# What Europe can learn from the law & economics of Delaware SB 21

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University of Amsterdam, ACLE, EBI and ECGI

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JEL Classifications: G34, K22

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Senate Bill 21 (SB 21) recast Delaware's law of controlling shareholder transactions, making it easier for controlling shareholders to obtain approval of related-party transactions. The reform has been controversial. This article argues that the central issue is not conflict of interest as such, but the opportunistic use of control discretion. SB 21 established procedures through which controllers may cleanse conflicts of interest, while leaving Delaware courts to police opportunistic compliance with those procedures. The broader lesson is that a European corporate law model, such as the EU Inc., requires a specialized EU court able to apply statutory rules uniformly and predictably while constraining their opportunistic use.

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## 1. Introduction

On March 25, 2025, Delaware Senate Bill 21 (SB 21) was signed into law.[2] SB 21 has been described as the most significant reform of Delaware corporate law in half a century.[3] Delaware corporate law is one of the most influential company laws in the world: 68% of S&P 500 corporations, the largest U.S. companies, are incorporated in Delaware.[4] SB 21 reshaped the law of controlling shareholder transactions and, in doing so, made it more favourable to controlling shareholders relative to minority shareholders.

The reform has been controversial, not least because it followed Tesla's spectacular reincorporation from Delaware to Texas, orchestrated by Elon Musk after an unfavourable ruling by the Delaware Court of Chancery.[5] Around the same time, Musk urged American companies to avoid Delaware. The question of this article is not whether SB 21 emerged from political pressure. It is whether, from a law and economics perspective,[6] the statutory reform should be understood as a redistribution from minority to controlling shareholders, or rather as an institutional recalibration between statutory and judge-made law to preserve the efficient balance between controller discretion and accountability to investors.

This article argues for the latter view. Investor protection is necessary for the efficient separation of ownership and control, but it is not sufficient. Corporate law must also support the exercise of control when control is value-increasing. Because business decisions are made under conditions of fundamental uncertainty,[7] corporate law should protect minority shareholders against expropriation without depriving controlling shareholders of the discretion needed to pursue entrepreneurial vision.[8] On this perspective, the problem raised by controlling shareholder transactions is not conflict of interest as such, but opportunism: the guileful exploitation of conflict of interest.[9] The legal system must therefore distinguish between conflicts that accompany value-increasing business decisions and conflicts that are instrumental to minority expropriation. Expropriation is value-decreasing because, once anticipated, it increases the firm's cost of capital.

Controlling shareholders are not alike. Some are efficient because they have vision and their grip on control allows them to pursue it despite stock-market pressure. Their exercise of control may benefit minority shareholders as well.[10] Others are inefficient because they extract private benefits of control by tunnelling value away from minority shareholders,

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[2] SS1 for SB 21 (Senate Substitute 1 for Senate Bill 21), Delaware General Assembly, 2025.
[3] Kenneth Khoo & Roberto Tallarita, 'The Price of Delaware Corporate Law Reform', Working Paper, December 2025, ssrn.com/abstract=5318203.
[4] Delaware Division of Corporations 2024 Annual Report (2025), available at https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2024-Annual-Report.pdf
[5] *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. Jan. 30, 2024).
[6] *See* e.g. Alessio M. Pacces, 'A law and economics perspective on normative analysis.' In: Sanne Taekema, Bart van Klink and Wouter De Been (eds.), *Facts and Norms in Law*, Elgar, 2016, 171-198.
[7] Frank H. Knight, *Risk, Uncertainty and Profit*, Houghton Mifflin, 1921.
[8] Alessio M. Pacces, *Rethinking Corporate Governance: The Law and Economics of Control Powers*, Routledge, 2012.
[9] Nobel prize laureate Oliver Williamson famously defined opportunism as "self-interest with guile." Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*, Free Press, 1985, 47.
[10] Zohar Goshen & Assaf Hamdani, 'Corporate Control and Idiosyncratic Vision', *Yale Law Journal*, 125(3), 2016, 560-617.

typically through self-dealing.[11] The difficulty is that even efficient controlling shareholders must enjoy some private benefits of control to compensate for forgone diversification and managerial monitoring.[12] The difference from tunnelling is that the private benefits of efficient controllers, such as the nonpecuniary reward of pursuing their vision, are idiosyncratic and need not harm minority shareholders. The challenge for corporate law is to distinguish these cases from those in which control is used opportunistically.

Ideally, corporate law should allow efficient controller transactions and disallow inefficient ones. Yet controlling shareholder transactions are hard for courts to screen because they are complex business decisions made under uncertainty. A conflicted transaction may generate unique synergies, or it may amount to outright expropriation. A decision that appears suspicious in hindsight may well have served a legitimate business purpose when it was made. For this reason, Delaware courts have long developed standards of judicial deference to business decision-making, most prominently the business judgment rule. Courts do not review decisions protected by the business judgment rule. That rule does not apply in the presence of conflicts of interest, but the central issue remains the design of an efficient standard of review for conflicted decisions.

Drawing on earlier work on related-party transactions,[13] this article argues that procedural review is generally superior to substantive review because it allows controlling shareholders to make idiosyncratic choices that courts cannot verify ex-post. At the same time, procedural review must be accompanied by sufficient constraints against opportunism. Under a procedural review, courts check whether conflicts of interest are "cleansed" by an independent and informed screening ex-ante. Related-party transactions are procedurally fair if they are approved by independent directors, an informed majority of the minority shareholders, or both. This approach reduces false positives in fiduciary-duty enforcement, that is, the risk that value-increasing transactions will be overdeterred by ex-post judicial review of the terms of the transaction.[14] But it also creates false negatives, namely underdeterrence of value-decreasing transactions, because the controlling shareholder may manipulate the supposedly independent screen.

Aware of this loophole, Delaware courts have traditionally supplemented procedural review with substantive review. When courts doubt that directors are truly independent or that shareholders are adequately informed, they review the transaction for entire fairness. Entire fairness asks whether the price and terms of the transaction resemble those that would have been obtained at arm's length. When entire fairness is the standard of review, the controlling shareholder must prove both fair dealing (in terms of negotiations, decision-making process, and disclosure) and fair dealing (in terms of comparable transactions). In this way, Delaware combines predictable bright-line rules on how to conduct corporate business with a backstop

[11] Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 'The Law and Economics of Self-Dealing', *Journal of Financial Economics*, 88(3), 2008, 430–465.
[12] Ronald J. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy', *Harvard Law Review*, 119, 2006, 1641-1679.
[13] Alessio M. Pacces, 'Procedural and Substantive Review of Related Party Transactions: The Case for Noncontrolling Shareholder-Dependent Directors', in: Luca Enriques & Tobias H. Tröger (eds.), *The Law and Finance of Related Party Transactions*, Cambridge University Press, 2019, 181–217.
[14] The false positives-false negatives framework to analyse the enforcement of fiduciary duties was first used by Robert Cooter & Bradley J. Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences', *New York University Law Review*, 66(4), 1991, 1070.

review of whether formally lawful conduct is consistent with the spirit, and not merely the letter, of the law.

According to recent law and economics scholarship, this feature of Delaware law corresponds to the general function of equity as a safety valve against opportunism.[15] Delaware courts are courts of equity. Historically, equity emerged to provide remedies in inequitable situations when an extraordinarily rigid English common law offered none. Following this tradition, Delaware courts have long constrained formally lawful conduct when it is used opportunistically against minority shareholders. At the same time, review of fiduciary duties must itself be limited. Otherwise, minority shareholders and their lawyers may behave opportunistically by alleging breach whenever a controlling shareholder has a conflict of interest to extract settlements or concessions. The economic approach to equity therefore recommends cabining equitable review to cases in which controllers use formal compliance to defeat the purpose of the law.[16]

This article evaluates SB 21 in light of that framework. SB 21 creates a safe harbour for controlling shareholder transactions that are cleansed by either independent director approval or informed approval by a majority of the minority shareholders, except for going-private transactions, which still require both, that is to say "double cleansing." Transactions that satisfy these conditions receive the protection of the business judgment rule. At first glance, the statute appears to displace equitable review. Yet that conclusion would be too strong. Even under SB 21, courts retain the authority to determine whether the statutory conditions for safe harbour protection have actually been met.[17] If they have not, courts may review the transaction for entire fairness. On this reading, SB 21 cabins, but does not eliminate, equitable review.

The current debate misses this nuance. One camp portrays SB 21 as a "billionaire's bill,"[18] enacted to appease powerful controllers threatening reincorporation. The other portrays it as a "course correction,"[19] necessary because Delaware courts had expanded fiduciary review too far, especially through the spread of double-cleansing requirements. Both accounts capture part of the story, but neither is complete. SB 21 undoubtedly makes it easier for controlling shareholders to cleanse conflicted-interest transactions. Yet it does not steer Delaware law away from fiduciary duties. If it had seriously undermined minority shareholder protection, Delaware should have become less attractive for newly listed firms seeking to obtain capital from investors at the lowest cost. At the same time, the course-correction account is also incomplete. If SB 21 had fully replaced equitable review with rigid safe harbours, it would have opened substantial room for opportunism. The better view is that SB 21 adjusts for judicial drift while preserving the courts' backstop role.

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[15] Kenneth Ayotte, Ezra Friedman & Henry E. Smith, 'A Safety Valve Model of Equity as Anti-opportunism', *Cambridge Elements in Law, Economics and Politics*, 2023.
[16] Andrew S. Gold & Henry E. Smith, 'The Equity in Corporate Law', *Notre Dame Law Review*, 100(2), 2025, 789–870.
[17] On these grounds, the Supreme Court upheld the constitutionality of SB 21. *Rutledge v. Clearway Energy Group LLC*, 2026 WL 548504 (Del. Feb. 27, 2026).
[18] Lawrence Cunningham, 'What Is the Furor Behind Delaware SB 21?', *Pro Market*, April 9, 2025, https://www.promarket.org/2025/04/09/what-is-the-furor-behind-delaware-sb-21/. *See also* Maarten Kroeze, 'The Billionaires' Bill', *Ondernemingsrecht*, 2025/32, 17 March 2025.
[19] Stephen M. Bainbridge, 'A Course Correction for Controlling Shareholder Transactions', *Delaware Journal of Corporate Law*, 49(3), 2025, 525–602.

The broader lesson from this article's analysis is one of institutional complementarity. In response to the growing importance of controlling shareholders in U.S. corporate governance, the Delaware legislature updated the standard of review to reduce overdeterrence. At the same time, Delaware courts remain available to ensure that the statute is not exploited opportunistically. Other jurisdictions may copy Delaware's rules, but they cannot easily replicate the combination of statutory law and judicial expertise that makes those rules work.

This conclusion has an important implication for the European Union's proposed EU Inc. regime. Whatever the content of its statute, the regime will struggle without a specialized court capable of applying its open norms predictably and curbing opportunism. In other words, the European Union needs a business court comparable to the Dutch Enterprise Chamber. In the absence of such a centralized expert judiciary, diversity of legal cultures and the spectre of opportunism will undermine the attractiveness of EU Inc.'s default rules and private-ordering options.

## 2. Evolution of Delaware law of controlling shareholders

Delaware law distinctively establishes that a controlling shareholder owes fiduciary duties to minority shareholders, preventing controllers from exploiting conflicts of interest. This is straightforward when a shareholder holds a majority, or nearly a majority, of the voting rights, because such power allows the election of the full board of directors, who are fiduciaries of all shareholders but may favour the controller who appointed them. Delaware has extended these fiduciary duties to situations of "actual control," meaning domination of the board even without a formal majority of voting rights. Defining actual control, however, has historically proven difficult in Delaware case law.[20] As we will see, SB 21 addresses this ambiguity as well.

Once a person is identified as a controlling shareholder, Delaware law used to refuse to apply a single standard of review to all transactions in which the controller may have a conflict of interest. Instead, courts distinguished between ordinary business decisions, including decisions that affect all shareholders pro rata but are incidentally more beneficial to the controller, and transactions in which the controlling shareholder extracts a non-ratable benefit at the minority's expense using the corporate machinery. Only the latter were subject to fairness review; the former enjoyed the deference of the business judgment rule.

In *Sinclair Oil v. Sinven*,[21] the Delaware Supreme Court recognized that a parent company owes fiduciary duties to the minority shareholders of its subsidiary, but it did not conclude that every parent-subsidiary transaction should be reviewed for entire fairness. Entire fairness was reserved for situations in which the controller stood on both sides of the transaction and used control to receive something to the exclusion, and at the expense, of the minority.

The significance of *Sinclair* lies in its treatment of non-ratable benefits, or private benefits of control. The court held that pro rata dividend payments did not amount to self-dealing, even if the controller had idiosyncratic reasons to favour those distributions. Because the minority

[20] Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., 'Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead', *Business Lawyer*, 77, Spring 2022, 345.
[21] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971).

received its proportionate share, there was no diversion of value from the company to the controller. By contrast, when the parent caused the subsidiary to act to its detriment, for instance by breaching a contract in favour of the controller or an affiliate, the court reviewed the transaction's entire fairness. Sinclair thus separated the controller's right to use control from self-dealing that may expropriate minority shareholders.

Freezeouts are exemplar of self-dealing. In a freezeout, the controller stands on both sides of the transaction and determines the price at which minority shareholders are cashed out. In *Weinberger v. UOP*,[22] the Supreme Court therefore held that the proper standard of review is entire fairness, which requires controlling shareholders to prove both fair dealing and fair price. *Weinberger* also recognized the importance of procedural protections, especially negotiation by a special committee of independent directors. In freezeouts, however, procedural fairness was not sufficient to cleanse the conflict. It only shifted the burden of proof to the plaintiff, leaving the transaction subject to entire fairness review.

*Kahn v. Lynch* confirmed this approach.[23] Freezeouts remained subject to entire fairness, but approval by either an independent special committee or a majority of the minority (MoM) shareholders shifted the burden of proving unfairness to the plaintiff. Combining both mechanisms still did not yield business judgment rule protection, because controlling shareholders were thought to exercise "inherent coercion" over both directors and minority shareholders. This theory had two weaknesses. First, it cast a shadow over virtually all controller transactions. Second, it did not encourage the use of both cleansing mechanisms, because the cheaper one (independent directors) was enough to shift the burden of proof.[24]

In *Kahn v. M&F Worldwide Corp.* (*MFW*),[25] Delaware courts changed course. They held that freezeouts could receive the protection of the business judgment rule if they were conditioned on both approval by a special committee of independent directors and approval by MoM shareholders. *MFW* imposed six conditions: 1) the transaction had to be conditioned *ab initio* on both mechanisms; 2) the special committee had to be truly independent; 3) it had to be empowered to hire advisors and say no definitively; 4) its members had to fulfil their duty of care; 5) the minority vote had to be informed; and 6) the vote had to be uncoerced. If any of the conditions failed, entire fairness would be the standard of review.

*MFW* tried to facilitate going-private transactions in a self-dealing context, but its complexity created new problems. Plaintiffs' lawyers began to attack the weak points of the procedure, especially director independence and the adequacy of shareholder information. If the independence of the special committee was successfully challenged, the MoM vote would also be undermined as uninformed, and the controlling shareholder would not even benefit from a shift of the burden of proof.[26]

The problem became more serious when the Delaware Supreme Court confirmed, in *Match*, that the *MFW* framework applied to all transactions involving controlling shareholders' conflicts of interest.[27] This so-called "MFW creep" blurred the distinction, central to *Sinclair*,

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[22] *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).
[23] *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994).
[24] Hamermesh, Jacobs & Strine, *supra* note 20, 332.
[25] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).
[26] Zohar Goshen, Assaf Hamdani & Dorothy S. Lund, 'Fixing MFW: Fairness and Vision in Controller Self-Dealing', *Harvard Business Law Review*, 15(3), 2025, 577-634.
[27] *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024).

between conflicts of interest that accompany the exercise of control and self-dealing that may result in tunnelling.[28] Once that distinction is obscured, judicial review risks becoming overinclusive. The litigation over Elon Musk's compensation package at Tesla illustrates the point. Although the package was tied ex-ante to ambitious performance milestones and approved twice by a MoM vote, it failed the *MFW* test and so the court ordered its rescission.[29] The result was a ruling that, while doctrinally faithful to the case law, revealed the difficulty of applying entire fairness outside the freezeout setting. In the end, the Supreme Court confirmed Musk's breach of fiduciary duties but changed the remedy from rescission to nominal damages ($1), allowing the compensation to be paid.[30]

SB 21 was enacted against this background. Its central contribution was to overrule *Match* and establish a regime of single cleansing for most controller's conflicts of interest. Only going-private transactions remain subject to double cleansing, though in a somewhat simplified form compared with *MFW*.

SB 21 amended §144 of the Delaware General Corporation Law (DGCL). According to the new formulation of §144, any non-going-private transaction from which a controlling shareholder receives a non-ratable benefit, whether financial or non-financial, may be cleansed either by approval of a committee of at least two disinterested directors or by an informed and uncoerced MoM vote. This is a safe harbour: if the transaction is properly cleansed, courts cannot review it, and it receives protection equivalent to the business judgment rule.

The statute is highly detailed, though it leaves a few open norms for judicial interpretation, such as the requirements that directors act "in good faith" and "without gross negligence", and that shareholder approval be "informed" and "uncoerced." At the same time, SB 21 narrows the judicial role through its definitions of disinterested directors and controlling shareholders. Directors are presumed disinterested if they satisfy stock-exchange independence criteria, and that presumption can be rebutted only by "substantial and particularized facts" showing a material interest in the transaction. Likewise, SB 21 addresses the uncertainty surrounding actual control by providing that no shareholder with less than one-third of the voting rights may be deemed a controlling shareholder for purposes of § 144.

The overall effect is to simplify the law of controlling shareholder transactions, making it easier for controlling shareholders to cleanse conflicts and avoid litigation. However, this simplification raises an obvious concern: minority shareholder protection may have been weakened. The tension between these two implications has fuelled the debate over the merits of SB 21.

[28] Bainbridge, *supra* note 19, 578-585.
[29] *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. Jan. 30, 2024) (ordering the recission of the pay package) and *Tornetta v. Musk*, 2024 WL 4930635 (Del. Ch. Dec. 2, 2024) (confirming the rescission despite the post-trial ratification by a MoM vote).
[30] *In re Tesla, Inc. Derivative Litigation*, 328 A.3d 286 (Del. Dec. 19, 2025).

## 3. Two competing explanations

The controversy over SB 21 has been framed through two competing narratives. One framing is political economy.[31] According to this view, the Delaware legislature enacted SB 21 to stop powerful controlling shareholders from leaving Delaware, as Elon Musk and a few others were planning to do, and in doing so undid several decades of case law aimed at protecting minority shareholders.[32] SB 21 was therefore called the "billionaire's bill."[33] The opposing narrative portrays the statutory reform as a much-awaited "course correction."[34] On this view, Delaware case law had gone too far in constraining controlling shareholders, particularly in the last decade, and legislative intervention was needed to insulate controlled companies from the suspicion courts had developed toward controllers.[35] Each account captures an important part of the story, but both are incomplete.

The "billionaire's bill" account persuasively attributes the reform to the fear of DExit (exit from Delaware). There is ample evidence that the legislature acted in early 2025 after an unprecedented series of announcements by controlling shareholders that they were planning to leave Delaware. The concern is rather the speed of the legislative response. The statute was enacted through a rushed process that departed from Delaware's longstanding tradition of institutional cooperation among legislature, courts, and the Delaware State Bar Association. This may undermine Delaware's reputation for thoughtful production of corporate law and, with it, the legitimacy of its role in governing most major U.S. corporations.[36]

On substance, the "billionaire's bill" account claims that SB 21 weakened investor protection by making controller conflicts too easy to cleanse. Transactions functionally similar to freezeouts may now benefit from single cleansing, including dilutive spin-offs, opportunistic asset sales, and other related-party transactions that can be used for tunnelling.[37] Because these transactions do not formally cash out minority shareholders, they can be cleansed by a committee of at least two independent directors, or alternatively by a majority-of-the-minority vote; the latter, however, is less likely to be used because it is costlier and the controlling shareholder faces a higher risk of a negative outcome. Another controversial feature of SB 21 is that directors are presumed independent if they satisfy listing-rule standards, even if they were nominated or elected by the controlling shareholder. Yet directors who depend on controllers for reappointment may still be implicitly biased in favour of them.[38] In that sense, the statute may indeed have made expropriation easier.

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[31] Marcel Kahan & Edward B. Rock, 'The New Political Economy of Delaware Corporate Lawmaking', *ECGI Law Working Paper No 879/2025*, October 2025, ssrn.com/abstract=5489066.
[32] Dorothy S. Lund & Eric L. Talley, 'Should Corporate Law Go Private?, *ECGI Law Working Paper No 877/2025*, September 2025, ssrn.com/abstract=5534959.
[33] Cunningham, *supra* note 18.
[34] Delaware Governor Matt Meyer put it this way. Anna Mobley, "A "Course Correction" to Delaware's General Corporation Law May be on the Horizon," Butler Snow, News and Insights, March 18, 2025, https://www.butlersnow.com/news-and-events/a-course-correction-to-delawares-general-corporation-law-may-be-on-the-horizon. See also Bainbridge, *supra* note 18.
[35] Jonathan R. Macey, 'From First-Best to Least-Worst: Emerging Threats to Delaware's Dominance that the Legislature Can't Fix', *Yale Law & Economics Research Paper No. 2025-01*, November 2025, ssrn.com/abstract=5735206.
[36] Kahan & Rock, *supra* note 31, 51-53.
[37] Lund & Talley, *supra* note 32, 33.
[38] Lucian A. Bebchuk & Kobi Kastiel, 'How to Control Controller Conflicts', *Journal of Corporation Law*, 50(4), 2025, 1001–1018.

The course-correction narrative agrees that SB 21 was prompted by the credible threat of DExit, but it offers the opposite normative assessment. According to this view, Delaware courts had developed a "reflexive suspicion" toward controlling shareholders,[39] making it almost impossible for them to enter into conflicted transactions without triggering litigation and costly settlements. The main sources of this problem were the vague notion of actual control, the doctrine of inherent coercion – especially outside the freezeout context – and the indeterminacy of the courts' inquiry into director independence.[40] These features made it likely for controlling shareholder transactions to fail the *MFW* conditions and to be reviewed under entire fairness.[41] From this perspective, the statutory definition of controlling shareholders, the safe harbour for cleansing conflicts of interest, and the presumption of director independence are welcome constraints on judicial discretion.

Neither explanation is fully persuasive. The difficulty with the "billionaire's bill" view is the market reaction. If SB 21 had drastically undermined minority shareholder protection, Delaware should have become less attractive as a state of incorporation for start-ups and scale-ups planning to raise capital on public markets. Assuming capital market efficiency, investors would have demanded a higher cost of capital from companies incorporated in Delaware, incentivizing companies to incorporate elsewhere. This has not happened. To the contrary, new incorporations in Delaware increased substantially in 2025, both in absolute terms and relative to the U.S. average.[42] To be sure, this fact does not establish that SB 21 was value-increasing: U.S. companies may lack more investor-friendly jurisdictions than Delaware. Nevertheless, the fact that new incorporations in Delaware have remained strong after SB 21 does suggest that the reform cannot simply be understood as a redistribution from minority to controlling shareholders.

On the secondary market, the evidence seems to point in the other direction. A careful event study reveals that existing Delaware controlled companies experienced negative abnormal returns around the date of the announcement of SB 21, some of which were reversed later.[43] Although the negative returns can be explained by the perceived redistribution from minority to controlling shareholders, those results are difficult to interpret because they may also reflect uncertainty about how courts will implement the statute, which would also reduce stock returns. The reversal of the negative returns right after the adoption of the Delaware State Bar Association's amendments, clarifying the importance of Delaware courts in applying the reform, lends support to this interpretation.

The difficulty with the course-correction narrative is precisely in the courts' role. Because law is necessarily incomplete, bright-line rules designed to facilitate controlling shareholder transactions cannot simply replace judicial enforcement of fiduciary duties.[44] If they did, judges would either become reluctant to apply the safe harbour when controllers use it opportunistically, or investors would lose trust in Delaware's ability to protect minority shareholders. Neither outcome is consistent with Delaware's continuing appeal. A course

[39] Bainbridge, *supra* note 19, 534, citing *Tornetta v. Musk*, 250 A.3d 793, 798, 812 (Del. Ch. 2019).
[40] Jill E. Fisch & Steven Davidoff Solomon, 'Control and Its Discontents', *University of Pennsylvania Law Review*, 173(2), 2025, 435–502.
[41] Goshen, Hamdani & Lund, *supra* note 26, 597-600.
[42] Andrew Verstein, 'An Update on DExit, from the Corporate Census', *Harvard Corporate Governance Forum*, January 15, 2026, https://corpgov.law.harvard.edu/2026/01/15/an-update-on-dexit-from-the-corporate-census/.
[43] Khoo & Tallarita, *supra* note 3 (see especially Appendix 8.3 for later reversal of some results).
[44] Zohar Goshen & Tomer S. Stein, 'Leaving Delaware? The Essential Role of Specialized Corporate Courts', *Columbia Law Review*, 125(7), 2025, 2077–2135.

correction, therefore, should not be understood as a change of course. It is better seen as a response to judicial drift in the application of fiduciary standards: a move toward clearer statutory rules without abandoning equitable review altogether.

This is the real significance of SB 21. The statute introduces predictable cleansing procedures, a clear threshold for controlling shareholder status, and a heightened presumption of director independence. But it does not fully eliminate the role of courts. § 144(d)(6)(a) expressly preserves equitable relief when a transaction was not approved in compliance with the statute, the charter, the bylaws, or other applicable legal obligations. In other words, the statute itself restores equitable review for the purpose of determining whether the conditions for the safe harbours to apply have truly been satisfied.[45]

The equity carve-out in § 144(d)(6)(a) matters because compliance with the safe harbours depends on open norms. Directors must be independent, act in "good faith", and not act with "gross negligence." Majority-of-the-minority approval must be "informed" and "uncoerced." These standards leave some room for courts to police opportunistic compliance with SB 21. If the facts of the case reveal that approval was only formally compliant, but substantively distorted by, for instance, documented controlling shareholder's pressure on independent directors, courts may still deny safe-harbour protection and revert to entire fairness review. The Delaware Supreme Court's decision upholding SB 21's constitutionality confirms this point: the statute is constitutional precisely because courts retain the "power to determine whether the requirements for the safe harbour to apply have been satisfied."[46]

A second implication of § 144(d)(6)(a) is the room for private ordering. This is important because critics of SB 21 are right that single cleansing by independent directors leaves room for minority expropriation, especially if directors are implicitly biased toward the controlling shareholder who appoints them, even in the absence of explicit pressure.[47] § 144(d)(6)(a) allows charter provisions to upgrade the statutory baseline, for instance by requiring double cleansing for a broader set of related-party transactions or by imposing stricter requirements for director independence. Courts would remain available to enforce those provisions through equitable relief or damages. The possibility of stronger charter-based protections allows controllers to commit credibly to higher standards of investor protection when doing so is efficient.

## 4. Controlling shareholder transactions: an analytical framework

Why should controlling shareholders be allowed to enter into conflicted-interest transactions at all? The short answer is that controlling shareholders may be efficient for corporate

[45] §144(d)(6)(a) of the DGCL reads as follows:
"Nothing in subsections (a), (b), or (c) of this section shall:
a. Limit or eliminate the right of any person to seek equitable relief on the grounds that an act or transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the procedures set forth in this chapter, was not authorized or approved in compliance with the certificate of incorporation or bylaws of the corporation, or is in violation of any plan, agreement, or order of any governmental authority to which the corporation is a party or subject."

[46] *Rutledge v. Clearway Energy Group* LLC, 2026 WL 548504, at *11 (Del. Feb. 27, 2026).

[47] Lucian A. Bebchuk & Kobi Kastiel, 'Controllers Unbound', *Texas Law Review*, 105, 2027 (forthcoming), ssrn.com/abstract=5621303.

governance particularly in those circumstances in which long-term commitment and firm-specific choices are important; some of these choices involve conflicts of interest.

Most listed companies in the world have controlling shareholders.[48] Controlling shareholders can be value-increasing for two reasons: first, because their large stake results in more focused managerial monitoring; second, because they have a vision and the power to implement it through a lock on control, despite market pressure. However, controlling shareholders can also be value-decreasing because their unchecked power may result in the expropriation of minority shareholders. This is particularly true in related-party transactions (RPTs): because the controlling shareholder controls the company's decision-making and is, directly or indirectly, on the other side of the transaction, self-dealing can expropriate minority shareholders through cash-flow, asset, and equity tunnelling.[49]

Efficient and inefficient controlling shareholders can be distinguished by the kind of private benefits of control (PBC) they extract.[50] Controllers, as opposed to diversified investors, must extract some PBC to compensate for the higher cost of monitoring management and the lack of diversification of their investment. Some PBC come at the expense of minority shareholders and are value-decreasing because, anticipating it, rational investors would demand a higher cost of capital. The clearest example is tunnelling, which amounts to diverting value from minority shareholders; call these diversionary PBC. Other value-decreasing PBC include control perks and, more generally, any nonpecuniary benefit that lowers shareholder value; call these distortionary PBC. Both are manifestations of agency costs. Controlling shareholders have a lower incentive than managers to extract such benefits, because they own larger stakes and therefore internalize more of the cost. They also bear these agency costs ex-ante, in the form of a discount on minority stock.[51] For this reason, controlling shareholders have an incentive to commit to low levels of PBC when raising capital. At the same time, controlling shareholders may extract PBC that do not come at the expense of the minority because only they can appropriate them: idiosyncratic PBC.

Idiosyncratic PBC are the reward for the controller's idiosyncratic vision.[52] If, as in most developed financial systems, diversionary PBC are limited, idiosyncratic PBC explain why efficient controlling shareholders exist.[53] The controller derives nonpecuniary utility from pursuing the vision. This benefit is subjective and idiosyncratic: because vision has no market value as such, the benefit from pursuing it need not cost anything to minority shareholders. Idiosyncratic PBC compensate the controller for the burden of concentrated ownership and should roughly match the discount on minority stock reflecting anticipated agency costs.[54]

[48] Gur Aminadav & Elias Papaioannou, 'Corporate Control around the World', *Journal of Finance*, 75(3), 2020, 1191–1246.
[49] Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, 'Unbundling and Measuring Tunneling', 2014 *University Illinois Law Review* 1697, 2014.
[50] Pacces, *Rethinking*, *supra* note 8, 83-115.
[51] Michael C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305, 1976.
[52] Goshen & Hamdani, *supra* note 10. Differently from Pacces, *supra* note 8, their framework does not support PBC extraction.
[53] Gilson, *supra* note 12, 1664-1665.
[54] Alessio M. Pacces, 'Controlling Shareholders and Sustainable Corporate Governance: The Role of Dual-Class Shares', *Theoretical Inquiries in Law*, 25(1), 2024, 43–75.

The problem is that the controller's idiosyncratic vision may involve asset specificity,[55] such as tailored inputs, which increases the frequency of self-dealing. A controller may need firm-specific capital, group structures, intragroup transactions, or managerial roles across controlled firms to implement the vision and extract idiosyncratic PBC. These arrangements may be efficient, but they also create conflicts of interest.[56] Once controllers stand on both sides of a transaction, they may use that position to expropriate minority shareholders. An optimal discipline of RPTs is therefore crucial for the viability of controlling shareholders.

Screening RPTs can be framed as a trade-off between false negatives and false positives.[57] False negatives are tunnelling transactions that go through and are therefore underdeterred. This is inefficient because tunnelling ex-post raises the cost of capital ex-ante. But an RPT regime may also produce false positives, namely the blocking of transactions with a legitimate business purpose. Overdeterrence may take two forms. First, controllers may be discouraged from pursuing asset specificity. Second, if asset specificity is crucial to pursuing the controller's vision, an excessively strict RPT regime may overdeter controlling shareholders altogether.

There is no perfect rule to screen RPTs, so some trade-off is unavoidable. In earlier work, I argued that procedural review is generally preferable to substantive review, especially in jurisdictions where courts are good at spotting egregious tunnelling.[58] Substantive review suffers from a basic limitation: when an RPT is motivated by asset specificity, such as tailored equipment or firm-specific services, it cannot be meaningfully compared to a transaction at arm's length. No reliable market benchmark may exist. This is the same logic that underlies the business judgment rule. Courts do not review business decisions on the merits because such decisions are highly firm-specific and difficult to evaluate without hindsight bias. The same problem arises when business decisions involve conflicts of interest.[59] Ex-post substantive review of litigated RPTs therefore risks serious hindsight bias.

Procedural review fares better when the screening by disinterested directors or shareholders is genuinely independent and informed. Under those conditions, these decision-makers are in the best position to determine ex-ante whether the transaction is value-increasing or value-decreasing. The problem is that a controlling shareholder may undermine the independence of the screen. Because controllers influence board elections, they also influence the reappointment of supposedly independent directors. This may bias directors' judgment of RPTs. The same bias can spill over into a majority-of-the-minority vote, because shareholders depend on directors for information.

To strengthen director independence in the presence of controlling shareholders, I previously proposed introducing noncontrolling-shareholder-dependent (NCS-dependent) directors, elected by a majority of the minority to screen RPTs.[60] Courts would review only the appointment process and the quality of the screen, but not also the terms of the transaction – as English courts do. Professors Bebchuk and Kastiel have recently proposed a similar

[55] Williamson, *supra* note 9, 52-56.
[56] Ronald J. Gilson & Jeffrey N. Gordon, 'Controlling Controlling Shareholders', *University of Pennsylvania Law Review*, 152(2), 2003, 791-793.
[57] Cooter & Freedman, *supra* note 14, 1070.
[58] Pacces, *Related Party Transactions*, *supra* note 13, 205-207.
[59] *See* Holger Spamann, 'Monetary Liability for Breach of the Duty of Care?', *Journal of Legal Analysis*, 8(2), 2016, 360.
[60] Pacces, *Related Party Transactions*, *supra* note 13, 209-212.

solution to upgrade SB 21 and improve investor protection.[61] Under the current section 144(d)(6)(a), Delaware corporations could adopt this solution through private ordering.

Enhancing director independence is not the only response. As discussed in the previous section, companies raising capital on the primary market have not fled Delaware after SB 21. I argue that this is because of the equity carve-out in section 144(d)(6)(a), which still allows courts to review RPTs in the most egregious cases. Recent law and economics theory understands equity as a safety valve against opportunism.[62] Because both contracts and laws are incomplete, contract surplus is increased when courts of equity can sanction substantive, as opposed to merely formal, performance. By contrast, in the absence of equity, opportunistic actors could comply with the letter of the law or the contract while defeating their purpose. This "compliant noncompliance" is value-decreasing.[63] In corporate law, controllers could formally satisfy cleansing procedures while staging a friendly review of transactions that are in fact instrumental to tunnelling. Section 144(d)(6)(a) is designed to prevent this kind of opportunism.

Equity as a safety valve must itself be cabined. From an economic perspective, unconstrained equitable review would enable opportunism on the other side, inviting meritless suits and inefficient rent extraction.[64] From a legal perspective, statutory law has primacy over equity and may constrain court review through bright-line rules.[65] SB 21 does exactly this: it creates safe harbours for RPTs while preserving the courts' role in determining whether those safe harbours have truly been satisfied. The legislature defines compliance through open norms, such as good faith and informed approval, thereby preserving the courts' ability to deny safe-harbour protection when the facts of the case reveal opportunism. According to the law and economics theory of equity, this limited judicial role maximizes welfare.

A remaining question is whether legislation or judge-made law is better suited to update the standards of review in response to corporate governance innovation, such as the increasing frequency of controlling shareholders in the United States.[66] Courts have the expertise to adapt standards, but judge-made law evolves incrementally and slowly.[67] Controllers with the power to reincorporate will not wait. Legislation is therefore better positioned to update the law by introducing bright-lines rules. By contrast, courts are better positioned to police the opportunistic use of those rules. This combination is hard to replicate. Other jurisdictions can copy Delaware's statute,[68] but not easily the judiciary's ability to prevent the opportunistic interpretation of corporate law. That complementarity also sustains private ordering, because freedom of contract remains credible only so long as courts stand ready to prevent its opportunistic abuse.[69]

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[61] Bebchuk & Kastiel, *supra* note 38, 1015-1018.
[62] Ayotte, Friedman & Smith, *supra* note 15, 1-2.
[63] Gold & Smith, *supra* note 16, 800-801.
[64] Ayotte, Friedman & Smith, *supra* note 15, 3.
[65] Leo E. Strine Jr., 'If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of *Schnell v. Chris-Craft*', *Business Lawyer,* 60 (3), 2005, 877-906.
[66] Kahn & Rock, *supra* note 31, 40-41; Bebchuk & Kastiel, *supra* note 45, 6-9.
[67] Goshen & Stein, *supra* note 44, 54-55.
[68] Macey, *supra* note 35, 49.
[69] *See* David Chekroun, Megha Bansal & Tanya Bansal, 'The Delaware Paradigm, Part Three: DExit vs Data: Market Segmentation, Institutional Lock-In, and the 2026 Effect', *Oxford Business Law Blog*, 18 February

## 5. EU Inc. and the case for an EU specialized judiciary

The analysis of the previous sections reveals why Delaware appears to have maintained its primacy in the U.S. market for incorporations despite the growing importance of controlling shareholders and the political pressure accompanying it. It also suggests an important lesson for other jurisdictions: the success of corporate law depends on institutional complementarity between legislation and judiciary. In the context of controlling shareholders, this means striking an optimal balance between control discretion and accountability to investors. It also requires a predictable space for private ordering, constrained only by open norms against opportunism.

This lesson is particularly important for the European Union (EU), where controlling shareholders are significantly more common than in the United States. In response to the call for regulatory simplification and greater competitiveness in the EU,[70] the European Commission has recently proposed an optional 28th corporate law regime available for companies established in any of the 27 member states: the EU Inc.[71] Commentators disagree on whether the EU Inc. is the right response to the fragmentation of European corporate law.[72] My point is simpler. The success of EU Inc. will not depend primarily on the quality of its black-letter rules. It will depend on whether a system of judicial interpretation emerges that can apply those rules in a predictable and non-gameable way. In the EU Inc. proposal, that system is missing because enforcement belongs to the courts of the member state where the company has its registered office.[73]

EU Inc. contains several interesting and innovative provisions, especially for controlling shareholder transactions. It introduces a European version of the business judgment rule (art. 44), rules on related-party transactions (art. 46), on dual-class shares (art. 55) and dual-class recapitalizations (art. 51), and appraisal rights for minority shareholders (art. 52). The problem is that art. 4(2) risks reintroducing fragmentation by providing that matters not covered by the Regulation or the articles of association are governed by national law.[74] This problem is reinforced by provisions stating that some matters, such as director liability, are

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2026, blogs.law.ox.ac.uk/oblb/blog-post/2026/02/delaware-paradigm-part-three-dexit-vs-data-market-segmentation-institutional.

[70] Mario Draghi, *The Future of European Competitiveness: A Competitiveness Strategy for Europe*, European Commission, September 2024, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4cf152a8232961_en.

[71] European Commission, *Proposal for Regulation of The European Parliament and the Council on the 28th Regime Corporate Legal Framework – 'EU Inc'*, 18 March 2026, COM(2026) 321 final (hereinafter: EU Inc. proposal).

[72] Luca Enriques, Casimiro A. Nigro, and Tobias H. Tröger, 'Why the 28th Regime Proposal Falls Short of Europe's Challenge', *Oxford Business Law Blog*, 19 March 2026, https://blogs.law.ox.ac.uk/oblb/blog-post/2026/03/why-28th-regime-proposal-falls-short-europes-challenge (arguing that the EU Inc will reproduce the fragmentation it aims to overcome, because it failed the more realistic goal to pre-empt national company laws only for a subset of innovative companies); Wolf-Georg Ringe, 'EU Inc: Why Startups Gain – and Venture Capital Hesitates', *Oxford Business Law Blog*, 30 March 2026, https://blogs.law.ox.ac.uk/oblb/blog-post/2026/03/eu-inc-why-startups-gain-and-venture-capital-hesitates. (arguing that the Eu Inc. is more suitable for start-ups than for scale-ups); Marco Ventoruzzo, 'Welcome EU Inc!', *Oxford Business Law Blog*, 2 April 2026, https://blogs.law.ox.ac.uk/oblb/blog-post/2026/04/welcome-eu-inc. (arguing that EU Inc. is a good first step towards a pan-European corporate law and the pessimism of other commentators is unwarranted).

[73] *See* Recital 81, EU Inc. proposal.

[74] Enriques, Nigro & Tröger, *supra* note 72.

further governed by national law (art. 44(4)). The question then becomes whether EU Inc.'s provisions such as the business judgment rule would survive in a member state whose company law does not support them. This uncertainty is not limited to one article; it potentially affects the entire regime.

The difficulty is compounded by the fact that the organization of the judiciary remains in the hands of the member states. EU Inc. may therefore be enforced differently across Europe. Because EU Inc. would take the form of a Regulation, conflicts of interpretation—including over whether EU Inc. default rules and articles of association pre-empt national law —would eventually have to be resolved by the European Court of Justice. But that process would likely take years. In the meantime, EU Inc. would remain unattractive both for controlling shareholders seeking predictability in governance arrangements and for investors wondering how courts would protect them from opportunistic conduct. Recital 81's recommendation that member states create specialized judicial chambers is hardly of any help. Member states may ignore it, and even if they comply, national business courts will continue to apply national judicial biases.

Recent research shows that such national biases are significant in Europe, especially in venture capital.[75] In some jurisdictions, constraints on transactional innovation do not stem from bright-line rules, but from judicial meta-rules embedded in legal culture and applied through open norms such as good faith. This contrasts with Delaware. There, bright-line statutory rules define the broad scope of private ordering, while the equity meta-rule operates as a safety valve against opportunism: courts invoke open norms only after having determined that the letter of the law has been used opportunistically.[76] This complementarity between legislature and judiciary allowed private ordering to develop an infallible and harmless takeover defence: the poison pill.[77] EU Inc. needs something similar. First, it needs a specialized court with sufficient expertise to confine its role to constraining opportunism, rather than deciding arbitrarily what corporate law should permit. Second, it needs a uniform interpretation of the regime and of the private ordering options it leaves open.

The Dutch example shows that an expert court can exercise self-restraint in reviewing business decisions. The Enterprise Chamber of the Amsterdam Court of Appeals – a specialized business court with exclusive jurisdiction on several corporate matters – has developed a jurisprudence of open norms that functionally resembles Delaware's. Although Dutch company law formally lacks a business judgment rule,[78] the Enterprise Chamber applies a principle of limited review:[79] courts do not second-guess business judgment absent clear signs of mismanagement. Dutch courts have also developed, from open norms, minority shareholder protections against opportunism while allowing significant room for private ordering.[80] For instance, they have allowed loyalty shares but restricted its opportunistic use

[75] Luca Enriques, Casimiro A. Nigro, and Tobias H. Tröger, 'Venture Capital Contracting as Bargaining in the Shadow of Corporate Law Constraints', *ECGI Law Working Paper No. 833/2025*, March 2025, ssrn.com/abstract=5183235.
[76] See *supra*, text accompanying notes 62-64.
[77] Strine, *supra* note 65, 886-887.
[78] Maarten Kroeze, 'Comparing company law in Europe and in the United States: some remarks inspired by Carney's presentation', in Alessio M. Pacces (ed.) *The Law and Economics of Corporate Governance: Changing Perspectives*, 2010, Elgar, 80.
[79] Vino Timmerman, 'Artikel 2:8 BW, Zorgplichten en de Rol van de Rechter', *Ondernemingsrecht*, 2023/48, 19 April 2023.
[80] The Enterprise Chamber has derived several minority shareholder safeguards from the open norm of reasonableness and fairness (art. 2:8 Dutch Civil Code). Examples include the director's obligation to disclose

in the *Mediaset* case.[81] Yet the Dutch model remains national. It might inspire the enforcement of the EU Inc., but it cannot ensure uniform interpretation across member states.

For that, an EU business court is necessary. EU Inc. could become an attractive pan-European model of incorporation if it were enforced exclusively by a specialized EU court charged with interpreting open norms, such as "good faith" or "the company's best interest", only to constrain opportunism by controlling shareholders. Any form of private ordering that complies with the letter of EU Inc. should be allowed unless the court is presented with concrete allegations of opportunistic "compliant noncompliance."[82] Such a court could be justified under the principle of subsidiarity (art. 5 TEU): member states' courts cannot enforce the EU Inc. as effectively as a centralized EU court, particularly in terms of overcoming fragmentation in the adoption of the 28th regime. If the EU Inc. is to stimulate innovation and competitiveness, EU legislature and courts must coordinate in striking the right balance between controller discretion and accountability to investors. That, ultimately, is the lesson of SB 21.

## 6. Conclusion

SB 21 should be understood neither as a redistribution from minority to controlling shareholders nor as a retreat from judicial enforcement of fiduciary duties. Its more plausible function is to recalibrate the balance between statutory certainty and court review in response to the increasing relevance of controlling shareholders in U.S. corporate governance. By moving most controlling shareholder transactions to a single-step procedure to cleanse conflicts of interest, Delaware reduced overdeterrence; by preserving judicial scrutiny of opportunistic compliance, it continued to protect minority shareholders where procedural fairness is only formal. The broader lesson is that corporate law works best when bright-line rules, judicial expertise, and private ordering operate as complements. This, more than any particular black-letter rule, explains Delaware's success in the production of corporate law and should inform any attempt to build an attractive EU company law regime.

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conflicts of interest (*Omines*, Hof Amsterdam 8 June 2022, ARO 2022/134, with annotation by Vino Timmerman) and the fiduciary duties ("zorgplichten," literally duty of care) of the parent's controlling shareholder towards the subsidiary's minority shareholders (*Funda*, Hof Amsterdam 10 February 2022, JOR 2022/147).

[81] The Dutch Supreme Court established the legality of loyalty dividends (and implicitly, of loyalty shares) in *DSM* (HR 14 December 2007, JOR 2008/11). Loyalty shares are a powerful mechanism to enhance a controlling shareholder's voting power. *See* Alessio M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', *Erasmus Law Review*, 9, 2016, 199-216. In *Mediaset* (Hof Amsterdam 1 September 2020, JOR 2020/279), the Amsterdam Court of Appeals ruled that loyalty shares cannot be used only to disproportionally increase the controlling shareholder's voting power, because this conflicts with the principle of reasonableness and fairness (art. 2:8 Dutch Civil Code) and the principle of equal treatment of shareholders (art. 2:92(2) Dutch Civil Code).

[82] Gold & Smith, *supra* note 16, 800.

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