Delisting Costs and Corporate Mobility in Europe

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We would like to thank participants of the Delisting of Stock Corporations in Europe and Beyond conference at the University of the Aegean in June 2023, organised by Prof. Rüdiger Veil and Prof. Vassilios Tountopoulos. We are indebted to the conference participants for helpful comments and for sharing their delisting questionnaires, without which this research would not have been possible. We also wish to thank participants at the Oxford Business Law Workshop and the 17th European Company and Financial Law Review Symposium, organised by Prof. Christoph Teichmann and Prof. Edmund Schuster, for constructive feedback. All errors are our own.

Abstract

There is considerable variation among capital markets in the frequency of voluntary and involuntary delistings, which has been attributed by some commentators to differences in the regulatory framework governing delisting decisions. However, there have been few systematic attempts to map these differences across legal systems and quantify the regulatory costs of delistings. This article analyses delisting regimes of major EU jurisdictions and several non-EU countries and develops indices that capture delisting costs. It shows that the delisting regimes of some EU Member States are prohibitively costly. The article then considers whether such delisting regimes are consistent with EU free movement rights. It concludes by critically evaluating a menu of policy options to ensure that delisting rules facilitate corporate mobility and an efficient allocation of capital in the EU.

Keywords: Delistings, capital allocation, corporate mobility, free movement of capital

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Delisting Costs and Corporate Mobility in Europe

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Abstract

There is considerable variation among capital markets in the frequency of voluntary and involuntary delistings, which has been attributed by some commentators to differences in the regulatory framework governing delisting decisions. However, there have been few systematic attempts to map these differences across legal systems and quantify the regulatory costs of delistings. This article analyses delisting regimes of major EU jurisdictions and several non-EU countries and develops indices that capture delisting costs. It shows that the delisting regimes of some EU Member States are prohibitively costly. The article then considers whether such delisting regimes are consistent with EU free movement rights. It concludes by critically evaluating a menu of policy options to ensure that delisting rules facilitate corporate mobility and an efficient allocation of capital in the EU.

I. Introduction

There is considerable variation amongst leading European and North American stock exchanges on the frequency of voluntary and involuntary delistings. A wide range of explanations have been proposed, including compliance burdens, M&A, market liquidity and valuations, bankruptcy, discipline, and regulatory competition. This article focuses on an under-appreciated feature of listing regimes – the regulatory costs of delisting, meaning the

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regulatory barriers to exit – and constructs two indices that permit the measurement and comparison of delisting costs between jurisdictions.[1]

This article argues that a delisting regime that is more difficult or costly for issuers – due to features in our indices such as the need in some jurisdictions to compensate dissenting minority shareholders, or prohibitively high shareholder approval requirements that make it near impossible to delist – has a negative effect on regulatory competition and may effectively impede the free movement of capital between EU Member States. More costly delisting regimes can be expected to lead to comparatively fewer voluntary delistings, and could also theoretically result in fewer listings ex ante, if exit costs are high enough to deter entry for some firms. Thus, the first aim of this article is to understand how significantly the regulatory costs of delisting differ between jurisdictions. If delisting rules can be described as a 'lobster trap' when entry is made easy but exit is very difficult,[2] then this article compares in relative terms, across a wide range of jurisdictions, just how trapped the lobsters are. We ultimately find that delisting costs differ significantly between listing regimes, which can be classified along a spectrum from 'prohibitive regimes' whereby voluntary delisting is extremely difficult due to high regulatory costs (eg, France, Netherlands, Finland) to 'permissive regimes' that facilitate exit by imposing few delisting requirements apart from a shareholder vote (eg, UK, Spain, Australia, Canada), or even no shareholder vote at all (eg, US).

The second aim of this article is to set out the implications of these delisting costs for corporate mobility and capital allocation in the European Union (EU), with a particular focus on capital markets integration. Here we conceive of corporate mobility in a broader sense than

[1] For example, in the recent debate surrounding UK capital markets reform, a competitive listing regime was in the foreground, whereas delisting rules were largely absent from the discussion. See Financial Conduct Authority, 'Primary Markets Effectiveness Review (DP22/2)' (May 2022). Issues relating to competition and competitiveness are discussed on multiple occasions throughout the review, whereas cancellation of shares is only mentioned once (and not substantively).

[2] Edward B Rock, 'Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure' (2002) 23 Cardozo Law Review 675.

the right of freedom of establishment as interpreted by the Court of Justice of the European Union (CJEU) in the *Centros* line of cases.[3] Corporate mobility should functionally include the possibility of migrating a listing between EU jurisdictions and the unfettered ability of a listed issuer in one Member State to exercise certain corporate powers (such as issuing securities to the public) in a different Member State through migration or cross-listing. The Treaty on the Functioning of the EU (TFEU) protects this type of corporate mobility by prohibiting restrictions on the free movement of capital within the EU (Articles 63-66 TFEU). We argue that delisting costs are so high in certain 'prohibitive regime' EU Member States that important components of corporate mobility are functionally impeded. We then evaluate a menu of policy options to ensure that delisting rules facilitate both efficient regulatory competition and corporate mobility, which is important given that delisting is the fate of most firms.[4] We also suggest that minority shareholder protection rights may be inefficiently strong in some EU jurisdictions, especially where they apply in cases of cross-border delistings.

The article is structured as follows. Part II contextualises our article within the broader law and finance literature on delistings. We review the reasons why public firms delist, as well as the characteristics of firms associated with a higher probability of going private. This article complements a strand of literature focusing on how higher regulatory compliance costs of maintaining a listing, such as following the passage of the Sarbanes–Oxley Act in the US, may contribute to delistings. Part III explains how we construct two indices to measure delisting costs. The first, our Take Private Index, allows for relative comparison of the difficulty of voluntary delisting in connection with an M&A (merger and acquisition) transaction. The

[3] Carsten Gerner-Beuerle and Michael Anderson Schillig, *Comparative Company Law* (Oxford University Press 2019), 118-130.

[4] Geoff Meeks and Geoffrey Whittington, 'Death on the Stock Exchange: The Fate of the 1948 Population of Large UK Quoted Companies, 1948–2018' (2023) 65 Business History 679. Meeks and Whittington find that in a sample of 1513 listed companies in 1948 (admitted to the Official List of the London Stock Exchange and some provincial exchanges), only 19 firms (1.26%) were still listed in 2018.

second, our Market Migration Index, measures the difficulty of voluntary delisting in connection with the migration of a listing from one public trading venue to another. Part IV considers the implications of disparate delisting costs for the free movement of capital and the efficiency of capital allocation in the EU. Part V concludes.

Finally, a brief remark on terminology. By 'delisting', we mean the indefinite cancellation (as opposed to temporary suspension) of an issuer's listing and admission of securities to trading on a stock exchange. In jurisdictions such as the UK this results in the end of a public market for the issuer's securities, whereas in the US securities can be delisted from a stock exchange and deregistered under § 12(b) of the Securities Exchange Act while still being publicly traded in over-the-counter markets.[5]

II. The relationship between delisting costs and listing/delisting activity

1. Types of delisting

Delisting can be voluntary or involuntary.[6] A delisting is voluntary if it is initiated at the will of the issuer. Most voluntary delistings occur in connection with a change in control transaction (eg, M&A), which we occasionally describe throughout this article using the term 'going

[5] In the US, a firm can deregister its securities (under § 12(b) of the Securities Exchange Act of 1934) with the Securities and Exchange Commission (SEC) to avoid reporting requirements ('going dark') while continuing to trade in over-the-counter markets (eg, Pink Sheets) and still being subject to disclosure requirements under the Securities Act of 1933. This is not possible in the UK. For the distinction between delisting and deregistration in the US, see Martin Gelter and Steven Thel, 'Delisting in the United States' (SSRN Scholarly Paper, 15 October 2024). See also Christian Leuz and others, 'Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations' (2008) 45 Journal of Accounting and Economics 181; András Marosi and Nadia Massoud, 'Why Do Firms Go Dark?' (2007) 42 The Journal of Financial and Quantitative Analysis 421; Jesse M Fried, 'Firms Gone Dark' (2009) 76 The University of Chicago Law Review 135. On OTC trading, see Ryan Davis and others, 'Modern OTC Market Structure and Liquidity: The Tale of Three Tiers' (2023) 64 Journal of Financial Markets.

[6] Jonathan Macey and others, 'Down and Out in the Stock Market: The Law and Economics of the Delisting Process' (2008) 51 The Journal of Law and Economics 683. NYSE Regulation also distinguishes between 'Exchange-Initiated Delisting' and 'Issuer-Initiated Delisting'. NYSE Regulation, 'Removal From Listings' (2023) <https://www.nyse.com/regulation/delistings?market=NYSE>.

private'.[7] Voluntary delistings also occur outside of M&A in the context of listing migrations or restructurings (eg, changing listing venue or moving from a dual to single listing), or in the case of a voluntary liquidation.[8] A delisting is involuntary if it results from firm failure (eg, non-strategic bankruptcy) or is initiated by the market operator against the will of the issuer (eg, exchange discipline). In some jurisdictions like the US, involuntary delistings are undertaken by the exchange rather than the public securities regulator.[9] We therefore assign delistings into one of the four categories below.[10]

Table 1: Delisting typology

A: Voluntary (in connection with M&A)	**B: Voluntary (no M&A)**
• Acquisition (eg, merger or scheme where surviving entity is a private company) • Take-private transaction (eg, MBO)	• Dual-listing to single listing (eg, Ryanair) • Migration of single listing, either between market segments or across markets • Voluntary liquidation (eg, strategic bankruptcy)
C: Involuntary (financial distress)	**D: Involuntary (no financial distress)**
• Bankruptcy • Exchange discipline due to financial distress	• Exchange discipline for violation of listing rules (not related to financial health)

[7] On the definition of going private transactions, see Isabelle Martinez and Stéphanie Serve, 'Reasons for Delisting and Consequences: A Literature Review and Research Agenda' (2017) 31 Journal of Economic Surveys 733, 737.

[8] Macey and others note that 'voluntary delistings occur as the natural consequence of a merger, a decision to take the firm private, a voluntary liquidation, or a company's decision to list only in its home market.' Macey and others (n 6) 689.

[9] ibid 710–11.

[10] Martinez and Serve also have a helpful delisting typology, which differs most notably from ours by categorizing voluntary delistings into those with and without subsequent trading, rather than categorizing on the basis of a change in control transaction. See Martinez and Serve (n 7) 736–38. Onesti and others have also proposed a classification of voluntary and involuntary delistings. See Tiziano Onesti and others, 'On Delisting of Corporations: A Three-Dimensional Classification Framework for Voluntary Delistings' (2014) 4 World Review of Business Research 1.

2. Law & finance literature on delisting

The question 'Why do public firms delist?' has a seemingly straightforward answer: firms delist when the costs of listing exceed the benefits. A considerable body of work has been devoted to examining this cost-benefit calculus. Corporate finance theorists conceive listing costs as including all features that decrease firm value,[11] and listing benefits as including the private benefits of control.[12] A firm's decision to go private can be modelled as the flip side of the decision to go public via an initial public offering (IPO) – a controller might weigh delisting costs such as less liquidity against benefits such as having more control in decision-making.[13] This cost-benefit calculus can be framed as a wealth maximisation problem, whereby a founder's decision to go public (or private) results from whichever trade-off of cash flow rights against control rights maximises their wealth.[14] Lower delisting costs should negatively affect firms' cost-benefit ratio of remaining publicly listed, and result in more public firms going private.

In a review of the literature, Bharath and Dittmar identify five theoretical drivers behind a firm's listing/delisting decision: '(i) information considerations [eg, adverse selection problems that reduce firm valuations]; (ii) access to capital; (iii) control; (iv) liquidity; and (v) agency and other considerations [eg, reduced managerial agency costs after going private].'[15] These reasons have been empirically tested in a significant body of research on which firm-

[11] Craig Doidge, G. Andrew Karolyi, and René M. Stulz, 'Why Do Foreign Firms Leave U.S. Equity Markets?' (2010) 65 The Journal of Finance 1507, 1509. Doidge, Karolyi and Stulz write that 'Listing costs include all costs incurred as a result of the listing that reduce firm value.'

[12] ibid 1508.

[13] Sreedhar T Bharath and Amy K Dittmar, 'Why Do Firms Use Private Equity to Opt Out of Public Markets?' (2010) 23 The Review of Financial Studies 1771, 1772.

[14] Luigi Zingales, 'Insider Ownership and the Decision to Go Public' (1995) 62 The Review of Economic Studies 425.

[15] Bharath and Dittmar (n 13) 1776.

specific characteristics are most relevant in explaining why firms go private. In a thorough literature review of the research on delisting, Martinez and Serve summarize these findings, noting which studies find positive/negative/null relationships between delistings and variables such as firm size, financial performance, risk of financial distress, firm valuation (specifically under-valuation), growth prospects, debt levels/leverage, financial visibility (analyst coverage), and liquidity.[16] In canvassing the literature, Martinez and Serve suggest that these firm-specific characteristics are relevant because they 'influence their [firms'] ability to afford listing costs.'[17]

For example, one prominent study of US firms going private between 1980-2003 finds that firms are more likely to go private when, compared to their peers, they have less analyst coverage, fewer institutional investors, more concentrated ownership, and less liquidity.[18] Another recent study of German delistings from 2003-2015 suggests that 'cost–benefit considerations are an important explanatory factor' in delistings, and finds that 'decreasing growth opportunities, liquidity and profitability as well as increasing regulatory costs' are associated with a higher probability of firms either down-listing (migrating from a more to less regulated market) or going private.[19] The empirical research on whether high free cash flows are associated with an increased likelihood of going private is mixed.[20]

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[16] Martinez and Serve (n 7) 740–43.

[17] ibid 742.

[18] Bharath and Dittmar (n 13) 1774.

[19] Wolfgang Bessler and others, 'Why Do Firms Down-List or Exit from Securities Markets?' (2023) 17 Rev Manag Sci 1175, 1207.

[20] Kenneth Lehn and Annette Poulsen, 'Free Cash Flow and Stockholder Gains in Going Private Transactions' (1989) 44 The Journal of Finance. But see Luc Renneboog and others, 'Why Do Public Firms Go Private in the UK? The Impact of Private Equity Investors, Incentive Realignment and Undervaluation' (2007) 13 Journal of Corporate Finance 591. Renneboog and others find that firm undervaluation (connected with informational asymmetries) and reduced agency costs are the most important drivers of UK public to private transactions, with no evidence for the excess free cash flow hypothesis.

3. The relationship between delisting and regulatory costs

Our research is situated within the significant body of research exploring how regulatory costs are relevant to the listing and delisting cost-benefit calculus. Much of this research examines whether the passage of the Sarbanes–Oxley Act of 2002 (‘SOX’) in the US – which occurred in the wake of scandals such as Enron and WorldCom and instituted more rigorous financial reporting requirements, corporate governance disclosure, and structural corporate governance requirements, among other reforms – contributed to more firms exiting public markets as the regulatory compliance costs of maintaining a listing increased and the private benefits of control correspondingly decreased (due to more stringent corporate governance requirements such as having audit committees entirely constituted of independent directors).[21]

Many of the studies find that the post-SOX increase in compliance costs for listed firms contributed to more delistings, sometimes called the ‘SOX cost hypothesis’.[22] Hostak et al. observe that more than three-quarters of the firms in their sample (foreign firms who voluntarily deregistered their American Depositary Receipts between 1997-2006) cited compliance costs in their deregistration announcement.[23] Leuz et al. attribute an increase in securities deregistration with the Securities and Exchange Commission (SEC) (‘going dark’) to the passage of SOX and its internal control requirements (eg, Section 404), suggesting that in addition to higher compliance costs ‘some firms exit the SEC reporting system because their insiders face more scrutiny and higher penalties after SOX.’[24] Chaplinsky and Ramchand find that the probability of foreign firms delisting in the US after SOX is higher for firms who are domiciled in countries with stronger corporate governance, suggesting that bonding and other

[21] For a discussion of the SOX requirements, see Gerner-Beuerle and Anderson Schillig (n 3), 274-275.

[22] Martinez and Serve (n 7) 743–44.

[23] Peter Hostak and others, ‘An Examination of the Impact of the Sarbanes–Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms’ (2013) 18 Rev Account Stud 522, 524.

[24] Leuz and others (n 5).

benefits of a cross-listing were outweighed by increased costs post-SOX for some firms.[25] Conversely, Gao et al. contest the SOX cost hypothesis,[26] as do Doidge et al., the latter attributing the decline in US listings to an increased rate of M&A activity rather than regulatory costs.[27]

4. Our contribution to the delisting literature

As highlighted above, most of the delisting literature focuses on finance-related drivers of delisting that are either firm-specific (eg, valuations, analyst coverage, turnover, etc.) or market-wide (eg, availability of private capital, the need for larger firms/economies of scope, etc.). The delisting research that engages with regulatory costs tends to use panel data to explore how changes in compliance costs or corporate governance requirements affect delistings (eg, rates of listing/delisting following SOX).

However, the emphasis in the literature is on whether the regulatory costs of *being listed* contribute to delistings, rather than analysing the regulatory costs of *terminating a listing* and considering how the costliness of exit and the delisting process itself could influence listing and delisting activity. The importance of regulation governing the delisting process has not gone without appreciation, though in the context of voluntary delistings it has been under-theorised.[28] Vismara et al. remark that 'the difference in the rate of delisting must also consider regulatory differences', noting that 'delisting is more difficult and "costly" in continental

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[25] Susan Chaplinsky and Latha Ramchand, 'What Drives Delistings of Foreign Firms from U.S. Exchanges?' (2012) 22 Journal of International Financial Markets, Institutions and Money 1126, 1127. Chaplinsky and Ramchand measure corporate governance quality using the index developed by De Nicolò and others. See Gianni De Nicolò and others, 'Corporate Governance Quality: Trends and Real Effects' (2008) 17 Journal of Financial Intermediation 198.

[26] Xiaohui Gao and others, 'Where Have All the IPOs Gone?' (2013) 48 Journal of Financial and Quantitative Analysis 1663.

[27] Craig Doidge and others, 'The U.S. Listing Gap' (2017) 123 Journal of Financial Economics 464, 466–67.

[28] For a seminal analysis of involuntary delistings, see Macey and others (n 6).

Europe' due to requirements to buy out minority shareholders.[29] We continue in the line of inquiry raised by Vismara et al., who, investigating the difference between primary markets (EU regulated markets) and second markets (typically multi-lateral trading facilities or 'MTFs'), demonstrate that 'IPOs that list on second markets are more likely to be subsequently delisted or targeted by an acquiring firm.'[30]

Within the legal literature that focuses on delisting regulation, Zetzsche analyses the similarity in regulatory costs for cold delistings (eg, a public-to-private freeze-out) versus regular delistings faced by controlling shareholders in German listed companies.[31] Maume compares UK and German delisting regulations with detail and clarity, proposing reform suggestions for the German regime.[32] Zmysłowska compares how minority shareholders are protected in delisting across different EU regimes.[33] The Financial Conduct Authority (FCA) reviewed delistings on the LSE Main Market and Alternative Investment Market (AIM) from 2010-2016, finding that on the Main Market the most commonly provided reason for a delisting was the issuer being acquired (141 issuers), followed by overseas companies cancelling their secondary listing (89 issuers), insolvency (53 issuers), market migrations/down-listings (44 issuers), and voluntarily going private (20 issuers).[34]

[29] Silvio Vismara and others, 'Europe's Second Markets for Small Companies' (2012) 18 European Financial Management 352, 371.

[30] ibid 383.

[31] Dirk A Zetzsche, 'Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting' (SSRN Scholarly Paper, 29 January 2014).

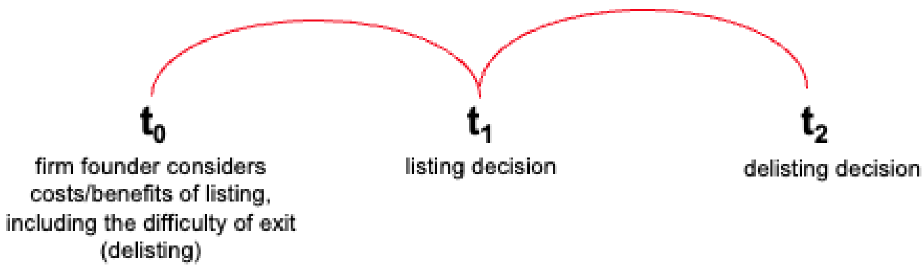
[32] Philipp Maume, 'The Parting of the Ways: Delisting Under German and UK Law' (2015) 16 Eur Bus Org Law Rev 255.

[33] Magdalena Zmysłowska, 'Protection of Interests of Minority Shareholders in the Case of the Delisting of a Company in the Light of Regulations Binding in Europe' (2023) 18 Capital Markets Law Journal 391.

[34] Financial Conduct Authority, 'DP17/2: Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape' (2017) 45.

Our delisting indices allow future research to empirically test hypotheses on the association between regulatory costs of delisting and the number of firms entering and exiting public markets in a range of jurisdictions, thereby complementing the studies mentioned above. Intuitively, the regulatory costs of delisting – ie, how onerous or permissive the regulatory requirements are in allowing an issuer to cancel its listing and shares admitted to trading – makes delisting more or less *sticky*. This can be expected to influence firms' delisting decisions and affect corporate mobility if, in addition to the usual costs and benefits of maintaining a listing, firms factor in the costliness of exit in the delisting decision calculus. In this vein, one may expect that the *stickier* the delisting regime (ie, higher costs imposed by regulation to exit), the fewer voluntary delistings there would be.

Figure 1: Delisting decision timeline



Relatedly, if private firm owners perceive the delisting regime to be *sticky* (ie, more costly to exit at t_2), they may be less likely to list in the first place (at t_1), because the future costs of delisting are higher in these regimes relative to the benefits of a listing (see Figure 1). This intuition builds on work by Chemmanur and others, who demonstrate that different post-IPO scenarios, such as the likelihood of being acquired, influence private firm founders' decision to go public.[35]

[35] Thomas J Chemmanur and others, 'The Exit Choices of European Private Firms: A Dynamic Empirical Analysis' [2023] Journal of Financial Markets 100821.

III. Measuring delisting costs

Many studies rely on corporate governance or investor protection indices to either control for or examine the role of corporate law and regulation on delisting. For example, delisting studies employ the World Bank governance ratings,[36] La Porta et al.'s investor protection index,[37] Djankov et al.'s anti-director rights index,[38] and De Nicolò's corporate governance index.[39] However, we have not yet come across an index capturing how difficult or costly it is to delist.

We create two bespoke delisting indices, distinguishing between take private transactions (voluntary delistings) and market migrations where a firm moves from one market segment to another. We make this distinction because most EU jurisdictions (not the UK) regulate take private transactions and market migration differently, the former often more stringently, such as imposing different shareholder approval requirements or waiving the requirement to make a tender offer to minority shareholders in the case of market migrations. Our Take Private Index (TPI) and Market Migration Index (MMI) examine delisting requirements in EU 'regulated markets' (larger exchanges such as Euronext or the Frankfurt Stock Exchange),[40] and therefore do not measure how costly it is to delist from MTFs (so-called 'second markets' such as AIM). The two indices allow for the comparison and ranking of delisting regimes from *most to least costly to exit*, with a high index value representing comparatively high regulatory costs.

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[36] Steen Thomsen and Frederik Vinten, 'Delistings and the Costs of Governance: A Study of European Stock Exchanges 1996–2004' (2014) 18 J Manag Gov 793; Chemmanur and others (n 35).

[37] Thomsen and Vinten (n 36). Thomsen and Vinten use the LLSV index as updated by Pagano and Volpin (2005).

[38] Doidge and others (n 11).

[39] Chaplinsky and Ramchand (n 25).

[40] For an explanation of 'regulated markets' under MiFID II, see Danny Busch, 'MiFID II and MiFIR: Stricter Rules for the EU Financial Markets' (2017) 11 Law and Financial Markets Review 126, 126–27.

1) Index coding criteria

The Take Private Index (TPI) is composed of the following ten indicators:

Variable	Coding criteria
1. tp_codified	Takes the value 0 if the requirements for a take private transaction are set out in law or regulations, and 1 otherwise. [eg, a law that provides for the possibility of a delisting, but does not set out the requirements to be fulfilled to delist an issuer (eg, a law that does not specify which corporate organ is responsible for the delisting decision), will receive the value of 1. Likewise, a law that does not provide for a delisting procedure, but requires companies to pursue another corporate transaction that makes it impossible for the issuer to retain a listing (eg, a takeover followed by a squeeze-out), will receive the value 1.]
2. tp_quorum	Quorum in the general meeting to delist; takes the value 0 if no shareholder vote or no minimum quorum is required, and expressed as the percentage of the share capital that must be represented at the meeting otherwise.
3. tp_majority	Majority in the general meeting to delist; takes the value 0 if no shareholder vote is required, 0.5 for a simple majority, 0.67 for a two-thirds majority, and the percentage of votes required for a delisting resolution otherwise.
4. tp_veto	Takes the value 0 if a delisting resolution is not conditional on approval by a majority of the minority and no comparable minority veto rights exist, and 1 otherwise.
5. tp_discretion	Takes the value 0 if a market regulator/operator has no discretion in approving an application for delisting, provided a set of formal requirements are satisfied, and 1 otherwise. [eg, where a market regulator has the power to reject an application because it would be detrimental to the interests of the investors or the orderly functioning of the market, the variable will take the value 1.]
6. tp_buyout	Takes the value 0 if the issuer or majority shareholder is not required to buy out dissenting shareholders in the case of a delisting, and 1 otherwise.
7. tp_buyout_price	Takes the value 0 if the issuer or majority shareholder is not required to buy out dissenting shareholders or there are no appraisal rights or other mechanisms to ensure that shareholders receive fair value (such as calculating the buyout price with reference to the average market price before the delisting decision), and 1 otherwise.
8. tp_substantive	Takes the value 0 if shareholders cannot challenge a delisting decision of the company (taken by the board of directors and/or the general meeting, as appropriate) on substantive grounds, for example by claiming that the delisting decision encroaches on their rights as shareholders (eg, is prejudicial to their interests, etc.), other than according to general directors' duties or duties imposed on shareholders; takes the value 1 if shareholders can challenge a delisting decision on such grounds.

9. tp_foreign_issuers	Takes the value of 0 if foreign issuers are subject to no additional requirements, and 1 otherwise.
10. tp_time_delay	Takes the value of 0 if no precondition for delisting imposes minimum time requirements of 180 days or more relating to any feature (eg, liquidity), and 1 otherwise.

The Market Migration Index (MMI) is composed of the following eleven indicators:

Variable	Coding criteria
1. mm_codified	[Same as tp_codified]
2. mm_quorum	[Same as tp_quorum]
3. mm_majority	[Same as tp_majority]
4. mm_veto	[Same as tp_veto]
5. mm_EU_listing	Takes the value 0 if it is not a precondition for a delisting that the shares are listed on another regulated market in the EU (but they can rather be listed outside of the EU), and 1 otherwise.
6. mm_discretion	[Same as tp_discretion]
7. mm_buyout	[Same as tp_buyout]
8. mm_buyout_price	[Same as tp_buyout_price]
9. mm_substantive	[Same as tp_substantive]
10. mm_foreign_issuers	[Same as tp_foreign_issuers]
11. mm_time_delay	[Same as tp_time_delay]

2) Background and index data

Our TPI and MMI indices for the countries listed in *Table 2* below are coded based on country questionnaires specifying aspects of delisting law, regulation, and jurisprudence. The questionnaires were completed by experienced legal academics in each jurisdiction and circulated for comments and discussion. Index values are presented in the Appendix.

Table 2: Jurisdictions in the TPI and MMI

Jurisdiction	**TPI Score** **(highest to lowest)**	**MMI Score**
1. France (Euronext Paris)	8.8	7.5
2. Netherlands (Euronext Amsterdam)	6.9	3
3. Finland (Nasdaq Helsinki)	5.8	5.8
4. Sweden (Nasdaq Stockholm)	5	3.5
5. Greece (Athens Stock Exchange)	4.9	4.8
6. Italy (Borsa Italiana/Euronext Milan)	4.87	2.87
7. Austria (Wiener Boerse)	4.75	3.75
8. Belgium (Euronext Brussels)	3.95	4.25
9. Cyprus (Cyprus Stock Exchange)	3.9	3.9
10. Australia (Australian Securities Exchange)	3.5	1
11. Germany (Börse Frankfurt)	3	2
12. Spain (BME Exchange)	2.75	2.75
13. UK (LSE) (premium segment)	1.75	1.75
14. Canada (Toronto Stock Exchange)	1.5	1
15. UK (LSE) (standard segment)	0	0
16. United States (New York Stock Exchange and Nasdaq Stock Market)	0	0

The TPI scores indicate that when it comes to voluntary delisting, France has the highest delisting costs (8.8 out of 10) and the US and UK have the lowest (when averaging for the UK the premium and standard segment TPI scores of the LSE Main Market).[41] The mean TPI score is 3.81 (σ = 2.36) and the mean MMI score is 2.99 (σ = 2.05). 12 of the 16 jurisdictions sit within one standard deviation of the mean TPI score, and 12 of the 16 jurisdictions sit within one standard deviation of the mean MMI score. Fewer jurisdictions require a mandatory tender offer to dissenting shareholders in the case of market migrations when compared to conventional going private transactions: the mean mm_buyout value (.31) is considerably lower than the mean tp_buyout value (.69). Shareholder approval requirements are lower on

[41] Standard-listed securities on the LSE Main Market can be cancelled without a shareholder vote, so long as 20 business days' notice is provided to shareholders. See Listing Rule 5.2.8. Note that our indices reflect UK delisting regulation at the time of writing, prior to the UK Financial Conduct Authority's enactment of a simplified listing regime in July 2024. Under the recently enacted UK Listing Rules (UKLR) in July 2024, the premium and standard segments of the LSE are replaced by a single segment: Commercial Companies (Equity Shares) or ESCC. Commercial companies previously listed on the premium segment will be 'mapped' to the ESCC category, and commercial companies previously listed on the standard segment of the LSE will be 'mapped' to a transition category or secondary listing category. See Financial Conduct Authority, 'Primary Markets Effectiveness Review: Feedback to CP 23/31 and final UK Listing Rules' (July 2024).

average for market migrations than take private delistings: the mean mm_majority value (.45) is lower than the mean tp_majority value (.59), as is the mean mm_quorum value (.17) when compared to the mean tp_quorum value (.31). Most jurisdictions explicitly provide for a delisting procedure (separate from a squeeze-out procedure) in law or regulations (mean tp_codified value is .31), grant the regulator or market regulator discretion in refusing a voluntary delisting (mean tp_discretion and mm_discretion values are .50), and do not provide shareholders with statutory or regulatory recourse to challenge a voluntary delisting that is otherwise compliant with the applicable requirements (mean tp_substantive and mm_substantive values are .38).

We categorise jurisdictions as having a *prohibitive*, *permissive*, or *differential* regulatory approach to voluntary delistings. A regime is prohibitive if it sets out requirements that effectively preclude voluntary delistings, such as a very high (≥ 90 percent) quorum or shareholder approval requirement, or if the cost of a voluntary delisting is prohibitively high because of the cumulative effect of multiple delistings requirements (as reflected by the aggregate value TPI and MMI indices). This is illustrated in the first and third columns of *Table 3* below, whereby all of the 'prohibitive delisting' jurisdictions, which represent the nine jurisdicitions with the highest TPI scores pursuant to *Table 2*, have quorum or shareholder approval requirements higher than 90 percent *and* require a mandatory buyout of minority shareholders in all cases.[42]

Permissive regimes impose less stringent requirements for a voluntary delisting than prohibitive regimes. A regime is permissive if its most onerous requirement is at most a moderately high shareholder vote (≤ 75 percent), coupled with relatively few other requirements (such as a majority of the minority vote or providing the regulator with discretion

[42] Germany and Spain require a mandatory buyout of minority shareholders, but do not impose high shareholder approval requirements, and therefore are more borderline classifications.

to reject a voluntary delisting application), but it does not require a mandatory buyout of dissenting minority shareholders. Extremely permissive delisting regimes, like the New York Stock Exchange (NYSE) and Nasdaq in the US, or the LSE standard segment in the UK, do not impose issuers with any material regulatory obstacles to delisting: shareholder approval is not required, nor can dissenting minority shareholders effectively challenge a delisting decision apart from general corporate law fiduciary duties claims or the usual securities law fraudulent and misleading disclosure claims. The decision is left in the hands of the directors whom the shareholders appointed. Moderately permissive regimes such as the LSE premium segment (UK) and Canada require a majority of independent shareholders to approve a voluntary delisting when the issuer has a controlling shareholder, and Australia provides shareholders with a statutory remedy to challenge voluntary delistings with the Takeovers Panel.[43]

The jurisdictions in column 3 of *Table 3* have regulatory requirements that substantially differ for take private transactions and market migrations, as indicated by their different TPI and MMI scores. All of these jurisdictions have a considerably lower MMI score than TPI score, suggesting that the approach to regulating market migrations is more permissive than for voluntary delistings. For example, some jurisdictions lower or remove altogether otherwise very high shareholder approval requirements upon a market migration, such as in the Netherlands. In some jurisdictions, such as Austria and Italy (as well as Germany and Spain), more lenient requirements only apply if the issuer migrates to another EU/EEA regulated market specifically.

[43] In addition to the oppression remedy, adjudicated by the courts (and also a feature of UK and Canadian company law), Australian shareholders can and have relied upon the 'unacceptable circumstances' remedy to challenge a delisting with the Takeovers Panel. See *Corporations Act 2001* Part 2F.1 and Part 6.10 Division 2 Subdivision B.

Table 3: Classifying delisting regimes

Prohibitive	Permissive	Differential (prohibitive for take privates, permissive for market migrations)
France	Australia	Netherlands
Finland	Canada	Sweden
Greece	UK (both MM segments)	Italy
Belgium	United States	Austria
Cyprus	Germany (borderline)	
	Spain (borderline)	

3) Issues surrounding index construction

In this section, we discuss possible challenges to the methodology underlying the construction of our TPI and MMI scores. A first issue in the construction of an index or composite indicator – whether it be the World Economic Forum's Global Competitiveness Index, LLSV's anti-director rights index (ADRI), or our indices – is whether the variables contained in the index validly measure the systematized concept (in our case, delisting costs).[44] All of the variables in the TPI and MMI measure how difficult or costly it is to delist in some regard. Variables concerning shareholder voting requirements or additional requirements for foreign issuers or minimum time requirements measure one component of delisting difficulty: satisfying more onerous ex ante conditions to delist. Other variables concerning legal challenges by shareholders measure a different component of difficulty: withstanding challenges after the initial conditions have been satisfied. Variables concerning whether a market regulator has discretion to approve a delisting or whether the delisting requirements are codified measure the legal certainty of a delisting application. More uncertainty increases delisting difficulty because the probability of an unsuccessful application increases, as do time and information gathering costs. Variables concerning requirements to buy out dissenting shareholders measure the costliness of delisting, since making a tender offer to dissenting shareholders materially

[44] On construct validity, see Robert Adcock and David Collier, 'Measurement Validity: A Shared Standard for Qualitative and Quantitative Research' (2001) 95 American Political Science Review 529.

increases the financial costs of delisting, and more capital is needed to delist. Costliness and difficulty are related concepts and go hand in hand, since a costlier delisting (whether financially or in terms of opportunity costs) is more difficult, all else equal.

A second issue in index construction is how to appropriately weight different variables. While acknowledging potential pitfalls, we weight all of the variables equally to minimize researcher subjectivity.[45] In doing so, we follow established methods of index construction used by the World Bank, Organisation for Economic Co-operation and Development (OECD), and others.[46] However, by including two binary variables that account for whether regulation requires an issuer to make a cash offer to minority shareholders in order to delist (eg, Austrian law requires a buyout offer that must not be lower than the issuer's average trading price over the last six month) and that should always move together – the presence of a tender offer requirement (tp_buyout) as well as a separate variable that receives a 1 if regulation includes a codified offer appraisal mechanism (tp_buyout_price) – we double weight what we perceive to be the most costly delisting indicator in our index.[47]

A third issue with any index is ensuring that the coding and index values are accurate. For example, Spamann's recoding and correction of the 1998 ADRI 'diverges substantially' from the original LLSV index (the correlation coefficient is 'only 0.53'), undermining some of

[45] We employ a linear aggregation method whereby each indicator value is added to arrive at a composite score, rather than other methods, such as contingent indexing, which are employed to measure the interaction of different indicators (eg, legal rules) with each other. See Daniel Ferreira and others, 'Management Insulation and Bank Failures' (2021) 47 Journal of Financial Intermediation 100909. Discussing index weights and aggregation, the Organisation for Economic Co-operation and Development (OECD) acknowledges that 'weights are essentially value judgements'. OECD and others, 'Handbook on Constructing Composite Indicators: Methodology and User Guide' (OECD 2008) 31.

[46] The World Bank *Doing Business* report weights all topics equally in its composite indicator. See World Bank, 'Doing Business 2020: Comparing Business Regulation in 190 Economies' (Washington, DC: World Bank 2020) 81. See also OECD and others (n 45) 31–33. Widely used indices such as Bebchuk et al.'s entrenchment index ('E-index') also use equally weighted components. See eg Lucian A Bebchuk and others, 'What Matters in Corporate Governance?' (2009) The Review of Financial Studies 783.

[47] Collinearity among indicators is not a problem if double weighting is intentional, since 'weights should ideally reflect the contribution of each indicator to the composite'. OECD and others (n 45) 32.

LLSV's original claims.[48] To reduce the probability of coding errors due to misunderstanding the questionnaires, we contacted the questionnaire authors to seek clarification when we felt it necessary.

IV. Delistings and capital allocation in the EU

As we have seen, some delisting rules impose significantly higher costs on issuers than others. This may affect the frequency with which companies move between capital markets in the EU and thus impact market integration. The question therefore arises how delisting rules should be evaluated in terms of the free movement provisions of the Treaty, and whether costly delisting regimes, or certain particularly demanding rules, for example 90-95% shareholder approval requirements, are in conformity with the economic freedoms.

Our discussion will focus on the free movement of capital, Articles 63-66 TFEU.[49] Article 63 TFEU prohibits all restrictions on the movement of capital between Member States, subject only to certain provisions of a Member State's tax law and general overriding requirements in the public interest.[50] The provision therefore captures both (directly and

[48] Holger Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23 The Review of Financial Studies 467, 483. See also Michael Graff, 'Law and Finance: Common Law and Civil Law Countries Compared—An Empirical Critique' (2008) 75 Economica 60.

[49] Delistings that are part of a corporate reorganisation may also implicate the right of establishment, Articles 49-55 TFEU. The right of establishment extends to transfers of shares that result in a shareholder gaining 'definite influence' over a company, Case C-231/05 *Oy AA* [2007] ECR I–6373, para. 20; Case C-251/98 Baars [2000] ECR I–2787, para. 22. The Court of Justice considers the intended purpose of national legislation to differentiate between the free movement of capital and the right of establishment where the two freedoms overlap, Case C-543/08 *Commission v. Portugal* (EDP) [2010] ECR I-11241, para. 40. It examines national legislation solely pursuant to Art. 49 if the challenged law is intended to apply only to shareholdings that enable the holder to have a definite influence over a company's decisions. Laws concerning shareholdings that do not reach this threshold (ie, portfolio investments) are examined solely pursuant to Art. 63, and where it is possible that the challenged law affects both shareholders exerting a definite influence and other shareholders, the Court applies Arts. 49 and Art. 63 concurrently, ibid. para. 43. Since we are interested in the effects of delisting rules on corporate mobility generally, rather than solely on M&A transactions, we centre our discussion on the free movement of capital as the more general freedom in the present context.

[50] Art. 65 TFEU and the jurisprudence of the CJEU following Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

indirectly) discriminatory and non-discriminatory national measures. It is uncontroversial that discriminatory measures that concern capital movements, for example the differential tax treatment of residents and non-residents,[51] are in breach of Article 63 unless they can be justified under the Treaty.

Non-discriminatory measures are more difficult to assess. The Court of Justice established in its so-called Golden Shares jurisprudence that indistinctly applicable laws that restrict the free movement of capital fall in principle within the scope of the free movement of capital.[52] As a result of this broad interpretation, Article 63 potentially captures a wide array of national legal rules, which would then need to be justified by a Member State under the *Gebhard* conditions.[53] Since the proportionality test required pursuant to *Gebhard* and related case law is demanding and puts the onus on the Member States to show that no less restrictive measure would have been available to attain the objective pursued and the measure does not have a disproportionate effect on protected interests,[54] the free movement provisions would leave little room for diversity in policy preferences and national experimentation.[55]

This problem is not unique to the free movement of capital. All four economic freedoms have been interpreted equally broadly by the Court of Justice. The Court has made efforts to formulate workable tests to determine 'the outer limits of EU law'[56] and to differentiate between rules that are unlikely to substantially hinder free movement and rules that require

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[51] Case C-443/06 *Hollmann v. Fazenda Pública* [2007] ECR I–8491.

[52] On the Court's Golden Shares jurisprudence, see Catherine Barnard, The Substantive Law of the EU: *The Four Freedoms* (7th ed., OUP 2022), 519-20; Leo Flynn, 'Free movement of capital' in Steve Peers and Catherine Barnard (eds.), *European Union Law* (4th ed., OUP 2023), 482, 487.

[53] See n 50.

[54] Barnard (n 52) 177-192 (free movement of goods), 542-544 (free movement of capital).

[55] On this problem, see Carsten Gerner-Beuerle, 'Shareholders between the market and the State. The VW law and other interventions in the market economy' (2012) 49 *CML Rev.* 97, 107.

[56] Barnard (n 52) 114.

further scrutiny (that is, justification under *Gebhard*). These efforts have not (yet) produced a coherent system, and they differ somewhat between the four freedoms, but certain common themes have emerged that are reflected in the free movement of capital case law. For example, the Court frequently asks whether a national legal rule hinders 'access to the market'. This formulation stems from the free movement of goods decision in *Keck*,[57] where the Court introduced a distinction between product requirements and rules prohibiting certain selling arrangements to define a sphere of national law that was 'beyond the scrutiny of the Court of Justice'.[58] Selling arrangements, the Court held, were outside the scope of the free movement of goods, provided they affected all traders in the same manner, in law and in fact, since their application to foreign products was 'not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products.'[59]

Since delisting rules are typically indistinctly applicable, at least in relation to migration between regulated markets within the EU,[60] defining the protected sphere of national law where policy decisions do not have to withstand scrutiny under the Treaty is important for our analysis. The next section describes the approach the Court has traditionally taken to delimit the scope of the free movement of capital. We argue that existing legal tests, stemming primarily from the Court's Golden Shares case law, are difficult to apply to the present context. Section 2 proposes an alternative approach, inspired by the Court's right of establishment jurisprudence, which is, arguably, more closely aligned with the problem at hand, the migration of companies between capital markets. Section 3 goes beyond a doctrinal analysis and provides

[57] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[58] Barnard (n 52) 114.

[59] *Keck* (n 57) para. 17.

[60] There are exceptions. For example, Art. 17(5) of Greek Law 3371/2005 on Capital Markets Issues and Other Regulations, Official Gazette A 178/14.7.2005, provides for exemptions to the delisting requirements if an issuer migrates to another regulated market in Greece, but not in the case of migration to another regulated market abroad.

another rationale for scrutinising delisting rules under the free movement provisions. When the capital needs of a company change, regulatory impediments to migrating to another market may negatively affect the efficient allocation of capital in the EU. Suppose a company seeks to finance a growth strategy but finds it difficult to raise the necessary funds in its home market because of a small investor base, or its operational focus has changed, perhaps as the result of an M&A transaction, and the local investor base lacks familiarity with the industry and geographic market that is now the company's focus. In the first case, a lack of funding would impede the company's growth, and in the second case reliance on the local investor base is likely to increase the company's cost of capital. In both cases, capital allocation in the EU is inefficient.

Assuming that migrating to a more appropriate market is not feasible because of a restrictive delisting regime, two alternative solutions are conceivable. The issuer may seek a secondary listing on another market or rely on investors migrating to its home market. The first of these alternatives comes with disadvantages. A secondary listing increases compliance and other costs, may receive less analyst coverage than a primary listing, and may not reach stock index inclusion thresholds, with the result that the issuer does not benefit from the positive stock price effects that are typically associated with index inclusion.[61] Section 3 explores whether the second alternative – supply side capital mobility – can be expected to mitigate the risk of inefficiency in capital allocation. In theory, perfect supply side capital mobility would remedy capital allocation problems resulting from restrictive delisting regimes, but in practice there are significant capital mobility frictions in the EU which limit the effectiveness of this solution.

[61] William B. Elliott, Bonnie F. Van Ness, Mark D. Walker, and Richard S. Warr, 'What Drives the S&P 500 Inclusion Effect? An Analytical Survey' (2006) 35 *Financial Management* 31.

1) Scope of the free movement of capital: the traditional approach

Capital movements pursuant to Article 63 TFEU include both direct investments in companies, that is, investments with a view to participating in the management and control of a company, and portfolio investments.[62] As mentioned above, the Court of Justice held in its Golden Shares jurisprudence that measures that make it less attractive for potential investors to hold equity in a company, for example because the company has a dual class share structure or certain shareholders have special control rights, such as veto rights, fall within the scope of the free movement of capital even if they apply irrespective of the nationality of an investor. It may be argued that the issue here is different: measures of a regulatory body or the legislator make it more difficult and thus less attractive for an issuer to raise capital in another market (be this another public or a private capital market), rather than for an investor to provide capital. However, this is only a difference of perspective. A rule that renders delistings more costly and potentially prevents an issuer from migrating to another market or going private impedes the deployment of capital that would otherwise be available in these markets as much as a rule that discourages investors from investing.[63] In both cases, the risk exists that the resultant allocation of capital is inefficient.[64] Delisting rules are therefore relevant to capital movements within the meaning of Article 63 TFEU.

[62] Case C-367/98 *Commission v. Portugal* (Golden Shares I) [2002] ECR I–4731, para. 38; Joined Cases C-282 and 283/04 *Commission v. Netherlands* (KPN/TPG) [2006] ECR I–9141, para. 19.

[63] In other contexts, the Court has confirmed that the issuer perspective is as relevant as the investor perspective, see Case C-315/02 *Lenz v. Finanzlandesdirektion für Tirol* [2004] ECR I–7063, para. 21 (holding that the differential tax treatment of dividend payments of Austrian and foreign companies 'produces a restrictive effect in relation to companies established in other Member States, inasmuch as it constitutes an obstacle to their raising capital in Austria').

[64] The net social welfare effects of mechanisms that disincentivise investment, such as multiple voting rights and other corporate governance arrangements that lead to board entrenchment, are difficult to assess. Empirical evidence shows that control-enhancing mechanisms are negatively associated with firm value. For an overview of the evidence, see Lucian A. Bebchuk and Kobi Kastiel, 'The Perils of Small-Minority Controllers' (2019) 107 *Geo. L.J.* 1453, 1471-73. However, these studies may not account for all effects that are relevant to a comprehensive social welfare assessment, for example positive externalities of higher research and development expenditure. For a critical evaluation of the empirical evidence, see also ISS Europe, ECGI, Shearman & Sterling, Report on the Proportionality Principle in the European Union, External Study Commissioned by the European Commission (May 2007), p. 6.

However, whether delisting rules that are indistinctly applicable fall within the scope of the free movement of capital is a more complex question than establishing that economic activity associated with a delisting qualifies as a capital movement.[65] The first case to address the issue at some length was Case C-98/01 *Commission v. United Kingdom*,[66] which concerned special rights retained by the British government as a shareholder in the process of privatizing the British Airports Authority. The British government argued that control enhancing mechanisms contained in the articles of association of the privatized successor company to the British Airports Authority, BAA plc, were compatible with EU law, 'since they appl[ied] to all Member State nationals without discrimination on grounds of nationality and [did] not restrict access to the market.'[67]

This argument relies on the Court's approach to delimiting the scope of the free movement of goods and explicitly references the decision in *Keck*.[68] The Court of Justice seemed receptive to the British Government's attempt to define 'the outer limits' of the free movement of capital by reference to *Keck* and the market access test, although it came to a different conclusion than the British Government. Embracing the dichotomy between product requirements and selling arrangements, the Court held:

> The measures at issue are not comparable to the rules concerning selling arrangements which were found in [*Keck and Mithouard*] not to fall within the scope of [the free movement of goods]. … In this instance, although the relevant restrictions on investment operations apply without distinction to both residents

[65] See the text to notes 52-60 above.

[66] [2003] ECR I-4641.

[67] Ibid. para. 27.

[68] See n 57 and the accompanying text.

> and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.

In subsequent free movement of capital cases, also concerning special rights established in favor of the state as a shareholder in privatized enterprises, the Court continued to entertain the *Keck* analogy. It consistently held that control-enhancing mechanisms affected shareholdings 'as such' and were therefore not equivalent to selling arrangements.[69] The Court simultaneously complicated the taxonomy in response to Member State arguments that dual class stock and other special shareholder rights were 'wholly in accordance with the normal rules of company law in force' in the Member State and that general company law was outside the purview of the Court of Justice.[70] The Court argued that the challenged special rights in the Golden Shares cases were reviewable because they 'derogated' from ordinary company law, either because special rights were established in favor of certain classes of shareholders in law[71] or in the articles of association (or a shareholders' agreement) *and* the special right in the articles or shareholders' agreement could be traced back to the exercise of the state's public authority, rather than being the product of a private act.[72]

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[69] For example, *EDP* (n 49), paras. 65-68; Case C-212/09 *Commission v. Portugal* (GALP) [2011] ECR I-10889, paras. 62-65.

[70] *BAA* (n 66) para. 31. The same argument can be found in many other Golden Shares cases, for example Case C-112/05 *Commission v. Germany* (Volkswagen) [2007] ECR I–8995, paras. 32-33; *EDP* (n 49)paras. 29, 33; *GALP* (n 69) paras. 35, 39.

[71] *Volkswagen* (n 70) paras. 46, 60-61; Joined Cases C–463 and 464/04 *Federconsumatori v. Comune di Milano* [2007] ECR I–10419, paras. 17, 34.

[72] For example, *EDP* (n 49) para. 62; *GALP* (n 69) para. 53.

These two tests work in opposite directions in the present context. It may be argued that costly (or at least *prohibitively* costly) delisting rules affect the position of issuers 'as such', since they prevent issuers from meeting their financing needs by raising capital in another market.[73] They may thus be compared to product requirements, rather than rules that concern the manner in which capital is raised. On the other hand, in contrast to the provisions that are scrutinised under the *Keck* test, delisting rules are imposed by the home state of an issuer (in the sense of the issuer's current listing state), not by the market which the issuer seeks to access.[74] Maintaining the free movement of goods analogy, they are therefore comparable to requirements in force in the Member States where goods are produced. In accordance with the principle of equivalence or mutual recognition,[75] a delisting that is lawful in one Member State needs to be recognised in other EU states, but what constitutes a lawful delisting is subject to the regulatory discretion of the home state. Given these considerations, it is perhaps more natural to rely on the Court's 'derogation of company law' test to determine whether the free movement of capital encompasses delisting rules (and more generally capital markets regulation). Since the delisting rules we have analysed entail no favorable treatment for specific issuers, it would follow that they do not engage Article 63 TFEU.

However, this of course does not resolve the problem that costly delisting regimes restrict access to capital markets in the EU. A delisting regime that stipulates a very high quorum or majority requirement of 90-95% effectively eliminates the possibility of migrating to another capital market outside of an M&A transaction. A better analogy for the problem at hand may therefore be the case law of the Court of Justice on companies that seek to

[73] This argument holds irrespective of whether a delisting occurs for purposes of market migration or to take a company private. In both cases a prohibitively costly delisting restricts access to another market.

[74] The Keck test concerns the question whether provisions of the *target* market fall within the scope of the free movement of goods, see the text to notes 57-59 above.

[75] Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.

reincorporate in another Member State. Delistings and reincorporations are two facets of corporate mobility that pose a similar legal question, namely, how to define the sphere of regulatory activity of the *home* state that is beyond the scrutiny of the Court of Justice. We turn to this question next.

2) <u>Analogy to the right of establishment</u>

Several landmark rulings of the Court of Justice have interpreted the rights of companies to exercise their freedom of establishment pursuant to Articles 49 and 54 TFEU, which are now relatively well defined. In contrast to the free movement of capital, the Court has developed bespoke principles that distinguish between inbound and outbound corporate movements.[76] We are interested in the latter case: the 'protected sphere' of national law where the home state can regulate without the need to justify (indistinctly applicable) restrictions on corporate mobility. In its first seminal decision concerning outbound mobility, *Daily Mail*, the Court famously stated that companies were 'creatures of the law and, in the present state of Community law, creatures of national law.'[77] Naturally, given that a company is an artificial legal person, a legal system (which, in the absence of harmonisation, is a national legal system) must be able to define the requirements that determine a company's incorporation, that is, the rules that need to be satisfied to establish a company. It would have been conceivable to apply the right of establishment from this point onwards, since a legal person has then come into existence that should in principle be able to benefit from the right of establishment. However, the Court of Justice in *Daily Mail* seemed to draw the ambit of reserved national law more widely, stating that national law 'determines [a company's] incorporation and functioning'.[78] While some

[76] For an overview, see Barnard (n 52) 402-408.

[77] Case 81/87 *The Queen v. HM Treasury and Commissioners for Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483, para. 19.

[78] Ibid.

questions remain unclear, the regulatory sphere within which a Member State can operate without the need for *Gebhard* justification consequently encompasses incorporation rules as well as provisions pertaining to the internal management of a company.[79]

The Court further held that the home state's regulatory authority includes the power 'not to permit a company *governed by its law* to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter'.[80] However, importantly, this does not mean that the home state can prevent a company from 'converting itself into a company governed by the law of [another] Member State, to the extent that it is permitted under that law to do so', for example by requiring the winding-up or liquidation of the company.[81] In other words, the regulatory authority of the home Member State ends when a company migrates to another Member State *and* the move entails a change in the applicable law.

It is not entirely clear from the case law of the Court of Justice what the cut-off point is that triggers the reviewability of home Member State law by the Court. In strict application of the *Daily Mail* rationale, it may be thought that home Member State law governing the decision whether to move (that is, the relevant internal corporate governance requirements, for example, the requirement to obtain shareholder approval) falls outside the scope of Articles 49 and 54 TFEU, since these matters concern the 'functioning' of a company. However, in more recent decisions, the Court seemed to define the scope of the right of establishment more broadly. In *Cartesio*, it stated that 'legislation [of the home state] on the incorporation and winding-up of companies [did not enjoy] any form of immunity from the rules of the … Treaty on freedom

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[79] For a detailed discussion of these issues, including more recent case law, see Carsten Gerner-Beuerle, Federico Mucciarelli, Edmund Schuster, and Mathias Siems, 'The Illusion of Motion: Corporate (Im)Mobility and the Failed Promise of Centros' (2019) 20 *EBOR* 425, 454-462.

[80] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para. 110 (emphasis by authors).

[81] Ibid. para. 112.

of establishment' if such rules prevented a company from migrating to another Member State.[82] In *Polbud*, the Court used even more inclusive language. It held that '*all measures* which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom'.[83] These two cases dealt with requirements of the home Member State for winding up or liquidating a company before it could be converted into a company governed by the law of another Member State. However, the rulings suggest that such requirements are merely examples of the types of measures that can impede the freedom of establishment in the case of outbound movements.

This interpretation is supported by the Court's approach to delimiting the regulatory authority of a host Member State where a company seeks to reincorporate under the laws of that state. In *VALE*,[84] the Court qualified *Daily Mail*'s 'creature of national law' argument. It recognised that in the absence of harmonised rules it was a matter for the domestic legal order of each Member State to determine the requirements for the incorporation or conversion of companies under their law.[85] However, this does not mean that 'such national provisions [can] escape all review in the light of [the] Treaty provisions.'[86] Rather, in the view of the Court, the Treaty requires that the relevant rules 'are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).'[87]

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[82] Ibid.

[83] Case C-106/16 *Polbud* EU:C:2017:804, para. 46 (emphasis by authors).

[84] Case C-378/10 *VALE Építési kft* EU:C:2012:440.

[85] Ibid. paras. 48, 51-52.

[86] Ibid. para. 45.

[87] Ibid. para. 48.

Translating these considerations to the context of listings and delistings, three points may be made. First, Member States should have discretion to regulate capital markets located within their territory without full scrutiny under the Treaty where capital markets regulation is not harmonised (thus, for example, in relation to delisting rules). Similar to *Daily Mail*'s 'creature of national law' argument, markets cannot function properly without a regulatory framework that determines the 'rules of the game'. Since it is easy to conceive of ways to make an existing regulatory regime more accommodating to market participants, full regulatory scrutiny under the Treaty would necessitate *Gebhard*-justification for virtually all of a Member State's non-harmonised capital markets law.

Second, we know from both the *Keck*-inspired free movement of capital case law and *Cartesio*, *Polbud*, and *VALE* that the reserved area of Member State law is not unlimited, including in relation to legal requirements that are a precondition for the exercise of free movement rights, such as laws on the incorporation or conversion of a company. Scrutiny under the Treaty is warranted particularly where laws prohibit or impede the movement from one market to another. At least the set of rules that we capture with our market migration index should therefore be subject to review by the Court. The legal rationale that motivated the Court in *Cartesio* and *Polbud* is equally applicable to the present context. Market migration is characterised by the decision to exit the jurisdiction of one Member State's regulatory authority in favour of submitting to that of another. The Court held in *Cartesio* and *Polbud* that this must be possible and cannot be impeded unduly by the home Member State.

Third, it is not clear from the right of establishment case law on outbound movements whether a home state's laws are fully reviewable, or an intermediate standard of review applies, for example the principles of equivalence and effectiveness on which the Court relied in *VALE* to assess a host state's law on conversions. We suggest that the latter approach is more convincing. Full review under the Treaty would be tantamount to a comprehensive harmonisation of delisting rules, favouring the adoption of the least restrictive regime unless individual rules that make access to capital markets less attractive can be justified. The Treaty's free movement provisions are not the right vehicle to bring about such comprehensive harmonisation, and Member States may object to the strong deregulatory tendency that is inherent in the structure of the economic freedoms. Additionally, it is useful to leave space for regulatory experimentation where conflicting interests are involved and it is not immediately clear how these interests should be reconciled, as here with the interests of issuers, controlling shareholders and minority investors. Consequently, if the solution suggested here is adopted, delisting rules that render market migration 'impossible in practice or excessively difficult'[88] are subject to review under the Treaty. Arguably, the rules we classify as prohibitively costly fall into this category.

The prohibitively high cost of a delisting regime may result from the cumulative effect of multiple rules operating in combination (as reflected by the aggregate value of our two indices) or from specific rules that are individually difficult to satisfy, for example a very high quorum or shareholder approval requirement. In principle, it is irrelevant for purposes of the principle of effectiveness whether one rule individually or several rules in combination render an exercise of the free movement of capital excessively difficult. However, the distinction will affect the potential policy responses of Member States. It is difficult to see how a rule that requires, say, the approval of 90% of the outstanding share capital (or indeed 90% of the voting share capital)[89] for market migration within the EU can be justified. On the other hand, where no individual rule is prohibitively costly, but the overall regime renders a delisting excessively difficult (as is, arguably, the case with the French market migration regime[90]), a policy maker

[88] *VALE* (n 84) para. 48.

[89] For example, Cyprus, Finland, and Greece, see Part III above and the scores of the MMI in the Appendix.

[90] See above, Part III, Table 2.

has discretion to retain certain requirements, even if they are not widely shared in the EU, while modifying others.[91]

3) Limited mobility of the supply of capital

A costly delisting regime can be conceptualised as a restriction on the free movement of capital that operates on the demand side. The negative implications of such a restriction for an efficient allocation of capital within the EU would be mitigated if the supply of capital was perfectly mobile. Consider the case of a company that intends to delist in order to migrate to another stock exchange. If that company was prevented from migrating because of a restrictive delisting regime, but the supply of capital was perfectly mobile, its cost of capital would not be higher than in the intended destination market for the sole reason that fewer domestic providers of capital were present in the market of the company's current listing. Restrictions on delistings would therefore not lead to a misallocation of capital (they may, of course, lead to other costs, for example higher transaction costs because of more costly communication with the issuer's shareholder base).[92]

However, it is well established that the mobility of capital continues to be low in the EU in comparison with other internal markets, such as the United States. This is despite sustained efforts to create a capital markets union – a truly integrated market for capital. The European Central Bank (ECB) assesses financial integration in the Euro Area regularly. In its biannual reports, it examines four market segments, the money, bond, equity and banking

[91] For example, as discussed in Part III above, only a minority of Member States require a mandatory buyout when an issuer migrates to another market within the EU. Yet, it is hard to contend that this requirement alone renders delistings prohibitively costly.

[92] The calculus would also be different in the case of a take-private delisting. Here, misallocations may arise between public and private markets even if the supply of public equity capital is perfectly mobile.

markets.[93] In all four segments, financial activity occurs predominantly in domestic markets, often outstripping transactions with other Eurozone countries by a significant margin. Notably, the share of debt and equity securities of non-domestic Eurozone issuers held by institutional and retail investors ranges between no more than 10 and 20 percent, while domestic holdings amount to between 50 and 60 percent.[94] In a potentially concerning sign for the project of Capital Markets Union, the home bias that can be observed in the debt and equity markets (and also in the banking market[95]) has remained at broadly the same level since the financial crisis.[96]

Limited mobility on the supply side makes a regulatory regime particularly important that facilitates demand-side mobility. While in theory a perfectly free supply of capital between EU Member States would remedy capital allocation inefficiencies stemming from prohibitively costly delisting rules, in practice there are significant frictions to capital mobility in the EU, therefore increasing the importance of delisting rules which are supportive of market migration.

V. Conclusion

This article has focused on an often-overlooked feature of listing regimes – the regulatory costs of delisting – which refer to the regulatory barriers to cancel an issuer's listing on a public trading venue. We have constructed two indices to understand and compare how significantly these regulatory costs differ between jurisdictions, which include eleven European jurisdictions

[93] European Central Bank, Financial Integration and Structure in the Euro Area, April 2022, and Statistical Annex, November 2023. For the most recent data, see the Statistical Annex, in particular section 2.3.1 (money market), section 2.3.2 (debt and equity securities markets), section 2.3.3 (banking market).

[94] Statistical Annex (n 93), pp. 18, 20 (charts 14, 16). Investment funds are an exception, since they typically hold broad, internationally diversified portfolios, see ibid. p. 19 (chart 15).

[95] Financial integration in the retail banking sector is low, with more than 80 percent of loans to non-financial borrowers coming from domestic lenders and banking institutions tending to concentrate their assets in their home states, Statistical Annex (n 93), pp. 21, 23 (charts 17, 21).

[96] For example, the percentage of equities held by domestic investors was around 65% in 2008 and has been flat at around 55% since 2013, Statistical Annex (n 93), p. 20 (chart 16).

(all 'EU regulated markets') and four non-EU jurisdictions. Our Take Private Index (TPI) measures the difficulty of voluntary delistings in a given jurisdiction, and our Market Migration Index (MMI) measures the difficulty of transferring from one listing venue to another. Our results indicate that, based on their TPI and MMI scores, regulatory variation between delisting regimes is significant. Given this variation, we classify delisting regimes as 'prohibitive' (ie, effectively precluding voluntary delistings), 'permissive' (ie, facilitating voluntary delistings with less onerous requirements), and 'differential' (ie, prohibitive for take private transactions but permissive for market migrations).[97]

Considering the lack of harmonised delisting rules in the EU and wide variation in the regulatory costs of delisting among EU Member States, we examine whether prohibitively costly delisting regimes are in conformity with Articles 63-66 TFEU on the free movement of capital. We apply doctrinal tests from the EU Court of Justice's Golden Shares and corporate mobility jurisprudence and suggest that while delisting rules do not engage Article 63 TFEU, they likely engage the rights of companies to exercise their freedom of establishment pursuant to Articles 49 and 54 TFEU by analogy. Ultimately, we suggest that an EU home state's rules contained in our market migration index should be subject to review by the Court of Justice, on an intermediate standard of review (as in *VALE*), since the legal rationale that motivated the Court in *Cartesio* and *Polbud* is equally applicable in the context of a company seeking to delist in one EU Member State and migrate its listing to another. Finally, we suggest that regardless of one's view on whether delisting regimes engage the freedom of establishment provisions in Articles 49 and 54 TFEU, regulatory impediments to delisting and migrating to another market negatively affect the efficient allocation of capital in the EU. Lowering the regulatory costs of delisting in prohibitive regimes where voluntary delisting is excessively

[97] For a list of each jurisdiction's classification, see Part III, Table 3: Classifying delisting regimes.

difficult is therefore an appropriate policy response to facilitate corporate mobility and increase capital allocation efficiency in the EU.

Appendix

Take Private Index (TPI)

Country	country_code	tp_total	tp_codified	tp_quorum	tp_majority	tp_veto	tp_discretion	tp_buyout	tp_buyout_price	tp_substantive	tp_foreign_issuers	tp_time_delay
Australia	AU	3.5	0	0.75	0.75	0	1	0	0	1	0	0
Austria	AT	4.75	0	0	0.75	0	0	1	1	1	0	1
Belgium	BE	3.95	0	0	0.95	0	0	1	1	1	0	0
Canada	CAN	1.5	0	0	0.5	1	0	0	0	0	0	0
Cyprus	CY	3.9	0	0	0.9	0	0	1	1	0	0	1
Finland	FI	5.8	1	0.9	0.9	0	1	1	1	0	0	0
France	FR	8.8	1	0.9	0.9	0	1	1	1	1	1	1
Germany	DE	3	0	0	0	0	1	1	1	0	0	0
Greece	GR	4.9	0	0.95	0.95	0	1	1	1	0	0	0
Italy	IT	4.87	1	0.2	0.67	0	1	1	1	0	0	0
Netherlands	NL	6.9	1	0.95	0.95	0	1	1	1	1	0	0
Spain	ES	2.75	0	0.25	0.5	0	0	1	1	0	0	0
Sweden	SE	5	1	0	0	0	1	1	1	1	0	0
UK_premium	UK_p	1.75	0	0	0.75	1	0	0	0	0	0	0
UK_other	UK_o	0	0	0	0	0	0	0	0	0	0	0
United States	US	0	0	0	0	0	0	0	0	0	0	0

Market Migration Index (MMI)

Country	country_code	mm_total	mm_codified	mm_quorum	mm_majority	mm_veto	mm_EU_listing	mm_discretion	mm_buyout	mm_buyout_price	mm_substantive	mm_foreign_issuers	mm_time_delay
Australia	AU	1	0	0	0	0	0	0	0	0	1	0	0
Austria	AT	3.75	0	0	0.75	0	1	0	0	0	1	0	1
Belgium	BE	4.25	0	0.5	0.75	0	0	0	1	1	1	0	0
Canada	CAN	1	0	0	0	1	0	0	0	0	0	0	0
Cyprus	CY	3.9	0	0	0.9	0	0	0	1	1	0	0	1
Finland	FI	5.8	1	0.9	0.9	0	0	1	1	1	0	0	0
France	FR	7.5	1	0	0.5	0	0	1	1	1	1	1	1
Germany	DE	2	0	0	0	0	1	1	0	0	0	0	0
Greece	GR	4.8	0	0.9	0.9	0	0	1	1	1	0	0	0
Italy	IT	2.87	0	0.2	0.67	0	1	1	0	0	0	0	0
Netherlands	NL	3	0	0	0	0	0	1	0	0	1	0	1
Spain	ES	2.75	0	0.25	0.5	0	1	1	0	0	0	0	0
Sweden	SE	3.5	1	0	0.5	0	0	1	0	0	1	0	0
UK_premium	UK_p	1.75	0	0	0.75	1	0	0	0	0	0	0	0
UK_other	UK_o	0	0	0	0	0	0	0	0	0	0	0	0
United States	US	0	0	0	0	0	0	0	0	0	0	0	0

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