Protection of outside stakeholders

in mergers and others fundamental changes

Creditors can be harmed by mergers or fundamental change, therefore they need adequate safeguards.

Stronger protection in the creditor-friendly jurisdictions (EU, Japan, Brazil)

Rationale:

creditors are not protected because mergers are per se harmful, but because mergers may increase enforcement risk by altering the asset pool or the debtor's structure. Legal systems differ between ex ante procedural protection (EU) and ex post remedies (US).

Tools:

creditors can challenge and even block a merger which could harm them (e.g. art. 2503 Italian civil code, art. 86j Directive 2019/2121/EU on cross border mergers, art. 13 Directive 2011/35/EU on domestic mergers).

Comparative note:

– EU and Japan allow creditors to delay or block the transaction unless adequate safeguards are provided.

– US law does not grant a general opposition right; protection mainly relies on fraudulent conveyance and insolvency law.

Employees: voice + transfer of their rights to the resulting corporation post merger

a) voice:

EU: mandated consultation prior to transfer of business or merger (dir. 2001/23/EC)

US: no general consultation but collective bargaining agreement when the company is unionized!

Meaning of "voice": employee voice does not imply veto power.

It consists of procedural participation rights (information and consultation), reflecting the treatment of employees as stakeholders rather than mere contractual parties.

Critical issues: domestic vs. cross-border mergers, the rules applicable to the surviving company might change

Key issue:

cross-border mergers may lead to a change in the applicable labour law.

EU law addresses this risk by preserving acquired rights and imposing enhanced consultation duties, in order to prevent regulatory arbitrage.

b) protection of acquired rights:

EU: automatic transmission of contracts of employment to transferee

US: personal nature of contract of service → no automatic transmission to transferee

CORPORATE DIVISION AND SALE OF ASSETS

INVERSE OF MERGER

Rationale:

divisions usually involve internal reallocations of assets rather than expansion.

Therefore, agency conflicts are considered weaker and regulation is generally lighter than in mergers.

- US disciplines only on ad hoc basis when opportunism appears evident

- EU (Directive 2017/1132/EU), like for merger but less protection for shareholders (vs. managers) and minority shareholders (vs. majority shareholders)

- Reasons: smaller transactions, less risk of agency conflicts in comparison with mergers

4.1. Managers / shareholders in division

Shareholders' approval

4.2. Protection of creditors in corporate divisions

(EU) companies receiving assets remain jointly liable towards pre-division creditors within the value of the assets transferred

4.3. Protection of employees in division

Consultation + automatic transfer of acquired rights

REINCORPORATION

Definition:

Reincorporation is a governance-sensitive transaction because it may shift the allocation of power and protections among shareholders, managers, and other stakeholders.

Core idea:

Reincorporation involves the migration of a corporation from one jurisdiction to another.

It typically requires:

- shareholder approval, and in some systems also
- judicial (court) approval.

How reincorporation occurs

A) United States

i. Reincorporation can occur:

ii. by direct conversion (where permitted), or

iii. through a merger-based technique (including cross-border structures).

B) European Union

1. Reincorporation may take place via:
2. cross-border conversion,
3. cross-border merger (under the Cross-Border Mergers framework), or
4. adoption of the European Company (Societas Europaea, SE).

Employee protection (EU focus)

Both the SE and cross-border merger regimes generally apply a “before-and-after” continuity rule:

➞ employee participation and involvement rules in force before reincorporation continue to apply after reincorporation.

This functions as a strong default rule:

it can be modified only through negotiation between management and employees’ representatives

CORPORATE CONVERSION

Definition:

Corporate conversion is the legal process by which a firm changes its legal form (entity type) while preserving the continuity of the business (assets, liabilities, and contracts generally remain with the same economic enterprise).

➞ Example: partnership → corporation; private company → public company; S.r.l. → S.p.A.

Why firms convert (common rationales)

1. Governance: different allocation of control between shareholders and managers
2. Capital raising: access to equity markets, different funding options
3. Liability and risk management: limited liability vs personal liability
4. Tax and regulatory reasons: different reporting and compliance frameworks
5. Transaction preparation: conversions often precede mergers, IPOs, or restructurings

Procedural protections (“tools”)

Conversions typically require **enhanced safeguards** because they can alter:

- ❖ownership rights and voting power
- ❖creditor and stakeholder protections
- ❖the risk profile of the enterprise

Key tools include:

1. Shareholder approval (often a supermajority)
2. Disclosure duties (conversion plan, rationale, financial terms)
3. Fiduciary duties of directors/management (loyalty + care; fairness obligations)
4. Exit rights (withdrawal / appraisal rights / redemption) for dissenting shareholders
5. creditor protection measures (e.g., notice, opposition rights, guarantees)

Comparative note:

some jurisdictions treat conversion as a routine reorganization, while others treat it as a fundamental change, triggering stronger voting and exit rights.

VOLUNTARY LIQUIDATION

protection of creditors: to be satisfied before shareholders

UK directors to release a solvency declaration (debits to be payable within one year)

- minority protection = like charter amendment!

approval by supermajority (EU)

UK appointment of a practitioner

- employees protection = voice!

OTHER SIGNIFICANT TRANSACTIONS

Problem: corporate law must address transactions that are formally different but functionally equivalent to mergers, and may be used to circumvent merger regulation.

How to find a general principal to tackle non regulated transactions which can achieve same goals!

- standard = enforcement of directors duties

- shareholders approval for sale of all assets/restructuring:

- Germany yes, in case of relevant spin-offs
- UK yes, when transferring at least 25% of assets or of value of ordinary shares
- France no, but exit rights
- Italy yes, whenever primordial interests of shareholders are involved

COMPARATIVE TAKEAWAY:

across fundamental changes, legal systems differ less on who deserves protection and more on how protection is delivered (procedural rights vs remedies, mandatory rules vs flexibility).