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The consequences of Brexit for companies and company law

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Abstract

The consequences of the Brexit vote will be felt throughout the legal systems, both in the UK and in the EU. The legal consequences of the Brexit decision and the process which will lead to the withdrawal of the UK, raises numerous questions many of which are in the process of being analysed, and possibly solved. In the field of company law, with respect to cross-border matters, UK companies will be exposed to national laws in the EU States after the Treaty freedom of establishment will not further apply. This may lead to tensions between the two systems of recognition of foreign companies, i,e. the incorporation theory and the seat theory. Foreign companies active in seat jurisdictions may in the future be disqualified if their seat is effectively established in the seat State. Access may become more difficult, not on the basis of company law, but of sectoral regulations. In other part of the regulatory system, such as the rules on cross-border mergers, on rights of shareholders in listed companies, or disclosures to be made, equivalence of rules, as decided by the European Commission, will be the key factor. Additional issues will arise for the cross-border recognition of accounting standards and for the activity of auditors.

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Among the many consequences of Brexit, some attention has already been paid to the consequences of the Brexit vote on company law, more specifically on the legal position of companies both in the UK and in the European Continent (EU). Although it is still far from clear according to which conditions the UK will leave the European Union, several scenarios are being discussed, the present analysis will be based on the hypothesis that the UK will leave the Union without specific agreement on the issues discussed here[1]. This approach allows to identify the possible consequences of a Brexit decision in the different fields analysed. Also the analysis will not take into account the possible extension in time, as the UK and the EU may agree on an extension of the negotiation period, and further adopt transitional measures that would allow to alleviate the negative consequences over time.

I. The Treaty process for leaving the European Union.

The process for leaving the European Union is detailed in article 50 of the Treaty on the European Union (TEU). The exiting Member State should notify its decision to the Council: this decision is a sovereign one. Article 50 does not require the notification to be motivated. The decision should be adopted according to that State's internal constitutional requirements: in the case of the UK, the Supreme Court held (by a majority of 8 to 3) that the decision to give notice had to be effected by Parliamentary legislation and could not be a decision of the UK executive without express Parliamentary authorisation [2]. Although not a national decision. the notification is based on a Treaty provision, and probably may be challenged by any other Member State on the basis of arguments drawn from EU law. After this notification which is now expected to take place before the end of March 2017[3], the Union will negotiate with the leaving state an "agreement" relating to the arrangements for the withdrawal. This agreement will have to be concluded within two years from the notification: the time available for the negotiation is however much shorter, as it will have to be submitted to the European parliament for "consent". It is generally considered that only 9- to 14 months will be available for negotiation[4]

[1] See the speech of Theresa May, of 17 January 2017: http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/; See for the UK position HM Government, The United Kingdom's exit from and new partnership with the European Union (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), at 65.

[2] In *R (on the application of Miller) v The Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court of the UK held that the UK government required the authority of primary legislation by Parliament before it could give notice, because exit from the EU would remove rights and duties created under the European Communities Act 1972, the Parliamentary legislation whereby the UK joined the EU. (See https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf. It seems likely that Parliament will give that consent, but possibly subject to conditions relating to later Parliamentary approval of the terms of exit.; P. Eeckhout and E.Frantziou, Brexit and article 50: a constitutionalist reading, UCL, European Institute, December 2016, SSRN –id2889254

[3] See Theresa May's speech 2 October 2016 http://www.bbc.co.uk/news/uk-politics-37532364

[4] See Bank of England: interim deal for financial groups needed 9 months within Brexit Triggered, 14 December 2016

The agreement should indicate which arrangements will apply to the withdrawal, "taking account of the framework for its future relationship" with the EU. It is unclear what this 'framework" will be: it will be the subject of the negotiation. The two year period could be extended but only by unanimous decision of both the exiting State and the Council[5].

If no agreement is reached, a "hard" or "clean" Brexit will take place[6]. What this means is subject to controversy[7]. If no agreement is reached, the remaining 27 Member States can only make a finding that the UK has left the Union and no "framework for future relationship" is available. The conditions at which this agreement may intervene are particularly arduous, and partly depend on the Member States acting in Council, but may also be affected by the negative vote in some of the Member States.

At Council level, the final decision will be taken by the 27 remaining Member States, and after obtaining the consent of the European Parliament. The Council acts by qualified majority as defined in article 238 (3)(b), being as a rule a majority of 55% of the States representing 65% of the population. In the Parliament an absolute majority would suffice. But the individual Member States may also have an interest allowing them to block the agreement. For some matters where the EU has shared competence with the Member States, the EU and the Member States will have to act jointly. In some states the national parliaments will have to agree on these matters in which competences are shared, leading to considerable delays in the withdrawal procedure[8]. The "withdrawal agreement", reflecting the conditions of the agreement for the UK exit, would be a Union act, based on article 50 TEU, and therefore might be subject to recourse to the ECJ. A legal recourse by an EU Member State might suspend the two year negotiation period, with unpredictable consequences, both politically and legally. The agreement would also be subject to a vote in the UK Parliament[9]. In the absence of an exit on the basis of article 50 TEU, the UK could investigate how it could base its withdrawal on the provisions of the Vienna Convention on the Law of Treaties[10].

If the withdrawal agreement would be refused by any of the parties mentioned above, the UK would remain a member of the EU. But it would be an unwilling member if the withdrawal was refused by any of the EU parties. In that case, the membership of the

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[5] article 50 (3) TEU

[6] J. Blitz, Why Brexit warnings about "hard Brexit" fall on deaf ears. Upbeat data are allowing Leavers to brush aside arguments about economic risks, FT September 19, 2016.

[7] It would be a decision of the court whether or not the decision of the EU to accept the agreement will be suspended.

[8] Basedow, J., Brexit und dass Privat- und Wirtschaftsrecht, ZEuP, 2016, 3, 567 mentions that at least 30 actors will have to give their agreement..

[9] This is quite controversial see: e.g. Skouris, V>, Rechtliche Forgaben fuer den Austritt aus der EU, EuZW, 21:807 (2016); ; Sari, Aurel, Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change Their Mind; The press has actively discussed the issue, see e.g. The Guardian, Can Brexit really be stopped? https://www.theguardian.com/politics/2016/nov/24/can-brexit-really-be-stopped. Lord Howard, No matter what the Supreme Court decides on Brexit,, article 50 will not be stopped, The Telegraph, 5 December 2016

[10] See P. Eeckhout and E.Frantziou, Brexit and article 50: a constitutionalist reading, UCL, European Institute, December 2016, SSRN –id2889254

UK would come to an end two years after the notification[11]. This feature may have an important impact on the margin for negotiation of both parties concerned.

In the absence of an acceptable solution on the basis of article 50 TEU, the UK could also investigate how it could base its withdrawal on the provisions of the Vienna Convention on the Law of Treaties[12]

In order to avoid the major disruption of a clean Brexit, the UK government has committed itself to "Global Leave" legislation, whereby all existing regulations originating from the EU will remain in place, but then under the legal form of UK regulations, and without relationship to their EU origin. This would prevent a void in the UK regulatory system due to a sudden lapse of especially the directly applicable EU regulations. These regulations could then be maintained and withdrawn at a later stage, preferably on the basis of specific arrangements with the Union, allowing for a better adapted system. The formula has been compared to a "reverse divorce settlement".

After the withdrawal agreement, the ECJ jurisdiction would cease, although the interpretation of these regulations in the UK, in accordance with UK law, might well find inspiration in the ECJ decisions. This would also be the case for the interpretation of the directive, or more precisely of the national law that have transposed them. Over time, the influence of EU law would fade. The subject is however quite complex [13].

It has been considered whether during the negotiation process, the exiting Member State could still abandon the process, and become member "again"[14]. The Treaty clarifies that an application for new membership can only be considered in accordance with the conditions and procedures for new membership[15]. The readmission as a member according to renegotiated conditions would not be allowed. Former ECJ president Skouris states that it would be preferable to allow a Member States to reconsider its position during the negotiation process, rather than obliging it, on the basis of an interpretation of the EU treaty, to be held to an irreversible decision[16]. In the same sense, some have considered that the UK could halt the negotiation, and not

[11] Article 50 (3), TEU

[12] See P. Eeckhout and E.Frantziou, n.12, stating that ' Article 54 of the Vienna Convention …juxtaposes withdrawal by consent of all the parties with withdrawal in conformity with the provisions of the treaty in issue"

[13] See Richard Gordon, The UK Courts after Brexit, Richard Gordon, Butterworths Journal of International Banking and Financial Law, Oct 2016, 511.

[14] See about the issue, V. Skouris, n.9, EuZW, 21:807 (2016) , who considers that regrets may be allowed. See: in the same sense, the position adopted by Lord Kerr, http://www.independent.co.uk/news/uk/politics/article-50-brexit-reversible-lord-kerr-a7592241.html. The position was also analysed by the German Parliament: Deutscher Bundestag 17.Wahlperiode, Jahresgutachten 2016/2017 des Sachverständigenrates zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Drucksache 18/10230, 7 November 2016, mentions several opinions on this issue, § 289

[15] Article 49 TEU

[16] Skouris, V., n.9, p 807

proceed to a final withdrawal agreement, remaining a member of the EU[17]. That outcome could only be reached with the consent of the EU Member States, as once the notification is not followed by a withdrawal agreement, the "Treaties shall cease to apply …. two years after the notification"[18]. The latter decision would have to be taken by the Council, by qualified majority[19]

The Union Member States will not negotiate separately, not only for political reasons but because most of the subject matters involved belong to the competence of the Union. The negotiation will be carried out by the Union bodies, adopting the guidelines of negotiation as adopted by the Council[20]. The Commission will negotiate for the matters for which it is competent according to the TFEU[21], but the final agreement will be concluded by the Council.

The withdrawal agreement should be one and undividable: partial withdrawals, partials agreements, or agreements applicable to part of the withdrawing Member States (see. e.g. Scotland) would not be admissible. A core element in the UK position is the possibility to negotiate later transitional partial arrangements, an alternative that has not been provided under article 50, although it could be part of the "framework for the future relationship with the Union". TheTreaty provides for the extension of the negotiation period by unanimous council decision, and this without time limitation. This might not exclude later partial agreements, but former ECJ president Skouris[22] considers that this two-tier negotiation could only be accepted if the withdrawal treaty contains the strictly defined parameters for any future agreement.

The conditions for applying article 50, both for the EU and for the UK, remain subject to EU law[23], until the moment of the final adoption of the withdrawal agreement, and

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[17] See House of Commons, Brexit: how does the Article 50 process work?, Briefing Paper, Number 7551, 16 January 2017; European Parliament, Brexit and the European Union: General Institutional and Legal Considerations, Study for the AFCO committee, January 2017, p. 17.

[18] Article 50 (3)

[19] Qualified majority is required for approving the withdrawal agreement. It seems logical to require a parallel requirement for putting an end to the withdrawal negotiation.

[20] Article 50 is silent on this point: see Commission Fact Sheet, UK Referendum on Membership. Membership of the European Union: Questions & Answers; Brussels, 24 June 2016, http://europa.eu/rapid/press-release_MEMO-16-2328_nl.htm; Adde : ECJ, Press release No 147/16 21 December 2016 on the involvement of the Member States in free trade agreements to be concluded by the Commission. Especially on the powers to terminate the free trade agreement with Singapore. European Commission,

Membership of the European Union: Questions & Answers; Brussels, 24 June 2016, http://europa.eu/rapid/press-release_MEMO-16-2328_nl.htm;

[21] It "will play the role foreseen in the Treaty", Commission Press Release, 24 June 2016. The Commission would mainly address recommendations to the Council, but the Commission considers this as a negotiation with a third country. See: Skouris, V., n.9, p. 808, who also mention the widespread expertise of the Commission in the different subjects that will be raised in the negotiations

[22] Skouris, V., n.9

[23] One could mention also the territorial scope: the overseas territories of the UK have a special status and are not subject to Treaty based rules. The EEA states are not involved, although they will exposed to the consequences of the exit arrangement: See for the Norwegian situation: Mörsdorf, R. Brexit - Folgen für das norwegische internationale Gesellschaftsrecht IWRZ, 5. 2016, 23

hence can be subject to ECJ scrutiny[24]. Whether the ECJ could still be involved after that date is the subject of debate.

International agreements between the UK and the EU would remain in force, and this on the basis of independent legal grounds (CETA[25], European Convention of Human Rights[26], Nato). The Schengen Treaty and the Treaty establishing the European Stability Mechanism were are also based on separate legal grounds but the UK is not part of these arrangements[27],

II. How Brexit will affect the UK and continental legal systems.

There can be little doubt that Brexit will have a considerable influence on the most diverse fields of activity, including on the law applicable on both sides of the Channel. This paper will focus on the company law issues and related topics, being aware that the more sensitive issues relate to other fields such as financial regulation and trade[28], which are topics to be developed in a later paper.

As a principle, once Brexit intervenes, the European law and its underpinning Treaties will no longer apply. The UK will become a "third country"[29], with which no further relations with the Union will subsist except to the extent that these have been put in place through bilateral agreements – usually post Brexit - or flow from multilateral trade treaties (WTO, GATT, CETA[30]). This means that the four European Freedoms will not further apply, and that the legal force of numerous European regulations - whatever their legal nature[31] -will not further extend to the UK. By the same token, EU firms will

[24] So e.g. with respect to the compatibility of the withdrawal agreement with primary EU law

[25] These treaties do not contain provisions safeguarding freedom of establishment.

[26] Concluded in the context of the Council of Europe, of which 47 European States and 6 non-European states are members. The Council founding agreement was signed in London in 1947. This Convention should be distinguished from the Charter of Fundamental Rights of the European Union (2000) which is an instrument of the European Union, binding since the Lisbon Treaty 2009. The UK and Poland obtained an opt-out in a separate protocol, the meaning of which is subject to controversy See: ECJ, C-411/10 and C-493/10, N.S. v Home Secretary and M.E. v. Refugee Applications Commissioner [2011] EUECJ C-411/10 (21 December 2011). After Brexit, the Charter, and the ECJ relating competence would not further be applicable to the UK.

[27] The Schengen Treaty incorporated into European Union law by the Amsterdam Treaty 1999.

[28] Special mention should be made of the European Aviation Safety Agency (EASA) in Cologne, which is the sole institution granting certification for aircrafts and components for civil aviation. The European Medicines Agency located in London granting authorisation for medicines in Europa, aalso will have to relocate: see Markus Haefliger «Unsere Kollegen zu verlieren, tut weh», NZZ 23 February 2017 https://www.nzz.ch/wirtschaft/brexit-und-die-folgen-unsere-kollegen-zu-verlieren-tut-weh-ld.147234.
The UK membership in these and other agencies – such as EBA, ESMA and EIOPA - should be terminated, the EBA relocated in the Union.

[29] See: The EUs Third Country Regimes and Alternatives to Passporting, The International Regulatory Strategy Group, January 2017. https://www.thecityuk.com/research/the-eus-third-country-regimes-and-alternatives-to-passporting-executive-summary/

[30] These treaties do not contain provisions safeguarding freedom of establishment.

[31] Apart from regulations and directives from Council and Parliament, this refers to Commission regulation based on delegations, regulatory technical standards, implementing standards, originating from the agencies active in the Union.

be considered as “third country firms” in relation to the UK, meaning here that they will have to apply UK rules.

The treaty principles as elaborated in the ECJ case law – especially important for company law - will also be affected: the freedom of movement – being of freedom of access and establishment - has been extensively interpreted by the court, leading to the well-known company law cases such as Centros, Überseering , Inspire Art, Cartesio, Vale[32], whereby host states were prevented from imposing additional or discriminatory requirements to companies registered in other EU States. In the future, EU states might be able to refuse access to UK firms, and UK firms will not have a treaty based right to access, or enjoy equal treatment when deploying activities in the Union. The same applies to EU firms intending to engage in activities in the UK: the UK may hamper the establishment of EU companies in the UK.

Most of the European action has taken the form of common treaties[33], agreements, directives or regulations. After Brexit, these will no longer apply, and may have to be replaced by other instruments. A large part of the European action has taken the form of harmonisation directives, aiming at eliminating the most obvious disparities between the national legal systems. The directives originally urged Member States to adapt their national laws to commonly agreed principles and objectives, but leave them free as to the format and formulation. Member States remained free to deal with subjects not included in the directives. In a later phase, these directives were complemented and sometimes replaced by - numerous - regulations, which are directly applicable and result in a largely – but not fully – identical legal apparatus.

As directives have to be transposed in national legislation, Member States have adopted a more or less equivalent regime. Per hypothesis, the transposing legislation should be equivalent, although the conditions of their application may vary depending on whether they have been declared exclusively applicable to European entities or not[34]. After Brexit, the UK transposing instruments will remain in place, at least until further changes have been introduced. This feature may facilitate transactions to take place even between UK and EU based entities as they are subject to comparable legal regimes, even after the UK laws have lost their status as EU based instruments. But the benefits flowing from the legal basis such as free access or no discrimination will not further be applicable. The ECJ case law will not further apply, allowing additional, even discriminatory requirements to be imposed by any of the States involved in a certain transaction. This conclusion applies in both directions, i.e. to UK firms accessing the EU and - depending on UK law- EU firms proposing to establish themselves or be active in the UK.

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[32] These cases are identified as follows: Centros 9 March 1999, C 212/97; Überseering, 5 November 2002, C-208/00; Inspire Art 30 September 2003, C- 167/01; Cartesio, 16 Dec. 2008, C-210/06, Vale 12 July 2012, C -378/ /10.

[33] See e.g. the Schengen agreements, now part of an EU body of rules, which were not subscribed by the UK nor Ireland. They allow any person to cross the Schengen internal border without systematic checks, but allow on-the-spot checks.

[34] See further for the case of the cross-border mergers, section 9(a)

In more recent times, a further step in the legal harmonisation has been pursued by adopting regulations, directly applicable in the Member States and as a consequence declaring applicable identical legal provisions in their respective national legal orders. Brexit would put an end to this feature: the regulations will not further be valid in the UK, although exceptionally they may have been included – often in modified form - in national provisions, such as in consumer legislation. Also, as a consequence of the Global Leave Act - more appropriately to be called the Global Withdrawal Act[35]- , they would remain in place and ensure continuity in the UK domestic regulatory system, while providing a useful reference for the third country equivalence assessment. As Brexit would put an end to their legal existence, cross border transactions would not further be regulated on a unified basis, and in some cases may even be forbidden[36].

The basis in EU law having disappeared, the application of the former EU regulation that remained into force under the Leave Act would not suffice to allow free access to the continental markets[37]. The former EU regulation would have become domestic law which UK and non-UK firms active in the UK would have to apply. Over time, legal requirements are likely to diverge, e.g. on legal capital, financial assistance, bonus caps etc. and this may lead to a refusal of certain transactions e.g. with respect to companies with shares traded on EU regulated markets.

On the other hand, UK firms addressing EU clients will de facto have to take into account and even to apply these provisions as these are applicable throughout the EU, leading to post-Brexit extraterritorial application of the EU regulation, in fact limiting the UK's firm freedom to abandon or even adapt these formerly EU provisions. This will be necessary not to lose access to EU markets, e.g. for financial services.

III. Brexit and company law

Brexit will affect the lives of companies in numerous respects: most of these will relate to their commercial activity, their access to the UK or to the Continental markets[38], to the financing of their business, especially for the larger companies. Up to now, the exchange rate has been a significant factor, resulting in a considerable change in the terms of trade, and raising fears for the continental exports. Among these factors, the legal status of companies in the other jurisdiction is the subject of the following analysis. In a first part, the position of companies in general will be dealt with, including the applicable accounting standards and the position of the auditors. In the second

[35] Gordon R, n.15, 2016,512, questions to what extent common law could accommodate the "new hybrid or mutant of former EU law now masquerading as domestic law"
[36] E.g. offering of securities to investors within the limits of the derogations in EU regulations while the UK may have introduced higher or different thresholds.
[37] Privacy protection rules that have been kept in place under the UK Global Leave Act would not substantively be different from the EU rules, but might not offer the same legal protection, e.g. in terms of recourse to the ECJ.
[38] This refers to the 27 Member States and the EAA states.

part more attention will be paid to corporate transactions and to the obligations of listed companies[39].

It is widely believed that access by EU companies to the UK market will remain very flexible, in line with the previously prevailing traditions and views. In pre-EU times, foreign firms were easily admitted to the UK. There will be regulated sectors where additional licences will be needed (e.g. for lawyers or medical doctors), but apart from the financial sector, no major hurdles will be raised to continental companies wanting to engage in business in the UK. By and large the same approach seems to be available to UK companies intending to develop activities on the continent: however, the regulation on the Continent is often stricter for numerous activities[40]. In both cases the impediments will not occur at the level of the respective company laws, but at the level of the business activity they intend to exercise.

How significant these impediments will be, is difficult to predict, but they may constitute a considerable brake on cross-border commercial flows and establishment.

From the angle of company law, a first issue relates to the recognition of foreign companies: under what conditions will companies originating from another jurisdiction be recognized as full legal entities. Under the regime article 54 of the TFEU "companies …formed in accordance with the law of a Member State …..shall be treated in the same way as natural persons who are nationals of Member States". No distinction should be made whether the company has been constituted in a jurisdiction where the "registered office, central administration or principal place of business" is considered the decisive criterion, as all will be fully recognised under article 54(1) of the Treaty. These companies will be entitled to the full freedom of establishment (article 49 TFEU) and may establish themselves without restrictions as agencies, branches or subsidiaries in any Member State[41]. Any discrimination in comparison to nationals of that Member States is prohibited (article 54). This provision benefits EU located companies and before Brexit, also UK incorporated ones. Moreover, European law does not allow national bodies to distinguish between companies created in "incorporation" States and companies originating from so-called "seat" jurisdictions.

IV. Choice between the "seat" and the "incorporation" theories

According to present UK law, companies incorporated in the UK are subject to UK company law, irrespective of the localisation of their activity: this is an application of the "incorporation theory" according to which the legal regime applicable a to a company is determined by the place where the company has been incorporated - or

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[39] See sections 9 and 10 respectively.

[40] The number of activities subject to licences is impressive: hairdressers, dental technicians, opticians, etc. See for an overview: http://www.europarl.europa.eu/facts_2004/3_2_3_en.htm. These requirements are neutral as to the legal form in which the activity is carried on,

[41] See in the cases of Centros and Überseering, n.32; also in the ECJ Kornhaas case (10 December 2015 C- 594/14) where it was held that the existence of pre-insolvency measures do not constitute a restrictions on freedom of establishment

more precisely registered - and not by the place where its activity is undertaken. In some States, reference is made to the "statutory seat", as an equivalent concept. As a consequence, the legal regime remains applicable even if no activity takes place at the address of the registered office[42]. The place of incorporation can only be changed within the jurisdiction of constitution of the company, and cannot be transferred to another jurisdiction. This applies even to the transfer to other jurisdictions within the European Union[43]. The transfer of the place of incorporation to another jurisdiction would lead to the dissolution of the company under UK law, and continuity of the legal entity will only be accepted if provided for in the transferee state[44]. Moreover, to the extent that it would be allowed in certain states, in case of transfer to another jurisdiction, considerable fiscal charges would apply. It is unlikely that this approach will be changed by the Brexit. The incorporation theory is followed by numerous European states: apart from the UK, the Netherlands, Sweden, Denmark, Finland, Norway, Switzerland Italy (intermediate approach). Hungary[45], Czech Republic[46], Slovakia[47] and follow the law of the place of registration and therefore are "incorporation states". The incorporation technique offers considerable advantages; it is the simplest and most easy to verify. It allows companies to develop their activities all over the world while remaining subject to their original legal regime. This relates also to businesses carried on in the form of branches, or agencies, as these remain part of the company and its legal personality, and therefore can take advantage of integrated management, including accounting. For these reasons, some jurisdictions, also under the influence of the ECJ case law, now seem to consider to opt for the

[42] See ECJ case Inspire Art,n.32

[43] Except in the cases where a EU regulation or directive allows it: the cross-border merger directive, the Statute of the SE and the regulation on the SCE are the only cases today where the company can be transferred to another jurisdiction with discontinuity of its legal existence, and hence its dissolution. The EU has not been able to agree on a legal regime allowing for the cross-border merger of companies, mainly out of fear for regulatory arbitrage. Some Member States recognise cross-border mergers, both outwards of the own jurisdiction and inwards.

[44] See ECJ, 16 Dec. 2008, aff. C-210/06, Cartesio Oktató és Szolgáltató bt; Andrzej W. Wisniewski and Adam Opalski, Companies' Freedom of Establishment after the ECJ Cartesio Judgment, European Business Organization Law Review, Volume 10, Issue 04, December 2009, pp 595-625; Stefano Lombardo, Regulatory Competition in Company Law in the European Union after Cartesio, European Business Organization Law Review, Volume 10, Issue 04, December 2009, pp 627-648; Didier Martin, Didier Poracchia, Company mobility through cross-border transfers of registered offices within the European Union - A new challenge for French law, Journal du droit international (Clunet) n° 2, April 2010, 5 ; Guillaume Santoro, L'évolution du principe de liberté d'établissement en droit communautaire : un mouvement de libéralisation depuis l'arrêt Cartesio, RIDE 2010/3. See for a pre-EU case of transfer of the seat from an incorporation to a seat jurisdiction: Belgian Cass. 12 November 1965, Pas. 1966, I, 336, (Lamot Case) in which the court recognized the validity of the transfer without dissolution if this was admitted in the exit state, applying that state's rules for the transfer, while in the entry state the company's articles are adapted to that state's legal system, without significant changes. See LENAERTS, "Het personeel statuut van een Belgische vennootschap bij overbrenging van de werkelijke zetel naar het buitenland" (Tijdschrift Rechtspoersoon en Vennootschap 1988, 112,

[45] Sec. 18 of the Hungarian Act on Private International Law (PIL)

[46] Sec. 30(1) of the Czech Act on Private International Law

[47] Sec 22 Slovak Commercial Code (Obchodny zákonnik 513/1991 Zb.)

incorporation theory at their domestic level [48], or at least do not challenge the existence nor the legal regime if the foreign company has some activity in its State of origin[49].

The seat theory – also referred to as the "real seat" theory- relates the legal regime of a company to the jurisdiction from where it will actually be directed. This technique allows states to exercise a closer control on the entities and their activities established in their territory. As a consequence, when the "seat" is effectively located in a place different from the place where the company was created, or has *de facto* been transferred to another state, the legal regime of the latter state will become applicable, possibly leading to its requalification[50]. Some consider this as a technique to combat different types of evasion or questionable conduct: tax or other types of evasion, bankruptcy, letter box companies, protecting labor codetermination etc.

What constitutes the "seat" is the subject of controversies. In several jurisdictions, it is the place where the company is effectively directed, often assimilated to the place where the board of directors meet, where the effective management is located, or where – in a subordinate order, to the extent that the previous criteria do not lead to a clear indication of the seat – where the business activity is undertaken, where the factories are established, etc. The place where the legal address of the company is located – the so-called "statutory seat" – is generally considered as a mere indication of the seat, that would only apply if none of the other criteria are inconclusive[51]. An exception constitute jurisdictions that consider the statutory seat as the exclusive criterion: such method of determining the law applicable to companies is similar but not tantamount to the incorporation theory; it remains in strict opposition to the "real seat" theory as the incorporation theory[52]. In some case law, the identity of the shareholders and their nationality, or of the directors may have been held as important indicators, but other jurisdictions have rightly refused to accept this criterion. These different criteria indicate that the determination of the seat may imply a factual analysis and is subject to judicial appreciation[53].

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[48] See for the Norwegian case; Mörsdorf, R. n. 23 IWRZ, 5. 2016, 236; similar discussions are being carried on in Belgium. See in the annex for the French and Polish legal regimes.

[49] Except it seems in Germany and Austria. See for the more lenient approach : : P Wautelet, Quelques réflexions sur la lex societatis dans le code de droit international privé, Rev. Prat. Sociétés, 2006, 6948, Also compare the summaries of Belgian and French legal regimes in the Annex.

[50] Under the seat theory, there can be no room for applying the concept of "pseudo foreign corporation"; the company is whether foreign, whether local, and possibly devoid of legal personality. But the "seat" jurisdiction may impose additional obligations to a foreign non-EU subsidiary.

[51] Jurisdictions that consider the "statutory" seat as the exclusive criterion may be considered applying an intermediate form of the incorporation theory (see e.g. Italy).

[52] An example of the "statutory seat" jurisdiction is Poland: the enigmatic statutory notion of the "seat" of the legal person provided for in the Polish Act on private international law is interpreted in court practice and by the prevailing part of contemporary legal commentators as the "statutory seat" because of the need to provide legal certainty for companies, its members and third parties as well as to achieve conformity of Polish law with the EU rules on freedom of establishment. See more under in the section on Polish law in the annex.

[53] See e.g., the cases where the seat is virtual, as board members meet in teleconferences, or by other electronic means of communication: here the statutory seat -or the registered office - are they the same " - represents the best link to a certain legal order: see : Armour, J., Fleischer, H., Knapp,V., Winner,M., Brexit and Corporate Citizenship, Working Paper N° 340/2017, January 2017, SSRN-id2897419.pdf . :

According to European law, especially as interpreted by the ECJ case law, the freedom of establishment regime applies irrespective of the location of the seat of the company and under both regimes, companies have to be dealt with the same way and enjoy the same rights and privileges. Hence "seat" jurisdictions cannot refuse access to a non-domestic EU company on the basis that the company's seat is not located in the jurisdiction from where it originates[54]. The host state will have to accept the company from another EU company as it is, its legal characteristics being defined by its national law, being the incorporation law, or that of its seat. It will also enjoy freedom of establishment and be entitled to form subsidiaries or branches in other EU states, again without being refused access or discriminated against. No additional requirements can be imposed on these companies from other Member States, except on the basis of fraud, a concept that is very narrowly construed by the ECJ, or on the basis of the "general interest"[55]. Therefore, according to EU law, both incorporation and seat jurisdictions cannot requalify companies from other Member States and subject them to their national law, even if the company's business activity is located in their territory. This issue is especially important for the so-called "formally foreign companies", or "pseudo foreign companies", being companies constituted in "incorporation jurisdictions" as "limited" companies, but the activity of which is entirely or largely exercised elsewhere. At most, the host jurisdiction could impose some additional disclosures[56].

Among the EU jurisdictions, the seat theory is applied i.a. in the following Member States, sometimes with some specific national differences : Austria, Belgium, Germany, Luxembourg, Portugal, Romania, Slovenia, Spain, and in France and in Poland, in both cases with some nuance[57]

For companies from non-EU states, the above analysis does not apply and these entities do not enjoy the protection of the EU freedom of establishment. The host state's position is different under an incorporation regime as opposed to a "seat" system. The incorporation states following their logic with respect to these foreign companies, apply the law of the incorporation state and recognise companies as created in that jurisdiction. However, as these companies may not have economic links with the host jurisdiction, in other words are only "formally foreign", these states sometimes impose additional requirements: in the Dutch case the additional obligations result in a system where these companies are subject to a legal regime that brings them close to that applicable to Dutch companies, e.g. in terms of capital

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P Wautelet, Quelques réflexions sur la lex societatis dans le code de droit international privé, Rev. Prat. Sociétés, 2006, 6948, p. 33..

[54] See Centros, see n 32 and 93.

[55] See also the ECJ Case C-55/94 (Gebhard), 30 November 1995 (C-55/94), stating the four conditions allowing national restrictions s to free establishment , in casu of a lawyer, should meet: non-discrimination, imperative needs of general interest, effectiveness for attaining the stated objective and limited to what is necessary to attain that objective.

[56] See particularly the Dutch example on the Formally foreign companies. ECJ, case C-167/01, Inspire Art, of 30 Sept. 2003) holding that no additional obligations can be imposed on Dutch "formally foreign companies" originating from another Member State. Italy has a comparable set of requirements

[57] For more details about the different national systems, see the annex.

protection or liability of directors. One could designate the outcome as supplementing with elements borrowed from the seat theory, except that the company remains subject to the law of the state of incorporation.

Seat jurisdictions often follow a different reasoning : they qualify foreign companies as domestic if the seat is on their territory. The consequences of this reasoning differ considerably: according to German and Austrian law, these companies will not be recognised as valid foreign companies, but requalified as irregular domestic companies, mostly as non-incorporated partnerships governed by the domestic law. Hence the legal personality will be denied, assets and liabilities will be owed by the partners and directors will be considered managing partners, hence indefinitely liable. Other seat jurisdictions apply less stringent solutions.. This question is also important for the cases of cross border seat transfer where national solutions are equally different.

V. Third Country firms: the post-Brexit regime

After the adoption of the Brexit agreement, UK companies would become "third country companies".

The basic Treaty freedoms are only granted within the functioning of the internal market, and only benefit the nationals, physical persons and firms legally established in the Member States of the Union[58]. Firms established outside the Union are qualified "third country firms" and are not entitled to take advantage of the freedoms regime. They can only establish themselves within the framework of the national regime in each Member State, or more exceptionally if meeting the conditions addressing third country firms as laid down in the Union sectoral directives or regulations. Most company directives contain no provisions dealing with third country firms[59].

The qualification of a "third country firm" applies to entities formed outside the Union. These are first the entities formed in the incorporation jurisdictions – such as the UK – pre- or post Brexit –, or other non-EU incorporation States. It also refers to companies in non-EU jurisdictions that follow the "seat" theory. Third country firms may be subject to access conditions, such as equivalence of regulatory regimes, disclosures, reciprocity and other politically or economically motivated authorisation requirements, e.g. residence permits for their directors or managers. Establishment may be refused for reasons of protecting the local market, e.g. in the context of a take-over bid on a local market leader. These authorisations are based on national law and only apply on a State by State basis.

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[58] Including the EEA States: Iceland, Liechtenstein and Norway. According to the EEA status, the participating States will not be bound by EU actions in the fields of justice and home affairs, are not held to the common agricultural and fisheries policies and may conclude their own bilateral deals with third countries

[59] The main exception relates to the 11th Eleventh Company Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State

Third country firms to which no EU regulations are applicable – or not further in the post-Brexit UK - will in general be able to exercise their activities in the Union. If they want to be active in a state in which the incorporation theory is applicable, their legal status will not be put in doubt as the host state will refer to the place of incorporation, being here the home state. Under company law rules, they will be considered fully valid legal entities. Some additional obligations may apply, e.g. in the field of disclosures, residence permits, authorisations of leading personnel, etc.

More generally however, UK companies would lose the protections provided by the Treaty, exposing them to additional obligations and – theoretically at least - discriminatory treatment. The EU treaty protections would not further apply. Access to the EU markets may even be denied, but this will rarely be a question of company law, but rather derive from their specific field of activity (see e.g. the need to have a banking license, or to exercise other regulated activities). In some jurisdictions a special regime will address the so-called "formally foreign companies", implying additional obligations somewhat equivalent to the regulations applicable in the host state[60] .

The situation is likely to be more complex if a UK company were to develop its activity in a "seat" jurisdiction, the latter acting as the "host". If that activity can legally be qualified as that of the seat, the UK company will become subject to the host state legal regime. In most cases, it will not have been created according to the host state's legal provisions, both in formal terms and in substantive terms (e.g. number of shareholders, capital requirements, management) and hence will be disqualified as a valid foreign company with its own characteristics. UK companies with factual seat in a seta jurisdiction would be confronted with severe challenges in some jurisdictions, Germany and Austria e.g., resulting in a refusal to recognise the foreign legal entity and requalify it as an unincorporated company, with unlimited liability for shareholders, and managers.

In other seat jurisdictions, the judiciary is more reluctant to requalify these foreign entities, whether by following a more restrictive reading of the notion of the seat, by referring to the statutory seat as the decisive criterion, or by presuming that the legal regime of the place of "registration" is to be applied. In these jurisdictions, requalification mainly occurs when the seat is undeniably located in the "host" (seat) jurisdiction. Also the consequences of a requalification may be more moderate, allowing e.g. a reincorporation in the host (seat) jurisdiction, or imposing an equivalent legal structure.

A relatively simple approach to avoid these unintended consequences would be to create sufficient activity at the place of registration in the home State. This may however not be sufficient if the flaw existed from the beginning – e.g. in pre-Brexit times - while it is doubtful that the absence of legal personality can be healed by later corrective action. This analysis makes it clear that the definition of what constitutes the seat will be of central importance. This is often based on a factual analysis.

The consequence of the disappearance of the Treaty protection for third country firms is best illustrated by the case of the numerous limited companies that have been

[60] See the Dutch regime on the formally foreign companies See Annex

created in the UK, and hence are subject to UK law, but exercise all or most of their activity on the continent and benefit of the protection of the freedom of establishment rule. According to recent figures[61], the number of entrepreneurs from some of the – non UK - Member States registered in the UK was about 103.000, with the largest presence in Germany, followed by the Netherlands and France. But also for Norway, significant numbers were mentioned[62]. However, not all "limiteds" are registered in their host state, normally as a branch, while some of the "limiteds" may have sufficient activity in the UK or elsewhere so that they cannot be considered to have their seat in the host "seat" state. The qualification of the seat is therefore an essential feature of the analysis.

In order to avoid often political conflicts in this matter, international treaties have been concluded that lead to the recognition of companies originating from one of the signatory states. These are e.g. the international treaties on "friendship, trade and navigation treaties" that before the Union existed mainly between the EU states, but also with third countries like the US. Many of these have been pre-empted by the TFEU regime or by treaties concluded by the EU and dealing with external commercial relations" [63]. Two EU treaties were concluded dealing with the "recognition of the legal personality of companies, associations and foundations", first The Hague Convention of 1 June 1956, and later the Brussels Treaty of 29 February 1968 on the mutual recognition of companies in the European Economic Community. These treaties have not entered into force for lack of the necessary ratifications and are now largely superseded by the Treaty provisions.[64] However, when the EU regime lapses as far as UK companies are concerned, these treaties and their underlying principles could become relevant again with respect to the relations involving UK companies.

VI. Branches v subsidiaries.

Companies can be active in other jurisdictions under different forms: for the more permanent establishments, one should distinguish the establishment of a branch, from the creation of the subsidiary. The branch is a separate unit of activity, belonging to the same legal entity. The subsidiary is a separate legal entity, separate from its owners

[61] See for the details M. Becht, C. Mayer, H. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry , ECGI , Law Working Paper, No. 070/2006; for more recent data see: Armour, J., Fleischer, H., Knapp,V., Winner,M., Brexit and Corporate Citizenship, Working Paper N° 340/2017, January 2017, SSRN-id2897419.pdf.
[62] See Mörsdorf n.23
[63] See on the topic: John F Coyle, The Treaty of Friendship, Commerce and Navigation in the Modern Era, Columbia Journal of Transnational Law, Vol. 51, p. 302, 2013, SSRN-id 2150260.pdf
[64] Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions, See: Hague Conference on Private International Law; Convention on the mutual recognition of companies and bodies corporate, 29 February 1968, aei.pitt.edu/5610/1/5610.pdf

A. Branches

For EU companies, the creation of a branch is one of the forms of exercising the freedom of establishment and therefore free and non-discriminatory access will be guaranteed. There are exceptions on the basis of fraud or for the protection of the general good (see e.g. depositor protection or systemic stability objectives in the field of financial regulation). The 11th Company law directive[65] lists the conditions for opening a branch and details the disclosure obligations to be met by branches. The company law directive does not impose authorisation conditions for opening a branch, nor are there requirements about equivalence with national companies.

If a third country company wants to establish itself by way of a branch, the national conditions for opening branches would apply. The 11th Company law directive contains no access conditions: it does not give any guidance as to the right or obligation of Member States to allow third country branches, nor is equivalence a condition generally applicable to establishing branches by third country companies. This matter would be dealt with in national law which may contain additional access conditions. The directive mainly imposes disclosures including of the accounts of the company as a whole[66]

Some jurisdictions restrict the use of the branch by third country companies on public interest grounds. The EU Directives often provide for an explicit "third country regime" implying access and mutual recognition, provided the basic conditions for this recognition have been met, such as an equivalent supervisory regime. This approach is frequently followed in the financial services directives or regulations. It also applies in the fields of accounting and provision of services by auditors[67]. It mostly applies on a state by state basis[68].

The notion of "equivalence" plays a core role in the establishment of branches and the provision of services, - but not for subsidiaries [69]- as is evidenced by the numerous directives and regulations especially in the financial services sector. The equivalence requirement is minimal in some fields, in others, it refers to several and strict conditions some of which will require considerable efforts[70]. For banking, access is further be

[65] Eleventh Company Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State
[66] Article7, 11th Company law directive. There is no disclosure of the separate accounts of the branch. But branches have to keep separate accounts for tax, or for supervisory purposes.
[67] See further section 9 (b) and (c)
[68] See e.g.article 39 Mifid II; but increasingly the third country regime is administered by ESMA; see article 46 for services under Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Mifir); article 25 , Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR). See for an overview of the third country regime in financial services: Lannoo, K. EU Financial Market Access after Brexit , CEPS Policy Brief, September 2016; The EUs Third Country Regimes and Alternatives to Passporting, The International Regulatory Strategy Group, n. 31, January 2017
[69] The consultation procedure e.g. article 16 CRD IV can be compared, but is not equivalent.
[70] See e.g. article 25 of Emir 648/ 2012 on the recognition of third country CCPs

conditional upon meeting the conditions fixed in an agreement with the third country. There is however no general equivalence requirement for branches in company law as such. Some States have imposed the use of the subsidiary form[71], or other ring fencing measures in order to avoid risks being imported from the parent company or from the head office. Shortly after Brexit equivalence should generally be presumed as the UK regulation will normally have adopted in its local regulation the criteria and provisions laid down in the EU company law or regulation. However, whether equivalence will open the door to establishment is disputable as the interpretation of the rules will not take place under the final authority of the ECJ. In the longer term, the equivalence decision will become more important, and ultimately equivalence may be lost due to regulatory changes in the EU or in the UK.

The degree of discretion that is thus introduced by the equivalence test has to be measured case by case, as the different directives use different formulations. In most cases, the assessment will be an objective one, referring to the comparative assessment of the regulatory requirements applicable in the third country jurisdiction with those provided in the EU regulation on the basis of which equivalence is granted[72]. Equivalence applies on the basis of the legal regime in place at the moment of granting equivalence and hence may become obsolete over time. In addition, it seems that equivalence is more and more a political instrument, as the directives or regulations give discretion to the Commission for opening the path to the official equivalence assessment[73]. This is often formulated by giving discretion to the Commission in undertaking the equivalence assessment: “the Commission may decide on… equivalence[74]” . In most cases the directive or regulation allows for a very wide appreciation: in Emir[75] e.g., the regulation contains a reference to a later international agreement relating to mutual access which is to be concluded, indicating that discretionary, political or strategy elements may come into play. The importance of this approach has been illustrated in the difficulties encountered for the recognition of derivative trading between the EU and the US[76].

Unless additional provisions are adopted as part of the article 50 TEU negotiation, the Brexit decision would directly affect UK companies accessing the EU internal market by way of trading through a branch as these will not further enjoy the freedom of

[71] What would be clearly incompatible with the Treaty as far as EU companies are involved.

[72] Under the CSD Regulation, 909/2014, article 25, the third country CSDs will have comply with legally binding requirements which are in effect equivalent to the requirements laid down in this Regulation, requiring that those CSDs are subject to effective supervision, oversight and enforcement in that third country on an ongoing basis and that the legal framework of that third country provides for an effective equivalent system for the recognition of CSDs authorised under third-country legal regime.

[73] See Moloney, N. International Financial Governance, the EU, and Brexit: The ‘Agencification’ of EU Financial Governance and the Implications, EBOR (2016) 17:451, at 4.2. This is often expressed by stating that the Commission “may” declare equivalent a certain foreign regulatory regime.

[74] By way of example see the formulation in article 38(3) Mifir: The Commission may adopt an implementing act …, determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements laid down … , that those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis and that the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.”

[75] See article 75 (2) Emir, n.68

[76] See Stafford, Ph., “EU clears way to end derivatives spat with US”, FT 15 December 2015

establishment. In past practice however, states have been very flexible in allowing branches from other jurisdictions - including non-EU - states – as this was beneficial to opening trade relations and created support for the local economy.

Specific conditions may apply, but these are not company law requirements and will apply to all traders active in the same field. In the name of the “public interest” regulations impose stringent conditions to e.g. financial institutions to which the third country regime applies; it usually consists of the presence of an effective supervisory regime, cooperation agreement with the European authorities, information exchange and an assessment of equivalence of the “legal and supervisory arrangements” with the requirements of the EU regulation.

B. Subsidiaries

Under the present Treaty regime, if the establishment leads to the creation of an EU *subsidiary* –i.e. of a local company - this company will be regarded as an EU national, irrespective of the nationality of its shareholders, members or directors, and will continue to exist in accordance with the national legal provisions. On that basis it could avail itself of the freedom of establishment and the prohibition of discrimination, as provided in the Treaty and subsequent case law. The regime laid out in the CRD IV comes close to full freedom[77]: a subsidiary of a third country bank is a full EU bank which could create subsidiaries in other EU states, establish branches without any further restrictions, or avail itself of the freedom to provide services in other EU states. As an EU entity, it will be protected by all the EU treaty rules, e.g. on freedom of establishment and other EU states will not be entitled to refuse to recognise its validity, impose additional conditions different from the ones applicable to local companies, or discriminate against these subsidiaries. The subsidiary regime is especially important for financial institutions as the subsidiaries will not be exposed to the restrictions applicable to companies from outside the EU. UK based financial institutions can be expected to avail themselves of this facility in order to reduce the negative consequences of the Brexit. Some are already analysing the available alternatives.

This regime will apply in full to subsidiaries established in incorporation states. If the subsidiary is located in a seat jurisdiction, there might be questions raised if the effective group direction is taking place from abroad, while the effective management is in the hands of the subsidiary leadership, leading to subjecting the subsidiary to the host state company law. This may lead to a refusal of the host state to recognise the

[77] The CRD IV regime for bank subsidiaries is based on informed freedom, whereby the supervisor of the subsidiaries obtains information of the parent supervisor, especially on the suitability of the shareholders and the reputation and expertise of the group management (CRD IV article 160) A comparable regime applies for branches, where a - clean or possibly a conditional- no objection from the home supervisor is needed, and activity is limited to some of the services mentioned in the annex to the directive provided these services are also offered in the home state. For services, there mainly are reporting obligations. Host Member States will remain in charge of reporting, and may undertake action in case the branches or the service provider does not meet the conditions for establishment (article 41 CRD).

subsidiary as a valid legal entity, and to the application of local law on unincorporated company forms[78]. Seat jurisdictions would be at a disadvantage in comparison to incorporation states which will recognise all foreign entities.

Generally, it seems not so likely that a national legislation or authority would refuse a non-EU company to establish itself as a subsidiary or as a branch, as this establishment may create additional employment and activity. Company law related criteria for refusing access to UK entities are difficult to imagine, it being assumed that the newly established subsidiary complies with all local regulations (e.g. on disclosures, insolvency,[79] accounting, etc.). However, there might be cases where for whatever reasons – competition, protection of the home market including creditors, economic sovereignty, security, etc. – the access of foreign entities may be barred. In this case, the prohibition would apply to both subsidiaries and branches, but is unlikely to be based on company law. It might even include existing subsidiaries and branches. On the basis of an international agreement, provisions could be introduced relating to the conditions of establishment such as reciprocity, supervision[80], etc. In the field of financial services or for public security motives, one may more easily draw up hypothetical cases that may lead to the withdrawal of the authorisation of a bank for not meeting the new national requirements, including endangering "Financial Stability" or leading to "overbanking".

With respect to subsidiaries there are generally no company law conditions of equivalence. However, as the subsidiary belongs to a wider group, there will be issues of integrating the subsidiary in that group. Here equivalence will take the form of equivalence of supervisory regimes, a subject receiving active attention for financial services groups, located in and outside the Union. This would also apply after Brexit: as will be illustrated further, third country equivalence may e.g. apply to third country auditors active in the Union.

VII. Transitory regime pre-Brexit

A further analysis relates to the transitory regime between the article 50 notification and the date of withdrawal two years later[81]. The UK will remain a full member of the Union until its membership ceases in accordance with article 50, this is two years after notification. It will further be entitled to take part in all EU deliberations, and contribute to the preparations of the directives or regulations.

During this interval, EU law will remain fully applicable both in the UK and in the other EU Member States, and their market participants can continue to rely on the application of EU law in their dealings with UK entities. This may be important for market

[78] See the Annex with respect to the German and Austrian legal regimes.
[79] See International Corporate Rescue, Special Issues, February 2017 Brexit, Leading Restructuring and Insolvency Articles
[80] See article 48 CRD IV for supervision on a consolidated basis.
[81] Or earlier or later if agreed.

confidence, but also for firms intending to use freedom of establishment, e.g. by creating subsidiaries which they could use in post-Brexit times. All legal remedies would remain applicable including a recourse to the ECJ. The refusal by an EU national authority to register a UK company on the basis of Brexit will be considered contrary to the Treaty, in accordance with the present case law of the ECJ.

Continuing to be a Member State, the UK would also be held to implement recently adopted EU legislation, and transpose directives in its national legislation. For company law purposes, the issue may become exciting, as the recently adopted amendments to the Shareholders Rights Directive may have to be implemented before the two year transposition period expires[82].

It can be expected that the UK will continue to transpose directives which have not been transposed at the moment of the notification starting the negotiation and which have to be transposed before the UK exits the EU, this is within the 2 year period or during any extension of that period. The directly applicable regulations would remain enforceable during that period, especially when private rights of action have been conveyed. It is not unlikely that EU directives which have been adopted at the EU level during this transitional period, but were not transposed before the UK exits the EU, will not be transposed even if the transposition date has passed. Would parties be entitled to claim against the UK after the transposition date, on the basis of the non-transposed directive provisions, and would they be entitled to pursue their claim even before the ECJ that respect? The answer lies in the vertical direct effect of directives on the basis of which unconditional and sufficiently clear and precise provisions may be invoked by an individual against a Member State which has not transposed the directive in time. The liability of the exiting State would take date on the ultimate transposition date, at the latest: acquired rights will probably be invoked here[83].

Some further measures are being considered at EU level: the planned revision of the CRD IV - CRR banking prudential regimes would affect the UK banks in several respects the UK financial institutions for their European operations, such as the requirement to create financial holding companies (FHCs) or the introduction of TLAC[84]. It may be unlikely that these measures would be adopted before the UK leaving the EU, one may wonder to what extent the UK can still be involved in the preparation of these legislative measures.

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[82] Council, Shareholders rights directive approved by Parliament on 9 December 2016: Presidency strikes deal with Parliament, FT 16 December 2016. The directive should be implemented two years after entry into force, i.e. 20 days after publication in the OJEU. The directive has not yet been published. http://www.consilium.europa.eu/en/press/press-releases/2016/12/09-shareholders-rights-eu-companies.

[83] See on this discussion; Lehmann, M., and Zetzsche, D., 'Brexit and the Consequences for Commercial and Financial relations between the EU and the UK' [2016] EBLR 999, 1013 et seq.. R Freitag and S Korch, 'Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Gesellschaftsrecht', *Zeitschrift für Wirtschaftsrecht* 2016, 1361, 1363 et seq.

[84] Commission, Frequently Asked Questions: Capital requirements (CRR/CRD IV) and resolution framework (BRRD/SRM) amendments, MEMO-16-3840_EN.pdf, 23 November 2016,

VIII. The post- Brexit legal regime

It is very difficult to define what will be the legal regime for many issues in Post-Brexit times. Much will depend on the negotiations between the EU and the UK. Access to the respective markets will be one of the key issues, numerous other legal issues will also redefine the positions of the two parties: insolvency, contract law, [85] Many sources indicate that the maintaining of the passport regime will be an essential ingredient of the future economic relationship between the UK and the EU[86].

After Brexit, the Treaty regime will cease to apply and company law will exclusively be governed by national legal provisions. However, the effect in practice will be different if one compares directives to regulations. The national laws transposing the directives will remain in place although over time their interpretation may become divergent from the EU interpretation, while the unifying effect of ECJ decisions will not further apply. Legal practice may still rely on the pre-withdrawal interpretations by the ECJ, and some have mentioned, may be too optimistically, that even later interpretation of the same wording by the ECJ might yield useful arguments even in the UK courts[87].

With respect to regulations, as these are directly applicable, they will cease to apply. The UK government has considered to adopt the "Great Repeal Bill", whereby all enactments under EU law - more precisely under the 1972 European Communities Act - would be repealed, and replaced by the identical enactments but then under UK law. The designation of this act being misleading, it has been proposed to call it the "European withdrawal bill" repealing the "acquis communautaire" as it then stands[88]. This act would enter into force at the moment the UK leaves the EU, which is the moment the exit agreement is adopted, or the two year transition period comes to an end. There is no doubt that the final exit agreement could be subject to an ECJ recourse, being based on article 50 TEU. The question may be raised whether the ECJ would also have jurisdiction over the UK Repeal act, which might be the case if the Repeal Act was an organic part of the article 50 final agreement. This would not be the case if the repeal act is adopted after the article 50 procedure has come to a close. In case of further transitional measures, these should be considered concluded between two sovereign entities – comparable to international trade agreements - and therefore would not be subject to the ECJs jurisdiction.

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[85] Lehmann, M., and Zetzsche,D., ,n.82, Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht, Zetzsche,D., and Lehmann, M.,JZ 2017, 62; Freitag, R, and Korch, St, Gedanken zum Brexit, Moegliche Auswirkungen im Internationalen Insolvenzrecht, ZIP, 2016, 1849; Weller, M.C., Thomale, Chr. and Benz, N., Englische Gesellschaften und Unternehmensinsolvenzen in der Post-Brexit EU, NJW, 2016, 2378; Armour, J., Fleischer, H., Knapp,V., Winner,M., n53 raising the question of Brexit as a material adverse clause event.

[86] See e.g. Deutscher Bundestag 17.Wahlperiode, Jahresgutachten 2016/2017 des Sachverständigenrates zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Drucksache 18/10230, 7 November 2016, mentions several opinions on this issue, § 302

[87] See Gordon, n. 15 for the analysis and doubts.

[88] According to some information, this would relate to 21.000 EU regulations being transferred to the UK domestic rule book.

In company law, most legislative instruments have taken the form of directives and hence have been translated in national legislation. Regulations have been more rarely used.

The regulation on the European Company Statute[89] would not further apply[90] and it seems logical that the UK would introduce its own legislation allowing the handful of SEs to be converted into a comparable legal UK form.[91] Although the SE regulation contains an express provision[92] allowing to convert an SE in a public-limited –liability company, this provision being part of the EU Regulation would not automatically apply in a national context. On the other hand cross-border creations of a SE could not further take place.

In the fields of accounting and auditing – as will be discussed later[93] - the European Union has acted by way of directives and regulations and the latter are directly applicable in the national legal order. This is the case of the regulations endorsing the International Financial Reporting standards of IFRS and for the recent regulation on "specific requirements regarding statutory audits of public-interest entities"[94] The content of these regulations may have to be included in the Withdrawal Bill. In practice however, the UK legal regime already follows IFRS for listed companies, while the auditing requirements as adopted by the Financial Reporting Council are largely comparable to the ones provided in the EU regulation on audit[95]. In addition, both refer to the International Auditing Standards (ISAs). Subject to detailed analysis, for both these subjects, Brexit would not substantially change the present situation.

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[89] The European Company Statute and the European Cooperative Company have been introduced by regulations: See: Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), For the SCE: see Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society. The EEIG was also introduced by a regulation: Council regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

[90] As a consequence, SEs in the UK would not further be subject to the specific EU legislation dealing with this company form such as the directive which has rendered labour codetermination optional (Article 13, Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees) and rarely practiced in the UK. The same applies to the European works council, required at the level of the group in Europe-wide groups with at least 1000 employees in at least two Member States. (Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees). See also: Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. For an analysis from the French point of view: see Le Monde de l'economie : »Après le « Brexit », suspense sur les droits des salariés des deux côtés de la Manche », http://www.lemonde.fr/economie/article/2016/06/27/apres-le-brexit-suspense-sur-les-droits-des-salaries-des-deux-cotes-de-la-manche_4958743_3234.html#GyClm0escQ0hzjSJ.99.

[91] There seem to be 61 SEs in the UK.

[92] Article 66 of the SE Statute containing the basis for a conversion but not declaring national law applicable. Only a pre-Brexit seat transfer to an EU State may be considered to maintain the SE status; article 8 of the SE statute.

[93] See further section 9 (b)..

[94] Regulation (EU) No 537/2014 of 16 April 2014, entered into force 17 June 2016.

[95] See on this topic, section 9 (c).

IX. The effect of Brexit on EU directives and regulations affecting company law.

Most of the EU company law measures have taken the form of directives, and therefore have been transposed in national legislation. Although after Brexit these laws will lose their status as instruments based on Union law and facilitating cross border operations, they may still be the basis for cross border relations on a bi-national basis. Many concepts of company law will remain comparable: the notions of a subsidiary, of a branch, of an auditor, etc. will remain the same, although the applicable requirements, originally quite similar may diverge over time.

In this part of the paper, an analysis is made of the consequences of the Brexit on the application of a series of other directives and regulations, changing the status of the UK from a Member State to a third country. One should distinguish between directives which address all companies, and those which are addressed only to listed companies.

More recently, a limited number of EU measures affecting company law have been adopted as 'regulations', rarely of Council and Parliament, but also adopted by the Commission. In the company law fields there have been few delegated regulations, proposed by regulatory agencies. Indeed there is no regulatory agency active in the company law field, the European Securities Committee acting in a mere advisory capacity.[96] In the UK, these regulatory instruments will lose their legal standing as EU instruments, and hence their status in the equivalence assessment. They will continue to live as UK law or regulations.

With respect to other instruments, such as recommendations, guidelines, Questions and Answers and related statements etc., these will lose their authoritative but non-binding function in the future debate between the UK and the continent. In practice, several of these provisions may inspire regulators in both jurisdictions.

A. Generally applicable company law provisions, including accounting and auditing provisions

The basic company law directives are applicable to all EU companies and have been implemented in the national legislations. They generally do not address cross border issues, but aim to harmonise substantive company law in each of the States. From the equivalence point of view, there can be little doubt that, initially at least, the legal regimes will be equivalent, e.g. with respect to the capital protection rules, or to the transparency requirements. However, as far as access to the markets of the Union is concerned, this substantive compliance with the directive's provisions – on legal capital e.g. – could be an argument for EU national authorities to refuse access to UK

[96] See article 14(a), Shareholders Rights Directive, as amended in 2016. Established by Commission Decision 2001/528/EC. Its role has been laid down in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers

companies seeking entrance to the Union's markets, especially the equity markets. Arguments could be found in the absence of EU judicial control. In other words, the case law under Centros and subsequent decisions[97] would not further apply and third country applicants could be exposed to whatever conditions apply in a specific Member State. The argument that the same text will apply in UK legislation and in the EU Member States would not suffice to consider the two regimes legally equivalent.

1. Company restructuring

In the field of company restructuring, several harmonisation directives have been adopted: these apply only on a national basis and deal with national mergers and divisions[98]. To the extent that the regime on division of companies is governed by – harmonised – company law, the divisions could take place in each of the states on the basis of their national company law. Therefore, the fact that one of the states does not belong to the Union anymore would not prevent these companies from engaging in a division at the national level, but then on the basis of their national law, in this case UK law.

A cross border issue lies at the basis of directive 2005/56[99] dealing with cross border mergers: mergers of limited liability companies originating from different EU states are facilitated by procedures introduced by this directive. The directive is limited to companies which are governed by the laws of different Member States (article 1) and expressly enumerates the legal forms in each of the Member States to which the directive will be applicable, in fact mainly the SA-AG types of companies and others with limited liability[100]. In most Member States, the national legislation has limited the

[97] See Art 49 TFEU and the decisions applying it to foreign companies: ECJ, Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459; Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919; Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003] ECR I-10155. From the literature, see WH Roth, 'From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law' (2003) 52 International and Comparative Law Quarterly 177; Armour J., and WG Ringe, 'European Company Law 1999-2010: Renaissance and Crisis', Common Market L. Rev. 125 (2011); W Schön, 'The Mobility of Companies in Europe and the Organizational Freedom of Company Founders' [2006] European Company and Financial Law Review 122, 138; P Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (OUP 2012).

[98] See: Directive 2011/35/EU of 5 April 2011 concerning mergers of public limited liability companies; Sixth Council directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies. The Commission has announced in its 2017 work program that it intend to review the cross border mergers regime; see: http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm.

[99] Directive 2005/56/ of 26 October 2005, as amended; for the consolidated version see: http://eur-lex.europa.eu/eli/dir/2005/56/2014-07-02/eng/pdfa1a; for an analysis see: D. Van Gerven (ed), Cross Border Mergers in Europe. 2010, Cambridge University Press,

[100] Directive 2005/56 deals with cross border merger; Directive 2005/56 deals with cross border merger, relating to at least companies which are governed by the laws of different Member States (article 1); Directive 2011/35/EU of 5 April 2011 concerning mergers of public limited liability companies, due to its scope limited to SA type of companies , The same applies to the 2014 cross border merger directive amending directive 2005/56.

scope of this more flexible regime to companies from other Member States.[101] In at least one Member State however, the more flexible regime is applicable to all companies[102], including non-EU companies.

After Brexit, cross-border mergers involving UK companies will not be able to avail themselves of the benefits of the Directive's provisions or more broadly of the EU freedom of establishment regime. The pre-Centros approach would become applicable again. National authorities monitoring the completion and legality of the merger [103] could raise objections, while the publications would have to conform to the national regime[104] . Also, the rule that the merger once effective could not be declared null and void would, on the basis of EU law, not be applicable anymore[105]. The ECJ will not be competent to decide on divergent views, raising objections from the continental merger authorities.

A cross-border merger with a non-EU company would not be recognised in EU states, as their national law would require conditions and formalities to meet the directive's requirements, more specifically that the companies involved should be limited liability EU companies. By way of example, the authority in charge of scrutinising the legality of the merger on the basis of the certificate delivered by each of the national authorities attesting the proper completion of the premerger acts and formalities, is likely to reject that certificate if it originates from a non-EU authority[106]. The conditions of the directive will have to be fulfilled at the last moment in the process, this is at the moment of the registration of the merged entity[107]. The objections from the continental authority could also be based on the lack of competence of the ECJ for mergers between an EU and non-EU company. In terms of protection of the interest of creditors and shareholders, the general merger regime is not substantially different from the conditions under which a domestic merger can take place[108], the formal requirements would allow merger authorities in EU jurisdictions to reject them, especially on the basis that they relate to a non-EU company. There might also be a political reasoning behind this restriction of the cross-border merger regime to EU companies, as it would prevent non-EU companies from taking-over EU companies through a merger. In practice, however,

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[101]According to the German Transformation Law (UmwG) at least one of the companies involved should belong to another EU or EEA State. See UmwG, para 122a, of 19 February 2007. In the UK, The Companies(Cross-Border Mergers) Regulations 207 require the other company to be located on an EEA jurisdictions. The same applies in the Netherlands: article 2;308 (3) Dutch Civil Code.

[102] See article 772/1 and following of the Belgian Companies Code. This feature can be related to the recognition of the cross border seat transfer under Belgian law..

[103] Article 11 of the R Freitag and S Korch, 'Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Gesellschaftsrecht', *Zeitschrift für Wirtschaftsrecht* 2016, 1361, 1363 et seq

[104] For the pre-merger publication, Article 6 of the directive 2005/56, of 26 October 2005, as amended

[105] see article 17, Directive 2005/56 of 26 October 2005, as amended.

[106] See: article 10 and 11 of directive 2005/56, of 26 October 2005, as amended.

[107] See article 12 and 14, directive 2005/ 56, of 26 October 2005 as amended. Mergers which have not been finalized before the final Brexit date would therefore not meet the conditions of the directive.

[108] Also being applicable in a domestic merger, see the "common draft terms of cross border mergers, article 5 of Directive2005/56 of 26 October 2005. Perhaps with the exception of article 5 (j) dealing with < arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border> and relating to the continuation of the regime of employee participation.

there are other techniques to achieve the same result, e.g. through a transfer of assets, or an offer to the holders of the shares.

The consequence of Brexit is obviously that cross-border merger cannot further take place, at least on the basis of the technique laid down in the Directive.

In a least one Member State – Belgium – the cross-border merger regime is not limited to EU companies. This would mean that a cross border merger could be realised between a UK company and a Belgian company on the basis of their respective national legislations, and once realised, the merger will be recognised in the jurisdiction where the post-merger seat is located. The validity of this transaction should be established in accordance with the legal regime applicable to the two companies irrespective of their nationality and could not be put in doubt by the authorities of other Member States, as the latter are not concerned.

The procedural requirements may be more burdensome in case of a cross-border merger outside the framework of the directive. In this case the cross-border merger is fully governed by national law, and can only be realised if accepted in both jurisdictions involved. The EU origin of the applicable legislation plays no significant role.

Brexit will have an impact on the ability for EU companies to use English schemes of arrangement, and consequently on the UK position as the restructuring capital of Europe. The UK courts have approved schemes of arrangement not only to companies from England and Wales but also relating to non-UK companies, where the company is liable to be wound up under the Insolvency Act. Following a scheme of arrangement, the company undertaking the scheme remains a separate legal entity and does not merge with any other company. However, a scheme of arrangement can be used to make a company the subsidiary of another company – so the shareholders of the scheme company become shareholders of the new parent company. Such schemes are attractive to non-UK corporates trying to restructure their debt and to avoid filing for insolvency in their home State. But they may also be used for organising a merger outside the merger framework introduced on the basis of the EU directives.

However, the English court's sanction for a scheme of arrangement is conditioned upon the effective recognition of the scheme in other relevant jurisdictions, so that the non-scheme creditors do not enjoy a better treatment than the scheme creditors[109]. Pre-Brexit, this effective recognition was made possible by application of the Recast Brussels Regulation[110] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In a hard Brexit scenario, with the Recast Brussels Regulation ceasing to apply[111], the judicial condition relating to the effective

[109] See Rob Aird, James Coiley, James Perry, Partner, Nigel Ward, Kirsty McAllister-Jones, Brexit: potential impact on the UK's banking industry, https://www.ashurst.com/en/news-and-insights/insights/brexit-potential-impact-on-the-uk-banking-industry/.

[110] Regulation (EU) No 1215/2012 of the European Parliament and of the Council, of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters .

[111] See The CityUK, The impact of Brexit on the UK-based legal services sector, December 2016.

recognition of the scheme in the EU jurisdictions will be more difficult to satisfy since English court decisions will be subject to diverse national procedural laws.[112]

2. Accounting.

The fundamental accounting regime for companies is now laid down in directive 2013/14 which is applicable to EU established companies only[113]. All companies with limited liability are included, whether directly (the SA, SARL and Coop types) or indirectly (unlimited liability companies formed by companies with limited liability). For these companies, a threefold obligation has been introduced: drawing up, presentation and publication of financial statements[114], of a management report[115] and of a corporate governance statement[116]. The directive also contains the basic requirements for the drawing up and publication of these statements. As to the accounting standards, these will be established at the national level, but taking into account some core principles of accounting, referring to the widely accepted principles of prudence and the "true and fair view"[117]. The latest directive on accounting contains only high level principles for accounts and model layouts[118], other than those established in IFRS. The directive provides for quite some flexibility for the smaller reporting entities, especially the SMEs and the micro- undertakings, up to the point of exempting publication, provided accounts are being kept[119].

With respect to some accounting statements, the accounts will have to be established in accordance with the IFRS[120]: this is the case for the consolidated accounts of companies with securities traded on a regulated market[121]. These standards will have to be established in EU regulations[122] which translate the former IAS and now IFRS

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[112] The rules for accepting jurisdiction are different in the following two cases: with shareholder schemes, it is the incorporation rule. With creditor schemes, the criterion is whether the company has a sufficient connection with the UK, which might mean only that the debt was issued under English law.
[113] Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Replacing directive 78/660 (4th company law directive) and 83/349 (former 7th company law directive).
[114] Composed as a minimum of the balance sheet, P&L account and notes; article 4(1) Directive 2013/34/EU of 26 June 2013.
[115] See article 19 and 29 Directive 2013/34/EU of 26 June 2013.
[116] Article 20 Directive 2013/34/EU of 26 June 2013.
[117] The directive makes reference to principles such as going concern, the prudence principle, and accounting on the accrual basis, the prohibition of set-offs between asset and liability items and income and expense items should not be allowed, and components of assets and liabilities should be valued separately.
[118] See article 10, directive 2013/34, of 26 June 2013.
[119] See preamble 13 directive 2013/34; see also article 14 Directive 2013/34/EU of 26 June 2013.
[120] See on the state of implementation in the different Member States: Deloitte, IFRS in Europe, http://www.iasplus.com/en/resources/ifrs-topics/europe?set_language=en, especially on Use and Adoption of IFRS.
[121] See article 33, Directive 2013/34/EU of 26 June 2013.
[122] See for an overview: http://ec.europa.eu/finance/company-reporting/standards-interpretations/index_en.htm#consolidated-version.

into EU law, most of the time unchanged[123]. In some other cases, IFRS may also have an influence, e.g. on the application of fair value rather than accrual accounting in the standard national accounting systems[124]. Companies subject to the full regime have to publish, apart from the accounting statement, the board's management report[125] and the statement on the company's corporate governance [126]. With respect to the last mentioned statement, the directive contains some high level principles, such as the "Comply or Explain" approach for derogations from the applicable corporate governance code and a report by the auditor in the company's internal controls and risk management systems[127].

The directive contains a special disclosure regime relating to "payments to governments" with respect to the exploitation in the extractive industry and in the logging of primary forest.[128] The provisions only apply to companies governed by the national law of a Member State and relate to the group's consolidated position. Disclosures are made on a country-by-country basis[129]. Exemptions apply to companies for which reporting takes places at a higher level of consolidation, whether for fully owned EU subsidiaries [130] or a parent from a third country that applies equivalent requirements. Equivalence will be established in a delegated regulation of the Commission[131].

Apart from the accounting regulations, the effect of Brexit on ongoing accounting may be considerable: apart from the effects of the considerable change in the foreign exchange rate, one can mention the changed risk assessment for companies dealing with the UK, especially for assets for which valuation is not based on market valuation.[132]

After Brexit, these accounting regulations will no longer be binding in the UK, while the law transposing the accounting directive will apply but then as a purely UK statute. Companies will continue to report according to their national accounting rules, which

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[123] This as a consequence of the so-called endorsement procedure, allowing for full conformity with IFRS. See for the one exception relating to IAS 39: http://ec.europa.eu/finance/company-reporting/index_en.htm.

[124] See Article 8 of the Directive 2013/34/EU of 26 June 2013; comp article 6 (1) (d).

[125] Containing information i.a. on Future Development and Performance; or on R & D.; see article 19 of the Directive 2013/34/EU of 26 June 2013.

[126] This statement is required from the companies referred in article 1(a) of article 2, i.e. which are the EU located entities whose "transferable securities" are admitted to trading. Unlisted Banking and insurance firms would not be included. The notion of 'transferable securities" should include both equity and interest linked securities, a requirement that is not clearly justified for the issuer of the latter securities.

[127] Article 20(3) Directive 2013/34/EU of 26 June 2013.

[128] See article 41 seq. Directive 2013/34/EU of 26 June 2013. For further details see: European Commission: New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting), 12 June 2013 http://europa.eu/rapid/press-release_MEMO-13-541_en.htm

[129] A similar approach is planned for tax disclosures: see: Proposal for a directive amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM/2016/0198 final - 2016/0107 (COD).

[130] Article 44, Directive 2013/34/EU of 26 June 2013.

[131] See articled 46 and 47, Directive 2013/34/EU of 26 June 2013.

[132] See Barchow, A, Brexit- Implikationen fuer die Rechnungslegung and die Standardentwicklung, IRZ, 2016, 297.

initially will correspond to the same general principles of the directive. Companies having established branches in the other jurisdictions will be able to disclose their full financial statements according to their national law, a regime that applies to companies from all third countries.

The Directive on branches refers for third country branches to the law of the Member State "which governs the company"[133]. But Member States may require accounts of branches to be drawn up and disclosed according to EU directives or practices if they have not been drawn up in a manner equivalent to the accounting directives. This might lead to additional disclosures in the form of explanations and footnotes and in case of considerable differences might even result in a restatement of the accounts.

Entities which publish consolidated accounting statements have to state these according to the International Accounting Standards, relating to the financial position of the parent company and its subsidiaries and other group entities[134]. This requirement will continue to apply after Brexit: the differences between the accounting systems of the EU and the UK would be less significant as both the UK[135] and the EU adhere to the same international standards[136]. This is most of the time limited to consolidated statements. Over time IFRS as applied in the UK may diverge from the EU version after endorsement, leading to discrepancies between the systems[137]. Even if these consolidated accounts are used in disclosure documents relating to listed companies[138], these differences would not necessarily result in explanatory notes nor restatements.

This analysis is a static one: it seems not unlikely that the UK may engage in a certain number of developments for the UK only, changing the present situation of de facto mutual recognition. This is less likely to happen in the fields of IFRS, the European version of which largely follows the UK views, than in the fields of national accounting standards and with respect to the disclosure to be made by companies, especially

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[133] Article 9 Eleventh Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State . This provision has not been adapted to the later directives. Notwithstanding a translation requirement which Member States may impose but only for branches of companies from other members states: see article 7 referring to directive 68/151 (1st directive) now probably article 4, Directive 2009/101/EC of 16 September 2009 **o**n the coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.

[134] See IFRS 10 – Consolidated Financial Statements.

[135] For UK companies and institutions, comparability is essential, see: Sir Win Bisschoff,at the Financial Services BREXIT summit, 12 October 2016, https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2016/October/Speech-by-Sir-Win-Bischoff-FRC-Chairman-Financia.aspx; Also P. George , "Financial reporting quality is generally good but companies have room for improvement", FRC, 21 October 2016, https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2016/October/Financial-reporting-quality-is-generally-good-but.aspx.

[136] Except for the EU's opt-out on IAS 39

[137] See: Brexit may lead to divergence between EU and UK accounting framework, 21 Oct. 2016; http://economia.icaew.com/news/october-2016/brexit-may-lead-to-divergence-between-eu-and-uk-accounting-frameworks-frc; Barchow, A., n 132, IRZ, 2016, 297.

[138] See article 4(3) of Transparency directive 2004/109.

those with securities traded on the market[139]. Any such differences will then also affect the transparency regime, analysed below.

A side effect of Brexit may relate to the position of EFRAG, the European Financial Reporting Advisory Group which is composed of the EEA legal entities, mainly professional organisations involved in the IFRS implementation, interpretation and advisory work. EFRAG has the legal form of a not-for-profits Belgian international association. The members are not the Member States but national regulators and private associations with an interest in accounting matters. This might lead to the conclusions that UK organisations, members of one of the private associations supporting EFRAG could still be active in EFRAG[140]. Whether the UK regulator could still be admitted can be argued on the basis of the legal structure of EFRAG, but might raise eyebrows in the Parliament, as the European Budget contributes to EFRAGs financing.

3. Auditing

Auditing has been the subject of a repeatedly amended directive[141] in which the position of the auditor, his main activities and attributes have been detailed. Only auditors meeting the requirements of the directive can confer full legal value to their audit reports.[142] An auditor or audit firm, who qualifies according to this directive should be registered at his local authority. The firm can exercise its activity as statutory auditor in all Member States, provided that the key audit partner complies with good standing and repute[143]. The firm has to be registered in the state where it will exercise its activity and this on the basis of its home state licence. Individual auditors from other Member States will have to be registered in the host states, and should meet two requirements, i.e. complete an adaptation period and meet an aptitude test. Auditors who have a long experience could be registered without formally meeting these requirements[144]. The supervisory system is based on home state regulations and supervision, the home state ensuring quality assurance, the host state exercising oversight on the audit in its jurisdiction[145]. Authorities other than the home authority may not impose other requirements relating to quality assurance if the auditor acts to

[139] In the UK, all companies, large and small may apply IFRS.
[140] Barchow, A., n. 132, IRZ, 2016, 297 adopts a stricter view, and would only maintain the British chairman, designated outside the constituencies
[141] Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC; for the consolidated text: see http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32006L0043.
[142] Implicit in article 3a, Directive 2006/43 of 17 May 2006, as amended
[143] In terms of good repute, education, training and examination. This would amount to almost unconditional freedom of establishment or services.
[144] Article 14 (2) Directive 2006/43 of 17 May 2006 as amended.
[145] See : article 34 Directive 2006/43 of 17 May 2006 as amended.

review consolidated accounts [146]. The authority will keep up to date a register with all auditors clearly identified. Third country auditors will be mentioned as such.

Cooperation between the national authorities will be coordinated in the Committee of European Auditing Oversight Bodies (CEAOB).

Auditors and audit firms from third countries may be approved by any Member State and may produce legally valid audit reports.[147]. With respect to auditors who provide audit reports on third country issuers' annual or consolidated financial statements the securities of which are traded on EU markets, the auditor or the audit firm will be registered[148]. These auditors and audit firms will be submitted to the host country oversight, quality assurance and investigation provisions.

This approval only relates to the audit reports on the accounts or consolidated accounts of companies with shares or bonds traded on EU regulated markets. Except if a derogation applies, these auditors or audit firms will be subject to the same oversight, quality assurance or investigation as the local auditors. For audit firms, the conditions for registration relate to ownership of the firms (majority owned by auditors and the carrying out the audit in conformity with the applicable auditing standards)

The derogation refers to the equivalence of the third country oversight, quality assurance and investigation regime. The equivalence will be assessed by the Commission – possibly by following the equivalent assessment criteria[149] - and laid down in an implementing act (i.e. a regulation) but the equivalence itself will be granted by the Member States' authority, and the latter will not be fully bound by the Commission equivalence finding.

However, these auditors may be exempted from these requirements if another Member States has carried out the same quality assurance check. An exception may also apply if the quality assurance has been checked by a third state, provided its assessment is considered equivalent by the EU Commission[150]

The conditions for a Member State to be considered equivalent relate to i.a. to the application of the International audit standards as approved by the Commission. The Commission will also adopt a regulation determining the criteria for equivalence of the third country oversight, quality assurance, investigations and penalties regime.

Statutory audits will be carried out according to the International auditing standard (ISAs), as developed by the IAASB, and subject to the Commission approval process[151]. This process may result in standards which are different from the international ones. National authorities may also add certain obligations to a standard[152]. The Commission's approval process has not yet started.

In the field of auditing, Brexit is likely to raise a few questions.

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[146] Article 34(2) seq Directive 2006/43 of 17 May 2006 as amended.
[147] Article 44 Directive 2006/43 of 17 May 2006 as amended.
[148] This regime applies to issuers of equity and of bonds of a certain higher nominal value: see for details article 45 (1) (a) and (b) Directive 2006/43 as amended.
[149] Article 45 (6) 2nd paragraph Directive 2006/43 as amended.
[150] Article 45(3) Directive 2006/43 of 17 May 2006 as amended.
[151] See article 26 of the directive 2006/43 of 17 May 2006.
[152] article 26 (4) of the directive 2006/43 of 17 May 2006.

The first issue relates to the conditions under which auditors may exercise their profession on a **cross border basis**.[153].

After Brexit, the directive 2006/43, as amended by directive 2014/56, would not further be applicable as the basis for cross border matters. UK auditors will be reclassified as third country auditors and be subject to a different authorisation regime, being the one applicable to third country auditors. They could be registered in any of the Member States and will be subject to that state quality assurance system. They could even be exempted from that requirement provided their home quality assurance system has been considered equivalent on the basis of the Commission evaluation and decision. As long as the Commission has not acted on these equivalence criteria with respect to the UK, the third country auditor can only continue to be active in the Union by registering with a national authority and complying with its national requirements [154].

The second issue in which after Brexit the audit profession will be confronted with relates to the use of the audit standards. **Auditing *standards*** have not yet been regulated in the EU: these standards may be established at the national level, but usually will be the transposition of the International Standards of Auditing or ISAs[155].

The directive clearly requires auditors to follow the international standards on auditing[156]. These standards are often rendered applicable – in modified form or not - in national regulation, and if not their implementation will be based on rules established by the professional associations, or even agreements between the large international audit firms, allowing these to operate on a cross border basis.

The European directive has provided that these standards could be the subject of a procedure, to a certain extent comparable to the endorsement process applied in the field of the accounting standards. The outcome of this procedure will consist of Commission regulations, hence directly applicable in the Member States. [157] As no standards in the field of auditing have yet been adopted at EU level, this subject has remained national[158].

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[153] Audit firms may be approved provided if 50% of the partners are auditors, and 50% of the voting rights are owned by local or foreign auditors. Separate conditions apply to auditors not engaging in statutory audits.

[154] European Commission Implementing Decision (EU) 2016/1223 of 25.07.2016 on the equivalence of certain third countries public oversight, quality assurance, investigation and penalty systems for auditors and audit entities (25.07.2016) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016D1155. Consequently, Member States will be able to exempt the auditors and audit firms concerned from the registration requirement and from the EU audit oversight. Certain states have previously been declared equivalent by the Commission: Commission decision 2011 2011/ of 19 January 2011.

[155] See for the ISAs: https://www.iaasb.org

[156] See article 26 and preamble 13, Directive 2006/43, of 17 May 2006 as amended. The conditions on which these standards will be declared applicable are mentioned in article 26(3). Additional conditions apply for audits of consolidated financial statements: article 27.

[157] Article 9 of Regulation (EU) No 537/2014 of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, where reference is made to Article 26(3) of Directive 2006/43/EC. See article 26, directive 2006/43 on the provisional application of audit standards and national additions or carve-outs.

[158] And can be applied by the Member States: see article 26(1) Directive 2006/43, as amended.

A **third field** of interest are the much debated provisions of the regulation 537/2014[159] which contains a considerable number of specific obligations for auditors and audit firms;

- conditions for audits of Public Interest Entities (listed companies, banks insurance, and entities locally defined as of public interest)
- prohibition of non-audit services
- how auditors should deal with "irregularities" i.a. fraud or violations of laws and regulations
- content of the audit report, including assessed risks of material misstatement
- duration of the audit engagement, containing the firm rotation rules
- uniform rules on quality assurance.

How will these requirements affect UK auditors and their ability to exercise their activity in the EU? And vice-versa, what will the position of the EU auditors

EU firms active in the UK will not be able to avail themselves of the directive's regime and will come under the UK regulation, which has recently been adapted to implement the directive. The UK government has recently adopted "Statutory Auditors and Third Country Auditors Regulations 2016 and the Statutory Auditors and Third Country Auditors Regulations 2016"[160]. The new regulations describe the audit function with clear reference to the EU regulations and standards, in some fields making reference to the Commission decisions e.g., to the Commission adaptation to the International Auditing Standards. It seems likely that these regulations will have to be adapted after Brexit to take account of the changed political situation to the extent that they refer to EU decisions. However, many of the obligations contained in the UK regulation make reference to the International Standards on Auditing, while taking into account the International Code on Ethics [161].

Article 37 of the directive forbids contractual clauses restricting the choice of the auditor, often referred to a "big-four only clauses"[162]. To the extent that these clauses have been transposed in national legislation, they would be valid in each of the

[159] Regulation (EU) No 537/2014 of 16 April 2014, n. 149.
[160] 2016 No. 649 Companies Auditors.
[161] These standards are produced by the International Ethical Standards Board for Accountants (IESBA), The UK document on International Standards on Auditing refers to the international ethics standards stating "The APB is not aware of any significant instances where the relevant parts of the IESBA Code of Ethics are more restrictive than the APB Ethical Standards for Auditors. " See FRC International Standard on Auditing) UK and Ireland) 220, Quality control for an audit of financial statements, https://www.frc.org.uk/Our-Work/Publications/APB/ISA-220-Quality-control-for-an-audit-of-financial.pdf.
[162] Article 37, Directive 2006/43, of 17 May 2006, as amended forbids the general meeting of shareholders or members of the audited entity to restrict its choice to certain categories or lists of statutory auditors or audit firms as regards the appointment of a particular statutory auditor or audit firm to carry out the statutory audit of that entity. Any such existing clauses shall be null and void; see: M. Schuhmacher Brexit Ueberlegungen im Zusammenhang mit internationalen Kreditvertraegen, ZIP, 2016, 43, 2050. The clauses will be null and void.

jurisdictions affected. The UK has also introduced this prohibition in its national law[163], so Brexit would not have material effect on this subject.

The above mentioned requirements introduced by **the regulation[164]** will not further be directly applicable in the UK, but may be replaced by identically worded provisions under UK law. The equivalent UK rules will remain in force: the obligations contained in the Regulation have largely been incorporated in UK legal system[165]: Registration in the EU Member States will be necessary, although allowing for exemptions on the basis of an equivalence finding. UK firms will not have to comply with the EU regulation directly, but if they want to exercise their profession in the EU, their compliance with EU standards will be part of the oversight and quality assurance requirements[166]. EU audit firms offering their services in the UK will have to comply with the UK regulations, and with the EU regulations as well. The EU regulation may in any case have to be taken into account to determine the auditors' independence[167] or the way the auditor deals with "irregularities"[168]. Here, the requirement to have an equivalence assessment e.g. on quality assurance by the Commission will provisionally play a role at least until the UK leaves the EU. After that moment, even if the requirements mentioned in the regulation would substantively be the same, the UK authorities will proceed to an individual assessment on the basis of the UK rules, whereby a negotiation about an equivalence regime would facilitate the recognition that the EU regime especially on quality assurance is acceptable for UK practice as well.

Auditors who would not meet these requirements would still have the right to exercise their activity as "domestic" auditors. Their registration will be decided by the national authorities on the basis of national law, or as the case may be, they will be able to rely on the assessment by other Member States. The Commission may allow this approach for a transitional period[169].

B. Provisions only addressing listed companies.

A certain number of directive provisions are applicable only to companies the shares of which are traded on a regulated market.

[163] Regulation 12 of The Statutory Auditors and Third Country Auditors Regulations 2016; http://www.whitecase.com/publications/alert/ban-big-four-auditors-clauses-comes-effect
[164] See The regulation is only applicable to Public Interest Entities, as defined in article2 (13) Directive 2006/43, as amended.
[165] See: The Companies, partnerships and groups (accounts and reports) Regulation, 2015; FRC, Implementation of the EU Audit Directive and Audit Regulation, December 2014. Comments in ICAEW, UK Implementation of the EU Accounting Directive, 10 September 2015.
[166] Third country firms are not explicitly held to the Regulation's obligations, many of which relate to the firm as a whole, including its "headquarters".
[167] Article 7, Regulation No 537/2014 of 16 April 2014.
[168] See article 5(5) Regulation. Compare with the equivalent international regulation "Noclar", Wymeersch, NOCLAR or How Accountants Deal with Suspected or Occurred Breaches of the Law, Financial Law Institute U,Gent, WP 2016-05
[169] Article 46(2) Directive 2006/43 Directive 2006/43, of 17 May 2006, as amended.

1. Shareholders rights directive

The 2007 directive on Shareholder Rights[170] builds further on the series of company law directives and defines its scope as including companies which have their registered office in a Member State while their shares are traded on a regulated market in the same or another Member State[171]. The Member State where the registered office is located determines the applicable law as introduced on the basis of the directive. The directive contains requirements relating to the AGM of listed companies, the pre-meeting information, rules on participation and voting in the AGM, and the different forms of voting (proxy, electronic, correspondence). The Directive contains no provisions for further implementing measures.

The provisions of this directive are not applicable to non-EU issuers, even if their securities are traded on an EU regulated market although the market authority of latter state may impose similar requirements as “listing conditions”.

The recently approved amending directive[172] contains a series of obligations for the same types of companies dealing with “shareholder engagement, identification of shareholders, transmission of information, facilitation of exercise of shareholders rights, transparency for institutional investors, asset managers and proxy advisors, remuneration of directors and related party transactions.”[173]**.** To the extent that this directive introduces new obligations for listed companies, the applicable regime would merely be an extension of

the previous one. But the new directive also defines the role of other addressees involved in matters regulated in the directive such as institutional investors[174], asset managers[175], proxy advisors, intermediaries providing securities related services to shareholders and other intermediaries[176]. Each time the activities of these parties are considered, the requirements are limited to the extent that they provide services relating to EU companies subject to the directive, i.e. with their registered office in the EU and admitted to trading in the EU. With respect to certain matters the Commission

170 Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies

171 Listing in a non-EU market would not trigger the same obligations: the definition of regulated market, as laid down *in* point (21) of Article 4(1), of Directive 2014/65/EU*.* Mifid 2 does not explicit exclude third country markets. However, the directive presupposes that regulated markets are the markets subject to the different obligations imposed by the Member States (article 44 Mifid 2).

172 See ECLE , Shareholder engagement and identification, Revue Trimestrielle de Droit Financier, 2015/1-2, p. 52.

173 See pt. 1 amending article 1 of the directive 2007/36/EC of 11 July 2007.

174 Here to be understood as activities of life assurance and institutions for occupational retirement provision.

175 Asset managers, portfolio management services, including Alternative Investment Management Firms.

176 See pt. 1, aa and ab , amending article 1 of the directive 2007/36/EC of 11 July 2007.

has received implementing powers, to be assisted for that purpose by the European Securities Committee[177].

In principle the provisions of this directive apply to financial intermediaries, asset managers, institutional investors, custodians, proxy advisors, asset managers irrespective whether they are located in the EU or not. With respect to those exercising financial functions, reference can be made to the mutual recognition regimes applicable according to the respective financial services directives or regulations[178]. It is more difficult to establish the legal regime applicable to those intermediaries that are not subject to specific financial regulation, such as the proxy advisors, public relations agents, non-bank custody services etc. who are not necessarily established nor active in the European Union, e.g. US proxy advisors, or non-bank intermediaries. The directive itself is particularly silent on this topic: it provides that "this Chapter also applies to intermediaries which have no registered office or head office in the Union when they provide services referred to in Article 1(4a)".[179] How the rules will have to be imposed and enforced to these third country addressees is far from clear.

The latter provision refers to the intermediaries who hold shares in EU listed companies and have to report the identity of the shareholder: non-EU intermediaries would be subject to the same obligations. With respect to proxy advisors, it states that "this Article also applies to proxy advisors having no registered office or head office in the Union which carry out their activities through an establishment located in the Union"[180]. Proxy advisors also do not necessarily have an "establishment" to exercise their function. One could assume that service providers with an establishment within the EU will have to abide by the rules applicable in the EU although the legal basis is unclear. In both cases, these are examples of extraterritorial application of this regulatory regime[181].

It is unclear whether third country proxy advisors could be refused access to the general meeting for having neglected some of the administrative obligations of the directive[182]. Whether this failure may affect the vote in the general meeting will also depend on whether the proxy advisor has cast the vote, or – as seems to be the usual case – has merely advised the voting shareholder

The same remarks apply to the identification of shareholders in the holding chain if the intermediate holders are located in a third country: as the obligation of the intermediary is different from the position of the shareholder, it would be wrong to annul the votes cast - or hold any other action undertaken by him as invalid- by or with the assistance

[177] See n. 153. See article 14(a), SRDirective 2016 amending directive 2007/36/EC of 11 July 2007.
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[178] This can refer to the institutional investors, here defined as pension funds and insurance companies ; Are also subject to certain provisions of this regime: asset managers in the sense of the AIFMD, Ucits or Mifid II directives.
[179] See article 3(e) of the amending directive on "third country intermediaries". See also Preamble 7 (a). The implementation issue has been shifted to the Commission as Member States will have to inform the Commission of "substantial practical difficulties" in the implementation: see article 3(aa) SRDirective 2016 amending directive 2007/36/EC of 11 July 2007.
[180] See article 1(b)(5), SRDirective 2016 amending directive 2007/36/EC of 11 July 2007.
[181] See Preamble 7 (a), SRDirective 2016 amending directive 2007/36/EC of 11 July 2007.
[182] But this may have been provided in the company's articles of association.

of that intermediary on the basis that he did not meet the formal requirements of the directive.

From the point of view of the application of this directive after the withdrawal of the UK from the Union, as it will then only apply to companies with registered office in the EU and with shares admitted to trading in the EU, the service providers from the UK would be in the same position as those of the US or of any other third country. Some intermediaries are likely to comply on a voluntary basis, but could they - as third country depositories - be sanctioned for not declaring the securities on their book? Third country proxy advisors would have an economic advantage to be able to advise on the votes for their principals and defend their opinion e.g. on corporate governance matters. But this attitude would be interest driven, not triggered by regulation.

2. Take-over bids

The directive on take-over bids of 21 April 2004 requires Member States to adopt certain laws, regulations and administrative practices relating to takeover bids for the securities of companies governed by the laws of Member States[183]. The directive is applicable to take- overs, voluntary and mandatory, launched on shares – referred to as transferable securities carrying voting rights – issued by EU companies and admitted to trading on one or several of the EU regulated markets[184].

The designation of the authority responsible for supervising the bid, and hence the applicable regulation is defined – in essence - on the basis of the place of the issuer's registered office if it shares are also traded in that state or on the basis of the market of trading its securities. If several markets are involved, it will be the market where the securities were first admitted to trading[185]. With respect to bids for shares traded in a market different from that of its state of incorporation, or in more than one EU markets, the directive distinguishes matters for which the market authority will be competent (e.g. procedure, consideration, disclosure) from those for which the company regulation will be in charge (e.g. company law matters, including anti-takeover defences)[186]. These principles apply to mandatory bids as well[187] Cooperation between the supervisory bodies is essential. Hence, the directive contains provisions identifying the fields in which cooperation is called for (e.g. in drawing up the offer document)[188].

In order to provide a better protection to its investors, national legislation has often applied some of its provisions to bids for securities traded on its markets, irrespective

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[183] See article 1, Directive 2004/25/EC of 21 April 2004 on takeover bids.
[184] Article 1 (1), art 4(2)(a); reference to article 5(1) Directive 2004/25/EC.
[185] See article 4 (2) of the Directive 2004/25/EC.
[186] See article 4 (2) (e).
[187] Article 5, Directive 2004/25/EC does not distinguish the case where the securities are traded in another market than that of the state of registration.
[188] Article 4(4) directive 2004/25/EC.

whether the issuers where EU companies or not[189]. This is however not the approach of the directive.

The UK follows a similar approach and applies its takeover regulation to companies incorporated in the UK the securities of which are traded on a regulated market in the UK[190] The Takeover Panel may also apply the rules to private companies which have their registered office and place of central management and control in the UK, Channel Islands or Isle of Man, the securities of which have been widely held in the previous 10 years. Some provisions may be applicable to UK securities of UK companies not traded in the UK, but traded on an EU regulated market[191] and to securities traded in the UK but issued by continental EU companies[192] (dual jurisdiction).

The directive contains no separate provision on takeovers for the shares of EU companies which are whether not listed at all or exclusively listed outside the Union: the applicable regime will be determined by the rules applicable in the market of their listing, or more exceptionally of their national law. This means that the protection of the directive does not extend to European companies listed outside the Union: company law will however remain applicable, e.g. on voting rights, or preference rights while the state of trading will apply to disclosures, and procedures [193]. Third country securities traded on an EU market are not included in the directive's regime, but the supervisor in charge of that market will in many cases be competent to ensure the orderly course of the EU part of the transaction (disclosures, tendering, manipulation) In France e.g. the AMF may apply the French takeover to non-EU companies whose shares are traded on a French regulated market, except for the most constraining rules i.e. the ones on mandatory bids and squeeze-outs.[194] The Dutch and Belgian laws contain similar provisions [195].

After Brexit, as the directive is only applicable to securities issued by companies from EU Member States, it will not be applicable in the UK and to UK securities traded on EU markets. However, as mentioned national authorities may still consider that investors in their jurisdiction deserve protection and hence apply some of the

[189] Without any condition that the issuer of these securities should be a European company: see e.g. article 3, Belgian L. 1 April 2007.
[190] Including the Channel Islands and the Isle of Man. Trading on an MTF is treated the same way; see point 3.1 of the City Code on takeovers.
[191] In which the Code provides that company law will apply, as well as rules on frustration of a bid and some information obligations. But matters of procedure and requirements as to consideration will be determined by the state of trading.
[192] In which case UK law will apply to procedural matters, and to the consideration to be offered.
[193] See article 4(2)(b) Directive 2004/25/EC.
[194] art 231-1 Reglement general AMF; http://www.amf-france.org/Reglementation/Reglement-general-et-instructions/RG-mode-d-emploi.html.
[195] Article 4 para 1, (2), 1 April 2007 including a foreign bid partly extended to the Belgian public.

provisions to a takeover for UK shares which are traded only in one of the EU Member States. On the UK side, it can be expected that the UK regulation, adopted pursuant to the directive, will remain in place and this in the framework of the Repeal act. A similar outcome can be expected fom the EU side.

The Brexit may make the cooperation between the supervisory authorities somewhat more difficult but would in practice not result in substantial differences with the pre-Brexit situation. In principle, an EU supervisor could consider a UK offer document non-equivalent and require an offer document according to its own rules. In practice however, in some states at least, it has been customary to use the third country document (e.g. the US one) along with an information note dealing with the conditions of the operation in the EU state concerned (e.g. the rules applicable to accepting the bid).

3. The prospectus regime

In the field of information to be included in a prospectus, relating either to a public offering **prospectus regime** offering or to an admission to trading, the European directives have essentially developed a system where one prospectus could be used in several Member States[196]. No further approvals or authorisations are necessary. Prospectuses for securities of third country issuers may be approved by an EU supervisor for use within the EU provided that the prospectus has been established in accordance with the international standards, referring especially to IOSCO standards, and provided it meets an equivalence test as established by the Commission[197]. Prospectuses so approved are valid in all Member States where the securities are offered, and local supervisors will not intervene[198]. Both regimes would result in allowing the use of one single prospectus in the entire EU. [199].

In the absence of an equivalence assessment, or of effective equivalence, there might be cumulative application of the two regimes, although that outcome would be contrary to the recent evolution of the regulation on prospectuses.

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[196] See article 17 of directive 2003/71 of 4 November 2003, on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC providing for Community wide approval of prospectuses by the "home State" in the sense of this directive. The different host states will not undertake any additional decisions nor impose conditions.

[197] Article 20 and recital 46 of directive 2003/71, prospectus directive. The commission *will* adopt an equivalence decision and other implementing measures to ensure "uniform application of the directive". The provision has been amended by extending the Commission's power to adopt a delegated act providing for general equivalence criteria; see point 19 of amending directive 2010/73. See also article 1 of the Omnibus directive 2014/51/EU of 16 April 2014.

[198] Article 17 Directive 2003/71, prospectus directive.

[199] In accordance with directive 2004/109 of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency directive).

This exemption regime was further refined in a 2010 directive[200] relating to two specific cases, i.e. the admission of securities originating from stock dividends, and the admission of securities to be allotted to former directors and employees. The exemptions relating these two specific cases of admission to trading already applied within the EU[201], but were extended to securities issued by third country issuers. The condition is that the Commission should make an equivalence finding with respect to the third market where the securities had been admitted, extending its findings to the applicable rules on insider trading[202] and on transparency.

The prospectus regime will be reviewed very soon: on the basis of the published documents especially the third country regime will remain the same[203].

A recent Commission proposal for a regulation further simplifies the third country regime: the prospectus will be approved by the issuer's authority competent for prospectuses,

but applying the EU standards for prospectuses. The latter notion is expressed in terms as third country requirements equivalent to those of the EU regulation. The Commission may adopt general equivalence criteria on the basis of the provisions of the regulation. Cooperation agreements among supervisors should be concluded.

The prospectuses that meet these conditions will in the future be fit to be used without more in the entire Union[204].

After Brexit the proposed prospectus regulation would allow for a regime that is almost as flexible as today, provided the necessary agreements[205] are concluded. But here again, even in the absence of a formal equivalence regulation, the EU supervisors could consider that the UK regime is equivalent to their own. Continental companies might however prefer to have their shares traded, not in a regulated market, but in another trading facility – e.g. in the Alternative Listing Market – where more flexible access and disclosure conditions will prevail. [206]

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200 Directive 2010/73, amending article 3 of directive 2003/71 (prospectus directive).

201 See article 4 (1) as modified by point 4 Directive 2010/73 of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; recital 14.

202 In accordance with directive 2003/ **of 28 January 2003 on insider dealing and market manipulation (market abuse).**

203 See article 26-27 of the Proposal for a regulation on the prospectus to be published when securities are offered to the public or admitted to trading, Com 2015/0268 (COD).

204 See article 26 to 28 of the Proposed Regulation on the prospectus to be published when securities are offered to the public or admitted to trading, COM(2015) 583 final of 30 November 2015.

205 Article 27(1) of the proposed regulation on the prospectus.

206 See Andreas Kokkinis, The impact of Brexit on the legal framework for cross-border corporate activity, European Business Law Review, 2016, 27, pp 959-987, at 981.

Companies which have issued shares which are listed on a regulated market are subject to a transparency regime set out in the directive 2004/109[207]. The scope of the directive is defined in terms of issuers whose securities are already admitted to trading on a regulated market in a Member State. It declares the supervisor of the "home Member State" in charge of ensuring the application of the directive's obligations: the home Member State is the one which, according to the decisions made by the issuer, is the State in which the issuer has its registered office or where its securities have been admitted to trading[208]. Only one Member State may be so chosen- and is called "home state" in the directive - even if it is not an EU issuer - , and the choice is binding for three years. This approach avoids conflicting competences.

Some of the provisions of this directive deal with third country issuers of securities which are traded on a regulated EU market. It allows for equivalence of some of the disclosures to be made by a third country issuer whose securities are listed in an EU State, provided equivalent information is made available in the issuers' state of origin, referring to the state where its registered office is located. The equivalence is assessed by the Member State where the securities are listed. The supervisor of that State will make sure that important information available in the state of origin is also disclosed in the state of listing.

As financial statements belong to the core elements of these disclosures, the Commission has been empowered to decide on the equivalence of the accounting standards as used in the third country. If standards of several jurisdictions are involved, the Commission will adopt measures establishing "general equivalence criteria" regarding accounting standards[209], or regarding the general disclosures to be made by these issuers. Equivalence is to be assessed by the Commission and based on international standards, referring i.a. to the IFRS.

In the Transparency directive – and to a certain extent also in the Prospectus directive- the Commission has received power to declare a certain number of third country accounting and disclosure regimes equivalent and in some cases allowing some of the information to be whether omitted[210] from the disclosures, or to be incorporated by

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[207] Directive 2004/109 of 15 December 2004 Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC as amended.

[208] As defined in article 2(1) (i); comp. the regime under the takeover bid directive: For an issuer of shares incorporated in the EU the competent authority is the one where it has its registered office. Where the issuer is incorporated in a third country, it is the Member State in which it is required to file the annual information with the competent authority in accordance with article 10 of directive 2003/ 71/EC. In other cases, it is the Member State chosen by the issuer from among the Member State in which the issuer has its registered office and those Member States which have admitted its securities to trading on a regulated market on their territory.

[209] This refers to the accounting standards used in the transparency documents of listed companies, to be distinguished from the accounting standards to be applied by all EU companies, as mentioned below, section 9 (b).

[210] Article 23(4) Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

reference[211]. Decisions in that sense have been made with respect to the US, Canada, Japan, and India. In the absence of a finding of equivalence, the Commission may grant a transitional permission to use the domestic standard for a certain period of time[212]. These individual decisions have been adopted on the basis of framework regulations adopted by the Commission[213].

Some provisions of this directive would not further be applicable after Brexit. The directive contains e.g. certain exemptions applicable to European subsidiaries: article 23 (8) of the accounting directive 2013/34[214] allows to exempt from the consolidation group entities which are intermediate parent-subsidiary companies within the foreign group and are consolidated in the accounts of the “larger body”.

With respect to disclosure of the acquisition or disposal of major holdings, issuers from third countries are subject to the disclosure of equivalent events[215]. Information has to be filed in the state of listing: this “home state“ has been the subject to redefinitions, in order to include the state that has been chosen by the issuer among the states where the securities are listed[216]. The UK approach may lead to the same outcome.

Brexit would not change the obligation to disclose the information that is called for by the EU competent market authority. However, equivalence of the information will not further be assumed, and EU market authorities could require additional information, or different presentations. Over time, divergence is likely to appear. The situation is similar to the one applying to EU securities listed in the US. A comparable regime could be developed for UK issuers, providing for reciprocity as EU companies traded on UK markets would face a similar situation. Coordination as called for in the regulation will be a key objective.

5. Market abuse and insider trading

The 2014 regulation (MAR) and directive (CSMAD) aim to protect market participants dealing in financial instruments that are traded on EU regulated markets, or on

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211 Article 11(a) introduced by directive 2010/73 modifying the directive 2003/71 on the prospectus to be published when securities are offered to the public or admitted to trading.

212 See more generally on this topic: K. Van Hulle, Harmonization of accounting standards A view from the European community, European Accounting Review Vol. 1 ,.1,1992.

213 Commission regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council ; Commission regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements; Commission decision of 12 December 2008 on the use by third countries’ issuers of securities of certain third country’s national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements (C 2008-8218).

214 Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

215 Article 9 (2), Directive 2004/109 , Transparency directive.

216 Directive 2013/50 recital 19, amending directive 2004/109 , Transparency directive.

Multilateral trading facilities (MTFs) or Organised Trading facilities(OTFs)[217] and derivatives relating to these.

The MAR and CSMAD are neutral as to the nationality of the securities' issuers. This is confirmed by the scope of the provisions subjecting issuers to preventative requirements, such as ongoing disclosure of inside information or the establishment of insider lists, which apply to all "issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State",[218] With respect to non-EU issuers the delegated regulation designates the national competent authority of the Member State where: (i) the issuer has equity securities admitted to trading or traded with its consent on a trading venue for the first time; or (ii) it has any other financial instruments admitted to trading or traded with its consent on a trading venue for the first time. In case of a simultaneous first trading in several Member States, the designated national competent authority is the one of the trading venue that is "the most relevant market in terms of liquidity, as determined in the Commission Delegated Regulation to be adopted under Article 26(9)(b)" of MiFIR[219].

All market participants trading on the basis of insider information, or making market abuse are subject to the regulation. The regulation makes it explicit that "the prohibitions and requirements in this Regulation shall apply to actions and omissions, in the Union and in a third country, concerning the instruments referred to in paragraphs 1 and 2" i.e. traded on EU markets[220].

Technically, the Brexit would put an end to the cooperation of UK authorities with EU market authorities. It is likely that cooperation agreements will be continued along the lines of the agreements called for in the regulation, especially as the definitions of the incriminated actions may not be the same. To that effect the directive[221] provides for the competent authorities of Member States to, where necessary, conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information with supervisory authorities of these countries and for the enforcement of obligations arising under the regulation in third countries. Those cooperation arrangements shall ensure at least an efficient exchange

[217] As defined in article 4 of Mifid II, Directive 2014/65 of 15 May 2014.

[218] This also applies to instruments exclusively traded on an MTF or on an OTF, "issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State". Article 4, of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR).

[219] Article 6, Regulation 2016/522 of 17 December 2015 laying down the rules for the identification of the national competent authority for notifications of delays in disclosure of inside information. Commission delegated regulation (EU) .../... of 18.5.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions C 2016)2860

[220] Article 2 (4) of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR).

[221] Article 26 Regulation No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR).

of information that allows the competent authorities to carry out their duties under the regulation. Safeguards for the exchange of personal data should be provided [222]

A competent authority must inform ESMA and the other competent authorities where it proposes to enter into such an arrangement. ESMA must, where possible, facilitate and coordinate the development of cooperation arrangements between the competent authorities and the relevant supervisory authorities of third countries.

X. Conclusions

Brexit will affect companies and company related matters both in the UK and in the EU and this in different ways. The hypothesis on which the present analysis has been based, is that there will be no specific conditions agreed in the transitional arrangements relating to the fields here analysed, the UK then being in the position of a "third country". Only company law aspects have been analysed. The issues related to Brexit will be more frequent and significantly more important in other fields.

The first main area of change relates to the freedom of establishment. Brexit will put an end to the right for UK companies to establish themselves in the EU without being confronted with additional or discriminatory conditions. The legal authority of the EU harmonization directives will be terminated while the liberalising case law of the European Court of Justice will not further apply. The same is valid for the European measures adopted as EU regulations.

Will these changes fundamentally change company life and practice in the EU- UK relations? Company law based arguments point to some issues, but the main changes will be found in the business activities to be developed by these companies, subjecting them to authorisation or other operational conditions, most visibly in the financial services field, but likely in many other sectors of economic and professional activity.

Companies looking for access to the other market will initially have to comply with the conditions applicable to local companies: one would revert to the pre-EU accession times to determine which differences will prevent access to the other jurisdiction's market.

Many of these differences have now been removed for certain company types, legal capital being one of the most visible ones. It is likely that the UK will further simplify its company law provisions, e.g. with respect to financial assistance. On the other hand, new restrictions are likely to be reintroduced, as a protection against competitive pressure from the other side. As it is unclear from where this pressure will originate, one cannot predict whether or where the UK or the EU will introduce new barriers, or remove them. It seems likely however, that states will strive to have a better view on the companies that enter their economic space, whether established or not.

[222] See article 29 of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR).

Conditions for access by companies originating from incorporation states to jurisdictions applying the same approach are minimal: but recently pressure has mounted to avoid these “quasi or formally foreign companies” by subjecting them to equivalent regulation. In at least one case, this amounts to de facto applying the seat theory within the incorporation approach. Some seat jurisdictions have taken a more drastic view, virtually refusing these “quasi foreign entrants” if these were originating from non-EU States and subjecting them to their own laws. The issue is likely to become important with companies registered in the UK and with their activity in some of the seat jurisdictions, but not in all. Letter-box companies in tax heavens also contribute to a more critical view. Some have even mentioned that this more sceptical tendency may lead to a stricter application of the seat doctrine in those States that followed a more lenient approach.

Access to other jurisdictions by creating a subsidiary or setting up a branch has always been facilitated by the local regulation: these entities contributed to the economy and often created considerable wealth. Even today, the access conditions are relatively mild, except for administrative requirements, often relating to disclosures or similar formalities. In the name of credit protection, they might claim sufficient own funds, but present regulations contain no conditions in that respect. Host registration authorities often do not check the articles of incorporation of their domestic, even less of foreign companies.

In summary, it would seem that conditions for access to other markets will not fundamentally change as far as company law provisions are concerned.

The EU have not actively addressed cross-border company law issues: for years, it has not been possible to reach an agreement on the cross-border seat transfer. Only with respect to cross-border mergers has a directive been adopted: on the basis of its transposing law, this regime is frequently used. The prerequisite to this regime is the condition that the companies involved belong to EU jurisdictions. Brexit would therefore bar this regime to be applied. But alternatives are available.

With respect to other cross-border relations, a third country regime has been provided in the applicable directives, allowing for reduced additional obligations for the third country companies. In part this is due to the fact that the applicable rules originate from international standards (IFRS, ISAs) and are recognised as valid standard for listed companies originating from non-EU states. For auditors, a more stringent regime would apply. For disclosures by third country issuers – in prospectuses, as part of the transparency regime - simplified procedures have already been agreed on the basis of an equivalence assessment by the Commission. This approach could easily be extended to the UK issuers.

The conclusion of the present study is that in the field of company law, the main concerns relate to the recognition of companies in case of divergence between incorporation and seat theory. Also in a limited number of fields equivalence conditions apply, most importantly in the field of auditing and company disclosures. For these and some other negative consequences, pre-emptive action will allow to avoid most of the difficulties. One may however also count on the transitional measures that the EU and the UK may be willing to agree. Here equivalence assessment will be the key to solutions. To what extent the equivalence judgment will mainly be a technical act, or a more political one, will be the subject of discussions in the framework of the Brexit discussion. From the point of view of the objective of the different regulatory regimes, the equivalence assessment should be an objective, non-political comparison of the conditions of functioning and supervision of financial services firms. The way the directive and regulation have been drafted point however to a different solution[223].

The overall conclusion could be that in the company law, Brexit will create a certain number of additional hurdles in the cross-border activity of companies, but the main hurdles will originate from other fields. Would this be another case of irrelevance of Brexit? [224]

ANNEX

The application of the incorporation and of the seat theory in some EU Member States: Overview of the legal regime of third country companies in the national companies laws

A. Incorporation jurisdictions[225]

1. UK Law

Under UK law, and probably under most legal systems practicing the incorporation criterion, recognition of companies originating from a "seat" jurisdiction would be based on the place of incorporation of these companies. Most of the time, this reference would point to the place where the seat is located, although the two locations may be different, e.g., when the seat has been transferred from one seat country to another. In practice, the jurisdiction where the company has been registered, will also be the jurisdiction where the company will be functioning and exercise its economic activity. Transfers within the jurisdictions following the seat approach would be irrelevant in this respect.

The reverse position is more complex. Companies that have been incorporated and registered in the UK are UK companies wherever their activity takes place. If the activity takes places in a "seat" jurisdiction, that jurisdiction will consider the company subject to its legal system and hence should apply its law as to incorporation, disclosures and

[223] In most applicable regulation, the power of the Commission to engage in equivalence negotiations is a facultative one ("may"), although sometimes stated as "will". In some fields no equivalence is required (see article 39 Midif II) .
[224] See Ringe, W.G. The irrelevance of Brexit for the European Financial market, https://ssrn.com/abstract=2902715 on the basis however of significantly different arguments. For a different view: Veron, N., A Post-Brexit Opportunity Europe Shouldn't Miss, 14 July 2016, https://www.bloomberg.com/view/articles/2016-07-14/an-post-brexit-opportunity-europe-shouldn-t-miss.
[225] Including "statutory seat" jurisdictions.

structure. Hence there is a conflict between the two systems of determining the applicable law. This question has been dealt with in the ECJ case law, allowing companies from incorporation States to deploy their activity in seat jurisdictions without needing an adaptation to the applicable legal system.

The question is particularly active with respect to the numerous private companies that have been created in the UK by parties from the Continent as the initial requirements for setting up a UK company were significantly lower than those applicable to the equivalent continental structures. The minimum capital requirement may have played a prominent role, although other aspects – ease of incorporation, tax e.g. – may also have been of importance[226]. In many cases, these companies engaged in active trading on the Continent and their management were usually established on the Continent. As a consequence, if these companies have their seat on the Continent, they would have to be characterised as German, Belgian, French depending on the place where their seat is established. Under the prevailing EU treaty provisions, as interpreted by the ECJ, the continental States are bound to recognize that these companies remain subject to UK law, and the law of the continental State where their exercised their activity could not be taken into consideration, and certainly could not impose additional requirements. Once the application of the TFEU will have been terminated, and freedom of establishment does not further apply, these entities would become subject to the law of the State of their "seat". As EU law will not offer any answer, the solution to this conflictual situation will depend on each Member State national law. UK law would still consider these companies to be subject to its jurisdiction.

2. Dutch law

Dutch law follows the incorporation approach[227] and hence does not impose its legal regime to companies constituted according to the law of other jurisdictions. It applies this approach to companies incorporated in the Netherlands, as well as to companies originating from other jurisdictions, including those subject to the real seat regime.

However, confronted with an inflow of mostly small companies formally constituted in incorporation States but exclusively or mainly active in the Netherlands, but without a real link with the jurisdiction of constitution, legislation was adapted in 1999 identifying these companies as "formally foreign" legal entities, and declaring some Dutch company law requirements applicable[228]. These are companies created under the law of another jurisdiction but having all or almost of its activities in the Netherlands. On the basis of the general principles, they would not be subject to any of the Dutch

[226] For an analysis of the motives for creating these entities: see M. Becht, C. Mayer, H. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, ECGI , Law Working Paper, No. 070/2006; see also ECJ, C-167/01 (2003) Inspire Art.
[227] See Article 118, Book 10, NBW.
[228] Wet op de formeel buitenlandse vennootschappen, 17 december 1997 applicable to "kapitaalvennootschappen" the activity of which is entirely or largely taking place in the Netherlands. The regime is only applicable to companies that are comparable to the BV.

company law rules and safeguards. This was qualified as "abusive"[229] by some legal writers. The law distinguishes companies created in accordance with the law of one of the EU or EEA Member States: no additional requirements could be imposed on these[230], but the position of their directors has been sharpened by imposing liability on directors for untrue or misleading information in the annual accounts, interim accounts or in the annual report published by these companies[231]. The notion of directors is extended to all parties who carry out acts of management. These additional requirements could be justified as being essential for protecting the interests of the Dutch economic society[232]. They stay within the limits of the European rules of freedom of establishment.

With respect to the non-EU companies, the law imposes a legal regime that in most significant respects is equivalent to the domestic Dutch regime, but without qualifying these companies as being Dutch. It first introduces a comparable disclosure regime, requiring these non-EU companies to file their act of incorporation and the company statutes, and this within the context of their registration in the commercial registry. This publication includes Information allowing identification of all holders of shares in the company. All documents originating from the company must contain a reference to the original foreign and to the Dutch registration. The company code capital maintenance rules such as the rules on distribution, on share repurchases, and on capital reductions are declared applicable. Directors must establish annual accounts in accordance with Dutch law, and with foreign law. Finally, liability of directors and officers – including the day-to-day managers – is strengthened. For all matters for which Dutch law has not been declared applicable, the law applicable to that company according to its home State regime will apply, what will often lead to applying both regimes. So e.g. could the directors of a formal UK company be held liable for the activities exercised in the Netherlands, according to the rules of Dutch law, while they may also be held liable according to the UK company law rules.

Some additional disclosure are applicable to foreign companies active in the Netherlands. Companies with a branch have to be registered at the commercial registry. Foreign companies offering labour intermediation also have to be registered in the commercial register, irrespective of whether they have a local establishment.

Once Brexit has been agreed, the regime applicable to companies constituted in the UK without much activity in the UK but engaging in considerable activity in the Netherlands would be subject to the last mentioned regime of non-EU companies. This is likely to lead to a further reduction in the number of entities opting for this regime. On the other hand, provided these conditions are met, Dutch law would not restrict the activity of these companies in the Dutch economy, while the UK company law regime

[229] See e,g, Slagter Compendium Ondernemingsrecht, 38, Winter in Van Schilfgaarde, Van der BV an de NV, nr 11, (2009)
[230] see ECJ, C-167/01, of 30 September 2003 , Inspire Art,
[231] Article 6, L 17 December 1997, referring to articles 249, 260 and 261 of the Civil Code, Book 2. The annual accounts should be established according to Dutch and foreign law.
[232] See ECJ, C-212/97 of 9 March 1999, Centros referring to fraud and "the owners means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned".

would remain applicable. For the same reason, issues of transferring the company seat have not been raised.

3. Italian law

The Italian law on Conflicts of Law of 1995 States that companies that have been constituted in Italy are subject to Italian company law. The rules are also applicable to companies constituted in other jurisdictions[233], therefore leading to a specific application of the incorporation theory. However, the Italian law will apply if the administrative seat or headquarters or if the main activity is situated in Italy[234]. The law lists the subject matters that would be governed by the law so declared applicable.

Italian law also imposes some disclosure obligations on branches[235] of foreign companies; these have to publish their charter, and data about the identity of the permanent representatives.

Italian law would also apply to foreign companies which have established a secondary seat" or "Branch with a permanent representative" [236] as these companies would have to publish their company charter, and data identifying the permanent representatives and their *powers*[237][238]. Other provisions[239] relating to company disclosures applicable to Italian companies will apply: registration in the company registry, mentioning of the registration number, mentioning of the amount of the capital effectively paid in, mentioning of sole ownership if applicable.

Foreign entities of a form not regulated in the Italian law, are subject to the provisions of the Italian Companies Act as far as their disclosure obligation and their liability of the directors is concerned.[240] The rule has been applied in the case of a Liechtenstein Install, a single member entity, concluding to unlimited liability of the single shareholder[241]

Participation in Italian companies by EU physical or legal persons is not subject to specific conditions or authorisations, except for specific business activities (e.g. company directors in the financial sector). For parties originating from third countries a different regime applies; long term residents would need a residence permit. The conditions for obtaining the permit relate to reciprocity, proof of a minimum income, statement of the authority that there are no impediments to the authorisation or to the activity proposed). The reciprocity condition is strict: if there is no reciprocity, participation in an Italian company is not allowed. This regime applies to shareholders

[233] Article 25 (1) legge 31.5.1995 n.218.
[234] "Oggetto principale"
[235] Defined as "sede secondario", article 2299 Codice civile.
[236] See 2295 Codice civile.
[237] Article 2508 Codice civile.
[238] Article 2508 Codice civile
[239] See article 2250 Codice civile.
[240] Article 2509 Codice civile; article 2509 bis declares the director liability jointly and severally for all liabilities before the date of publication.
[241] Cass It n 3352// 1977; comp Cass it n 1853/ 1993.

that are resident in Italy. Non-residents can become shareholder under the conditions of reciprocity. If there is no reciprocity, participation in an Italian company is not allowed. The reciprocity condition is an application of the general principle laid down in the initial title of the civil code[242]

By way of a general reference it is stated that the interpretation of these provisions will take place according the principles of the European regulation[243]

4. Swiss law

According to the Swiss Law on International Private Law[244] the legal status of companies is determined by their law of incorporation. This clear decision of the Swiss legislator of 1987 put an end to a decade-long uncertainty caused by an earlier propensity for the «*seat*» theory (with a «*frauds legist*» exception[245] attached to it). Still, where the criterion of incorporation does not lead to a tangible result (because e.g. indispensable conditions of incorporation or registration have not been met or, if there are no such requirements, the company otherwise does not fulfill the requirements of the respective State for a valid organization of a company), then Swiss law looks to the place of the effective administration of the company. Yet, in spite of the appearance of a reference to the earlier «*seat*» theory, this is exclusively a back-up to avoid, if possible, legal uncertainty in pathological cases.

While the incorporation theory determines the general applicability of company law, Swiss law contains different provisions on the law applicable to specific situations, such as public issuance of equity, instruments or bonds, protection of company names and the personal liability of persons acting on behalf of foreign companies which are in fact managed in Switzerland[246].

Brexit would not affect the Swiss position in this matter.

5. Swedish law

The principal source of Swedish legislation regarding company law is the Swedish Companies Act 2005.[247] However, there is no codification in the Companies Act or

[242] Article 16, of the Initial Title of the Civil code, subjecting the benefit of the civil rights of foreigners to the condition of reciprocity
[243] Article 2507. It is unclear which regulation is referred to.
[244] Federal Law of 18 December 1987 („IPRG“), Art. 154, which qualifies this basic rule in the following terms: "…if they
satisfy the publication or registration requirements of that law or, if there are no such requirements, if they are organized
according to the law of that State".
[245] Abandoned in the decision of the Swiss (Supreme) Federal Court in 1991, BGE 117 II 449.
[246] Articles 156 to 159, and, in rare cases, Art. 17 IPRG.
[247] See: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Aktiebolagslag-2005551_sfs-2005-551/.

elsewhere regarding the private international law aspects of company law. Furthermore, there is only very limited Swedish case law and literature on the subject matter.

Pursuant to the Companies Act, a Swedish limited company (Sw. *aktiebolag*) is a company registered in the Swedish register of limited companies.[248] There are no additional or alternative requirements regarding territorial connection. For example, although the *registered seat* of the board of directors of a Swedish limited company must be in Sweden,[249] the *'real seat'* or headquarters of the company does not have to be located in Sweden. The company does not even have to carry out any business activities in Sweden or have any business premises at all in the country. Furthermore, it does not matter for the rules of substantive Swedish law whether the founder or owner of the company is foreign or domestic. As a principal rule, there are no restrictions or special provisions for foreigners (including foreign companies) wanting to establish a company in Sweden.

When it comes to determining the *lex societatis* of a non-Swedish company under general principles of Swedish private international law, the situation is not entirely clear. It is sometimes said that the *lex societatis* is the jurisdiction to which the company owes its existence, i.e. the jurisdiction under the laws of which the company's status as a legal person has arisen. As to legal persons for which the formation requires registration, this means that the *lex societatis* is the country of registration, i.e., Sweden, applies the *incorporation principle* (or, *registration principle* or *registered office principle*). There is less clarity regarding the determination of the *lex societatis* in situations involving jurisdictions applying the 'real seat' principle.[250,251]

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[248] It is sometimes said that the requirement is two-fold: the company must be (i) *formed* in accordance with the Companies Act and (ii) *registered* in the Swedish register of limited companies, see Government Bill 1955:87 p. 22, Government Bill 1973:42 p. 213, Government Bill 1981/82:135 p. 54, Government Bill 1992/93:71 pp. 23 and 35; Government Bill 1994/95:186 pp. 104-105, and Government Bill 2004/05:85 p. 510, and, for example, Andersson, Johansson & Skog, *Aktiebolagslagen — En kommentar*, 1:1.3. However, for example in the case of a European company (SE) being converted into a Swedish limited company the former requirement serves no purpose.

[249] The registered seat determines the domicile of the company for purposes of determining where the company can be sued. It also determines where, as a general rule, the general meeting is to be held.

[250] See, for example, M. Bogdan, *Ordre public, internationellt tvingande rättsregler och kringgåendeläran i EG-domstolens praxis rörande internationell privaträtt*, Svensk Juristtidning 2001 p. 329, and *Svensk internationell privat- och processrätt*, 8th edition 2014, pp. 143-144.

[251] There is nothing to prevent Swedish courts from treating a company as having its *lex societatis* in a certain country (A) even if the authorities and courts in that country are of the opinion that the company's *lex societatis* is the laws of another country (B). However, according to statements in the literature, if, for example, both countries (A and B) agree that the *lex societatis* is B, there is no reason for a Swedish court not to accept this, despite Sweden's negative attitude towards *renvoi*

Where Swedish private international law results in the application of the law of another country, the principal rule is that this means a referral only to the substantive law of that country, i.e. Swedish private international law does not support the doctrine of *renvoi* except in a number of special situations, none of which is relevant in the field of company law.[252] Generally, in Sweden, *renvoi* has not become an issue of concern for any questions that deal with the private international law of companies.

Since both Sweden and the UK apply the incorporation principle, Brexit would most likely have no effect on Swedish companies acting in the UK or vice versa.

6. Polish law

Under the Polish Act on private international law of 2011, the law applicable to legal persons and other entities should be determined on the basis of their "seat". However, neither the Act nor its official motives provide an explanation of the seat notion. In the pre- and post-war period, under the similar wording of the previous acts on private international law as of 1926 and 1965, the majority of legal commentators followed the German and French approach and tried to apply the real seat doctrine although it was never followed by Polish courts or practice[253]. However, in the last 10-15 years the views have evolved towards a preference for the statutory seat theory. The real seat doctrine (and especially its effects of denying the legal personality of foreign entities or reclassification of companies to partnerships) has been heavily criticized on the ground that it is incompatible with general rules of conflicts of laws, rules of substantive law set forth in the Civil Code and the Code of Commercial Companies (since it ignores the will of founders to submit the company to a particular legal system) as well as it cannot be reconciled with the EU freedom of establishment[254]. Withdrawal from the

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(see below). See M. Bogdan, *Svensk internationell privat- och processrätt*, 8th edition 2014, p. 144. See also Stockholm International Arbitration Review 2007:2 p. 235, where the arbitral tribunal held that a certain company law question relating to an Austrian company was to be determined using the laws in the country where the company had its 'domicile' (Austria).
Further, in Swedish International Arbitration Review 2009:1 p. 89, the tribunal stated (*obiter dictum*) that under Swedish private international law the *lex societatis* is the laws of the country where the company is registered.

[252] See the Swedish Supreme Court case NJA 1969 p. 163, and (with further references to statements in preparatory works of certain Swedish legislation) M. Bogdan, *Svensk internationell privat- och processrätt*, 8th edition 2014, pp. 50-52.

[253] See, for example, K. Przybyłowski, *Prawo prywatne międzynarodowe. Część ogólna*, Lviv 1935, p. 129; W. Ludwiczak, *Międzynarodowe prawo prywatne*, Warsaw 1967, p. 125; M. Pazdan, *Prawo prywatne międzynarodowe*, 4th ed., Warsaw 1996, p. 83–84.

[254] See, for example, A.W. Wiśniewski, *Statut personalny spółek kapitałowych i uznawanie spółek zagranicznych. Orzecznictwo Trybunału Wspólnot a reforma polskiego prawa prywatnego międzynarodowego*, in: Liber Amicorum Professor Eugeniusz Piontek, Cracow 2005, p. 707; A. Opalski, *Europejskie prawo spółek*, Warsaw 2010, pp. 98–107; K. Oplustil, *Łącznik siedziby spółki w nowym*

real seat doctrine did not require intervention of the legislator or courts since it existed in Poland only as a theoretical concept.

The results of the statutory seat doctrine under Polish law are similar to the application of the incorporation theory: Polish law does not prohibit a foreign company to maintain its real seat in Poland and, reversely, to transfer the centre of management decision of a Polish company abroad. Therefore, an EU or third country foreign company which moved its real seat to Poland would be recognized under Polish law as an entity established and governed by foreign law (the law of the country where the company's statutory seat is located, in practice, usually the jurisdiction where the company has been registered). No rules on pseudo-foreign companies exist; in cases of fraud or evasion of law the restrictions on application of foreign law (or/and application of Polish law to a foreign company) could be based on the general *ordre public* clause (which however, has not been applied yet in the field of companies or legal persons). Restrictive position is represented by substantive company law. Rules inherited from the pre-war Polish Commercial Code forbid the transfer of the statutory seat of a Polish company abroad, since a resolution of the shareholders to effect such transfer causes the dissolution of the company by operation of law (*ex lege*) and its liquidation. The dissolution effect should be regarded as contradicting the rules on freedom of establishment as interpreted in the ECJ *Cartesio* ruling[255].

Brexit will not affect the situation of UK companies having its factual seat in Poland since Polish law it does not foresee separate intra-EU rules for companies.

B. Seat jurisdictions

7. German law

German company law applies the seat theory according to which German company law (AG and GmbH) and partnership law will be applied to companies the management of which is located in Germany. The seat is defined as the place where the management takes place and where its decisions are transformed into the day-to-day activities of the company[256]. Before Brexit, this application of the seat theory was not

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prawie prywatnym międzynarodowym. Uwagi na tle prawa europejskiego, "Kwartalnik Prawa Prywatnego" 2011, No. 3, p. 635.

[255] The issue of conformity of Art. 459 point 2 of the Polish CCC with EU law was subject of the preliminary question submitted by the Polish Supreme Court to the ECJ in 2015 (Decision of 22.10.2015, IV CSK 664/14). See J. Napierała, *Przeniesienie siedziby polskiej spółki kapitałowej za granicę jako przyczyna jej rozwiązania w świetle kodeksu spółek handlowych i swobody przedsiębiorczości*, RPEiS 2016, No. 2, p. 59.

[256] See BGH, 21 March 1986 – V ZR 10/85, BGHZ, 97, 269, 272 = NJW 1986, 2194.
BGH 27.10.2008 – II ZR 158/06, BGHZ 178, 192 = NJW 2009, 289 and II ZR 290/07; ZInsO 2009, 149 „Trabrennbahn"; see also: (BGH 01.07.2002 – II ZR 380/00 , BGHZ 151 S. 204 = NJW 2002, 3539.

relevant for companies originating from EU or EEA states. Upon Brexit becoming effective, these third country companies would become subject to German law to the extent that their seat – as defined in German law - is located in Germany, which is the case for many of the so-called "Limiteds" incorporated in the UK. As they have not been set up in accordance with German company law rules, especially the rules for the formation of a company with capital - type GmbH or AG - these companies would nor be recognized as a corporate body, , comparable to partnerships ('Personengesellschaften'). Under German law these would not be recognised as separate legal entities[257]. Their members would not enjoy limited liability and the powers of their directors and officers would have to be defined according to the German rules for unincorporated companies (civil or commercial partnerships) , essentially putting the members or partners in charge of directing the company's activities.

The consequence of this change of legal regime would be very significant. Not only would the members of these UK companies be held indefinitely liable, their members would be considered partners in these unincorporated entities and might be personally held to all liabilities contracted in the name of the company. Decisions should in principle be adopted by unanimity. It is discussed in legal writing whether there is (limited) protection of the legal status for existing pseudo-foreign companies[258] and whether the extension of liability would be limited to the liabilities created since the change to the seat theory – i.e. since the Brexit - or would also include pre-existing liabilities for which the UK company was exclusively responsible[259]. The management structure would also be greatly affected. The shareholders would become managing partners, while the former directors and officers would not be further entitled to represent the entity, except with a special proxy.

Several schemes have been considered to solve this conundrum: as in other jurisdictions one could consider to convert the UK company into a GmbH or a Unternehmergesellschaft (UG), a type of the GmbH, introduced in German law in 2008 and subject to reduced requirements in terms of initial capital (1 euro), as an alternative to the UK Limited. The companies could be re-established as German companies to which the German located assets are contributed and which will have to meet the requirements applicable to German companies. In this case there would be no continuity of the legal entity, leading to significant tax consequences in the UK. Legal practice pleads for long transition periods and pragmatic solutions.[260] Other have argued that the theory of protection of confidence would lead to protect these constructs: how this will convey legal personality seems difficult to explain[261].

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[257] They would be considered Offene Handelsgesellschaften (OHG), or Gesellschaften buergerliches Recht (GbR). The limiteds are qualified as an "Auslaufmodel", Hopt, K., Unsicheres Recht, Handelsblatt, 12 July 20916, p. 13.
[258] Stiegler, S in Kramme/Baldus/Schmidt-Kessel (eds), Brexit und die juristischen Folgen, 2017, 129, 133; Weller, M-P/Thomale, C/Benz, N, NJW 2016, 2378, 2381.
[259] See Freitag, R., and Korch, S., Gedanken zum Brexit, ZIP, 37, 1363 (22 July 2016).
[260] See Eilers, St, and Welling, B, Brexit: Soft-Landing statt Bruchlandung!, Der Betrieb, 2016, M.5.
[261] See about the discussion: Armour, J., Fleischer, H., Knapp,V., Winner,M., Brexit and Corporate Citizenship, Working Paper N° 340/2017, January 2017, SSRN-id2897419.pdf.

Another solution might be a cross border merger of the UK entity with the German company and this in accordance with the Merger Directive: however, this technique can only be followed as long as the directive is in force between the UK and the other EU jurisdictions. After that date, the merger could only take place on the basis of the respective UK and German laws transposing the Merger directive. Whether that approach is workable from both the company law and the tax side should be further investigated[262]. One will understand that in legal writing, commentators call for a simple and satisfactory solution in accordance with future German law.

8. Austrian law

Austrian law closely follows the German model: The applicable law is determined according to the location of the company's central administration (Sec. 10 Austrian Act on Private International Law), that is as the place where the material corporate decisions of the management are implemented in day-to-day managerial decision-making.[263] If this centre is located in Austria, the Austrian lex societatis determines e.g. the liability of the members and the rules on management.[264] This mirrors the German situation.

There is one crucial difference, however: As the company or partnership is not registered locally it cannot acquire property, enter into contracts and sue or be sued. It merely is a civil law partnership without legal personality. Therefore, creditors who sue a UK company after Brexit may be surprised to learn that they have been suing a pseudo-foreign company and, therefore, a non-existing entity – their case will be dismissed (with the usual cost consequences), as it should have been brought against the members directly[265]. However, that suit may have become time-barred in the meantime.[266]

9. French law

French law traditionally follows the seat theory. The company seat has been characterized as the dominant connecting factor in French case law since the end of the XIX[e] century. This theory has been endorsed by the French legislator in the XX[e] century. Today, both civil and commercial codes state that: "*Companies whose*

[262] For an analysis of the tax consequences in numerous jurisdictions, see KPMG Taxation of cross-border mergers, Europe, https://home.kpmg.com/xx/en/home/insights/2014/06/europe-download.html, 13 June 2014.

263 Austrian Supreme Court, Judgment of 7 October 1998, 3 Ob 44/98m; Eckert, Internationales Gesellschaftsrecht (Vienna: Manz, 2010) at 30.

[264] In the context of pseudo-foreign companies see e.g. Austrian Supreme Court, Judgment of 29 April 2004, 6 Ob 43/04y.

265 OGH, Judgment of 23 August 2000, 3 Ob 59/00y.

[266] See . Armour, J., Fleischer, H., Knapp,V., Winner,M, Brexit and corporate citizenship, ECGI, January 2017.

registered office is located on French territory shall be subject to French law."[267]. This rule has been interpreted as a bilateral conflict rule. Therefore, foreign companies' *lex societatis* is the one of the State where their seat is located[268].

However, some hesitation exists as to whether the company seat to be taken into consideration is only the "registered seat" ("*siège statutaire*") – i.e. the place where the company is located according to its articles of incorporation – or, if it is located elsewhere, the "real seat" ("*siège réel*") – i.e. the centre of the company's decisions, the place where the board of directors and/or shareholders meet, or where the most important management decisions are adopted[269]. It is commonly asserted that, when the registered seat and the real seat do not coincide, French law opts for the latter. In other words, French courts would not be bound by the articles of incorporation but by the duty to determine, according to the particular circumstances, where the real seat of the company is located. This presentation calls for some nuance. Indeed, as has been demonstrated, all decisions subjecting a foreign company to the French *lex societatis* point to the existence of a fraudulent behaviour or a lack of any serious link implicitly revealing the will to evade the *lex fori*[270]. The most recent case law tends to endorse a unilateral tendency to consider that the *lex societatis* is the law of the State that took the initiative to recognize the valid constitution of the company and to grant it the benefit of legal personality, whether or not this law is designated by the French conflict rule[271]. This evolution is partially imposed in the EU context by the ECJ case law on the freedom of establishment. It is only contradicted in the field of criminal company law, where a series of judgments from the criminal division of the Court of Cassation subject to French criminal law provisions the companies incorporated abroad because of the localisation of their activity in France[272]. It should also be noted that no decision exists applying the *lex societatis* of a foreign State to a company registered in France.[273]

[267] "*Les sociétés dont le siège social est situé en territoire français sont soumises à la loi française*" (Art. 1837 of the Civil Code; Art. L. 210-3 of the Commercial Code).
[268] Cass Civ. 30 March 1971, Rev Crit. dr. internat. privé, 1971, 451, nt Lagarde, but differently in a case of transfer of the seat from Algeria to France.
[269] The nationality of the directors or of the shareholders is not considered as a decisive criterion, see: See Cass com, 8 February 1972, Bull civ, IV, 61 where it was decided that a subsidiary of an English company was considered French, even if its shares were held by an English parent. In some cases it has taken into account as an additional criterion.
[270] M. Menjucq, Droit international et européen des sociétés, LGDJ, 4e éd., 2016, n° 99.
[271] See Louis d'Avout, Siège social, fictivité et fraude : hésitations autour du rattachement français des sociétés (à propos de Crim. 25 juin 2014, n° 13-84.445, Rev. sociétés 2015. 50, note M. Menjucq ; Dr. soc. 2015. 159, chron. R. Salomon et Com. 21 oct. 2014, n° 13-11.805, D. 2015. 1056, obs. H. Gaudemet-Tallon et F. Jault-Seseke ; ibid. 2031, obs. L. d'Avout et S. Bollée ; Rev. sociétés 2015. 463, note M. Menjucq ; RTD com. 2015.103, chron. A. Constantin), Revue critique de droit international privé 2015 p. 541.
[272] See V. Louis d'Avout, n.256

Unless provided otherwise, foreign companies are recognized[274] and entitled to the same legal status as applicable to French companies, subject to reciprocity[275]. This rule applies to companies originating from other EU jurisdictions on the basis of the Treaty freedoms. It also applies to companies from third countries subject to applicable international or bilateral Treaties. However, French law contains a certain number of exceptions, reserving certain privileges to French companies: up to 2014, the charter clause granting double voting rights to stable shareholders could exclude non-EU shareholders; up to 2014, the right to a renewal of a commercial lease was reserved to French nationals and companies, except those originating from the EU or the EEA[276]. It was also decisive in the legislation on the nationalisation of French companies[277]. Investments in sensitive sectors, especially from non-EU companies, may also be subject to governmental authorisation[278]. Other provisions relate to working permits for directors and managers that apply to directors or managers of foreign companies, whether they are French nationals or not[279].

The cross-border change of the seat of a French company would lead to a change in its *lex societatis*. The Code de Commerce provides that a change in the "nationality" of the company can only be achieved by an unanimous vote of its members or shareholders[280], except in joint-stock corporations where this change can be voted in an extraordinary general meeting of shareholders, provided that France and the transferee State have concluded an agreement allowing for the transfer of the seat with continuity of the legal personality[281]. However, this exception is devoid of practical application since no agreement of this kind has ever been concluded[282]. On the basis that the legal personality is a characteristic granted by the law, the seat transfer would lead to dissolution[283]. This opinion is however contested in recent literature[284], arguing that a change of nationality is only a change of the articles of incorporation that should not impact on the existence of the company's legal personality. Reference is made to

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274 Regarding foreign joint-stock corporations, the law of 30th May 1857 conditioned their recognition upon the existence of a general decree enacted in France in favour of such companies of a particular country or the conclusion of an international treaty between France and that country. However, the practical importance of this restriction has been significantly reduced through the multiplication of bilateral conventions, the application of European law principles or of the European Convention on Human rights principles. The law of 1857 was finally repealed by the law of 20 December 2007 "*sur la simplification du droit*".
275 On the basis of article 11, Code civil.
276 Article 145-13 of the Code de commerce, deleted by L 2014-626 of 18 June 2014, see for further details about these exception cases of exclusion of foreign companies: M. Menjucq, Droit international et européen des sociétés, 4th ed., p. 75 *sq*.
277 Companies controlled by foreign shareholders were excluded from the nationalisation decisions; see L. 11 February 1982, article 12.
278 See Art. L. 151-3 of the monetary and financial Code.
279 Code de l'entrée et du séjour en France, article 313-10, 2e; see M. Menjucq, Droit international et européen des sociétés, 4th ed., p. 81.
280 Art. L. 221-6, L. 222-9 and L. 223-30 of the Code de commerce.
281 Art. L. 225-97 of the Code de commerce.
282 It is regretted to no agreement has been concluded between the EU member States on the seat transfer: Guyon, Y., nr 182, 191.
283 Following the evolution of EU law, the French tax code was modified in 2004 in order to provide that the tax on winding up is only applicable in the case of a seat transfer to a non-EU jurisdiction: article 221-2 of the Code général des impôts.
284 Menjucq, M., Droit international et européen des sociétés, nr 466 e.s.

Italian, Spanish and Greek law where a change of nationality is a mere change of the articles of association merely triggering shareholder protection rules. In addition, such a dissolution would, in certain circumstances, go against the ECJ decisions in Cartesio[285] and Vale[286].

French law contains no clear answer regarding the legal status of a UK "limited" whose activity is entirely or principally located in France. On the basis of the real seat criterion, and under the conditions above-mentioned, it may be re-characterized as a French company. Post-Brexit, there will no longer be any particular impediments for French courts to apply the fraud theory to such companies incorporated in the UK. The end-result of a re-characterization and change of *lex societatis* would be close the German one, since the shareholders of the ex-UK limited company would lose the benefit of the limited liability, which may only belong to foreign companies or French companies registered as such in the Trade and Companies registry. The number of UK "limiteds" in France is among the highest in the EU[287].

After the UK leaves the EU, UK companies will further be recognized as legal entities entitled to sue in court and defend their rights, under the European Convention on Human rights. If the centre

of their business is located in France, they may be requalified as being French, beyond the mere application of the French *lex societatis*, and subject to the obligations applicable to French companies.

10) Belgian law

The Belgian legislation adheres to the seat doctrine which it has been following for more than 150 years. The "seat" is defined in the Code on Private International Law on the basis of a the "principal establishment", being defined on the basis of a threefold criterion defining the seat as based on the "center of decisions" where the board decisions are adopted and the strategy is determined, and if that does not lead to a convincing result, the "center of business" or "center of activity" and in the last place, its "statutory seat", this is the place indicated in the provisions of its articles of incorporation[288].[i289] If the seat in not localised in Belgium, several legal regimes might be applicable. To avoid this type of conflict, the code further refers to the law of

[285] ECJ, C-210/06, of 16 December 2008 Cartesio.
[286] ECJ, C- 378/10 of 12 July 2012 Vale
[287] See M. Becht, C. Mayer, H.F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry , SSRN-id906066.pdf. More recent data indicate that Germany, France and the Netherlands are among the most frequent users of the UK Limited: Armour, J., Fleischer, H., Knapp,V., Winner,M., Brexit and Corporate Citizenship, Working Paper N° 340/2017, January 2017, SSRN-id2897419.pdf.
[288] See article 4 (2) and (3)of the Code of private international law. The French version states : § 2 le lieu où une personne morale a son établissement principal; § 3. Pour l'application de la présente loi, l'établissement principal d'une personne morale se détermine en tenant compte, en particulier, du centre de direction, ainsi que du centre des affaires ". The qualification under the conflict of law rules should preceed the analysis under other legal regimes such as bankruptcy, competition law, or criminal law: see for an analysis not taking into account the Conflict of law rules : Navez E.J. and Navez, A. L'identification et les sanctions du siège social fictif ou frauduleux en droit belge des sociétés, TRV-RPS, 2016, 829

constitution of the legal entity, declaring that that law will have to be followed, including the cases where that law refers to another jurisdiction (renvoi). This rule would only be applicable if the criteria mentioned under the definition of "principal establishment" would not be applicable. It will be applicable to cases where the foreign law is based on a seat theory as well as to those where the incorporation doctrine applies. [290]

It is recognised that the criterion of the "principal establishment" is not very precise and raises difficulties of application. However, with respect to companies constituted in incorporation states, the judiciary will normally consider the law of that state to be applicable. In legal writing it is mentioned that the increasingly prevalent character of the incorporation theory is leading to a preference for the application of the incorporation approach, except in cases where there undeniably has been a "centre of decisions" within Belgium[291]. In these cases, Belgian company law - but also bankruptcy law- will become applicable. With respect to Belgian companies controlled from abroad, this would not lead to declaring the foreign law applicable if the decisions e.g. of the board are formally adopted in Belgium, even if these are the mere translation or implementation of group decisions[292].

Belgian legal writing has stated that whether a company has to be recognised as a separate legal entity has no importance any more, but this reasoning is only applicable to companies created in other EU jurisdictions. After the Brexit decision, the question may become active again, as companies incorporated in the UK but essentially having their centre of decision and activity in Belgium would possibly be requalified as Belgian. There are no voices declaring these companies to be unincorporated entities as the basic company form – société en nom collectif, com oHG under German law - – is considered a full legal person. Belgian law would accept continuity of the legal entity, but declare the Belgian company law regime applicable, leading to a requirement to establish a company charter according to Belgian law, provide the required capital, proceed to the mandated disclosures and adapt its governance and articles of incorporation to Belgian law.

The factual situation whereby the seat of the company originating from an incorporation state is located in Belgium would be considered as a factual 'seat transfer". Article 112 of the Code allows for the "principal establishment" to be transferred, provided this is done in accordance with the legal regime applicable in both jurisdictions. In a leading decision relating to the transfer of the seat of a UK plc to Belgium, it was held that by virtue of the law, this could take place without interruption of the company's legal

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[290] Article 110,(2) provides "Si le droit étranger désigne le droit de l'Etat en vertu duquel la personne morale a été constituée, le droit de cet Etat est applicable". This criterion acts as a default rule, for cases in which the other criteria are not applicable, e.g. dormant companies or companies that are not managed in any specific location, by a board that may meet in several locations in the world. See for more details: Marescеau,K., Belgium, get ready to compete for corporate charters, een pleidooi voor de invoering van de statutaire zetelleer, Financial Law Institute, 2013, Working Paper 2014-02

[291] See: Marescеau, K.,Belgium, get ready to compete for corporate charters, een pleidooi voor de invoering van de statutaire zetelleer, Financial Law Institute, 2013, Working Paper 2014-02; There are an increasing opinion in favor of a change to the incorporation system in Belgium. See in general Marescеau,K., Grensoverschrijdende mobiliteit van vennootschappen; *De effecten van regelgevende competitie op vennootschapsrechtelijk vlak, 2014.*

[292] See Wautelet, P.. Quelques réflexions sur la lex societatis dans le code de droit international privé, Rev. Prat. Sociétés, 2006, 6948, nr 27.

personality leading essentially to the obligation of that company to conform to Belgian company law. [293] A further conditions was that the seat transfer was realised in conformity with te legal provisions in both jurisdictions [294]. One can admit that this approach would also be applicable to UK companies which have their effective centre of decisions in Belgium, and after Brexit could not further avail themselves of the freedom of establishment.

11) Spanish law

Spanish law also conforms with the seat theory, although some qualifications are required, since the interplay of legal provisions is complex. The Spanish Civil Code establishes the general principles of incorporation and legal seat as the criteria to assign the nationality of companies. Article 28 of the Spanish Civil Code indicates that all legal persons incorporated under Spanish law and with their legal seat in Spain will be of Spanish nationality. The rights of legal persons with a legal seat in a foreign country –and therefore, of a foreign nationality- will be determined according to the applicable treaties. The legislation affecting most companies ("sociedades de capital", which include both public limited companies and limited liability companies), refers also to the issue of the nationality of companies, but its formulation is relatively different: companies are Spanish if their legal seat is located in Spain, irrespective of the place where the incorporation actions were performed (art. 8 of the Companies Act)[295].This general principle is complemented by the rule that establishes that companies must establish their legal seat at the place where the centre of their effective administration and direction is located, or where the main establishment is located (art. 9.1 of the Companies Act). The adoption of the real seat doctrine is even clearer when the law states that "companies whose main establishment is located in Spain must have their legal seat in Spain" (art. 9. 2 of the Companies Act). These rules must be put in context: legal specialists agree that the rules containing this real seat doctrine are not applicable to companies incorporated in countries of the European Union, since that would be

[293] See Lamot case, Cass. 12 november 1965, Pas. 1965, I, 336; RW 1965-66, 911 en RCJB 1965, 393, note VAN RYN, J., "Conséquences juridiques du transfert en Belgique du siège social d'une société étrangère et du transfert à l'étranger du siège social d'une société belge". See also: WOUTERS, J., Het Europees vestigingsrecht voor ondernemingen herbekeken. Een onderzoek naar de grondslagen, draagwijdte en begrenzingen van de vrijheid van vestiging van ondernemingen in de Europese Unie, Doct Thesis, KUL, 1997, 632-641.

[294] It is likely that the UK judge would further consider the company to be subject to UK law. The tax consequences may be severe: See Haelterman, A., Belgische fiscale regels inzake emigratie en immigratie van vennootschappen, Maresceau, n. 128; https://lirias.kuleuven.be/bitstream/123456789/438389/1/Immigratie+vennootschappen+axel+Haelterman.pdf

[295]See art. 8 of the Ley de Sociedades de Capital, Royal Legislative Decree 1/2010 (3rd May). Spanish specialists consider that this principle is actually a variety of the "incorporation principle", since the law of the company will be that selected by the parties at incorporation: see F.J. GARCIMARTÍN ALFÉREZ, *Derecho de sociedades y conflictos de leyes: una aproximación contractual*, Madrid, 2002. However, this general principle is nuanced by the exceptional rules described in the text.

contrary to the jurisprudence of the ECJ[296]. However, the application of these rules to third countries is clear, and it has been widely discussed, especially in the context of companies incorporated in offshore jurisdictions. If the UK becomes a third country, companies incorporated under English law which have their main establishment in Spain will be considered Spanish companies and would be subject to the provisions of Spanish law.

[296] See J. Carrascosa Gonzalez, "Sociedades fantasma y Derecho Internacional Privado", *Rev. Electr. Estud. Internacionales*, 2014, p. 17.

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