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The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity

Dr Andreas Kokkinis[1]

Abstract

The extent of the legal impact of the withdrawal of the UK from the EU on cross-border corporate activities, transactions and investment will depend on whether the UK remains part of the European Economic Area. If the UK leaves the EEA, it will be more difficult for UK companies, and in particular for financial sector firms, to do business and expand in the EEA either by acquisitions or by establishing subsidiaries and branches. In parallel, it would be more difficult for the UK to attract investment by EEA companies and investors. Furthermore, the preeminent position of London as a major global financial centre would be challenged due to the combined effect of two factors: (a) it would be more difficult for UK and EEA companies to offer their securities to investors across the EEA; and (b) selecting the UK as the country of incorporation either of the top holding company of an internationally active corporate group or of the main European arm of such a group would be less attractive. Maintaining full access to the Single Market is thus crucial for the UK economy.

I. Introduction

The result of the European Union (EU) membership referendum held on 23 June 2016 has caused considerable instability in the global capital markets and early evidence suggests that the growth of the UK economy will be slower than expected in 2016 and 2017 due to a reduction in investment and consumption.[2] The purpose of this article is to analyse and evaluate the potential impact of the Brexit vote on the legal and regulatory framework governing cross-border corporate activities, transactions and investment within the European Economic Area (EEA). In

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[2] The British Chamber of Commerce revised its growth forecasts after the referendum from 2.2% to 1.8% for 2016 and from 2.3% to 1% for 2017. See BBC News, *UK growth forecast cut by BCC after Brexit* (12 September 2016) available online at http://www.bbc.co.uk/news/business-37334933 accessed 15 Sept 2016.

particular, the discussion will focus on EU law rules with regard to cross-border mergers, takeovers, special EU law corporate forms, the freedom of establishment of companies, company branches and especially bank branches, the pass-porting of prospectuses, cross-border insolvency and rules on the recognition and enforcement of civil and commercial law judgments, but will exclude the free movement of goods as such.

It is essential to note that the extent of the legal impact of the referendum will depend heavily on the form which the UK's withdrawal from the EU will take – assuming that the withdrawal eventually happens. This will of course depend on the outcome of the negotiations that will commence subsequent to the UK's invoking of article 50 of the Treaty on European Union.[3] If the UK leaves the EU but remains part of the EEA – as are currently Norway, Lichtenstein and Iceland – the impact of the withdrawal from the EU on the aforementioned areas of law will be minimal as all EU legislation that concerns the Single Market is also applicable to EEA states subject to incorporation into the EEA Agreement following a special procedure. If, however, the UK withdraws from both the EU and the EEA the legal framework on cross-border business activity will change significantly.

It will be argued that an exit from the EEA would have a serious negative impact on the ability of UK companies to do business and expand in the EEA either by acquisitions or by establishing subsidiaries and branches. In parallel, it would be more difficult for the UK to attract investment by EEA companies and investors. Furthermore, the preeminent position of London as a major financial and economic centre would be challenged due to the combined effect of two factors: (a) it would be more difficult for UK and EEA companies to offer their securities to investors across the EEA; and (b) selecting the UK as the country of incorporation either of the top holding company of an internationally active corporate group or of the main European arm of such a group would be less attractive.

To this effect, the discussion will be organised in six main parts. Part II will offer some necessary background on the importance of cross-border corporate activity for the UK and the role that EU law has played to facilitate such activity. Part III will explore the various possible models of the future relationship of the UK with the EU with a particular emphasis on the scope

[3] Consolidated version of the Treaty on European Union [2012] OJ C326/1. Article 50 was introduced by the Treaty of Lisbon of 13 December 2007 and came into effect on 1 December 2009.

of application of EU legislation on non-EU EEA states. Part IV will analyse the likely impact of the loss of the right of establishment of UK companies in other EEA states with a particular emphasis on the benefits flowing from the right to establish overseas branches, especially for banks and other financial institutions. Part V will examine the consequences on corporate amalgamations in view of several possibilities that are currently open to UK companies. Part VI will focus on the impact of leaving the EEA on international listings of securities and on investment abroad, taking into account the potential loss of pass-porting rights for prospectuses. Part VII will then analyse the potential impact on debt financing due to the discontinuation – for UK companies – of the beneficial effects of EU law harmonising rules on conflict of law and international jurisdiction with regard to civil and commercial matters. Part VIII will conclude.

II. The Importance of Cross-Border Corporate Activity for the UK Economy and the Role of EU Law

The UK economy is heavily reliant on international trade[4] and investment,[5] and the position of London as the unrivalled financial capital of Europe[6] and world's largest international financial centre at least partially relies on its continuing access to European financial markets and customers. It is therefore of no surprise that the outcome of the referendum on the UK's

[4] The total value of exports and imports of goods and services as a percentage of the UK's GDP was 56.7% in 2015 making the UK an intensively trading major economy in line with Canada, France and Italy and surpassing the USA and Japan. Only Germany's external trade was significantly higher in 2015 at 86% of GDP. In recent years UK imports have consistently exceeded exports, the trade deficit standing in 2015 at 1.9% of GDP. This trend is driven by a large deficit in the trade of goods (mostly within the EU) while trade in services is characterised by a considerable surplus. See Office for National Statistics, *UK Trade: June 2016* at 8 – 9 (2016) available online at http://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/june2016 accessed 15 Sept 2016.

[5] The UK is a champion amongst European countries in attracting foreign direct investment (FDI). In fact, the UK attracted 28% of all FDI flows in Europe in 2014 while the next more popular destinations of FDI were Russia (10%), Spain (7%) and Germany and Poland (5% each). In 2014 the total value of FDI stock in the UK was £1,065 billion ($1.7 trillion) making the UK the third country in the world with the highest value of FDI stock behind only the US ($5.4 trillion) and China ($2.7 trillion). In 2014 around 40% of the total FDI stock in the UK originated from the Netherlands, France, Germany, Spain, Switzerland and Luxembourg thus illustrating the great importance of maintaining good economic relationships with EU countries and other countries participating in the Single Market. See UK Trade & Investment, *Inward Investment Report 2014/15* UKTI/15/43 (2015) available online at https://www.gov.uk/government/publications/ukti-inward-investment-report-2014-to-2015/ukti-inward-investment-report-2014-to-2015-online-viewing accessed 15 Sept 2016.

[6] In 2012 43% of all inward foreign investment projects involving setting up European headquarters selected the UK (mostly London) as their base. The next most popular destinations were Ireland and Germany which both attracted 14% of headquarters. See UK Trade & Investment, *The UK – Number One for European Headquarters* UKTI/13/662 (2013) available online at https://www.gov.uk/government/publications/a-guide-to-locating-european-business-headquarters-in-the-uk accessed 15 Sept 2016.

membership of the EU has spurred speculation with regard to the impact of Brexit on the UK economy in general,[7] and on the position of London as a global financial hub in particular. These are of course questions that are very difficult to be answered with any degree of certainty and fall within the scope of political economy and financial economics. The purpose of this paper is instead to focus on the legal consequences of Brexit in the area of cross-border corporate and financial activity involving the UK and other EU Member States. As a preliminary matter, this part will provide an overview of the historical role of European integration in facilitating cross-border economic activity, and will briefly compare the EU project to other forms of international economic cooperation.

Already since its inception in 1958 the European Economic Community (EEC) had a number of characteristics that differentiated it starkly from a mere free trade zone.[8] Rather than merely allowing free trade between the participant states, the EEC's purpose was – and is still a fundamental aspect of the European project – to create the same level of economic integration as exists within one single sovereign state.[9] This entails the free movement not only of goods but also of services, capital and people and the establishment of a common customs and commercial policy towards third countries. In addition, it entails the harmonisation of a broad range of areas of law of the Member States including competition law, consumer protection law, labour law, contract law, company law and financial regulation. To achieve this uniquely high level of harmonisation and abolition of formal and informal obstacles to free movement the EEC Treaty established four institutions namely the Council of Ministers, Assembly, Commission and Court of Justice which evolved into the Council of the European Union, European Parliament, European Commission and European Court of Justice (ECJ) respectively.[10] A further innovation of the EEC was that decision making at the Council of Ministers was by weighted majority rather than consensus thus differentiating from typical intergovernmental organisations.

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[7] The EU was the UK's largest trading partner in 2015 accounting for 46.9% of UK's exports of goods, 39.4% of the UK's exports of services, 54.2% of the UK's imports of goods and 49.4% of the UK's imports of services. See *UK Trade: June 2016* (above n 4) at 10.

[8] A free trade zone is an area consisting of more than one sovereign states where goods can be imported, exported and re-exported without paying duties and with no quantitative restrictions.

[9] For a discussion of key European institutions from a sociological perspective, see Neil, Fligstein and Iona, Mara-Drita, *How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union* 102 American Journal of Sociology 1 (1996).

[10] A discussion of the evolving role of the ECJ can be found in Alec, Stone Sweet, *The European Court of Justice* in Paul, Craig and Grainne, de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford, OUP, 2011).

It follows that membership of the EU confers on UK businesses much broader benefits than unfettered trade of goods with the other Member States. UK banks and other financial services firms can provide their services directly to European customers, operate branches abroad and set up subsidiaries. European companies can move their headquarters to the UK and get their shares listed on the London Stock Exchange at a low cost. There is a range of legal options available for UK and European companies that intend to merge. And selecting English law to govern a transaction and the English courts as the competent courts is facilitated by EU-wide conflict of law rules and recognition of judgments in civil and commercial matters. The aforementioned EU law rules are based on one or several of the fundamental freedoms of movement of people, capital and services which create an integral framework allowing for free corporate and financial activity throughout the EEA.[11] The relevant areas of EU law will be analysed with a particular emphasis on the economic benefits that they bring to UK businesses. For each area of law, the discussion will delineate the likely impact of a full withdrawal from the EU and Single Market and potential ways to mitigate the repercussions. Before embarking on this discussion, however, it is necessary to explore the various possible models for the relationship between the UK and EU post-Brexit and in particular the significance of whether the UK will be part of the European Economic Area.

III. The Minimal Impact of Brexit on Cross-Border Corporate Activity if the UK Remains Part of the European Economic Area

The extent of the legal consequences of the UK's withdrawal from the EU in the area of cross-border corporate activity will depend first and foremost on whether the UK will continue to be part of the Single Market. Contrary to popular perceptions of EU law as a uniform body of law that applies to all Members States and only to them, the legal reality is of course much more nuanced. Certain areas of EU law that derive from the fundamental rules on the free movement of goods, persons, services and capital enshrined in the Treaty for the Functioning of the European Union[12] (TFEU) are equally applicable to countries that are not EU Member States but

[11] These three freedoms are heavily interconnected and their combination is necessary to achieve true free trade in services. A political economy analysis of free trade in services can be found in Gary P, Sampson and Richard H, Snape, *Identifying the Issues in Trade in Services* 8 World Economy 171 (1985).

[12] TFEU art 26(2). Specific provisions on the free movement of goods, customs union and competition law harmonisation are set out in arts 28 – 44. Detailed provisions on the free movement of individuals, services and

are members of the Single Market. Indeed, the Single Market extends to all countries that are members of the European Economic Area[13] (EEA) – that is, all 28 EU Member States as well as of three of the European Free Trade Association (EFTA) Member States,[14] and – to a limited extent – to Switzerland through bilateral treaties.[15]

This is crucial in the area of cross-border corporate activities as all EU legislation that is relevant to company law and financial services regulation falls within the scope of the Single Market *acquis*. Indeed, the EEA Agreement covers *inter alia* the following areas of law: free movement of workers, social security, recognition of professional qualifications, right of establishment, financial services, services in general, free movement of capital, competition, state aid, procurement, consumer protection and company law.

EEA countries are obliged to implement all EU law rules that fall within the scope of the EEA Agreement subject to their formal approval by special joint committees that include representatives from both sides. As the EEA Agreement does not entail the delegation of any legislative or other powers by EEA States to EU institutions, all new EU legislation has to be incorporated into the EEA Agreement by consensus of all EEA states in order to become binding. A number of EEA/EFTA bodies mirror EU institutions and administer those EU law rules that are applicable to EEA states. The most important of these bodies are the EFTA Standing Committee that comprises the ambassadors of the three EEA States to the EU, the EFTA Surveillance Authority that oversees the implementation of and monitors compliance with

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capital, including the right of establishment for natural and legal persons and the prohibition of discrimination on grounds of nationality, are set out in arts 45 – 66.

[13] The European Economic Area was created by the Agreement on the European Economic Area which was signed in Porto on 2 May 1992 [1994] OJ L1/3 and became effective on 1 January 1994. It is an international treaty originally between the 12 EU Member States at the time and the European Free Trade Association States. These were at the time the following: Norway, Lichtenstein and Iceland (which are still members of EFTA and the EEA), Austria, Sweden and Finland (which joined the EU in 1995) and Switzerland, which never ratified the Agreement due to its rejection by a referendum in December 1992.

[14] The European Free Trade Association is an intergovernmental organisation established by a Convention on 4 January 1960. Its original signatories were the United Kingdom, which played a primary role in the creation of the organisation as a countervailing force to the European Economic Community founded in 1958, Austria, Denmark, Norway, Portugal, Sweden and Switzerland. Iceland joined in 1970, Finland in 1986 and Lichtenstein in 1991. However, as many of the members joined the EEC (and later EU) the importance of EFTA gradually declined. Indeed, the UK and Denmark left in 1973, Portugal in 1986 and Austria, Finland and Sweden in 1995. As a result, EFTA has currently only four members: Iceland, Lichtenstein, Norway and Switzerland.

[15] Switzerland remains an EFTA member but is not a member of the EEA. Still, it is part of the European Single Market by virtue of a series of bilateral treaties with the EEA. By way of background, the EEC Switzerland Free Trade Agreement [1972] OJ L300/189 which was signed in Brussels on 22 July 1972 and came into force on 1 January 1973 covered trade in goods other than agricultural products.

the relevant rules, and the EFTA Court that hears cases of alleged infringement of the relevant rules brought by the Surveillance Authority. [16] The incorporation of new rules into the EEA Agreement is led politically by the EEA Council which consists of the foreign ministers of the EEA States and the EU Member States which holds the EU Presidency at the time and meets twice a year.

The actual decision to incorporate applicable EU legislation into the Agreement is taken by consensus by the EEA Joint Committee which consists of the EFTA Standing Committee and the European External Action Service.[17] The procedure entails notification of the Joint Committee as soon as an EEA-relevant piece of legislation is proposed and further notification when it is adopted. Then the act is scrutinised by the Joint Committee to ensure it falls within the scope of the EEA Agreement and if approved, a draft decision is sent to the Commission for review to ensure the coherence of the law relating to the Single Market. Once approved by the Commission the incorporating decision is formally made and a date is specified for its coming into force.[18] As explained above, EEA countries have the right to refuse the application of new EU law, but this right has never been used as it would give the EU the right to terminate the whole EEA Agreement.

Although in principle incorporation ought to occur as soon as possible so that new rules are implemented at approximately the same time throughout the EEA, in practice the process is often protracted and can last several years. At the time of writing there are pieces of EU legislation pending incorporation to the EEA Agreement that have been adopted in the EU as long back as 2003.[19] The tables below illustrate the pace of the incorporation process since 2012. It is evident that the incorporation process has been slow in the years leading up to 2011 which resulted in the creation of a large backlog of legal acts pending incorporation. The efforts of the

[16] An analysis of the jurisprudence of the EFTA Court during the first 20 years of its existence can be found in EFTA Court (ed), *The EEA and the EFTA Court* (Oxford, Hart Publishing, 2015).

[17] This is an Agency established for this purpose in 2010. Until then it was the role of the Commission to represent the EU on the EEA Joint Committee.

[18] This normally happens automatically. However, if one or more EEA States need to amend their constitutions in order to be able to comply with the relevant piece of legislation, the entry into force of the Joint Committee Decision is made conditional on receipt of notification by the relevant States that their constitutional amendment requirement has been fulfilled.

[19] These are very few exceptional cases. Substantial numbers of EU legal acts that are still pending incorporation only date back to 2012.

Joint Committee to clear the backlog by June 2012 have had only partial success but the incorporation process has definitely been accelerated since then.

Table 1. The progress of EEA incorporation of EU legislation on 1 September 2016[20]

Year of EU adoption	EEA-incorporated EU Acts	Incorporation pending constitutional change	JC approved but pending entry into force	Under JC scrutiny
2012	344	1	26	12
2013	418	1	43	27
2014	407	13	36	86
2015	333	4	20	111
2016	63	0	54	179

Table 2. Historical data on EU law incorporation and Acts pending incorporation

Year	Possibly relevant EU Acts	EU Acts deemed not relevant	Draft JCDs submitted	Acts incorporated in the same year as adopted by EU	Total Acts incorporated	Pending Acts (in force in EU)
2014	790	128	591	225	627	428
2013	535	53	484	117	400	506
2012	411	21	468	83	486	418
2011	423	78	418	unknown	373	544

It is important to note that although all EU law that relates to the free movement of goods, services, people and capital applies to EEA countries, the same is not the case with regard to Switzerland. EU law that is based on the free movement of persons (natural and legal) applies

[20] All data is taken from the EEA/EFTA website http://www.efta.int/eea-lex accessed 15 Sept 2016.

to Switzerland but EU rules on cross-border mergers and takeovers, prospectuses and their passporting and the passporting rights of financial firms do not apply.[21] A special bilateral agreement allows Swiss general insurance firms to set up agencies and branches in EEA States and vice versa.[22] Another crucial difference is that the bilateral treaties between the EU and Switzerland[23] do not provide for the incorporation of new pieces of EU legislation. Any expansion of Switzerland's participation to the Single Market is achieved by concluding additional bilateral treaties which over the years has led to a proliferation of treaties which now exceed 120. The EU Council has stated that no further bilateral treaties will be concluded and has demanded that an appropriate institutional framework is set up to ensure the coherence of the Single Market, incorporation of new rules and dispute resolution.[24] These negotiations commenced in May 2014 but have now been put on hold due to the result of a Swiss referendum held in February 2014 where the majority of Swiss people approved a motion to introduce quotas on migration.[25] According to Swiss law the outcome of the vote must be implemented within three years so by 2017. If this happens, Switzerland will be in breach of its obligations under the bilateral treaties and will lose access to the Single Market. It is thus obvious that the so-called Swiss model for the future relationship between the UK an EU is unlikely to be practicable as Switzerland itself is likely to either lose access to the Single Market or to accept a framework that is similar to the EEA Agreement.

[21] On this, see Parts IV and VI below.

[22] Agreement between the European Economic Community and the Swiss Confederation of 26 July 1989 on direct insurance other than life insurance [1991] OJ L205/3, which became effective on 1/1/1992.

[23] The ten bilateral treaties granting Switzerland partial membership of the Single Market were signed in two phases, the first seven in 1999 and the last three in 2004. They cover areas such as the free movement of persons, technical trade barriers, public procurement, agriculture, air and land transport, and Switzerland's participation in the Schengen and Dublin agreements. For an in-depth discussion of the position of Switzerland vis-à-vis the Single Market, see Stephan, Breitenmoser, *Sectoral Agreements between the EC and Switzerland: Contents and Context* 40 Common Market Law Review 1137 (2003).

[24] See Aydan, Bahadir and Fernando, Garcés de los Fayos, The European Economic Area (EEA), Switzerland and the North (2016) available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.5.3.html accessed 15 Sept 2016.

[25] The referendum resulted in an amendment to the Swiss Constitution. See Federal Constitution of the Swiss Confederation of 18 April 1999, art 121a (inserted by virtue of the referendum by the Federal Council Decree of 13 May 2014).

IV. The Right of Establishment: UK and European Companies

The EU law foundation of unconstrained cross-border corporate activity is the right of establishment which is part of the free movement of people framework. In short, any restrictions in the freedom of a national of a Member State to pursue economic activity in another Member State are prohibited including the rights to work as self-employed, and to set up a company, agency, branch or subsidiary.[26] This right is evidently also enjoyed by companies or firms (other than those who are non-profit-making) whose registered office or centre of administration is within the EU.[27] As a result, a UK company can establish itself, and operate an agency branch or subsidiary in the territory of any Member State and vice versa. In addition, UK citizens can set up a company in another Member State or invest in the capital of such a company in the same way as the citizens of that Member State[28] and vice versa.

1. The Partial Abolition of the Real Seat Doctrine and the Benefits to the UK

One particular barrier to cross-border corporate activity which has been partially removed due to the right of establishment is the so-called real seat doctrine followed by many Member States.[29] This is a conflict of laws[30] rule establishing that the law applicable to a body corporate is the law of the country where the body corporate has its actual centre of administration.[31] In

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[26] TFEU, art 49.
[27] TFEU, art 54.
[28] This is also explicitly stipulated by TFEU, art 55.
[29] The traditional dichotomy between real seat and incorporation countries does not reflect the full complexity of the various national legal arrangements that often combine elements of both. In Italy, for instance, the real seat doctrine is applied to foreign companies that move their centre of administration in Italy while the incorporation doctrine is applied to Italian companies that move their centre of administration abroad. One can thus distinguish between countries that strictly follow the real seat theory and countries that follow a mixed approach, which are however, closer to the real seat theory vis-à-vis the treatment of foreign-incorporated companies. In this sense, pure real seat countries are Austria, Belgium, Cyprus, Slovenia, Spain and Romania, while the following countries follow a mixed approach: France, Germany, Greece, Italy, Luxembourg, Poland and Portugal. See Blanca, Ballester, and Micaela, del Monte, *European Added Value Assessment: Directive on the Cross-Border Transfer of a Company's Registered Office (14th Company Law Directive)* PE 494.460 EAVA 3/2012 at 13 (2013).
[30] Conflict of laws or private international law is the area of domestic law that regulates the applicable national law and competent jurisdiction with regard to a person, relationship or transaction.
[31] A precise and succinct statement of the real seat doctrine as it applies in Germany can be found in the ruling of the ECJ in *Uberseering* (below n 38) at 4:

> According to the settled case-law of the Bundesgerichtshof, which is approved by most German legal commentators, a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established ('Sitztheorie' or company seat principle), as opposed to the 'Gründungstheorie' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany. Since a company's legal capacity is determined by reference to German law, it

contrast, according to the incorporation doctrine,[32] a body corporate is governed by the law of the country where it was incorporated,[33] irrespective of the location of its centre of administration or of its principal business activities. Evidently, while the incorporation doctrine is perfectly consistent with the free movement of companies within the EU as it allows for a change in the centre of administration without reincorporation and the incorporation *ab initio* of a company in a jurisdiction other than the one where its centre of administration will be, the same is not the case with regard to the real seat doctrine. Absent EU law, a country following the real seat doctrine will treat a company that is incorporated elsewhere, but has its main centre of administration in its territory, as an entity governed by its own company law and hence it is likely that the company's legal personality will not be recognised due to failure to comply with the relevant legal requirements. In parallel, a real seat country will stop recognising the legal personality of a company incorporated under its company law which has moved its centre of administration abroad. This has the additional consequence that the country to which the centre of administration is moved will also not recognise the company's personality, if it is following the incorporation doctrine, as the company is no longer recognised as such by its country of incorporation.

The above state of affairs led to a string of ECJ cases where the court took a relatively bold approach to ensure the effective protection of the freedom of establishment. In brief, a Member State cannot *prima facie* refuse to recognise the validity of a company which has been duly incorporated in another Member State on the grounds that the company has its real seat in the former Member State or that it was incorporated abroad with the sole purpose of bypassing national legislation. This was the effect of the decisions of the ECJ in three landmark cases.[34] In *Centros*[35] two Danish citizens registered a private company limited by shares in England and

cannot enjoy rights or be the subject of obligations or be a party to legal proceedings unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law.

[32] This is followed by Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Slovakia, Sweden and the UK. See Ballester and del Monte (above n 29), 13. The incorporation theory is also followed by the EEA States and Switzerland, Russia, the USA and most common law jurisdictions. See Paul, Storm, *Scope and Limitations of the Cross-Border Mergers Directive* in Dirk, Van Gerven (ed), *Cross Border Mergers in Europe* at 57 (Cambridge, CUP, 2010).

[33] See above n 31.

[34] See Tobias Georg, Schmidt, *Founding Limited Companies (Ltds) in Germany: Perspectives and Risks* at 11 – 18 (Hamburg, Salzwasser Verlag, 2007). See also Caspar, Behme, *The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies* 13 European Company and Financial Law Review 31, esp 42 – 49 (2016).

[35] Case C-127/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR, I-1459.

sought to register a branch in Denmark where the company exclusively conducted its business. The Danish authorities refused to register the branch on the grounds that the only reason the company was incorporated in the UK was to circumvent the minimum capital requirement in Danish company law of DKR 200,000. The ECJ ruled that for a company to have its registered office in a Member State where it conducts no business is not *per se* tantamount to abuse or fraud,[36] and that the refusal of a host Member State to register a branch on the aforementioned grounds contravenes the TFEU provisions on freedom of establishment.[37] It is interesting to note that in this case the issue of the relationship between the real seat doctrine and freedom of establishment did not arise as both the UK and Denmark follow the incorporation doctrine.

The real seat issue arose in *Uberseering*[38] where a Dutch company was – after several years of trading – acquired by two German citizens residing in Germany and was refused *locus standi* when it attempted to sue a German company for breach of contract on the grounds that it had not been re-incorporated in Germany when its centre of administration moved there. The court ruled that the requirement of re-incorporation in Germany amounted to an outright negation of freedom of establishment.[39]

Furthermore, in *Inspire Art*[40] the ECJ ruled on the validity of additional conditions imposed on foreign companies by host states. The case involved a company incorporated in the UK but controlled by a Dutch national and trading in the Netherlands. According to Dutch law,[41] such companies had to register as 'formally foreign companies', had to use that phrase in all their legal documents, and had to comply with Dutch minimum capital requirements which at the time of litigation was €18,000. The court ruled that the imposition of these additional requirement by Dutch law had the effect of rendering Dutch company law rules on minimum capital and directors' liability mandatory for all companies considered as formally foreign and therefore interfered with their freedom of establishment.

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[36] See *Centros*, para 29.
[37] See *Centros*, para 30.
[38] Case C-208/00 *Uberseering BV v Nordic Construction Baumanagement GmbH* [NCC] [2002] ECR I-9919. An in-depth doctrinal analysis of the case can be found in Nicole, Rothe, *Freedom of Establishment of Legal Persons within the European Union: An Analysis of the European Court of Justice Decision in the Uberseering Case* 53 American University Law Review 1103 (2004). See also Thomas, Bachner, *Freedom of Establishment for Companies: A Great Leap Forward* 62 The Cambridge Law Journal 47 (2003).
[39] See *Uberseering*, para 81.
[40] Case C-167/01 *Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.
[41] Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 (Staatsblad 1997 No 697) articles 1 – 4.

In all the above cases the finding of a *prima facie* interference with or negation of the relevant company's freedom of establishment was followed by a finding that the national rules in question were not exceptionally justifiable as legitimate restrictions in the public interest based on the general principles of EU law. In particular the court clarified that:

> National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a *non-discriminatory* manner; they must be justified by imperative requirements in the *public interest*; they must be *suitable* for securing the attainment of the objective which they pursue, and they must not go beyond what is *necessary* in order to attain it.[42](emphasis added)

Applying these principles, the ECJ ruled that selecting the legal regime within the EU that is – in the opinion of the incorporators – most appropriate to set up a company is an inherent feature of the single market and does not constitute an abuse of right or fraudulent behaviour in any way.[43] As a result, Member States that follow the real seat doctrine can no longer require foreign companies which move their centre of administration into their territory to re-register under their own laws. More importantly, countries following the real seat doctrine cannot stop their citizens from incorporating companies abroad with the sole aim of doing business domestically. The latter possibility has meant that a form of regulatory competition[44] has emerged in recent years within the EEA. Indeed, available evidence indicates that most companies that have been incorporated in a country other than the one where they intend to trade have chosen the UK as their country of incorporation, and are trading in Member States with significant minimum capital requirements or which prescribe a costly and/or lengthy procedure

[42] Inspire Art, para 133.
[43] '[T]he fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.' See Inspire Art, para 138.
[44] There is rich literature on regulatory competition to attract incorporations amongst American States. See e.g. Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation* 6 JLS 251 (1977), and Frank Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence* 9 Delaware Journal of Corporate Law 540 (1984) who is in favour of the phenomenon. The opposite view is taken by scholars such as Bebchuk. See Lucian, Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law* 105 Harvard Law Review 1435 (1992). For a comparison of the phenomenon of forum shopping by companies in the US and Europe, see Federico M, Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU* 20 Tulane Journal of International and Comparative Law 421 (2012).

to set up a company.[45] This phenomenon has been particularly strong in Germany where incorporating an English private company has now become a widely-used alternative to incorporating a GmbH.[46]

All the aforementioned cases are cases where a foreign-incorporated company is entering a Member State. The ECJ followed a different approach in cases where a company incorporated in a Member State wishes to transfer its centre of administration abroad and the Member State of formation restricts this move usually by requiring the company to get liquidated (exit cases). As companies are the creatures of national law, the court has consistently ruled that restricting their ability to move their centre of administration outside their country of incorporation while still being governed by the law of that country does not constitute a breach of the right of establishment.[47] However, there is a crucial qualification added in the *Cartesio* case, which facilitates cross-border activity. In the case that a company transfers its real seat to another Member State and the law of the State where the seat is transferred stipulates that the company is to be governed by the same, the Member State of origin cannot impose on the company, which is now governed by the law of another Member State, an obligation to undergo a winding up or liquidation.[48] Companies can therefore move their real seats from one country that adopts the real seat doctrine to another member state and maintain their legal personality. But they are converted to a form of company recognised by the law of the state where they move their real seat. It follows that this rule does not help companies incorporated in a real seat State to transfer their centre of administration into the UK as the UK follows the incorporation doctrine and hence the law of the State of origin remains applicable and the company loses its personality.

It is worth noting that the trend of incorporating in the UK in order to evade the restrictive provisions of continental European company laws was strong enough to instigate legal reforms in several countries including France, Germany, Hungary, Poland and Spain.[49] Since 2003 in France and since 2008 in Germany it is possible to incorporate a special type of private

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[45] See Lars, Hornuf, *Regulatory Competition in European Corporate and Capital Market Law: An Empirical Analysis,* 20 – 29 (Cambridge, Intersentia, 2012).
[46] It is notable that in Germany until 2008 the only way to create a body corporate with limited liability was to set up a GmbH which required a minimum capital of €25,000 and that forming a company involves using the services of a notary which renders the process relatively slow and expensive.
[47] This principle was established in *Daily Mail and General Trust plc* [1988] ECR 5483 and was reaffirmed in Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.
[48] See *Cartesio*, paras 111 – 113.
[49] See Simeon, Djankov, *The Regulation of Entry: A Survey* 24 The World Bank Research Observer 183 (2009).

limited liability company with a legal capital of €1 and in Hungary and Poland the minimum capital prescribed for private limited companies has been reduced significantly. In Hungary and Spain low-cost electronic formation of companies has also been introduced. Despite these reforms, the UK remains an extremely attractive place of incorporation[50] as it combines the following features: (a) absence of any minimum capital requirement for private companies; (b) very cheap and quick electronic formation of companies; and (c) very low overall cost of commencing business in the UK.[51] This is beneficial to the UK economy as it generates tax revenue and professional fees. A withdrawal from the EEA would terminate the right of establishment for UK and EEA companies and would thus lead to a loss of the aforementioned benefits accruing to the UK.

2. The possibility to set up branches: facilitating the provision of services abroad

A crucial aspect of the freedom of establishment is the right to set up branches in other Member States. The concept of a branch, which derives exclusively from EU law, is somewhat obscure. The 11th Company Law Directive[52] which imposes a number of disclosure obligations

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[50] Between 1997 and 2006 approximately 120,000 companies with main centre of operations in another EEA Member State were incorporated in the UK. The ECJ decision in *Centros* had a material effect in the number of EEA businesses choosing the UK as their country of incorporation: before *Centros* (since 1997) there were on average 4,400 such incorporations per annum while after *Centros* (until 2006) there were 28,000 such incorporations per annum. Many of these companies have their main operations in Germany (48,000 in total and 16,438 in 2006) other popular countries of origin being the Netherlands, Norway and France. See Becht, Marco, Coli, Mayer and Hannes F, Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, 14 Journal of Corporate Finance 241 (2008). Although there is no clear evidence on the impact of German legal reforms in 2008 it seems that a substantial number of German businesses continued to choose the UK as their country of incorporation in the 2008-2010 period. See Hornuf (above n 45) 26. In parallel, a considerable number of public companies incorporated in the UK operate mostly in other Member States. Available evidence on companies traded on the Alternative Investment Market shows that 17 companies are incorporated in the UK but do most of their business in other EEA States (mostly in Germany, the Netherlands, Ireland, Finland, and Greece). The popularity of the English legal system is further evinced by the fact that a further 17 AIM companies that operate mostly in EEA countries have been incorporated in a UK Crown Dependency or Overseas Dependent Territory. See London Stock Exchange Group, AIM: Country of Operation & Country of Incorporation: July 2016 (2016) available online at http://www.londonstockexchange.com/statistics/historic/aim-country-of-operation-and-incorporation/aim-companies-country-of-operation.htm accessed 15 Sept 2016.

[51] In the UK the average cost of setting up a business as a limited liability company was estimated at €370 in 2012 while the average cost in the EU was €2,020. The most expensive EU Member States to start up a business are Italy (€8,950), Greece (€7,000), Cyprus (€5,580), the Netherlands (€3,810), Austria (€3,490), Belgium (€3,340), Poland (€3,010), and Germany (€2,820). See Ballester and del Monte (above n 29) 32.

[52] Eleventh Council Directive (89/666/EEC) 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 [1989] OJ L395/36 (to be abbreviated as the '11th Company Law Directive') as amended by Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012, amending Council Directive 89/666/EEC and Directives

to branches does not provide a definition. The ECJ has not provided a definition of the term branch in the Treaty, but has provided interpretations of the term as used in several Directives. According to one such definition:

> [A branch] implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not deal directly with the parent body.[53]

It therefore follows that a branch must at least have a physical presence and include individuals with the authority to enter into transactions with third parties on behalf of the overseas company.

Branches facilitate economic activity abroad as they ensure that a foreign company can acquire an establishment without infringing national laws and without having to set up a subsidiary company. Unsurprisingly there are numerous branches of overseas companies registered throughout the EU. In the UK as of 2012 there were more than 10,000 registered branches of EEA companies.[54] It follows that a withdrawal from the EEA would terminate the possibility of countries from the rest of the EU and EEA to set up branches in the UK and *vice versa* unless special bilateral treaties replicated the current effect of EU law.

A related issue of crucial importance for the UK is the EU framework on overseas branches of financial institutions and on the direct offering of services abroad. The financial sector accounts for approximately 10% of the UK GDP[55] and is heavily export-oriented. In parallel, London's position as a global financial centre is strengthened by the operation of branches of EEA banks and other financial institutions. Banks, insurance firms and investment firms that are authorised to perform regulated activities in one Member State can offer their

2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers [2012] OJ L156/1. The Directive is currently implemented in the UK by the Overseas Companies Regulations 2009 (SI 2009/1801) which requires branches or establishments of EEA companies to register with the Companies House.

[53] Case 139/80 *Blanckaert & Wilems*, para 11.

[54] See Karsten, Engsig Sørensen, *Branches of Companies in the EU: Balancing the Eleventh Company Law Directive, National Company Law and the Right of Establishment* 11 European Company and Financial Law Review 53 at 61 - 62 (2014).

[55] See Stephen Burgess, *Measuring Financial Sector Output and Its Contribution to UK GDP 2011,* Bank of England Quarterly Bulletin 234, 234-235 (2011).

services directly or through a branch in any other Member State[56] insofar as the competent authority of the host State is notified, based on the provisions of the relevant piece of EU law regulating the activity in question.[57] The right to offer services abroad without presence in the other Member State emanates from the free movement of services,[58] while the right to set up a branch emanates from the freedom of establishment.

A withdrawal of the UK from the EU and EEA would lead to the loss of the automatic freedom to set up branches and offer services to customers in other Member States for UK based financial sector firms, which would be particularly alarming for the UK economy as financial services accounts for a considerable part of UK exports.[59] It would also end the possibility of UK-incorporated companies to set up branches freely in the EEA and would probably make it necessary in many cases to set up subsidiaries in the relevant countries. Such changes would be particularly detrimental to the attractiveness of London as a place for non-EU companies to set up their European headquarters.[60] Currently a non-EU multinational corporation can set up a subsidiary in the UK and base its headquarters in London (to take advantage of London's professional services, multinational labour market and English legal system) and then set up branches in other EU Member States and pursue economic activities there. In other words, choosing London combines the benefits of the English legal system and City financial expertise with full and unfettered access to a huge market of more than half a billion consumers. If this

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[56] This is governed by Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents [1989] OJ L44/40.

[57] A number of Directives include passporting provisions the most significant of which are listed below: (a) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1 (to be abbreviated as 'MiFID'); (b) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338; (c) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) [2009] OJ L335/1; (d) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1; and (e) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L174/1.

[58] TFEU, art 56.

[59] Exports of financial services accounted in the second quarter of 2016 for more than 20% of the total value of exports of services. See *UK Trade,* June 2016 (above n 4) at 24.

[60] On this, see above n 6 and accompanying text.

possibility is lost and establishing elsewhere in the EU becomes more burdensome, the dominance of London as the preferred place for multinational corporations' European headquarters would be severely challenged.

V. The Legal Framework on Cross-Border Mergers and Acquisitions within the EU and the Benefits for UK Companies

Having explored the potential impact of Brexit on the right of establishment of UK companies, this part turns to the EU legal framework that aims to facilitate corporate amalgamations across the EU. It has been longstanding EU policy to create a vivid internal market for corporate control by way of takeover or merger, and a new legal form the *societas europaea* (European company) has been introduced to facilitate such transactions. The UK has been influential in the drafting of some of the relevant legislation, most notably of the Takeover Directive, and has been one of the main countries which have been attracting companies relocating their registered offices and headquarters.

The Takeover Directive[61] is an area of law where the UK's potential withdrawal from the EU and EEA cannot possibly have much effect for the simple reason that it applies to takeover bids with regard to companies governed by the law of any Member State whose securities are traded on a regulated market in any Member State, irrespective of the nationality of the bidder.[62] As a result, UK companies will still be able to enjoy the same legal protection as they currently do when they seek to take over an EEA company. This, of course, assumes that the UK will continue its current policy of outlawing any defensive measures without the consent of the targets' shareholders and of not discriminating between domestic and foreign bidders.[63] This is important because the Directive allows Members States to put in place a condition of mutuality with regard to the crucial no frustration principle so that if the bidder company is not bound by

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[61] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12 (to be abbreviated as the 'Takeover Directive'). The Directive has been implemented in the UK via Part 28 of the Companies Act 2006 which delegates responsibility to issue and enforce rules on takeovers to the Takeover Panel. The relevant rules are contained in the City Code on Takeovers and Mergers (to be abbreviated as the 'Takeover Code') which was most recently amended in May 2013 (11th edition), and is available online at http://www.thetakeoverpanel.org.uk/the-code/download-code accessed 15 Sept 2016. For a critical evaluation of the Directive, see Paul L, Davies *et al*, *The Takeover Directive as a Protectionist Tool?* in Ulf, Bernitz and Wolf-Georg, Ringe, *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford, OUP, 2010).
[62] Takeover Directive, article 1(1).
[63] As it is currently set out in the Takeover Code, Rule 21.

the no frustration principle the target is not bound either.[64] That being said, if the UK remains part of the EEA, the Directive will remain fully applicable. If, however, the UK attempts to follow the Swiss model or fully exits the Single Market, the Directive will cease to apply allowing for greater flexibility in the future design of UK takeover regulation. In practice, it is unlikely that the UK regulatory framework will change – at least in the short-term – and therefore it will continue to apply as it currently stands in cases where a UK listed company is the target of a takeover bid launched by an EEA company.[65]

A rather different picture emerges with regard to the possibility of effectuating true legal mergers involving UK and EU companies. The Cross-Border Mergers Directive[66] enables two or more companies to merge into a new body corporate (merger by formation of a new company),[67] or one company to absorb one or more companies (merger by absorption),[68] provided that at least two of the companies involved are governed by the laws of different Member States.[69] The Directive applies to transactions where the companies that merge into another are dissolved without going into liquidation and their shareholders receive shares in the resulting company as consideration for their shares, with the additional possibility of a cash component of up to 10% of the nominal value of their share capital,[70] unless the law of a Member State allows a higher cash component.[71] The Directive requires the resulting company to comply with the relevant

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[64] Takeover Directive, article 12(3).

[65] In theory, once the Directive stops being applicable the UK could adopt a protectionist approach with regard to takeovers of UK companies by foreign companies. This, however, is extremely unlikely to happen in the foreseeable future given the traditional stance of the UK in favour of an active market for corporate control and the way takeovers are regulated by the Takeover Panel which represents the interests of institutional investors. On this, see John, Armour and David A, Skeel, *Who Writes the Rules for Hostile Takeovers, and Why - The Peculiar Divergence of U.S. and U.K. Takeover Regulation* 95 Georgetown Law Journal 1727, esp 1767 – 1776 (2007). Within the scope of this article, it is not possible to do justice to the rich legal and economic academic literature on the market for corporate control. As Moore observes, scholars of the contractarian school of thought tend to view hostile takeovers positively as a useful corporate governance tool. See Marc, Moore, *Corporate Governance in the Shadow of the State*, Chapter 3 (Oxford, Hart Publishing, 2013).

[66] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJL 310/1 (to be abbreviated as the 'Cross-Border Mergers Directive'). The Directive has been implemented in the UK by The Companies (Cross-Border Mergers) Regulations 2007 S.I. 2007/2974, which came into force on 15 December 2007 (to be abbreviated as the CBM Regulations).

[67] See Cross-Border Mergers Directive, art 2(2) (a) and (c), and CBM Regulations, Reg 2(2) and 2(3). When the entity absorbed is a wholly-owned subsidiary of the absorbing company the process is simplified as set out in art 15(1) of the Directive.

[68] See Cross-Border Mergers Directive, art 2(2) (b), and CBM Regulations, Reg 2(4).

[69] Cross-Border Mergers Directive, art 1.

[70] Cross-Border Mergers Directive, art 2(2) (a) and (b).

[71] Cross-Border Mergers Directive, art 3(1). UK law does not impose any upper limits to the amount of cash consideration that can be offered in the context of a cross-border merger. See CBM Regulations.

provisions of national law and prescribes a process of approval of the draft terms of the merger by a national court at two stages.[72]

If the UK does not join the EEA, the Directive will cease to apply which means that there will be no longer a way for a UK company and an EEA company to merge into one legal person. Granted, there have been few instances of UK companies participating in cross-border mergers as the common approach is to simply take over or be taken over by a foreign company so that the target becomes a wholly-owned subsidiary but retains it separate corporate personality. However, the Directive has had some use as is evinced by the fact that it has generated case law in the UK,[73] and therefore its demise would mean that UK companies would lose a potentially useful legal mechanism with regard to cross-border amalgamations.

Furthermore, cross-border amalgamations involving EEA companies and transfers of companies registered offices can be achieved using a new type of body corporate governed directly by EU law. The European Company Regulation[74] allows for the creation of a *societas europaea* (SE) or European company, which is essentially a public company limited by shares, in the following ways: (a) merger by formation of an SE involving at least two public companies that are governed by the laws of different Member States;[75] (b) creation of an SE as a holding company of at least two companies which are governed by the laws of different Member States or which both have had (for a period of two years) subsidiaries governed by the law of another Member State or branches in another Member State;[76] (c) creation of an SE as a joint subsidiary of at least two companies or other legal persons governed by private or public law, with the features described above in (b);[77] and (d) transformation of a public company into an SE provided that it has had for two years a subsidiary governed by the law of a different Member State.[78] In all the above cases the companies that participate in the formation of an SE must *prima facie* have both their registered office and head office within the EEA but they need not

[72] Cross-Border Mergers Directive, arts 10 – 11.
[73] See e.g. *In re Olympus UK Ltd and others* [2014] EWHC 1350 (Ch) where the court ruled that a merger involving companies belonging to the same corporate group fell within the scope of the Directive despite the fact that consideration for the shares of the transferor companies was waived.
[74] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/1 (to be abbreviated as the 'SE Regulation') which is directly applicable to Member States and came into force on 8 October 2004.
[75] SE Regulation, art 2(1).
[76] SE Regulation, art 2(2).
[77] SE Regulation, art 2(3)
[78] SE Regulation, art 2(4). An SE can also be formed as a subsidiary of another SE.

have their head office in the EEA if a Member State so allows provided that they are governed by the law of that Member State, have their registered office in that Member State and have a real and continuous link to that State's economy.[79] An SE's share capital must be denominated in euros and must be no less than €120,000 and its registered office must be in any Member State, the law of that State applying to the SE on all matters save for matters covered by the Regulation or by national laws implementing EU law on SEs.[80] Following the real seat doctrine, an SE must have its head office (i.e. centre of administration) within the same Member State as its registered office. However, SEs are enabled to move their registered offices to another Member State without having to go into liquidation and re-register.[81]

Empirical evidence suggests that SEs have been relatively popular in Member States that impose mandatory employee representation on corporate boards. Most SEs have been incorporated in the Czech Republic, Germany, the Netherlands and Austria while only a few have been incorporated in the UK.[82] Still, SEs are also a legal mechanism for a company to move its registered office and centre of administration, which is particularly useful for companies incorporated under the laws of a Member State that follows the real seat theory. A significant number of SEs have made use of this possibility and the country that has attracted most moves of registered offices is the UK.[83] It follows that although the SE is not a particularly useful business form for UK originating businesses, given the flexible and permissive domestic company law of the UK, the UK benefits from the SE Regulation as it allows businesses originating from other Member States to transfer their centre of administration into the UK and it facilitates amalgamations involving UK and other Member State companies. As is the case with the Cross-Border Mergers Directive, if the UK joins the EEA the SE Regulation will continue to apply. If,

[79] SE Regulation, art 2(5)
[80] SE Regulation, art 9. In addition, according to art 10, an SE is entitled to be treated in the same manner as a public limited company governed by the law of the Member State in which it has its registered office.
[81] SE Regulation, art 8. Article 8 prescribes the process by which a transfer of registered office can be effected. Broadly speaking, the administrative organ of the SE must draft a proposal and a report explaining and justifying the legal and economic consequences of the transfer on shareholders, creditors and employees, and the proposal must be approved by both the shareholders and creditors of the SE.
[82] Between 2004 and 2008, 216 SEs were formed across the EU, of which 74 in Germany, 62 in the Czech Republic, 19 in the Netherlands, 10 in Austria, 9 in Belgium, 7 in France, 2 in the UK and none in Italy and in 11 other Member States. See Hornuf (above n 45) 74.
[83] Between 2004 and 2012 69 SEs moved their registered office to another Member State. The most popular destinations were the UK (14 SEs), Luxemburg and Austria (10 SEs each), and France and Cyprus (6 SEs each). The countries with the highest numbers of SEs moving out of were the Netherlands (17 SEs), Luxembourg (14 SEs), Germany (9 SEs) and Denmark (5 SEs). See Ballester and del Monte (above n 29) 25.

however, it does not, the Regulation will cease to apply and thus it will no longer be possible to set up new SEs in the UK nor to move the registered offices of SEs into the UK.[84] That being said, it appears that any SEs that are already registered in the UK at the time of the cease of applicability of the Regulation will continue to be valid legal persons, recognised by UK law, but they will probably not be recognised as SEs by EU law.

VI. Cross-Border Public Offerings and Listings of Securities within the EU: What is at Stake for UK Companies

The prospect of the UK's withdrawal from the EU casts doubts on the continuing position of the London Stock Exchange as an attractive destination of EEA companies to list their securities, and on the sustainability of the current levels of investment by UK nationals and funds in EU-listed companies and by EU nationals and funds in UK-listed companies.[85] EU law seeks to facilitate the free movement of capital across the territory of the EEA by harmonising national regimes on offering securities to the public and on getting securities admitted to trading to a regulated market.[86] In particular, the Prospectus Directive[87] harmonises the instances in which a

[84] The same will be the case with regard to the ability of UK companies and citizens to participate in a European Economic Interest Grouping (EEIG) which is an association without legal personality which does not engage in significant trade itself and does not manage the companies that participate in it but aims to facilitate or develop the economic activities of its members. See Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) [1985] OJ L199/1.

[85] As of 2014 it is estimated that 54% by value of the shares of UK listed companies was owned by foreign investors of which 26.1% (and thus approximately 13% of the total) was by European investors, which are mostly from the EEA. See Office for National Statistics, *Ownership of UK Quoted Shares: 2014* (2015) available online at http://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2015-09-02 accessed 15 Sept 2016.

[86] The harmonisation of information disclosure requirements for companies whose securities are traded on a regulated market has been achieved by Directive 2004/109/EC of the European Parliament and of the Council 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 [2004] OJ L390/38.

[87] Directive 2003/71/EC of the European Parliament and of the Council 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 [2003] OJ L345/64 (to be referred to as the 'Prospectus Directive') which had to be implemented by Member States by 1 July 2005. In the UK it was implemented by appropriately amending the Financial Services and Markets Act 2000 and the (then) FSA handbook. The Prospectus Directive was amended in 2010 – especially with regard to the conditions that need to be satisfied for an issuer to be exempt from the duty to issue a prospectus – by virtue of Directive 2010/73/EU of the European Parliament and of the Council 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 [2010] OJ L327/1. The amendments were implemented in the UK by the Prospectus Regulations 2011 (SI 2011/1668) which came into force on 31 July 2011.

company must issue a prospectus either due to offering securities to the public[88] or due to being admitted to trade in a regulated market,[89] as well as the content of prospectuses,[90] and ensures that a prospectus that is approved by the competent authority[91] of an issuer's home Member State can be used across all other Member States.

This latter provision is known as the passporting of prospectuses and is of great significance as it allows companies to offer shares to investors situated across the EU and facilitates the listing of securities on multiple stock exchanges in various Member States. In particular, the Directive requires that as soon as a company's securities are lawfully offered to the public and/or admitted to trading in a regulated market in the home Member State the same prospectus can be used to make public offers or obtain admission to trading in any other (host) Member State without having to follow any administrative approval procedure.[92] There is only one procedural requirement, that is, the notification of the competent authority of the host Member State. This is the duty of the authority of the home member state which must so do within three working days after an issuer so requests or – if the request is submitted at the same time as the submission of a draft prospectus for approval – within one working day from the day of the approval.[93] Moreover, the issuer does not have to translate the prospectus in all the official languages of the Member States where it is used. Rather the issuer can choose to provide a prospectus in a language that is customary in international finance – that is in English – and only has to translate the summary of the prospectus in all relevant official languages.[94]

The way the term 'home Member State' is defined thus becomes crucial as it determines the jurisdiction over the approval of a prospectus. The general rule is that the home Member

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[88] Prospectus Directive, art 3(1).
[89] Prospectus Directive, art 3(3). The notion of a regulated market is defined by EU law as 'a multilateral system operated and/or managed by a market operator, which brings together […] multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules'. See, MiFID, art 4(1) (14).
[90] Prospectus Directive, arts 5 – 12.
[91] Each Member State must designate a competent authority. The UK initially designated the Financial Services Authority (FSA) which was the country's unitary financial regulator since 1999. This changed in 2012 when the Financial Conduct Authority (FCA) assumed the role of the UK Listing Authority by virtue of the Financial Services Act 2012. For a detailed discussion of the Act and its rationale, see Andreas, Kokkinis, *The Financial Services Act 2012: The Recent Overhaul of the UK's Financial Regulatory Structure,* International Corporate and Commercial Law Review 325 (2013).
[92] Prospectus Directive, art 17.
[93] Prospectus Directive, art 18.
[94] Prospectus Directive, art 19 (2).

State is the country where the issuer has its registered office.[95] If an issuer's registered office is not within the EEA, the home Member State is either the country where securities are first offered to the public or the country where securities are first admitted to trading on a regulated market at the choice of the issuer.[96] Exceptionally – both for issuers incorporated within the EEA and not – if the securities are non-equity securities and have a nominal value of at least 1,000 euros (or a value nearly equivalent in another currency) the home Member State is either of the three: (a) the country where the issuer has its registered office; (b) the country where the securities are first admitted to trading on a regulated market; and (c) the country where securities are first offered to the public at the choice of the issuer.[97] So the Directive follows the principle that a company's registered office should normally determine the competent Member State to scrutinise the prospectus, thus following the incorporation theory rather than the real seat theory.[98] This is necessarily the case with regard to equity securities such as shares unless the issuer is incorporated in a country outside the EEA where a choice is given between the place of the first public offer and the first place of trading which at any rate are usually the same. Maximum flexibility is allowed in the case of debt or hybrid securities with a high nominal value as in such cases the importance of ensuring adequate investor protection is reduced as retail investors do not normally invest in such securities. So, within this narrow exception there is a direct possibility for regulatory arbitrage. Of course, some regulatory arbitrage can happen in all circumstances as a company may set up a holding company in the Member State of its choice and make the holding company issue the securities in question thus rendering that country the home Member State.

The only case where the full passporting effect of a prospectus ceases is where the competent authority of a host Member State discovers irregularities in the public offer or breaches of applicable law in the admission to trading. In such circumstances the host authority must in the first instance notify the home authority,[99] but if the relevant breach continues despite the measures taken by the home authority, the host authority is allowed to take appropriate

[95] Prospectus Directive, art 2(1) (m) (i).
[96] Prospectus Directive, art 2(1) (m) (iii).
[97] Prospectus Directive, art 2(1) (m) (ii).
[98] For a discussion of these theories see above n 31 and accompanying text.
[99] Prospectus Directive, art 23 (1).

measures to protect investors insofar as it notifies the home authority and the Commission.[100] This exception is evidently a very narrow one and does not detract from the general facilitative policy of the Directive.

If the UK chooses to not be part of the EEA, the beneficial passporting effect of prospectuses will be lost. This will prevent UK companies which are making a public offer of shares in the UK from offering shares to investors in other Member States and EEA companies which are making a public offer of shares in an EEA state from offering them to investors in the UK. This would mean that companies wishing to offer shares to investors abroad would have to satisfy the relevant regulatory requirements in all jurisdictions involved and hence bear the ensuing cost. This would be likely to make companies reluctant to offer shares to investors abroad and thus reduce both the available equity capital pool for UK companies and the available investment opportunities for UK investors. The UK could mitigate these effects by recognising that all prospectuses prepared based on the Prospectus Directive can be used in the UK subject to a duty to notify the PRA and provide a translation in English, but it remains to be seen whether other EEA countries would do the same for UK-approved prospectuses.

In addition to facilitating international offerings of shares, the EU framework also facilitates international listings of securities. If a secondary listing occurs at the same time as an issue of shares in a company's home country the same prospectus can be used for both. And, at any rate, the harmonisation of disclosure requirements for listed companies reduces the regulatory burden of listing securities in multiple EEA States as the same rules apply throughout the EEA. This beneficial effect is economically significant as currently a considerable proportion of companies whose shares are traded on the Main Market and the Alternative Investment Market of the London Stock Exchange are EEA companies.[101] The loss of these benefits would in all likelihood reduce the number of EEA companies that seek a secondary listing in the UK. That being said, the direct effect of a potential UK withdrawal from the harmonised EU

[100] Prospectus Directive, art 23 (2). The general powers of competent authorities to impose sanctions are set out in art 21 and include the suspension or prohibition of a public offer or of an admission to trading, or of trading, and issuing a public statement that an issuer has failed to comply with its obligations.

[101] For instance, in AIM there are currently 57 companies with their main operations in Western Europe and 11 companies with their main operations in Central and Eastern Europe excluding Russia the vast majority of which are from EEA Member States. See London Stock Exchange Group, *AIM: Country of Operation & Country Of Incorporation: July 2016* (2016) available online at http://www.londonstockexchange.com/statistics/historic/aim-country-of-operation-and-incorporation/aim-companies-country-of-operation.htm accessed 15 Sept 2016.

regulatory framework on attracting listings of securities from the EEA may not be very significant as most EEA firms prefer to list at the Alternative Investment Market which is not a regulated market for EU purposes and therefore the common EU rules do not apply. This phenomenon can be attributed to the high cost of compliance with the EU framework for companies that list their shares on a regulated market such as the Main Market of the London Stock Exchange.

More importantly, however, the UK's withdrawal could weaken the ability of London to attract the top holding company of international corporate groups originating from other EEA countries as for these companies listing their shares in multiple European Stock Exchanges and offering shares to investors in multiple Member States is crucial. One way to mitigate these repercussions would be for the FCA to recognise EU law on disclosure obligations as fully equivalent with UK law but again reciprocity cannot be guaranteed especially if the UK tries to reduce the regulatory burden for listed companies.[102] Doing so, of course, would mean that the UK regulatory framework would have to continue mirroring the EU rules so there would be very little scope for reducing compliance cost for companies. These negative effects will apparently be exacerbated by the fact the post-Brexit the UK will not participate in the Capital Markets Union project, unless it joins the EEA. A detailed discussion of the characteristics of the forthcoming Capital Markets Union falls beyond the scope of this paper.[103] Still, it is important to note that its principal policy objective is to facilitate the raising of finance by European companies and especially small and medium-sized enterprises,[104] and that it will entail an extensive reform of the prospectus rules,[105] and the introduction of new European legislation to harmonise national legal frameworks on securitisations.[106]

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[102] Such recognition of equivalence of foreign legal provisions is currently in place with regard to Switzerland (Swiss firms are exempt from complying with DTR5 and from most of DTR4 and DTR 6), and – to a more limited extent –with regard to the United States, Canada and Japan. See FCA, *Equivalence of Non-EEA regimes* 16/06/2016 https://www.fca.org.uk/markets/ukla/regulatory-disclosures/equivalence-non-eea-regimes accessed 15 Sept 2016.

[103] For an in-depth analysis and evaluation of the Capital Markets Union, see Niamh, Moloney, *Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?* 13 European Company and Financial Law Review 376 (2016).

[104] Commission (EC), *Action Plan on Building a Capital Markets Union* COM (2015) 468, 30 September 2015.

[105] Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading' COM (2015) 583, 30 November 2015.

[106] Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council laying down common rules on securitization and creating a European framework for simple, transparent and standardised securitisation' COM (2015) 472, 30 September 2015.

VII. The Consequences on Debt Financing due to a Loss of Benefits Conferred by EU Law on Judgments Recognition and Cross-Border Insolvency

The discussion so far has focused on companies' rights of establishment and on raising equity finance within the EU legal framework but it is also expedient to consider the potential impact of the UK's withdrawal from the EU on debt financing. Debt financing is extremely flexible and does not depend heavily on national legal frameworks as the parties to a relevant contract are free to choose the applicable law that they prefer. In Europe it is indeed very common to select English law as the law governing loan facilities and bonds.[107] Typically contractual parties also stipulate that the courts of the country the law of which they have selected as applicable are to have jurisdiction over any dispute arising from the contract. However, contractual stipulation of the applicable law and selection of the jurisdiction of the courts of a particular country are effective only insofar as the laws of any countries that have a link to the case or where assets are situated recognise the effect of such contractual clauses. This is an area of extensive EU harmonisation.

With regard to the choice of law that governs contracts the Rome I Regulation[108] creates uniform conflicts of law rules across the EU and stipulates that parties to a contract can freely choose the governing law of the contract or of a part of the contract[109] with the exception of several types of contracts involving a weaker party where the range of available options is set out by the Regulation.[110] The Regulation covers all contracts civil and commercial, but does not extend to pre-contractual obligations, obligations arising out of negotiable instruments, agency issues, the constitution of trusts, family relationships, issues of capacity, and company law matters.[111]

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[107] In Germany, France and Italy the majority of corporate bonds are governed by English law. See Hornuf (above n 45) 159 -162.

[108] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (to be abbreviated as the 'Rome I Regulation). Similar provisions apply with regard to non-contractual obligations (torts) by virtue of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[109] Rome I Regulation, art 3(1).

[110] Rome I Regulation, arts 5 – 8 covering the carriage of goods, consumer contracts, insurance contracts and individual employment contracts.

[111] Rome I Regulation, art 1. However, art 9 preserves the applicability of overriding mandatory provisions of the national law of the court that hears a case and, in particular, the applicability of overriding mandatory provisions of the law of the Member State where contractual obligations are to be performed with regard to determining whether performance is unlawful.

Moreover, the creation of a Single Market amongst the Member States requires not only the harmonisation of substantive conflict of law rules, but also the mutual recognition of judgments in civil cases across the EU. To this effect, the Regulation known as the Brussels I Regulation, as it currently stands,[112] seeks to ensure that there is free movement of judgments in civil and commercial matters as a complement to the free movement of goods, services, capital and people. The Regulation applies to all judgments on civil and commercial matters irrespective of the nature of the court or tribunal with the exception of judgments on the capacity of natural persons, family law, wills and succession, insolvency and bankruptcy law, social security and arbitration.[113] As a necessary condition for the automatic recognition of judgments across the EU, the Regulation sets out uniform rules of jurisdiction of national courts within the scope of its application. Broadly speaking, the general rule is that jurisdiction is determined by the domicile of the defendant in a case, irrespective of the defendant's nationality,[114] unless the courts of another Member State have special jurisdiction either in parallel to the state of domicile or excluding the latter, pursuant to the provisions of the Regulation.[115] For the purposes of the Regulation a natural person's domicile is determined by the national law of the country in which the person in question purports to have his domicile.[116] The domicile of a legal person such as a company is determined by its statutory seat (or in the case of the UK, Cyprus and Ireland its registered office), or its central administration or its principal place of business.[117] These criteria apply concurrently so that a company may have up to three domiciles if it is incorporated in a Member State following the incorporation doctrine.[118]

[112] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1 which entered into force on 1 March 2002. Subsequent to a Commission review in 2009, the Regulation was recast in 2012 as the 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 (recast) [2012] OJ L351/1 (to be abbreviated as the 'Brussels I recast Regulation'). The recast Regulation became applicable law on 10 January 2015 with the exception of articles 75 and 76 which became applicable on 10 January 2014.
[113] Brussels I recast Regulation, art 1.
[114] Brussels I recast Regulation, art 4(1). Art 4(2) further provides that Member States must apply to EU nationals who are domiciled in them the same rules of jurisdiction as they apply to their own nationals.
[115] These alternative linking factors are specified in arts 7 – 23 (concurrent jurisdiction) while art 24 sets out the cases that a Member State has exclusive jurisdiction irrespective of the defendant's domicile (e.g. rights *in rem* in immovable property and the validity of bodies corporate).
[116] Brussels I recast Regulation, art 62.
[117] Brussels I recast Regulation, art 63.
[118] A discussion of the notion of domicile in the Regulation can be found in *Ministry of Defence and Support of the Armed Forces for Iran v Faz Aviation Ltd* [2007] EWHC 1042 (Comm). In particular, Langley J – having reviewed applicable precedent – emphasised that the notion of domicile of a legal person in the Regulation is an autonomous

That being said, it is possible for parties to a contract to select the Member State whose courts they want to have jurisdiction (prorogation of jurisdiction) over any disputes arising from the contract or – more generally – from a particular legal relationship. Such agreement is presumed to create an exclusive jurisdiction and must be in writing including by electronic mail or in any form consistent with established practice of the relevant parties or with the relevant usage of international trade.[119] This, however, does not apply to insurance contracts, consumer contacts and employment contracts where mandatory rules of jurisdiction apply with a view to protecting policy holders, consumers and employees from exploitation by their counterparties that tend to be in a stronger negotiating position.[120]

Having harmonised the rules on jurisdiction, the Regulation sets out a broad rule of automatic recognition and enforceability of judgements on civil and commercial matters across the EU. Judgments given in a Member State must be recognised[121] and are enforceable[122] in all other Member States without any special procedure or declaration of enforceability. There is no possibility to review the substance of judgements given in other Member States,[123] but there are some limited exceptions to the duty to recognise and enforce,[124] most notably if the recognition or enforcement would be against public policy in the relevant Member State. The free movement of judgements is further facilitated by providing that, if a judgment orders a measure that is not known in the law of another Member State, that measure is to be adapted to a measure known in the law of the State where recognition or enforcement is sought which has equivalent effects,[125] and by prohibiting the imposition of an obligation to pay a deposit or security on grounds of nationality or domicile to the party that seeks recognition or enforcement abroad.[126]

Furthermore, there is a strong special conflict of law and judicial cooperation framework with regard to insolvency law aiming to facilitate cross-border insolvency proceedings and to preclude forum shopping that could harm the interests of creditors. Indeed, the Insolvency

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concept, and is completely different from the common law concept of individual domicile. It was also held that a company need not have a centre of administration or a place of business at all as will be for instance if it is dormant, and that the relevant time for the determination of a court's jurisdiction is the time that proceedings are issued.

[119] Brussels I recast Regulation, art 25.
[120] Brussels I recast Regulation, arts 10 – 23.
[121] Brussels I recast Regulation, art 36.
[122] Brussels I recast Regulation, art 39.
[123] Brussels I recast Regulation, art 52.
[124] Brussels I recast Regulation, art 45 on refusal of recognition and art 46 on refusal of enforcement.
[125] Brussels I recast Regulation, art 54.
[126] Brussels I recast Regulation, art 56.

Regulation[127] applies to all types of collective insolvency proceedings known by the laws of the Member States with the exception of those involving banks, insurance companies and investments companies,[128] as these are dealt with by special rules.[129] With regard to jurisdiction, the Regulation stipulates that it is the courts of the Member State in which the debtor has his centre of main interests that have jurisdiction to open main insolvency proceedings.[130] For bodies corporate it is presumed that the place of their registered office (country of incorporation) is also their centre of main interests. The Regulation thus relaxes its *prima facie* adherence to the real seat theory as insofar as the presumption is not rebutted jurisdiction depends on a company's place of incorporation.

In parallel, there is the possibility to commence proceedings in other Member States if the debtor has an establishment there, but the effect of such proceedings in restricted to assets that are located in that Member State.[131] The notion of establishment is broad including not only a branch but any place where non-transitory economic activity occurs.[132] Such proceedings must normally be opened after the main proceedings unless the latter either cannot commence due to the law of the relevant Member State; or a creditor with a domicile, habitual residence or registered office in a Member State where the debtor has an establishment so demands.[133] Any proceedings that are opened subsequent to the opening of main proceedings are secondary proceedings and they must be winding up proceedings only.[134]

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[127] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1 which has been in force since 31 May 2002 (to be abbreviated as the 'Insolvency Regulation'). The Regulation will be replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) once the latter becomes applicable, that is, for most of its provisions on 26 June 2017. An evaluation of the reforms brought by the recast Regulation can be found in Federico M, Mucciarelli, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?* 13 European Company and Financial Law Review 1 (2016).
[128] Insolvency Regulation, art 1.
[129] For banks the relevant framework is provided by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L173/190. A detailed examination of this framework fall outside the scope of the present paper which focuses on general corporate activity rather than on banking and financial regulation as such.
[130] Insolvency Regulation, art 3(1).
[131] Insolvency Regulation, art 3(2).
[132] Insolvency Regulation, art 2 (h).
[133] Insolvency Regulation, art 3(4).
[134] Insolvency Regulation, art 3(3). Winding up proceedings are defined in art 2 (c) as proceedings that aim at realising the debtor's assets. Annex B provides a list of such proceedings in the various Member States.

There is a set of special procedural rules applying to secondary proceedings. Broadly speaking, the court that opens secondary proceedings must stay the proceedings for up to three months upon the request of the liquidator of the main proceedings unless such stay is manifestly against the interests of the creditors in the secondary proceedings, but may require the liquidator of the main proceedings to take appropriate measures to safeguard the interests of the creditors in the secondary proceedings.[135] Crucially, if any assets are left at the end of a secondary winding up, such assets must be transferred to the liquidator of the main proceedings.[136] All relevant liquidators have a duty to cooperate and exchange information.[137] It is worth noting that the recast Insolvency Regulation – when it becomes effective – will further strengthen cooperation between insolvency practitioners and courts most notably in the case of corporate groups, and will introduce group coordination proceedings at the option of the relevant insolvency practitioners responsible for each group member.[138]

Within the scope of the Regulation, insolvency proceedings instigated in one Member States must be recognised by all other Member States irrespective of whether the particular debtor would have capacity to enter such proceedings in national law.[139] In this context, recognition means that the judgment that opens the proceedings has the same effects in other Member States as it has in the national law of the court,[140] and that the relevant liquidator can exercise all the powers conferred to him by national law in any other Member State insofar as secondary proceedings have not commenced in that State.[141] The latter provision applies only to liquidators appointed by a court of the Member State where the debtor has its centre of activity, while in the case of liquidators appointed by a court of a Member State where the debtor has an establishment can only pursue legal action in another Member State if property was moved from the former to the latter.[142]

As far as the applicable law is concerned, the solution given is simple and *prima facie* effective: insolvency proceedings are governed by the law of the Member State the courts of

[135] Insolvency Regulation, art 33.
[136] Insolvency Regulation, art 35.
[137] Insolvency Regulation, art 31.
[138] Insolvency recast Regulation, arts 56 – 77.
[139] Insolvency Regulation, art 16.
[140] Insolvency Regulation, art 17.
[141] Insolvency Regulation, art 18(1).
[142] Insolvency Regulation, art 18(2).

which have opened the proceedings.[143] In this way national courts apply their own law. The main exception to this rule is with regard to rights *in rem* of creditors and third parties (including property rights that are only known by the common law such as floating charges and beneficial ownership) which are not affected by insolvency proceedings,[144] and contracts for the transfer of title or use of immovable property that are governed by the law of the Member State where the property is situated.[145]

The aforementioned provisions have harmonised Member States' national regimes on the governing law of contracts and jurisdiction on commercial disputes and insolvency proceedings to the benefit of businesses which are allowed broad freedom to choose the applicable law and the courts of the State they prefer, and enjoy legal certainty. In particular, the ability to enforce judgments in all Member States makes it easier to reach more of the assets of a debtor and thus reduces counterparty risk and the cost of lending. If the UK leaves the EU and the EEA, the most notable problems will arise in the area of the recognition and enforceability of judgments, the ability to choose the jurisdiction of any Member State on civil and commercial disputes, and the coordination of insolvency proceedings of corporate groups. Conversely, as the Rome I Regulation applies to all contracts irrespective of the nationality or domicile of the parties, the UK will continue to benefit from its rules. The negative effect for UK companies will probably be most serious with regard to cross-border insolvency cases. It is worth noting that although the UK has now adopted the UNCITRAL Model Law on cross-border insolvency[146] most EEA Member States have not,[147] and hence such matters will have to be resolved via bilateral agreements.

[143] Insolvency Regulation, art 4(1). Paragraph (2) provides an indicative enumeration of matters on which the law of the court that opened the proceedings applies including *inter alia*: conditions to open proceedings, capacity of the debtor to be made insolvent; scope of assets that form part of the debtor's estate; effect of insolvency on current contracts; effect of insolvency on the ability of creditors to bring individual litigation; the powers of the liquidator; the process to lodge a creditors' claim; the distribution of assets to creditors; and the closing of proceedings.
[144] Insolvency Regulation, art 5.
[145] Insolvency Regulation, art 8.
[146] The Model Law was implemented in Great Britain (England and Wales and Scotland) by The Cross-Border Insolvency Regulations 2006 SI 2006/1030, which entered into force on 4 April 2006. An in-depth comparative analysis of the Model Law can be found in Jay Lawrence, Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation* 76 American Bankruptcy Law Journal 1 (2002).
[147] Out of 30 EEA Member States (apart from the UK) only Greece, Poland, Romania and Slovenia have adopted the Model Law so far. See UNCITRAL, *Status UNCITRAL Model Law on Cross-Border Insolvency (1997)* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html accessed 15 Sept 2016.

VIII. Conclusions: The Value of EEA Membership for UK Companies

Having reviewed the contribution of various areas of EU law to the creation of a harmonised EEA-wide legal framework for cross-border corporate activity it becomes clear that EU law brings a range of legal and economic benefits to UK companies and the UK economy. It facilitates the raising of both debt and equity capital, facilitates investment in the UK by EEA and third country businesses, and improves the attractiveness of London as Europe's largest financial centre. The majority of these benefits will only continue to be available after the withdrawal of the UK from the EU if the UK joins the EEA. Doing so would most likely mean that the UK will have to abandon any demand for restrictions on the free movement of people which is currently politically difficult given the dominant interpretation of the referendum result as a vote against migration from the EU. Still, given the multiple legal and economic benefits of EEA membership for the UK, it is hoped that the country's unfettered access to the Single Market will be preserved. It is very difficult to predict at present whether this will ultimately be the case. If it is not, it will be expedient for the UK to try to establish the most proximate relationship possible with the Single Market in order to secure the continuation of as many as possible of the benefits identified herein.