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COMPLETE REMOVAL OF SHARES FROM TRADING ON THE REGULATED MARKET AT THE ISSUER'S REQUEST UNDER CROATIAN LAW (DELISTING)

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ABSTRACT

The Capital Market Act establishes a general regulatory framework for trading on the Croatian capital market. The delisting of shares from the regulated market is regulated by Article 341 Capital Market Act which sets out measures for the protection of the issuer's shareholders and the delisting procedure. Such delisting generally requires a qualified majority decision of the issuer's general meeting, obligatory repurchase of shares held by some of the issuer's shareholders, and determination of the moment when the delisting decision takes effect at the regulated market. However, as the paper will demonstrate, such rules produce serious doubts as to their consistency, effectiveness, and sufficiency to conform to the needs of legal certainty, protection of the shareholders, and the rule of law.

Key words: *delisting, delisting decision, regulated market, repurchase obligation, investor protection.*

1. INTRODUCTION

Many terms in everyday use refer to the cessation of securities trading on the regulated market, e.g. "going private", "withdrawal of securities from the regulated market", "p2p – public to private" and "regular delisting".[1] What is

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[1] In this direction for the differences between the cessation of admission on the regulated market, suspension of trading and cessation of quotation on the regulated market see Groß, W.: Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wert-

generally meant under such terms is the cessation of securities admission to trading on the regulated market. Although securities can be delisted from the regulated market due to many reasons (e.g. because of the issuer's insolvency or due to the issuer's transformation to a legal form other than the public limited company) and in different manners (e.g. downgrading and partial delisting), this paper elaborates upon delisting understood as complete removal of shares from trading on the regulated market at the issuer's request.[2]

In 2020 fourteen securities have been delisted from the Zagreb Stock Exchange (ZSE).[3] This was due to failure to comply with transparency obligations (eight securities), then because the issuer merged with another company (three securities), and finally because the issuer decided to delist (as well as three securities). For comparison, in 2019 fifteen securities were delisted from ZSE, more precisely, six securities due to failure to comply with transparency obligations, three securities due to insolvency or liquidation of the issuer, three securities both due to the issuer's decision to delist and due to statutory changes of the issuer.[4] This data demonstrates that delisting at the request of the issuer is a relatively common occurrence in the Croatian-regulated market. However, such delisting is not the main reason behind such removal from trading on the regulated market.

Delisting is an interdisciplinary legal area because its regulatory aspects generally fall under the scope of the respective company and capital market laws.[5] Therefore, depending on the regulatory framework of national legal systems, it is possible that both bodies of law will have to be considered to remove securities from trading on the regulated market. At times, this process might not be as straightforward as one might desire, thus the question of interplay between the company and capital market law arises. Capital market law rules are generally superordinate to the company law rules when regulating a matter

papierprospektgesetz, München, 2016, BörsG §39 Rn. 11 & Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, 2015, §26 Rn. 2.

[2] For future ease of reference, for the purposes of this paper the term delisting refers solely to delisting that is instigated at the request of the issuer of securities. In the same manner, the term security is used to denote equity securities while a separate chapter shortly elaborates on the delisting of debt securities.

[3] This is according to the available data until September on the official ZSE internet site (https://zse.hr/).

[4] Aggregated data provided on request by the ZSE. However, it should be noted that in the last ten years 12 shares of different issuers (4 in the last two years) have been admitted to trading on the ZSE regulated market.

[5] In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 104.

that concerns the operation of the capital market.[6] This means that applicable company law rules can be used by way of legal analogy in situations where the capital market law rules fail to regulate a certain matter that generally falls under the scope of the company law. However, this should not mean that capital market rules have absolute precedence over company law rules in every situation. In every contested situation between these two bodies of law, the legal nature of the contested issue should be determined and then, depending on the result of such analysis, placed within the scope of either the company or capital market law.[7] In other words, if a certain issue fundamentally relates to capital market law principles, its regulatory purpose, and subject matter, it should be resolved according to the applicable capital market law rules. The same applies to the company law. However, in most situations, such an assessment will be difficult to undertake since it is normally hard to determine whether a specific issue falls under the scope of one or the other body of law.[8] Even though they have completely different functions, the scope of the company and capital market law overlap in some areas of regulation (e.g. the issuance of new shares through the regulated market).[9] To avoid issues regarding contradictory application and interpretation of legal rules, the national legislator should primarily strive to ensure that both company and capital market law rules coexist in harmony. This means that the delisting rules should be regulated by both the capital market law and company law rules with clear delineation between the two or by either of the two but by affording due respect to the underlying principles and purpose of the other. In this way, the issues relating to the application of diverging sets of rules can be avoided and the legal certainty preserved.

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6 In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, pp. 26 &104.

7 In this regard the company law generally regulates the formation and operation of private companies while capital market law is generally concerned with ensuring the orderly trading on the regulated markets and protection of the capital market and investors. Company law is focused on establishing a balance between various interests in the management of corporate structure while capital market law is focused on ensuring orderly trading on the regulated market. Protection of investors as a group forms and integral part of such capital market protection, while individual investor protection is secondary in nature. In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 26 & pp. 104-106.

8 In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 106.

9 For example, in general the capital market law serves the wider public interests aimed at protection of trust into orderly trading on the regulated market while company law primarily serves to protect confidence of various private stakeholder interests into orderly internal and external operation of commercial companies.

One can argue that both the listing and delisting of securities have advantages and disadvantages. Considering the circumstances of each case, these advantages must be carefully weighed against the disadvantages to determine whether the decision to delist from the regulated market is in the best interest of the issuer on whom lies the initiative for such a decision. Such advantages normally include easier access to fresh capital through the regulated market, increased liquidity of listed securities, increased transparency of issuer's business activities, and possibility of better reputation in the community as well as the advantage of having the value of listed securities determined in a lasting and presumably more reliable way by regular market mechanisms.[10] On the other hand, the listing imposes the issuer with a burden of increased transparency obligations, the financial cost of maintaining the listing, and easier exposure to hostile takeovers.[11] Therefore, the issuer's ultimate decision to delist should be based on careful consideration of these advantages and disadvantages as well as the specific circumstances of each case. When observed advantages are overshadowed by the disadvantages, the issuer will normally decide to remove its shares from trading on the regulated market.

Under Croatian law, delisting is regulated by the Capital Market Act and the Companies Act.[12] Article 275 para. 1 p. 9 Companies Act only provides that the competence for making the delisting decision lies with the general meeting of the public limited company. However, Article 341 of the Capital Market Act, besides providing that the delisting decision must be taken by a certain majority at the general meeting of the issuer, also determines the moment when the listed shares are removed from trading on the regulated market and that certain shareholders are entitled to seek remuneration in return for the shares being

[10] In this regard from the position of German and Austrian law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, pp. 16-17 & pp. 22-25 & Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, 2, Wien, 2015, §26 Rn. 23 & Maurer, M., Crone, H, C.: Rechtsschutz bei Dekotierungen von der Börse SIX Swiss Exchange, *Schweizerische Zeitschrift für Wirtschafts-und Finanzmarktrecht*, 83(4) 2011, p. 406 & Kunz, P.: Kotierung sowie Dekotierung – oder: "Werden" und "Sterben" der Publikumsgesellschaften, *GesKR*, 2-3 2006, p. 133.

[11] In this regard from the position of German, Austrian and Swiss law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, §26 Rn. 4, 23 &, pp. 17-18 & Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, Wien, 2015, §26 Rn. 23 & Maurer, M., Crone, H, C., Rechtsschutz bei Dekotierungen von der Börse SIX Swiss Exchange, *Schweizerische Zeitschrift für Wirtschafts-und Finanzmarktrecht*, 83(4) 2011, pp. 406-407 & Kunz, P.: Kotierung sowie Dekotierung – oder: "Werden" und "Sterben" der Publikumsgesellschaften, *GesKR 2-3*, 2006, p. 133.

[12] Capital Market Act, (Official Gazette no. 65/18, 17/20) & Companies Act, (Official Gazette no. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13, 110/15, 40/2019).

delisted. The paper will therefore elaborate on the competence for making the delisting decision, it will then tackle the rules on the publication and effectiveness of that decision and finally the rules on the mandatory repurchase of the delisted shares.

2. THE DELISTING DECISION COMPETENCE AND THE SUBJECTIVE SCOPE OF THE DELISTING RULES

Under Croatian law determination of competence in the public limited company is generally considered to fall under the scope of the applicable company law.[13] Although the question of competence determination for making the delisting decision falls under the scope of the company law, other aspects of delisting fall under the scope of the capital market law. That is because the delisting process unfolds through several stages some fall under the scope of the capital market law and some under the scope of the company law. The initial stage ending with the issuer's decision is considered a company law matter since the respective decision-making process takes place within the issuer and is as such regarded as an internal process and autonomous right of the issuer.[14] Once such a decision is made and declared, the capital market law rules take precedence, and all subsequent stages that implement such a decision fall under the scope of the capital market law since such implementation (removal of shares from trading on the regulated market) directly affects not only the shareholders but the orderly operation of the regulated market as well.[15]

[13] The same position seems to be taken by both the applicable German and Swiss delisting regulation. Namely, in both countries there are no express delisting competence provision in the applicable capital market laws. Therefore, both countries rely on the applicable company law rules for determining the competent body for making the delisting decision. Moreover, Article 58 para. 1 p. SIX Swiss Exchange Listing Rules only generally provides that the delisting is initiated upon receiving "the issuer's application". In this regard from the position of Swiss law see Möhrle, C.: Delisting, Zürich/St. Galen, 2006, Rn. 368, 370. These rules further provide that the issuer must submit a duly signed declaration stating that its "responsible bodies" agree to the delisting. It should be noted that under Austrian law the respective national competence rule applies to all issuers, irrespective of where their company seat is located. See §38 para. 7 Börsegesetz in connection with §1 p. 8 Börsegesetz where the issuer is determined in very broad terms not distinguishing between a foreign or a domestic legal entity or natural person.

[14] In this direction from the position of German see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 114.

[15] In this direction from the position of German see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 115.

This generally means that the Companies Act determines the competent body for making certain decisions that affect that company's internal and external operations.[16] Consequently, Article 275 para. 1 p. 9 Companies Act provides that the general meeting of a public limited company is competent to decide on the removal of its shares from trading on the regulated market.[17] However,

[16] For example, the rules concerning the board members income policy (Article 247.a), rules on the required field of expertise for at least one supervisory board member (Article 255 para. 4), rules concerning dealings with affiliated persons (Article 263.a to 263.d), rules on the application of a corporate governance code (Article 272.p), rules on creation and publication of the income report (Article 272.r), rules on the competence of the general meeting to admit shares of the company to trading on the regulated market (Article 275 para. 1), rules on the convening the general meeting (Article 277 paras. 4, 5 and 8), rules concerning informing the shareholders and the company (Article 297.a to 297.f).

[17] Under the applicable German law, the delisting competence belongs to the board of directors. However, previously there was a serious debate before the courts as to whether such board decision required approval of the company's general meeting via the use of the *Holzmüller* doctrine. Eventually, German courts settled the decision by concluding that it was eventually concluded that such approval was not required since delisting does not impair shareholder's rights in way that is required by the *Holzmüller* doctrine. In this regard see Groß, W.: Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz, München, 2016. Under applicable Swiss law, there are no express rules for delisting. The recently implemented *Finanzmarktinfrastrukturgesetz*, same as the previously applicable *Börsengesetz*, does not provide any rules on the delisting but leaves this matter to the self-regulation of the respective stock exchange. Namely, stock exchange must issue regulations for the organisation of orderly and transparent trading, for admission of securities to trading, and particularly for the listing. It seems that such wide regulatory authorization implies self-regulation in regard to the delisting as well. Such conclusion is supported by the SIX Swiss Exchange Listing Rules and the SIX Swiss Exchange Directive on Delisting of Equity Securities (Article 58 para. 1 SIX Swiss Exchange Listing Rules). These rules also fail to expressly determine the competent body for making the delisting decision and are consequently leaving this to the applicable *le societatis*. In this regard see Möhrle, C.: Delisting, 2006, Rn. 368, 370. For Swiss companies, based on Article 716 para. 1 and Article 698 *Obligationenrecht*, this competence lies with the issuer's board of directors. In this regard see Kunz, P.: Kotierung sowie Dekotierung – oder: „Werden" und „Sterben" der Publikumsgesellschaften, *GesKR 2-3*, 2006, p. 135 & Maurer, M., Crone, H, C.: Rechtsschutz bei Dekotierungen von der Börse SIX Swiss Exchange, *Schweizerische Zeitschrift für Wirtschafts-und Finanzmarktrecht*, 83(4) 2011, p. 407. On the other hand, under the Austrian law the applicable *Börsegesetz* expressly provides that the delisting decision competence rests with the issuer's general meeting. Unlike in Germany, under Austrian law it is considered that delisting is comparable to the change of legal form from the public limited company to the limited liability company since the delisted instruments are deprived of their liquidity and fungibility feature. In this regard see Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, Wien, 2015, §26 Rn. 28, 30. Furthermore, under Austrian law the general meeting's decision to remove shares from trading on the regulated market must be passed by the majority of at least three quarters of votes cast. In addition, delisting application can also be made upon request of the shareholders holding at least three quarters of the share capital with voting rights.

Article 341 para. 1 Capital Market Act also provides that the general meeting of a company established in Croatia, whose securities have been admitted for trading on the regulated market in Croatia or in another member state, can pass a decision on the removal of shares or other equity securities from trading on the regulated market. Therefore, the Croatian legislator decided to determine the competence of the general assembly in both the relevant company and the capital market law. It is unclear why such a dual approach was taken by the legislator since the general rule contained in the Companies Act would suffice.[18] However, regulatory advantage is clearly given to the respective capital market rules.

This is obvious from the rules on the required majority for passing the delisting decision. Namely, the cited Companies Act provision does not provide any special rule on the required majority for passing the delisting decision. This means that the general rule of a simple majority of the votes cast would be applicable.[19] However, Article 341 para. 2 Capital Market Act provides that the concerned delisting decision is made by a greater qualified majority, namely, three-quarters of the share capital represented at the general meeting at the time of the decision making. Naturally, it is possible to establish even a greater majority for passing such a decision than the one determined by the Capital Market Act. Such a greater majority must be determined in the company's articles of association.

Concerning the subjective scope of the respective delisting rules, Article 341 para. 1 Capital Market Act covers only domestic companies whose equity securities have been admitted to trading on the regulated market in Croatia. In other words, foreign companies whose equity securities have been admitted to trading on the regulated market in Croatia do not seem to be covered by the cited Capital Market Act provision. This supports the position that the rules relating to the determination of competence are considered to fall within the scope of the company law. Otherwise, the competence rule provided under the Capital Market Act would extend to all issuers, irrespective of their company seat location. Furthermore, the cited Capital Market Act provision also does

[18] One reasonable explanation would be iteration out of convenience. In other words, to regulate the matter of delisting entirely, along with other aspects relevant to delisting, in a single provision of a single legal act, i.e. Article 341 Capital Market Act.

[19] Article 290 Companies Act provides for a principle of simple majority by stating that the decisions of the general meeting shall be made by a majority of votes cast (simple majority), unless a greater majority is required by law or by the article of association, or if some additional requirements must be met. In that regard also see Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 558.

not cover domestic companies whose shares have been admitted to trading on the capital market outside of the European Union (EU). In such a situation, the applicable rule for determining delisting competence in the Croatian company, unless the applicable capital market regulation expressly provides otherwise, is the general assembly according to Article 275 para. 1 p. 9 Companies Act as the applicable *lex societatis*.[20] However, the required majority for passing such a decision, unlike the qualified majority rule required under the Capital Market Act, shall be made by a simple majority of the votes cast.

As previously mentioned, delisting rules provided under Article 341 Capital Market Act do not seem to apply to foreign issuers whose shares have been listed on the regulated market in Croatia. Namely, the cited provision in its first paragraph expressly refers solely to domestic companies while throughout the remaining ten paragraphs of the cited provision, there is no mention of either domestic or foreign issuers. This can be interpreted to mean that a foreign company could delist its shares from trading on the regulated market in Croatia without observing any of the delisting requirements set out by the Capital Market Act aimed at the protection of the regulated market and affected investors. However, since such an outcome could be very harmful to trading on the regulated market in Croatia, the cited delisting rules should be, solely in part related to the protection of the investors (paras. 3 to 11), *de lege lata* interpreted to cover foreign companies as well. However, to ensure legal certainty, the cited delisting rules should *de lege ferenda* amended to expressly include foreign companies that have their shares listed on the domestic regulated market.[21]

Article 341 para. 1 Capital Market Act is also wider in its scope of application than Article 275 para. 1 p. 9 Companies Act. Namely, while the latter mentions only shares, the former mentions both shares and other equity securities. Notwithstanding, the mention of only shares in the cited Companies Act provision does not mean that the competence for passing the delisting decision for other equity securities cannot be derived from the cited Companies Act provision and other underlying company law principles. In other words, notwithstanding

[20] In regard to the competence for making the delisting decision see Zubović, A., Zubović Jardas, I., Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 557. As to the applicable capital market law, this especially includes any other requirements set out by the applicable capital market law rules relating to the protection of the investors and trading on the affected capital market (e.g. complying with prior mandatory time for official listing before submittal of the delisting application). In that regard see Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, pp. 557-558.

[21] In that regard see §27g Übernahmegesetz on the obligatory application of rules relating to the obligatory repurchase offer.

the wider scope of the cited Capital Market Act provision, the same conclusion regarding the delisting decision competence for other types of equity securities can be inferred from the company law rules as well.

Furthermore, debt securities, like bonds and collateralized debt obligations, can be listed for trading on the regulated market. It is reasonable to conclude that it should then also be possible to remove such securities from trading on the regulated market at the issuer's request.[22] However, neither the Capital Market Act nor the Companies Act expressly mention debt securities. The clear wording of the cited delisting provisions speaks against the application of such delisting rules to financial instruments other than equity securities. Furthermore, it is also highly improbable that these rules could be applied by legal analogy to the delisting of bonds. That is because protection measures provided under the current delisting rules are tailored for equity securities and protection of shareholders as investors compared to the holders of bonds who, on the other hand, are not necessarily the issuer's shareholders.[23] Under the current regulatory framework, the listing of debt securities on the ZSE normally ceases after the expiry of the maturity (termination) date or after the issuer repurchases all debt securities from its creditors. Therefore, it is currently not possible to delist any other financial instrument from trading on the regulated market than equity securities. Any legislative intent that would enable the delisting of debt securities at the request of the issuer should be accompanied by a new *de lege ferenda* rules that would be equally applicable to equity and debt securities or an additional set of rules that would be tailored for delisting of debt securities.[24]

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[22] For example, Börsengesetz provides that delisting at the issuer's request is possible in regard to the securities as determined by the Wertpapiererwerbs- und Übernahmegesetzes (WpÜG). WpÜG determines securities as shares and comparable securities and certificates that represent shares as well as other securities whose purpose is acquisition of such shares and comparable securities and certificates that represent such shares. This seems to include convertible bonds and other swap for shares securities. However, it seems that other types of bonds could also be delisted at the issuer's request. In that direction from the position of German law see Schwark, E., Zimmer, D.: Kapitalmarktrechts- Kommentar, München, 2020.

[23] For example, the applicable Croatian law provides that convertible bonds, floating rate bonds and other types of bonds with preferential profit participation rights should be initially offered to the issuer's shareholders (Article 313 para. 5 and 341 para. 4 Companies Act). However, it is possible to exclude the application of such shareholder's precedence right by the issuer's general meeting decision (Article 308 para. 4 Companies Act). The current delisting decision competence rule foremost enables issuer's shareholders to decide on the matter that affects third party (creditor). Furthermore, the right to seek renumeration for the delisted shares applies solely to the shareholders and not to holders of bonds who are not necessarily, as previously elaborated, issuer's shareholders.

[24] In this regard, the delisting rules established under the applicable German law could serve as a legislative role model to the Croatian legislator. This entails the transfer of competence from

3. POSTPONED REMOVAL OF DELISTED SHARES FROM TRADING ON THE REGULATED MARKET

The issuer's delisting decision is rarely immediately implemented. Such delayed effectiveness of the delisting decision hypothetically serves to enable the affected shareholder to sell their shares on the regulated market during the remaining limited time before their removal from trading.[25] However, such protection measures normally are incapable of providing the affected shareholder with the required protection since the public announcement of delisting will negatively reflect on the affected share's market price and liquidity.[26]

The delisting officially commences once the competent body of the issuer's company passes the delisting decision. Under Croatian law, such a decision is subject to mandatory registration with the competent court register.[27] The

the general meeting to the board of directors followed by other adequate protection measures, primarily the ones aimed at financially compensating all holders of such financial instruments. For more on delisting of other financial instruments under German law generally see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 29-31.

[25] In this regard from the position of Swiss law see Möhrle, C.: *Delisting*, 2006, Rn. 377. In this regard from the position of Croatian law see Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 558.

[26] In that direction from the position of Swiss law see Möhrle, C.: *Delisting*, 2006, Rn. 374, 377, 379.

[27] See Article 341 para. 7 Capital Market Act. This obligation does not exist under the applicable German, Austrian or Swiss laws. Only requirement is that the delisting decision is disclosed to the respective stock exchange and then published on the official stock exchange's internet site. Although Article 341 Capital Market Act does not provide for such a disclosure obligation, ZSE announces the delisting on their web site once it receives the issuer's delisting decision. Such disclosure can be based on the general obligation to disclose information that can be qualified as inside information. In that direction from the position of the Swiss, German, and Austrian law see Möhrle, C.: *Delisting*, 2006, Rn. 374 & Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, Auflage, 2020, BörsG §39 Rn & Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, Wien, 2015, §26 Rn. 35. On the other hand, such disclosure obligation (as suggested by some ZSE decisions) should not be based on Article 340 paras. 2 and 3 Capital Market Act which relates to disclosures where the financial instruments do not comply with the rules established by the respective stock exchange. Compliance of the financial instrument with the stock exchange rules normally relates to compliance with the stock exchange rules on admission to trading. Delisting decision cannot qualify as such non-compliance since financial instruments are presumably compliant with such rules even though the issuer made an autonomous delisting decision to delist the respective financial instruments from trading on the regulated market. Furthermore, cited provision of the Capital Market Act applies to situations where the operator of the regulated market made its own *ex officio* decision on removal of a specific financial instrument from trading on the regulated market (e.g. where the issuer does not comply with its reporting obligations towards the investors).

transparency value of such registration is at least debatable when the required transparency is also afforded by the publication of the delisting decision via the regular stock exchange disclosure venue.[28] Such an approach only burdens the overall delisting procedure with additional and time-consuming steps. Moreover, investors are more likely to follow information disclosed through the regular stock exchange disclosure venue than through the court register. Therefore, Article 341 Capital Market Act should be *de lege ferenda* amended to expressly provide that the delisting decision must be solely disclosed by the respective stock exchange. Such disclosure should be made without delay along with the stock exchange's own follow-up decision implementing the issuer's delisting decision.[29] There is no need to burden the delisting procedure with additional transparency obligations like the one currently provided through the court register. If desired, such transparency could be reinforced by establishing the issuer's obligation to disclose such stock exchange's decision on its own internet site.[30]

Once the issuer's delisting decision is registered with the court register, the issuer must notify the respective stock exchange of its decision by an authorized representative.[31] Upon notification, the management of the stock exchange commences the delisting procedure and makes its own follow-up decision to remove the delisted shares from trading at the issuer's request. Instead of "application", the applicable capital market law provision uses the term "notification". For the sake of legal clarity, "notification" should be replaced with "application" since the application better corresponds to the legal nature and effect of such action by the issuer since without the follow-up decision of the stock exchange the issuer's shares cannot be removed from trading on the regulated market.

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[28] The only added value of such registration is the supervision provided by the court register before registration of the decision with the court register. However, this does not ensure the validity of the delisting decision.

[29] The same approach seems to be taken by both the applicable German and Austrian law (for first see §39 para. 5 Börsengesetz and for latter see §38 para. 10 Börsegesetz). The applicable SIX Swiss Exchange rules provide only that the follow-up Regulatory Board's decision shall be made be made public on the internet site, however, without providing the exact time of such disclosure.

[30] Such obligation exists under the applicable Austrian and Swiss law. For the former see see §38 para. 10 Börsegesetz and for the latter see Article 4 para. 2 SIX Swiss Exchange Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products. In that direction from the position of Swiss law see Möhrle, C.: *Delisting*, 2006, Rn. 371-372.

[31] See Article 341 para. 8 Capital Market Act. Under the applicable German, Austrian and Swiss law, the delisting procedure is initiated by the stock exchange upon receipt of the issuer's delisting application.

Once notified of the issuer's delisting decision and its registration with the court register, the stock exchange must follow up with its own delisting decision at the latest by the end of the next working day.[32] The stock exchange's decision provides that the affected equity securities will be removed from trading on the regulated market by specifying the last trading day. The decision's explanatory part contains circumstances leading up to this decision as well as elaborates on whether all the stipulated conditions are met.[33]

Determination of the last trading by the stock exchange is dependent on the majority that passed the delisting decision at the issuer's general meeting. The first (presumably less common) option provides that if the delisting decision is passed by a majority higher than the nine-tenths of the votes cast, the decision takes effect a) by the expiry of the period determined by the issuer in such decision depending on the day that the decision is registered with the court register or, in case no such date is determined, b) it takes effect on the day it is registered with the court register.[34] This means that the date the delisting decision becomes effective is closely connected with the entry of the issuer's delisting decision in the court register. The second option provides that if the delisting decision is passed by at least the majority of three-quarters of the share capital represented at the general meeting (i.e. majority other than the nine-tenths of the votes cast), the decision takes effect with the expiry of the six months starting with the registration of the decision in the court register.[35]

Unfortunately, it seems that this Capital Market Act provision incorrectly implements the concept of pending general meeting decisions. Namely, pending decisions have no effect until a specified condition is met.[36] As previously elaborated, the Capital Market Act provides that the delisting decision is effective immediately on registration or after the expiry of specified time after registration with the court register (six months or time autonomously determined by the general meeting's delisting decision). Article 341 para. 3 Capital Market Act

[32] See Article 341 para. 8 Capital Market Act.

[33] In that direction from the position of the German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 36. In that regard from the position of Austrian law see §38 para. 10 Börsegesetz and from the position of Swiss law Article 4 para. 1 SIX Swiss Exchange Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products.

[34] See Article 341 para. 7 p. 1 Capital Market Act.

[35] See Article 341 para. 7 p. 2 Capital Market Act.

[36] For example, that might be registration in the court register or approval of the preferential shareholder's meeting. For example, the general meeting's change of company's articles of association is effective only once entered in the court register (Article 303 para. 3 Companies Act). More on pending general meeting decisions see Barbić, J.: *Pravo društava*, Organizator, Zagreb, 2013, p. 1347.

provides that the issuer shall provide, along with the invitation to the general meeting, an irrevocable statement that it will repurchase the delisted shares for a fair remuneration at the latest within three months since registration of the delisting decision with the court register. This provision alone does not lead to a conclusion that such an obligation is pending (as one could expect considering the nature of the pending general meeting's decision) until the delisting decision entirely becomes effective (e.g. after the expiry of the six months since registration of the delisting decision with the court register). Further Capital Market Act provision only reinforces such a conclusion by providing that shareholders are time-barred from enforcing their repurchase claims after the expiry of two months from registration of the issuer's delisting decision with the court register.[37] This means that some parts of the delisting decision take effect before the removal of the delisted shares from trading on the regulated market.

Another issue relates to the two-sided system established for the calculation of votes required for passing the issuer's delisting decision at the general meeting and the effects resulting from such different outcomes of votes cast. Article 341 para. 2 and para. 7 p. 2 Capital Market Act provides that the delisting decision is made by the three-quarters of the share capital represented at the general meeting at the time of the decision-making when such decision becomes effective after the expiry of the six months since its registration with the court register. On the other hand, Article 341 para. 7 p. 1 Capital Market Act provides that the delisting decision comes into effect when the decision is registered with the court register if the issuer's general meeting passes the decision by a majority higher than the nine-tenths of the votes cast. The problem lies in the legislator's flawed understanding of how these two different majorities operate under applicable company law rules. Namely, it is possible that the delisting decision is barely made by the three-quarters of the share capital represented at the general meeting but that such votes also amount to a majority of the ninth-tenths of the votes cast. This is because, the "votes cast" rule does not include sustained votes but only votes cast "for" and "against" the general meeting's decision, on the other hand, the rule "of the share capital represented at the general meeting" requires that such three quarters indeed vote "for the general meeting's decision". If the legislator's idea behind the use of such a two-sided system was to ensure that a higher majority exists for passing the delisting decision where delisting takes effect immediately upon registration with the court register (Article 341 para. 7 p. 1 Capital Market Act), the reasoning is flawed.[38] In other words, if the legislator intended to enable the imme-

[37] See Article 341 para. 6 Capital Market Act.

[38] This also complicates the operative side for passing general meeting's decisions since the minutes of the general meeting will need to clearly establish whether the required majority for

diate removal of shares from trading on the regulated market where a higher majority of the shareholder's votes for delisting exists, the rule provided under Article 341 para. 7 p. 1 Capital Market Act should relate to a higher majority of the share capital represented at the general meeting at the time of decision-making than the one provided under Article 341 para. 2 Capital Market Act (e.g. nine-tenths of the share capital represented at the general meeting). However, moving forward a position is elaborated taken that the effectiveness of the issuer's delisting decision should not be *de lege ferenda* tied with the decision's registration in the court register but with the stock exchanges' own follow-up decision on delisting.

As previously mentioned, the issuer must notify the stock exchange about its delisting decision once it is registered with the court register and then the stock exchange shall make its own follow-up decision by the end of the next working day.[39] In a situation where the issuer's delisting decision takes effect immediately upon registration with the court register (Article 341 para. 7 p. Capital Market Act), the Capital Market Act provision concerning the follow-up delisting decision of the stock exchange seems to be inoperative. Namely, since Article 341 para. 8 Capital Market Act mandates that the stock exchange makes its own follow-up decision at the latest following the day it was notified of the issuer's delisting decision, this means that at the moment of such stock exchange's decision the trading on the regulated market could have already ceased since issuer's delisting decision becomes effective immediately upon registration with the court register and not when the stock exchange makes its own follow-up delisting

passing the delisting decision exists (para. 2) and if it does, which of the two provided majority exists for determination of the decision's entry into force (para. 7).

[39] Under the applicable Austrian law, unlike with the time limit provided for making the stock exchange's delisting decision (i.e. without under delay), the issuer is under no obligation to submit its delisting application to the stock exchange within a certain time after the delisting decision was made by the issuer's general meeting. Presumably, this will be undertaken shortly after the general meeting's decision since such decision represents the will of its shareholders. Similar regulatory solution exists under the applicable Swiss law. The delisting application by the issuer must be submitted to the stock exchange twenty exchange days prior to the announcement of the delisting. Normally the Regulatory Board's decision is made within one month of the issuer's application receipt. For example, see SIX Exchange Regulation Decision on Volkswagen AG dated 19 December 2019 and SIX Exchange Regulation Decision on Schlumberger Limited dated 31 March 2020. It should consequently be noted that similarly under Croatian law there is also no need to expressly set the time limit for submitting the issuer's application (notification) to the stock exchange. Namely, if the management does not undertake actions to notify the stock exchange pursuant to the decision of the general meeting, such failure to act would violate duties of the management to the company and its members would risks liability for the damages thus incurred to the company. Therefore, it can be expected that such an application will be submitted to the stock exchange without undue delay.

decision. In other words, the stock exchange might not even be aware that the delisting became effective since there is no obligation of the issuer or the court register to inform the stock exchange about the impending registration of the issuer's delisting decision with the court register. Even if the stock exchange was warned in advance that the delisting decision would become effective immediately upon registration with the court register, it doesn't help much since the issuer's delisting decision will always become effective immediately upon such registration, i.e. before the stock exchange was able to make its own follow-up decision that implements the issuer's decision and removes the delisted shares from trading on the regulated market.[40] Therefore, Article 341 para. 7 p. 1 Capital Market Act on the immediate effectiveness of the issuer's delisting decision is inconsistent with Article 341 para. 8 Capital Market Act on the stock exchange's follow-up delisting decision. The effectiveness of the issuer's delisting decision should not relate to the moment of registration of such decision with the court register but to the moment determined by the stock exchange's own follow-up decision implementing the issuer's delisting decision.[41] It is the stock exchange that operates the regulated market and not the court register. Consequently, the removal from trading on the regulated market should be *de lege ferenda* connected with the stock exchange's own follow-up decision implementing the issuer's decision and removing shares from trading on the regulated market.

Under Article 341 para. 7 Capital Market Act, the stock exchange does not have any discretion in the determination of the time limit for the effectiveness of the issuer's delisting decision.[42] Under other comparable legal systems, such discretion is generally afforded to the stock exchange.[43] This enables the stock

[40] Improvisation does not help much either because even if the stock exchange received advanced warning about the impending registration in the near future and even if it makes its own follow-up decision beforehand but conditional upon notification of such registration, the delisted shares would still be traded on the regulated market until the stock exchange is notified about the registration.

[41] In that direction from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, 5, München, 2020, BörsG §39 Rn. 36. In this regard from the position of Austrian law see §38 para. 10 Börsegesetz.

[42] The issuer's delisting decision becomes effective either immediately or after expiry of the time limit set out by the issuer itself from the moment of registration of such a decision with the court register (Article 341 para. 7 p. 1 Capital Market Act) or after expiry of a six-month period form the moment the decision is registered with the court register.

[43] For example, the applicable German law only provides that the period between the publication and the effectiveness of the revocation cannot exceed two years (§39 para. 5 Börsengesetz). The exact time limit, which can be shorter but cannot exceed two years is determined by every stock exchange. However, the time limit determined in such a way is subject to an ex ante judicial review. In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 38 & Baumbach, A. et al:

exchange to tailor this time limit to particular circumstances of every delisting situation.[44] The Croatian legislator should also *de lege ferenda* expressly enable the stock exchange to determine the exact moment when the delisted shares are going to be removed from trading on the regulated market. Namely, the Capital Market Act should both determine the minimum and the maximum time limit (e.g. three to six months from the issuer's delisting application is submitted to the stock exchange) but also enable the stock exchange to determine the exact moment of delisting within the set limits while observing that adequate protection of investors, issuers and other valid interests is ensured. This provides the stock exchange with adequate flexibility.

4. OBLIGATORY REPURCHASE OF DELISTED SHARES FOR A FAIR REMUNERATION

The capital markets normally enable appropriate market price formation for the listed securities while also providing them with constant liquidity.[45] Small

Handelsgesetzbuch, München, 2020, BörsG § 39 Rn. 7. For example, on the Frankfurt Stock Exchange such time limit varies between three days and six months but could, under specific circumstances, be even further shortened (Article 46 paras. 3 and 4 Exchange Rules for the Franfurter Wertpapierbörse). Under applicable Austrian law the delisting decision becomes effective within a period that is not shorter than three months and not longer than twelve months following the stock exchange's decision (§38 para. 10 Börsegesetz). Under applicable SIX Swiss Exchange rules, the Regulatory Board determines the last trading day of the delisted securities which cannot be less than three and more than twelve months from the delisting announcement (Article 4 paras. 1 and 2 SIX Swiss Exchange Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products). Only under particular circumstance this time limit can be shortened to as little as five days from the announcement, e.g. in case of merger or liquidation of a company (Article 4 para. 3 SIX Swiss Exchange Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products).

[44] For example, under applicable German law the exact time limit determined by the stock exchange is generally influenced by the time required to ensure adequate protection of investor's and issuer's interests and thus preserving protection of the capital market as well. In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts-Kommentar*, München, 2020, BörsG §39 Rn. 37. For example, this means that if the liquidity of the delisted securities is low or non-existent prior to the delisting because of low investor's interest, there is no need to keep the securities listed on the regulated market for a longer time since it is unlikely that the affected shares will be sold at a higher price than the compensation offered as a part of the obligatory repurchase offer. The same can be concluded for the applicable Austrian law and the observed SIX Swiss Exchange. It should be noted that such discretion might facilitate regulatory competition between competing stock exchanges while maintaining adequate standards of protection.

[45] In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 271.

investors are generally more interested in profit realized from daily trade in listed securities rather than in the acquisition of a controlling stake in the issuer.[46] Therefore, for investors, it is important to be able to disinvest (sell) the issuer's shares at any moment. They acquire listed shares with the expectation that they will be able to easily liquidate such assets at their discretion. Protection of such liquidity serves also to protect the confidence in orderly trading on the regulated market.[47] Delisting of issuer's shares severely impairs their liquidity. However, the mere announcement of the delisting normally severely inhibits the share's liquidity and consequently negatively reflects on the share's market price since it is unlikely that other investors will have much interest in assets with reduced or no liquidity. Therefore, once delisting is announced investors are unlikely to return the value of their investment during the remaining trading time on the regulated market. To protect investors and to preserve confidence in trading on the capital markets Capital Market Act ultimately establishes rules on the obligatory repurchase of delisted shares. Such a measure only aims to ensure that investors receive a fair return on delisted shares in case of failing market conditions caused by delisting.

Therefore, Article 341 para. 3 Capital Market Act provides that announcement of the delisting decision in the general meeting's agenda must also include an irrevocable statement by the issuer towards shareholders voting against the delisting decision wherewith the issuer takes upon itself an obligation to repurchase their shares for a fair remuneration. Such repurchase must be undertaken within three months after the delisting decision's registration with the court register. This also means that such repurchase will normally be undertaken before the removal of shares from trading on the regulated market.[48] With this in mind, doubts also arise as to the need to still have such shares on the stock exchange listed for the following three months or more once they have been already repurchased.

Foremost, it should be noted that the Capital Market Act does not take into consideration whether investors are able to disinvest the issuer's shares in another regulated market within the EU or other capital markets with comparable delisting regulations within the EEA. If the issuer's shares are simultaneously listed on two or more regulated markets, in case of delisting on one of those markets' investors are still able to continue normally trading or disinvest on the remaining market where the shares are still listed and traded. In case such sha-

[46] In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, p. 272.

[47] In this regard from the position of German law see Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012, pp. 270-271.

[48] Article 341 para. 7 p. 2 Capital Market Act.

res are subsequently also removed from trading on that other regulated market, investors are entitled to the protection provided under the capital market law that applies to that other market. This means that in such a situation there is no need for obligatory repurchase of shares for a fair remuneration when the affected shares are still listed and regularly traded on another regulated market.[49] Such exception should be *de lege ferenda* introduced into the Capital Market Act since it offers some flexibility, adds to procedural speed, and alleviates the issuer's financial position. However, this exception should not apply to cases where the applicable capital market law does not provide any comparable rules on the obligatory repurchase of shares for fair remuneration.[50] Otherwise, this could weaken established investor protection standards since the repurchase obligation could be easily circumvented. In addition, this exception should also not apply to downgrading situations, i.e. situations where shares are removed from trading on the regulated market but continue to be traded on another lower market segment that is not part of the regulated market.[51] That is because such capital market segments are not as easily accessible and do not afford the same levels of liquidity as the regulated market segments.

Article 341 para. 3 Capital Market Act provides that the general meeting agenda containing the delisting proposal must also contain an irrevocable statement by the issuer that it will repurchase shares from shareholders that vote against the proposed delisting. In addition, para. 5 of the same Article also provides that such shareholders as well as shareholders that did not participate at that general meeting because it was convened irregularly or untimely are entitled to such renumeration. Such an approach, where the obligation to repurchase is provided by both the issuer's statement following the general meeting's agenda and then additionally set out as a statutory right, results in uncertainty as to the legal nature of the shareholder's right to seek remuneration for the shares held.

[49] For example, such exception exists under applicable German and Austrian laws. For the former see §39 para. 2 Börsengesetz and for the latter see §38 para. 8 Börsegesetz. More on this exception from the position of German law see Baumbach, A., Hopt, K, J., Kumpan, C., Merkt, H., Roth, M.: *Handelsgesetzbuch*, 39. Auflage, 2020. München, BörsG §39 Rn. 8. Such possibility is not recognized by the SIX Swiss Exchange rules. Namely, neither the Börsengesetz, the Finanzmarktinfrastrukturgesetz, the SIX Swiss Exchange Listing Rules nor the SIX Swiss Exchange Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products provide for the obligatory repurchase of shares for fair renumeration. It should also be noted that Switzerland is not an EEA member state.

[50] In this direction from the position of German law see Groß, W.: K*apitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz*, München, 2016. BörsG §39 Rn. 16, 19.

[51] In this direction from the position of German law see Groß, W., Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz, München, 2016, BörsG §39 Rn. 19a.

In other comparable Companies Act situations, the rights of third persons are normally clearly set out as statutory rights. The holder of such statutory right is then only reminded of its existence and thus the possibility to exercise it.[52] By imposing an obligation on the issuer to make a statement that is then appended to the general meeting's agenda, one cannot but wonder whether the right to seek remuneration is a statutory right or a right based on such private declaration of the issuer or whether these two rights exist parallel to each other. Such legal uncertainty is further emphasized by the fact that the issuer's statement is solely directed to the shareholders that voted against the delisting decision, while the right to seek remuneration under the para. 5 of the same provision is directed to both such shareholders as well as shareholders that did not participate at that general meeting because it was convened irregularly or untimely. Namely if the paras. 3 and 5 exist parallel to each other, the question arises as to the legal effect of these two provisions when shareholders during the general meeting exclude such statements from the text of the delisting decision with their counter-proposal. This all leads to the conclusion that the current regulatory framework is inconsistent and unclear. At the very least these two provisions should be *de lege ferenda* aligned with comparable rules in the Companies Act. In other words, the right to seek remuneration should be established as a statutory right while the invitation to the general meeting should only warn shareholders that they can exercise such statutory right.[53]

As mentioned in the previous paragraph, the two cited provisions of the Capital Market Act limit the right to seek such remuneration to specific shareholders of the issuer. Namely, to shareholders who voted against the delisting and to shareholders who did not participate at the general meeting because the general meeting was not convened by the applicable company law rules. However, these rules do not distinguish between shareholders affected by delisting and all other shareholders. In other words, it seems that the right to seek remuneration belongs to all shareholders of the issuer, regardless of whether the shares they hold are affected by the delisting or not. It should be noted that the

[52] For example, Article 517 para. 1 Companies Act provides that the general meeting invitation must remind shareholders of their statutory rights relating to the merger of their company to another company.

[53] For example, under applicable German and Austrian law the irrevocable and unconditional offer to repurchase delisted shares is established as a mandatory precondition of the delisting application that is submitted to the respective stock exchange. If the delisting application is not accompanied by such an offer, the delisting will be denied. From the position of German law see §39 para. 2 p. 1 and para. 3 Börsengesetz and from the position of Austrian law see §38 para. 7 Börsegesetz. Since the repurchase right is based on the prior unconditional offer it seems that it is established as private right. The SIX Swiss Exchange rules do not provide investors with such right to seek renumeration for the delisted shares.

Capital Market Act provides that not all shares of the issuer need to be (listed) admitted to trading on the regulated market. In general, only shares belonging to the same class must be admitted to trading on the official market.[54] There is no obligation to admit all shares of the same class to trading on the regular market, furthermore, regarding admission to trading on the official market this obligation does not cover shares belonging to other classes (e.g. preferred shares).[55] The right to seek remuneration should belong only to shareholders affected by the delisting and not to all shareholders of the issuer. Therefore, the applicable Capital Market Act provisions should *de lege ferenda* clearly distinguish between these shareholders groups while *de lege lata* shareholders whose shares are not being delisted should be precluded from seeking remuneration due to delisting.

Furthermore, as mentioned, the right to seek remuneration also belongs to shareholders who did not participate in that general meeting because it was convened irregularly or untimely.[56] Such a rule departs from comparable situations recognized by the Companies Act.[57] In such situations, the Companies Act limits the right to seek remuneration only to shareholders who voted against the decision of the general meeting and to shareholders who expressed their opposition to the decision in the minutes of the general meeting.[58] On the other hand, shareholders who did not participate in the general meeting because it was convened irregularly or untimely are entitled to bring a claim before the court to invalidate such general meeting decisions. However, under the Companies Act, this right is also afforded to shareholders who intended to participate at the general meeting but were erroneously forbidden access to the general meeting.[59] Despite the inconsistent approach of the legislator in cited provisions of the Capital Market Act, at the very least shareholders who intended to participate at the general meeting but were erroneously forbidden access should also enjoy the same protection as shareholders who did not participate at that general meeting because it was convened irregularly or untimely. In other words, Article 341 para. 5 Capital Market provision should be *de lege ferenda* aligned with Article 362 para. 1 p. 2 Companies Act.

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54 Article 329 para. 8 Capital Market Act.

55 Article 168 Companies Act. Even more so, the rule on admission of all shares belonging to the same class does not always apply, e.g. when shares belong to blocks serving to maintain control over the company. See Article 329 para. 9 Capital Market Act.

56 Article 341 para. 5 Capital Market Act.

57 For example, the rules relating to transformation of a public limited company to a limited liability company.

58 For example, see Article 562 para. 1 Companies Act and Article 550.j para. 1 Companies Act.

59 Article 362 para. 1 p. 2 Companies Act.

However, such inconsistency should be altogether avoided. Namely, the right to seek remuneration should be solely limited to shareholders who voted against the proposed delisting and expressed their opposition to the delisting decision in the minutes of the general meeting. Such an approach enables the issuer to maintain oversight over the financial consequences of delisting. If the right to seek remuneration is limited solely to shareholders who voted against delisting, the issuer's management could easily determine the maximum scope of the possible financial burden caused by the incumbent repurchase obligation. Following the personal decision of every such shareholder to keep the shares or seek remuneration, the scope of financial burden can only become lower.[60] Under existing delisting rules, the issuer's management will not be able to determine the financial consequences of delisting until several months have passed once the decision is passed by its general meeting.[61] That is because shareholders who did not participate in the general meeting but are entitled to seek remuneration because the general meeting was convened irregularly or untimely, can also seek such remuneration. Therefore, the right to seek remuneration should be limited solely to shareholders who voted against the delisting and expressed their opposition to such a decision in the minutes of the general meeting. In case of any irregularities concerning the convening and access to the general meeting, shareholders who were not permitted to participate are still entitled to invalidate all general meeting decisions, including the delisting decision, before the court.

Under Article 341 paras. 3 and 5 Capital Market Act the issuer is solely under obligation to repurchase delisted shares from its shareholders. Under other comparable rules, such obligation is not limited to the issuer but can also be undertaken by any other person, e.g. a shareholder or even a person unrelated to the issuer.[62] Such obligation is construed as an unconditional and monetary purchase offer directed to all affected shareholders.[63] For example, such an

[60] Such approach coupled with the mandatory prior application for participation at the general meeting (Article 279 para. 2 Companies Act) enables the issuer's management to financially plan ahead even before the general meeting takes place and the votes are cast.

[61] In this direction see Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 560.

[62] From the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020. From the position of Austrian law see Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, Wien, 2015.

[63] From the position of German law see Baumbach, A. et al.: *Handelsgesetzbuch*, München, 2020 & Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 24 & Groß, W.: *Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzulassungsVO und zum Wertpapierprospektgesetz*, München, 2016, BörsG §39 Rn. 19b. From the

offer cannot provide other shares in exchange for the delisted shares and it cannot be limited to only some of the delisted shares. Since such an offer could facilitate a change in the issuer's ownership control similarly as with the takeover bid, the comparable rules based such an offer on the repurchase offer from the takeover bid rules.[64] It would be useful to *de lege ferenda* amend the cited Capital Market Act provision to enable persons other than the issuer to undertake the obligation to repurchase delisted shares.[65] Such extension to the existing rules would provide much-needed flexibility and avert the financial cost of delisting from the issuer to other persons who might in turn establish ownership control over the issuer. In such a situation, the right to seek remuneration should be established as an unconditional and irrevocable offer and a condition precedent for the removal of shares from trading on the regulated market. Such an offer should also be based on the rules relating to the voluntary takeover bid from the Takeover Act since it could lead to a change of ownership control in the issuer.[66] This especially relates to the rules on determining appropriate remuneration, publication, and examination of such an offer by the Croatian Financial Services Supervisory Agency as the responsible regulator authority for the examination of the takeover bid.[67] This will ensure that the remuneration provided under the offer is appropriate and follows the applicable rules.

Such a solution could also resolve the issue relating to the rules on the issuer's acquisition of its own (treasury) shares because it would enable the issuer to delist its shares without potential violation of the applicable rules on the acqui-

position of Austrian law see §27e paras. 5 and 6 Übernahmegesetz. Also see Kalss, S., Oppitz, M., Zollner, J.: Kapitalmarktrecht System, Wien, 2015, §26 Rn. 31-32.

64 This is especially evident from the applicable rules where direct reference is made to the applicable takeover bid regulation in regard to determination of monetary consideration offered for the delisted shares. See §31 para. 3 Börsengesetz where reference is made to appropriate application of the §31 Wertpapiererwerbs- und Übernahmegesetz as well as §38 para. 8 Börsegesetz where reference is made to appropriate application of §27 Übernahmegesetz.

65 This proposal also goes in hand with the German solution where competence for the delisting decision lies with the issuer's management and not its general meeting. However, such legal solution also means that the offer is directed towards all affected shareholders, and not to only some of them. In that direction see Baumbach, A. et al.: *Handelsgesetzbuch*, München, 2020, BörsG § 39 Rn. 8 & Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68 (3-4) 2018, p. 560.

66 Takeover Act, (Official Gazette no. 109/07, 36/09, 108/12, 90/13, 99/13, 148/13).

67 For example, this generally relates to Article 10, Article 11 para. 1, Article 16 with provisions of Capital Market Act having precedence, Article 18, Articles 19 and 24 Takeover Act.

sition of treasury shares.[68] Depending on the nominal value and the scope of the delisting, it is probable that the issuer will be forced to repurchase more shares than the prescribed threshold permits and thus violate the mentioned treasury share rules.[69] Such acquisition is prohibited while the delisting decision which results in the acquisition of shares over the prescribed threshold is voidable. Therefore, the court should deny the registration of such a decision with the court register. The issuer avoids the application of these mandatory rules by permitting persons other than the issuer to repurchase delisted shares.[70]

As to the determination of the fair remuneration, Article 341 para. 9 Capital Market Act provides that fair remuneration is determined as an average share price on the regulated market calculated as a weighted average of the market price during the last three months before the publication of an invitation to the issuer's general meeting.[71] However, if the shares have been traded in less than one-third of the trading days during the aforementioned period, the repurchase price is determined by an analytical study on the fair share value confirmed by an independent auditor.[72] Therefore, consideration is primarily based on the

[68] Article 233 para. 4 Companies Act generally limits the acquisition of treasury shares to no more than ten percent of the total share capital. Furthermore, according to Article 236 paras. 2 and 3 Companies Act if such shares are not alienated within a period of three years since acquisition, the issuer will have to redeem them. The same issue is recognized under the applicable Austrian law. In this regard see Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, Wien, 2015, §26 Rn. 31.

[69] Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 561.

[70] For example, the issuer can in cases where it expects acquisition of more than ten percent of own shares find another interested person ready to repurchase and acquire the delisted shares (e.g. a majority shareholder).

[71] Similar approach is undertaken under comparable German and Austrian rules. Both the applicable German and the applicable Austrian law in this regard reference the application of the takeover bid rules on determination of consideration. This generally means that consideration is determined as a weighted average of the domestic market price during the last six months prior to the publication of the decision to make a repurchase offer. In this regard from the position of German law see Baumbach, A. et al.: *Handelsgesetzbuch*, München, 2020, BörsG § 39 Rn. 9 & Groß, W.: *Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz*, München, 2016, BörsG §39 Rn. 19b. In this regard from the position of Austrian law see §27e para. 7 and §26 para. 1 Übernahmegesetz. See also Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, Wien, 2015, §26 Rn. 34. However, the applicable Austrian law also provides that consideration under the repurchase offer must at least correspond to such market price. See §26 para. 1 Übernahmegesetz.

[72] Article 341 para. 10 Capital Market Act determines the content of such an analytical study, e.g. the method used to determine the fair share value which must be based on internationally accepted valuation standards, detailed explanation of the methods and significant assumptions used as well as the suitability of such method. The determined fair renumeration is published

market price of the issuer's share because this measure aims to protect shareholder's interest in disinvesting such shares.[73] However, other comparable rules provide additional exceptions for the use of the mentioned average market price as a basis for the determination of fair remuneration. The first exception relates to the situation where the issuer violated the rules on the publication of inside information that directly affects the market price or if it violated the rules on the prohibition of market manipulation.[74] In these situations, the issuer is under obligation to pay the difference between the consideration set out in the repurchase offer and consideration that corresponds to the actual value of the issuer's company unless such violation has an insignificant effect on the average market price.[75] The further exception relates to the situation of failing market conditions (lower liquidity of issuer's shares) where one cannot rely on the market price to reflect the fair value of the issuer's shares but can rely on the actual value of the issuer's company.[76] Such valuation should be based on the standard audit valuation procedures of the company's net value taking into account particularities relating to small and medium-sized enterprises.[77] Once determined, the offeror can provide higher consideration since such higher consideration only benefits the affected shareholders.[78] Before publication, the

in the company designated gazette. However, it should also be noted that the applicable German law similarly provides for this exception, but the observed time is extended to six months and to cases where the successively determined market prices deviate form each other by more than five percent.

[73] In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020., BörsG §39 Rn. 24 & Baumbach, A. et al.: *Handelsgesetzbuch*, München, 2020, BörsG § 39 Rn. 9.

[74] See §31 para. 3 p. 1 and 2 Börsengesetz.

[75] The burden of proof that such violations were of no significance lies with the offeror. In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts-Kommentar*, München, 2020, BörsG §39 Rn. 26; Groß, W.: *Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz*, München, 2016, BörsG §39 Rn. 19b. However, existence of such violations must be established by the responsible regulator and the burden of proof that such were indeed committed lies with the issuer's shareholder. In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 25.

[76] For example, under applicable German law if the successively determined market prices deviate from each other by more than five percent the consideration must be set to determine the actual value of the company. In this regard see §31 para. 3 Börsengesetz. In this regard from the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 25.

[77] In this regard from the position of Gemrna law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 25.

[78] From the position of German law see Schwark, E., Zimmer, D.: Kapitalmarktrechts- Kommentar, München, 2020. BörsG §39 Rn. 26. This is even more evident from the position of

repurchase offer should be approved by the responsible regulator similarly to the takeover bid.[79] This means that the issuer's shareholder can challenge both the regulator's decision on the appropriateness of the repurchase offer and the subsequent stock exchange's delisting decision.[80] The sole exception provided under the Capital Market Act on the use of the average market price as a basis for determination of fair remuneration should be *de lege ferenda* extended to also include exceptions relating to situations where 1) the violation of inside information and market manipulation rules is proven as well as to situations where 2) the average market price obviously does not reflect the actual value of the issuer's company due to failing market conditions.

Finally, while Article 341 para. 3 Capital Market Act provides that the issuer undertakes to repurchase shares from its shareholders at the latest within three months since the registration of the delisting decision with the court register, para. 6 provides that the shareholder's claim is time-barred by the statute of limitations after the expiry of two months since the registration with the court register. Such diverging time limits seem to be inconsistent with each other and add to the overall legal uncertainty caused by the existing delisting rules since it is unclear whether such different time limits both refer to the shareholder's claim to request remuneration or maybe to some other claim.[81] For

Austrian law because the primary average market price represents the lowest possible consideration that must be provided in the repurchase offer. In this regard see Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, Wien, 2015, §26 Rn. 34.

[79] The responsible regulator shall examine the repurchase offer in accordance with the applicable takeover bid rules. Such examination ensures that the consideration is not obviously inappropriate, that the offer can be financially realized and that the average market price is correctly determined. In this regard from the position of German law see Baumbach, A. et al.: *Handelsgesetzbuch*, München, 2020, BörsG § 39 Rn. 8 & Groß, W.: *Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz*, München, 2016, BörsG §39 Rn. 19b. In this direction from the position of Austrian law see Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, . Wien, 2015, §26 Rn. 31-32. However, examination under Austrian law is undertaken only upon request of the interested party within a set time limit (three months since the publication of the decision to make such an offer) or ex officio at the discretion of the responsible authority. See §33 para. 1 Übernahmegesetz.

[80] From the position of German law see Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, München, 2020, BörsG §39 Rn. 38, 40 & Groß, W.: Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzullasungsVO und zum Wertpapierprospektgesetz, München, 2016, BörsG §39 Rn. 19b. From the position of Austrian law see §38 para. 2 Börsegesetz. However, under applicable Austrian law if the offeror received acceptance to its repurchase offer in regard to more than fifty percent of the affected securities, a challenge to the appropriateness of the consideration provided cannot be made. See §27e para. 8 Übernahmegesetz.

[81] Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, p. 561.

example, it might be that the three-month period limits the right to seek examination of the determined consideration or that within two months the remuneration claim should be submitted to the issuer by the affected shareholder. Furthermore, it is unusual that the time limit for the statute of limitations (two months) deviates from the maturity (three months) of the remuneration claim. Therefore, these time limits should be *de lege ferenda* clearly construed or at least aligned.

5. CONCLUSION

Article 341 Capital Market Act regulates the matter of delisting equity securities at the issuer's request. The contained provisions relate to three general areas of regulation: rules on passing the delisting decision within the issuer, determination of the moment when the delisted shares will be removed from trading on the regulated market, and the obligatory repurchase of the issuer's shares. However, such rules are inconsistent and deficient in several aspects which leads to legal uncertainty and even questionable protection of the affected stakeholders, including but not limited to the issuer's shareholders.

There is noticeable space for improvements in all observed aspects of the current delisting regulation. Namely, the competence for making the delisting decision should fall under the scope of the company law. Furthermore, the application of delisting rules should *de lege lata* apply to foreign companies whose shares have been listed on the domestic regulated market while *de lege ferenda* the issue should be clearly regulated. The legislator might consider *de lege ferenda* extending the application of the delisting rules to debt securities as well.

As to the actual removal from trading on the regulated market, the Capital Market Act associates the delisting effectiveness to the registration of the issuer's delisting decision with the court register. However, the transparency provided by such registration is questionable compared to the transparency afforded by regular stock exchange disclosure venues. Furthermore, the effectiveness of the issuer's delisting decision is closely tied to such registration with the court register. The established three-pronged mechanism is not only unnecessarily complex but is also incorrectly implemented. These issues are further emphasized by the erroneous application of the general voting rules in the issuer's general meeting. The existing rules should be *de lege ferenda* simplified by tying the actual removal from trading with the expiry of a flexible time limit determined by the respective stock exchange.

Finally, regarding the obligatory repurchase of delisted shares for fair remuneration there is no need to force the repurchase obligation if the affected share-

holders are still able to normally disinvest delisted shares on another regulated market. Furthermore, the applicable delisting rules should *de lege ferenda* and *de lege lata* entitle only specific affected shareholders with the right to seek remuneration for the delisted shares. The use of the company value instead of the average market price as a basis for the determination of fair remuneration should be extended to situations where a violation of inside information and market manipulation rules was observed as well as to situations where failing market conditions exist. Furthermore, the right to seek remuneration should be solely limited to shareholders who voted against the delisting decision and expressed such opposition in the minutes of the general meeting. Allowing persons other than the issuer to take upon the obligatory repurchase of delisted shares would also provide much-needed flexibility and protection to the issuer and its creditors which should be supplemented with the appropriate application of the existing takeover bid rules.

LITERATURE

1. [https://zse.hr/], 12/09/2023.
2. Barbić, J.: *Pravo društava*, Organizator, Zagreb, 2013.
3. Baumbach, A., Hopt, K. J., Kumpan, C., Merkt, H., Roth, M., H*andelsgesetzbuch*, 39. auflage, C.H. Beck, München, 2020.
4. Capital Market Act, (Official Gazette no. 65/18, 17/20).
5. Companies Act, (Official Gazette no. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13, 110/15, 40/2019).
6. Groß, W.: *Kapitalmarktrecht, Kommentar zum Börsengesetz, zur BörsenzulassungsVO und zum Wertpapierprospektgesetz*, 6. auflage, C.H. Beck, München, 2016.
7. Kalss, S., Oppitz, M., Zollner, J.: *Kapitalmarktrecht System*, 2. auflage, Linde Verlag, Wien, 2015.
8. Kunz, P.: *Kotierung sowie Dekotierung – oder: "Werden" und "Sterben" der Publikumsgesellschaften*, GesKR 2-3, 2006.
9. Maurer, M., Crone, H, C.: Rechtsschutz bei Dekotierungen von der Börse SIX Swiss Exchange, *Schweizerische Zeitschrift für Wirtschafts-und Finanzmarktrecht,* 83(4) 2011, pp. 400-415.
10. Möhrle, C.: *Delisting*, Zürich/St. Galen, 2006.
11. Probst, M.: *Rechtsfragen des regulären Börsenrückzugs*, Nomos Verlagsgesellschaft mbH & Co. KG, Köln, 2012.
    – DOI: https://doi.org/10.5771/9783845242002

12. Schwark, E., Zimmer, D.: *Kapitalmarktrechts- Kommentar*, 5. auflage, C.H. Beck, München, 2020.

13. SIX Exchange Regulation AG: Decision on Schlumberger Limited dated 31 March 2020, https://www.ser-ag.com/dam/downloads/publication/delisting-notices/2020/2020-07-03-schlumberger.pdf, 20/09/2023.

14. SIX Exchange Regulation AG: Decision on Volkswagen AG dated 19 December 2019, https://www.ser-ag.com/dam/downloads/publication/news/media-releases/2019/20191220-e-delisting-volkswagen.pdf, 20/09/2023.

15. Takeover Act, (Official Gazette no. 109/07, 36/09, 108/12, 90/13, 99/13, 148/13).

16. Zubović, A., Zubović Jardas, I.: Povlačenje vrijednosnih papira sa Zagrebačke burze (delisting) i potreba izmjene regulatornog okvira, *Zbornik PFZ*, 68(3-4) 2018, pp. 553-585.