Corporate Law Competition in the EU Revisited: Italian Corporations Moving North and the Missing German SPACs

Ben W. Fuhrmann[*]

This Article analyzes recent developments in European corporate law to argue that a Corporate Law Competition is emerging in the EU. For nearly half a century, scholars in the U.S. have engaged in a debate about a Corporate Law Competition between U.S. states and its various implications. In the late 1990s and the early 2000s, the European Court of Justice rendered a series of liberalizing decisions that broke with the long-standing prohibition on corporate mobility in the EU. Despite these judgements, scholars generally assert that there is no Corporate Law Competition among EU member states. This Article challenges such consensus by arguing that two recent examples demonstrate that a Corporate Law Competition among EU member states is finally emerging. It analyzes how this emerging Corporate Law Competition works and how it shapes corporate law development in the EU. In doing so, it also identifies the major differences of the competitive dynamics in the EU compared to the U.S. This Article first presents the theoretical and practical frameworks of a Corporate Law Competition both in the U.S. and the EU. It then explores two recent case studies in corporate law developments in the EU, namely the increasing reincorporation of Italian companies to the Netherlands and the incorporation of German SPACs in Luxembourg. The Article then examines these case studies to construct the dynamics of the demand and supply sides of the emerging Corporate Law Competition in the EU. It develops the argument that in both fact patterns, the general limitations to EU Corporate Law Competition have been overcome. Based on this analysis, the Article assesses public policy implications and argues that there is no race to the bottom to be expected for Corporate Law Competition in the EU.

[*] Ph.D., Attorney at Kirkland & Ellis.

INTRODUCTION

This Article argues that there has recently been a Corporate Law Competition[1] emerging in the EU. To this end, Part I first delves into the motivations behind the state competition in the U.S. and discusses the theories advanced by U.S. scholars to understand such development. Subsequently, it explains the statutory and regulatory setting that stipulates the framework of Corporate Law Competition in the EU. It outlines the traditional consensus that there is no Corporate Law Competition in the EU and discusses the various limiting factors. Part II then presents two recent cases that demonstrate a burgeoning Corporate Law Competition between member states. There is a variety of idiosyncratic cases in which corporations choose the corporate law of another EU member state over the corporate law of their home member state. However, in recent years, two particularly striking instances emerged that involve a broad movement of corporations in a common fact pattern. Part II takes a closer look at these two fact patterns, which are the increasing reincorporations of Italian companies to the Netherlands and the incorporation of German SPACs as Luxemburg entities. This Part analyzes the respective legal and factual background of both case studies and investigates the motives of the decision makers involved. Part III builds on these findings to demonstrate that the academic consensus does not hold true anymore. It shows how these findings challenge many assumptions about the development of corporate law in the EU. This Part also proposes a new theory about an emerging Corporate Law Competition in the EU and describes the general impact of such emerging competition and the resulting public policy implications. Finally, it gives an outlook on potential future developments and research on this topic.

I. THE THEORY OF CORPORATE LAW COMPETITION IN THE U.S. AND THE EU

Day one of a corporations class at any U.S. law school will likely feature a professor stressing the significance of the state of Delaware and its persistent success in dominating U.S. corporate

---

[1] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277 (1985) [hereinafter *Law as a Product*] (the term "Corporate Law Competition" will be referred to as meaning a contest of state actors in the provision of corporate law as a product offered and provided to out-of-state business enterprises on terms considered more favorable by them than those of other market actors; the "law as a product" analogy was first advanced by Romano).

law. At a European law school, conversely, the corporate law of any member state other than the country in which the law school is located will likely not even be taught. The chief reason for this striking difference is the different conceptions for a Corporate Law Competition in the EU and the U.S. This Part explores the history and current state of both frameworks. It shows that while the Corporate Law Competition is a well-analyzed phenomenon in the U.S., it was first actively impeded and later dismissed as barely observable in the EU.

A. State Competition in the U.S.

In the U.S., courts in all states will generally apply the law of a corporation's state of incorporation to determine the rules governing the internal organization of that corporation. This idea is called the "internal affairs doctrine" and is the basis for the Corporate Law Competition in the U.S.[2] It is a choice of law rule that applies the corporate law of the state of the corporation's incorporation to the internal organizational rules of that corporation, without regard to where it does business or where its headquarters are located.[3] Thus, the internal affairs doctrine effectively allows corporations to choose freely between the corporate law offered by the different states. More than a century ago, corporate law professionals and scholars gradually observed that certain states had become significantly more successful than other states in attracting out-of-state corporations.[4] Since then, scholars in the U.S. have engaged in a debate about a Corporate Law Competition between states, its impact on corporate law development and public policy implications. This discussion spans several theories and debates, which can be grouped into three main questions: (i) the directional question, (ii) the competition question and (iii) the federalism question.[5]

---

[2] VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112–13 (Del. 2005); Holger Spamann & Jens Frankenreiter, *Corporations* 535 (3d ed. 2023); *cf.* Restatement (Second) of Conflict of Laws § 296, 297; Federico M. Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*, 20 TUL. J. COMPAR. & INT'L L. 421, 426–27 (2012).

[3] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987); *VantagePoint*, 871 A.2d at 1112–13; Spamann & Frankenreiter, *supra* note 2, at 538.

[4] For some of the first accounts of the time when New Jersey was still the dominant corporate law jurisdiction in the U.S., see Edward Q. Keasbey, *New Jersey and the Great Corporations* (Part I), 13 HARV. L. REV. 198 (1899); *see also* Christopher Grandy, *New Jersey Corporate Chartermongering*, 49 J. ECON. HIST. 677, 678–85 (1989).

[5] For a comprehensive overview of the three debates, see Marcel Kahan, *The State of State Competition for Incorporations*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 105, 106 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2020).

1. The Directional Question: Is State Competition Desirable?

The central discourse is known as the directional question, which asks whether a Corporate Law Competition yields any benefits and if so, to whom. A common perspective in the debate argues that competition among states causes a "race for the bottom."[6] According to these voices, states compete for incorporations by offering corporate laws that maximize board power while lowering the standards for the protection of shareholders and stakeholders of the corporation.[7] The opposing view argues that competition among states will incentivize them to make their corporate law offerings more efficient and shareholder value-enhancing. This would then increase the potential benefits to the corporation's shareholders, producing a strong demand by corporations for the most attractive available corporate law product.[8] Such a demand for the corporate law of certain states would spur a race to the top between them.[9] That claim draws from the general idea that the enabling of competition produces innovation and thereby, superior outcomes.[10] The incentive for the states to participate in such a competition by offering a corporate law to out-of-state businesses is a potential increase in the respective state tax income. Such additional tax income results directly from franchise taxes and indirectly from a boosted demand for its legal

---

6 The term was arguably coined in William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L. J. 663, 666 (1974).

7 *Id.* at 665–66; Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1444 (1992); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1505–07 (1989); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1800–01 (2002); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 133–35 (2001).

8 Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 264 (1977) [hereinafter *State Law, Shareholder Protection*]; Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 546 (1984); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 16 (1993) [hereinafter GENIUS OF AMERICAN CORPORATE LAW]; Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919–20 (1982); Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competitions" Versus Federal Regulation*, 53 J. BUS. 259, 281–82 (1980).

9 Winter, *supra* note 8, at 276.

10 Friedrich August von Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* 179–90 (London, Routledge & Kegan Paul 1978) (describing this as a "discovery procedure").

services industry.[11] The underlying assumption of the race to the top view is that capital markets will reward more investor-friendly corporations with an increased demand for their stock and thus a higher stock price.[12] This seemed at first questionable when states won over corporations with anti-takeover statutes. Such statutes decrease stockholder value due to decreased interest of the stock market and the absence of a price premium in potential takeover bids.[13]

Another view has argued that even though the Corporate Law Competition is setting a race between states in motion, this race is going "to nowhere in particular."[14] Rather than attracting corporations through a particular value-enhancing or (according to the opposite view) a particularly lax corporate law, there would be an entirely different set of factors explaining the dominance of Delaware's corporate law. This view places particular importance in strong positive network externalities of a jurisdiction.[15] In Delaware, this includes specialized courts and the comprehensive body of case law developed by them in the last few decades.[16] This large amount of case law leads many to believe that Delaware corporate law is rather predictable, which provides corporations and their boards with legal certainty in their corporate decisions and transactions.[17]

All of these three views at least agree that there is a Corporate Law Competition. Not all scholars see it that way though, as the debate around the Competition question demonstrates.

---

11 Bebchuk, *supra* note 7, 1443; Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 771 (1995); *Law as a Product*, *supra* note 1, at 240–41.

12 Winter, *supra* note 8, at 276; Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 527–28 (2001). For summaries of empirical studies, see also GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 20; *but see* Robert J. Rhee, *The Irrelevance of Delaware Corporate Law*, 48 J. CORP. L. 295 (2023) (more recent studies do not find an actionable Delaware premium).

13 Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 823 (1982).

14 William W. Bratton, *Corporate Law's Race to Nowhere in Particular*, 44 TORONTO L.J. 401, 401 (1994); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2020).

15 Klausner, *supra* note 11, at 842–47.

16 *Id.* at 845–46; *Law as a Product*, *supra* note 1, at 277; Martin Gelter, *The Structure of Regulatory Competition in European Corporate Law*, 5 J. CORP. L. STUD. 247, 253 (2005).

17 *Law as a Product*, *supra* note 1, at 277; Gelter, *supra* note 16, at 253. For critical assessment of such legal predictability, see John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 766 (1987).

2. The Competition Question: Is there a Competition at All?

A second, related concept is the competition question. This debate concerns the question of whether there is a Corporate Law Competition between states going on at all. The view that denies the existence of such competition argues that even if there might have a competition between the states historically, this is not the case anymore today (or to a significantly lesser extent).[18] The proponents of this view propose that Delaware has built a strong competitive advantage over the other states, which have largely stopped trying to compete.[19] Even if corporations are often initially registered in the state where they do business, when they grow or contemplate a listing, they usually later reincorporate in Delaware.[20] This gives Delaware an even more significant advantage regarding its market share of large and mature companies. Some scholars have drawn on empirical evidence from such pre-IPO reincorporations supporting the competition theory by showing that 95% of all pre-IPO firms choosing a Corporate Law outside their home state choose Delaware Corporate Law.[21] According to these voices, the Corporate Law Competition is decided for the foreseeable future. However, that would not mean the end of the Corporate Law Competition, as the debate surrounding the Federalism question demonstrates.

3. The Federalism Question: Is Federal Corporate Law the Solution?

The last of the three main questions is the one considering federal law as an alternative to the current situation. The debate focuses on what role federal law should play in the Corporate Law Competition. Corporate law has traditionally been within the states' lawmaking powers.[22] That fact is what enables the Corporate Law Competition between states in the first place. However, over the last decades and in particular through more and more Securities Regulation rules applying to listed corporations,

---

[18] Kahan & Kamar, *supra* note 14, at 679; Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 555–57 (2002); *cf. also* Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 U. KAN. L. REV. 541, 543–44 (1995).

[19] Bebchuk & Hamdani, *supra* note 18, at 555–57.

[20] *Law as a Product*, *supra* note 1, at 226; *See* Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 390–94 (2003).

[21] Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572 (2002).

[22] Restatement (Second) of Conflict of Laws §§ 296, 297.

federal law has gained a far-reaching role in Corporate Law.[23] Commentators have therefore suggested that even if Delaware might have won the horizontal Corporate Law Competition against other states, it is still in heavy "vertical" Corporate Law Competition with the federal lawmakers.[24] Many proponents of the "race to the bottom" theory propose the use of federal law to remedy the alleged low standards in shareholder protection under state law. They argue that the issue of states' incentive to cater to management to the detriment of shareholder protection can be best remedied by stipulating uniform federal minimum corporate law provisions.[25] The opposing view counters this by pointing to the fact that there are several shortcomings in the federal law process because of a lack of information or effort of federal officials and distortion of their intentions by interest groups and legislative overreach.[26] These shortcomings in the creation of federal corporate law would worsen perceived deficits of state corporate law.[27] On this basis, recent proponents of a certain federal alternative or minimum standard regulation in corporate law have resorted to more nuanced proposals, such as a mix of optional federal corporate law provisions and mandatory right of shareholders to opt into such federal law.[28]

In contrast to the vigorous debate surrounding these three questions of the Corporate Law Competition in the U.S., the EU for a long time has maintained a legal framework that avoided Corporate Law Competition between member states altogether.

B. The Competition Framework in the EU

1. The Traditional Equilibrium: Maintaining "No Competition"

Traditionally, EU member states did not allow for corporate mobility between member states. Under the EU's "No Competition" strategy, the member states had a *de facto* virtual monopoly on corporate law.[29] This monopoly was predicated on the conflict

---

23 Coffee, *supra* note 17, at 759–60, 766.

24 Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003).

25 Cary, *supra* note 6, at 701–03.

26 Bebchuk, *supra* note 7, at 1501–07; GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 75–84.

27 Jonathan R. Macey, *Displacing Delaware, Can the Feds Do a Better Job Regulating Takeovers?*, 57 BUS. LAW 1025, 1044–45 (2002).

28 Bebchuk & Ferrell, *supra* note 7, at 133–35.

29 William W. Bratton, Joseph A. McCahery & Erik P.M. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis*, 57 AM. J. OF COMPAR. L. 347,

of laws rules of most member states, which used to follow the real seat doctrine instead of the incorporation doctrine.[30] These doctrines determined the rules member states would apply to corporations incorporated in or reincorporating from other member states to the respective member state.[31] According to the latter, the corporate law governing a corporation is determined by its state of incorporation.[32] In contrast, the real seat doctrine determines the law of the location of the corporation's business headquarters to be the governing law.[33] Traditionally, member states either did not allow or significantly impeded reincorporations, both by way of a cross-border merger or through the transfer of the corporation's registered office.[34]

The policy underpinning of the No Competition approach was the desire to avoid a "Delaware Effect" in the EU.[35] Instead, the longstanding EU policy with regard to the common development of corporate law was based on a gradual process of corporate law harmonization across member states.[36] To this end, the EU adopted several directives, each aiming at different aspects of corporate law.[37] Most of the early directives focused on codifying rules that were already established in many of the more

353 (2009); Joseph A. McCahery & Erik P. M. Vermeulen, *Does the European Company Prevent the 'Delaware Effect'?*, 11 EUR. L.J. 785, 792 (2005).

30 Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 479–80.

31 *See, e.g.*, GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 132; Dammann, *supra note 30*, at 479–80; Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1869–70 (2002); Mucciarelli, *supra* note 2, at 427–28.

32 Dammann, *supra* note 30, at 479–80.

33 *Id.*

34 Mucciarelli, *supra* note 2, at 428.

35 GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 129; Clark D. Stith, *Note, Federalism and Company Law: A "Race to the Bottom" in the European Community*, 79 GEO. L.J. 1581, 1618 (1991); Bratton, McCahery & Vermeulen, *supra* note 29, at 354–55; McCahery & Vermeulen, *supra* note 29, at 792; William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 317 (1997); David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423, 430 (1991).

36 Bratton, McCahery & Vermeulen, *supra* note 29, at 353–58; Carney, *supra* note 35, at 317.

37 TFEU art. 288(3) (under EU law, a "directive" is a legal norm that is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods").

influential member states.[38] The first directive[39] on corporate law focused on corporate disclosure requirements with the aim to create a basic level-playing field for the protection of shareholders throughout the EU. Other of the early directives covered capital requirements,[40] financial statements,[41] or auditing.[42]

However, more ambitious later efforts shed light on the limitations of the top-down harmonization approach. Member states resisted change to the more fundamental and characteristic pillars of their national corporate law systems, such as board structure and employee participation.[43] This resulted in a severe slowdown of the harmonization efforts.[44]

Some of the most significant directives on which member states were finally able to broker an agreement were the Takeover Directive[45] and the Directive on Cross-border Mergers.[46] These set joint provisions for several key areas of the design of corporate law in the member states. The difficulty of reaching an agreement, however, often resulted in major areas of law being left to the legislative and otherwise discretionary powers of the member states. That was, for instance, the case for the most contentious issues, like certain parts of the incorporation process (e.g., minimum legal capital, involvement of a notary public) and corporate governance (e.g., governing bodies, co-determination).[47] That issue was crucial when EU lawmakers tried to build a consensus for a statute on the creation of a corporate form common to all member states, the European Company (*Societas Europaea* or

---

38 European Parliament, Company Law – Fact Sheet on the European Union, https://perma.cc/4CT2-8CRW (May 2023); Bratton, McCahery & Vermeulen, *supra* note 29, at 353–58.

39 First Council Directive 68/151, 1968 O.J. (L 65) 8 (EEC) (on the coordination of safeguards required by Member States for company protections to ensure equivalency across the Community).

40 Second Council Directive 77/91, 1977 O.J. (L 26) 1 (EEC) (on coordination of safeguards required by Member States concerning the formation, capital maintenance, and capital alteration of public limited liability companies).

41 Fourth Council Directive 78/660, 1978 O.J. (L 222) 11 (EEC) (concerning the annual accounts of certain types of companies).

42 Eighth Council Directive 84/253, 1984 O.J. (L 126) 20 (EEC) (regarding the approval of persons responsible for statutory audits of accounting documents).

43 Bratton, McCahery & Vermeulen, *supra* note 29, at 356.

44 *Id.*

45 Directive 2004/25, 2004 O.J. (L 142) 12 (EC) (on takeover bids).

46 Directive 2005/56, 2005 O.J. (L 310) 1 (EC) (on cross-border mergers of limited liability companies).

47 Bratton, McCahery & Vermeulen, *supra* note 29, at 356–57.; *cf. also* GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 129–32.

SE). It was finally adopted in 2000,[48] but the statute leaves major corporate matters to be governed by the member state law in which the respective SE is incorporated.[49] It established a potential cross-border incorporation process, which can be accomplished through four different ways: (i) a merger of two or more companies in different member states, (ii) the formation of a holding company with two companies from different member states, (iii) the formation of a subsidiary jointly held by corporations in different member states or (iv) the conversion of an existing corporation.[50] Even though this allowed companies a cross-border incorporation, these four formation processes are much geared towards the organization of multi-national corporations. These, however, only form a minority of all the corporations in the EU. Given those limitations, the introduction of the SE only harmonized specific aspects of cross-border corporate law for certain types of corporations. Thus, it did not lead to an uninhibited choice of incorporation and was seen by many as a rigid, unattractive system.[51] This also limited the effect the introduction of the SE had on initiating a Corporate Law Competition between member states. Therefore, member states and EU lawmakers were, for a long time, successful in maintaining the "No Competition" equilibrium. However, this situation was ripe for change when several cases came before the ECJ that finally presented it with the opportunity to upset the traditional balance.

2. The Challenge by the ECJ: Centros and its Progeny

The real seat doctrine has always been in tension with one of the key provisions of the constitutional agreement of the EU. Art. 49 of the TFEU[52] grants European citizens Freedom of Establishment. The compatibility of both has been the subject of a long-standing scholarly debate with a broad variety of views. In any event, the real seat doctrine virtually prohibited corporate mobility.[53] This is because the real seat doctrine requires any company intending to reincorporate to move their headquarters to the new

---

48 Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (the "SE Regulation"), 2001 O.J. (L 294) 1.

49 SE Regulation art. 9(1)(c).

50 SE Regulation art. 2(1)–(4).

51 McCahery & Vermeulen, *supra* note 29, at 800; Bratton, McCahery & Vermeulen, *supra* note 29, at 356–59.

52 EC Treaty art. 34 (as it was designated at the time of the ECJ judgments).

53 Dammann, *supra* note 30, at 479–80; Gelter, *supra* note 16, at 247–49.

member state as well—the financial, human capital and other costs of which are usually prohibitive.[54]

Both this issue and the debate surrounding it were gradually put to rest by the European Court of Justice (ECJ), starting in 1999. In a series of rulings (*Centros,*[55] *Überseering*,[56] and *Inspire Art*[57]), the ECJ confirmed for different fact patterns that the Freedom of Establishment justifies corporate mobility in the EU and the real seat doctrine is incompatible with the Freedom of Establishment.[58] These rulings greatly increased the available options for corporations in the EU to take advantage of cross-border mobility. Once this set of decisions was on the books, they were free to incorporate and reincorporate in other member states, without also moving their headquarters along.[59] Accordingly, in the wake of these judgements, there was an expectation that the changed legal framework could give rise to a Corporate Law Competition between member states similar to the U.S.[60]

However, the changes in the legal framework were not the only ones that laid the groundwork for the emergence of a Corporate Law Competition. In the wake of *Centros* and its progeny decisions, the U.K. emerged in a pole position to attract incorporations and reincorporations from other member states.

3. A Changing Landscape: Brexit and its Impact

The earliest contender for the champion of the most attractive corporate law in the EU was the U.K.[61] The English closed corporation—the Limited—had several features that made it significantly more attractive for young and small companies in Continental Europe. In particular, it required no minimum capital,

---

54 GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 132; Dammann, *supra* note 30, at 480.

55 Case C-212/97, Centros Ltd. v. Erhvers-og Selskabsstyrelsen, 1999 E.C.R. I-1484.

56 Case C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC), 2002 E.C.R. I-9943.

57 Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10195.

58 Centros, 1999 E.C.R. I-1459; Überseering, 2002 E.C.R. I-9919; Inspire Art, 2003 E.C.R. I-10155.; Stefano Lombardo, Regulatory Competition in European Company Law, 15–19 (ECGI Law Working Paper No. 452/2019) (providing a brief discussion of the facts and reasoning in the respective decisions).

59 Gelter, *supra* note 16, at 248–49; Mucciarelli, *supra* note 2, at 431–32; Lombardo, *supra* note 58, at 16.

60 Dammann, *supra* note 30, at 543.

61 BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 441–43 (1997); Bratton, McCahery & Vermeulen, *supra* note 29, at 374; Wolf-Georg Ringe, *Corporate Mobility in the European Union – a Flash in the Pan?* 10 Eur. Co. & Fin. Rev. 230, 236–237 (2013).

and could be incorporated quickly and without the involvement of a notary public.[62] Against this backdrop, the number of U.K.-incorporated Limiteds doing business exclusively in Germany soared after the rendering of the ECJ judgements.[63] However, its attractiveness and the numbers of its use began to decline quickly when public perception of the Limited soured in Continental Europe in the wake of corporate scandals. Instances of corporate fraud gave rise to it being increasingly characterized as a cheap and dishonest vehicle, and the business community realized that the use of the Limited also entailed high accounting costs.[64] The decline of the Limited's popularity was further accelerated after some EU states that were key demand markets for the Limited as a corporate form up to this point (France, Germany, the Netherlands and Spain) enacted sweeping reforms to their private company laws as a response to the challenge by U.K. corporate law.[65]

In any case, this challenge ended when the U.K. decided to leave the EU in January 2020. Since the ECJ judgements on corporate mobility only applied to corporations incorporated in or reincorporating from other member states, all Limiteds automatically ceased to exist with the effectiveness of Brexit on January 31, 2020, and their shareholders thereby lost all the protection afforded by the limited liability of those corporations.[66] Brexit hence ended what seemed like an early Corporate Law Competition emerging after the ECJ judgements on corporate mobility.

The withdrawal from the European Corporate Law Competition might carry a faint resemblance to a similar turning point in the U.S. That analogy includes the upcoming contender at the time of such withdrawal by the UK, the Netherlands, which had previously been trying to keep up with the UK. A similar historic shift had occurred in the U.S. when Delaware took the spot as most attractive Corporate Law offering from New Jersey, following New Jersey's decision to deliberalize several key parts of its Corporate Law.[67] After Brexit, Corporate Law Competition decreased significantly, to the point where the consensus took hold that there was no Corporate Law Competition to be observed in the EU.

---

62 Cheffins, *supra* note 61, at 447; Ringe, *supra* note 61, at 236–37.

63 Ringe, *supra* note 61, at 238.

64 *Id.* at 260–62; Bratton, McCahery & Vermeulen, *supra* note 29, at 376–77.

65 Ringe, *supra* note 61, at 239–41.

66 *See, e.g.*, OLG München [Munich Court of Appeals], Aug. 5, 2021, Neue Zeitschrift für Gesellschaftsrecht [NZG] 2021, 1518 (Ger.).

67 Gelter, *supra* note 16, at 252.

C. The Limited State of Corporate Law Competition in the EU

1. Consensus: No Corporate Law Competition

The consensus among scholars up to this point has been that there is currently no Corporate Law Competition in the EU, and virtually all corporate actors choose the corporate form of their home countries.[68] Scholars generally conclude that the effects of the ECJ case law were "limited to [some] economically negligible" small businesses and that there are too many obstacles to cross-border mobility remaining.[69] Others observe that member states have not been actively competing in making their corporate laws more attractive and have rather been taking a "solely defensive" stance towards competition.[70] Also, scholars note that they see no member state trying to claim the advantages of superior corporate law administration or adjudication to make their corporate law more alluring to corporations.[71] Member states are often perceived to shape their corporate law policies to pursue other goals than shareholder wealth maximization, which is better served without a Corporate Law Competition among member states.[72] Some scholars point to the company law directives[73] as demonstrations of how member states actively attempt to frustrate a Corporate Law Competition.[74]

The only exception to this common assumption was the situation outlined above immediately after the ECJ decisions on corporate mobility, in which for a short time a Corporate Law Competition emerged.[75] However, such competition soon waned and ended abruptly after Brexit. More importantly, it was limited solely to small, closely held firms with few shareholders, which

---

68 Charny, *supra* note 35, at 449–450, 453; Stith, *supra* note 35, at 1618; GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 128–40 (1993); Luca Enriques, *EC Company Law and the Fears of a European Delaware*, 15 EUR. BUS. L. REV. 1259, 1273 (2004); Tobias H. Tröger, *Choice of Jurisdiction in European Governance Law – Perspectives of European Corporate Governance*, 6 EUR. BUS. ORG. L. REV. 3, 43 (2005); Lombardo, *supra* note 58, at 29; Bratton, McCahery & Vermeulen, *supra* note 29, at 384–85; Carney, *supra* note 35, at 327.

69 Bratton, McCahery & Vermeulen, *supra* note 29, at 385.

70 Lombardo, *supra* note 58, at 29.

71 Tröger, *supra* note 68, at 43.

72 GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 129.

73 *See* 0.

74 Carney, *supra* note 35, at 329; GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 131–33.

75 Bratton, McCahery & Vermeulen, *supra* note 29, at 380–84.

was the attractive corporate form of the Limited.[76] This fact pattern is different from the U.S., where the Corporate Law Competition also encompasses the major public corporations.[77] Corporations reincorporating to Delaware tend to be mature corporations that are already publicly held or about to go public.[78]

There are a number of different reasons advanced by scholars regarding why there is no Corporate Law Competition in the EU, which will be discussed below.

2. Limiting Factors: EU-Specific Impediments to a Competition

Several scholars have proposed different answers for the question of why there is currently no Corporate Law Competition in Europe. These limiting factors are not strict legal prohibitions of a Corporate Law Competition. However, all of them increase the transaction costs for corporations and therefore decrease the demand for more attractive corporate law products offered by member states.

First, the obvious obstacle to a Corporate Law Competition in Europe has traditionally been "the lack of common history, (legal) culture and language among the member states."[79] The EU has 24 different official languages,[80] and each member state has its distinct and century or millennia-old legal culture. This is markedly different from the U.S., where those three issues are to a large degree identical between states. This issue was less a problem in the Corporate Law Competition with the U.K. due to English being generally more accessible, which is taught as foreign language in the schools of most member states. However, that competitive advantage has largely been lost since Brexit, since no EU member state other than Ireland and Malta uses English as its official language. The related issue of the existence of geographic barriers has also been raised.[81] Even though the EU is a highly integrated union with a long history of harmonization

---

76 The Limited is also called a "closely held" corporation. Lombardo, *supra* note 58, at 29; Marco Ventoruzzo, *"Cost-Based" And "Rules-Based" Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U.*, 3 N.Y.U. J.L. & BUS. 91, 100.

77 Daines, *supra* note 12, at 527 (2001); GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 33; Mucciarelli, *supra* note 2, at 427.

78 Ventoruzzo, *supra* note 76, at 100.

79 Bratton, McCahery & Vermeulen, *supra* note 29, at 350; *see also* Gelter, *supra* note 16, at 261–62; Charny, *supra* note 35, at 456; Enriques, *supra* note 68, at 1264.

80 EUR. UNION, *Languages*, https://perma.cc/3FAH-GEY5.

81 Kahan, *supra* note 5, at 126.

and supranational institutions, it still consists of 27 different national states with borders and individual national policies.

Second, ownership structures in the EU differ significantly from those in the U.S. Corporations in the U.S. tend to have a higher free float and dispersed ownership, while most corporations in the EU have a highly concentrated ownership.[82] The share of corporations in which the largest shareholder holds more than 50% of the equity as share of the total number of listed corporations in Germany, France and Italy amounts to approximately 39%, 38%, and 50%, respectively, versus only approximately 4% in the U.S.[83] While the board is in a very strong position if it has widely held stock, the board is less powerful if a corporation has majority shareholders that can impose their will on the board by virtue of their stock ownership share. Hence, reincorporations solely fueled by the board's interest and opportunistic actions are less likely in Europe.[84]

A third limiting factor might be the frequent absence of the decision makers' familiarity with the legal frameworks of other member states. The regular legal counsel of such decision makers will often be unable to provide guidance on the attractiveness of the corporate laws of other member states as well as general corporate law advice on such corporate laws.[85] That differs significantly from the U.S., where corporate law training for law students across the country is usually focused on Delaware corporate law, equipping all corporate lawyers in the U.S. with a basic understanding of the corporate law in Delaware.[86]

Local lawyers in member states will also have decisive influence on the incorporation or re-incorporation decision of the respective decision makers.[87] That is because they might be the trusted adviser of the decision makers or, in the case of a

---

82 *Cf.* ORG. FOR ECON. CO-OPERATION & DEVELOPMENT, OECD CORPORATE GOVERNANCE FACTBOOK 2023, at 19, https://www.oecd.org/en/publications/oecd-corporate-governance-factbook-2023_6d912314-en.html (2023); Gelter, *supra* note 16, at 270–71; Marco Becht & Alisa Röell, *Blockholding in Europe: An International Comparison*, 43 EUR. ECON. REV. 1049, 1052–53 (1999).

83 *Cf.* OECD CORPORATE GOVERNANCE FACTBOOK *supra* note 82, at 19.

84 Tröger, *supra* note 68, at 19.

85 Ventoruzzo, *supra* note 76, at 116.

86 The importance of corporate lawyers for the incorporation choice has been demonstrated in the takeover context by John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301, 1309–26 (2001), and more generally by Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1007–14 (1994).

87 Enriques, *supra* note 68, at 1264; compare *Law as a Product, supra* note 1, at 274, for the evidence of the legal counsel interests in the U.S.

reincorporation, the ones advising the decision makers on their fiduciary duties related to the reincorporation decision and the steps required in the corporation's former home member state to execute such the reincorporation. However, the local lawyer will generally have a significant interest in advising against the incorporation or reincorporation in a different member state, because he will inevitably lose a major share of corporate legal work for such a client to local lawyers in the member state the client is contemplating moving to.[88]

Additionally, the federal law in the U.S. applies identically to all states. It encompasses not only securities and bankruptcy laws, but also stipulates significant regulation for public corporations (e.g., proxy rules[89] and mandatory disclosures[90]). This means that a reincorporation affects mainly the internal organization of a corporation. The key relationships with its public shareholders, its creditors and its other stakeholders, however, are less affected by it.[91] In Europe, on the other hand, a reincorporation entails not only a change of the corporate law of a corporation, but also of bankruptcy law and partially of securities regulation[92] as well.[93]

Further, corporations in the EU tend to rely on private capital raising to a much larger extent than their U.S. counterparts, which predominantly raise their capital on public markets.[94] This means that there is less incentive for a European corporation to reincorporate solely in pursuit of a higher stock price, because the economic benefits of raising capital on more favorable terms on the public markets after a reincorporation are less significant than in the U.S.

Other potential limiting factors include a negative market perception of non-domestic legal forms in certain member states,[95] the EU law prohibiting member states from collecting franchise taxes from corporations,[96] an adverse treatment of non-domestic

---

88 *Cf.* Dammann, *supra* note 30, at 506.

89 17 C.F.R. § 240.14a (2023).

90 Securities and Exchange Act of 1934, 15 U.S.C., §§ 78a-78rr.

91 Mucciarelli, *supra* note 2, at 425.

92 Large parts of EU Securities Regulation are fully harmonized, in particular disclosure and trading rules, but, importantly, not liability provisions. *See* 0.

93 Mucciarelli, *supra* note 2, at 466.

94 Fiorella De Fiore & Harald Uhlig, *Bank Finance versus Bond Finance*, 43 J. MONEY, CREDIT & BANKING, 1399, 1415 (2011); GENIUS. OF AMERICAN CORPORATE LAW *supra* note 8, at 136.

95 Ringe, *supra* note 61, at 260.

96 GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 133–34; Gelter, *supra* note 16, at 259–60.

legal forms by courts, public authorities, and lawmakers,[97] little shareholder rights to discipline directors for decisions that are not value-enhancing,[98] a general low risk of transaction-related litigation,[99] a home bias by investors[100] and interest groups (in particular labor unions) pressuring lawmakers to preserve the *status quo*,[101] as well as additional administrative costs such as accounting rules, additional legal advice, and translation costs.[102] Political divergences and cultural path dependencies of the legal systems of certain member states also play a role.

3. Advantages of a Still Nascent Corporate Law Competition

Despite the various factors that limit a Corporate Law Competition, there are also advantages for EU member states. In particular, they benefit from not yet being in a stage of the competition where a single member state dominates—like Delaware does in the U.S.

Comparing the corporate law of different EU member states to the corporate law of U.S. states, the EU member states' corporate laws are less uniform.[103] For instance, Germany has a mandatory two-tier board system including a supervisory board which appoints a management board (*Vorstand* and *Aufsichtsrat*) as well as mandatory labor representation on the supervisory board (*Mitbestimmung*).[104] In contrast, Italy traditionally maintained a governance system which encompasses a board of directors (*consiglio di amministrazione*) as well as a board of auditors (*consiglio sindacale*), both appointed a the shareholders' meeting and without mandatory labor representation.[105] Following the corporate law reform in 2003, corporations may now also choose a one-tier

---

97 Ringe, *supra* note 61, at 257–60.

98 GENIUS OF AMERICAN CORPORATE LAW, *supra* note 8, at 135–36.

99 Enriques, *supra* note 68, at 1262 (2004).

100 Joshua D. Coval & Tobias J. Moskowitz, *Home Bias at Home: Local Equity Preference in Domestic Portfolios*, 54 J. FIN., 2045 (1999); Mark Grinblatt & Matti Keloharju, *How Distance, Language, and Culture Influence Stockholdings and Trades*, 56 J. FIN., 1053 (2001).

101 Carney, *supra* note 35, at 318–27.

102 Ringe, *supra* note 61, at 257–62.

103 See Klausner, *supra* note 11, at 842–47 for a discussion of the uniformity of state corporate laws.

104 David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 148 (1998); Jean Du Plessis, *The German Two-Tier Board and the German Corporate Governance Code*, 15 EUR. BUS. L REV. 1139 (2004).

105 Federico Ghezzi & Corrado Malberti, *The Two-Tier Model and the One-Tier Model of Corporate Governance in the Italian Reform of Corporate Law*, 5 EUR. CO. & FIN. L. REV. 1, 11–12 (2008).

model, although many retain the aforesaid traditional model.[106] This starting point of a more diverse legal landscape in the EU might make even higher value-unlocking possible in a Corporate Law Competition,[107] because corporations have a broader offering of Corporate Law products to choose from.

Further, the absence of a head start of a member state through positive network effects might lead to better (re-)incorporation decisions based more strongly on the respective corporate laws' merits.[108] In contrast, if a first-mover had already established the leading Corporate Law judiciary and administration, this might lead corporations to choose such member state's corporate law without regard to its quality.

That also means that there is still a better opportunity for member states to decide how they want to participate and shape a nascent Corporate Law Competition in Europe, *i.e.*, whether they choose to compete by focusing on improving the quality of corporate law codes or rather their case law, legal services, and expert judiciary (or spread resources by trying to improve both at the same time).

II. TWO CASE STUDIES IN EUROPEAN CORPORATE LAW COMPETITION

Two recent case studies challenge the academic consensus on the absence of any Corporate Law Competition: Southern European holdings companies in the Netherlands and Luxembourg SPACs in Germany. The former provides a case for a Corporate Law Competition regarding incorporations, the latter a case for competition with regard to reincorporations. Part II takes a close look at these two case studies and examines them by asking a set of three questions: What is the respective phenomenon and what corporations are involved? What was the respective legal and factual background and how was the EU competition framework used to enable those reorganizations and incorporations? What were the motives of the corporate actors involved that made the decisions and what impact did these reorganizations and incorporations have on the corporations?

---

106 Paolo Montalenti, *The New Italian Corporate Law: An Outline*, 1 EUR. CO. AND FIN. L. REV. 368, 370 (2004).

107 Tröger, *supra* note 68, at 17.

108 Tröger, *supra* note 68, at 15–16.

A. The Appeal of Dutch Holding Companies for Italian Corporations

1. Italian Corporations Moving North

Italian corporations include some of the most iconic consumer brands in the world, many of which are publicly listed. In recent years, several of these corporations decided to reincorporate in the Netherlands. Some of the best known examples include the industrial holding company Exor (reincorporation in 2016, listing transfer in 2022),[109] luxury sports car manufacturer Ferrari (reincorporation in 2015),[110] liqueur-maker Campari (reincorporation in 2020),[111] the broadcaster Mediaset (reincorporation in 2021),[112] as well as brake manufacturer Brembo (2024).[113] Even though these moves to Amsterdam have become very dominant among Italian corporations, they are not the only ones. Already in 2015, French telecoms group Altice had moved its headquarters to the Netherlands.[114] In June 2023, Spanish construction group Ferrovial also made the move, reincorporated its holding to Amsterdam and also listed there.[115]

As of 2023, fifteen corporations with a market capitalization of more than one billion Euros have left Italy for the Netherlands.[116] Those corporations were some of the most valuable corporations listed on the Borsa Italiana in Milan, equaling 22% of its entire market capitalization and 27% of the FTSE MIB, the benchmark index comprising the 40 top traded stocks on the

---

109 EXOR N.V., Prospectus for the admission to listing and trading of Ordinary Shares in EXOR N.V. on Euronext Amsterdam, a regulated market organized and managed by Euronext Amsterdam N.V., 178.

110 Ferrari N.V., Prospectus for the admission to listing and trading on the Mercato Telematico Azionario organized and managed by Borsa Italiana S.p.A. of common shares, 96.

111 Davide Campari-Milano N.V., Prospectus for the admission to trading of on the regulated market of the Luxembourg Stock Exchange, 45.

112 MFE-Mediaforeurope N.V., Prospectus for the admission to listing and trading of Ordinary Shares A in MFE-Mediaforeurope N.V. on Euronext Milan, a regulated market organized and managed by Borsa Italiana S.p.A., 28.

113 Press Release, Brembo S.p.A., Effectiveness of Brembo's Cross-Border Conversion and allotment of special voting shares (Apr. 24, 2024), https://perma.cc/H4JR-CWHB.

114 Altice N.V., Deed of cross-border merger, August 10, 2015.

115 Ferrovial International SE, Prospectus for the Admission to listing and trading of all shares in the share capital of Ferrovial International SE (to be renamed 'Ferrovial SE') on Euronext Amsterdam and the Spanish Stock Exchanges, 45.

116 Massimo Belcredi et al., *Così non fan tutte. An Analysis of Italian Companies Moving Abroad* 14 (Università Cattolica del Sacro Cuore – Centro di ricerche finanziarie sulla corporate governance, Working Paper, 2023).

exchange.[117] Only approximately 82 corporations on the Milan stock exchange still have a market capitalization of more than one billion Euros.[118]

For these moves, the reincorporating corporations used and often specifically invoked their freedom to reincorporate abroad as an expression of their fundamental right of establishment. Some of them even cited ECJ decisions on cross-border conversions in board reports contained in their proxy statements.[119]

The reincorporation of these corporations often closely follows an established two- or three-step playbook. The key step is the reincorporation, which is a transfer of the corporate headquarters through a cross-border conversion of the group holding company[120] or a cross-border merger with a company already incorporated in the Netherlands.[121] Most of the corporations then also pursue a dual listing in Amsterdam.[122] In a number of cases, this was followed by a delisting of the corporation's shares from the Borsa Italiana.[123]

2. Dutch Loyalty Share Schemes

The background of this broad movement of corporations from Southern Europe to the Netherlands may be manifold, but

---

[117] *See* Francesco Bertolino, *Brembo, Campari, Mediaset: Perché le Aziende Italiane Vanno in Olanda. E Cosa si può Fare per Trattenerle*, 11, CORRIERE DELLA SERA, Aug. 15, 2023, https://perma.cc/7ZAK-3ZRP (putting the market capitalization of the corporations which reincorporated in the Netherlands at 22% of the entire market capitalization of the Milano Stock Exchange).

[118] COMPANIESMARKETCAP, *Largest Italian companies by market capitalization*, https://perma.cc/DV59-FGBZ.

[119] *See, e.g.*, Mediaset S.p.A., Board of Directors' explanatory report on the sole item on the agenda of the Extraordinary Shareholders' Meeting of Mediaset S.p.A. of 23 June 2021, drafted pursuant to Article 125-ter of Italian Legislative Decree no. 58 of 24 February 1998 and Article 72 of the regulation adopted by Consob under resolution no. 11971/99, as amended, 3.

[120] *See, e.g.*, the description of the transfer in Mediaset S.p.A., Board of Directors' explanatory report on the sole item on the agenda of the Extraordinary Shareholders' Meeting of Mediaset S.p.A. of 23 June 2021, May 20, 2021.

[121] Elena Ratti, *Il superamento del principio "un'azione-un voto": azioni a voto plurimo e azioni a voto maggiorato* [The overcoming of the "one share-one vote" principle: multiple-voting shares and loyalty shares], 2017 IL NUOVO DIRITTO DELLE SOCIETÀ 573, 583–88 (It.); *See, e.g.*, Ferrovial International SE, Prospectus for the Admission to listing and trading of all shares in the share capital of Ferrovial International SE (to be renamed 'Ferrovial SE') on Euronext Amsterdam and the Spanish Stock Exchanges, 45, 156.

[122] *See, e.g.*, Exor N.V., Prospectus for the admission to listing and trading of Ordinary Shares in EXOR N.V. on Euronext Amsterdam, a regulated market organized and managed by Euronext Amsterdam N.V.

[123] *See, e.g.*, Press Release, Exor N.V., Delisting of Exor's Ordinary Shares from Euronext Milan with Effect from 27 September 2022, (Aug. 12, 2022), https://perma.cc/RMB3-R85R.

corporate law is a critical differentiator between the respective jurisdictions. Some corporations even stressed that the move is solely aimed at switching to a jurisdiction where the legal system would better support their aims.[124]

For instance, in the Netherlands, a supermajority voting structure can be introduced either through conventional multi-class share structures or through a Dutch loyalty share scheme (DLS). Even though a couple of corporations chose the multi-class share structure, the lion's share of those moving in the recent past has opted for a DLS. Both measures strongly increase the voting power of certain shareholders. While multi-class share structures can be opted for in the charter of a corporation similar to the rules in Delaware (§ 151 DGCL), there are no statutory rules on DLS in the Netherlands.[125] The Supreme Court of the Netherlands, however, explicitly approved a related structure of a loyalty scheme by way of distribution of special dividend rights.[126] On that basis, the general consensus among practitioners and scholars emerged that loyalty shares are permissible under Dutch law, provided that the DLS structure is designed in a way that does not violate the principle of equality (§ 2:29 (2) of the Dutch Civil Code).[127] Given the European law origins of this principle to treat shareholders equally,[128] a classic German law-style

---

[124] *See, e.g.*, Mediaset S.p.A., Board of Directors' explanatory report on the sole item on the agenda of the Extraordinary Shareholders' Meeting of Mediaset S.p.A. of 23 June 2021, May 20, 2021, 1, 3, ("[T]he choice of the Netherlands is aimed at placing the Company's registered office in a jurisdiction that for various reasons is ideal for this purpose": "expand[ing] the competitive position of its business . . . , also through appropriate growth transactions by external lines.").

[125] F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. CO. L.J. 40, 41 (2023).

[126] Hoge Raad [Supreme Court of the Netherlands], 14 Dec. 2007, RN 2008, 11 (Dutch).

[127] S. Cools & T. A. Keijzer, *Over meervoudig stemrecht, loyaliteitsstemrecht, levenscycli en horizonbepalingen. Rechtseconomische en rechtsvergelijkende beschouwingen?* [About multiple voting rights, loyalty voting rights, life cycles and sunset provisions. Legal economics and comparative legal considerations], 70 ONDERNEMINGSRECHT 371, 372 (2019) (Dutch); A. A. Bootsma, *Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders* [Loyalty dividend, special voting shares and the position of minority shareholders], 7 MAANDBLAD VOOR ONDERNEMINGSRECHT 151, 155 (2016) (Dutch); K. J. Bakker, *Loyaliteitsregelingen. Lessen uit Frankrijk en Delaware* [Loyalty schemes. Lessons from France and Delaware], 4 (1&2) MAANDBLAD VOOR ONDERNEMINGSRECHT 26, 33 (2019) (Dutch).

[128] Dutch Civil Code § 2:29 (2) was originally implemented under the Second European Company Law Directive. The successor provision is now Article 85 of Directive (EU) 2017/1132. *See* J. S. Kalisvaart, *Meervoudig stemrecht* [Multiple Voting Rights], 27(2) ONDERNEMING EN FINANCIERING 22, 29 (2019) (Dutch).

proportionality test is used to analyze whether that principle is violated.[129] Rewarding long-term shareholders of a corporation for their continued investment in the corporation and promoting a long-term oriented shareholder base is generally seen as meeting the proportionality test.[130] A DLS was first adopted in 2013 by an Italian corporation, CNH Industrial.[131] The test is applied quite permissively, putting a limit to the structure only in circumstances where not all shareholders would technically be able to "meet applicable criteria" to obtain loyalty shares under the employed DLS structure.[132] However, in 2020, the first loyalty shares transaction was blocked by the Amsterdam Court of Appeal in its *Mediaset* decision, which concluded that the specific DLS structure proposed was not proportional to promote long-term shareholder stability, but rather specifically tailored to procure the control of the post-transaction entity for its largest shareholder.[133] The *Mediaset* court did not pin down a specific structural element that made the DLS structure employed by Mediaset unproportional, but its reasoning was widely construed as finding the specific tailoring of the structure to suit the interests of the largest shareholder too aggressive.[134] However, the court also explicitly confirmed that DLS structures in general are admissible under Dutch law.[135]

A DLS is implemented by including its specific conditions in the Certificate of Incorporation of a Dutch corporation.[136] Such a DLS generally provides for the registration of each shareholder

---

[129] F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. CO. L.J. 40, 42 (2023).

[130] J. S. Kalisvaart, *Meervoudig stemrecht* [Multiple Voting Rights], 27(2) ONDERNEMING EN FINANCIERING 22, 42 (2019) (Dutch); F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. CO. L.J. 40, 42 and 47 (2023).

[131] Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?* 28 (Harv. John M. Olin Center for L., Econ., & Bus., Discussion Paper No. 1066).

[132] F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. CO. L.J. 40, 42 (2023); Loyens & Loeff, Recent developments in Dutch loyalty share schemes, 2.

[133] Gerechtshof Amsterdam [Amsterdam Court of Appeals] Sept. 1, 2020, RN 2020/100 (Dutch).

[134] F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. CO. L.J. 40, 46 (2023); Roe & Venezze, *supra* note 131, at 29 (Harv. John M. Olin Center for L., Econ., & Bus., Discussion Paper No. 1066).

[135] Gerechtshof Amsterdam [Amsterdam Court of Appeals] Sept. 1, 2020, RN 2020/100 (Dutch).

[136] J. S. Kalisvaart, *Meervoudig stemrecht* [Multiple Voting Rights], 27(2) ONDERNEMING EN FINANCIERING 22, 24 (2019) (Dutch); K. J. Bakker, Annotation to Gerechtshof Amsterdam, RN 2020/100 (Dutch).

in a special register (*loyaliteitsregister*).[137] On that basis, additional voting rights (but only nominal profit rights) are granted to shareholders for each registered share held by them and not sold in excess of a stipulated time.[138] The quantum of additional voting rights to be obtained can be quite substantive and the DLS structures appear to get more aggressively recently. For instance, Exor's DLS structure allowed shareholders to increase their voting rights tenfold after ten years (reincorporation in 2016),[139] while Campari (reincorporation in 2020) instituted its DLS structure with the tenfold increase after just five years.[140]

Given this broad movement of corporations from Italy to the Netherlands making use of a DLS, this Article suggests that two main motives of the decision makers to reincorporate in the Netherlands can be carved out.

3. Motives of the Decision Makers

a) Stability and Inorganic Growth

The Italian corporations generally put forward two main aims when announcing their reincorporation decision: shareholder and company stability as well as inorganic growth opportunities.[141]

Shareholder stability means that a DLS benefits long-term shareholders by rewarding them and incentivizing other shareholders to become long-term shareholders as well by not selling their shares for a prolonged period.[142] Corporations claim this

---

137 J. S. Kalisvaart, *Meervoudig stemrecht* [Multiple Voting Rights], 27(2) ONDERNEMING EN FINANCIERING 22, 27 (2019) (Dutch).

138 *See, e.g.*, Exor N.V., Prospectus for the admission to listing and trading of Ordinary Shares in EXOR N.V. on Euronext Amsterdam, a regulated market organized and managed by Euronext Amsterdam N.V., 34.

139 Exor N.V., Special Voting Shares – Terms and Conditions, Sec. 6.1.

140 Davide Campari-Milano N.V., Special Voting Shares – Terms and Conditions, Sec. 7.1.

141 *See, e.g.*, Brembo S.p.A., Press Release on December 4, 2023; Davide Campari-Milano S.p.A., Press Release on February 18, 2020; Exor N.V., Prospectus for the admission to listing and trading of Ordinary Shares in EXOR N.V. on Euronext Amsterdam, a regulated market organized and managed by Euronext Amsterdam N.V., 34; Ferrari N.V., Special Voting Shares – Terms and Conditions, 5; MFE – MEDIAFOREUROPE N.V., Terms and Conditions for Special Voting Shares, 1.

142 *Cf.* Umberto Tombari, *"Maggiorazione del Dividendo" e "Maggiorazione del Voto": Verso Uno "Statuto Normativo" per L'investitore di Medio-Lungo Termine?* ["Dividend Increase" and "Vote Increase": Towards a "Regulatory Statute" for the Medium-Long Term Investor?], 2016 BANCA BORSA TITOLI DI CREDITO 303, 313 (It.); K. J. Bakker, *Loyaliteitsregelingen. Lessen uit Frankrijk en Delaware* [Loyalty schemes. Lessons from France and Delaware], 4 (1&2) MAANDBLAD VOOR ONDERNEMINGSRECHT 26, 30 (2019) (Dutch).

enables them to focus on their long-term vision for the future, because they wouldn't have to fear pressure for certain short-term results by outside investors. Since more and more voting power is owned by the controlling group, management does not have to worry about an activist buying in and leading a disruptive campaign to sway minority shareholders to win a proxy contest to replace directors.

The inorganic growth opportunities claimed pertain to the fact that the more voting power relative to economic rights a controlling group owns in a corporation, the more equity financing the corporation can undertake by divesting equity without diluting its controlling voting position and thereby triggering opposition by the control group against an undertaking proposed by management. Equity financing is particularly important for transactions involving transformational deals or other strategic partnerships, for which sole debt financing might not be economically feasible. In that case, these can either be financed by selling equity or swapping equity for stock in a target company via a share exchange transaction. DLS structures give corporations significantly enhanced flexibility to execute such deals.

b) The Tax Factor?

A favorable corporate tax treatment of corporations in a particular jurisdiction is often seen as strong appeal for corporations moving to jurisdictions other than their home country by scholars, politicians, and the general public alike.[143] This makes sense, since taxes are generally a cost to every corporation and all money saved through tax optimization translates into an additional profit.

However, a major share of those companies moving forward with a reincorporation to the Netherlands did not move their fiscal office along with their corporate headquarters. Instead, they stressed that despite the move, their tax residence, management, and operational activities will stay in their home country.[144] In

---

[143] Chow, T., Huang, S., Klassen, K. J. & Ng, J., *The Influence of Corporate Income Taxes on Investment Location: Evidence from Corporate Headquarters Relocations*, 68 MGMT. SCI. 1404, 1419 (2022); Braden M. Williams, *Multinational Tax Incentives and Offshored U.S. Jobs*, 93 ACCT. REV., 293, 318 (2018); Timothy J. Bartik, *Business Location Decisions in the United States: Estimates of the Effects of Unionization, Taxes, and Other Characteristics of States*, 3 J. BUS. & ECON. STAT. 14, 19–20 (1985).

[144] *See, e.g.*, Ferrari N.V., Prospectus for the admission to listing and trading on the Mercato Telematico Azionario organized and managed by Borsa Italiana S.p.A. of common shares, 96; Davide Campari-Milano N.V., Prospectus for the admission to trading of on

support of these claims, a study of the tax saving motives found no significant variation in the effective tax rate around the year of reincorporation of a corporation.[145] This speaks strongly against the favorable tax treatment in the Netherlands as a dominant motivation for the reincorporations of Italian corporations.

c) Increased Control Benefits

A different approach is to look for the intentions of the controlling group instead of those of the corporation. According to the stated motives of corporations, a DLS would make most sense for corporations with widely dispersed shareholders since these tend to be most susceptible to short-termism by (activist) shareholders. However, a significant majority of the corporations reincorporating with DLS are controlled by majority shareholders, in particular families.[146] This suggests the reincorporation decisions in the fact patterns of the case studies herein are more dependent on the effects a DLS entails for the controlling group instead of the effects for the corporation. Majority shareholders obtain significant benefits from the reincorporation including a DLS, namely, more voting power and therefore more control.[147] Control that is disproportionate to the economic investment of the control group will enable it to extract private benefits of control.[148] These benefits bring many risks for the corporation and its minority shareholders, in particular tunneling, engagement in self-dealing or non-arms-length related party transactions, abnormal low risk-aversion, and a decreased disciplinary effect of the capital markets.[149]

---

the regulated market of the Luxembourg Stock Exchange, 45; Brembo S.p.A., Press Release on December 4, 2023.

145 Belcredi et al., *supra* note 116, at 18.

146 Roe & Venezze, *supra* note 131, at 29; F. C. M. in de Braekt, *Limitations to the Development of Loyalty Shares in the Netherlands?*, 20 EUR. COMP. L. J. 40, 47 (2023).

147 Vincenzo Cariello, *Azioni a voto potenziato, "voti plurimi senza azioni" e tutela dei soci estranei al controllo* [Enhanced voting shares, "multiple votes without shares" and protection of shareholders outside the control], 2015 RIVISTA DELLE SOCIETA 164, 165 and 169 (It.); K. J. Bakker, *Loyaliteitsregelingen. Lessen uit Frankrijk en Delaware* [Loyalty schemes. Lessons from France and Delaware], 4 (1&2) MAANDBLAD VOOR ONDERNEMINGSRECHT 26, 31–2 (2019) (Dutch).

148 Cools & Keijzer, *supra* note 127, at 374; Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 541 (2004).

149 Dyck & Zingales, *supra* note 148, at 541; Johnson, Simon, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Tunneling* 90 AM. ECON. REV., 22, 22–27 (2000); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 2006, 1641, 1661–73; Cools & Keijzer, *supra* note 127, at 374; K. J. Bakker, *Loyaliteitsregelingen. Lessen uit Frankrijk en Delaware* [Loyalty schemes. Lessons from France and Delaware], 4 (1&2) MAANDBLAD VOOR ONDERNEMINGSRECHT 26, 32–4 (2019) (Dutch).

This suggests that control benefits truly drive reincorporation decisions in these reincorporation fact patterns.

In Delaware, the *de facto* decider in a reincorporation decision is the board.[150] The reason is that most Delaware corporations have a highly dispersed shareholder structure, which face collective action and information problems when trying to pursue their interest against the board.[151] In Europe, the typical fact pattern is markedly different: usually, most but the largest corporations have majority shareholders or a group of shareholders acting in concert.[152] This is demonstrated by the fact that the share of corporations where the largest shareholder holds more than 50% of the equity as share of the total number of listed corporations in Germany, France and Italy is approximately 39%, 38%, and 50%, respectively, versus approximately 4% in the U.S.[153] The Italian Companies and Exchange Commission even puts the average stake held by the largest shareholder in corporations listed in Milan at 49.1%.[154] These majority shareholders are *de facto* controlling the corporation by virtue of holding the lion's share of the votes represented at a shareholders' meeting and their powers to potentially replace board members should disagreements with their representation arise.[155] Hence, the majority shareholders will often be able to push through a reincorporation decision in their interest.[156] This is possible even if it might be to the detriment of the board or the minority shareholders. Absent a controller, the board would be generally opposed to such a reincorporation, because the voting power shift to one shareholder group will undercut the board's power, which will have to sustain the support of the control group to stay in office. Therefore, reincorporation benefits to the controlling shareholder might matter significantly more in the EU than they do in the U.S. Supporting this argument, a recent study found a striking correlation between reincorporations to the Netherlands and shareholder structures:

---

150 Bebchuk, *supra* note 7, at 1460.

151 *Id.*

152 *See, e.g.*, Becht & Röell, *supra* note 82, at 1052–53; Gelter, *supra* note 16, at 270–71; Belcredi, M. & Enriques, L., *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: the Case of Italy*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER, 383, 387 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

153 OECD CORPORATE GOVERNANCE FACTBOOK, *supra* note 82, at 19.

154 Commissione Nazionale per le Società e la Borsa, *2023 Report on corporate governance of Italian listed companies*, 14, Report 2023 on corporate governance of Italian listed companies, available at https://perma.cc/J9YF-8S48.

155 Gelter, *supra* note 16, at 272.

156 Gelter, *supra* note 16, at 252.

the vast majority (approximately 90%) of Italian and other European firms reincorporating to the Netherlands had a controlling shareholder.[157] Further, the study showed that Italian firms that moved to the Netherlands made a far more aggressive use of the DLS possibilities under Dutch law than Dutch firms,[158] further backing the explanation of the control benefits to shareholders as the main relocation motive.

B. The Case of the Missing German SPACs

1. Luxembourg SPACs in Germany

In 2021, the surging wave of SPAC-IPOs in the U.S.[159] also showed effects in Germany. By the end of the year, the first four SPACs had been listed in Germany, with two additional ones following in the first half of 2022.[160] A number of SPACs were also listed in other European countries (e.g., France and Sweden). The German SPACs however had one surprising peculiarity: none of them was a German corporation. Most German businesses would usually choose the German corporation prior to a listing, the *AG* or *Aktiengesellschaft*. However, all of the German SPACs listed on the Frankfurt Stock Exchange,[161] were incorporated as entities under Luxembourg law in the form of European Companies (SEs)[162] and with a registered office in Luxembourg.[163]

2. The Inflexibility of German Corporate Law

The reason why all German SPACs decided to incorporate in Luxembourg instead of incorporating in Germany is due to German law. One central tenet of German corporation law is that there is a large number of statutory rules that neither the founders nor the shareholders of a corporation are allowed to change,

---

157 Belcredi et al., *supra* note 116, at 7.

158 *Id.* at 30.

159 In 2021 alone, 613 SPACs listed in the U.S. *See* White & Case, *US SPACs Data Hub*, US SPACs IPO Data, https://www.whitecase.com/publications/insight/us-spacs-data-hub (last visited Mar. 28, 2025).

160 White & Case, *European SPAC & de-SPAC data & statistics roundup*, European SPAC IPO data, https://www.lexology.com/library/detail.aspx?g=b2facf1c-c0e8-4cbd-b07f-f00497778005 [hereinafter *White & Case SPAC Roundup*] (last visited Mar. 28, 2025).

161 Börse Frankfurt, *SPACs*, https://perma.cc/64TY-TJQV.

162 Even though a SE is a European corporate form, the major corporate rules, in particular on internal affairs, are governed by the member state law in which the respective SE is incorporated *See supra* 0.

163 *See, e.g.*, 468 SPAC I SE, Prospectus for the admission to trading of 30,000,000 Class A Shares.

not even by amending the certificate of incorporation.[164] However, the way the process of setting up, listing, and structuring a SPAC in the U.S. generally works has become an international market standard expected by investors (the majority are of which are also from the U.S.).[165] Since the SPAC process is already complex, SPACs try to follow the established and well-known process as closely as possible to avoid losing investor interest through an increased degree of complexity or a perceived lack of transparency. Some elements of this process are not possible to replicate under German law though, since they would depart from the mandatory German corporate law statutory rules.[166]

First of all, the burdensome German capital raising rules prohibit the transfer of the capital contributions by the investors (and new shareholders) of the SPAC to an escrow account which can only be accessed by the SPAC in case of a business combination. Instead, those rules mandate that the capital contributions must be available to the management board without any restrictions.[167] Second, creditor protection rules prohibit the implementation of redemption rights, which are central to investor protection in the SPAC structure. Rather, those rules stipulate that capital cannot be returned to shareholders except in a cumbersome and time-consuming process likely not acceptable to any investors, including an amendment of the certificate of incorporation, the posting of collateral, and a six-month waiting period.[168]

In the same vein, the liquidation of a SPAC with the return of all the invested capital to investors is further complicated by German corporate law. Statutory provisions regarding the

---

164 Sec. 23 para. 5 of the German corporation law (*Aktiengesetz – AktG*).

165 For an introduction to the SPAC structure and process, see Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REGUL. 228, 236–41 (2022).

166 Ben Fuhrmann, *SPAC-Prospekte in Deutschland und den Niederlanden und das Public Statement der ESMA* [SPAC Prospectuses in Germany and the Netherlands and the ESMA Public Statement], 2021 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 390, 391 (Ger.).

167 Sec. 188 para. 2 in connection with Sec. 36 para. 2, Sec. 37 para. 1 AktG; Rafael Harnos, *Börsenmantelaktiengesellschaft* [Listed Shell Corporations], 2024 AKTIENGESELLSCHAFT [AG] A53, S54–5 (Ger.); Kay-Michael Schanz, *SPACs—Neue Finanzierungsform und deutsches Recht* [SPACs a new way of financing and German law], 2011 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1407, 1411 (Ger.).

168 Sec. 57 para. 1 AktG, Sec. 71 para. 1 AktG in connection with Sec. 225 para 1. and 2, 237 para. 2 AktG; Kay-Michael Schanz, *SPACs Neue Finanzierungsform und deutsches Recht* [SPACs—a new way of financing and German law], 2011 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1407, 1412 (Ger.); Clemens Just, *Special Purpose Acquisition Companies (SPACs)—Börsengang durch die Hintertür?* [Special Purpose Acquisition Companies (SPACs)—going public through the back door?], 2009 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1698, 1702–3 (Ger.).

liquidation of a corporation mandate a waiting period of one year to distribute the proceeds after the decision to liquidate has been made.[169] Having to wait another year for their capital to be returned after the SPAC being unsuccessful in negotiating a business combination with a target company in the customary 24 months will generally not do justice to the interest of the potential SPAC investors, which means their capital would be tied up for a total of 36 months. Finally, German corporate law requires a minimum capital contribution per issued share of €1.00.[170] Given that the sponsor's shares are usually given to the sponsor for much less, this rule increases the acquisition consideration for the sponsor's shares, thus making the setup of the SPAC more expensive for the sponsor.

In contrast, Luxembourg law does not stipulate any rules that would significantly impede the SPAC process or at least only rules that can be modified in the SPAC's certificate of incorporation. For instance, Luxembourg corporation law provides only few requirements to implement redemption rights of shareholders, such as the shares being fully paid up and the redemptions being authorized in the certificate of incorporation.[171]

The motives for an incorporation decision are more difficult to understand than for a reincorporation decision since there are no proxy statements or press releases for a corporation yet to be established. However, this Article suggests that there are two main motives of the decision makers to choose Luxembourg corporate law over German corporate law for the incorporation of a SPAC.

3. Motives of the Decision Makers

a) Corporate Law Flexibility

The central factor for SPACs choosing Luxembourg law is the flexibility awarded to them by Luxembourg corporate law in structuring a SPAC. As a key differentiator, there is simply no possibility to incorporate a SPAC with the features expected by the international market convention under German law. That makes the mere technical feasibility a major motive by default. Further, what would matter most to the sponsor and the board of the SPAC is the degree of complexity involved in consummating

169 Sec. 272 para. 1 AktG.

170 Sec. 8 para. 3 AktG.

171 Art. 430–22 of the Luxembourg Law of August 10, 1915 on Commercial Companies (Consolidated Version).

the business combination and the PIPE financing.[172] Both are crucial transaction steps in the de-SPAC process and facilitated greatly in Luxembourg *vis-à-vis* other European jurisdictions. First, the business combination in Luxembourg can be structured as a contribution in kind employing capital authorizations included in the certificate of incorporation of the SPAC at its inception.[173] In such case, the shareholders of the target company contribute their shares into the SPAC in exchange for new shares in the SPAC.[174] This has the advantage of saving the target shareholder vote required for a merger or for authorizing such a capital authorization later, as well as several other time benefits. The target shareholders or at least a majority of the shareholders sufficient to allow for a squeeze-out will need to be in favor of the de-SPAC process in any event given that they will have to contribute their shares. However, not having to go through a formal shareholder vote avoids adding notice periods to the timeline as well compliance with potentially cumbersome corporate formalities and other procedural requirements.

In addition, Luxembourg law allows the sponsor to vote their shares in the general meeting approving the business combination,[175] whereas many other jurisdictions such as Germany prohibit sponsors to vote their shares, based on the assumption of an inherent conflict of interest.[176]

Moreover, the resolution to consummate the business combination requires only the approval of a majority of the votes validly cast.[177] In many other jurisdictions, including Germany, the resolution would rather require a majority of 75% of the votes present at the shareholder meeting.[178] More generally, Luxembourg corporate law is uniquely flexible at several other key steps of the SPAC process—for instance, with regard to voting rights, the implementation of different stock classes, special financial and

---

172 For an explanation of the PIPE financing process, see Klausner et al., *supra* note 165, at 238.

173 *See, e.g.*, Article 5 and 6 of the s*tatuts cordonnés* of SMG Hospitality SE (April 2, 2024), setting the authorized capital of the SPAC at more than the share capital.

174 *See, e.g.*, Business Combination Agreement between Marley Spoon SE and 468 SPAC II SE (Apr. 25, 2023), at 2.

175 Mark Austin et. al., *US SPAC Boom Spreads to Europe with Recent Amsterdam and Frankfurt SPAC Listings and Potential Reform in London*, FRESHFIELDS BRUCKHAUS DERINGER LLP (Mar. 10, 2021), https://perma.cc/HRJ9-F56M.

176 Sec. 46 para. 3 of the Stock Exchange Law (*Börsengesetz – BörsG*); Rafael Harnos, *Börsenmantelaktiengesellschaft* [Listed Shell Corporations], 2024 AKTIENGESELLSCHAFT [AG] A53, S62–3 (Ger.).

177 Austin et. al., *supra* note 175, at 11.

178 *Cf.* Sec. 179a para. 2 AktG.

control rights for sponsors, and amendments of the corporate law framework of a SPAC in general.[179] This is especially important at the back end of the de-SPAC process if a particular business combination requires adjustments in the Corporate Law foundation of the SPAC due to special circumstances of the target or special requests from the target shareholders, which is not uncommon.[180] Luxembourg law is also substantially more flexible than German law with regard to the Corporate Governance of a SPAC. For instance, German Corporate Law, stipulates a two-tier board structure (management board and supervisory board).[181] In contrast, Luxembourg law allows for a more flexible choice of either a one-tier or a two-tier structure.[182]

b) The Tax Factor?

Luxembourg shares a reputation for a particularly favorable corporate tax environment with the Netherlands. Hence, as with the first case study, one might ask whether it's the favorable tax environment alone that attracts German SPACs to incorporate in Luxembourg rather than in Germany. Indeed, all the German SPACs also have their tax residence in Luxembourg.[183] However, the very nature of a SPAC implicates that a SPAC has no taxable income prior to the business combination (besides interest income on the escrow amount). During this time, the SPAC is looking for a suitable target company to combine with, which means paying legal and financial advisors and some operational expenses but does not result in a profit for the SPAC that might be taxed.[184] Further, no SPACs from other European countries moved to Luxembourg. Although SPAC-IPOs also picked up in other European Countries such as France or Sweden, those were incorporated in their respective home jurisdictions.[185]

---

179 *Luxembourg positions itself as an attractive player on the rising SPAC market*, SILICON LUXEMBOURG (Mar. 10, 2021), https://perma.cc/MCP4-WJEQ.

180 Isabelle Lentz et al., *SPAC Developments in Luxembourg*, ASHURST LLP (Nov. 30, 2021), https://perma.cc/Q9VJ-BT88.

181 Sec. 76 and 95 AktG.

182 Art. 441-1 and Art. 442-1 of the Luxembourg Law of August 10, 1915 on Commercial Companies.

183 *E.g.*, Lakestar SPAC I SE, *Prospectus for the Admission to Trading of 27,500,000 Class A Shares*, 88; 468 SPAC I SE, *Prospectus for the Admission to Trading of 30,000,000 Class A Shares*, 93.

184 *See, e.g.*, SMG European Recovery SPAC SE, *Unaudited interim consolidated financial statements for the financial period ended 30 June 2023*, p. 7, which lists no revenue for the period covered, but only operating expenses, consisting mainly of directors, accounting, legal & audit fees, p. 22.

185 *White & Case SPAC Roundup, supra* note 160.

This supports the argument that the tax factor has not been a key motivation for the German SPACs to choose Luxembourg corporate law over German corporate law in their incorporation.

c) Legal Certainty and Market Credibility

The choice of Luxembourg law for all German SPACs raises the question who is making the incorporation decision in a SPAC. That is the choice of the sponsor, who is the sole shareholder of the SPAC and is arranging the incorporation.[186] So it is worth thinking about what the key motives are for a sponsor in choosing an incorporation jurisdiction. The sponsor is incentivized under the SPAC structure by being granted stock in the SPAC that will later be converted into stock of the target (called the sponsor's "promote") in the business combination (called the "de-SPAC").[187] If the SPAC is not successful in consummating a de-SPAC, the stock of the sponsor will expire worthless after the shares of the public investors have been redeemed and the SPAC is liquidated.[188] This means that the incentives of the sponsor are strongly channeled towards achieving a business combination and less on other results like post-de-SPAC stock performance.[189]

To achieve a business combination, being attractive to a target and thus having a strong negotiating position is key.[190] For a SPAC, this means on the one hand having as much cash available after redemptions as possible and on the other hand being able to consummate the business combination as fast and with as much legal certainty as possible. Both are important to give the target access to an attractive amount of the SPAC's funds quickly. The percentage of redemptions is principally dependent on how attractive public shareholders think the target is and will only be known to the parties after the announcement of the target. On the front end of the process and pre-announcement, the legal framework of the SPAC will be key for the promise to accomplish the business combination fast and with as few legal execution risks as possible. This means that especially legal certainty is vital for sponsors in choosing an incorporation jurisdiction for a SPAC. In addition, being a jurisdiction in which a number of

---

186 Klausner et al., *supra* note 165, at 238; for a Luxembourg-specific description of the process, see, e.g., 468 SPAC I SE, *Prospectus for the Admission to Trading of 30,000,000 Class A Shares*, 59.

187 Klausner et al., *supra* note 165, at 235.

188 *Id.* at 247.

189 In re Multiplan Corp. Stockholders Litigation, 268 A.3d 784, 812 (2022).

190 *Cf.* COOLEY LLP, *10 Key Considerations for Going Public With a SPAC*, https://perma.cc/W5JG-XWJS.

SPACs with similar characteristics already executed a successful de-SPAC will be particularly enticing to the sponsors because it lends them and their SPAC additional legal certainty and market credibility.

This is particularly significant with respect to the European de-SPAC market. In Europe, a large share of potential target companies will be significantly less familiar with the de-SPAC process than their peers in the U.S. and the availability of market precedents in materially comparable fact patterns (e.g., jurisdiction, industries, and transaction volume) will give greater comfort to such target companies that they can go down the relatively new route of an IPO through a de-SPAC.

Also, successful SPACs tend to have sponsors with strong networks in the relevant private capital and venture capital community.[191] Incorporating a SPAC in the same jurisdiction as someone in their network will allow sponsors to tap the experiences gained in prior transactions, making the option more appealing to sponsors than incorporating in a "new" jurisdiction.

In sum, all these factors mean that besides the basic corporate law flexibility required to implement the SPAC structure as expected by market convention, legal certainty and investor demand are also key in choosing the incorporation decision for a SPAC in Europe.

III. ANALYSIS OF AND LESSONS FOR A CORPORATE LAW COMPETITION IN EUROPE

The two case studies above demonstrate that the academic consensus does not hold true anymore. These findings change many assumptions about the development of corporate law in the EU.

A. The Mechanics and Development of the Corporate Law Competition

1. The Demand Side: What Do Corporations Ask for?

On the demand side, we can examine how demand for the corporate law product works in the European Corporate Law Competition.

---

[191] Chen Lin et al., *SPAC IPOs and Sponsor Network Centrality*, 20–21 (HKU Bus. Sch., Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3856181&.

The emergence of a Corporate Law Competition in the EU based on these two case studies raises the question of under which circumstances such a Corporate Law Competition might be triggered by a corporation choosing to incorporate in a different member state or reincorporating there. Generally, the answer to that question is said to be that corporations are moving jurisdictions to take advantage of more efficient, higher quality or value-enhancing corporate law rules.[192] These claims are not always entirely clear as to what specifically the motive for an incorporation or reincorporation is. They might also not hold true in the EU, where most jurisdictions do not strictly align the fiduciary duties of the board to shareholder value. Rather, fiduciary duties often follow a multi-stakeholder model. This means that boards have to consider a variety of reasons other than shareholder value in making decisions under their fiduciary duties.[193] Drawing on the two case studies gives us a more nuanced picture of the demand side dynamics of the Corporate Law Competition in the EU.

As we can see from the German SPACs, one trigger might be the need to establish a certain corporate structure that aligns with market convention but is impossible in the current or potential home jurisdiction. If another jurisdiction offers a solution to the problem and the transaction costs to incorporate in that jurisdiction instead are low, there is a strong incentive to change to that jurisdiction. A second motive observable from the Italian reincorporations is the intention to profit from a corporate law product offering a broader range of structuring optionality because it provides the shareholders or the corporation with certain benefits. Interestingly, corporations from other countries like France, Germany, and Spain have also reincorporated to the Netherlands in recent years.[194] However, from no other country is the trend as pronounced and comprises such economically important corporations as in Italy.[195] This is surprising, because technically, the benefits of a reincorporation to the more flexible Dutch corporate

---

[192] *State Law, Shareholder Protection*, *supra* note 7, at 256; *Law as a Product supra* note 1, at 272 (1985); Dammann, *supra* note 30, at 507–20.

[193] For Germany, see, e.g., Michael Kort, *Vorstandshandeln im Spannungsverhältnis zwischen Unternehmensinteresse und Aktionärsinteressen* [Board of Directors' actions and the conflict between company interests and shareholder interests], 2012 AKTIENGESELLSCHAFT [AG] 605, 610 (Ger.) and for France see e.g., Forrest G. Alogna et al., *The Shareholder in France and the United States: a Comparative Analysis of Corporate Legal Priorities*, REVUE DROIT & AFFAIRES [Business & Law Review], Paris, 17th Ed. 2020, 94–96 (Fr.).

[194] See the overview compiled by Belcredi et al., *supra* note 116, at 37.

[195] See the overview compiled by Belcredi et al., *supra* note 116, at 37.

law framework are not restricted to corporations from a certain jurisdiction.

However, Italian corporations have a much stronger concentrated shareholder structure even compared to other European countries, with the share of listed corporations where the largest shareholder holds more than 50% of the equity amounting to approximately 50% versus approximately 39% and 38% in Germany and France, respectively.[196] The Italian Companies and Exchange Commission even puts the average stake held by the largest shareholder in corporations listed on the Borsa Italiana at 49.1%.[197] If the benefits for which the reincorporation is consummated are principally for controlling shareholders rather than the corporation, then the major shareholders in corporations with generally more concentrated shareholder structures will push stronger for a reincorporation. At which point exactly the benefits become so great that a corporation decides to reincorporate depends on the fact pattern of a given case and the specific preferences of the decision makers. However, what generally follows from relevant case studies is that offering benefits to controlling shareholders makes a jurisdiction more attractive for reincorporations. This is especially true when the competing jurisdictions have a significant share of corporations with concentrated shareholdings.

Curiously, the quality of case law surrounding the statutory provisions of the jurisdictions attracting the incorporations and reincorporations didn't prove a competitive disadvantage in both cases. The quality of a jurisdictions' case law develops from the number and diversity of lawsuits initiated and decided before its courts. [198] But neither Luxembourg nor the Netherlands boast a reputation of having a particularly well-developed case law in corporate law like Delaware does.[199]

In contrast, Italy and Germany, which have significantly larger legal systems both in terms of economic power and disputes arising under their jurisdiction, have broader and deeper case law and would also be expected to be more advanced in that regard. In larger legal systems, a broader range of issues are brought before the courts and more courts produce a more diversified and

---

196 OECD CORPORATE GOVERNANCE FACTBOOK, supra note 82, at 19.

197 Paola Deriu, et. al., 2023 Report on corporate governance of Italian listed companies 14, COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA (2023), https://perma.cc/72EX-6NH8.

198 *Cf.* Klausner, *supra* note 11, at 842–47.

199 *Law as a Product,* supra *note 1*, at 277.

more consolidated case law.[200] This is often said to be one of the strengths of Delaware corporate law, since many view that as a hallmark of the legal certainty awarded by its corporate jurisdiction.[201] The answer, however, lies in the difference in legal systems. EU member states follow the civil law legal tradition, in which case law is of much less importance than in the Anglo-American tradition of common law. That means that decision makers will likely think less about whether a particular jurisdiction has a developed case law in corporate law, since this will be less front of the mind for themselves and more importantly for their legal advisers when considering the advantages of a jurisdiction. Also, the "quality" of the case law of a jurisdiction is often difficult to judge across different member states given the natural lack of comparability and language barriers. Thus, the key issue with regard to the attractiveness of a particular corporate law will be the characteristics of the member states' statutory laws.

2. The Supply Side: Do Member States Care What They Offer?

On the supply side, the question is if member states are competing to offer a superior corporate law product to attract corporations from other member states. Both case studies offer some insights in that regard as well.

The German SPACs in Luxembourg in 2021 have not been the first such vehicles making use of the flexible Luxembourg corporate law framework. In 2010, a first pair of SPACs were already incorporated in Luxembourg[202] to circumvent the problems with the implementation of the defining features under German corporate law discussed above.[203] Then in 2021, the second "class" of listings followed as described above.[204] During the first listings in 2010, both the German legislators and regulators did not seem to give any attention to the phenomenon, since SPACs were still a niche asset class with minor significance. However, 2021 marked a turning point, when SPACs in other jurisdictions, in particular the U.S., struggled with the competitive environment of an

---

[200] Gelter, *supra* note 16, at 253–56.

[201] *Law as a Product*, supra note 1, at 250–51; Klausner, *supra* note 11, at 842–47; Gelter, *supra* note 16, at 253.

[202] The two SPACs were named Helikos SE and European CleanTech I SE, listing in Frankfurt in February and October 2010, respectively.

[203] *See supra* 0.

[204] *See supra* 0.

oversupply of SPACs chasing the same set of target companies and started to look for targets abroad. In 2022 in particular, a large number of European-based technology companies were reported to be in discussions with U.S.-listed SPACs to consummate a business combination. Then Lilium, a popular German aerospace company, went public through a de-SPAC on NASDAQ.[205] This set alarm bells ringing about promising German start-ups relocating abroad. German legislators likely felt that it would be important to have at least the option to structure a SPAC as a German entity to broaden access to German capital markets for German start-ups and enacted a new legal form at the beginning of 2024 that allows for the formation of a German SPAC company (*Börsenmantelaktiengesellschaft*).[206] Even though the market perception of the technical implementation of the new legal form is fairly critical,[207] its mere implementation can be interpreted as evidence that German legislators did make an effort to change Germany's corporate law to improve its attractiveness. In its draft proposal (covering also a number of other measures), the German government also mentioned competitive disadvantages for the German financial market as a reason to implement the law.[208] This example shows that German legislators became active in improving its corporate law product offering. That did not happen immediately when it became clear that another corporate law framework was more suitable for SPACs. Rather, German legislators seem to have taken a wait-and-see approach until the use of Luxembourg SPACs became more prevalent since 2021. Probably also driven by the unprecedented significance of SPACs in

---

[205] Media Release, Lilium GmbH, Lilium closes business combination with Qell Acquisition Corp., will begin trading on Nasdaq under the symbol "LILM" (Sept. 14, 2021), https://perma.cc/N2PJ-4MKQ.

[206] Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes zur Finanzierung von zukunftssicheren Investitionen [Draft by the German Government of a law to finance future investments (Future Financing Act)] (Ger.).

[207] *See, e.g.*, Stellungnahme der Gruppe Deutsche Börse zum Entwurf eines Gesetzes zur Finanzierung von zukunftssichernden Investitionen (Zukunftsfinanzierungsgesetz) [comment letter of Deutsche Börse Group on the draft of a law to finance future investments (Future Financing Act)], 2 (Ger.); Rafael Harnos, *Börsenmantelaktiengesellschaft* [Listed Shell Corporations], 2024 AKTIENGESELLSCHAFT [AG] S53, S70 (Ger.); Alexander Herzog & Bero Gebhard, *Der aktienrechtliche Regelungsrahmen für SPACs im Entwurf zum Zukunftsfinanzierungsgesetz* [The corporate law framework for SPACs in the draft of the Future Financing Act], 2023 Neue ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1055, 1059 (Ger.).

[208] Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes zur Finanzierung von zukunftssicheren Investitionen [Draft by the German Government of a law to finance future investments (Future Financing Act)], 2; *cf.* also Rafael Harnos, *Börsenmantelaktiengesellschaft* [Listed Shell Corporations], 2024 AKTIENGESELLSCHAFT [AG] A53, S55 (Ger.).

the U.S. in 2021 and 2022, it took some time for SPACs to gain the lawmakers attention.

The specific motive of the German legislator is less explicit, since the legislative proposal does not pin down a specific objective behind improving competitive disadvantages and there are no public statements by the government on the rationale for the new corporate form. Since franchise taxes are prohibited under European law, the increase of those was certainly not a factor. Rather, the most plausible explanation is that the German legislator was concerned over a potential loss of employment, tax revenues and general prestige as being an attractive business and investment environment. These are not directly connected to an incorporation abroad but are usually related to it. If the parent company of a German business is located in a different jurisdiction after a de-SPAC, this will lead to a loss of management and advisory employment opportunities (legal, accounting, financial) to that other jurisdiction, including the respective tax revenues. Further, the corporations from more flexible corporate law jurisdictions will also have a competitive advantage over corporations from restrictive corporate law jurisdictions, since they can more easily and flexibly access financing and thus make more investments.

The case study on Italian corporations reincorporating in the Netherlands further supports the thesis that European member states actively engage in the supply side of the Corporate Law Competition. After Fiat as the first Italian corporation moved to the Netherlands and established a DLS in 2014, Italian legislators rushed to act.[209] To prevent any further reincorporations to another jurisdiction, Italian legislators introduced their own version of a loyalty share scheme in 2014 with the goal of stemming the exodus.[210] That form of a loyalty share scheme was though limited to the doubling of voting rights (i.e., a 2:1 ratio) after two

---

[209] Elena Ratti, *Il superamento del principio "un'azione-un voto": azioni a voto plurimo e azioni a voto maggiorato* [The overcoming of the "one share-one vote" principle: multiple-voting shares and loyalty shares], 2017 IL NUOVO DIRITTO DELLE SOCIETÀ 573, 585–88 (It.); Roe & Venezze, *supra* note 131, at 28.

[210] Chiara Mosca, *Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law*, 8 MICH. BUS. & ENTREPRENEURIAL L.J. 245, 253 (2019); Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat* 114 Zeitschrift für vergleichende Rechtswissenschaft 192 (2015); Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?* 76 BUS. LAWYER 467, 495 (2021); Giulio Sandrelli & Marco Ventoruzzo, *Classes of Shares and Voting Rights in the History of Italian Corporate Law*, in RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 269, 293–94 (Harwell Wells ed., 2018).

years of holding a particular stock.[211] However, it proved to be of no avail in putting an end to the reincorporations, as the number of large-cap companies leaving for the Netherlands only accelerated after 2014.[212]

In a late scramble to make up lost ground, the Italian parliament enacted a new law (the so-called *Legge capitali*), effective since March 27, 2024, that gave listed corporations more leeway in introducing their own Italian loyalty share schemes.[213] In particular, the cap on the maximum voting ratio was lifted to 10:1, with shareholders obtaining one additional vote for every subsequent twelve months holding the stock.[214] It remains to be seen whether this will have the desired effect. So far,[215] 72 listed corporations have adopted the double voting loyalty share scheme, but only ten listed corporations have adopted an additional voting loyalty share scheme,[216] out of a total of 210 corporations listed on the Borsa Italiana.[217]

Both these legislative reforms provide support to demonstrate that Italian legislators are trying to change Italy's corporate law to improve its attractiveness for corporate actors. With regard to the *Legge capitali*, the legislator even included this aim in the name of the law ("*to support the competitiveness of capital*"). As in the case of Germany, however, the specific motive of the Italian legislator is not easily discernible. The *Legge capitali* does not state an explicit objective. Also, the government did not make any public statements to explain the reasoning behind the increase of the flexibility of the Italian loyalty share schemes. Franchise taxes can be ruled out given their prohibition under EU law. Hence it again seems most plausible that the Italian legislature

---

211 Article 127-*quinquies* para 1 Consolidated Law on Finance; [Decreto Legge No. 91, 24 giugno 2014 convertito con modificazioni dalla Legge No. 116, 11 agosto 2014] Law Decree No. 91, June 24, 2014, converted with amendments into Law No. 116, Aug. 11, 2014; Elena Ratti, *Il superamento del principio "un'azione-un voto": azioni a voto plurimo e azioni a voto maggiorato* [The overcoming of the "one share-one vote" principle: multiple-voting shares and loyalty shares], 2017 IL NUOVO DIRITTO DELLE SOCIETÀ 573, 602–06 (It.).

212 *See* Part 0 for some of the most iconic Italian companies reincorporating post 2014.

213 Law No. 21 of March 5, 2024, https://perma.cc/X58Z-SZ8D.

214 Article 127-*quinquies* para 2 Consolidated Law on Finance, available at https://www.consob.it/o/PubblicazioniPortlet/DownloadFile?filename=/documenti/english/laws/fr_decree58_1998.pdf.; *see* for a concise summary: *Italy – New Capital Markets Law*, WHITE & CASE (Apr. 9, 2024), https://perma.cc/PN5Q-2PRA.

215 Last reviewed on May, 30, 2025.

216 *See* Commissione Nazionale per le Società e la Borsa, *Listed companies with increased voting shares or multiple-voting shares*, https://perma.cc/EX25-FELU.

217 *See* Commissione Nazionale per le Società e la Borsa, *2023 Report on corporate governance of Italian listed companies* 14 (2023), https://perma.cc/9UE8-E9SA.

was motivated by concern over potential losses of employment, tax revenues and the country's overall reputation as an appealing investment destination.

Despite the changes, it is striking that the Italian and the German legislatures did not attempt to introduce even more flexibility into their respective corporate laws than available in the jurisdictions where corporations moved to. This suggests that neither country aimed to become an attractive host jurisdiction themselves. Rather, their competitive approach was "defensive," meaning they merely tried to stop corporations from reincorporating out of their jurisdictions. Neither Italy nor Germany looked to "offensively" compete, i.e., vying for companies in other jurisdictions to reincorporate to them.

The evidence from these case studies is consistent with the previous phenomenon of the German and Dutch legislators solely competing defensively in making their corporate laws for private limited companies in their jurisdiction less burdensome in response to the short-lived popularity of the legal form of the U.K. Limited.[218]

B. Overcoming the Limitations

The limitations discussed in Part I.C[219] that were proposed by different scholars were overcome by the incorporations and reincorporations in both case studies. The lack of common history and (legal) culture and language among the member states, which were advanced as central limitations to Corporate Law Competition in the EU by scholars, seem to be significantly less obstructive at this point. First of all, the European member states share a much longer common legal and economic history today than they did at the time the ECJ judgements[220] were rendered (1999–2003). Language is also less of an obstacle, since the globalization of capital markets forced all the decision makers to become more fluent in English as a ubiquitous *lingua franca* for cross-border business transactions. Most importantly, the various legal cultures in the individual EU have become increasingly similar during the last twenty years as well. The EU enacted several directives regulating key areas of corporate law (e.g., the Takeover

---

[218] Bratton, McCahery & Vermeulen, *supra* note 29, at 380–84; *see* also *supra* 0.

[219] *See supra* 0.

[220] *See supra* 0.

Directive[221] and the Directive on Cross-border Mergers[222]). Further, all major areas of securities law are fully harmonized in the EU through regulation, in particular the disclosure regime under the Prospectus Regulation[223] and the trading of securities under the Market Abuse Regulation.[224] The ECJ also handed down many judgements in the last twenty years interpreting the provisions of those regulations and directives, thus further clarifying statutory EU law and thereby driving legal harmonization. Of course, there are still important differences in corporate law across members states that enable the Corporate Law Competition. But compared to 25 years ago, decision makers today are much more familiar with a major part of the rules applicable to their corporation when contemplating an incorporation or reincorporation to a foreign jurisdiction, as well as the consequences of moving such foreign legal jurisdiction.

In addition, legal education in the EU member states has significantly changed from being exclusively focused on national legal systems as was the case some decades ago. The European legal acts mentioned above are generally taught in all member states to students of corporate law or securities regulation. The study of the legal systems of other member states has also greatly increased in the curricula of a considerable number of leading universities.[225] This is not least due to the ERASMUS program giving students the opportunity to study the law of another member state on the ground, of which a large share of European law students takes advantage.[226] That means that the legal counsel of decision makers today will be much better versed in advising them about other member states' jurisdictions and the various options for incorporation or reincorporation.

---

221 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

222 Directive 2005/56/EC of The European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

223 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

224 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

225 Aalt Willem Heringa, *European Legal Education: The Maastricht Experience*, 29 PENN ST. INT'L L. REV., 81, 86–88 (2010); Hein Kötz, *Towards a European Legal Education* [*Auf dem Wege zur Europäischen Juristenausbildung*], 14 BUCERIUS L.J., 1,4 (2020).

226 Heringa, *supra* note 225, at 87; Kötz, *supra* note 225, at 4.

The conflict of interest faced by legal counsel in advising decision makers about reincorporating in another jurisdiction or incorporating there instead of in the home member state[227] also decreased in the last decades. While many law firms in EU member states ––in contrast to their U.S. counterparts––used to largely stay focused on their national legal markets, the EU legal market changed after the ECJ judgments. Mostly initiated by the British, a number of cross-border mergers of law firms led to international firms that spanned offices across multiple jurisdictions. One of the most important events of that development was the creation of Freshfields Bruckhaus Deringer (now Freshfields LLP), which resulted from a merger of a British, German, and Austrian law firms in 2000.[228] Many smaller national law firms that did not want or were not able to negotiate mergers joined law firm networks of local firms, the best known of which are the CMS and the Advent networks.[229] This change in the EU legal market made the servicing of client on cross-border advice much more international and placed legal counsel in the position to provide advice on other member states' corporate law to clients while keeping the relationship, the matter, and the fees in the law firms (or at least in the firm network). That significantly mitigated the conflict of interest and contributed to more candid advice clients received about the benefits of the corporate laws of other member states.

Further, the danger of a negative market perception of non-domestic legal forms in certain member states is significantly lower than was the case when the Limited from the U.K. became widely used in Germany and in other central European countries. All the German SPACs in Luxembourg incorporated as a SE.[230] However, one can hardly argue that the SE is a legal form suffering from a negative market perception. Over the last two decades, it has become a rather popular and highly reputable legal form in the EU, with a large number of blue-chip corporations using the

---

227 Enriques, *supra* note 68, at 1264; to compare for the evidence of the legal counsel interests in the U.S., see *Law as a Product, supra* note 1, at 274.

228 FRESHFIELDS BRUCKHAUS DERINGER, *Our history*, https://perma.cc/AH5S-74FC.

229 ADVANT BEITEN, *About us*, https://www.advant-beiten.com/en/about-us; CMS, *About us*, https://perma.cc/B98E-MUKN.

230 Ben Fuhrmann, *SPAC-Prospekte in Deutschland und den Niederlanden und das Public Statement der ESMA* [SPAC Prospectuses in Germany and the Netherlands and the ESMA Public Statement], 2021 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 390, 391 (Ger.).

SE as their legal form.[231] For instance, approximately 35% of the companies in the DAX, the stock index including the 40 German issuers with the highest market capitalization listed on the *Deutsche Börse*, are organized as an SE.[232] For their reincorporation to the Netherlands, most Italian corporations choose the Dutch *naamloze vennootschap* (N.V.). The N.V. is a legal form used by the majority of the large public Dutch corporations (e.g., Heineken, ASML) and can therefore likewise hardly be seen as suffering from a negative market perception. Against this background, corporations incorporated or reincorporated as a SE or N.V. will most likely not suffer from any adverse treatment by courts, public authorities, or lawmakers in their home countries due to their legal form.

The additional administrative costs such as accounting rules, additional legal advice, and translation costs remain, but they are much lower than was the case 25 years ago, given the legal harmonization of member states, the internationalization of law firms and the advice they can offer on other jurisdictions, as well as leaps in translation and AI-based service technology.

C. Race to the Top or Race to the Bottom?

The policy question arising from the emergence of a Corporate Law Competition is whether such a Competition is desirable. As we have seen in Part I.A, there is a long discussion on this issue in the U.S., with one side warning of the erosion of shareholder protection and the other side hailing the potential benefits for efficiency and shareholder value.[233]

The decision makers in the European Corporate Law Competition are the shareholders.[234] Therefore, the benefits a member state offers to the shareholders of a corporation will also be its main lever to attract incorporations and reincorporations. One could argue that this makes the setup of the Corporate Law Competition in the EU already destined to produce a race to the bottom because the controlling shareholders will always mainly pursue their own benefits. Further, having a controlling shareholders means that market forces can do less to discourage the board of a corporation from engaging in actions enhancing value for the controlling shareholders to the detriment of the minority

---

[231] Jessica Schmidt, *Twenty Years Societas Europaea*, 18 EUR. COMPAR. L., 116, 116 (2012); Bratton, McCahery & Vermeulen, *supra* note 29, at 366.

[232] See the list of all current DAX members on https://perma.cc/J8D9-68L3.

[233] *See supra* 0.

[234] *See supra* 0.

shareholders.[235] The setup might therefore be akin to a fact pattern in the U.S. where there is a dominant shareholder, which nearly inevitably leads to a wealth transfer from the minority shareholders to the public shareholder.[236] However, this Article argues that this effect does not hold true in the EU Corporate Law Competition to the same extent it does in the U.S. This is mainly due to two reasons.

First, in most European jurisdictions, the protection awarded to minority shareholders is much more developed. In the U.S., minority shareholder protection has traditionally been confined to fiduciary duties of controllers and the board, as well as shareholder voting.[237] In contrast, most European jurisdictions have a significantly more encompassing set of laws and mechanisms to protect minority shareholders. Since controlled corporations are so much more prevalent in European countries, the solutions to the problem have also become more advanced since the genesis of their respective corporate laws.[238] For instance, Germany and Italy have group laws that establish comprehensive statutory rules governing the protection of minority shareholders in circumstances where there is a majority shareholder that might transfer value of the corporation to itself.

Under the German law governing controller relationships between entities (*Konzernrecht*), controllers are obliged to compensate a controlled corporation for all and every individual disadvantage to it prompted by the controlling corporations influence. In the event that it fails to do so, the relevant controller will be liable for damage claims of the controlled corporations, which may also be raised against the controller's directors. Additionally, the controller is required to prepare an annual report detailing all transactions with the controlling corporation.[239] Similarly, Italian law establishes liability of controllers and directors in fact patterns in which the interests of the controlled entity are harmed by the influence of the controllers. It also sets forth

---

235 Bebchuk, *supra* note 6, at 1478; Gelter, *supra* note 16, at 274; *see also supra* 0.

236 Bebchuk, *supra* note 7, at 1478.

237 J. Bautz Bonanno, *The Protection of Minority Shareholders in a Konzern Under German and United States Law*, 18 HARV. INT'L L.J. 151, 165 (1977).

238 For a comprehensive overview of minority rights in member states corporate laws see *European Commission*, Study on Minority Shareholders Protection, Final Report, January 2018.

239 Sec. 311, 315 and 317 AktG; Alexander Scheuch, *Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, 13 European Company Law, 191, 195–96 (2016); Bonanno, *supra* note 232, 158–63.

reporting obligations regarding the relationship with the controlling corporation.[240]

Second, shareholders generally have withdrawal rights in case of a reincorporation or an incorporation in another jurisdiction. With regard to reincorporations, European law provides for mandatory withdrawal rights to be awarded to all shareholders of a corporation that use a cross-border conversion or merger to reincorporate.[241] Most member states already had a provision like this on the books for a long time (e.g., Italy[242]) prior to the European law requiring it. In the reincorporations of the Italian corporations to the Netherlands, shareholders were given withdrawal rights to exercise in case they were not convinced by the benefits of the reincorporation.[243] In practice, however, few shareholders exercise their withdrawal right.[244] That can be understood as an indication that shareholders are generally not as concerned about the reincorporation as often suggested by the scholars fearing a race to the bottom. The advocates of a race to bottom hypothesis might argue that minority shareholders might not understand or be misled about the risks stemming from such reincorporation. However, given the significant disclosure by those corporations about the reincorporated entity and the intended Dutch loyalty share schemes in their proxy statements, there is no substantiated basis for such a claim. In further support of this argument against a race to the bottom, the economic evidence from the introduction of loyalty shares in Italian companies finds no significant value- or profitability-decreasing effect as a result of the adoption of loyalty shares.[245]

---

[240] Articles 2497–2497-*septies* of the Italian Civil Code (*Codice Civile*): "Capo IX – Direzione e Coordinamento Di Societa"; Diego Corapi, *The Law on Groups of Companies in Italy*, 16 EUR. CO. L., 121, 121 (2019); Samira Kousedghi, *Protection of Minority Shareholders and Creditors in Italian Group Law*, 4 EUR. CO. L., 217, 219 (2007); Paolo Montalenti, *The New Italian Corporate Law: An Outline*, 1 EUR. CO. & FIN. REV. 368, 376 (2004)

[241] *See* Art. 86i and 126a of the Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 with regard to cross-border conversions, mergers and divisions.

[242] Article 2437 (for a *società per azioni*) and Article 2473 (for a *società a responsabilità limitata*) of the Italian Civil Code.

[243] *See, e.g.*, Mediaset S.p.A., Board of Directors' explanatory report on the sole item on the agenda of the Extraordinary Shareholders' Meeting of Mediaset S.p.A. of 23 June 2021, drafted pursuant to Article 125-ter of Italian Legislative Decree no. 58 of 24 February 1998 and Article 72 of the regulation adopted by Consob under resolution no. 11971/99, as amended, 4.

[244] *E.g.*, in Brembo S.p.A.s recent reincorporation, only 1.3% of shareholders exercised their withdrawal rights, *see* Brembo S.p.A., *Final results of the exercise of the Right of Withdrawal*, Press Release August 30, 2023.

[245] Emanuele Bajo, Massimiliano Barbi, Marco Bigelli, Ettore Croci, *Bolstering family control: Evidence from loyalty shares*, 65 J. CORP. FIN. 101755 (2020).

If a SPAC incorporates, shareholders will always be given redemption rights by market convention.[246] Also, minority shareholders need less protection in an incorporation scenario anyway, because they can choose in which corporation to become a shareholder or not. In a SPAC-IPO, public shareholders will have the substantial added benefit of receiving a full prospectus informing them about the benefits of the corporation prior to their investment decision. Against this background, it can hardly be argued that a competition for incorporations of SPAC corporations leads to an erosion in shareholder protection and hence to a race to the bottom.

CONCLUSION

This Article aims to challenge the consensus among corporate law scholars that there is no Corporate Law Competition in the EU. It does so by analyzing two case studies that demonstrate that such a competition is finally emerging. This does not imply that there will be a full-blown regulatory competition in the EU just a couple of years down the road, as many have observed it in the U.S. However, the two case studies show that the dynamics of how EU member states' corporate laws interact with each other are beginning to shift. Both corporations and decision makers now have access to a broader array of corporate law products to choose from than they did 25 years ago. In contrast to the EU's traditional top-down harmonization strategy, this introduces a new layer of market-based corporate law stimulus to the European corporate law landscape. Supply and demand side pressures will potentially grow stronger in the future, propelling a new dynamic for European corporations and legislators alike. This opens a trove of exciting new questions for further research, such as the resulting policy implications, potential other cases evidencing the emerging competition, the underlying economics, the role of corporate lawyers in facilitating the competition, and the competition's broader impact on stakeholders.

---

[246] *See, e.g.*, Klausner et al., *supra* note 165, at 237; Ben Fuhrmann, *SPAC-Prospekte in Deutschland und den Niederlanden und das Public Statement der ESMA* [SPAC Prospectuses in Germany and the Netherlands and the ESMA Public Statement], 2021 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 390, 402–3 (Ger.).