Lessons For Luxembourg: Are Delaware And The Netherlands Examples You Can Emulate?

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I. Introduction

On this important occasion celebrating the 100th anniversary of the Luxembourg Companies Act, we write in a constructive way to help policymakers in Luxembourg determine whether amendments to its Companies Act should be made to make it more competitive. We start from the premise that in order for Luxembourg to be successful in attracting more business entities, it must meet some need of those who start, manage, and invest in businesses that is currently not being met by other countries in the European Union or would be a marked improvement. Put simply, what do the member states in the European Union lack that Luxembourg might supply or do better?

We address this question from the perspective of two citizens of polities that have had some success in becoming centers for the formation of business entities, in the case of Delaware in particular, and commercial law, in this case of both Delaware and the Netherlands. Delaware is actually not a nation-state; it is one of the fifty states that make up the United States of America. The Netherlands is, of course, one of the member states of the European Union. For reasons we shall discuss, in examining the question of being competitive in the area of entity formation, the individual states within the United States can be usefully analogized to nation-states within the EU, because both are important units in a much larger economy.

To help our friends in Luxembourg think through the policy challenges ahead, we start with a basic description of how the Delaware regime operates. We then address the needs that Delaware fills within the U.S. for managers and investors in business entities, and therefore the appeal Delaware has in attracting business entities. After doing so, we consider whether the Delaware regime provides any lessons for Luxembourg, if Luxembourg desires to become an even more attractive place to form business entities.

As we will show, we are not persuaded that Delaware provides a model that Luxembourg, given its existing legal landscape, seems desirous of emulating or, as important, even could emulate at this stage of European economic development and integration. Based on what we know, we are skeptical that as a matter of corporate law itself, Luxembourg has developed any distinctive approach that provides demonstrable advantages to both of the key constituencies with the most influence over the decision whether to domicile businesses — corporate managers (including founding entrepreneurs) and stockholders (in particular, institutional investors and their representatives). Absent such an approach and in light of EU-specific factors, such as the prevalence of nationalist policies like the so-called "real seat doctrine" in the EU, we perceive no particular corporate law reason why business entities currently should gravitate to Luxembourg. It may be that Luxembourg could try to position itself among the several EU nations attempting to secure corporate citizens through tax arbitrage, but in this space Luxembourg is not unique and like other nations deploying this strategy, it faces the threat of an OECD reaction against national policies by which smaller nations appear to be securing momentary economic advantage for themselves at the larger expense of the societies from which corporations derive their profits.

Despite these challenges, it is not inconceivable for Luxembourg to successfully promote the formation of business entities in Luxembourg from a corporate law angle.

We illustrate this with some recent developments in the Netherlands, showing a significant influx of multinationals setting-up legal headquarters in the Netherlands at least in part for reasons related to Dutch corporate law. Although Delaware, incidentally, was discontinuously a Dutch colony until 1664 and the Netherlands may be the closest EU analog to Delaware,[1] the Dutch brew a somewhat different cup of tea than Delaware does. The Dutch model may even be closer related to the Luxembourg model of corporate law than to Delaware's and this Dutch perspective wraps-up our comparative law *tour d 'horizon*.

II. The Delaware Model Of Corporation Law

We start with the narrow and mundane: a basic description of Delaware's corporation law. Delaware's corporation law is not what, in a European context, might be called a broad-based company law. Aspects of company law like competition law, labor law, trade law, and requirements for the filing of regular disclosures to public investors, are not part of Delaware's corporation law. Instead, those matters are primarily governed at the national level by regulatory regimes originating in congressional enactments and administered through agencies of federal government, like the Federal Trade Commission and the Securities and Exchange Commission.

Delaware corporation law governs only the internal affairs of the corporation. In that sense, Delaware law is a specialized form of contract law that governs the

[1] AMANDUS JOHNSON, THE SWEDISH SETTLEMENTS ON THE DELAWARE: THEIR HISTORY AND RELATION TO THE INDIANS, DUTCH, AND ENGLISH 663–70 (1911).

relationship between corporate managers — *i.e.*, the directors and officers — and the stockholders. Consistent with a contractarian vision, the Delaware statute is, by design, a broad enabling one that permits and facilitates company-specific procedures. In other words, the Delaware statute is different from what one might find in a civil law nation, which would be more likely to have a prescriptive corporation law chock full of mandatory terms specifying exactly how corporations must conduct their business.

By contrast, the Delaware approach to corporation law keeps statutory mandates to a minimum. And even some of the mandatory terms are subject to being overridden through charter and bylaw provisions. In particular, Delaware law gives corporate planners tremendous power to use the charter — the equivalent of the corporate constitution — to vary otherwise mandatory terms. The charter, which is formally known as the certificate of incorporation, can be amended only upon a recommendation by the board of directors coupled with stockholder approval.[2] Because the charter therefore reflects a contract that is agreed upon by both the managers and the stockholders, the Delaware statute permits more specific manifestation of contractual assent to override most of the statutory default terms.

The Delaware statute is flexible in another way. It provides transactional planners with multiple routes to accomplish identical ends. Under the doctrine of independent legal significance, a board of directors is permitted to effect a transaction through whatever means it chooses in good faith.[3] Thus, if one method would require a

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[2] 8 *Del. C.* § 242(b).
[3] *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963).

stockholder vote, and another would not, the board may choose the less complicated and more certain transactional method.

In emphasizing the enabling nature of the Delaware statute, it is important to make two related points. First, and too often ignored, is that efficiency and flexibility are values that do not just serve the interests of corporate managers; they are also vital to stockholders. It is rather obviously useful for stockholders to have the freedom to craft charter provisions that address their company-specific needs. But there is an even more important reason why stockholders are benefited by a broad, enabling statute.

The central idea of Delaware's approach to corporate law is the social utility of an active, engaged central management. That idea is expressed by the Delaware statute, which states the fundamental principle that the "business and affairs of the corporation are managed by or under the direction of a board of directors."[4] It is managerial ingenuity that creates stockholder wealth through the invention and exploitation of new products, the development and more efficient provision of services, and sound financial management. Delaware corporate law recognizes that reality by vesting central management with wide discretion to make business decisions and a wide choice of means to effect those decisions. Those investments facilitate creativity and risk-taking. The so-called business judgment rule, which requires that the judiciary not second-guess business decisions made in good faith and with due care, even if they turn out badly, is also designed to protect the economic value served by centralized management. The rule

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[4] 8 *Del. C.* § 141(a).

does so by insulating managers from fear that pursuit of an attractive, but risky, business venture will leave them liable to the stockholders if the venture fails.

But Delaware's broad grant of power to management leads to a second point, which also deserves emphasis. Delaware corporate lawmakers recognize that managers can abuse their clout, and have therefore deployed means to prevent and remedy disloyalty. The statutory means are several, and include the requirement that stockholders meet annually to elect directors.[5] Although the analogy can be pushed too far, elections in the corporate republic have the same purpose as they do in real polities: they are designed to promote before-the-fact responsiveness and guarantee after-the-fact accountability to the electorate.

In the Delaware corporate republic, stockholders also get other ballot box opportunities that promote managerial fidelity. The statute identifies certain transactions that may not be implemented by the directors without stockholder approval. These include sales of substantially all the assets of the corporation, mergers, and charter amendments.[6] The requirement of stockholder approval permits stockholders to decide for themselves whether an important initiative of central management deserves support. The obvious goal is to provide, by the requirement of a stockholder vote, a before-the-

[5] The default rule under Delaware law is that all directors stand for election annually. A classified board system whereby a third of the board is elected every year may be implemented by charter. 8 *Del. C.* § 141(d). Classified boards are diminishing at a rapid clip, as boards respond to stockholder demands for their elimination. *See* SPENCER STUART, SPENCER STUART BOARD INDEX 7 (2014) (reporting that 93% of S&P 500 companies now have declassified boards, up from 55% in 2004).

[6] 8 *Del. C.* §§ 241(b), 251(c), 271(a).

fact incentive for management to present only transactions that management believes to be in the best interests of the corporation.

The other major check on managerial abuse is where the Delaware Court of Chancery and the Delaware Supreme Court come in. Delaware's broad investiture of legal — *i.e.*, statutory and contractual — authority in corporate management is policed by its court of equity, the Court of Chancery, which reviews claims by stockholders that corporate fiduciaries have breached their fiduciary duties of loyalty and care. The intensity of that review varies in a sensible way correlated with the probability that the managers' business decisions might have been impermissibly influenced by self-interest, rather than a proper concern for the corporation's interests.

For example, when a corporate board decides to approve next year's natural gas supply contract, and none of the directors has an ownership interest in any of the competitors bidding to be the supplier, there is virtually no chance that a stockholder would be able to prove a claim that the directors breached their fiduciary duties by striking a bad deal. Because there was no conflict of interest, the business judgment of the board is sacrosanct, unless, at the extreme, no person of rational mind could think the deal fair to the corporation.[7]

But, assume a different scenario, when a board is responding to an unsolicited takeover bid. Assume further that the board is comprised of a majority of independent

[7] *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'") (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

directors. Unlike the situation in certain European nations, including the United Kingdom, the directors of a Delaware corporation may thwart even an all-shares, all-cash bid if they believe that the offer is not in the best interests of the corporation and its stockholders. But, when the directors decide to take a defensive stance, Delaware law requires the court to scrutinize their actions closely.

Under Delaware law, the concern that the directors might be influenced by their desire to keep their positions, and to keep the company independent, justifies a tightened form of equitable review. Therefore, the court may overturn the defensive actions of the board if those actions are not reasonably proportionate to any threat the bid poses to proper corporate interests.[8] In Delaware's jurisprudential lexicon, a "reasonableness" standard legitimates far more searching judicial scrutiny than exists under the business judgment rule.[9] Yet, even here, Delaware law does something that is consistent with the business judgment rule. In assessing the reasonableness of a board's defensive reactions to a takeover, the courts give more credit to a board that is comprised of a majority of independent directors.[10]

Why? Because Delaware law intuits that the independent directors, although not immune from a desire to protect their positions, will be more likely than inside directors to impartially decide whether a bid is in the stockholders' best interest. The inside

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[8] *See, e.g.*, *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385–86 (Del. 1995); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1993); *Unocal*, 493 A.2d at 955.

[9] *See Unitrin*, 651 A.2d at 1275 (placing the burden under the reasonableness test on the directors to show a reasonable investigation and good faith determination that the threat posed warranted a defensive response).

[10] *See id.* (explaining "that the presence of a majority of outside independent directors will materially enhance such evidence" in support of meeting *Unocal*'s reasonableness prong).

managers, in the ordinary course, have more at stake, both financially and reputationally. Therefore, Delaware law encourages board processes that give a strong hand to the independent directors in responding to takeover bids and, even more generally, in handling M & A transactions, such as mergers of equals.

In other words, Delaware does not wish to maximize judicial rulings finding board actions unreasonable; its law wishes to provide an incentive for boards to use good processes that can be trusted to reduce the role of self-interest and promote a focus on what is in the best interests of the stockholders. Notably, the heightened scrutiny the directors face in this context does not work in isolation; the voting rights we earlier described often come into play in M & A deals, requiring directors to face not only heightened judicial scrutiny, but also the need to convince the stockholders to ratify their actions. This combined pressure has led, in general, to boards that are far more willing to consider unsolicited bids and to abandon friendly mergers if demonstrably preferable alternatives come along. As a result, most M & A battles are decided in boardrooms and not by judicial injunctions.

Delaware reserves the most intrusive form of scrutiny for actual conflict of interest transactions. These transactions occur when a fiduciary — a director, a manager, or a controlling stockholder — is on the other side of the deal from the corporation. When a conflict transaction is effected, the burden is on the proponents to demonstrate that the deal is entirely fair to the corporation. In the absence of such proof, the fiduciary interested in the transaction — *i.e.*, the one on the other side of the deal — must disgorge any profits or pay whatever damages are necessary to make the corporation whole.[11] The interested fiduciary must do that regardless of whether or not she acted with the intention to take unfair advantage of the corporation; in other words, even if she acted in utmost good faith.

Even here, however, Delaware tries to respect the business judgment of disinterested directors and stockholders. How? By invoking the protection of the business judgment rule if an interested transaction is approved by a majority of the independent directors or by a majority of the disinterested stockholders, after full disclosure.[12] The idea, of course, is that the investment of ultimate power over the transaction in impartial directors or stockholders suffices to police the conflict. By this instrumental means, Delaware law can protect the resulting business decision without any loss of integrity, because the decision was made or ratified by persons whose interests were aligned with those of the corporation and its stockholders.

Consistent with the nuance that infuses its common law, Delaware is more suspicious when the fiduciary who is interested is a controlling stockholder. When that is so, there is an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders. For that reason, when a controlling stockholder is on the other side of the deal from the corporation, Delaware law has required that the

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[11] *See Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 437 (Del. 1996) (holding that the defendants' breach of their duty of loyalty required them to disgorge profits resulting from that breach).

[12] 8 *Del. C.* § 144(a)(1)–(2).

transaction be reviewed for substantive fairness even if the transaction was negotiated by independent directors or approved by the minority stockholders.[13] To encourage the use of these protections, however, when these protections are deployed, the burden of proving that the transaction is fair falls not on the controlling stockholder or the corporation, but on the stockholders who sue, who must show that the transaction is unfair.[14]

In a recent development, the business judgment rule standard can be invoked if stockholders are given the protections of both an independent board committee with veto power and an informed majority of the minority vote, because the combination of these protections replicates a third-party merger and has been shown to be effective in protecting minority stockholders.[15]

As this necessarily surface level overview shows, Delaware's scrutiny of managerial conduct gets tighter the more the court has rational reasons to suspect that a conflict of interest exists. Similarly, because Delaware gives great deference to decisions made by the stockholders' elected representatives, its law is extremely vigilant about policing abuse of the director election process. The heightened scrutiny given to defensive actions is applied even more intensively when the court suspects that incumbents are taking actions that have the effect of preventing a fair election.

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[13] *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (explaining that entire fairness applied even though an independent committee approved the transaction).
[14] *Id.*
[15] *See In re MFW S'holders Litig.*, 67 A.3d 496, 535 (Del. Ch. 2013), *aff'd* 88 A.3d 635 (Del. 2014) (explaining the rationale for this rule).

III. How Delaware Makes Corporate Law And Why We Are Well Positioned To Construct A Fair And Efficient Corporation Law That In Many Ways Acts As A De Facto National U.S. Corporate Law

That brisk tour of Delaware law leads to the next logical topic, which is how Delaware breathes life into its corporate law.

Delaware's statutory law is made, of course, by an elected legislature, subject to veto by a governor. Because of the special importance of corporation law to Delaware, amendments to the corporate code must pass with a super-majority vote. In practice, Delaware's legislature and governor defer in the making of statutory law to the corporate law council of the Delaware State Bar Association. That council consists of corporate lawyers of all kinds, not just the transactional lawyers who represent corporate managers, but also plaintiffs' lawyers who represent stockholder interests. The council is comprised entirely of Delawareans, but it regularly seeks out and receives national input from the only two constituencies involved in shaping Delaware's corporation law: corporate managers and stockholders.

We say they are the only two constituencies because that is what we mean. And that is where Delaware's small size comes in as, in our view, an important part of the story. Delaware is a state of fewer than one million residents. It has important industries like chemicals (you might have heard of that little company called DuPont), pharmaceuticals (*e.g.*, Astra Zeneca's U.S. headquarters), banking, and agriculture (think chickens, corn, and soybeans). But, the corporate law industry is as important, or more important, than any of those industries. For a state of Delaware's size, the corporate franchise taxes and legal jobs that Delaware's corporate law advantage brings in are a substantial reason why Delaware is among the most prosperous of the 50 states.

For other states, the integrity of their corporation law is of far less moment than the fate of a particular corporation facing a takeover bid or a major claim for damages. From sea to shining sea, we have witnessed examples of this phenomenon. For example, when Wachovia bank faced a takeover battle, the North Carolina legislature passed a bill changing the state's corporation law precisely in order to help its home-based Wachovia avoid accepting a hostile bid from SunTrust.[16] The legislatures of Massachusetts and Ohio have acted similarly, intervening to make changes in their corporate codes to address specific corporate feuds that they believed threatened the independence of corporations headquartered in their states.[17] For these state legislators, the jobs and collateral community benefits that would be lost if a home-state headquartered firm was taken over far outweighed any concern about having a responsible corporation law that facilitates long-term wealth creation. The political calculus for them was not difficult. Their states receive a trivial portion of their revenue from corporate franchise taxes or their equivalent. Indeed, even if Delaware's advantage was wholly dissipated and all of

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[16] *See* Lijun K. Yang, First Union v. SunTrust Banks*: The Fight for Wachovia and its Impact on North Carolina Corporate Law*, 6 N.C. BANKING INST. 335, 336 (2002) (observing that the amended corporation law was the "result of the successful lobbying by First Union and Wachovia").

[17] *See Campeau Corp v. Federated Dept. Stores*, 679 F. Supp. 735 (S.D. Ohio 1988) (ruling on the constitutionality of Ohio's Foreign Business Acquisitions Act, which was enacted after a foreign corporation made a tender offer to a "resident" Delaware corporation with substantial ties to Ohio); *Hyde Park Partners v. Connolly*, 839 F.2d 837 (1st Cir. 1988) (ruling on the constitutionality of Massachusetts' takeover statute passed in 1987); *Nomad Acquisition Corp. v. Damon Corp.*, 701 F. Supp. 10 (D. Mass. 1988) (declining to rule on the constitutionality of Massachusetts takeover statute).

Delaware's corporation business was distributed over the 50 states, the other states would barely notice.

But for a small state like Delaware, remaining the leader in corporation law is vital. That leadership produces thousands of Delaware jobs and nearly a quarter of the state's budget revenues.[18]

For that reason, Delaware will not tilt its corporation law to favor a corporation that happens to have its headquarters here. It cannot afford to do so. Even if the DuPont Company faced a hostile bid or a proxy contest as happened this very year, Delaware could not change the rules of the game to favor DuPont. The cost to Delaware's integrity and ability to preserve its advantage in the corporation law field would be too high.

Because of that reality, corporation law in Delaware is influenced by the only two constituencies whose views are most important in determining where entities incorporate: managers and stockholders. Over time, the relative power of these constituencies has changed, and it is now fair to say that both groups have a lot of clout, and that Delaware corporate lawmakers seriously consider each group's perspective on all key issues. Given the increasing flow of capital from individual investors into institutional investors, this rough equality of voice is likely to be preserved, and may at some point tilt heavily towards stockholder interests. As an example of that clout and its influence on Delaware,

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[18] *See* Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1159 (2006) ("A huge percentage of Delaware's government budget revenues are derived from its corporate chartering business. This heavy reliance on tax revenues generated by corporate chartering makes Delaware's state legislatures highly attenuated to preserving Delaware's dominance in corporate chartering since legislation that reduces the number of firms incorporating in Delaware will reduce tax revenues.").

Delaware adopted a statute responsive to institutional investor concerns about using a plurality rule in director elections. That statute authorized stockholders to adopt bylaws embracing majority voting that are not repealable by the directors.[19]

But, for now, the key takeaway point is that Delaware's financial self-interest in legal excellence leads to a productive dynamic for the creation and maintenance of an efficient and fair corporation law. That law is essentially a specialized body of contract law that governs the relations between the managers and stockholders of firms incorporated in Delaware. That is not to say that Delaware itself does not have laws protecting the environment, ensuring the fair treatment of workers, and guarding consumers against fraud. Delaware does have such laws, but they govern only actual business operations that are conducted within its borders.

The corporation law itself does not address these issues. It governs only the internal affairs of the corporation. Within that domain, Delaware law emphasizes that the goal of the corporation is to advance the interests of the stockholders. But Delaware does not — by law — require boards to measure their success against the moment-to-moment impulses of the stock market. Rather, Delaware law gives central management a strong hand to chart a course for the corporation that it believes will, in the end, produce the greatest increase in stockholder wealth. A good faith business judgment that does not maximize current payoffs to stockholders — such as a decision to grant pay increases to the workers, increase the corporation's involvement in charitable giving, or to sacrifice

[19] 8 *Del. C.* § 216 ("A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors.").

current dividend payments in order to make capital investments — will be respected if it is rationally related to a plan to enhance the corporation's long-term profitability.

Furthermore, Delaware's statutory corporation lawmaking process is not only careful, it is continuous. Delaware does not look at the corporation law every five or ten or fifteen years as Congress might do with the national securities laws. The Delaware corporation council meets regularly and the General Assembly makes modest adjustments annually to make sure Delaware law remains as efficient as possible.

Because the Delaware statute is an enabling statute, the enforcement of the managers' fiduciary duties is arguably the most important check Delaware imposes on managerial abuse. When a stockholder believes a fiduciary breach has occurred, he can bring suit in the Delaware Court of Chancery, the court on which one of us was privileged to serve for 16 years.

The Delaware Court of Chancery's original jurisdiction explicitly includes all the jurisdiction vested in the English Court of Chancery as of 1776. By happy historical evolution, the English Court of Chancery had jurisdiction over fiduciary relations, like those between executors and estates, and between trustees and trusts. The Delaware Court of Chancery kept that jurisdiction and other traditional equity jurisdiction, all of which involved exclusively civil as opposed to criminal law.

When Delaware moved beyond the specific legislative chartering of particular corporations and adopted a backbone, general corporation law that enabled entrepreneurs to freely create corporations, it was natural to vest jurisdiction over corporate law disputes in the Court of Chancery. Directors were thought to be a species of fiduciary.

Thus it was fitting for the court that enforced equitable duties to oversee suits against corporate directors.

Because Chancery did not use juries, other advantages flowed to corporate managers and stockholders. The Chancellor issued written decisions that, unlike a jury verdict, provided useful guidance for future analogous situations. Until shortly after World War II, Chancery had only one judge. Even if the raging internal debates that go on in a former Chancellor's own head were characteristic of the inner ruminations of past Chancellors, it's fair to say that having a single judge promoted a certain consistency in application. And, because the Chancellor heard lots of business cases, he developed a good feel for business dynamics and fashioned commercially practical rulings.

Not only that, the Chancellor was often called on, as part of his equitable duties, to consider emergency applications for injunctions to stop actions that, if not enjoined, might cause irreparable injury. Injunction rulings must be issued with dispatch in order to serve their intended purpose.

The capacity and willingness of Chancery judges to act with speed fit well with the business community's needs. In many instances, once a transaction is completed, there is no way for the judiciary to, as folks are wont to say in Delaware, "unscramble the eggs," leaving the parties who effected it in danger of facing a huge damages suit. Therefore, it is often the case that the proponents and opponents of certain corporate action agree on one thing, which is that they would like to get an up-front ruling on whether the transaction should be preliminarily enjoined. Chancery judges were well-equipped by disposition and training to provide such answers with the alacrity that modern commerce demands.

In fact, as a matter of judicial culture, Chancery developed a deep commitment to the timely resolution of disputes, however big or small, and whether expedited or not. As a result, corporate constituencies knew that they would receive well-written, practical, and timely decisions from Chancery. If they did not like those decisions, they could appeal directly to the court with the final say, the Delaware Supreme Court, an appellate court that took business cases equally seriously, and that also has historically had a very practical bent.

Although there were the occasional controversial decisions, all-in-all the system produced predictable, efficient results that balanced the needs of managers for flexibility and consistency with those of stockholders in policing self-dealing and managerial sloth.

The small size of Delaware was again not coincidental to these results. Because Delaware is small, it can devote a Chancellor, and now four Vice Chancellors as well, substantially to the expert resolution of corporation law cases and other exclusively civil matters. Because corporation law is materially important to the state, the Chancery and Supreme Court judges who handle corporate cases take them very seriously and are motivated to produce a law that fairly balances the interests of managers and stockholders. Each generation of corporate law judges truly feels invested with a sacred trust, and behaves accordingly.

And, because most corporate cases involve corporations that are chartered, but not headquartered, in Delaware, its courts are not subject to hometown bias. To put a point on that, in most takeover battles filed in Delaware, one Delaware corporation headquartered somewhere else is seeking to take over another Delaware corporation headquartered elsewhere, not atypically because that second Delaware corporation has signed up a friendly merger agreement with yet a third Delaware corporation also headquartered outside of Delaware.

The use of a specialized court that issues written rulings has other advantages. By its very nature, equitable review is situationally-specific and proceeds in the common law fashion. The case at hand is decided and the law is thereby evolved incrementally. Although that can lead to what some scholars like to call indeterminancy — *i.e.*, some residual uncertainty — it also allows space for the judiciary to pull back in future cases if a prior decision turns out, in the wake of experience, to have been unwise. And the overall body of case law coherently fills in a map that guides transactional and corporate governance advisors in charting a course for their clients that is relatively risk free.[20] The speed with which the Delaware judiciary works also enables corporate constituencies to get answers about emerging issues with the speed required by the business world. When novel issues arise, they are addressed with dispatch, as is exemplified by Chancery

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[20] *See Roundtable Discussion: Commentary From the Delaware Corporation Law Revision Committee*, 33 DEL. J. CORP. L. 619, 624 ("People can do business in a climate of reasonable certainty. The idea of having Delaware courts with a high caliber business acumen interpreting the Delaware Corporation Law gave corporations an assurance that there was going to be a level of consistency and certainty that businesses could plan around.").

decisions that upheld the ability of stockholders to make proposals at annual meetings, in the face of arguments that company bylaws barred them from doing so.[21]

Although the Delaware system is not perfect, the value it generates for the United States is considerable and would be difficult for the federal government to replicate. Unlike Congress, Delaware's legislature attends to its corporation law every year and does so thoughtfully. Unlike what would be the case in Congress, Delaware corporation law is solely focused on the relations between stockholders and managers, and is not heavily influenced by other constituencies. And unlike the federal judiciary, consisting of over one thousand judges, ten Delaware Chancellors and Supreme Court Justices devote a considerable amount of time to fashioning sensible, fair corporate law decisions in a timely way. Also unlike the federal judiciary, the Delaware judiciary is, by the state's Constitution, evenly balanced between the major political parties, resulting in a centrist group of jurists committed to the sound and faithful application of the law.[22]

Through this means, the United States achieves the benefits of a virtual national company law, but more efficiently. Even for firms not chartered in Delaware, the teachings of Delaware courts are likely to be more important than their own state's law, as a practical matter. Delaware law is, in essence, American corporation law for most purposes. The balanced approach it embraces facilitates managerial innovation and creativity, while preventing managerial self-dealing and entrenchment.

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[21] *See Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 346 (Del. Ch. 2008); *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *7 (Del. Ch. Apr. 14, 2008).

[22] Moreover, for the past thirty years, Delaware governors have employed a bipartisan judicial nominating commission comprised of distinguished lawyers and laypersons to screen nominees for fitness.

IV. Does The Delaware Model Suggest A Way Forward For Luxembourg?

The question we have been asked to address today is whether and to what extent the success our nations have had in becoming a center for entity formation can be a model for Luxembourg.

For a small nation like Luxembourg, Delaware is an intuitively appealing model, given that Delaware is one of the smallest of the states that comprise the United States. Could it therefore be that its European counterpart Luxembourg can assume a similar role in the EU?

Count us as skeptics that Luxembourg can secure anything like the market share that Delaware has in the United States. More than 50% of the public companies in the United States are Delaware entities.[23] And Delaware's domestic share has been rising, not falling, with Delaware entities constituting a very high percentage of those initial public offerings that occur in the United States.[24]

But current Delawareans knowledgeable about their role in the American corporate governance system are self-aware enough to realize that much of Delaware's current success is attributable to our predecessors who, beginning in the 19th Century and accelerating in the early 20th Century, took steps to position Delaware as a national leader

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[23] Delaware Department of State, Division of Corporations http://corp.delaware.gov/aboutagency.shtml (last visited Aug. 25, 2015). This includes the 64% of Fortune 500 companies that are incorporated in Delaware. *Id.*

[24] *See* Brian Broughman, et al., *Delaware as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 871 (2014) ("Indeed, we find that 93 percent of the firms in our sample that ultimately went public were incorporated in Delaware at the time of their IPO . . . ."); Jeffrey R. Wolters, *Delaware Insider: Delaware Law Pitfalls in IPOs*, BUS. L. TODAY, Nov. 2013 ("Approximately 85 percent of U.S. IPOs in 2013 involved Delaware corporations.").

in corporate law. Taking advantage of slips from its competitor states like New Jersey, and its geographic and culture closeness to the New York legal and financial community, Delaware early developed the most flexible corporate law in the United States.[25] Delaware combined that statutory flexibility to a commitment to timely judicial review of stockholder complaints and the articulation of case law that provided guidance to corporate managers who needed it for future action. And as previously indicated, because Delaware was small, corporate law mattered to it, and Delaware was not the physical hometown of either the corporation's headquarters or its stockholders, and its success depended on providing a fair forum where they could work out their differences without either side being hometowned. Although some scholars quibbled, Delaware was typically and is certainly now the jurisdiction most focused on the protection of invested capital, and thus became a place where corporate managers knew they would be treated fairly and be given the discretion to make impartial decisions without undue fear of judicial interference. At the same time, stockholders had the assurance that Delaware courts would closely police conflict transactions, takeover defenses, and safeguard the director election process against manipulation. In a federal system where there was no national corporate law, Delaware also became an easy language of choice for businesses headquartered in different locations. When corporations chose Delaware law to govern their relationships (or even to have a contract under New York law interpreted in the

[25] *See* Richard J. Agnich & Steven F. Goldstone, *What Business Will Look for in Corporate Law in the Twenty-First Century*, 25 DEL. J. CORP. L. 6, 29 (2000) (observing that Delaware benefitted from the "outmigration" of large public corporations from New Jersey to Delaware); Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 969–72 (1995) (summarizing "Delaware's rise to prominence" in corporate law).

Delaware courts), they would have a body of rich case law to guide them and they could depend on having a neutral forum that would treat each of them equally if their relationship resulted in litigation.

Notably, in this story, tax is not much of a factor. Certainly, over the years, Delaware has tried to provide business entities with tax effective options. But the reality is that in the United States, a small state like Delaware cannot act as a shelter for a large corporation from the taxing power of its sister states, which are allowed to tax profits in proportion to where they are actually generated.[26] As important, Delaware is just one state in a federal union, and thus has no power to immunize corporations from taxes imposed by the national government.[27] And although Delawareans are good at corporate law, they are not alchemists. Delaware has a profound interest in business entities choosing it as their home precisely because they pay franchise taxes that help fund its government. These franchise taxes are not low in comparison to other states, they are high. As one of us often puts it, Delaware is Bergdorf Goodman, not the Dollar Store.[28]

For that reason, we do not focus on tax in comparing Delaware's position to that of Luxembourg. As two citizens of different OECD nations, it is not apparent to us that the tax arbitrage that is occurring because of competition within the OECD by nations seeking to lead as tax domiciles is sustainable for any of them as a long-term economic

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[26] *See generally* Rick Geisenberger, *The Delaware Corporation Franchise Tax*, DELAWARE LAW., Fall 2012.

[27] *See id.* (explaining that federal corporate taxes are "a function of U.S. tax law and [have] nothing to do with any state tax or corporate laws").

[28] *See* A.C. Pritchard, *London as Delaware?*, 78 U. CIN. L. REV. 473, 476 (2014) ("Notably, Delaware does not compete on price. Delaware's incorporation fees are generally higher than those charged by other states . . . .").

strategy, and even less that it is useful for the OECD as a whole to allow it to continue. The common challenges of funding needed investments in clean infrastructure and energy to address climate change, shoring up social safety net programs for aging populations, and addressing the challenges of globalization suggest that there will be pressures to prevent particular nations from acting as havens to allow corporations to escape fair taxation by the various nations from which their operations generate profits. Perhaps Luxembourg can become the preferred tax haven for the EU, but that will not make it distinct from others, and the tolerance that larger nations have for such conduct has already grown thin. For present purposes, what matters even more is that Delaware cannot act as a tax haven model for Luxembourg because the tax advantages Delaware offers are not distinct from most American states, and Delaware provides no real advantage to companies seeking to avoid national U.S. taxes. [29]

Having gotten the tax mythology out of the way, we focus on the real issue. The primary difficulty for Luxembourg in emulating Delaware is that it is not clear that Luxembourg has the same attributes to offer the EU that Delaware has in the U.S. context, or that the EU even wants those attributes.[30]

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[29] *See id.* at 476 (noting that "incorporating in Delaware does not produce any particular tax advantages."); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1221 n.73 (observing that "other states offer tax advantages that equal or surpass Delaware's").

[30] *See* Christian Kersting, *Corporate Choice of Law — A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 41 (2002) (predicting that any European nation that attempts to become Europe's Delaware counterpart will face issues of language, difficulty of reincorporation, and "the already substantial harmonization of European company law").

For starters, based on our less than expert understanding of Luxembourgian corporate law, it does not appear that Luxembourg provides investors with the sort of protections that Delaware law does. As we understand it, stockholders may not bring derivative suits against directors who may have breached their fiduciary duties in a manner that caused damage to the company.[31] Although the derivative suit remedy is not without its difficulties for Delaware stockholders, it is an important accountability tool that has been used effectively on many occasions to not only recover monetary damages, but, perhaps as important, to act as a goad for greater diligence and loyalty by corporate directors.[32] Likewise, it is not at all clear to us that outside of the derivative suit context, Luxembourg has a vibrant history of corporate law cases, in which its courts protect the legitimate interests of stockholders from breaches of fiduciary duty. By contrast, in Delaware, litigation has resulted in bodies of law that police self-dealing in the context of controlling stockholder transactions,[33] the use of takeover defenses,[34] and even to some

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[31] Margaretha Wilkenhuysen & Louisa Silcox, *Luxembourg*, *in* THE CORPORATE GOVERNANCE REVIEW 201 (Willem J. L. Calkoen, ed., 2012); Pit Reckinger & Philippe Prussen, *Luxembourg*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE GOVERNANCE 67 (2010).

[32] *See, e.g.*, *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (referring to the derivative suit as "'one of the most interesting and ingenious . . . accountability mechanisms for large formal organizations'") (quoting ROBERT C. CLARK, CORPORATE LAW 639–40 (1986)); *Agostino v. Hicks*, 845 A.2d 1110, 1116 (Del. Ch. 2004) ("Recognizing, however, that directors and officers of a corporation may not hold themselves accountable to the corporation for their own wrongdoing, courts of equity have created an ingenious device to police the activities of corporate fiduciaries: the shareholder's derivative suit.").

[33] *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761 (Del. Ch. 2011).

[34] *See, e.g.*, *Paramount Commc'n, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000).

extent, executive compensation.[35] Although perfection is an unrealistic goal for human made commercial law, the results in Delaware have been very positive for investors, with very low levels of corporate corruption, and a high incidence of fairly priced M & A transactions of all kinds, including controlling stockholder buy-outs that tend to be priced as high as or even higher than third-party buy-outs.[36]

As mobilized capital continues to grow even more important in the decisions as to where businesses domicile, it is not clear to us that Luxembourg has much to offer institutional investors in terms of their ability to use litigation to protect their entrusted capital. Relatedly, given the absence of litigation, it is also not clear how Luxembourg can serve as the same sort of common standard for managerial conduct that Delaware does in the United States. The policing and guidance functions that Delaware provides are related and have benefits for both stockholders and managers. The accountability generated by litigation has undoubted costs, but it also has benefits in terms of the road map it provides for managers who wish to chart a future path that avoids legal difficulties by respecting the fair expectations of investors.

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[35] *See, e.g.*, *In re Citigroup Inc. S'holder Derivative Litig*., 964 A.2d 106, 138–39 (Del. Ch. 2009); *Carlson v. Hallinan*, 925 A.2d 506, 531–33 (Del. Ch. 2006); *Sanders v. Wang*, 1999 WL 1044880 (Del. Ch. 1999).

[36] *See In re MFW S'holders Litig.*, 67 A.3d 496, 530 (Del. Ch. 2013) (deciding dispute involving a controlling shareholder and 47% premium) (citing Guhan Subramanian, Post-Siliconix Freeze-Outs: Theory and Evidence, 36 J. Legal Stud. 1, 13 tbl.1 (2007) ("reporting long-term cumulative abnormal returns of 39% in completed going private transactions between 2001 and 2005, almost all of which used a special committee")); Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach*, 5 HARV. BUS. L. REV. 205, 223 (2015) ("[O]ur results suggest that the unified approach [of treating all freezeout transactions the same, regardless of form,] has reduced the opportunity for (and possibility of) freezeouts below intrinsic value.").

In this regard, it should not be ignored that Delaware's pre-eminence in the IPO market reflects the perspectives of not just controlling stockholders, but of those who represent investors. Many controllers would, for obvious reasons, like to go public in the state where the corporation is headquartered,[37] a state that will have a special interest in protecting it from a future takeover and that will often have corporate laws enabling preclusive defenses. But the representatives of investors are rightly skeptical. In Delaware, managers and stockholders find the level pitch on which they are comfortable playing the capitalist game. Critical to that comfort is the reality that although controllers may be able to secure voting control through mechanisms like dual class shares,[38] the ability of stockholders to use litigation to ensure their fair treatment allows them to invest with confidence. To this point, Delaware law has a combination of doctrines that, taken together, encourage pro rata treatment of all stockholders in key transactions.[39] Thus, in

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[37] *See* Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, at 27–28 (observing a company's effective choice when going public between the state where it is headquartered and Delaware); *see also* William J. Carney, et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 148 n.65 (2012) ("One of us experienced the power of venture capitalists' views on incorporation in Delaware prior to a recent IPO. The lawyer advised incorporating in the issuer's headquarter state, only to be met by an objection from a foreign venture capitalist that 'everyone knows you can't go public unless you're incorporated in Delaware.' Two other venture capitalists on the board nodded their assent and the discussion was over.").

[38] *See* Tian Wen, Comment, *You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies From Listing on the Securities Exchanges*, 162 U. PA. L. REV. 1495, 1496 (2014) ("In 2004, Google's initial public offering (IPO) revealed that the company would go public with a dual-class capitalization structure. A dual-class stock company has a capital structure whereby insiders hold common stock with multiple votes per share (typically ten), while the public holds common stock with just one vote per share.").

[39] *See, e.g.*, *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1039–40 (Del. Ch. 2012) ("It is, of course, true that controlling stockholders are putatively free under our law to sell their own bloc for a premium or even to take a different premium in a merger. As a practical matter, however,

some ways the Delaware deal for controlled corporations can be seen as one in which controllers are given the flexibility to implement their own corporate vision, but on the promise that they do so for the ratable benefit of all stockholders, including the minority. We are unable to discern any basis on which EU managers and investors would see Luxembourg as offering a similar "shared" bargain that would lead it to become the preferred venue for IPOs.

As important, a sometimes underestimated reason that investors trust Delaware is that Delaware law provides stockholders with an annual opportunity to elect directors[40] and to adopt by-laws.[41] When insiders have tried to monkey with the election process, Delaware courts have come down hard on them.[42] With the growing activism of

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that right is limited in other ways that tend to promote equal treatment, for example, by the appraisal remedy that requires pro rata treatment of minority stockholders without regard to minority discounts, by certain substantive and procedural doctrines, and, in a good illustration of the law of unintended consequences, § 203 of the DGCL.") (footnotes omitted); *Gilliand v. Motorola, Inc.*, 873 A.2d 305, 310 (Del. Ch. 2005) ("In an appraisal action, minority stockholders are entitled to the *pro rata* fair value of their shares as of the merger date.").

[40] *See* 8 *Del. C.* § 211(b) ("Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws.").

[41] *See* 8 *Del. C.* § 109(a) (vesting power to amend the bylaws "in the stockholders entitled to vote"); 8 *Del. C.* § 211 (providing for annual stockholder meetings).

[42] *See, e.g.*, *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("[M]anagement has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident shareholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to the established principles of corporate democracy."); *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 264 (Del. Ch. 2013) (granting preliminary injunction to stockholder after directors violated their fiduciary duties by using a Proxy Put inequitably to enhance their chances of winning reelection); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (holding that when "the board acts . . . for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action"); *Lerman v.*

institutional investors, the tools granted to them by Delaware law have been deployed vigorously in combination with related federal tools, such as the right to present non-binding proposals using Rule 14a-8.[43] Knowing that the stockholders may replace them, directors are loath to ignore even a non-binding proposal that has majority support. Proxy contests have become more common, as have "withhold the vote" campaigns.[44] Because stockholders have shown the capacity to win such fights, boards often reach voluntary settlements in which representatives of the insurgents are seated on the board.[45]

From our understanding, Luxembourg does not mandate that any segment of the board face annual election,[46] although that is considered a best practice.[47] Rather,

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Diagnostic Data, Inc., 421 A.2d 906, 914 (Del. Ch. 1980) (holding that management's bylaw amendment that made it impossible for shareholders to wage a proxy contest was "invalid").

[43] *See* 17 C.F.R. § 240.14a-8.

[44] *See* STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 153, 177 (3d ed. 2012) (noting that proxy contests are rare but have become more common in recent years); Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 878 (2014) (same).

[45] *See* GIBSON DUNN & CRUTCHER LLP, ACTIVISM UPDATE: 2014 YEAR IN REVIEW 2–3 (2014), http://www.gibsondunn.com/publications/Documents/MA-Report-2014-Activism-Update.pdf (observing that in a survey of 64 activist campaigns involving large U.S. companies, 19% of the campaigns ended with "formal settlement agreements granting board representation to activists" and that "[o]f the campaigns in which an activist sought board representation, at least some change in the board composition occurred nearly 77% of the time"); GIBSON DUNN & CRUTCHER LLP, 2015 MID-YEAR ACTIVISM UPDATE 2–3, 17 (2015), http://www.gibsondunn.com/publications/pages/MA-Report-2015-Mid-Year-Activism-Update.aspx (observing that in a survey of 56 activist campaigns at 50 U.S. companies with market capitalization of over $1 billion during the first six months of 2015, settlement agreements resulted in insurgents obtaining an average of 1.8 board seats or 17.2% of a 10.5 member board in the first six months of 2015).

[46] Millicom International Cellular S.A., *Summary of Key Differences Between Luxembourg and Swedish Corporate Law, as per 22 June 2011*, at 3, http://www.millicom.com/media/2600/Summary_of_key_differences_between_Luxembourg_and_Swedish_Corporate_Law.pdf.

directors may be elected for terms of up to six years.[48] And a majority of Luxembourg companies have controlling stockholders. The rules that govern offers by controlling stockholders do prevent a squeeze-out if the controller does not obtain 95% of the shares,[49] but there does not seem to be the kind of intensive review of controlling stockholder buy-outs that exists in Delaware, an intrusive form of review that puts tremendous pressure on controllers to use procedural protections such as a special committee of independent directors and a majority of the minority vote.

It has also been indicated to us that Luxembourg may want to become a preferred domicile for privately held entities. Absent some distinct tax advantage that Luxembourg presents, about which we are unaware, the Delaware experience does not suggest that Luxembourg can offer anything distinct to private entities that would allow it to carve out a niche in just that space. Rather, the Delaware experience suggests that most businesses that wish to domicile in Delaware and that are physically located elsewhere have an ambition to become larger entities and potentially go public. Many Delaware corporations and alternative entities are in fact subsidiaries of large public corporations. And many Delaware private corporations are held by private equity firms that hope to bring them public. Many other Delaware entities are emerging companies whose managers dream of going public.

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[47] Monique Bachner, *Legal Framework for Corporate Governance in Luxembourg*, at 9, http://femaleboardpool.eu/LLFCGL.pdf ("Best practice is annual re-election, with each Director elected separately (no bundling)[.]").
[48] *Id.*; Millicom, *supra* note 46, at 3.
[49] DAMIEN CONEM ET AL., PUBLIC TAKEOVER BIDS IN THE BENELUX 63 (Peter Corten, ed. 2011); Reckinger & Prussen, *supra* note 31, at 67.

For private companies with only one stockholder, Delaware law provides no particular advantage. It is only as to private companies where the relationships among several stockholders must be addressed where Delaware's principal advantage comes in. And the body of case law that addresses those relationships does not vary by the nature of the corporation. Delaware has no "public corporation law" and no "private corporation law"; it has one Delaware General Corporation Law. Without the rich body of guidance that exists in Delaware and an open forum for stockholders to resolve their disputes with management, it is not clear that Luxembourg provides much of a reason for private entities to form within its borders. To this point, it must be remembered that even in the formation of private entities — such as private alternative entities in the energy space in the United States that sells interests to sophisticated entities — the case law that exists in Delaware regarding public alternative entities and even the analogous corporate law principles act as an assurance to investors that encourages capital entrustment.[50] For all these reasons, we are dubious that there is an approach to attracting entities that, based on corporate governance principles, would segment private from public entities. Entities move in and out of those statuses over time, and any savvy manager, investor, or advisor will therefore have to consider how a choice of domicile will allow the entity to move forward with the flexibility to choose either status, if the circumstances make that

[50] *See* Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465, (2009) (citing Jack B. Jacobs, *Entity Rationalization: A Judge's Perspective*, 58 BUS. LAW. 1043, 1044 (2003); Larry E. Ribstein, *Making Sense of Entity Rationalization*, 58 BUS. LAW. 1023, 1031 (2003)) (discussing the "explosion of litigation" regarding alternative entities and how the development of case law will provide investors with assurance).

advisable, and what benefits and protections the domicile's laws afford to managers and investors if a change in status is implemented.

Not only that, it is not clear that Luxembourg has done anything to distinguish itself more generally in the M & A field. Delaware has made its mark in this arena by being truly open to the M & A market. Although Delaware gives directors a strong hand in navigating that market, there is intensive judicial review that is focused on ensuring that directors are faithful to the stockholders' best interests. When a company is going to engage in a change of control transaction, the directors have an affirmative duty to seek the best price for the stockholders.[51] Because sell-side stockholders almost always have a vote, they are able to protect themselves and competing bidders are able to influence the outcome.[52] A determined bidder is virtually never thwarted. Importantly, Delaware does nothing to prevent the outmigration of corporations. Although many Delawareans find the recent redomiciling by corporations to avoid taxations—so-called inversions—distasteful, there has been no Delaware effort to take legal action to prevent

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[51] *Revlon*, 506 A.2d at 182.

[52] *See* Robert E. Spatt, *The Four Ring Circus — Round Nine: A Further Updated View of the Mating Dance Among Announced Merger Partners and an Unsolicited Second or Third Bidder*, Simpson Thacher & Bartlett LLP 1 (Mar. 24, 2008), http://www.simpsonthacher.com/content/publications/pub698.pdf (cataloging numerous instances of "deal jumping" in which additional bids are made for a target by third parties after the signing of a merger agreement, and noting that such instances have "become a standard execution risk of getting a deal done, and tend[] to reflect the ebb and flow of hostile acquisition activity"); *see also* Wayne O. Hanewicz, *Director Primacy,* Omnicare*, and the Function of Corporate Law*, 71 TENN. L. REV. 511, 555 (2004) (explaining that stockholders of the selling corporation "may still vote down the board's proposed transaction, and competing bidders are still free to make hostile bids").

them.[53] As a study by a distinguished Harvard scholar shows, Delaware has had to remain competitive by being a continuingly attractive forum for the formation of business entities.[54] Precisely because Delaware is truly open to M & A transactions, mergers frequently result in one fewer Delaware public corporation. But Delaware's calculus is simple: by enabling corporations to engage in M & A efficiently, they will be more successful over time and a greater number of them will continue to choose Delaware as their home.

There is risk in this. As we understand it, it is a risk that Luxembourg does not take and Luxembourg has special rules for mergers that will result in the surviving corporation not being domiciled in Luxembourg.[55] In other words, although Luxembourg is welcoming to in-bound M & A, it is reluctant to let corporations depart if that is what their managers and stockholders wish to do.[56]

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[53] *See* Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 375 (2004) (discussing the history of inversions and noting the absence of legislation that would prevent them).

[54] *See* Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 78 (2008) ("Even if no state actively competes with Delaware, business dynamism is so substantial in the United States that a large fraction of Delaware's tax base would disappear in a decade if Delaware did not get new firms into its tax base. Delaware truncates its tax rate, in that mid-sized companies pay as much as the very largest companies. Therefore, mergers, acquisitions, and disappearances erode Delaware's tax base even more quickly than American business turns over. Delaware must keep convincing firms to reincorporate from their home state into Delaware, even though it faces no important immediate competitor in the interstate chartering market.").

[55] Ogier, *Luxembourg Corporate – Cross Border Mergers*, OGIER.COM (Mar. 4, 2013), http://www.ogier.com/publications/luxembourg-corporate-cross-border-mergers (last visited Aug. 24, 2015).

[56] As to this point, this is another area where the European Union is considering harmonization. As we understand it, the EU is looking at measures to make it easier for cross-border mergers to occur in the EU without inhibition from any particular nation's corporate law. Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives*

This consideration also relates to Luxembourg's perspective on the "real seat" doctrine.[57] Delaware is the quintessential example of a polity that rejects the real seat doctrine. Corporations whose headquarters are all over the world call Delaware their corporate domicile. The choice of Delaware law as the one that governs the relations of its managers and investors has nothing to do with where the corporation conducts most of its actual operations. Being open to the marketplace is seen as essential to the Delaware approach to corporate law. Thus, for years the largest private sector employer in Delaware was a major credit card bank headquartered in Delaware, which was a Maryland corporation.[58] Delaware is proud to be the corporate domicile of iconic corporations like General Motors, Google, and Coca-Cola, but none of these corporations are headquartered in the state.

In the United States, no particular state can dictate that a corporation must domicile in its borders to do business there. A variety of legal doctrines (e.g., the Commerce Clause of the U.S. Constitution and the so-called internal affairs doctrine)[59] have the practical effect of preventing that kind of discrimination. But the real seat

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on Corporate Law and Corporate Governance 57 (ECGI Working Paper Series in Law, Working Paper No. 296/2015, August 2015).

[57] Under the real seat doctrine, "the internal affairs of a corporation are governed not by the law of the state of incorporation but by the law of the state where the corporation's headquarters are located." Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 479–80 (2004). Luxembourg law adopts this doctrine. *Id.* at 479 n.9.

[58] Ted Griffith, *MBNA Gone, But What About Jobs?*, DEL. ONLINE, Jan. 1, 2006, http://archive.delawareonline.com/article/20060101/NEWS/601010334/MBNA-gone-what-about-jobs-.

[59] *See* Marco Ventoruzzo, *"Cost-Based" and "Rules-Based" Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U.*, 3 N.Y.U. J.L. & BUS. 91, 93 n.5 (2006); P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers — Controlling Choice of Law*, 14 DEL. J. CORP. L. 499, 523–24 (1989).

doctrine remains alive and well in parts of the EU, and may still act as somewhat of a check on the unfettered ability of managers and investors to domicile an entity in a nation that is not the physical home of a substantial amount of its operating assets.[60]

To the extent we can discern any distinctive appeal that Luxembourg's choices regarding takeover law would have, it is for corporate managers who would prefer the ability to chart a future course with some ability to fend off takeovers that they believe are not in the best interests of their stockholders. We say this because, on one hand, Luxembourg did not adopt the non-frustration or board neutrality rule, which prohibits a board from taking measures that may frustrate a bid unless the board receives prior shareholder approval.[61] On the other hand, Luxembourg, like the majority of other EU states, has opted in to the reciprocity rule in Article 12, which permits a target company that applies the board neutrality rule to opt out if the bidding company does not apply the

[60] At the EU level, no principal choice has been made between the real seat doctrine and the statutory seat doctrine. For example, if a certain EU member state (A) uses the real seat doctrine, and a certain corporation has its statutory seat in another EU member state (B) but its real seat in A, a court in A may find A's corporate law to be applicable and not that of B. The European Court of Justice has rendered several decisions in which this distinction (real v. statutory) played a role, within the broader scheme of the overarching freedom of corporations to establish themselves within the EU, as protected by the EU treaty. This case law is not easy to summarize and multi-layered. See the line of cases from ECJ 27 September 1988, 81/87 (Daily Mail and General Trust) through ECJ 12 July 2012, C-378/10 (VALE Építési).

[61] CRISTOPHE CLERC, ET AL., A LEGAL AND ECONOMIC ASSESSMENT OF EUROPEAN TAKEOVER REGULATION 78 (2012); Anneli Krunks, *The Conformity of Initial Objectives With the Actual Impacts of the Hostile Takeover Defences Regulation in the European Directive on Takeover Bids* 26 (Mar. 5, 2014) (unpublished Master thesis, University of Tartu); Luca Enriques & Matteo Gatti, *EC Reforms of Corporate Governance and Capital Markets Law: Do They Tackle Insiders' Opportunism?*, 28 NW. J. INT'L L. & BUS. 1, 29 (2007); Klaus J. Hopt, *Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis*, 20 COLUM. J. EUR. L. 249, 254 (2014).

same board neutrality provision.[62] Luxembourg is not alone in adopting this construct, as six other EU nations (including the Netherlands) have also opted in to reciprocity while opting out of board neutrality.[63] But the result of this combination has been that only a company that has itself opted in to board neutrality can invoke the reciprocity rule.[64] Predictably, this means that the reciprocity rule is in reality rarely, if ever, invoked in Luxembourg and the other EU nations with this construct.[65] Put simply, that means that the managers of Luxembourg corporations should usually be able to employ defenses. In this respect then, corporate managers may find Luxembourg appealing, although Luxembourg has several EU sister nations who have taken a similar approach, including, as we soon discuss, the Netherlands.[66]

In allowing the utilization of takeover defenses, Luxembourg is like Delaware, but remains distinct in two key respects. First, unlike Delaware, which requires directors to exercise the discretion they have within the limits of the law to advance the stockholders' best interests,[67] Luxembourg appears to permit directors to consider the interests of not

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[62] CLERC, ET AL., *supra* note 61, at 78; CONEM ET AL., *supra* note 49, at 90; Krunks, *supra* note 61, at 26; Hopt, *supra* note 61, at 278 n.153.

[63] *See* CLERC, ET AL., *supra* note 61 at 78, 80 tbl.18 (listing Belgium, Denmark, Germany, Hungary, Luxembourg, the Netherlands, and Poland); Krunks, *supra* note 61, at 26 (same).

[64] CLERC, ET AL., *supra* note 61, at 78.

[65] *See id.* (observing that the reciprocity rule is "rarely used" in countries that have opted in to reciprocity but opted out of board neutrality); Krunks, *supra* note 61, at 26 ("Reciprocity rule according to Article 12(3) is applied in all of these countries though there has been no case where such a rule has been used in practice.").

[66] *See infra* note 63 and accompanying text (explaining that the Netherlands and Luxembourg have both opted into reciprocity but opted out of board neutrality or non-frustration).

[67] *See, e.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings*, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that a board may consider the interests of non-stockholder constituencies, but that there must always be "rationally related benefits accruing to the stockholders"); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 40–41 (Del. Ch. 2013) ("[T]he standard of conduct for directors

just stockholders, but other constituencies such as employees.[68] In this regard, Luxembourg is more like many of Delaware's competitors in the United States, which have a more protectionist attitude toward their companies than does Delaware. For example, many of these states have adopted so-called constituency statutes that allow directors to block a takeover if it harms a constituency other than the stockholders.[69]

Second, as we have pointed out, Delaware courts subject managerial defensive actions to heightened scrutiny to ensure that directors use defenses consistently with the duty of loyalty they owe to stockholders. Luxembourg does not have any body of case law to which we could refer that addresses how intensive judicial or regulatory review would be of defensive measures employed by a Luxembourg board of directors. In this regard, Luxembourg appears to be more like the U.S. states that give directors wide leeway to use defenses.[70]

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requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants."); *eBay Domestic Holdings., Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) ("I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders." (emphasis in original)); *see also* William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 893, 896–97 (1997) ("[T]he proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm." (emphasis omitted)).

[68] *See* Margaretha & Silcox, *supra* note 31, at 199 ("Under Luxembourg law, directors are neither legally required to take the company's impacts on non-shareholders into account; nor are they prevented from doing so.").

[69] *See* Kathryn Acello, *Having Your Cake and Eating it Too: Making the Benefit Corporation Work in Massachusetts*, 47 SUFFOLK U. L. REV. 91, 100 n.51 (2014) (listing the thirty-three states that "have some form of constituency statute"); Nathan E. Standley, *Lessons Learned From the Capitalization of the Constituency Statute*, 4 ELON L. REV. 209, 212–14 (2012) (surveying states' constituency statutes and the policy objectives behind them).

[70] *See, e.g.*, MD. CODE ANN. CORPS. & ASS'NS §§ 2-405.1(f), 3-803 (West 2015); NEV. REV. STAT. § 78.139 (West 2015).

When considering all of these aspects of Luxembourg law, Luxembourg appears to be a choice that might have some appeal to managers or entrepreneurs who want a comparatively stronger hand against stockholders than they would have in some other EU jurisdictions. It is not clear to us whether Luxembourg has intentionally chosen this path or is perceived in that manner. But this choice comes with an obvious cost. The other key constituency in the corporate law context is the stockholders. Institutional investors will perceive most of the features we have just discussed as negatives and choices that make them suspicious. They will also not tend to favor the provision of Luxembourg's labor law that requires corporations with more than 1,000 employees to give employees a right to representation on the company board.[71] To the extent the representatives of institutional investors will have a role in expressing views about domicile at key stages like an initial public offering, we suspect that they would favor other EU nations that embrace the non-frustration rule and that are otherwise more open to the market for corporate control. Luxembourg's choices have understandable purposes, which we may even find attractive ourselves. But, we are not institutional investors. And as a general

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[71] Margaretha & Silcox, *supra* note 31, at 199 (explaining this requirement under Luxembourg labor law and also explaining that "employees in Luxembourg workplaces with more than 15 employees have a legal right to representation at work"); *see also* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 735–36 (2004) ("Employee participation in the supervisory organ is also mandated (with qualifications) in . . . Luxembourg . . . . It should be emphasized that membership in the supervisory board does not give employees formal decision power. Nonetheless, the structural involvement of non-shareholder constituencies in the governance of firms is effective in mitigating informational asymmetries and facilitates informal negotiations among corporate constituencies."); Florence Shu-Acquaye, *Corporate Governance Issues: United States and European Union*, 29 HOUS. J. INT'L L. 583, 617–18 (2007) ("Similarly [to the fiduciary duties owed to several constituencies under German law], in Austria, Denmark, Luxembourg, the Netherlands, and Sweden, employee participation in the supervisory board is mandated.").

matter, we expect that institutional investors are likely to put pressure on policymakers in the EU for convergence in corporate governance around rules that give them more influence.[72]

Luxembourg's agnostic approach to corporate constituencies brings another point to mind. Although we have stressed Delaware's pro-investor corporate law, Delaware now has another option that addresses the interest many entrepreneurs have in operating their businesses in a socially responsible and sustainable manner. The so-called benefit corporation model is one in which the corporation and its managers have a legally enforceable duty to act in a socially responsible manner and to advance interests other than just profit.[73]

The benefit corporation is distinctive because it does not merely involve lip service regarding the corporation's duty to other constituencies. In the United States, key constituencies have become cynical to an approach of corporate governance, like Luxembourg's, where corporate managers are given the putative leeway to decide whether to consider other constituencies or not. This approach has been seen in the

[72] In this respect, the European Union is considering a Directive on Shareholder Rights. *See* Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance* 11 (ECGI Working Paper Series in Law, Working Paper No. 296/2015, August 2015). Among the sensitive topics that draft Directive may cover would be requirements for stockholders to vote on certain conflict transactions. *Id.* at 12. If such a Directive were adopted, this would again limit the extent to which any particular EU nation could distinguish itself.

[73] *See* 8 *Del. C.* § 362(a) ("A 'public benefit corporation' is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.").

United States as giving managers a license to use the pretext of other constituencies as a way to get concessions for themselves in the takeover context, without actually delivering any benefits to the workers or communities that have supported the company. The benefit corporation model addresses this concern by making the corporation commit to certain goals and to act in the best interests of all the corporation's constituencies at all times.[74] In modest but real ways, the statute puts legal teeth behind these duties and the idea of social responsibility.[75] In Delaware, this model has genuine appeal and it is expected that the first IPOs among Delaware benefit corporations will occur in the coming year or so.

With the emergence of a new generation of entrepreneurs and socially responsible investors, Luxembourg may wish to consider how its approach to the Directive and other constituencies might be adapted to be attractive to this increasingly important segment of company formation. If, for example, Luxembourg were to require that corporate directors use takeover defenses in a responsible way, modeling on Delaware, that would provide assurance to institutional investors and be livable for managers. At the same time, Luxembourg could consider expressly requiring that corporations be managed for the best interests of all constituencies and in a socially responsible manner — or at least

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[74] *See* 8 *Del. C.* § 365(a) ("The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.").

[75] *See* Leo E. Strine, Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 245–48 (2014) (describing the Delaware benefit corporation statute and how it changes a board's duties and goals).

allow corporations the option to form under that model. Doing so could create a framework that would potentially give Luxembourg some distinctive approach.

At this point, this seems the most obvious path forward for Luxembourg if it were to draw on the Delaware experience. That said, we are not sanguine that within the EU's present context, there is much room for optimism that Luxembourg can obtain anything approaching Delaware's role within the overall U.S. system of corporate governance.

None of this is a criticism of Luxembourg, and it reflects the reality that the Takeover Directive makes it difficult for any EU nation to use corporate law as a distinctive marketing tool. By way of example, the Takeover Directive itself can be seen as making that difficult even in the realm of takeovers itself. The Directive gives the state of incorporation, or in Directive parlance the state of the registered office, only limited authority. Key issues such as bid procedure aspects like consideration offered and the contents of the offer document are governed, not by the state of incorporation's version of the Directive, but by the version adopted by the nation where the exchange on which the target's shares are listed is located.[76] Because of the dominance of exchanges like the German Deutsche Börse, the London Stock Exchange, and the multinational Euronext, it is difficult to see Luxembourg becoming a haven for public companies listed only on the Luxembourg market.

In other words, any EU nation seeking to play the role that Delaware does in the United States system deals with a fundamental problem. In the United States, there is one Securities and Exchange Commission, whose distinct role in the regulation of M & A

[76] CONEM ET AL., *supra* note 49, at 222.

is understood, primarily related to disclosure requirements, and has little to do with the form of bids, their conditionality, or the interaction of the bidder and the target. Therefore, when a corporation in the United States selects a particular state of incorporation, it can expect that the key dynamics of an M & A transaction in which it is a target will be governed by the corporate law of its state of incorporation. Because so many public companies are Delaware companies, it is often the case that most of the likely bidders are also from Delaware. Thus, companies can rely upon Delaware law to provide important guidance in one of the key moments for corporate governance.

In the EU, things are, let's say, "more complicated." The EU does not have an overarching securities law and what constitutes so-called company law varies by nation. Although the Takeover Directive was designed to provide EU-wide harmony, it allows for national variations. Most important, for present purposes, the Directive does not say that the state of incorporation of the target of a bid's version of the Directive will govern all aspects of the bid. As a result, by selecting a corporate domicile, a corporation in the EU cannot obtain the same certainty about the application of the key rules that can be obtained by a U.S. public corporation that is listed on a major exchange, which can select Delaware law, and knows with certainty the rules of the game that will apply. And although we have noted the pressures for greater harmonization by institutional investors, the result of such harmonization will likely limit the ability of any specific nation to carve out a distinctive market niche based on a system of corporate governance.

V. A Nutshell Perspective From The Same European Side Of The Atlantic: Some Recent Dutch Developments That May Be Of Interest To Luxembourg

Although we have set forth a number of reasons why Delaware does not seem like a role model for Luxembourg to emulate, we do not go so far as to argue that it would be inconceivable for Luxembourg to be more successful in promoting the formation of business entities in Luxembourg[77] by using the instrument of corporate law reform.[78] Some recent developments in the Netherlands — like Luxembourg, a member state of the EU — illustrate our point. Before highlighting those developments, we start with an outline of the Dutch corporate law framework.

The Dutch model, is not identical to the Delaware model, as we shall illustrate.[79] But, like Delaware's model, the Dutch model is based on a combination of statutory rules and case law, as well as corporate self-regulation. And it may well be the closest EU analog to Delaware.

The general civil law rules relating to the governance of public corporations (*naamloze vennootschappen*, or N.V.'s) and close corporations (*besloten*

[77] What is needed is increased economic activity in Luxembourg (by those businesses themselves, but also in the form of the legal/financial services industry that is instrumental in the process, administrative and tax revenues, etc.) as well as a stronger influence of the Luxembourg legislature and courts on businesses who have a presence there.

[78] We recognize that in practice there is typically more to it than only corporate law. The political situation, economic developments, tax regime and social aspects, just to name a few, may — and often will — also be factors that co-determine a place of incorporation if founders are taking an international perspective (which, in turn, may be limited to Europe of the United States but can also encompass these continents).

[79] On another note, there does not appear to be a corporate law jurisdiction in the EU — including the Netherlands and Luxembourg — that is leading in a way comparable to Delaware's leading position within the United States as corporate law jurisdiction. Now and again the question comes up in the Netherlands whether the Netherlands is, or should become, "the Delaware of Europe." Coincidentally, a symposium will take place in November 2015 in Nijmegen centered on this theme.

vennootschappen, or B.V.'s) are set forth in Book 2 of the Dutch Civil Code (DCC). Unlike Delaware, the Dutch statute on corporations (*i.e.*, Book 2 of the DCC) distinguishes between a "public'" corporation and a "close" corporation as two different types of legal form, each a legal entity (a corporation) with its own statutory regime. The close corporation was introduced as a legal form in Dutch corporate law in 1971, to a large extent as a clone of the public corporation (before then, there was only the legal form of the public corporation). Historically, most Dutch corporations are public corporations, but not all public corporations are listed, not even most of them. In the realm of non-listed corporations (*i.e.*, both public and close corporations), shareholders typically are way fewer in number and more actively involved in the corporation's policy and course of affairs compared to listed corporations; also, contractual instruments like shareholder voting agreements are often part of the governance landscape within the corporation.

These general civil law rules relating to the governance of public corporations and close corporations in Book 2 of the DCC address issues such as: (i) the creation and liquidation of a corporation; (ii) the powers and duties of various corporate bodies, in particular the general meeting of shareholders, the management board and the supervisory board; (iii) shares and voting rights; (iv) the hiring and replacement of directors; (v) the remuneration of directors; (vi) conflicts of interest of directors; (vii) liability of directors; (viii) mergers; (ix) demergers; and (x) financial reporting. The premise of Book 2 of the DCC is that the rules set forth therein are of a mandatory nature, unless and to the extent the statute itself allows deviations based on the articles of associations (section 2:25 DCC). Although Book 2 of the DCC does not take as contractual a tack as the Delaware statute, Book 2 is quite facilitating in nature and relatively flexible in its application. But, a basic and inalienable rule of Dutch corporate law is the obligation of the corporation, and of those actors who are part of its organization based on the statute or the articles of association (including directors and shareholders), to act vis-à-vis each other in accordance with the requirements of reasonableness and fairness (section 2:8(1) DCC).

In addition, the Netherlands has legal rules on the supervision of the business conduct of listed corporations, set forth in Chapter 5 of the Financial Supervision Act (FSA). The FSA contains rules on issues like the disclosure of major holdings, financial reporting, the prevention of market abuse, and the obligations of institutional investors. Supervision of compliance with these rules is carried out by a specially designated body, the Authority for the Financial Markets (AFM). There are additional rules for financial institutions. As to listed corporations, both Book 2 of the DCC and the FSA apply.[80]

Compliance with the rules in Book 2 DCC can—if necessary and through various corporate litigation avenues—be forced through the courts, for example by shareholders who want to have a decision of the corporation nullified because of violation of the requirements of reasonableness and fairness (sections 2:15-16 jo. 2:8 DCC).[81] Dutch

[80] Of course, listed corporations are also subject to the listing rules of the exchange(s) where their shares trade.

[81] There is plenty of corporate litigation in the Netherlands, to be sure, but it is doubtful whether Dutch society is as litigation-intensive as American society. As one of us recently remarked about the latter, "We're perceived as having too much — to use a technical term — 'hoo-hah' about everything. . . . So, everything in the United States tends to be dramatic. There tends to be

corporate law is well-known for its use of general normative legal concepts like reasonableness and fairness (section 2:8(1) DCC), proper fulfillment of director duties towards the corporation (section 2:9(1)-(2) DCC), and mismanagement of the corporation (section 2:355(1) DCC), as set forth in the DCC and interpreted and applied by the courts.[82] As to corporate litigation, it bears noting that Dutch corporate law does not allow a derivative action, unlike Delaware. In practice, director liability proceedings are a major part of everyday corporate litigation, but the emphasis is on third parties — especially creditors — seeking damages in tort (section 6:162 DCC) from directors of insolvent or bankrupt corporations, and on trustees in bankruptcy seeking damages from directors of bankrupt corporations (section 2:138/248 DCC), not so much on solvent corporations seeking damages from its (former) directors for improper fulfillment of director duties (section 2:9 DCC). Although—unlike Delaware corporate law—Dutch corporate law does not embrace a version of the business judgment rule,[83] it does provide for a heightened threshold for director liability, especially in the realm of section 6:162

a lot of excitement and emotionalism. We are a more litigation-intensive society. That doesn't just involve stockholder activism and stockholder litigation." Interview by Judy Warner with Leo E. Strine, Jr., Chief Justice, Delaware Supreme Court (Aug. 13, 2015), *available at* http://corpgov.law.harvard.edu/2015/08/13/an-interview-with-chief-justice-strine/.

[82] As to section 2:8(1) DCC, HR 27 July 2013, *NJ* 2013/461 (VEB/KLM) provides a nice example. This case centered around the failed attempt of minority shareholders to have certain dividend related decisions of the corporation nullified, based on section 2:15 jo. 2:8(1) DCC. As to section 2:9(1)-(2) DCC, this provision typically comes up in cases about liability of directors towards the corporation, such as HR 29 November 2002, *NJ* 2003/455 (Schwandt/Berghuizer Papierfabriek) dealing with a violation of the corporation's articles of association. As to section 2:355(1) DCC, the case of HR 6 December 2013, *NJ* 2014/167 (Fortis) comes to mind, in which the Supreme Court affirmed the decision of the Enterprise Chamber in which it found mismanagement of Fortis related to developments during the aftermath of the ABM Amro takeover in 2007.

[83] For a Dutch take on the business judgment rule see B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag* (diss.), Deventer: Kluwer 2007.

DCC and section 2:9 DCC—by means of the contextual serious reproach (*ernstig verwijt*) standard.[84]

Dutch corporate law does have a feature that is relatively unique internationally: the right of inquiry as laid down in Book 2 DCC, as updated on 1 January 2013 (section 2:344-359 DCC). Inquiry proceedings are numerous — they have sharply increased since the late 1990s — and have played an important role in the development of case law in many areas of corporate governance. In short, the right of inquiry allows certain parties — including shareholders with a specific capital interest — to request the Enterprise Chamber of the Amsterdam Court of Appeals[85] (i) to order an inquiry into the corporation's policy and course of affairs (section 2:350 DCC) and, optionally, (ii) to intervene through one or more immediate measures (section 2:349a DCC).[86] If an inquiry is ordered and the investigator's report is filed with the Enterprise Chamber, it is possible for certain parties — including the original requesting party — to ask the court

[84] See, *e.g.*, HR 10 January 1997, *NJ* 1997/360 (Staleman/Van de Ven) as to section 2:9 DCC and HR 8 December 2006, *NJ* 2006/659 (Ontvanger/Roelofsen) as to section 6:162 DCC.

[85] The Enterprise Chamber is a specialized court, consisting of three judges and two non-judges with a certain expertise in, for example, accountancy, entrepreneurship or business economy. In some ways, the position of the Enterprise Chamber in Dutch corporate law is comparable to the position of the Court of Chancery in Delaware corporate law. For a more in-depth description see, *e.g.*, M.J. Kroeze, The Companies and Business Court as a specialized court, *Ondernemingsrecht* 2007/29.

[86] For example, the Enterprise Chamber may preserve the status-quo for the duration of the proceeding by suspending one more decisions taken by the management board, supervisory board or general meeting of shareholders, or suspending one or more managing directors or supervisory directors. Book 2 DCC is silent on the specific immediate measures that the Enterprise Chambers can take. But section 2:349a DCC gives the Enterprise Chamber a broad mandate to intervene — if requested — through a wide range of immediate measures, provided that certain requirements are met (including that the immediate measure has a temporary nature, that interests of the parties are properly weighed, and that the measure is necessary): the Enterprise Chamber does not have a *carte blanche*.

to establish mismanagement of the corporation and, optionally, to take certain measures if mismanagement (*wanbeleid*) is established in order to redress that mismanagement (section 2:355-356 DCC). In the latter scenario, the Enterprise Chamber may also — upon request — implement potent injunctive remedies that are not limited in time to the duration of the proceedings, unlike the immediate measures authorized by section 2:349a DCC.[87] The right of inquiry is not about finding liability,[88] but about transparency, redressing mismanagement, and allocating responsibility for mismanagement.[89] Mismanagement has no single meaning in the Netherlands. It used to be translated as acting contrary to elementary principles of responsible entrepreneurship, but in more recent years it was also conceptualized as a serious violation of section 2:8 DCC or as seriously reproachable conduct.[90] Sometimes the Enterprise Chamber just sticks to "mismanagement."

[87] For example, the Enterprise Chamber may nullify decisions taken by the management board, supervisory board or general meeting of shareholders, or fire one or more managing directors or supervisory directors. The Enterprise Chamber may even decide that the liquidation of the corporation is the most suitable measure to redress the mismanagement.

[88] Although the Enterprise Chamber may for example, upon request, order certain directors who are held responsible for the mismanagement to refund the costs related to the investigator's report — which are in principle paid for by the corporation — to the corporation (section 2:354 DCC). Furthermore, it is not a rare thing for shareholders to start an inquiry proceeding in an attempt to use the potential results (like the investigator's report and, possibly, allocation by the Enterprise Chamber of responsibility for mismanagement) as a stepping-stone to a later liability proceeding. The Dutch Supreme Court has attempted to take mitigating steps in this respect. *See, e.g.*, HR 8 April 2005, NJ 2006/443 (Laurus).

[89] As was made clear by the Dutch Supreme Court in HR 10 January 1990, *NJ* 1990/466 (Ogem Holding), based on an analysis of the legislative history of the right of inquiry. This approach was confirmed in later years.

[90] *See, e.g.*, HR 10 January 1990, *NJ* 1990/466 (Ogem Holding) (acting contrary to elementary principles of responsible entrepreneurship), HR 1 March 2002, *NJ* 2002/296 (Zwagerman Beheer) (serious violation of section 2:8 DCC) and HR 18 April 2003, *NJ* 2003/286 (Rodamco North America) (seriously reproachable conduct).

As is the case in the field of director liability, inquiry proceedings are mostly about disputes involving non-listed corporations, especially close corporations with typically only a small number of directors and shareholders. Corporate litigation relating to listed corporations does occur, but far less frequently.[91] This reality should also be seen in light of the types and numbers of different legal forms used in the Netherlands, as illustrated with the below schedule reflecting the different types of legal forms[92] and the number of active registrations thereof in the Dutch chamber of commerce as per 1 July 2015:

Legal forms	**Registrations**
Besloten vennootschap (close corporation)	887,174
Buitenlandse rechtsvorm (foreign legal forms)	7,791
Commanditaire vennootschap (limited partnership)	11,184
Coöperatie (cooperation)	7,949
Eenmanszaak (one-man business)	1,027,003
Eenmanszaak met meerdere eigenaren (one-man business with multiple owners)	16
Europees economisch samenwerkingsverband (European economic interest grouping)	50
Europese coöperatieve vennootschap (European cooperative company)	3
Europese naamloze vennootschap (European public company)	44

[91] See, *e.g.*, B.F. Assink | W.J. Slagter, *Compendium Ondernemingsrecht* (Deel 2), Deventer: Kluwer 2013, § 90 (p. 1592-1594).

[92] This includes European legal forms based on European regulations (i.e., European economic interest grouping, the European cooperative company and the European public company) with their seat in the Netherlands. As the schedule underscores, these European legal forms are not used in great numbers in the Netherlands.

Kerkgenootschap (church)	1,266
Maatschap (professional partnership)	35,025
Naamloze vennootschap (public corporation)	4,224
Onderlinge waarborgmaatschappij (mutual society)	301
Overige privaatrechtelijke rechtspersoon (other private law legal entities)	84
Publiekrechtelijke rechtspersoon (public law legal entities)	974
Rechtspersoon in oprichting (legal entity in formation)	1,239
Rederij (shipping company)	100
Stichting (foundation)	208,678
Vennootschap onder firma (general partnership)	172,646
Vereniging (association)	124,568
Vereniging van eigenaars (association of appartmentowners)	102,184
Total	**2,592,353**[93]

As is apparent from the above, close corporations outnumber public corporations by far. And only a small percentage of Dutch public companies have the shares listed for trading on an exchange (*i.e.*, are listed companies).

Alongside these statutory rules in Book 2 DCC, there is a system of self-regulation consisting of codes of conduct containing principles and best-practice provisions drawn

[93] Numbers obtained from the Dutch Chamber of Commerce.

up by the sector itself, typically based on a "comply or explain" approach.[94] The first Dutch Corporate Governance Code, containing governance rules for listed corporations, entered into effect in 2004. Since 2009, a revised version has been in effect. The Dutch Corporate Governance Code takes special care to explain principles and best-practices regarding the respective roles of managing directors, supervisory directors and shareholders in the corporate governance scheme, tailored to listed corporations. This code does not have the same legal status as statutory rules or case law, but provisions in the code may overlap with statutory rules and case law. Furthermore, such these provisions may serve as inspiration for future legislation and may also be used by the courts — such as the Enterprise Chamber in inquiry proceedings — to give "color" to contextual standards like the requirement of reasonableness and fairness that applies between the corporation and actors in the corporate realm (section 2:8 DCC) and the requirement of proper fulfillment of duties that applies to managing directors and supervisory directors vis-à-vis the corporation (section 2:9 DCC), the standards of which are not limited in scope to listed corporations.[95]

A public corporation or close corporation can be incorporated by one or more founders, who may become — but do not have to become — shareholders of the

[94] Meaning that in their annual reports, corporations covered by the scope of a certain code must state how they applied the principles and best-practice provisions and, if applicable, provide a reasoned explanation of why a provision has not been applied. For all these codes, there is typically a separate monitoring committee that annually reports on the extent to which each code has been complied with, and on any problem areas that have emerged in this regard. There have also been targeted corporate governance initiatives at EU level.

[95] *See, e.g.*, the decisions of the Dutch Supreme Court in HR 13 July 2007, *NJ* 2007/434 (ABN Amro) and HR 9 July 2010, *NJ* 2010/544 (ASMI).

corporation following its incorporation. Every public corporation or close corporation has a general meeting of shareholders, a body of the corporation (section 2:107/217 DCC). The general meeting of shareholders has important powers within the corporation, such as the power to amend the articles of association (section 2:121/231 DCC), dissolve the corporation (section 2:19 DCC), approve a merger (sections 2:317 and 3:330 DCC), and adopt the annual accounts (section 2:101/210 DCC). The corporation's articles of association can provide for the power of the general meeting of shareholders to give certain instructions to the management board, with the caveat that directors are always under the duty to act in the best interest of the corporation and its enterprise (section 2:129/239(4) DCC). Under the influence of the ongoing corporate governance debate since the mid-1990s, especially as to listed corporations, the position of shareholders was strengthened in the early years of this century.[96] For example, since 2004, management board decisions resulting in an important change of identity or character of the public corporation or its enterprise requires the approval of the general meeting of shareholders (section 2:107a DCC).[97] In principle, all shares carry equal rights and obligations in

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[96] At European level as well, the focus at the turn of the century was on promoting greater shareholder participation in corporate governance. This was expressed in the Shareholder Rights Directive, which grants shareholders in listed corporations various rights also related to — cross-border — voting.

[97] This applies, for example, to decisions to transfer the enterprise or almost the entire enterprise, enter into or terminate a significant long-term cooperation like a joint-venture, or acquire or divest a significant holding. It should be noted that in HR 13 July 2007, *NJ* 2007/434 (ABN Amro), the Dutch Supreme Court interpreted section 2:107a DCC restrictively. A similar provision does not exist for close corporations, because it was deemed overly restrictive for those corporations.

proportion to their nominal value (section 2:92/201(1) DCC).[98] A fundamental right of a shareholder is the right to vote in the general meeting of shareholders, premised on the principle of "one share-one vote" (section 2:118/218 DCC).[99] The corporation's articles of association may, however, provide otherwise. For example, in the form of facilitating so-called "loyalty" shares: shares to which extra voting rights (or other benefits, such as extra dividend rights) are attached as a reward for long-term shareholders.[100] Another important shareholder right, provided certain requirements are met, is the right to have items placed on the agenda of a general meeting of shareholders (section 2:114a/224a DCC). Under Dutch corporate law, in principle shareholders, who — unlike managing directors and supervisors — are not charged with a duty to the corporation itself, are not required to be guided by the best interest of the corporation and its enterprise. Rather, shareholders may in that capacity give priority to their own legitimate interests. But, that right is tempered by a requirement that their actions must always have due regard for the requirements of reasonableness and fairness to be applied in the circumstances of the case at hand (section 2:8 DCC).[101]

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[98] Also, in principle the corporation must treat shareholders who are in an equal position in the same manner (section 2:92/201(2) DCC).

[99] There are exceptions. For close corporations, it is even possible to issue shares without voting rights in the general meeting of shareholders (section 2:228(4) DCC), which requires, among other things, that such shares are not also excluded from a share in the corporation's profits or reserves (section 2:228(4) DCC jo. section 2:216(7) DCC).

[100] It follows from the decision of the Dutch Supreme Court in HR 14 December 2007, *NJ* 2008/105 (Koninklijke DSM) that the distribution of loyalty dividends is possible under Dutch corporation law. This phenomenon is not regulated at the EU level.

[101] There is a tendency though, as reflected in paragraph 9 of the Dutch Corporate Governance Code's preamble, to accept as a guideline that the greater the percentage interest which the shareholder has in a corporation, the greater is his or her responsibility to the corporation, the

Every public corporation or close corporation has a management board (section 2:129/239 DCC), a body of the corporation different from the general meeting of shareholders. Dutch corporate law has traditionally provided for a two-tier board structure, consisting of a management board and a separate supervisory board, each of which is governed by different statutory provisions.[102] But, the institution of a supervisory board is mandatory only for corporations subject to the so-called "structure regime."[103] The management board is charged by law with the duty to manage the company, subject to restrictions imposed in the articles of association (section 2:129/239(1) DCC). It is generally accepted that management includes, among other things, directing the corporation's day-to-day affairs.[104] Managing directors, when fulfilling their task towards the corporation, have to act in the best interest of the corporation and its enterprise (section 2:129/239(5) DCC). What this best interest entails depends on the circumstances of the case at hand. If the corporation has an enterprise (*i.e.*, runs a business), this best interest will typically consist of promoting the long-term

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minority shareholders and other stakeholders. It appears that institutional investors in particular are being called upon to accept greater responsibility in this respect.

[102] This is another difference compared to the Delaware model, which applies a one-tier board structure.

[103] Aside from possible exceptions, a corporation is subject to this regime if, for a period of three consecutive years: (i) its issued capital and reserves amount to not less than €16 million; (ii) it has a works council instituted pursuant to a statutory requirement; and (iii) it regularly employs at least 100 employees in the Netherlands.

[104] In recent cases that involved listed corporations, the Dutch Supreme Court ruled in general terms that the determination of the corporation's strategy is a matter for the management board, under the supervision of the supervisory board, and that the general meeting of shareholders may express its views in this respect by exercising its rights based on statute and articles of association. *See* HR 13 July 2007, *NJ* 2007/434 (ABN Amro) and HR 9 July 2010, *NJ* 2010/544 (ASMI).

success of the corporation's enterprise.[105] In doing so, the managing directors will have to act with care towards the interests of those who are involved with the corporation and its enterprise.[106] The latter will normally require managing directors not to subordinate such interests unnecessarily or disproportionally.[107] The function of the supervisory board is to supervise and advise the management board and oversee the general state of affairs within the corporation (section 2:140/250(1) DCC).[108] Like the management board, supervisory directors have to act in the best interest of the corporation and its enterprise (section 2:140/250(2) DCC). To enable the supervisory board to perform its supervisory duties, the management board must provide the supervisory board at least once a year with information about the corporation's strategic policy, its general and financial risks, and its internal control system (section 2:141/251(2) DCC).

In the last decades, developments in Dutch corporate law were triggered in part by EU directives on company law that the Netherlands, as a member state, had to

[105] This may reflect a difference with the Delaware model, in which more emphasis is put on shareholder wealth maximization as the end of corporate governance, through the means of director primacy (in terms of allocation of power). The difference becomes apparent, for example, in the setting of a change of control transaction. Whereas in the Delaware model the directors have an affirmative duty to seek the best price for the stockholders, in the Dutch model such a duty does not exist. *Compare* HR 13 July 2007, *NJ* 2007/434 (ABN Amro) *with Revlon*, 506 A.2d 173 and its progeny.

[106] This includes shareholders, creditors, and employees.

[107] See the decision of the Dutch Supreme Court in the four parallel cases concerning the Cancun inquiry proceeding, one of them published as HR 4 April 2014, *NJ* 2014/286 (Cancun), building in part on its decisions in HR 13 July 2007, *NJ* 2007/434 (ABN Amro) and HR 9 July 2010, *NJ* 2010/544 (ASMI).

[108] The supervisory board of a structure-regime corporation has a number of important statutory rights. *See, e.g.*, section 2:164/274 DCC.

implement.[109] These directives have shaped Book 2 DCC in part, thereby indirectly injecting international elements into Dutch corporate law.[110] One of the last directives in this series is the Takeover Directive. The Netherlands has opted out of the board neutrality rule and into the reciprocity rule (section 2:359b DCC). In principle, it is permissible under Dutch corporate law for a target public corporation to take defensive measures against a hostile bidder (or shareholder activists), with emphasis on preserving the status-quo during discussions between the target and the bidder and assuming — in short — that the defensive measures are justified by a threat (in view of the best interest of the corporation and the interests of those involved with the corporation and its enterprise) and qualify as an adequate, proportional response to that threat.[111] Aside from these EU directives, the Dutch legislature has not been averse to using foreign concepts as inspiration for the further development of Dutch corporate law. A nice example is the introduction in 2013 in Book 2 DCC of a one-tier board structure in which there is a management board comprised of executive members and non-executive members, as an

[109] Although not required to do so by these directives, the Dutch legislature made a habit out of implementing such rules not only for public corporations but also for close corporations.
[110] Directives relating to financial supervision are also of relevance to listed corporations. This is where the FSA comes in, not so much Book 2 DCC. We leave this aside.
[111] See HR 18 April 2003, *NJ* 2003/286 (Rodamco North America), in which the Supreme Court emphasized the non-permanent nature of the defensive measure taken. This approach is in line with the Delaware model, as outlined in *Unocal* and its off-spring, in which the court may overturn the defensive actions of the target's board if those actions are not reasonably proportionate to the threat the bid poses to proper corporate interests. A popular defensive measure in the Netherlands is the issuance of preference shares to an independent foundation set up in advance for this purpose. The shares, which are issued when a threat materializes, change the balance of control within the general meeting of shareholders. As preference shares are purchased for an amount less than their real value, the foundation acquires substantial control for relatively little invested capital. In the autumn of 2013, the Dutch telecom company KPN successfully defended itself against the hostile takeover bid of the Mexican company America Movil with the help of such a foundation.

alternative to the classic two-tier board structure.[112] This introduction can be seen in light of several decisions at the turn of the century from the European Court of Justice involving the free movement of businesses throughout the EU, decisions that underscored the importance for EU member states to have a corporate law model with international appeal in order to be competitive in the field of formation of business entities.[113] These decisions also drove an overhaul of the rules in Book 2 DCC on close corporations, intended to make those rules less complex and more flexible and to make the close corporation less of a clone of the public corporation. This reform was completed in 2012. A revision of the rules in Book 2 DCC on public corporations is under consideration.

Against this backdrop, we highlight some recent developments in the Netherlands. As several events since 2012 have shown, the Dutch model has international appeal. Several originally foreign listed corporations (multinationals with global activities) have moved their statutory seat to the Netherlands by setting up their legal headquarters in the Netherlands through a public corporation, thereby subjecting issues of their internal corporate governance to Dutch corporate law.[114] In all these cases, the choice to go Dutch appears to be driven, at least in part, by the modalities of Dutch corporate law including its flexibility in application, the normative guidance provided in case law and

[112] An alternative that was already applied by some (listed) corporations before 1 January 2013, which was possible although Book 2 DCC was silent on this. The Corporate Governance Code, itself influenced by especially the English Cadbury Code, already contained provisions relating to listed companies with a one-tier board structure since 2004.

[113] *See, e.g.*, Assink | Slagter 2013, § 4.1, 146, 149; *see also supra* note 61.

[114] In short, under Dutch rules on private international law, set forth in part in sections 10:117-124 DCC, Dutch law is not premised on the real seat doctrine but on the statutory seat doctrine. This seems comparable with the Delaware approach, whose internal affairs doctrine is the antithesis of the real seat doctrine.

the presence of business-savvy courts dealing with corporate litigation, especially the Enterprise Chamber. These examples include:

- CNH Industrial N.V., incorporated in November 2012 as the result of a cross-border merger between the Italian corporation Fiat Industrial S.p.A. and the Dutch corporation CNH Global N.V.;[115]
- Fiat Chrysler Automobiles N.V., the result of a cross-border merger in August 2014 with the Italian corporation Fiat S.p.A., which merged into Fiat Investments N.V., a wholly-owned Dutch subsidiary, which after completion of the merger was renamed Fiat Chrysler Automobiles and became the holding corporation of the group;[116]
- Mylan N.V., the result of a structuring in February 2015 through which the holding corporation is no longer seated in Pennsylvania in the United States, but in the Netherlands;[117] and

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[115] *See* http://cnhindustrial.com/it-IT/Pagine/Homepage.aspx. CNH Industrial was the first Dutch corporation to issue loyalty shares in September 2013 to a certain group of shareholders. *See, e.g.*, M. van Olffen, Nederlandse loyaliteitsaandelen met een Frans sausje, *Ondernemingsrecht* 2013/67.

[116] *See* http://www.fcagroup.com/Pages/index.html. The merger allowed the Agnelli family — the founder of Fiat — to increase its control in August 2014 from around 30% of voting rights (pre-merger) to around 45% (post-merger). *See, e.g.*, R. Abma, De uitwassen van ons flexibele vennootschapsrecht, *Ondernemingsrecht* 2015/87. He also mentions that Ferrari, a subsidiary that Fiat intends to demerge and spin-off, has recently announced it will choose the same path.

[117] *See* http://www.mylan.nl/. It is reported that Dutch corporate law — instead of alternatives like England, Ireland Luxembourg or Switzerland — was found preferable, in part because of the possibility to take defensive measures against a hostile bidder, which possibility was actually used in the summer of 2015. *See, e.g.*, NRC of 15 August 2015, 'Wordt Nederland het Delaware van Europa?,' and S. Davidoff Solomon, 'A So-Called Independent Foundation Enters the Mylan-Teva Fray,' at http://www.nytimes.com/2015/07/24/business/a-so-called-independent-foundation-enters-the-mylan-teva-fray.html.

- Altice N.V., the result of a cross-border merger in August 2015 involving the Luxembourg corporation Altice S.A. (as well as its wholly-owned subsidiary Altice Luxembourg S.A.), which corporation ceased to exist as a result of the merger.[118]

Of course, corporate law was not the primary driver of these mergers. Tax law was, and the desire to reduce corporate level taxes in particular. But, there were jurisdictions in the EU where the parties could have achieved the same or similar tax benefit, and the Netherlands' status as an EU jurisdiction with its corporate law model may well have tilted the parties toward Holland.

Although this wave of tax inspired inbound transfers to the Netherlands is not without its critics,[119] and it is true that being competitive as a jurisdiction for formation of businesses is not necessarily the same as (also) being competitive as a jurisdiction for investors in business,[120] these in-bound moves into the Netherlands do illustrate a modest point we want to make. In Europe, features of national corporate law — also if not quite comparable to the Delaware model — can make a difference for a particular country in

[118] *See* http://altice.net/. Altice has issued two types of shares (A and B) with different voting rights (dual-class shares), of which only the lower-voting shares are listed. The flexibility offered by Dutch corporate law was also applied in other respects, including the governance of Altice's one-tier board. *See, e.g.*, Abma 2015.

[119] Especially from the ranks of institutional investors, who are concerned about the position of the minority shareholders in view of the governance of these corporations post-transfer to the Netherlands. *See, e.g.*, Abma 2015 (who also mentions the move by French Casino in January 2015, to transfer the statutory seat of its demerged subsidiary Cnova to the Netherlands) and PGGM (especially as to Altice: https://www.pggm.nl/wie-zijn-we/pers/Paginas/Statement-PGGM-over-corporate-governance-Altice.aspx).

[120] Ideally there is a balance between both. *See, e.g.*, Assink | Slagter 2013, § 4.3. A perceived lack thereof in Dutch corporate law seems to be the target of the above critics.

becoming and remaining attractive as a jurisdiction for the formation of business entities, just as Delaware's popularity in the United States as the center of formation of business is due almost exclusively related to its corporate law. But, as our discussion of Delaware illustrates, for those features to make a difference, a jurisdiction must offer something distinctive. In the case of the Netherlands, this means providing a modern and internationally-oriented corporate law system that is familiar to corporate managers and investors, that facilitates flexibility, that offers normative guidance, that provides for a fair balance between giving directors a strong hand to manage the corporation and accountability to shareholders (through not only the voting process, but also in litigation), and that has a judiciary well-equipped to deal effectively and responsibly with corporate litigation.

VI. Concluding Thoughts

In a developed market like the European Union, it is not possible for Luxembourg, which is honoring the 100th anniversary of its Companies Law, to obtain the kind of first mover advantage that Delaware secured for itself in the United States. But, what we have shown by reference to Luxembourg's Dutch neighbors, is that a distinctive model of corporate law can help a European nation secure a larger share of the market for the formation of business entities. What we cannot discern, however, is any distinctive approach to corporation law that Luxembourg is attempting to take. That, of course, may reflect a legitimate public policy choice to make Luxembourg conform to typical EU company law practices, because those practices best accord with the nation's values and best interests. Absent, however, a benefit to domiciling in Luxembourg that is distinctive, we believe it will be difficult for Luxembourg to markedly increase the percentage of European business entities that call it home.