholders can block the delisting. Then the professors argued that when the firms failed traditional listing requirements, investors in delisted

<sup>57</sup> Division of Market Regulation, United States Securities and Exchange Commission, *Market 2000 – An Examination of Current Equity Market Developments* (Jan. 30-31, 1994) at 30-31.

<sup>58</sup> SEC Approves Amendment Easing Delisting Requirements for NYSE Firms. *Securities Regulation & Law Report: News Archive > 1999 > 07/23/1999* (Bloomberg BNA).

<sup>59</sup> Richard G. Ketchum and Beth E. Weimer, *Symposium: Market 2000 and the NASDAQ Stock Market*, 19 *Iowa J. Corp. L.* 559, 574 (1994).

firms would be provided with a 'soft-landing' in the form of an efficient alternative trading venue<sup>60</sup>.

The NASDAQ initiated revision of NYSE Rule 500. After its letters to the NASD and the SEC the revision process started. Frank G. Zarb, a former Chairman and Chief Executive Officer of the NASD, warned that unless the NYSE repealed the rule voluntarily, regulators were going to take an action.

Under significant pressure from the SEC and NASD, the NYSE has revised this rule in 1997 and in 2003 it was abolished entirely to permit corporate officers and directors to delist securities without shareholders voting.

In 1997 an amendment to NYSE Listing Rules eliminated the shareholder-vote requirement, but voluntary delisting required board (by the majority of votes) and audit committee approval, prior to the written notification to the company's 35 largest shareholders, and a publication of press release<sup>61</sup>.

However, this norm continued to be criticized. According to the NASDAQ, its petition sought repeal of NYSE Rule 500 by the SEC on three reasons. First, the NASDAQ considered this rule as a "relic of another era" that served no legitimate investor protection purpose. The Rule's shareholder notice provisions and the requirement of audit committee approval were not consistent with the principles of shareholder democracy and corporate governance espoused by the SEC. Lastly, at the opinion of the NASDAQ Rule 500 was antithetical to the free and open competition that the SEC had consistently advanced and that was the bedrock of the U.S. capital markets system. Accordingly, the NASDAQ maintained that the SEC's mandate under Section 11A of the 1934 Securities Exchange Act to "assure ... fair competition ... among exchange markets"<sup>62</sup>.

The NASD also voiced the strong opposition to the 500 NYSE rule's existence and recommended the NYSE to eliminate the Rule altogether. "Far from protecting investors, the approved amendment to Rule 500 is obviously intended to protect the NYSE's hold

<sup>60</sup> Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: the Failure of National Market System*, 1(1) U. Ill. L. Rev. 315, 350 (1985).

<sup>61</sup> SEC (Release No. 34-40688; File No. SR-NYSE-97-31) Nov 18, 1998.

<sup>62</sup> NASDAQ Files Petition Requesting the SEC to Repeal NYSE Rule 500. In its entirety, <http://ir.nasdaqomx.com/releasedetail.cfm?ReleaseID=177912>.

on listed companies against fair competition by other markets,” the NASD charged.

The entire repeal of NYSE Rule 500 was also supported by the Bloomberg tradebook, which indicated that it, not providing any meaningful investor protection, was an impediment to achieving best execution of the market. It stood on the way of innovation and competition.

The SEC received 23 comment letters on the proposed rule change. Many commentators pointed out that the proposed requirements concerning the approval process, shareholder notification, and the mandatory waiting period were still anticompetitive, unduly burdensome, and costly for issuers. Two commentators stated that the proposal generally did not provide sufficient shareholder protection<sup>63</sup>. The SEC pointed that the interests of investors in choosing the trading center were vitally important and supported the entire repeal of NYSE Rule 500.

As a result in 2003 the NYSE repealed Rule 500 and at present the issuer can delist its stocks from the NYSE with the approval of board of directors.

*If to summarize all the arguments for repeal of shareholder approval of delisting on the issuer's request, we can conclude the following: (1) its anticompetitiveness and restriction of the right of issuer to exit the stock exchange; (2) it doesn't protect investors anymore.*

Let's look at these arguments critically. One of the main arguments against shareholder approval of voluntary delisting is its *anti-competitiveness*. Proponents of this point of view indicate that it prevents exchange-listed companies from withdrawing and transferring their securities to another exchange. Indeed, an important indicator of presence of competition at a stock market is easiness to enter a stock market and exit it.

Professor Pritchard asserted that delisting provision no longer served any investor protection purpose and put an exchange at a competitive disadvantage. Corporations were reluctant to list on

<sup>63</sup> See Securities Exchange Act Release No. 39394 (December 3, 1997), 62 FR 65116.

the NYSE because its stringent delisting provision effectively precluded switching listings to competitor exchanges<sup>64</sup>.

I should agree with the remark of Frank Zarb, a former NASD's chairman and chief executive officer, that the proven benefits provided to the American economy by free and open competition should present overwhelming evidence that any barriers to competition among financial markets must be eliminated.

But was shareholder approval of delisting a real impediment to competition on the U.S. stock market?

Empirical research has shown that after the repeal of shareholder approval of delisting on the NYSE (in the period of 2000-2008) 160 NASDAQ companies moved to it, while only 20 have shifted the other way. The NYSE claims that only 14 of the listings, which it lost to the NASDAQ, were "voluntary" transfers<sup>65</sup>. In the vast majority of cases, a company's transfer from the NYSE to the NASDAQ was rather the result of the company's inability to satisfy the NYSE's continued listing standards. This fact underscores the confusion that is likely to result if a company that falls below the NYSE's continued listing standards is permitted to retain its symbol when it transfers to the NASDAQ<sup>66</sup>.

These data indicates that after NYSE Rule 500 repeal a number of transfers from the NYSE to the NASDAQ increased slightly. It would be unreasonable to link these transfers only with a repeal of shareholder approval in delisting. First of all, the NYSE eliminated shareholder-vote requirement in 1997 (however, the rule required board (by majority of votes) and audit committee approval, prior written notice to the company's 35 largest shareholders, and a press release were left) but only one company had transferred listing of its stocks from the NYSE to the NASDAQ by 2003<sup>67</sup>. The majority of transfers from the NYSE to the NASDAQ occurred after the SOX of 2002 took into force and their number increased even

<sup>64</sup> A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 (6) Vt. L. Rev. 925, 992 (1999).

<sup>65</sup> Serena Ng, *Nasdaq Pulls Harder for Listing Switches*, Wall St. J., Feb. 26, 2009, at C1.

<sup>66</sup> NYSE Response to Re: File No. SR-NASDAQ-2007-031. - P.7 // [www.sec.gov/comments/sr-nasdaq-2007-031/nasdaq2007031-12.pdf](http://www.sec.gov/comments/sr-nasdaq-2007-031/nasdaq2007031-12.pdf)

<sup>67</sup> Avner Kalay, Evgenia Portniaguina, *Swimming against the Tides: The Case of Aeroflex Move from NYSE to NASDAQ*, 4 J. Financ Markets. 261-267 (2001).

more after the financial crisis of 2008. The SOX increased costs for public companies and as a result a lot of companies went dark<sup>68</sup>. The financial crisis of 2008 caused deficit of capital for companies and most of them had to reassess their expenses (including costs of listing). That is why I think that most of the companies, which moved to the NASDAQ, just tried to save costs on the NYSE listing fees, which are significantly higher than the NASDAQ ones.

I would like to question *if shareholder approval of delisting is an effective investor protection tool or not.*

On one side when buying stocks investors should understand that a company could be delisted either voluntarily or involuntarily at any moment.

But on the other side, we shouldn't forget that in firms with a controlling shareholder there is a risk that management and the board of directors will follow the direction of the blockholders ignoring the interests of the minority shareholders. As management becomes more beholden to the interests of large shareholders, it may become less concerned with the welfare of smaller investors<sup>69</sup>.

“The *agency problem* here is the possible conflict of interest between the dominant shareholder (supported by the officers and directors who are under the dominant shareholder's control) and other shareholders”<sup>70</sup>. In this case, blockholders might misuse their

<sup>68</sup> Goetzmann & Garry, *supra* note 13 at 64-69; Kaserer C, Mettler A, Obernberger S, *The Impact of the Sarbanes-Oxley Act on the Cost of Going Public*. 4(2), Bus. Res.125-147 (2011); Stephen M. Bainbridge, *Corporate Governance and U.S. Capital Market Competitiveness* 1-36 (UCLA School of Law, Law-Econ Research Paper No. 10-13), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1696303](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696303); Leuz, Triantis, Wang, *supra* note 8, at 181.

<sup>69</sup> Stephen Bainbridge, *Say-on-Pay Frequency results depend more on who the shareholders are than market cap of company*, <http://www.professorbainbridge.com/professorbainbridge.com/2011/03/say-on-pay-frequency-results-depend-more-on-who-the-shareholders-are-than-market-cap-of-company.html>

<sup>70</sup> Ron Daniels, Randall Morck, *Canadian Corporate Governance: the Challenge*, University of Calgary Press, Calgary (1995), at 9 [http://www.business.ualberta.ca/en/People/TechGroupTest/Backup/~/\\_/media/business/FacultyAndStaff/FSA/RandallMorck/Documents/Research/Articles/DanielsMorckTheChallengeINDCAN.pdf](http://www.business.ualberta.ca/en/People/TechGroupTest/Backup/~/_/media/business/FacultyAndStaff/FSA/RandallMorck/Documents/Research/Articles/DanielsMorckTheChallengeINDCAN.pdf)

power to get private benefits at the expense of minority shareholders<sup>71</sup>.

The problem with giving insiders the ability to unilaterally exit mandatory disclosure is that insiders may benefit from a value-decreasing exit<sup>72</sup>. Controlling shareholders have an informational advantage when facing minority shareholders and investors. They possess private information, and can exploit this edge<sup>73</sup>. Moving to a suboptimal level of disclosure may enable insiders to get more private benefits. And the stock price drop caused by the suboptimally low disclosure may enable the insiders, who know the shares' actual value, to accumulate stocks at a bargain price<sup>74</sup>.

So, this shows that there is an agency conflict between controlling and public shareholders in delisting, that is also confirmed by the U.S. court practice. In *Hamilton v. Nozko* Court of Chancery alleges that the *deregistration and delisting* eliminated the market for the common shares, which adversely *affected the minority (public) shareholders'* ability to liquidate their shares at a fair price, and made them vulnerable to a forced sale at an unfair price by means of an exchange offer or otherwise<sup>75</sup>. This case also revealed different interests of controlling and public shareholders in delisting. The only interest of public shareholders after delisting is to sell their stocks. In contrast, controlling shareholders can be interested in enlarging of their majority control into 100% ownership. Controlling shareholders are not adversely affected by delisting; they don't want to sell their shares. Controlling shareholders can even benefit from it. Elimination of a public market for the shares in delisting would

<sup>71</sup> Michael J. Barclay & Clifford G. Holderness, *Private Benefits from Control of Public Corporations*, J. Financ. Econ. 371-395 (1989); Andrei Shleifer and Robert W. Vishny, *A Survey of Corporate Governance*, 52(2) J. Financ. 737-783 (1997); Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *Tunneling*, 90(2) Am. Econ. Rev. 22-27 (2000); Marco Becht, Ekkehart Boehmer, [Voting Control in German Corporations](#), 23(1) Int'l. Rev. L. & Econ. 1-29 (2003).

<sup>72</sup> See abuses of controlling shareholders, when they went private in a few years after IPO, in Pierpaolo Pattitoni, Barbara Petracchi, Massimo Spisni, *"Hit and Run" and "Revolving Doors": Evidence from the Italian Stock Market*, J. Manage. Gov. 1-17 (April, 2013).

<sup>73</sup> Ettore Croci, Alfonso Del Giudice, *Delistings, Controlling Shareholders and Firm Performance in Europe*, Europ. Financ. Manage. 1, 4 (2012).

<sup>74</sup> Fried, *supra* note 5, at 155-156.

<sup>75</sup> *Hamilton v. Nozko*, No. 13014, 1994 WL 413299, (Del.Ch. July 26, 1994).

facilitate them to acquire the publicly owned shares at an unfair price.

I consider the right to sell shares at a profit as a constituent part of the shareholder's property right (which is a fundamental shareholder right<sup>76</sup>). One of the key characteristics of corporations is a free transferability of shares: shareholders have the right to sell their stocks but delisting significantly restricts this transferability.

First of all, it can be explained by radical reducing of disclosure of information by the issuer after the delisting. As we know, after delisting a company moves to the Pink Sheets (OTC market). The studies of Hasbrouck and Schwartz, Marsh and Rock showed that *the exchanges are more liquid than the OTC market*<sup>77</sup>. First and foremost disadvantage of trading on OTC is giving limited information by the company to the investors compare to stock exchanges<sup>78</sup>. Pink sheets-listed companies do not need to report any information to investors. There is also more speculation in such a market.

Information about issuers quoted on the Pink Sheets is often difficult to find because only a bare minimum of information about companies must be available to investors. There is "lack of reliable and current financial information about the issuers. This information obviously pales in comparison to the extensive disclosures required by the Securities Exchange Act. For example, although some financial statements are required, they need not be audited, reviewed, or even compiled by an accounting firm. This can make

<sup>76</sup> In sec. 186a of Commercial Code of Czech Republic it was directly pointed that delisting has a fundamental character for the companies' shares and securities.

<sup>77</sup> Joel Hasbrouck, Robert A. Schwartz, *The Liquidity of Alternative Market Centers: A Comparison of the New York Stock Exchange, the American Stock Exchange, and the NASDAQ National Market System* 1-16 (American Stock Exchange Transactions Data Research Project Report No.1, 1986); Terry A. Marsh, Kevin Rock, *Exchange Listing and Liquidity: A Comparison of the American Stock Exchange with the NASDAQ National Market System* 1-24 (Amer. Stock Exchange Transactions Data Research Project Report No. 2, 1986).

<sup>78</sup> Kate Litvak, *Summary Disclosure and the Efficiency of the OTC Market: Evidence from the Recent Pink Sheets Experiment*, (Dec. 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1443595>.

it difficult to know what you're buying and how the company is doing over time<sup>79</sup>.

Only a small fraction of firms that go dark provides any financial information publicly to their hundreds or thousands of their public investors, the overwhelming majority of these firms provide zero information to them<sup>80</sup>.

As a result of reducing of the issuer's disclosure of information, the stock price falls down significantly and it becomes extremely difficult to sell small shareholding on an unorganized market. *Restriction of the right to sell stocks in delisting leads to such changes of investors' property rights on their stocks that mean actual lose of them* without formal withdrawal of property rights.

In fact, approval of delisting by board of directors, defended by the NASDAQ, can be also explained as a consequence of domination of the doctrine of directors' primacy in the U.S. At present, the corporate law of every state provides that the business of the corporation shall be managed by, or under the direction of, the board of directors. Shareholders typically don't vote on matters of ordinary business judgment. All statutes provide that in a situation of fundamental corporate changes – the issue must be submitted to shareholders.

As Professor Bainbridge writes, directors manage by the corporation more effectively than shareholders because they are better informed than shareholders, tend to have longer experience with firms than shareholders, fewer and fewer of whom are true long-term investors. That is why, in his opinion, directors should take most of decisions of the corporation<sup>81</sup>and I agree with this point of view. But *delisting decision is not an ordinary case of management; it is a fundamental change of the nature of the investment that a shareholder owns*. In fact, it is “a disposal” of shareholders' property rights.

Motivating, that insiders of publicly-traded firms can abuse their rights in the relation of minority shareholders, Professor Fried

<sup>79</sup> Michael K. Molitor, *Will more sunlight fade the Pink Sheets? Increasing Public Information about non-reporting issuers with quoted securities*, 39 Ind. L. Rev. 309, 311-312, 336 (2006).

<sup>80</sup> Fried, *supra* note 5, at 137-138.

<sup>81</sup> Should shareholders have a voice in corporate strategy? The Dutch case. <http://www.professorbainbridge.com/professorbainbridgecom/2011/01/should-shareholders-have-a-voice-in-corporate-strategy-the-dutch-case.html>

proposed to give public shareholders veto rights in delisting. Under this approach a publicly-traded company can be delisted if it obtains the consent of the majority of the firm's public shareholders<sup>82</sup>.

I think legal remedies in delisting of stocks on the issuer's request should be provided to the investors; and shareholder approval of delisting would be the most effective one. In this way, the balanced regulation of different corporate actors' interests could be reached: the issuer would be guaranteed the right to delist its stocks at any moment and shareholders could express their will as to this fundamental decision for the corporation. Shareholders' right to vote could be "an additional monitoring device possessed by the residual claimants when the stakes are high enough"<sup>83</sup>.

But at the same time minority (public) shareholders should not wield disproportionate power over the activities of a listed company<sup>84</sup>. There is a great risk that public shareholders will never vote in the support of delisting of stocks. Leuz, Triantis and Wang found that the negative market reaction to delisting/deregistration announcements reflected that minority shareholders view going dark as being primarily in insiders' interests<sup>85</sup>. That is why minority shareholders will never be interested in delisting because for them it means loss (or significant decreasing) of their investments. In this case it will be practically impossible to delist stocks if the controlling shareholder initiates this procedure (regardless of whether there is insiders' abuse or not). Another moment is that it is difficult to define who a public investor is (e.g. in Carmel Container Systems Ltd. Case, the public investor, who applied to the SEC, stating that delisting was unlawful, possessed by 25% of stocks<sup>86</sup>; in

<sup>82</sup> Fried, *supra* note 5, at 157.

<sup>83</sup> [Frank Easterbrook](#), [Daniel R. Fischel](#), *The Economic Structure of Corporate Law* 79-80 (Harvard University Press, 1996). *See also*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 (3) Harv. L. Rev. 833, 836 (2005).

<sup>84</sup> Consultation Paper 05/7\*\*\*; 28 April 2005 [all high-profile consultations, and major policy changes affecting a large number of consumers or financial sectors] The Listing Review and Prospectus Directive Feedback on CP04/8 and CP04/16, near final text and supplementary consultation, § 6.5 FSA.

<sup>85</sup> Leuz, Triantis, Wang, *supra* note 7, at 185.

<sup>86</sup> Comment on File No.1-09274 SEC from February 20, 2005. Re: Notice of Application of Carmel Container System Ltd to Withdraw its Ordinary Shares from List-

other companies such a shareholder could be considered as a majority one).

As it was previously mentioned, former NYSE Rule 500 had already provided shareholders with veto rights and this provision was strongly criticized because minority shareholders could block delisting (by 10% of votes)<sup>87</sup>. I think that existence of shareholder veto rights and less concentrated ownership of the U.S. listed companies (which made it more difficult to get the approval of delisting by 2/3 of shareholder votes) at that time, indeed, could restrict the issuer's right to leave the stock exchange voluntarily and in this relation be reasonably criticized by the NASDAQ and other participants of the US stock market.

In my opinion, giving the right to veto to public shareholders in delisting would put disproportionate burdens on listed companies. That is why I offer an alternative approach: giving all the shareholders voting rights to take a delisting decision, which should be approved by the qualified majority – two thirds of votes.

The next issue concerns whether the *approval of delisting can be justified from the cost-benefit point of view*.

The proposed regulation can have the following costs: (1) the cost of holding the general meeting; (2) costs associated with continuing to abide by the listing rules in the period between the announcement of the general meeting and the meeting; and (3) the on-going costs of compliance with the listing rules if shareholder approval is not obtained<sup>88</sup>.

The common view is that it's difficult and expensive to convene a general meeting of shareholders in the countries with dispersed ownership because of a big number of shareholders. That is why the board of directors takes most of corporate decisions and a general meeting of shareholders approves only fundamental corporate changes.

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ing on the American Stock Exchange LLC,  
[www.sec.gov/rules/delist/109274/ashenhav022305.pdf](http://www.sec.gov/rules/delist/109274/ashenhav022305.pdf)

<sup>87</sup> Macey & Haddock, *supra* note 60, at. 350.

<sup>88</sup> FSA Consultation paper 04/08, Miscellaneous amendments to the Handbook (No. 14), (May, 2004) § 7.21.

The existence of large shareholders who control the listed companies is widespread in Europe<sup>89</sup>. However, recent evidence provided by Professor Holderness shows that large shareholders are also common in the U.S. firms. The author also gives the empirical data that 96% of public firms have blockholders; these blockholders in aggregate own an average of 39% total of the common stock<sup>90</sup>. Aviv Pichhadze also confirms that market forces transformed the American equity markets into a variant of the blockholder model and facilitated concentration of ownership. He goes further and says that these blockholders are institutional investors<sup>91</sup>. Indeed, the number of institutional investors is growing every year. In 1950 institutional investors accounted for only about 23% of all outstanding public and private equities in the U.S., a figure that increased to 53.3% in 1990<sup>92</sup>. As in 2007, the total ownership of institutional investors accounted for 76.4% of the 1000 largest US firms<sup>93</sup>.

The above-mentioned facts permit me to conclude that the costs of holding of a general meeting in order to get shareholder approval will not be too high and are economically justified. Leuz, Triantis and Wang affirm, “the market reaction is significantly less negative when outside investors are better protected, as in going dark decisions that require shareholder approval”<sup>94</sup>. That’s why shareholder approval of delisting is beneficial from the economic perspective.

<sup>89</sup> Mara Faccioa, Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 (3) *J. Financ Econ.* 365–395 (2002).

<sup>90</sup> Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 (4) *Rev. Financ. Stud.* 1377, 1384 (2009).

<sup>91</sup> Aviv Pichhadze, *Institutional Investors as Blockholders*. 145, 156, In *Corporate Governance after the Financial Crisis*, Cheltenham, edit. by P. M. Vasudev & S. Watson (Edward Elgar, 2012).

<sup>92</sup> Mark R. Wingerson, Christopher H. Dorn, *Institutional Investors in the U.S. and the Repeal of Poison Pills: A Practitioners Perspective*, 201, 203. in *Institutional Investors and Corporate Governance*, edit. by Theodor Baums, Richard M. Buxbaum, Klaus J. Hopt (De Gruyter, 1993).

<sup>93</sup> The Conference Board, 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition (November. 2010) (“Conference Board Report”) at 22. See also Bernard S. Black, [Agents watching agents: The promise of institutional investor voice](#), *UCLA L. Rev.*, 811, 827 (1991).

<sup>94</sup> Leuz, Triantis, Wang, *supra* note 7, at 202.

Ordinary, in the case of fundamental corporate changes, corporate laws give to minority shareholders *appraisal - or dissenter's rights* - which are a rare exception where corporate law guarantees shareholders the right to sell their shares. Under corporate norms it is considered that a shareholder must obtain liquidity not from the corporation but from the market, if there is one. That is not to say that corporate law does not assume an important role for the ability to exit. Free transferability of shares and limited liability - both core characteristics of the corporate form - facilitate liquidity through the market<sup>95</sup>. I think that exit rights in delisting are justifiable for young, developing or small markets and without developed OTC markets. The U.S. doesn't belong to such kind of markets and introduction of exit rights in delisting would unfairly breach the balance of interests between majority and minority shareholders to the side of the last ones.

## Conclusion

This study showed a significant increasing in the number of voluntary delisted companies from the U.S. stock market. Delisting has an adverse impact primarily on the minority shareholders' interests. However, current U.S. legislation doesn't provide effective tools for their protection.

I single out two major approaches to investor protection in voluntary delisting (depending on the corporate organ that takes it): 1) in those countries where a board of directors (or management) approves delisting, shareholders are protected by the doctrine of directors' fiduciary duties; 2) in other countries - shareholders approval of delisting. Some countries also give such shareholder remedies in voluntary delisting as veto rights, exit rights to public shareholders and extending of the term when delisting takes into force.

I found that until 1997 the NYSE required shareholder approval by the qualified majority of votes with giving veto rights to the

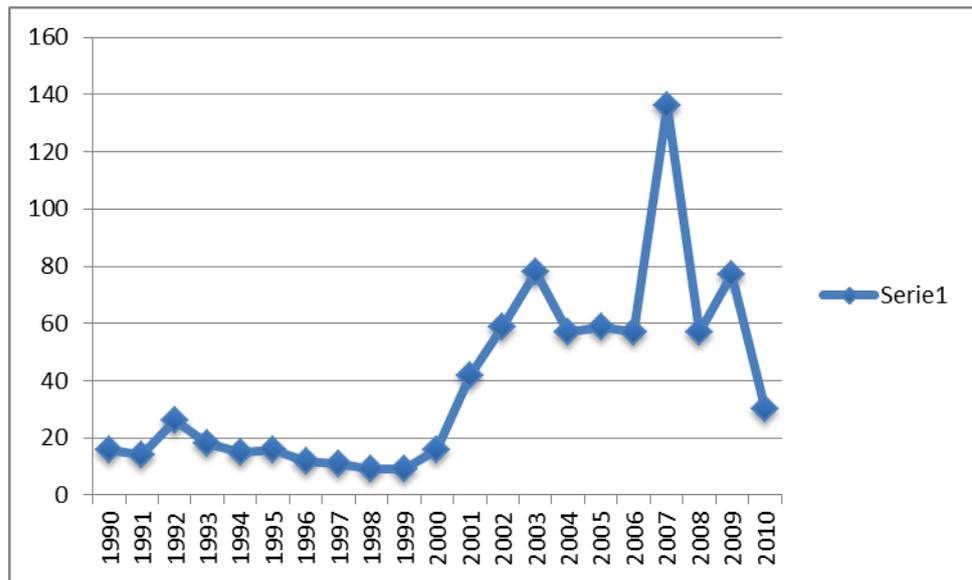
<sup>95</sup> Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protection Shareholders Rights to Vote, Sell, and Sue*, 62(3) L. & Contemp. Probs. [215, 217 \(1999\)](#).

shareholders but under the pressure of the NASDAQ this rule was cancelled (mainly on the reason of its anticompetitiveness). Taken together my findings support two proposed explanations. It is improper to consider shareholder approval of delisting as an anti-competitive factor. The analysis of the empirical data showed that since 2003 the number of transfers from NYSE to the NASDAQ did not increase significantly; and it would be unreasonable to connect the existing transfers only with the repeal of shareholder approval in delisting (such determinants as adoption of SOX and the financial crisis of 2008 should be also considered). I develop previous research of agency conflict in delisting (Fried; Leuz, Triantis and Wang) and additionally show that delisting negatively affects on the constituent part of property right of a shareholder - the right to sell shares at a profit. Restriction of this right in delisting leads to such changes of investors' property rights of their stocks, that means actual lose of them without formal withdrawal of property rights.

I assert that shareholder approval of delisting is the most preferable investor remedy for the U.S. stock market and compliance costs will not be burdensome.

## Tables

Table 1. Voluntary delistings in the USA<sup>96</sup>



<sup>96</sup> For calculation of voluntary delistings on the U.S. stock market I used delisting codes 520, 570 and 573 from the CRSP database as it was proposed in Andras Marosi, Nadia Massoud, *Why Firms go dark?* 10 (Nov. 2004). (Unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=570421](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=570421).

Table 2. Chronology of changes to the FSA Listing Rules concerning delisting

Year of a change	Regulation	Description of a change
2013	Current regulation  United Kingdom Listing Authority listing rules edition on May 2013	Required shareholder approval of cancellation of premium listing of equity shares by a majority of not less than 75% of the holders of the securities. <b>Exemptions from this regulation</b> (when prior approval of shareholders is not required): - the financial position of the <i>issuer</i> or its <i>group</i> is so precarious that, there is no reasonable prospect that the <i>issuer</i> will avoid going into formal insolvency proceedings; - that there is a proposal for a transaction, arrangement or other form of reconstruction of the <i>issuer</i> or its <i>group</i> which is necessary to ensure the survival of the <i>issuer</i> or its <i>group</i> and the continued <i>listing</i> would jeopardise the successful completion of the proposal; - explaining; (a) why the cancellation is in the best interests of those to whom the <i>issuer</i> or its <i>directors</i> have responsibilities (including the bodies of <i>securities</i> holders and creditors, taken as a whole); and (b) why the approval of shareholders will not be sought prior to the cancellation of <i>listing</i> ; and (4) giving at least 20 <i>business days</i> notice of the intended cancellation (5.2.7 R); - to other securities; - cancellation in relation to takeovers; - cancellation as a result of schemes of arrangement etc.
2012	FSA 2012/51 Listing Rules (Cancellation of Listing) (Amendment) Instrument 2012	New edition of R 5.2.12 which envisages not application of shareholder approval to cancellation as a result of schemes of arrangement.
2010	FSA 2010/7 Listing Rules Sourcebook (Amendment No.4 Instrument 2010 [Made 25 February 2010] [Commencement April 6, 2010]	Shareholder approval by 75% of votes is required only for cancellation of listing of <u>equity shares</u> with a premium listing.
2009	FSA 2009/54 Listing Rules Sourcebook (Amendment No 3) Instrument 2009 [Made September 2009] [Commencement: October 6, 2009 and April 6, 2010]	Shareholder approval by 75% of votes is required only for cancellation of listing of <u>ordinary equity shares with premium listing</u> on the request of issuer  Rule 5.2.5A R, which envisaged shareholder approval of cancellation of secondary listing in the range of cases, was canceled.  Rule 5.2.6 R, which envisaged that shareholder approval, is not required if the shares are admitted to trading on regulated market in an EEA State, was canceled.
2007	FSA 2007/40	There was changed scope of application of Rule 5.2.5R. If earlier this

	<p>Listing, Prospectus and Disclosure Rules (Miscellaneous Amendments) Instrument 2007</p>	<p>norm applied to all equity securities with primary listing, after changes – only to <u>ordinary equity shares with primary listing</u>.</p> <p>There was introduced rule 5.2.5A. - <i>shareholder approval of cancellation of secondary listing in the range of cases</i>: (1) the shares have previously been converted from being primary listed to secondary listed; and (2) the conversion has taken place within 2 years before the proposed cancellation of the secondary listing of the shares.</p> <p>Introduced new exemption from shareholder approval of cancellation of listing. It doesn't apply to cancellation as a result of schemes of arrangement. (5.2.12 R).</p>
<p>2005</p>	<p>FSA 2005/35 Listing Rules Instrument 205 (July 1, 2005)</p>	<p>Approval of cancellation of <i>listing</i> of <u>any of its equity securities with a primary listing</u> by a resolution of not less than 75% of the holders of the <i>securities</i> (5.2.5 R).</p> <p><i>Introduced exemptions from this regulation (when prior approval of shareholders is not required)</i>:</p> <ul style="list-style-type: none"> <li>- if the <i>securities</i> are admitted to trading on a <i>regulated market</i> in the EU before the cancellation takes effect (5.2.6 R).</li> <li>- the financial position of the <i>issuer</i> or its <i>group</i> is so precarious that, there is no reasonable prospect that the <i>issuer</i> will avoid going into formal insolvency proceedings;</li> <li>- that there is a proposal for a transaction, arrangement or other form of reconstruction of the <i>issuer</i> or its <i>group</i> which is necessary to ensure the survival of the <i>issuer</i> or its <i>group</i> and the continued <i>listing</i> would jeopardise the successful completion of the proposal;</li> <li>- explaining; (a) why the cancellation is in the best interests of those to whom the <i>issuer</i> or its <i>directors</i> have responsibilities (including the bodies of <i>securities</i> holders and creditors, taken as a whole); and (b) why the approval of shareholders will not be sought prior to the cancellation of <i>listing</i>; and (4) giving at least 20 <i>business days</i> notice of the intended cancellation (5.2.7 R);</li> <li>- to other securities (but in this case should be RIS notification)(5.2.8-5.2.9 R);</li> <li>- cancellation in relation to takeovers.</li> </ul>

Table 3. Delisting on the application of issuer from Tokyo Stock Exchange

Year of delisting	Total number of delistings	Delisting on the application of issuer	Delisting on the application of issuer by foreign company
2013	12	0	0
2012	56	0	0
2011	52	1	1
2010	68	4	4
2009	78	1	1
2008	79	7	7
2007	70	3	3

Table 4. Cross-country comparison of delisting regulation

Country	Decision-making corporate organ in delisting	Exit rights of shareholders	Other investor remedies
<b>Australian Securities Exchange (ASX)</b>	<p><b>The corporate organ, which takes delisting decision, is not specified</b> (17.11 Australian Securities Exchange Listing Rules).</p> <p>However, in practice general meeting of shareholders very often approves it by its ordinary resolution.</p>	<p><b>No</b></p> <p>No legislative requirements.</p> <p>In practice, some corporations declare buy-back programs of ordinary shares for shareholders that hold less than a marketable parcel of shares.</p>	<b>N/A</b>
<b>Bolsa de Madrid</b>	<p><b>General meeting of shareholders</b></p> <p>(Art. 34 (5) Consolidated Text of the Spanish Securities Market Act 24/1988 of 28 July).</p>	<p><b>Yes</b></p> <p><b>Takeover bid</b> made by the issuer as to all delisted stocks from the official secondary markets, must make a takeover bid for all the shares, which it wishes to exclude.</p> <p>The National Securities Market Commission may grant a waiver from this obligation if other investor protection means exist (Art. 34 (5) Consolidated Text of the Spanish Securities Market Act 24/1988 of 28 July).</p>	<b>N/A</b>
<b>Bombay Stock Exchange</b>	If the issuer has an alternative listing after delisting - <b>board of directors</b> .	<b>No</b>	<b>N/A</b>
	If the issuer doesn't have an alternative listing after delisting) - <b>board of directors and general meeting of shareholders</b> (by 75% of votes and the votes cast in favor of the resolution by public shareholders to be at least 2 times the votes cast by public shareholders against the resolution (Art. 6-8 of Securities and Exchange Board of India (Delisting of Equity Shares) regulations, 2009").	<b>Yes</b>	
<b>Borsa Italiana</b>	<p><b>General meeting of shareholders</b> (for Italian issuers)</p> <p><b>Resolution of the competent body that re-</b></p>	<p><b>Yes</b> (for Italian issuers).</p> <p><b>Mandatory tender offers</b> are applicable or an issuer should show other conditions guaran-</p>	For Italian issuers - at least <b>3 months</b> and for foreign issuers - <b>at least 45 days</b> shall pass from the submission of

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	<p><b>quested delisting</b> (for foreign issuers).</p> <p>(Art. 2.5.6-2.5.7 of Rules of the markets organized and managed by Borsa Italiana S.p.A, Rules BIt 15_10_2012 no high Effective date: 15 October 2012)).</p>	<p>teeing an equivalent protection of investors. This provision only applies to ordinary shares (Art. 2.5.6. of Rules of the markets organized and managed by Borsa Italiana S.p.A.).</p>	<p>the request to the actual delisting.</p> <p>(Art. 2.5.6.-2.5.7 of Rules of the markets organized and managed by Borsa Italiana S.p.A.).</p>
<p><b>Bovespa Mais (Brazil)</b></p>	<p><b>General meeting of shareholders</b></p> <p>(Sec.11.1 Bovespa Mais Listing Rules)</p>	<p><b>Yes</b></p> <p><b>Public Tender Offer</b> by the Controlling Shareholder to acquire the other shareholders' common shares, if the Company's delisting from the BOVESPA MAIS is because of registration of its securities for trades outside the BOVESPA MAIS.</p> <p>Public tender offer is not mandatory in the case of downgrading (namely, moving of company to BOVESPA Novo Mercado)</p> <p>Requirements to fair price of redeemable stocks apply.</p> <p>(Sec. 11.2 of Bovespa Mais Listing Rules)</p>	<p>A Company may delist from the BOVESPA MAIS at any time, as long as the delisting has been reported in writing to BOVESPA at least 30 days in advance (Sec. 11.1 of Bovespa Mais Listing Rules).</p>
<p><b>Budapest Stock Exchange</b></p>	<p><b>General meeting of shareholders</b> taken by qualified majority of votes (3/4).</p> <p><b>Management</b> decision in the case of transfer of shares to another trading venue (Art. 63 of Hungary Act on the Capital Markets).</p>	<p><b>Yes</b></p> <p><b>Appraisal rights of dissenting shareholders</b></p> <p>Any shareholder whose shares are directly affected by the delisting - excluding those who supported the general meetings decision - may request - within a sixty-day forfeit deadline following the date of publication of the decision on delisting - the company to purchase his shares. Such offer to sell may not be withdrawn.</p>	<p>The time span between the date of submission of the delisting notice to the exchange market and the date when the shares are in fact removed from the regulated market in question may not be less than <b>60 trading days</b> (Art. 63 (5) of Hungary Act on the Capital Markets).</p> <p>In the event that all the shares of a listed public company are acquired by a single shareholder, the CEO issues a resolution to have the equity series delisted within <b>3 Ex-</b></p>

		(Art. 63 (7) of Hungary Act on the Capital Markets).	<b>change days</b> (26.2.4.1 Regulations of the Budapest Stock Exchange Ltd. For listing, continued listing and disclosure).
<b>Buenos Aires Stock Exchange</b>	<p><b>General meeting of shareholders</b></p> <p>Art. 50 Reglamento de Cotizacion de La Bolsa de Comercio De Buenos Aires quorum to 75% to approve delistings and giving shareholders representing more than 10% of the votes the right to veto such a decision.</p>	<p><b>Yes</b></p> <p><b>Tender offer</b> ( Art. 50 of Reglamento de Cotizacion de La Bolsa de Comercio De Buenos Aires).</p>	Listing is suspended in the last day of the redemption offer of shares (Art. 50 (g) of Reglamento de Cotizacion de La Bolsa de Comercio De Buenos Aires).
<b>Frankfurt Stock Exchange</b>	<p><b>Management board</b></p> <p>(§ 46(1)(2) Exchange Rules for the Frankfurter Wertpapierbörse).</p>	<p><b>Yes</b></p> <p>(Macrotron judgment of 2002, Judgment of German Federal Constitutional Court from July 11, 2012).</p>	In the case if the issuer delists its securities and it is neither admitted to nor traded on another domestic exchange or foreign organized market or on a respective market in a non-EU country provided that, after the revocation decision has been announced, the investors have sufficient time to sell the securities in the regulated market – such securities being affected by the revocation - on the regulated market of FWB – during <b>3 months</b> after the revocation or if major shareholder makes the security holder a purchase offer of these securities it can be reduced to <b>one month</b> (§ 46(1)(2) Exchange Rules for the Frankfurter Wertpapierbörse).
<b>Hong Kong Stock Exchange</b>	<p><b>General meeting of shareholders</b></p> <p>- <b>by ordinary resolution if an issuer has an</b> alternative listing on another regulated, regularly operating, open stock exchange recognized for this purposes by the Exchange).</p> <p>-<b>by qualified majority of votes</b> at least 75% of the votes attaching to any class of listed securities held by holders voting (if the issuer has no such alternative listing) + <u>veto rights</u> the num-</p>	<p><b>Yes</b></p> <p>If the issuer has no alternative listing, the issuer may not voluntarily withdraw its listing on the Exchange without the shareholders and holders of any other class of listed securities, if applicable, other than the directors (excluding independent non-executive directors), chief</p>	The issuer has given its shareholders and holders of any other class of listed securities, if applicable, at least three months notice of the proposed withdrawal of the listing. This minimum notice period must run from the date on which the shareholders approve the voluntary withdrawal of listing and such

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	<p>ber of votes cast against the resolution is not more than 10% of the votes attaching to any class of listed securities held by holders permitted to vote.</p> <p>(sec. 6.11-6.12, 6.15 Rules governing the listing of securities on the Stock Exchange of Hong Kong Limited (Main Board Listing Rules).</p>	<p>executive and controlling shareholders, are offered a reasonable cash alternative or other reasonable alternative</p> <p>(sec. 6.12 Rules governing the listing of securities on the Stock Exchange of Hong Kong Limited).</p>	<p>notice must include details of how to transfer securities to and trade those securities on the alternative market</p> <p>(sec. 6.16 Rules governing the listing of securities on the Stock Exchange of Hong Kong Limited).</p>
<p><b>Kazakhstan Stock Exchange (KASE)</b></p>	<p><b>General meeting of shareholders</b></p> <p>In voting on preferred shares voluntary delisting holders of these shares must participate.</p> <p>Art 19 (4) Kazakhstan Stock Exchange Listing Rules, Art. 36 subparagraph (1) 9-1 Law No. 415-II of 13th May 2003 of the Republic of Kazakhstan on Joint-Stock Companies</p>	<p><b>Yes.</b></p> <p><b>Appraisal rights</b> (if the shareholder did not participate in the general shareholders meeting or if the said shareholder participated at the said meeting and voted against the said decision) (Art. 27 (1) subsec. 1-1 Law No. 415-II of 13th May 2003 of the Republic of Kazakhstan on Joint-Stock companies)</p>	<p>The Listing Commission (in cases when these securities delisting is significantly, according to the Listing Commission, affects investors rights and interests on the securities market and/or securities market professional participants) has the right to set forth that its decision on these securities delisting becomes effective upon expiry of a certain period, which must not exceed <b>6 months</b> from the consideration day (Art 19 (4) Kazakhstan Stock Exchange Listing Rules</p> <p>Redemption of bonds in the case of their delisting on the request of joint-stock company (art. 18-4 The Securities Market Law of the Republic of Kazakhstan).</p>
<p><b>London Stock Exchange</b></p>	<p><b>General meeting of shareholders</b></p> <p>(by qualified majority in 75% of the holders of the securities). It applies only to cancellation of premium listing.</p> <p>(Rule 5.2.5 R of the UK Listing Authority listing rules).</p>	<p><b>No</b></p>	<p>A written request by an issuer to have the listing of its securities cancelled must be made not less than 24 hours before the cancellation is expected to take effect (Rule. 5.3.5 R of United Kingdom Listing Authority listing rules).</p>
<p><b>MICEX-RTS (Russian Federation)</b></p>	<p><b>General meeting of shareholders</b></p> <p>(by qualified majority in 3/4 of voting shares who participate in general meeting of shareholders). It applies to delisting of shares and/or securities converted in shares</p>	<p><b>Yes</b></p> <p><b>Appraisal rights of shareholders</b> on their demand if they voted against delisting or</p>	<p>The Exchange can determine period of time when the securities continue trading after delisting announcement. It can last from 14 days to 3</p>

	(Art. 48 (1) subparagraph. 19-2, 49 (4) of Federal Law “On Joint-Stock Companies”).	didn’t vote for it (Art. 75 (1) paragraph 3 of Federal Law “On Joint-Stock Companies”).	months starting from the day when the Exchange decided to remove the securities from the list and suspend trading of these securities (Art. 21 (6) of Rules for listing securities, admission to flotation and trading in CJSC MICEX Stock Exchange of 21.02.2013)
<b>NASDAQ</b>	<b>The corporate organ, which takes delisting decision, is not specified</b> but usually board of directors does.  (Rule 5835 (j)(1) of NASDAQ Listing Rules).	<b>No</b>	The delisting will become effective 10 days after filing the Form 25 (§ 240.12d2-2 of General Rules and Regulations promulgated by Securities Exchange Act 1934)).
<b>14. NASDAQ OMX Copenhagen</b>	<b>The corporate organ, which takes delisting decision, is not specified</b> but usually board of directors does.  However, if the exchange finds that delisting will be detrimental to the stock market, creditors or minority shareholders, it can ask convene general meeting for taking delisting decision. Considering these factors, the exchange will determine: whether the protection of minorities has been disregarded, or whether a deletion would give certain shareholders or others an undue advantage over other shareholders or the company. check how many outstanding shares and shareholders there are in the company in question. (sec. 2.9 Rules for issuers of shares of NASDAQ OMX Copenhagen A/S 1-10-2011)	<b>Yes</b>  (in special situations)  In the situations whereby the exchange finds that the interests of the investors or the market can justify a deletion, the exchange will require the company to ensure that the company’s shareholders may dispose of their shares until the company is deleted from the exchange via an offer to buy the remaining shares (sec. 2.9 Rules for issuers of shares of NASDAQ OMX Copenhagen A/S 1-10-2011)	<b>N/A</b>
<b>NASDAQ OMX Oslo</b>	<b>General meeting of shareholders</b> (by qualified majority of votes in 2/3 (but can be exemptions from this rule when board of directors takes delisting decision)).  (Sec. 15.1(4) of Continuing obligations of stock exchange listed companies)	<b>No</b>  There is no direct provision about share buy-backs.  But Oslo Borse decides in every concrete case will be breach of shareholder rights or no, including minority shareholders are not given an option of exit or withdrawal prior to delisting.	The decision to delist shall state the date on which delisting will be implemented. When fixing the date for delisting, consideration shall be given inter alia to allowing the company a reasonable period to adjust to the fact that its shares will no longer be stock exchange listed.

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		Oslo Borse will assess: if delisting caused substantial disadvantage for the shareholders; how many minority shareholders opposed to delisting.	(Sec. 15.1(7) of Continuing obligations of stock exchange listed companies)
<b>NASDAQ OMX Stockholm</b>	<b>Board of directors</b>  Sec. 11 Chapter 15 of Securities Market Act Where appropriate in the public interest delisting can be postponed.	<b>No</b>	Art. 2.8.1 Listing Rules generally require four weeks' notice for a company to be delisted, but if there is extensive trading and a large number of shareholders, the Exchange may decide to postpone the delisting up to 6 months. In case of a public offer, the Exchange can accept two weeks notice for delisting, if the bidder holds 90 percent or more of the shares in the company, the trading is sporadic and the bidder has initiated proceedings in respect of compulsory redemption. The Exchange will make an assessment of an appropriate delisting date in each individual case.
<b>NYSE</b>	<b>Board of directors</b>  (NYSE Listed Company Manual Rule 806.02)	<b>No</b>	The delisting will become effective 10 days after filing the Form 25 (§ 240.12d2-2 of General Rules and Regulations promulgated by Securities Exchange Act 1934).
<b>NYSE Euronext Amsterdam</b>	As a rule, <b>board of directors</b> approves it <sup>97</sup> .  (Art. 2707 Book II General Rules for the Euronext Amsterdam Stock Market).	<b>No</b>	Euronext Amsterdam indicates the date on which it takes effect (Rule 6905/3 of Euronext Rulebook). Delisting date is normally 20 trading days after publication of the decision or later, if this is specified in an exit arrange-

<sup>97</sup> There is no option to delist with shareholders' consent. The Euronext rules prescribe that the shareholder protection must take the form of opportunity to sell, not to vote. See, T.M. Stevens, *Listing and Delisting* in Financial law in Netherlands edited by Marcel C. A. van den Nieuwenhuijzen, Wolters Kluwer, 2010, at 194.

			ment.
<p><b>NYSE</b> <b>Euronext Paris</b></p>	<p><b>Board of directors</b></p> <p>But in some cases should be voting of general meeting of shareholders.</p> <p>An issuer that applies to delist its equity securities but that plans at the same time to seek admission to an organized multilateral trading facility on which it would be subject to equivalent public offering rules shall present the approval decision of the general meeting of shareholders that voted on the plan after being duly informed of how the transfer would affect the periodic or ongoing disclosure regime of the issuer</p> <p>(Article P 1.4.5 of Euronext Rulebook II Specific rules applicable to the French regulated markets)</p>	<p><b>No</b></p>	<p>Euronext Paris indicates the date on which it takes effect.</p> <p>An issuer that applies to delist its equity securities but that intends to remain listed on another regulated market or on a third-country market with equivalent characteristics shall follow a <u>sales facility procedure</u>, which implies, inter alia, that existing shareholders are first invited to sell their securities on the most liquid market at no expense. Euronext Paris can waive this obligation if the issuer remains listed on a regulated market operated by another Euronext market operator, where the settlement system is the same as far as the shareholder is concerned (Art. P 1.4.2-P 1.4.4 of Euronext Rulebook II Specific rules applicable to the French regulated markets).</p>
<p><b>Prague Stock Exchange (Czech Republic)</b></p>	<p><b>General meeting of shareholders</b></p> <p>(Art. 9 (2) of Prague Stock Exchange Listing Rules, Sec. VI, Art. 47 of Act on Business Activities on Capital markets of Czech Republic, Sec. 186a of Commercial code).</p>	<p><b>Yes</b></p> <p><b>Appraisal rights of dissenting shareholders</b> who didn't attend general meeting or voted against delisting decision.</p> <p>(Sec. 186a of Commercial code)</p>	<p>The regulated market operator shall exclude the security from trading on the official market without undue delay after receiving the application (Art. 47 of Act on Business Activities on Capital markets of Czech Republic).</p> <p>If the issuer requests a transfer to another regulated market of the Exchange, it is obliged to fulfill the disclosure duty established for the Prime Market for the period within 12 months from the day of transfer, unless the Committee establishes otherwise (Art. 10 (1) Prague Stock Exchange</p>

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			Listing Rules).
<b>Shanghai Stock Exchange and Shenzhen Stock Exchange</b>	<p><b>Absence of voluntary delisting institution.</b></p> <p>According to the sec. 14.3.1 (10), (12) Rules Governing the Listing of Stocks on Shanghai Stock Exchange Rules: the Exchange will terminate listing of the stocks of a listed company upon the occurrence of any of the following circumstances: the company repurchases stocks or an acquirer makes a tender offer for the purpose of listing termination and the implementation of relevant plan gives rise to changes in the company's total share capital and equity structure which render the company unsuitable for listing; during the period of listing suspension, the company's shareholders' general meeting adopts a resolution to terminate listing. The same provisions are envisaged at Shenzhen Stock Exchange (Sec. 14.3.1. (7) and (11) Rules Governing Listing of Stocks on Shenzhen Stock Exchange). As we can see although Shanghai stock exchange has ruled voluntary delisting, that is, stock exchange must make the decision to terminate listing if the shareholders' meeting makes resolution to terminate after the stock suspending, the listing company is not willing to withdraw from the stock market on its initiative in reality, which make voluntary delisting unable to come true.</p>	<b>No</b>	<b>No</b>
<b>Singapore Stock Exchange</b>	<p><b>General meeting of shareholder</b> (by qualified majority of votes (at least 75% in nominal value of the shares held by the shareholders present and voting))</p> <p>+ veto rights of shareholders: (not more than 10% of the shares held by shareholders present and voting, voted against delisting resolution).</p> <p>(Rule 1307 of the SGX-ST Listing Manual).</p>	<b>Yes</b>	<b>N/A</b>
<b>Stock Exchange of Thailand</b>	<p><b>General meeting of shareholders</b> (by qualified majority of votes (at least 3/4 of the shares held by the shareholders who are present and voted))</p> <p>+ veto rights (not more than 10% of the shares</p>	<b>Yes</b>	The Board of Stock Exchange designates the date on which the delisting shall take effect (Art. 8 of Regulations of the Stock Exchange of Thailand. Re: Delisting of Securities,

	<p>held by shareholders present and voting, voted against delisting resolution).</p> <p>(Art. 5 of Regulations of the Stock Exchange of Thailand. Re: Delisting of Securities, 1999).</p>	<p>ible securities from the shareholders and holders of such securities (Art. 4 (5), 7 of Regulations of the Stock Exchange of Thailand. Re: Delisting of Securities, 1999).</p>	<p>1999).</p>
<p><b>SIX Swiss Stock Exchange</b></p>	<p>Does not provide which corporate body should resolve on a delisting request, usually <b>board of directors</b></p> <p>(Art. 52 SIX Swiss Stock Exchange Listing Rules)</p>	<p><b>No</b></p>	<p>Maintenance of listing should be during <b>3 months</b> after delisting announcement (art.4)</p> <p>If at the time of delisting, the free float of securities outstanding is higher than 5%, the issuer will be responsible to maintain or procure the maintenance of an OTC market for such securities for a period of <b>up to 6 months</b> (Art. 5 of Directive on the Equity Securities and Derivatives from October 29, 2008).</p>
<p><b>Tokyo Stock Exchange (TSE)</b></p>	<p><b>The corporate organ, which takes delisting decision, is not specified.</b></p> <p>(Rule 608 Tokyo Stock Exchange Listing Regulations).</p> <p>In practice only in foreign companies, quoted on TSE, board of directors approved voluntary delisting.</p>	<p><b>No</b></p> <p>There are no legislative requirements as to shareholders' exit rights; Japanese companies, which delist their stocks, usually make a tender offer to shareholders as to share buy-back.</p>	<p><b>N/A</b></p>
<p><b>Toronto Stock Exchange (TSX)</b></p>	<p><b>Board of directors or other similar body</b></p> <p>(Sec. 720 of Toronto Stock Exchange Company Manual)</p>	<p><b>No</b></p> <p>However, some companies voluntary declared buy-back program of small shareholdings as a result of delisting.</p>	<p><b>N/A</b></p>

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<p><b>TSX Venture Exchange</b></p>	<p><b>Board of directors</b></p> <p>But if the Exchange is not satisfied that a satisfactory alternative market exists for the listed shares, it will require majority of the minority shareholder approval for the delisting application.</p> <p>(Sec. 4.2-4.3 of Policy 2.9 of TSX Venture Exchange Corporate Finance Manual)</p>	<p><b>Yes</b></p> <p>Typically a class of listed shares will be delisted at the request of the issuer when it has redeemed its shares or a successful <b>take-over bid</b> for the shares has been completed.</p> <p>(Sec. 4.4 of Policy 2.9 of TSX Venture Exchange Corporate Finance Manual)</p>	<p><b>N/A</b></p>
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