Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U.

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Abstract.

In the U.S. corporations can be incorporated in any of the 50 states and can “reincorporate” afterwards in any other state. In the E.U. such freedoms are a recent achievement: In the last decade, first the European Court of Justice has liberalized initial incorporations and only in 2005 the cross-border directive has open the doors to freedom of midstream reincorporation from one member state to another. Midstream reincorporations, however, in the E.U. have a much different impact than on the other side of the Atlantic. In the U.S., indeed, the competence of the state where a company is incorporated is limited: On the one hand, it is restricted by federal laws and, on the other hand, it regulates only the “internal affairs” of corporate activities. By contrast, in the European Union, the agency problems between shareholders and board are bundled with the agency problems between shareholders and creditors, all being part of "corporate law" and in the exclusive competence of the member state of incorporation. Consequently, in the U.S. reincorporations are a relatively easy task, since they shift only rules that address the shareholders - board relation, while creditors and other stakeholders are not affected. By contrast, in the E.U., any change...
of the applicable corporate law risks to jeopardize also creditors. Adjusting creditors will discount this risk from the credit rate or will protect themselves through specific covenant, but not-sophisticated creditors will bear entirely the risk of opportunistic reincorporations. For this reason, many E.U. member states provide mechanisms for creditors’ protection in case of reincorporation, often by requiring the debtor to give a security or to pay the debts that are not yet due. These mechanisms are necessary to avoid negative externalities in "multi-stakeholder" corporate laws, yet they make reincorporations more expensive and will impede a certain number of efficient transactions.
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I. INTRODUCTION

Freedom to reincorporate is an essential prerequisite of regulatory competition for corporate law. According to the theoretical model of a perfect “market for corporate law”, corporations should be allowed to select the corporate law they prefer, regardless of the country where the firm’s activities take place or where the corporate headquarters is. In this way, the firm would actually “buy” the best tailored corporate law out of a menu of different alternatives (i.e. the different jurisdictions). In this scenario, corporations should be free to choose the preferred law at the moment of the original incorporation and to change applicable law afterwards without the need to liquidate in the original state. In other words, a free demand for corporate law requires freedom of incorporation as well as freedom of reincorporation. If - under the 'demand side ’ - reincorporations are admitted, companies can threaten the state of origin to "leave" the country and switch to the law of a different state. This threat might trigger regulatory competition, if - under the 'supply side ’ - domestic policy-makers have incentives, such as franchise fees, to avoid that domestic corporations flee to a different law.

This model becomes reality in the U.S., where freedom of reincorporation is one of the trigger of regulatory competition for corporate law. Corporations, indeed, initially are formed in the state of their headquarters and then reincorporate in Delaware upon going public. In the U.S., legal and economic scholars have engaged in an intense debate on the efficiency of free choice of law and regulatory competition. While some scholars hold that the regulatory competition among U.S.
states to attract incorporations has positive effects upon shareholders' value ("race to the top" theory)\(^1\), others hold that such competition ultimately leads to a race to "the bottom" or to protect the board's interest at the expenses of shareholders and creditors\(^2\). However, in recent years intermediate theories have been developed, arguing that regulatory competition leads "nowhere in particular"\(^3\) or that after the "victory" of Delaware, no real competition exists anymore\(^4\).

A similar debate has enflamed E.U. policy makers and scholars in recent years, after the European Court of Justice (hereinafter also "ECJ") and E.U. derivative law have liberalized initial incorporations and midstream reincorporations by way of cross-border merger. But are we really sure that, when they talk about "reincorporations", Americans and Europeans are meaning the same thing? In this paper I argue that they don't, and that the transatlantic debate is affected by a misunderstanding of the real nature of midstream choice of corporate law in the U.S and the E.U. Goal of this paper is to unveil this misunderstanding.

We should remember that corporate governance rules aim at addressing three fundamental agency relations: Between shareholders and the board; between

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\(^4\) See: Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L. J. 553 (2002 - 2003); (absence of real threat of Delaware domion, due to barriers to entry into the market for corporate laws); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STANF. L. R. 679 (2002) (according to Kahan and Kamar, entry barriers are not sufficient to explain the lack of regulatory competition, which depends also on political reasons). See also Michal Barzuza, *Delaware's Compensation*, 3 VA. L. REV., 521 (2008) (Delaware franchise fee is not optimal and induce Delaware to create a law that increases board's powers).
majority and minority shareholders; and between shareholders and creditors. So we can put the question in this way: What set of rules can corporations deliberately shift from one jurisdiction to another and which agency relations are affected by this choice. In this regard U.S. and E.U. diverge, since in the U.S. midstream reincorporations shift a more limited set of rules than European companies. Indeed, in the U.S. corporate law is not entirely in the competence of the states, since also federal government has a word to say and bankruptcy law is federal. Additionally, in the U.S. the competence of the state of incorporation is much more limited than in the EU: According to the "internal affairs doctrine", only the shareholders - managers relations are in the exclusive competence of the state of incorporation, while the most important creditors' protection mechanisms are either outside the doctrine or federalized. In other words, the regulation of the agency relations between shareholders and creditors is unbundled from the other agency problems. By contrast, in the majority of member states of the E.U., corporate law aims also at creditors' protection. The three fundamental agency relations (shareholders - board; majority - minority shareholders; shareholders - creditors) are bundled together and, consequently, reincorporations in the E.U. switch a broader set of rules than in the U.S.

Reincorporations are problematic transactions even under an ex ante viewpoint. The reason is that the applicable law is an implicit part of the contracts between the different investors (shareholders and creditors). By “reincorporating” under a different law, corporations implicitly change these elements of the contract: They change the rule of the game before the play is over. Ex ante, investors may discount
this risk from the price requested (cost of capital or interest rate), yet this does not mean that the law is irrelevant or trivial. The state of origin, that is to say the state whose law was discounted by investors when they negotiated with the firm, is competent, among other things, to regulate the proceeding to reincorporate abroad. One of the main policy issues for the state of origin is whether reincorporations can be implemented only with the consent of all constituencies potentially affected by the transaction. And, of course, the more such constituencies are, the more complicated is to strike a balance among them and to regulate the reincorporation proceeding, which increases the risk of over-regulation.

The paper will be shaped as follows. In the next section, I will depict the reincorporation options available to corporations in the U.S. and in the E.U. In the third section, I will address the vertical allocation of regulatory powers between the federal bodies and the member states in the U.S. and the E.U. We will see that in the U.S., despite corporations are chartered by the states and are governed mainly by state law, the Congress and other federal bodies have enacted a significant portion of modern U.S. corporate law, while in the E.U. the Commission and the other federal bodies have simply partially harmonized through directives the corporate law rules of member states. In the fourth section, I will depict the main difference between the U.S. and the E.U. Indeed, the internal affairs doctrine covers only the rules affecting the internal affairs of a corporation, not rules addressing creditors' protection; consequently, under a functional view point, creditors in the U.S. rely much more upon other pieces of regulation, such as federal insolvency
law. In the fifth section, I will ask whether these differences have impact on efficiency and redistribution. In particular, I will argue that the "multi-stakeholder" nature of many E.U. jurisdictions requires them to protect creditors from opportunistic reincorporations, yet the risk of over-regulation exist and the costs of reincorporation are higher than in the U.S., which makes the market for corporate law more static.

II. REINCORPORATIONS IN THE U.S. AND THE E.U.

Corporations chartered under the law of one of the states of the U.S. or of one of the member states of the European Union can reincorporate into another member state without the need to liquidate. However, in the E.U., differently from the U.S., freedom of reincorporation is a recent achievement. Indeed, till few years ago a number of EU states did not allow domestic companies to "reincorporate" under the law of another state. Only in 2005 a European directive allowed cross-border mergers throughout the E.U. and, in this way, has given to European corporations a legal mechanism to reincorporate from one state to another.

A. Reincorporations in the U.S.

In the U.S., the fundamental choice-of-law criterion for corporate law is the "internal affairs doctrine", pursuant to which the state of incorporation is competent to regulate internal corporate matters and the other states should
recognize validly incorporated companies\textsuperscript{5}. Depicted in this way, the Internal Affair Doctrine seems to be a version of the "incorporation theory" applied in the U.K. and in the other common law countries. And indeed a number of similarities exist, the most important of which is that corporations do not need to have their business or headquarter in the territory of the state of incorporation in order to be validly incorporated.

However, differently from English law, companies incorporated in one of the states of the U.S. can validly reincorporate into another state without the need to liquidate. Technically, under the law of most states of the U.S., as well as the Model Business Corporation Act, reincorporations should be implemented through cross-border mergers, whereby a company merges into a newly incorporated "shell" corporation in the state of arrival\textsuperscript{6}. The "emigrating" corporation does not need to transfer also its headquarter or its business into the new state of incorporation. Therefore, U.S. corporations can freely choose the preferred corporate law, both at the moment of initial incorporation and afterwards, regardless of the location of headquarter and business.

Midstream reincorporations play a significant role in the U.S. market for corporate law. Indeed, U.S. corporations are initially chartered in the "home state" where also business and headquarter are, but upon going public most of them decide to reincorporate to Delaware, even though their business and activities remain in

\textsuperscript{5} \textit{Restatement of the Law, Conflict of Law, 2nd Edition:} \S 296 "In order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled"; \S 297 "Incorporation by one state will be recognized by other states."

state of origin\textsuperscript{7}. In other words, in the U.S. the regulatory competition among states, if ever occurs, is fundamentally aimed at attracting already existing corporations to domestic law.

B. \textit{Reincorporations in the European Union}

In the European Union, like in the U.S., corporate law is state law\textsuperscript{8}. However, differently from the U.S., member states do not share a common choice of law criterion for corporations. As is well known, member states' choice of law criteria can be roughly divided in two opposite fields\textsuperscript{9}. On the one hand, according to the "incorporation theory", companies are governed by the state of incorporation, regardless of the location of business or headquarter. On the other hand, under the "real seat theory" companies should be incorporated in the same state where the headquarter is. The question as to whether reincorporations are allowed or not, however, is independent from the choice of law criterion adopted. Consequently, till few years ago a number of member states did not allow reincorporations at all, and most of them still do not admit "direct reincorporations", by transferring the registered office\textsuperscript{10} from the original country to the new one. However, this

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\textsuperscript{7} Romano, \textit{Law as a product}, supra note 1, 225; Lucien A. Bebchuk & A. Cohen, \textit{Firms' Decision Where to Incorporate}, 46 JOURN. LAW, ECON, 383 (2003).


\textsuperscript{9} Although this divide is, at a deeper glance, an oversimplification, I will nonetheless use it for the sake of simplicity. See: Wouters, \textit{Private International Law and Freedom of Establishment}, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW, 103 (2001); Benedettelli, \textit{Liberta' comunitarie di circolazione e diritto internazionale private delle societa'}, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 570 (2001).

\textsuperscript{10} I will use the English language "registered office". However, in continental European jurisdictions the registration should coincide with a formal clause of the articles of incorporations, called "statutory seat"; in these countries, corporations that want to change jurisdiction and registration, will be required to signal this choice by amending the provisions of the by-laws
situation is slowly changing for intra-EU reincorporations due to recent development of EU derivative law and of the European Court of Justice case law. In recent times, indeed, the E.U. enacted a directive enabling cross-border mergers, so that corporations have now at disposal a legal mechanism to reincorporate in another member states.

1. Before the revolution

Since few years ago, reincorporations were not generally admitted throughout the European Union and a number of member states simply prohibited domestic companies from reincorporating abroad, either directly or by way of cross-border mergers.

Such prohibitions of "outbound" reincorporations were independent from the choice of law criterion adopted by the state of origin. Both the "incorporation theory" and the "real seat theory" are neutral for the question as to whether companies can change the state of incorporation without the need to liquidate. For instance, despite U.K. and Germany follow opposite choice-of-law criteria, their laws converge regarding the limits posed to the freedom to "emigrate". The difference between such two states is that for English law a transfer abroad of registered office is simply impossible\(^ {11} \), while under German law any transfer

\(^ {11} \) Under English conflict-of-law the competent jurisdiction for corporate affairs is such where the original domicile of the corporation is located and, therefore, reincorporations are not admitted: A-G v Jewish Colonisation Association [1900] 2 QB 556; Baelz v PT [1926] 1 Ch. 683; Gäske v Inland revenue commissioners [1940] 2 KB 80 ("[t]he domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence"); Carl Zeiss Stiftung v. Rayner & Keeler Ltd and others (n. 3) [1970] 1 Ch 506, 544; National trust company
abroad of the registered office or the corporate headquarter may lead to the liquidation of the company and to the taxation of its assets\textsuperscript{12}.

However, other states allowed reincorporations, but restricted significantly the practical availability of this transaction, often with the aim to protect minority shareholders and creditors. For instance, under France law "private" limited liability corporations can enter into a direct reincorporation only if shareholders approve such transaction unanimously\textsuperscript{13}; by contrast, French "public" corporations can decide to reincorporate with simple majority, but only to another member state or to states with which France has signed an international agreement\textsuperscript{14}. To be sure, other states allow direct reincorporations and regulate this proceeding with the aim to protect all involved constituencies. In Spain, for instance, direct reincorporations have been explicitly admitted and regulated in

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\textsuperscript{13} Code de commerce, Article L. 223-30.

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2009\textsuperscript{15} through a complex proceeding aimed at protecting minority shareholders and creditors.

Similarly, reincorporations abroad by way of cross-border mergers were allowed by some member states, such as Italy\textsuperscript{16}, French and Spain, but were prohibited by others, such as Germany, Austria, Luxembourg and the Scandinavian states\textsuperscript{17}.

2. Revolution step 1: The liberalization of initial incorporation

In the last decade, the European Court of Justice has banned\textsuperscript{18} unreasonable restrictions posed by member states to "inbound" transfers of the headquarter of foreign corporations\textsuperscript{19} and "inbound" cross-border mergers\textsuperscript{20}. Consequently, domestic restrictions to the activities of pseudo-foreign corporations are allowed

\textsuperscript{15} Ley 3/2009, "Modificaciones estructurales de las sociedades mercantiles" [structural amendments of corporations].

\textsuperscript{16} Italian law admits cross-border mergers, yet it is still unclear whether direct reincorporations are allowed. The conflict of law criterion for corporations refers, similarly to English law, to the country "where the incorporation occurred" (article 25, act 218/1995). Consequently, reincorporations should not be admitted, as conflict of law refers to the original place of incorporation not to any subsequent places of "re-incorporation". However, Italian Civil Code (articles 2437 and 2473) allows corporations to transfer abroad their statutory seat, in which case dissenting shareholders have the right to withdraw from the company. Additionally, as a matter of fact, reincorporations are commonly implemented in the Italian business practice and accepted by many local chambers of commerce, despite the contrary opinion of the majority of case law. Therefore, if we look at the "law in action", we should assimilate Italy to the countries that admit reincorporations, while the "law on the book" is fuzzy and uncertain. See: FEDERICO M.MUCCIARELLI, SOCIETÀ DI CAPITALI, TRASFERIMENTO ALL’ESTERO DELLA SEDE SOCIALE E ARBITRAGGI NORMATIVI (Milan, 2010).


\textsuperscript{18} These restrictions are violations of the EU freedom of establishment. Pursuant to article 49 TFUE, the Freedom of establishment grants to citizens and corporations of European member states the right to establish themselves in other member states and to set up branches and subsidiary, without being discriminated and without suffering unreasonable restrictions and burdens. In addition, pursuant to article 63 TFUE, restrictions to free movements of capital are banned within the EU as well as with third states.


\textsuperscript{20} European Court of Justice C-411/03, SEVIC System AG [2005] ECR I-10805
only if they fulfill the four condition of the s.c. "Gebhard-test": "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it". In practice, this means that the state of incorporation is free to decide autonomously the policy goals to be pursued through corporate law and to set the level of shareholders' and creditors' protection, and that the other states where companies run their business or have the headquarter should accept rules, policy goals the level of creditors' protection decided by the state of origin. Consequently, corporations can be incorporated in any member state and run their business in another state. Free choice of corporate law at the moment of the incorporation, therefore, is admitted in the E.U., but only if the state of incorporation does not require domestic companies to have their business or its headquarter on the territory. The liberal decisions of the ECJ has given free way to a flourishing market for initial incorporations throughout the E.U. Differently from the U.S., the actors of this market are “private” not listed corporations: Indeed a relevant number of limited liability corporations in recent years were formed in

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22 The rationale is that creditors should rely upon the transparency of the rules to be applied to the corporation and to the accounting statement published under the law of origin. This rationale is acceptable for sophisticated adjusting creditors, yet it is doubtful that nonadjusting creditors really can rely exclusively upon transparency and that in certain circumstances they do not deserve a protection from the state where the business is conducted. See: Horst Eidenmüller, Mobilität und Restrukturierung von Unternehmen im Binnenmarkt, JURISTEN ZEITSCHRIFT, 24, 28 (2004).
states with low capital requirements – typically in the U.K. – but pursue their business exclusively in the "home state".

3. Revolution step 2: Reincorporations through cross-border mergers

Regarding restrictions placed by the original country of incorporation to reincorporations abroad, ECJ’s case law is much more uncertain. In the leading case “Daily Mail” of 1988, the ECJ declared that freedom of establishment does not cover the freedom to “emigrate”, since corporations are product of the domestic state law and their existence depends entirely on the jurisdiction of incorporation. Daily Mail has always been considered as a milestone of ECJ’s case law, so that member states felt free to prohibit domestic corporations from reincorporating abroad. Things, however, are slowly changing. After Daily Mail, indeed, some corporate tax decisions seem to adopt different views, without openly challenging Daily Mail. Eventually, the ECJ in the "Cartesio" ruling of 2008 partially reversed Daily Mail, by stating in an obiter dictum that member

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26 European Court of Justice, C-210/06, CARTESIO Oktató és Szolgáltató [2008] ECR I-09641. See: Korom – Metzinger, Freedom of establishment for company: the European Court of Justice
states can keep own substantive and conflict law for domestic corporations, but can not “require the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State.” This part of the decision is merely an obiter with doubtful binding force, yet it is extremely significant, since it signals what policy the Court will pursue if a question on a "direct reincorporation" should be submitted to her. Despite the ECJ has been dithering for many years, reincorporations were eventually liberalized by E.U. derivative law during the last decade. However, this liberalization was not pursued directly, by allowing "direct reincorporation" abroad, but through cross-border mergers. To be sure, the enactment of a directive on reincorporations has been on the agenda of the European Commission for several years, yet such proposal was eventually dismissed in 2007. A first detailed project for a directive was presented in 1997, but was not approved. In 2002 a panel of corporate law specialists, entrusted by the E.U. Commission to develop proposals of reform for the European company law (the "high level group") firmly recommended to liberalize reincorporations throughout the European Union, as a way to increment both efficient allocation of resources and

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27 The case at stake in Cartesio was not one of reincorporation, but of simple relocation of the administrative seat from Hungary to Italy, without the aim to change applicable company law. Therefore the second prong of the Cartesio ruling, according to which reincorporations should be allowed throughout the E.U., is an obiter dictum with doubtful binding force.

28 Cartesio, supra note 26, 112. In other words, member states can prohibit domestic corporations to transfer their headquarters abroad, but can not prohibit them reincorporations to another European jurisdiction.

29 Such directive should have been the 14th directive on corporate law harmonization, and in the following text I will refer to it also as to the project for a XIV directive.

the quality of domestic laws\textsuperscript{31}. Following this suggestion, the Action Plan of the Commission of 2003 to modernize company law identified the directive on reincorporation among their priorities\textsuperscript{32} and the 14th directive was also on the "Lisbon Agenda" of 2005. Such directive proposal would have allowed "direct reincorporations" from one state to another and, at the same time, would have protected minority shareholders, creditors and employees. Nonetheless, and despite the repeated calls of the European Parliament to the Commission for submitting a proposal on corporate reincorporations, in 2007 the Commission decided to abandon the project. The reason was that such reform does not provide for evident advantages that outweigh the risk that, by reincorporating abroad, domestic company would displace member states' authority in establishing own policy goals through corporate law rules\textsuperscript{33}. The final dismissal of the proposal came quite as a surprise, because E.U. derivative law during the last decade had already turned in another direction.

The first step towards freedom of reincorporation was the Regulation on the European Company (\textit{Societas Europaea}, hereinafter "SE" and "SE Regulation")\textsuperscript{34}. The SE is a type of corporation which is not established by any EU member state, but directly by EU law. However, the SE Regulation governs the SEs only partially,


\textsuperscript{34} Regulation of the Council 2157/2001/CE, October 8th 2001, on the statute of the European Company (hereinafter, the "SE Regulation").
since the major part of their rules are established by the member state where the
registered office is. In practice, SEs are domestic joint stock corporations with a
"federal" E.U. vest. One of the reason to create this new kind of company with a E.U.
legitimation was to allow cross-border reincorporations and transfer of the
registered office from one member state to another. Indeed, SEs can change the
applicable law by transferring abroad the registered office, which makes the SE a
potential vehicle to avoid restrictions to reincorporations placed by member
states. However, the SE is not a vehicle for free choice of law, because its
administrative seat should be placed in the same country of the registered office.
Therefore, in order to change the applicable company law, SEs should shift both
the registered office and the administrative seat into the new jurisdiction.
Freedom of midstream reincorporation throughout the E.U. was eventually
imposed by the E.U. to the member states by enacting a directive on cross-border

35 SE Regulation, article 9(1).
36 SE Regulation, article 8. By contrast, the SEs can transfer the registered office outside the EU
and, in this way, to "convert" into an extra-EU corporation. The consequence produced by a
decision of a SE's general meeting to transfer the registered office outside the EU are in the
competence of the member state where the registered office: Ringe, The European Company Statute,
37 Luca Enriqueis, Silence is Golden: the European company as a catalyst for company law
arbitrage, J. CORP. L. STUD., 82, 78 (2004); Horst Eidenmüller, Andreas Engert & Lars Hornuf,
Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage, 10
EUROPEAN BUSINESS ORGANIZATION REVIEW, 1 (2009).
38 SE Regulation, article 7. See: Ringe, The European Company Statute, supra note 36, 190 (Article
7 of the SE Regulation violates EC freedom of establishment). However, the SE Regulation does not
provide for any specific definition of "administrative seat". Two alternative interpretations are
possible. On the one hand, we might hold that "administrative seat" is the place where the board
meets, in which case free choice of law does not suffer any great restriction, since cheap flight
connection allow board’s directors to fly easily to the country of the registered office: Enriqueis,
Silence is Golden, supra note 37, 81. By contrast, if we accept a more strictly concept of
"administrative seat", for instance the place where day-by-day administrative decisions are taken,
then regulatory arbitrages becomes more implausible and the SE would be an unsuitable device
for free choice of corporate law: Daniel Zimmer & Wolf-Georg Ringe, Comment to Article 7 SE
Regulation, n. 12, (Lutter & Hommelhoff eds.) SE KOMMENTAR, (Köln, 2008).
mergers in 2005\textsuperscript{39}, which introduced a specific proceeding to implement this kind of transactions\textsuperscript{40}. A company incorporated in a member states, therefore, can now incorporate a new "shell" company in another state and then merge into it, without risking that the state of origin taxes its hidden reserves as in case of liquidation\textsuperscript{41}. Therefore, European firms seem to have at disposal a "U.S. - style" mechanisms to reincorporate in another member states\textsuperscript{42}.

However, some differences between the European Union and the U.S. still exist. The first difference is that E.U. law does not harmonize corporate choice-of-law criteria of member states and does not ban the "real seat theory", which can be still applied by member states to domestically incorporated companies\textsuperscript{43}.

\textsuperscript{39} Directive 2005/56/CE, of the Parliament and the Council, October 26\textsuperscript{th} 2005, on cross-border mergers of limited liability companies (hereinafter, the "Cross-border Merger Directive"), entered into force on December 16th 2007. This directive was enacted long before the cross-border merger directive, yet it did not mandated member states to accept such transactions. See Jens Damman, \textit{A New Approach to Corporate Choice of Law}, 38 VAND. J. TRANSNAT’L L., 51, 77 -79 (2005).

\textsuperscript{40} Almost simultaneously, the ECJ banned prohibitions to cross-border merger placed by the country of the post-merger company as a violation of EU freedom of establishment: European Court of Justice, C-411/03, \textit{SEVIC System AG} [2005] ECR I-10805.

\textsuperscript{41} Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different member states O.J. (L 225) 1.


\textsuperscript{43} In Germany, the "real seat theory" has been upheld by the Federal Court of Justice, at least for extra-E.U. corporations, that are recognized in Germany as German partnerships without limited liability: Bundesgerichtshof [BGH] [Federal Court of Justice] October 27, 2008, "Trabrennbahn", 23 (Swiss company) and Bundesgerichtshof [BGH] [Federal Court of Justice] October 8 2009 (Singapore company) www.bundesgerichtshof.de. The Federal Court of Justice claims that the real seat theory is part of German customary case law and can be repealed only by an explicit act of the Parliament. However, the reform of 2008 of the limited liability corporations (that was considered not sufficiently explicit by the BGH) has abolished the duty of German corporations to keep the place of business and the headquarter in the same city of the registered office (see the repealed § 4(2) \textit{GmbHG} and § 5(2) \textit{AktG}). It is not clear whether German companies can now transfer the headquarter abroad (which would be at odds with the real seat theory), but the opinions of the Federal Court of Justice seem to point in the opposite direction. This opinion is held by: Hoffmann, \textit{Die stille Bestattung der Sitztheorie durch den Gesetzgeber}, ZIP, 1581 (2007); Bayer & Schmidt, \textit{Grenzüberschreitende Sitzverlegung und grenzüberschreitende Restrukturierungen nach MoMG, Cartesio und Trabrennbahn}, \textit{Zeitschrift für das gesamte handels- und wirtschaftsrecht} (ZHR) 735,

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Consequently, if the "real seat theory" is followed by either the member state of arrival or the member state of original incorporation, reincorporations require also a transfer of the headquarter to the new jurisdiction. The Cartesio opinion, according to which reincorporations are protected by freedom of establishment, does not change this conclusion, because the real seat theory, taken as a choice of law criterion, does not obstacle reincorporations abroad, providing that the emigrating company transfers both the registered office and the headquarter in the new state<sup>44</sup>.

Additionally, the proceeding of cross-border merger is burdensome and time consuming. These are the essential steps of this transaction, according to the Directive: (a) the transferring corporation needs to draw-up a draft term of the merger and make it public on the domestic public register<sup>45</sup>; (b) the corporation should publish in the national gazette the essential elements of the transaction (which is a pretty expensive requirement)<sup>46</sup>; (c) the board and an independent expert should draw-up business and financial reports<sup>47</sup>; (d) the transaction should be approved by the shareholders meeting at least 30 days after the publication of

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749 (2009); Marc-Philippe Weller, GmbH-Bestattung im Ausland, ZIP, 2029, 2030 (2009), but see HERIBERT HIRTE, KAPITALGESELLSCHAFTSRECHT<sup>6</sup>, Köln, 2009, 465, n. 7.14. Additionally, we should take into account that a legislative project has been presented to the German Parliament by a commission of expert, which will replace the real seat theory with the incorporation theory. See: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Gesetz_zum_Internationalen_Privatechten_Vereine_und_juristischen_Personen.pdf?__blob=publicationFile

<sup>44</sup> See: Christoph Teichmann, Cartesio: Die Freiheit zum formwechselnden Wegzug, ZIP, 393. 397 (2009).

<sup>45</sup> Cross-Border Mergers Directive, Article 5 and Article 6(1)

<sup>46</sup> Cross-Border Mergers Directive, Article 6(2)

<sup>47</sup> Cross-Border Mergers Directive, Article 7 and Article 8.
the draft in the public register\textsuperscript{48}; (e) the transaction and the documents should be submitted to judicial or notary supervision\textsuperscript{49}; (f) eventually, the merger is published in the new register. Additionally, a significant number of member states protect creditors of the merging company by granting them a right to oppose judicially to the transaction within a certain time from its publication, or to obtain security or advanced payment. These mechanisms make the whole proceeding more time-consuming and expensive, since creditors have at disposal a certain time, ranging from 30 to 90 days, to oppose the deal.

III. Company law and federalism: Vertical power allocation in the U.S. and the E.U

Reincorporations induce a change of the applicable law, from the law of the state that originally chartered the company to a different one, chosen by the corporation afterwards. It is of fundamental importance, therefore, to clarify which rules are shifted from the former jurisdiction to the second one. U.S. and the E.U., however, are complex or "federal" legal systems, where the regulatory power on a number of issues - not only on corporate law - is shared by the "federal" bodies and the member states. Both systems have in common one fundamental character, namely that the states, not the federal body, are exclusively competent to charter corporations\textsuperscript{50}.

\textsuperscript{48} Cross-Border Mergers Directive Article 9 and Third Council Directive 78/855/EEC of 9 October 1978, based on Article 54 (3) (g) of the Treaty, concerning mergers of public limited liability companies (hereinafter, the "Third Directive"), Article 8(1)(a)

\textsuperscript{49} Cross-Border Merger Directive, Article 10 (pre-merger scrutiny) and Article 11 (overall scrutiny of the completion of the merger)

\textsuperscript{50} Not all federal states follow the same pattern: Canadian corporations, for instance, can be chartered both under federal and under state law. Yet the relations between federal level and lower jurisdictions is peculiar, since both "level" have enacted autonomous corporate laws. Consequently,
A. Federal corporate law in the United States

The internal affairs doctrine is widely established as the choice of law criterion among states of the U.S. for corporate law issues. Consequently, in order to know how corporate law is, a simple answer is to look at the law of the state of incorporation. Things, as usual, are much more complicated and to have a full picture of U.S. corporate law it is necessary to enlarge our view and to bring into the scene also the federal actors, namely the Congress and the SEC, and their "vertical" relations to member states. Indeed, the Congress has the power to enact legislations aimed at regulating the commerce among the several states ("commerce clause") and corporate governance can be federalized to address interstate commercial issues.

In recent years, legal scholars have debated upon the role of federal actors on corporate governance and upon the existence of a "vertical" competition among the Congress and the states to govern corporate law. While some scholars hold that corporations can choose to incorporate either under federal law (Canada Business Corporation Act [CBCA] 1985) or under one of the law of the member states. In addition, corporations can "move" from one state to another and also from federal law to state law, by following the procedure provided for by the original law (s.c. "continuance"). Therefore, Canadian corporations have at disposal a different kind of menu of choices than U.S. ones. Federal regulation is able to intervene in fields that not addressed properly or sufficiently by state law; it does it however in a "soft" way, by leaving corporations the power to "opt" for federal law instead of state law. Reincorporations, therefore, in Canada have a broader meaning than in the U.S. (or the E.U.) since companies can move both horizontally and vertically. Van Duzer, The law of partnerships and corporations, Toronto, 2003, 375.

51 To be sure, another "federal" source of corporate law are the stock exchange rules. For instance, the New York Stock Exchange manual bans no voting stocks (§303) or requires independent directors (§313); see Arthur Pinto, An Overview of United States Corporate Governance in Publicly Traded Corporations, 58 AM. J. COMP. L., 257, 281 (2010).

52 Article 1, Section 8 U.S. Constitution.

federalization of corporate law is not significant, since the regulation of agency
relations between shareholders and the board has not been touched by federal
law\textsuperscript{54}, other ones have argued that the federalization of corporate law is a
significant threat for state's powers and for Delaware's dominion on corporate law
matters, so that corporate regulatory competition among states is substantially
restricted by actual\textsuperscript{55} or threatened federalization\textsuperscript{56}. Another scholar, in addition,
has stressed the democratic and political virtue of federalization of corporate law
and has shown that Delaware case law reacted positively to the threat of
federalization posed by the Sarbanes-Oxley Act\textsuperscript{57}. Finally, according to an
intermediate opinion, in the aftermath of the Enron scandals Delaware tacitly
delegated to the federal government the enactment of certain strict rules that
would have caused a high political cost\textsuperscript{58}. The debate upon vertical competition, in
addition, has also a normative side: for scholars who hold that horizontal
regulatory competition can produce negative externalities, inefficiencies and,
ultimately a "race to the bottom" in corporate law, federal intervention is the

\textsuperscript{54} See the seminal paper of Roberta Romano, \textit{Law as a product, supra note 1}, and, more recently,
discussing the impact of the Sarbanes Oxley Act and responding to Roe: Roberta Romano, \textit{Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?}, 21 \textit{OXFORD REVIEW OF ECONOMIC POLICY}, 212 (2005). Similarly, see also Richard M. Buxbaum, \textit{Is There a Place for a European Delaware in the Corporate Conflict of Laws?}, 74 \textit{RABELSZ} 1, 14 (2010).


\textsuperscript{56} Roe, Delaware's competition, 117 \textit{HARVARD L. R.}, 588 (2003); Roe, Delaware and Washington as
corporate law makers, 34 \textit{DELAWARE J. CORP. L.}, 1 (2009) (Delaware is always exposed to the risk of
federalization on corporate law matters).

\textsuperscript{57} Renee M. Jones, \textit{Rethinking Corporate Federalism in the Era of Corporate Reform}, 29 \textit{J. CORP. L.},

\textsuperscript{58} Kahan – Rock, \textit{Symbiotic federalism and the structure of corporate law}, 58 \textit{VAND. L. REV.}, 1573
(2005) (Delaware implicitly delegate some specific matters to the federal government, when this is
in a better political position to address them).
proper solution\(^5\), while the "race to the top" theory leads to opposite result and to limit federal intervention into internal affairs of the corporation\(^6\).

A positive analysis of U.S. law reveals that a number of corporate governance issues have been federalized, mainly as response to economic or financial crisis. The first wave of federalization was undertaken within the New Deal legislation by the Securities Exchange Act 1934, which is still the backbone of federal corporate governance regulation and whose norms need to be implemented by SEC rules\(^7\). The second relevant wave of federalization of corporate law matters occurred almost 70 years later, through the Sarbanes Oxley Act (hereinafter "SOX"), which was enacted in 2002 as a response to the Enron scandal\(^8\). Eventually, the third step of federalization was embodied in the Dodd-Frank Act of 2010, which was the reaction to the big economic crisis of 2008\(^9\). Finally, as regarding the enforcement of the law, it is worth to point out that in the U.S. any litigation related to federal rules is in the competence of federal courts, not of state courts\(^10\). The presence of an autonomous federal circuit that deals with the interpretation of federal corporate law rules is a significant step towards the uniformity of this regulation through a body of judicial decisions.

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\(^5\) Cary, Federalism and Corporate Law: supra note 2; Bebchuk, Federalism and the Corporation, supra note 2.


\(^7\) To be sure, SEC Rules should not exceed the power conferred by the Securities Exchange Act. See: The Business Roundtable v. SEC, 905 F.2d 406 (App. D.C. 1990); SEC Rules 19c-4, which barred U.S. securities exchanges from listing dual-class stock corporations, was deemed as exceeding the powers conferred by article 19 of the Securities Exchange Act.


To sum up, federal law regulates some issues that are relevant for corporate governance and that, to a certain extent, belong also to the internal affairs of the corporation. The most important of these provisions are:

- regulation of proxy voting\(^{65}\), which is an important issue in widely held corporations where shareholders face collective action problems and rational apathy; recently, the Dodd-Frank Act has modified such regulation, authorizing the SEC to issue new rules aimed at facilitating proxy access\(^{66}\);
- mandatory disclosure rules of relevant concentration of shareholdings\(^{67}\);
- general anti-fraud provision\(^{68}\), from which federal courts and SEC have developed also the ban of insider trading\(^{69}\);
- regulation of internal auditors and audit committee, aimed at granting their independence and transparency\(^{70}\).

\(^{65}\) Securities Exchange Act §14(a).

\(^{66}\) Dodd-Frank Act §971: The SEC has authority to promulgate a so-called “proxy access” rule pursuant to which shareholders would be allowed to use the company’s proxy statement to nominate candidates to the board of directors. On August 25, 2010, the SEC enacted a new regulation (Rule §240.14(a)-11) that allow shareholders with at least 3% of the shares and who held these shares for at least 3 years, to put own board’ member nominee (for up to 25% of board’s seats) in the company’s proxy materials. The U.S. Chamber of Commerce challenged the rule to an administrative court and, as a response, the SEC has suspended its application until the 2012 proxy season. The new SEC rules on the proxy access have raised an intense debate. See the opposite opinions of Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge*, (event studies show that the new rules is considered as value enhancing by the market) and Marcel Kahan & Edward Rock, *The insignificance of Proxy Access*, (showing that the new rules do not significantly reduce the cost of proxies as compared with the general proxy contest).

\(^{67}\) Securities Exchange Act §13(d).

\(^{68}\) Securities Exchange Act §10b-5.


\(^{70}\) Sarbanes Oxley Act 2002, §§ 201, 203, 204, 301, 302, 303, 304.
• provisions on conflict of interests of corporate bodies, which address the relations between the board and shareholders and enter in the internal affairs of the corporation;

• regulation of executive compensation through the Dodd-Frank Act, which requires shareholders' advisory vote on boards' compensation, mandates full independence of compensation committee, provides additional disclosure of compensation plans and extended the original claw back rules of executive compensation.

Consequently, in the U.S. due to the partial federalization of the law of listed corporations, for these entities the effects of reincorporations are limited to the issues left to state law. These issues are relevant, since they cover the fundamental agency relation between the board and shareholders. As we have seen above, reincorporations are relevant because corporate laws are not identical across countries, but whenever uniformity is reached, reincorporation does not play a significant role. In the U.S., therefore, corporate free choice of law and the regulatory competition among states are partially constrained by the fact that states do not enjoy an exclusive competence on corporate law issues. This means that corporations are not completely free to choose the preferred law, since part of

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74 Dodd-Frank Act §952.
75 Dodd-Frank Act §953.
76 Dodd-Frank Act §954.
corporate law rules are not at their disposal. In practice, using the words in a bit a-technical fashion, we can say that "reincorporations" are admitted for state rules, but are not admitted for federal regulation of listed corporations. By contrast, federal law has not intervened to regulate LLC and "private" limited liability corporations, thus a decision of such companies to reincorporate from one state to another have a much broader impact, because the entire set of rules in the competence of the states will be shifted.

B. Weak harmonization of corporate law in the E.U.

Also in the European Union, similarly to the U.S., member states are competent to charter and regulate corporations. Using the language of the European Court of Justice, "companies are creatures of the law and, in the present state of Community law, creatures of national law". Nonetheless, EU federal bodies have some powers in the field of corporate law and securities regulation. In the European Union, the allocation of legislative powers between central bodies (the EU Commission, the Council and the European Parliament) and the member states reflects the "hybrid" constitutional nature of the European Union, which is neither a true federal state nor a mere international organization. The vertical allocation of powers between the EU bodies and the member states is shaped by the general principle of "subsidiarity". Regarding corporate law, the Treaty on

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78 Daily Mail, supra note 34, 19.
79 Treaty of the European Union ("TUE") article 5(3): "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at
the Functioning of the European Union (hereinafter "TFUE") provides the EU with powers to enact directives to harmonize the internal laws of member states with the purpose of realizing an internal market\(^{60}\). In this regard, the EU harmonizing effort has always been underlined by the idea that a minimum level of harmonization of corporate law is essential for establishing a single internal market in the EU and to avoid the "race to the bottom" that regulatory competition would have, allegedly, produced\(^{61}\).

Consequently, a number of E.U. Directives have been enacted since 1968, addressing the most significant issues of corporate law regulations, namely: disclosure and registration mechanisms, nullity of the corporations, board's powers and *ultra vires*\(^{62}\), incorporation's mechanisms, capital requirements and mechanisms to creditors' protection\(^{63}\), mergers and divisions\(^{64}\), accounting and auditing rules\(^{65}\), takeover bids\(^{66}\), shareholders' rights\(^{67}\).

\[^{60}\text{Article 50(2)(g) TFUE.}\]

\[^{61}\text{See, among others: HERBERT WIEDMANN, GESELLSCHAFTSRECHT I, 51 (München, 1980).}\]

\[^{62}\text{First Council Directive 68/151/EEC of 8 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended and then codified by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009.}\]

\[^{63}\text{Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.}\]

\[^{64}\text{Third Directive; Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies.}\]


However, legal scholars in recent years have increasingly challenged the validity and efficiency of the general goal of harmonizing corporate law\textsuperscript{88}. Additionally, the real impact of these harmonization directives is highly debated: while a traditional and widespread opinion considers the process of harmonization a significant element of a new "European corporate law"\textsuperscript{89}, other scholars are much more skeptical about the ability of directives to really harmonize domestic laws and legal cultures\textsuperscript{90}.

For the purposes of this paper, it is sufficient to remark that harmonization directives can not produce the same kind of law uniformity as U.S. federal law, because they need to be implemented by domestic laws of each member state. Furthermore, in the European Union the judiciary power is still entirely in the competence of the member states, so that national courts will primarily interpret and enforce the domestic rules that implement EU directives. The absence of a federal system of courts is the most profound element that divides the EU from the U.S. Indeed, the competences of the Court of Justice of the European Union\textsuperscript{91} are limited to those enumerated in the TFUE\textsuperscript{92} and, furthermore, the ECJ can decide on


\textsuperscript{91} The Court of Justice of the European Union includes the Court of Justice, the General Court (first instance) and some specialized courts: Article 19(1) Treaty on the European Union.

\textsuperscript{92} Such competence are: Decisions upon compliance of member states to EU law (article 258 TFUE); review of legality of EU legislative acts (article 263 TFUE); decisions upon lack of due actions by EU bodies (article 265 TFUE); interpretation of the Treaty and EU law (article 267 TFUE); compensation for damages caused by EU bodies (article 268 TFUE).
the interpretation of EU law only upon preliminary reference made by national courts, not after a direct suit brought by private parties\textsuperscript{93}. Furthermore, a number of directives apply only to "public" joint stock corporations, while "private" limited corporations are often outside the range of the harmonization\textsuperscript{94}. We can conclude by saying that in the EU the vertical allocation of powers in corporate law matters is shaped differently than in the U.S., since the "central level" (i.e. the E.U. bodies) do not and can not advocate entirely the power to regulate such matters, but exercises a more "soft" form of regulation through directives, whereby they leave to member states the last word in shaping corporate law rules. Consequently, by reincorporating into another member states, a European corporation would shift the entire sets of rules usually labeled as "corporate law" and in the competence of the state of incorporation.

IV. The scope of corporate law in the U.S. and in the E.U.

We should now address the question of which set of rules can shareholders (and/or the board, according to internal corporate legislation) deliberately shift from one jurisdiction to another and of which is the impact of such changes. To compare different policies, and to understand their rationales, we should focus our attention to the function played by the different sets of rules in corporate activities. Corporations are complex relations among different classes of stakeholders: Shareholders, creditors (e.g. banks, employees or suppliers) and the board. These

\textsuperscript{93} Article 267 TFUE.
\textsuperscript{94} The Second Directive (capital requirements), the Third Directive (mergers) and the Fourth Directive (division) do not apply to private limited liability companies.
relations are regulated by different sets of rules, only some of which will change after a reincorporation. To understand this issue it is necessary to classify the relevant interests and to depict the different legal strategies aimed at addressing the agency problems arising from their relations.

A. Corporate agency relations and the law

Each corporate governance system addresses the fundamental agency problems between corporate stakeholders (control shareholders, minority shareholders, the board and creditors) through different mechanisms and strategies. In order to understand the effects of reincorporations upon corporate interests, it is necessary to depict briefly such different strategies. We will see that corporate law rules are only one of the possible solutions to agency costs.

a. Agency Problems between shareholders and the board. - The agency relation between shareholders and the board are addressed primarily by board’s duties and liabilities, and by the rules on shareholders' derivative action\(^\text{95}\). These are typical "corporate law" issues that belong to the internal affairs of the corporation. However, if corporate ownership is widely held and the capital market is sufficiently developed, the market for corporate control is a powerful force of boards’ discipline and, consequently, takeover regulation and board’s duties vis-à-vis unsolicited offers play a crucial role. By contrast, if shareholders ownership is

\(^{95}\) In general, we can say that shareholders are interested in maximizing the value of the corporation and that the board is hired to pursue such goals. The reality might be different, especially in widely held corporations, since the board might be tempted to pursue self-serving goals that do not maximize shareholders' wealth. On the other hand, had the board no discretionary powers to decide on the merit of general strategies or the day-by-day business, corporations would not work efficiently and effectively.
concentrated, the reduction of property costs relies mostly upon classical *ex ante* mechanisms such as boards’ liability, derivative suits and the activity of internal supervisory bodies.\(^{96}\)

\textit{b. Agency problems between minority and control shareholders.} - The agency problems between minority and control shareholders is relevant primarily in companies with concentrated ownership (as is mostly the case in continental Europe), in which it is far more significant than such between shareholders and the board.\(^{97}\) We can distinguish following two classes of opportunistic behaviors of majority shareholders against minorities: (a) transactions that advantage, directly or indirectly, private economies of majority shareholders at the expenses of corporate assets (s.c. “tunneling”); (b) transactions that dilute minority ownership, such as mergers or raising new capital without preemptive right. The goal to reduce agency costs deriving from the relation between majority and minority shareholders might be pursued through different strategies like (a) procedural or transparency requirements; (b) restrictions to the “abuse” of majority powers; (c) limits to concealed distributions to majority shareholders; (d) special rules on group of companies and intra-group liabilities.\(^{99}\)

\(^{96}\) In all circumstances, a powerful force is the labor market for managers: the more such market is restricted (i.e. managers have few alternatives) the more managers will make firm-specific investments and, consequently, will require certain safeguards.


\(^{99}\) See: Mathias Siems, *Convergence in Shareholder Law*, 199 - 210 (Cambridge University Press, 2008). In widely held corporations, when the market is developed and liquid, minority shareholders have in their hand also the weapon to sell their shares on the market. Additionally, other sets of norms protect shareholders by considering them as investors and market participant: insider trading, market transparency and prospectus regulation, takeover regulation.
c. Agency problems between shareholders and creditors. - The third agency problem is between shareholders and creditors and stems from the limited liability enjoyed by shareholders. In particular, the s.c. "defensive asset partitioning" protects shareholders' private assets from claims of corporate creditors\(^{100}\) and, by limiting the risk suffered by shareholders, induces them to invest in risky activities\(^{101}\). At the same time, the s.c. "affirmative assets partitioning", which protects corporate assets from claims of shareholders' private creditors, partially transfers risks to creditors\(^{102}\). Shareholders could, for instance, distribute excessive resources\(^{103}\), enhance the risk profile of the corporation\(^{104}\) or increase the debt leverage (s.c. debt dilution)\(^{105}\). *Ex ante*, sophisticated or “adjusting” creditors can discount from the credit price the risk of opportunistic behaviors of shareholders\(^{106}\), or can require “covenants”, which accelerate the loan under specific triggering


\(^{101}\) Frank Easterbrook & Daniel Fischel, *Limited Liability and the Corporation*, 52 *U. Chi. L. R.*, 97 (1985);

\(^{102}\) This is particularly evident when the insolvency approaches, because, if the corporation recovers thanks to the risky activities, shareholders will gain the entire surplus, while, if the corporation fails, shareholders will lose only the invested capital. See: Easterbrook & Fischel, *Limited Liability*, *supra* note 101, 96. However, limited liability has also positive effects for creditors, as it reduces their monitoring costs: Hansmann & Kraakmann, *The essential role*, *supra* note 100, 398. For proposals to restrict limited liability see: David W. Leebron, *Limited liability, tort victims and creditors*, 91 *Columbia L. R.*, 1573 (1991) (arguing that tort creditors should have priority over secured creditors); Henry Hansmann & Reinier Kraakmann, *Towards Unlimited Shareholder Liability for Corporate Torts*, 100 *Yale L. J.*, 1879, 1919 - 1920 (1991) (suggesting pro rata unlimited liability for tort claims).


\(^{106}\) Leebron, *Limited liability*, *supra* note 102, 1585 s.
circumstances\textsuperscript{107}, or securities, such as a lien that has priority in case of insolvency\textsuperscript{108}. Therefore, adjusting creditors do not need any protection\textsuperscript{109}. By contrast, “nonadjusting” creditors can not impose to the corporate debtor any specific security or covenant and can not discount the risk of default from the market price, so the entire risk of opportunistic behaviors will fall on their backs\textsuperscript{110}. The agency problems between shareholders and creditors may be addressed by the law through transparency strategies, such as mandatory registration\textsuperscript{111} or disclosure duties, and through rules or standards aimed at avoiding opportunistic behaviors of shareholders or at minimizing their impact on corporate activities. In this regard, the fundamental distinction is between rules aiming at preventing creditors’ damages (\textit{ex ante} strategies) and rules that operate after the corporation has become insolvent (\textit{ex post} strategies)\textsuperscript{112}. \textit{Ex ante} rules are, for example, minimum capital requirements or the different kinds of “solvency


\textsuperscript{110} See: Hansmann & Kraakman, \textit{Toward Unlimited Shareholder Liability}, supra note 102, 1920; Lucian A. Bebchuk, \textit{Federalism and the corporation}, supra note 1, 1489. “Nonadjusting creditors”, however, could free ride on the covenant and securities obtained by “adjusting creditors”: Enríques & Macey, \textit{Creditors versus capital formation}, supra note 105, 1172; Enríques & Gelter, \textit{Regulatory competition in European company law and creditor protection}, European Business Organization Law Review, 417, 430 (2006). This is true if the adjusting creditor requires the corporation to provide for general financial covenant, whereby the debtor is obliged to maintain certain assets or financial value. This does not exclude that externalities can be produced, especially when the securities required by adjusting creditors are personal and enjoy priority in case of insolvency. Ellis Ferran, \textit{The place for creditor protection on the agenda for modernization of company law in the European Union}, European Company Finance Review, 178, 192 (2006).


tests" aimed at establishing the proper assets' value to be held in specific circumstances. Ex post strategies are, among others, avoidances of fraudulent conveyances and concealed distributions within a bankruptcy proceeding\(^{113}\), or directors' liabilities towards the corporation or its creditors in case of insolvency or for having delayed the filing of insolvency\(^{114}\).

\textit{d. Choice of forum.} - To have a full picture of how the law addresses the fundamental agency relations, we should consider also the enforcement mechanisms. For instance, a good corporate law “on the books”, with high standard of shareholders or creditors’ protection, might be weakened by an inefficient civil procedure or if judges are deferent to shareholders’ or board’s decisions\(^ {115}\). The example of Delaware law is illuminating. Delaware corporate law is extensively judge-made law and the creation of legal rules and standards is partially delegated to the judiciary\(^ {116}\). Delaware's judge made law is doctrinally indeterminate\(^ {117}\) and,


\(^{114}\) Two examples from European countries: (a) the wrongful trading in English corporate law: Within insolvency proceedings, upon liquidator's request, directors can be made liable towards the insolvent corporation if it is proven that they knew, or shall have known, that no reasonable possibility existed to avoid insolvency, unless they have undertaken all possible measures to protect creditors (Section 214 Insolvency Act, see \textit{Davies, Introduction to Company Law}, Oxford 220, 96); (b) \textit{Insolvenzverschleppungshaftung} in Germany: Directors have the precise duty to file for insolvency when the corporation is not able to pay its debts or in case of balance-sheet insolvency (§ 15a \textit{Insolvenzordnung}). Directors are made liable towards both creditors and the corporations if they delay such filing: \textit{Thomas Bachner, Creditor Protection in Private Companies}, 191 (Cambridge, 2009).


to some extents, Delaware's courts do not simply "apply the law" but take policy decisions. In addition, the quality of Delaware' courts and civil proceeding is one of the reasons that induce firms to reincorporate in Delaware. To be sure, corporate law cases can be litigated outside Delaware\textsuperscript{118}, however such cases do not contribute to the evolution of Delaware case law and foreign courts simply apply Delaware courts' precedents in a rather passive way. Therefore, choice-of-forum criteria are relevant to understand the characters of a corporate governance system\textsuperscript{119}.

\textbf{B. The scope of corporate law in the U.S. and the E.U.}

If we bear in mind that the concept and the functions of "corporate law" are diverse from jurisdiction to jurisdiction, we can also understand why and to what extent U.S. and E.U. diverge regarding reincorporations. The most significant divergence is related to the effects produced by reincorporations, which are in the U.S. more limited than in the E.U. We have already met the first reason for this,


\textsuperscript{119} To be sure, in the international arena positive and negative conflicts of jurisdiction can easily arise whenever two countries adopt conflicting criteria, although within regional or federal legal systems such conflicts are often addressed by specific pieces of legislation. This is the case in the European Union, whereby according to the Regulation on jurisdiction (EC/Regulation 44/2001, art. 22(2)) the most important internal affairs should be litigated in the member state of the "seat". Such matters are: "the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs". However, the concept of "seat" is to be established according to each member states' own private international law, so that conflict of jurisdiction can still arise. In addition, other typical "internal" or "corporate law" matters, such as derivative suits, are not comprised in this list. See: Tobias H. Tröger, \textit{Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance}, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW, 3, 23 – 24 (2005).
that is the vertical division of powers between federal government and states: While in the U.S. corporate law rules are enacted and enforced only partially at state level, in the European Union the "federal" level has enacted a number of harmonizing directives, but has no direct legislative power and there is no federal court system, so that corporate law is substantially state law. In addition to these differences as to the "vertical" relations between central bodies and states, to understand the contours of regulatory competition and the effects of reincorporations we should compare the province of corporate law in different jurisdictions.

1. The scope of corporate law in the U.S. under the "internal affairs doctrine".

Within the boundaries set by federal intervention, corporate law in the U.S. is a state affair, so that corporations moving from one state to another shift the set of rules which are in the competence of the state. As we have seen above, the horizontal distribution of competence among states is generally governed by the internal affairs doctrine.

The internal affairs doctrine was originally adopted by U.S. states’ courts on a voluntary base during the Nineteenth century, in a time when corporations’ activities were prevalently domestic. Despite a different view expressed by the Delaware Supreme Court, the internal affairs doctrine does not seem to be

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121 In re Topps Co.S’holders Litig., 924 A.2d 951, 958-60 (Del. Ch. 2007); VantagePointVenture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1115-16 (Del. 2005). See also McDermott Inc. v. Lewis 531 A.2d 206 (application of Panama corporate law to a corporation incorporated in Panama and operating in Delaware).
mandated by the dormant commerce clause of the U.S. constitution\textsuperscript{122} as a necessary mechanism to facilitate interstate commerce\textsuperscript{123}. The U.S. Supreme Court addressed this issue in \textit{CTS Corp. v. Dynamics Corp. of America}, by upholding an Indiana anti-takeover law that applied only to corporations incorporated in Indiana, yet the Court seemed to be more concerned of the need that one single jurisdiction regulates internal corporate affairs, rather than with the conflict of law criterion to be applied by member states\textsuperscript{124}. And indeed the Internal Affairs Doctrine, as choice-of-law criterion, can suffer exceptions when a state different from the state of incorporation has "a more significant relation to the occurrence and the parties"\textsuperscript{125}. In addition, two states, namely California and New York,

\textsuperscript{122} The Commerce Clause (U.S. Constitution, Article I, §8, cl. 3) grants to the Congress the power to regulate commerce among states. Such clause, however, implicitly prohibits States from hindering interstate commerce even in absence of federal law.


\textsuperscript{124} \textit{CTS Corp. v. Dynamics Corp. of America}, 481 U.S. 69, 86 (1987) (Indiana law, requiring majority voting to take over Indiana corporations, is compatible with the dormant commerce clause): "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders"; it is "accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares". See also: \textit{Amanda Acquisition Corp v. Universal Foods corp.} 877 F.2d 496 (7th Cir. 1989) and \textit{Tyson Food Inc. v. Mc Reynolds} 865 F.2d 99 (6th Cir 1989). By contrast, see \textit{Edgar v. MITE Corp.}, 457 U.S. 624 (1982), where the Supreme Court held the Illinois anti takeover statute, regulating takeover bids of corporations with significant assets in Illinois, as a violation of the dormant commerce clause. The Court distinguished \textit{CTS} from \textit{Edgar}, because Illinois antitakeover statute did not apply only to Illinois corporations, while the Indiana anti-takeover law applied only to Indiana corporations and regulated their internal affairs. See: Christian Kersting, \textit{Corporate Choice of Law – A Comparison of the United States and European Systems and a Proposal for a European Directive}, 28 BROOK. INT'L L. 1, 7 – 8 (2002 – 2003).

\textsuperscript{125} \textit{Restatement of the Law, Conflict of Law}, 2nd edition, § 302: "Issues involving the rights and liabilities of a corporation, other than those dealt with in § 301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied."
partially apply domestic corporate law rules to foreign not listed corporations having their business on the domestic territory\textsuperscript{126}.

The major difference between the internal affairs doctrine and the mechanisms applied in the member states of the European Union, however, is related to the set of rules to which the choice of law criterion applies. In other words, the real difference concerns the province of corporate law, which is narrower in the U.S. than in the E.U. Indeed, the scope of the internal affairs doctrine is mostly limited to specific matters, such as shareholders' rights, boards' duties and shareholders' financial duties, whilst a number of relevant rules aimed at creditors' protection, are either federalized, or outside the doctrine\textsuperscript{127}.

To be sure, some rules aiming at avoiding opportunistic behaviors of shareholders belong to the internal affairs doctrine, yet such rules do not seem to be effective. The most significant "corporate law" mechanism to protect creditors is the restriction to distribution of dividend to shareholders. In many states dividends can be paid only if the distribution would not lead to the insolvency and may not be paid out of stated capital\textsuperscript{128}. However, under the law of many states (with the important exception of California\textsuperscript{129}) the board or the shareholders can shift parts


\textsuperscript{128} See, among others: Delaware General Corporate Law §170: directors can pay dividends out of the capital surplus or, alternatively, out of net profit of current or last year. See also Revised Model Business Corporation Act Section 6.40: directors can pay dividend if there is a surplus off assets out of liabilities, and only if, after the distribution, the corporation would be still able to pay its debts when they fall due.

\textsuperscript{129} California Corporate Code §500.
of the stated capital into the surplus account and, additionally, the board can partially alter the valuations of the balance sheet using the GAAP criterions. Consequently, dividend restrictions and legal capital requirements are ineffective and trivial. A somewhat similar function of protecting creditors is played by the doctrine of "duty shifting", according to which directors' duties are shifted from shareholders to creditors when the corporation enters a serious financial distress. According to recent Delaware case law, the duty shift is triggered by the "insolvency" of the corporation, since only from this moment creditors become residual claimants of corporate activities. The duty shift doctrine applies in very limited circumstances, because directors have incentives to enter into a Chapter 11 restructuring proceeding. The doctrine, therefore, does not really change the fundamental goal of boards' duties to enhance shareholders' value. Consequently, even though the law of the state of incorporation provides for some kind of protection against opportunistic or excessive distributions, creditors rely mostly upon other legal mechanisms, namely fraudulent transfers, equitable subordination and veil piercing.

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130 In Delaware, the directors can transfer stated capital associated with no par stock into surplus account without shareholders approval, while a reduction of stated capital associated with par stocks should be approved by shareholders' general meeting: § 244(a)(4).

131 RMM \\S 6.40.

132 North American Catholic Education Programming Fund v. Gheewalla, 930 A.2d 92 (Del. 2007) (creditors do not have direct claims for breach of fiduciary duty when a corporation is in the zone of insolvency). The "duty shift doctrine" was properly formulated by Credit Lyonnais Bank Nederland v. Pathe Communications Corp., 1991 Del. Ch. LEXIS 215, according to which, however, the triggering moment was the "vicinity of insolvency". See: Henry T.C. Hu & Jay Lawrence Westbrook, Abolition of the Corporate Duty to Creditors, 107 COLUM L. REV., 1321, 1332 - 1345 (2007).
a) *Fraudulent transfer.* The most important of these mechanisms are fraudulent transfers rules, that are not part of the internal affairs doctrine\(^{133}\). To be sure, fraudulent transfers rarely emerge outside bankruptcy proceedings, in which case the federal rules on fraudulent conveyances, embodied in the Bankruptcy Act 1978\(^{134}\), apply, unless the trustee shows that state law allows to avoid a transfer that would not be avoided under federal law\(^{135}\). In the latter case, however, the applicable state law is not such of the state of incorporation of the debtor, but the law of the state that governs the transaction\(^{136}\).

b) *Equitable subordination.* Under the equitable subordination doctrine, debts of the company to its controlling shareholders are re-characterized as equity, if the transaction between the corporation and the insider-creditor did not occur within the bounds of reason and fairness\(^{137}\). For our purposes it is relevant to point out that equitable subordination is part of federal bankruptcy law\(^{138}\), not of state law, and, consequently, a reincorporation from one state to another would not change the applicable standard.

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\(^{134}\) 11 U.S.C. § 548(1).

\(^{135}\) 11 U.S.C. § 544(b).

\(^{136}\) However, the precise choice of law criterion to establish the applicable state law on fraudulent transfers is still disputed. A common answer is to apply choice of law of the state of the forum, following *Klaxon Company v. Stentor Electric Manufacturing Co.* 313 U.S. 487 (1941). However, *Klaxon* was referred to federal jurisdiction on diversity and aimed at avoiding "vertical" forum shopping, but it is not yet clear whether it should be extended also to other competences of federal courts, like in bankruptcy litigation; see: John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 573 - 576 (1989) (the federal court should select substantive state law that would be chosen by the state court that would adjudicate the dispute outside of bankruptcy) and Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law and the Conflict of Law*, 32 U. PENN. J. INT'L LAW, 439 (2010).

\(^{137}\) See: *Costello v. Fazio* 256 F.2d 903 (9th Cir. 1958)

\(^{138}\) Bankruptcy Act §510(c)(1)
c) **Veil piercing.** Finally, under specific circumstances, a dominant shareholder can be held directly liable towards creditors by way of piercing the corporate veil.\(^\text{139}\) Veil piercing, therefore, is ineffective for widely held corporation, which do not have a control or dominant shareholder. Additionally, even though veil piercing is generally governed by the state of incorporation, its exclusive power is not undisputed and the state where a corporation conducts its business may claim to be competent to regulate this issue.\(^\text{140}\)

Furthermore, it is worth mentioning that, since corporate debentures and financial contracts are outside of the scope of the internal affairs doctrine, they often embody choice-of-law clauses that refer to a different state as the applicable law.\(^\text{141}\)

To sum up, we can say that creditors’ protection in the U.S. relies mainly on rules that do not belong to the province of corporate law under the Internal Affairs Doctrine. Creditors’ protection mechanisms that are part of the Internal Affairs Doctrine (namely dividend restrictions) are not effective to address the agency costs between shareholders and creditors and, therefore, the most important common denominator of creditors’ protection in the U.S. is the federal bankruptcy law.

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\(^{139}\) Zaist v. Olson 227 A.2d 552 (1967); Walkowszky v. Carlton, 223 N.E.2d 6 (Court of Appeal 1966).

\(^{140}\) E.g. see Provident Gold Mining Co. v. Haynes 173 Cal. 44, 159 Pac. 155 (1916) (application of California law); Multi-Media Holdings, Inc. v. Piedmont Center, 15 L.L.C. 262 Ga.App. 283, 583 S.E.2d 262, 264, 265 (Georgia law on veil piercing applies to a Delaware corporation). See: P. John Kozyris, *Corporate Wars and Choice of Law*, 41 DUKE L.J., 1, 64 (1985); Hansmann & Kraakmann, *Toward Unlimited Liability; supra* note 102, 1924, 1921 - 1923 (unlimited liability of shareholders is tort law, not corporate law); Tung, *Before competition; supra* note 120, 94, nt. 311.

\(^{141}\) See Uniform Commercial Code §1-301(c)(1).
In other words: In the U.S., the agency relation between shareholders and creditors is unbundled from the other agency relations. In practice, the most important area that is in the exclusive competence of the state of incorporation is the regulation of board’s fiduciary duties and its liability towards shareholders. Therefore, reincorporations in the U.S. affect mainly the board - shareholders and the majority - minority relations (to the extent that they are not regulated by federal rules, as we have seen above), while the agency problems between shareholders and creditors are substantially unaffected.

2. The scope of corporate law in the European Union.

Differently from the states of the U.S., E.U. member states do not share a common conflict-of-law doctrine for corporations. While an increasing number of states follow the s.c. ”incorporation theory”, others still apply, at least to domestic corporations or to foreign extra-EU corporations, the ”real seat theory” according to which the administrative seat should coincide with the state of incorporation. Both theories, however, face an identical issue, namely to establish the scope of the applicable corporate law. In this regard, European member states seem to share a common general understanding of which topics should be governed exclusively by the country of incorporation and this common denominator of the scope of corporate law covers also mechanisms for creditors’ protection that in the U.S. are

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142 Article 1, section 8 of the U.S. Constitution give the Congress the power to enact a uniform bankruptcy law throughout the U.S. Despite this provision, a definitive uniform bankruptcy law was enacted only in 1898, probably as a response to the increase continental relevance of corporate insolvencies and to the need to organize effectively railroads reorganizations. See: David A. Skeel, Rethinking the Line Between Corporate Law and Corporate Bankruptcy, 72 TEX. L. REV. 473, 476 - 486 (1994) and An Evolutionary Theory of Corporate Law and Corporate Bankruptcy, 51 VAND. L. REV., 1325, 1353 - 1358 (1998).
outside the internal affairs doctrine. Although it would not be correct to collapse all member states’ corporate laws into a single model, we can find some patterns that are common to many of them.

The most significant, and discussed, mechanism to restrict redistributions is the legal capital, that is mandated for joint stock companies by the Second Directive on company law, but is applied by some member states also to private limited liability corporations. If the mechanism of legal capital is in place, redistributions to shareholders are allowed only to the extent that the net assets exceed the stated capital. This limit to distribution is backed by other rules on "capital maintenance", such as limits to concealed distributions, which tackle transfers to shareholders at underprice\textsuperscript{143}. Additionally, under the Second Directive at least creditors “whose claims antedate the publication of the decision” to reduce the capital have the right to obtain a security for claims that have not yet fallen due\textsuperscript{144}.

In recent years, however, many legal scholars have challenged the real efficacy of the mechanisms of legal capital (and, in particular, of the minimum capital requirements) to prevent shareholders' opportunism at the expenses of creditors and avoiding insolvency, advocating for the adoption of a different mechanism,

\textsuperscript{143} German and Austrian law are probably the most rigid jurisdictions as to restrictions to concealed distributions, because in the German joint stock companies and in all Austrian corporations concealed distributions are always prohibited (independently from the effect on the capital): see §57(3) § 58(4) German Joint Stock companies' law (Aktiengesetz), § 53 Austrian Joint Stock Companies law; § 82 Austrian law on limited liability corporations. However, also in England concealed distributions are prohibited if they are "out of proportion to any possible value attributable to [the] office": \textit{Re Halt garage (1964) Ltd [1982] 3 All ER 1016}. See: John Armour, \textit{Avoidance of Transactions as 'Fraud on Creditors', at Common Law, in Vulnerable Transactions in Corporate Insolvency}, 297 (Oxford, 2003); Paul Davies, Gower & Davies' Principles of Modern Company Law, 2nd edition, 290 (London, 2008); Bachner, \textit{Creditor Protection}, supra note 115, 115 – 120.

Similar results may be obtained through board's liabilities or rules on related parties' transactions: Armour, \textit{Avoidance, supra}, 282.

\textsuperscript{144} Second Directive, Article 32.
such as the "solvency test", that would take into account the liquidity of a corporation. Indeed, the "solvency test" bars distributions that would lead the company to insolvency, regardless of its effects on the legal capital, yet legal capital and the solvency test are not incompatible, as is shown by the German reform of limited liability corporations which combines both mechanisms.

Additionally, veil piercing liability can also represent - although often only under extreme circumstances where an abuse of the legal personality emerges - a valid creditors' protection device if the corporation has a single or dominant shareholder, but it seems to be useless for listed or widely held corporations. In many member states, corporate veil piercing is considered as part of the lex societatis and, consequently, governed by the state of incorporation.

To be sure, independently from the debate on the legal capital mechanism under the Second Directive, it is realistic to say that in a number of E.U. member states corporate law mechanisms are in place to limit distributions to shareholders. Even assuming that these mechanisms, or some of them, are not efficient or entirely effective to protect creditors, they can not be considered as completely trivial. For the purposes of this work it is significant to notice that all mechanisms that restrict

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145 See: Friedrich Kübler, Aktie, Unternehmensfinanzierung und Kapitalmarkt, 30 (Köln, 1989); Dan Prentice, Corporate Personality, Limited Liability and the Protection of Creditors, CORPORATE PERSONALITY IN 20TH CENTURY (Grantham & Ricket eds.) 99 (1998); Enriques & Macey, Creditors versus capital formation, supra note 105, 1194; Ferran, The place for creditor protection, supra note 110, 190.


147 §64 GmbHG e §92(2) AktG. See: Ulrich Noack & Michael Beurskens, Modernising the German GmbH – Mere window dressing or fundamental redesign?, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW, 97 (2008).

excessive distributions to shareholders are considered as part of the lex societatis and are governed by the law of the state of incorporation.

Indeed, EU directives assume that the harmonized issues have to be regulated by just one jurisdiction and some directives establish explicitly that the competent state should be such where the "registered office" is. Among harmonized issues some are U.S.-style "internal affairs" of the corporation, while other are aimed at creditors' protection, such as the registration mechanisms, and the whole mechanism aimed at protecting capital and avoiding excessive distributions in public companies.

My point, therefore, is that "corporate law" in the member states of the European Union embodies also mechanisms for creditors' protections. A possible counterargument might be that many member states, in recent years, perhaps as a form of defensive regulatory competition, have relaxed the mechanism for creditors' protection of "private" limited liability corporations. Consequently, we can not exclude that, at least for this kind of companies, in the next years

149 See: Directive 2007/36/CE, July 11th 2007 on shareholders' rights, article 1 §2; Directive 2004/25/CE on takeover-bids (the duties of the target's board are in the competence of the member states of the target's registered office).

150 Additionally, a "re-label" of corporate law rule as insolvency law is allowed only to the extent that it does not restrict the fundamental freedom of establishment and the free movement of capitals provided for by the EU Treaty on the Functioning of the European Union (hereinafter "TFUE"). Consequently, creditors' protection rules belonging to the realm of bankruptcy law, which applies to pseudo-foreign corporations having the COMI on the domestic territory, might be considered by the ECJ as a not proportionate obstacle to freedom of establishment. In this respect, we should bear in mind that domestic classifications are irrelevant for the application of EU law, so that ECJ's only concern is that certain policy or regulatory strategies do not restrict unreasonably freedom of establishment or free movement of capitals. Enriques & Gelter, Regulatory competition, supra note 110, 449.

151 In France the minimum legal capital was repealed for the société à responsabilité limitée (l. 2003-721); In Italy, the reform of company law enacted in 2003 allowed initial shareholders of private limited liability corporations (societa’ a responsabilità limitata) can pay shares with a bank guarantee (Article 1364(4) Italian Civil Code); in Germany, minimum capital requirement has been in practice repealed for private limited liability companies (Gesellschaft mit beschränkter Haftung) in 2008, if specific transparency requirements are fulfilled (§ 5a GmbHG).
creditors will be increasingly protected by contracts or through ex post mechanisms embodied in insolvency law, similarly to the U.S. Additionally, some jurisdictions characterize veil piercing as tort law\textsuperscript{152} and apply its distinct choice-of-law criteria according to the “Rome II Regulation”\textsuperscript{153}, with the consequence that domestic rules may be applied to pseudo-foreign corporations.

Even if we admit that corporate laws in the E.U. member states are slowly changing for private corporations, by shifting some creditors’ protection mechanisms outside the realm of corporate laws into bankruptcy law or tort law, some relevant difference between the U.S. and the E.U. would still persist as to the effects of reincorporations. To understand this point, we should remember that in the European Union, differently from the U.S., bankruptcy law is state law, not federal law and E.U. derivative law has only harmonized choice of law criteria\textsuperscript{154}. Pursuant to the Insolvency Regulation, to insolvencies applies the law of the state where the Center of the Main Interests (or “COMI”) of the debtor is, which is presumed to be in the state of the registered office\textsuperscript{155}, unless the contrary is proven. Consequently, any reincorporation abroad, since it leads to a transfer of the registered office, will also affect the location of the COMI and, unless creditors give evidence that the COMI is still in the original country, will also shift the applicable insolvency law to the new state of incorporation. Consequently, even if all mechanisms for creditors’ protection would be, in the future, shifted from

\textsuperscript{152} This is the case for veil piercing in German law (\textit{Existenzvernichtungshaftung}), that was recently qualified as belonging to tort law, see Bundesgerichtshof [BGH] [Federal Court of Justice] July 16, 2007, NJW 2689 (2007); see Eva-Maria Kieninger, \textit{The law applicable to corporations in the EC}, 73 \textit{Rabels Zeitschrift}, 607, 614 (2009).

\textsuperscript{153} Regulation 864/2007 “Rome II” on the law applicable to tort liabilities, article 4.

\textsuperscript{154} Regulation 1346/2000, hereinafter the “Insolvency Regulation”.

\textsuperscript{155} Regulation 1346/2000 on cross border insolvencies, article 3.
corporate law into insolvency law, due the lack of a "federal" insolvency act and the presumption that the COMI coincides with the registered office, in the most cases reincorporations will shift the applicable rules to protect creditors.

To sum up, in many member states of the E.U. "corporate law" does not address only the internal affairs of the corporation, but also the agency relations between shareholders and creditors. To be more precise, a significant part of the rules aimed at creditors protection are considered as "corporate law" for choice of law purposes and are regulated by the country of incorporation. Consequently, reincorporations from one member state to another shift also rules aimed at creditors' protection, not simply rules regulating the "internal affairs" of the company. This is a remarkable difference with the U.S., where the creditor's protection is either federal or outside the internal affairs doctrine.

V. REGULATING REINCORPORATIONS IN "BI-STAKEHOLDER" AND "MULTI-STAKEHOLDER" JURISDICTIONS

The former sections have revealed that the European Union and the U.S. diverge as to the extension of rules that are switched through a reincorporation: In the U.S., the state of incorporation has narrower powers than in the E.U., because creditors' interests are excluded from the internal affairs doctrine and because a number of significant corporate law issues have been federalized. Basically, the most important competence of state laws is to regulate the fiduciary duties of the board vis-à-vis the shareholders.
U.S. corporate law, consequently, can be labeled as a "bi-stakeholder" system, meaning that its corporate law addresses only the relation between shareholders and the board, while E.U. member states' laws are prevalently "multi-stakeholder" systems, since corporate laws of member states, albeit to different degrees, address also the agency problems emerging between shareholders and creditors. To put it differently: In the E.U. the regulation of all three relevant agency relations are bundled together into a broad concept of "corporate law" in the competence of the state of incorporation. Consequently, in the E.U. reincorporations can affect also creditors' interests, not only shareholders' value. This different stakeholder structure changes also the regulatory competition "game" and the notion of "optimal" or "efficient" corporate law changes.

A. Redistributive effects of reincorporations

Reincorporations produce economic effects on the different constituencies of the "emigrating" corporation. More precisely, reincorporations can have redistributive effects among stakeholders, but can also have an impact on the value of the firm. We should focus our attention first on redistribution. Corporate governance rules are implicit elements of the contracts between the different corporate stakeholders (shareholders, creditors and the board). Consequently, any midstream change of the applicable law implicitly changes such contractual relations. Such changes may advantage some stakeholders at the expenses of others ("redistributive reincorporations"), depending on the rules that are shifted from one state to another. Such redistributions will occur along the line of three
relevant agency relations (shareholders - board; majority - minority; shareholders - creditors). Basically, the direction of the redistribution depends on whether any significantly redistributive rule for any of those relations is shifted from one jurisdiction to another\textsuperscript{156}. For instance, if the state of arrival protects the board from the threat of unsolicited takeover bids, while the original jurisdiction does not, this insulation from the market of corporate control will increase managers’ ability to extract private benefits of control. Additionally, if the new jurisdiction protects minority shareholders less than the original one, or gives to shareholders less power, the reincorporation would increase the risk of opportunistic behaviors of majority shareholders at the expenses of the minority. Finally, if in the new jurisdiction capital requirements or fraudulent conveyance rules are less stringent or less efficient than in the original one, creditors’ interests might be jeopardized\textsuperscript{157}, at least such of "nonadjusting creditors\textsuperscript{158}, unless other mechanisms are in place in the new state of incorporation to “compensate” that reduced protections.

In addition, even if detrimental for one or more constituency, reincorporations may be beneficial for the overall value of the firm. To understand the policy choices made by different states as regarding reincorporations, we need to adopt a


\textsuperscript{157} That is to say that the risk of the investment is higher in the new jurisdiction than it was in the former.

\textsuperscript{158} Adjusting creditors will discount the probability that the debtor corporation will change jurisdiction in a way detrimental for their interests. Consequently, the risk of opportunistic reincorporations at the expenses of creditors will be suffered only by ”nonadjusting creditors”.
“benchmark” to assess the optimality or efficiency of reincorporations. The fundamental alternative is between a Pareto and a Caldor-Hicks criterion. A reincorporation is Pareto optimal if increases the overall value of the nexus of contract and make no constituency worst-off. By contrast, following a Kaldor-Hicks efficiency criterion, a reincorporation is efficient if the advantages of some constituencies outweigh the losses suffered by others, so that the former may (at least theoretically) compensate the latter and be nonetheless better-off.\(^{159}\) Obviously, in liberal economic systems it is up to private actors to decide whether a given transaction is worth to be pursued. The law, however, is never neutral and may play a role in striking the balance among the involved interests.

Reincorporations, like many other corporate transactions, are decided by board's and shareholders’ joint wills. In addition to that, legislators should decide whether creditors deserve some kind of protection or "voice" powers in the decision on the reincorporation itself. In this regard, mirroring the respective constituency structures, U.S. and E.U. follow opposite strategies. Table 1 summarizes the policy issues raised by reincorporations in “bi-stakeholder” and “multi-stakeholder” corporate law systems.

Table 1: Summary of the problems of reincorporations

<table>
<thead>
<tr>
<th>Type of corporate</th>
<th>Type of ownership</th>
<th>Relevant agency relations</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>law</th>
<th>Widely held companies</th>
<th>Privately held companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Bi-Stakeholder&quot;</td>
<td>Shareholders - Board</td>
<td>Majority - Minority</td>
</tr>
<tr>
<td>corporate law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Multi-Stakeholder&quot;</td>
<td>a. Shareholders - Board</td>
<td>a. Majority - Minority</td>
</tr>
<tr>
<td>corporate law</td>
<td>b. Shareholders - creditors</td>
<td>b. Shareholders - creditors</td>
</tr>
</tbody>
</table>

B. *Redistributive effects of reincorporations in "bi-stakeholder" corporate laws: the U.S.*

As we have seen, in the U.S., freedom of reincorporations is the driver of regulatory competition for corporate law. Companies are formed originally in the "home state", but then reincorporate to Delaware upon going public.

The U.S. debate on the "efficiency" of regulatory competition is almost exclusively focused on whether this competition, if it ever exists, maximizes shareholders' value. Advocates of the "race to the top" theory hold that market constrains' (market for corporate control, credit market, and market of the product) will induce corporations to choose the law that enhances shareholders' value and, under the supply side, that the states of the U.S. have incentives to compete to
attract reincorporations and to avoid domestic companies to reincorporate abroad. By contrast, the opposite "race to the bottom" theorists argue that Delaware law has increasingly disenfranchised shareholders and shielded boards from the market for corporate control. Yet for both theories the fundamental goal of corporate governance is to increase shareholders' value, so that creditors' interests do not enter into the scene.

Why do U.S. scholars forget creditors? The reason is now in front of us: Corporate law is not aimed at creditors' protection, but addresses almost exclusively the shareholders - board and the majority - minority agency relations. In this "bi-stakeholder" world, the regulation of the agency relation between shareholders and creditors is not bundled with the rules on the other agency problems. Consequently, reincorporations are neutral for creditors and the main policy issue is whether regulatory competition increases shareholders' value. Under an efficiency perspective, indeed, a reincorporation that increases shareholders' welfare increases also the total value of the nexus of contracts, being the transaction irrelevant for creditors. Consequently, and coherently, U.S. law does not provide any form of creditors' protection from opportunistic reincorporations.

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161 Cary, *supra* note 2; Bebchuk, *Federalism and the corporation*, supra note 2, 1467 - 1470.
162 To my knowledge the only remarkable exception is to be found in Bebchuk's seminal paper, *Federalism and the corporation*, supra note 1, 1485 - 1491. According to Bebchuk, reincorporations can produce negative externalities on a number of constituencies, among which are creditors. In Bebchuk's view, the damage for creditors, however, is not produced by the reincorporation itself, since Bebchuk acknowledge that state law rules on creditors' protection are extremely weak, but by the whole mechanism of regulatory competition that induced the states to lower creditors' protection in domestic law.
163 See: RMBCA § 13.02 (b)(1)
C. Redistributive effects of reincorporations in the E.U. and the mechanisms to protect creditors

If we turn our attention to reincorporations in the European Union, we face a completely different scenario. As we have seen above, till 2005 reincorporations were not generally admitted in the European Union, so that a number of states simply prohibited such transaction. We can now understand that these prohibitions of outbound reincorporations were not simply the product of parochialism, but responded also to a precise need. Indeed, behind the veil of the legal arguments adopted to support this option in different states, the policy reasons underlying the ban of reincorporations is clearly to protect creditors from redistributive reincorporations. These jurisdictions implicitly held that the vast majority of reincorporation has redistributive effects and that such redistributions are always politically unacceptable. A ban of reincorporations, therefore, is deeply underlined by the paternalistic idea that creditors are not able to protect themselves.

This scenario has been drastically changed by the enactment of the SE Regulation and the Cross-Border Merger Directive that introduced freedom of reincorporation throughout the European Union. As we have seen above, in the European Union the regulation of the agency problem between shareholders and creditors is, at least in part, bundled with the other agency relations. Consequently, reincorporations, differently from the U.S., may damage creditors that have relied upon the application of a certain corporate law. Reincorporations, in other words,
would change the rules of the game before the end of the play. These transactions, similarly to the U.S., are decided by the combined will of the board and the shareholders. If they decide to reincorporate, they will opt for a jurisdiction that increases shareholders' value or, at least, that advantages the majority of shareholders\textsuperscript{164}. Consequently, since in the E.U. the three agency problems are partially bundled, reincorporations may be detrimental for creditors even if they increase shareholders' value.

The reaction of E.U. derivative law is to require member states to protect creditors against opportunistic reincorporations\textsuperscript{165}, while minority shareholders protection is only optional\textsuperscript{166}. However, this federal harmonization is extremely "weak", since member states are free to design autonomously the preferred mechanisms to

\textsuperscript{164} To be sure, European corporate governance gives to shareholders and minorities more rights than in the U.S., where shareholders powers are extremely limited. See Arthur Pinto, The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations, 32 FORDHAM INT'L L.J. 587 (2009). Consequently, it is realistic to assume, even though reincorporations need to be initiated by the board, they will not damage shareholders. Additionally, in system with concentrated ownership, the board will initiate a reincorporation only if the majority of shareholders sponsors this choice.

\textsuperscript{165} Cross-border Mergers Directive, article 4 §2.

\textsuperscript{166} Cross-border Mergers Directive, article 4 §2: "A member state may […] adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger." Therefore, as to shareholders' protection, the common denominator E.U. member states is established by the Third Directive on domestic mergers, article 7(2): supermajorities and by special vote of each class of shares "whose right are affected by the transaction", according See Marco Ventoruzzo, Cross-border mergers, change of applicable corporate law and protection of dissenting shareholders: withdrawal right under Italian law, EUROPEAN COMPANY FINANCIAL LAW REVIEW, 59 (2007). However, if ownership is concentrated, shareholders' vote, even with supermajorities, might turn out to be ineffective in preventing opportunistic reincorporations that damage minority shareholders and (see: Bebchuk, Federalism and the Corporation, supra note 1, 1477), therefore, a number of member states safeguard shareholders' interests by granting them appraisal rights. Appraisal rights, while protecting shareholders ex post, increase ex ante the cost of the reincorporation, which will be implemented only if the gains outweigh the cost to pay-out dissenting shareholders. See: Daniel R. Fischel, The Appraisal Remedy in Corporate Law, AM. BAR. FOUND. RES. J., 875, 878 (1983). Additionally, the need of a special meeting of each class of shares, may become a very powerful weapon to block an undesired reincorporation: if the new law does not grant to the class of shareholders rights or powers identical to such attributed by the state of origin, each class of shares has de facto a veto - power on the transaction, that may transcend into a "blackmail" power. See: Tröger, Choice of Jurisdiction, supra note 119, 40 (no incentives to reincorporation in order to damage minority shareholders)
protect creditors. This means that member states are fundamentally free to over-
regulate this issue and to place unnecessary burdens in the way of cross-border
mergers. A comparative view reveals that a common mechanism to protect
creditors is to oblige the corporation to provide a security or to pay in advance
credits that are not yet fall due. Similar mechanisms are commonly adopted in
almost all E.U. member states\textsuperscript{167} and in Switzerland\textsuperscript{168}. Creditors are often
required to file a petition or to "oppose" judicially against the merger, in order to
receive advance payment or a security, in which case the court should assess
whether the reincorporation is detrimental for creditors or not. Advance payment
or securities are very powerful devices to protect creditors' interests. The
rationale behind it is to pursue a Pareto optimum, by granting creditors an "exit
option" from the nexus of contract\textsuperscript{169}. However, this "exit option" may lead to
overregulation because it is usually granted also to adjusting creditors, who do not
need it. Indeed, only nonadjusting creditors deserve such protection, while
adjusting creditors have already discounted the risk of future reincorporation
from the price or have already protected themselves with adequate covenants or
'commitment clauses'\textsuperscript{170}. A possible solution is to delegate courts to assess

\textsuperscript{167} To my knowledge, "exit" mechanisms (security or advanced payment) are applied in almost all member states: Norway, Slovak Republic, Poland, The Netherland, Germany, Italy, Estonia, Denmark, Czech Republic, Bulgaria, Belgium, Austria. Such exit mechanisms might protect creditors from opportunistic reincorporations, yet they can not force a corporation to a reincorporation that enhances value to creditors, but is detrimental for shareholders: Enriques & Gelter, Regulatory Competition, supra note 110, 433.

\textsuperscript{168} Article 706(b) of the Swiss Code of Obligations. See: Tanner, Die Generalversammlung, (Schmid ed.), OBLIGATIONENRECHT, V, vol. 5b, article 698 – 706b, 397 (Zürich, 2003).

\textsuperscript{169} Stefano Lombardo, Regulatory Competition in Company Law in the European Union after Cartesio, 10 EUROPEAN BUSINESS ORGANIZATION REVIEW, 627, 647 (2009).

\textsuperscript{170} See: Enriques & Gelter, Regulatory Competition, supra note 110, 432 – 433. See also Impact Assessment XIV Directive, supra note 33, 49: a general duty to provide security to creditors "would
whether the reincorporation damages creditors. However, judges without a significant economic background are probably not able to distinguish sophisticated “adjusting” creditors with ex ante bargaining power from “nonadjusting” creditors.

Among creditors, it is worth to mention also employees, who enjoy a higher degree of mandatory protection under E.U. law. Indeed a number of member states provide for "codetermination" mechanisms, under which the employees have the right to appoint a certain number (usually between one third and the half) of member of the supervisory board of the company, that hires the board and often has the power decide upon fundamental strategies. The codetermination is embodied in domestic corporate laws and, consequently, reincorporations would disenfranchise the employees if the new state of incorporation does not have similar mechanisms. Indeed, as a basic principle, employee participation is governed by the law of the state where the registered office is located after the reincorporation by way of cross-border merger. E.U. derivative law, differently from general creditors' protection, does not entirely delegate to member states the protection of employees, but establishes a mandatory proceeding. Corporation and its employees should enter into negotiations, in order to establish the employees’ rights after the merger. If the parties do not find an agreement, or if

\footnotesize{ensure more extensive protection of creditors' rights but they would add – sometimes unnecessary – financial and time cost to the transfer“.


\footnotesize{172 Cross Border Mergers Directive, Article 16(1).

they wish so, certain "standard rules", enacted for this purpose by the member state of the new registered office, applies. The fundamental principle embodied in the directive is that employees should keep the same rights they had under the original law, unless the involved parties find a different agreement (s.c. principle "before/after")\(^\text{174}\). However, in case of cross-border mergers the "standard rules" apply only if, before the merger, not less than 33 and one third percent of the employees were involved in codetermination. In conclusion, E.U. derivative law protects employees’ right with a mandatory proceeding, but at the same time allows minor regulatory arbitrages aimed at weakening employees participation rights\(^\text{175}\).

D. "Multi-stakeholder" corporate laws, creditors’ protection and the constraints to regulatory competition

In the last subsections, we have seen how minority shareholders and creditors are protected from opportunistic reincorporations in a "bi-stakeholder" system like the U.S., and in "multi-stakeholder" corporate laws, like member states of the E.U. What emerged is that, when confronting with the need to regulate reincorporations, the U.S. has an easier task, because reincorporations are neutral - or, at least, not particularly relevant - for creditors. Consequently, the states of the U.S. do not really need to protect creditors from opportunistic reincorporations\(^\text{176}\).


\(^{175}\) Indeed, one of the main reasons for the employment of European Companies, as a mechanism to realize regulatory arbitrages, is to weaken employees' codetermination. See Gelter, *Tilting the balance, supra* note 171, 810 - 818 and the empirical findings of Eidenmüller, Engert & Hornuf, *Incorporating under European Law*, supra note 37.

\(^{176}\) See: LOMBARDO, *REGULATORY COMPETITION, supra* note 88, 175.
By contrast, multi-stakeholder corporate laws, like member states of the E.U., need to find a much more complicated balance, since reincorporations are not neutral for creditors\textsuperscript{177}. In such systems, even reincorporations that increase shareholders’ value may turn out to be detrimental for creditors, so that the total value of the nexus of contracts may be correspondingly reduced. If the state of origin does not provide for any mechanisms to avoid opportunistic reincorporations at the expenses of creditors, domestic creditors’ protections rules would be at disposal of the shareholders and the board, which have the power to approve the reincorporation.

\textit{Ex ante}, adjusting creditors would discount the "worst case scenario", that is the worst possible corporate law that the debtor may opt into, from the price of the credit. Consequently, adjusting creditors will require a higher interest rate, which would increase the total cost of credit; alternatively, adjusting creditors may protect themselves with covenants that accelerate the loan in case of reincorporation. The risk of opportunistic reincorporation, then, will be suffered only by nonadjusting creditors, unless they free-ride on the covenants negotiated by adjusting creditors\textsuperscript{178}.

To avoid these risks, as we have seen above, member states provide for mechanisms for creditors’ protection against redistributive reincorporations. The E.U. cross-border merger directive leaves to member states an adequate freedom to shape such mechanisms, in order to respect their different levels of creditors’

\textsuperscript{177} LOMBARDI, \textit{REGULATORY COMPETITION}, supra note 88, 180 – 182.

protection embodied in domestic corporate laws. Therefore, member states with high standard of creditors' protection will probably provide for strong creditors' protections mechanisms also in the way of reincorporations abroad and, conversely, if general creditors' protection in the state of origin is low, coherently there should be less stringent creditors' protection mechanisms against reincorporations.

This “multi-stakeholder” tendency of corporate laws of E.U. member states affects also the mechanisms of regulatory competition. Under the supply side, by protecting creditors from opportunistic reincorporations, a jurisdiction signals to the market its intention to keep its character of "multi-stakeholder" system. Indeed, if such state would abolish any creditors' protection against opportunistic reincorporation, it would convert soon into a "bi-stakeholder" system, where mechanisms for creditors protection will be shifted from the realm of corporate law into other areas of law, such as tort or insolvency law, as we have seen above. Table 2 summarizes the alternative options faced by multi-stakeholder corporate law states.

Table 2: Multi-stakeholder jurisdictions

<table>
<thead>
<tr>
<th>Creditors' protection mechanisms are repealed</th>
<th>State's power to protect creditors is displaced</th>
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<td>If the state of origin engages in defensive competition, it will become</td>
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| "Multi-Stakeholder" corporate law | Creditors' protection mechanisms are repealed | a "bi-stakeholder" jurisdiction  
- In the transitional period a number of inefficient reincorporations may be implemented |
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<tr>
<td>Creditors' protection mechanisms are in place</td>
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- The state will keep the character of "multi-stakeholder" jurisdiction  
- Inefficient reincorporations are banned  
- Risk of false negative (a number of efficient reincorporations are also banned) |

Under the demand side, a number of obstacles are placed in the way of free choice of corporate law in the E.U.\textsuperscript{179}, but even if all of them would be overcome, at least one will persist, namely the mechanisms for creditors' protection in reincorporations. As we have seen above, in order to avoid negative externalities, member states protect creditors from opportunistic reincorporations by giving them an "exit" option. However, if such mechanisms are too stringent, cross-

border mergers might become costly or even impossible and a certain number of reincorporations that enhance shareholders' value won't be implemented. This is particularly true because member states' mechanism to protect creditors usually do not distinguish between “adjusting” and “nonadjusting” creditors. However, the real impact of creditors’ protection mechanisms on reincorporations depend on a number of factors, that are not easily predictable. On the one hand, for sophisticated and large creditors, like banks or financial institutions, the “exit right” may be trivial, since such lenders will require contractually effective veto rights or acceleration covenants; on the other hand, for extremely “small” and nonadjusting creditors, the “exit right” may turn out to be unimportant because too costly, due to the need to act in court\(^\text{180}\). However, between these two classes, other creditors exist, for whom the legal provision of an “exit right” is either not trivial, allowing them to avoid transaction costs, or not so expensive to prevent them to sue. These creditors need protection and are able to use the “exit right” granted them by the law. At the same time, the exercise of such right will enhance the total cost of the transaction and might exclude a certain number of efficient reincorporations.

VI. CONCLUSIONS

In the European Union, "federal" E.U. law is the driver of the evolution of member states' laws towards a more liberal approach on corporate mobility. This is a significant difference with the U.S., where states voluntarily adopt the internal

affairs doctrine and allow outbound reincorporations. Without the action of the European Union bodies, member states would still be defending own domestic choice-of-law criteria and own national privileges. Case law of the European Court of justice of the last decades has banned unreasonable barriers to inbound transfers of the headquarter of foreign corporations and to cross-border mergers. However, regarding barriers to "outbound" reincorporations erected by member states and midstream free-choice of law, the E.U. is behind the U.S. This does not depend on lack of actions by E.U. bodies, but on member states' domestic policies. Indeed, the Cross-Border Merger Directive might be an efficient instrument for reincorporations, but member states are still free to adopt mechanisms for creditors' and shareholders' protection that may impede this form of "indirect" reincorporation.

This difference between U.S. and E.U. can not be eliminated completely, since it reflects the fact that "corporate law" (i.e. the set of rules that are shifted with a reincorporation from one state to another) in European jurisdictions plays a more significant role for creditors' protection than in the U.S. Therefore, the fact that member states still protect dissenting shareholders and creditors mirrors this different scope of "corporate law". In general, it is predictable that whenever creditors' protection relies more on "corporate law" than on other sets of rules, some kind of protection will be granted to creditors from opportunistic reincorporations. However, these mechanisms, that usually don't distinguish between adjusting and nonadjusting creditors, might burden the corporation with unnecessary costs and prevent a certain number of reincorporations abroad.