Maastricht Centre for European Law

Master Working Paper

2018/11

Thomas Devine

The End of the 'European Delaware'

UK Limiteds in the EU after Brexit

All rights reserved

No part of this paper may be reproduced in any form

Without the permission of the author(s)

The MCEL Master Working Paper series seeks to give excellent Master students the opportunity to publish their final theses and to make their work accessible to a wide audience. Those wishing to submit papers for consideration are invited to send work to: mcel@maastrichtuniversity.nl
Our submission guidelines and further information are available at:
https://www.maastrichtuniversity.nl/research/institutes/mcel/mcel-publications#master

© THOMAS DEVINE

Published in Maastricht, November 2018

Faculty of Law
Maastricht University
Postbox 616
6200 MD
Maastricht
The Netherlands

This paper is to be cited as MCEL Master Working Paper 2018/11

Table of Contents

Table of Abbreviations ..... **i**

1. Introduction **1**

2. Analytical Framework **3**

2.1 Definitions of key concepts *3*

2.2 Legal framework of freedom of establishment under EU law and of national conflict rules applicable to companies *6*

2.3 Scope of consequences of non-application of Freedom of Establishment *8*

3. Limiteds operating in 'incorporation' Member States: the Netherlands **10**

3.1 Dutch legal framework applicable to Limiteds post-Brexit *11*

3.2 The WFBV – consequences for Limiteds *12*

4. Limiteds operating in 'real seat' Member States: Germany **16**

4.1 Sitztheorie theory in Germany: Non-recognition of the Limited's legal personality *16*

4.2 Non-recognition of company form: consequences of requalification for Limiteds in Germany *18*

5. What can Limiteds do to mitigate the effects of Brexit? **21**

5.1 Asset deal: re-incorporation of the Limited *21*

5.2 Cross-border merger *22*

5.3 Cross-border seat transfer *23*

5.4 A fresh look at domestic company forms? *23*

6. Conclusion **24**

7. Table of Legislation **26**

8. Table of Cases **27**

9. Bibliography **28**

Table of Abbreviations

AG	*Aktiengesellschaft*
BGB	*Bürgerliches Gesetzbuch*
BGH	*Bundesgerichtshof*
BV	*Besloten vennootschap*
BW	*Burgerlijk Wetboek*
CA	Companies Act
CBM	Cross-border merger
CBST	Cross-border seat transfer
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
EU-27	Post-Brexit European Union
FFCA	Formally Foreign Companies Act
GAAP	Generally Accepted Accounting Principles
GbR	*Gesellschaft bürgerlichen Rechts*
GmbH	*Gesellschaft mit beschränkter Haftung*
HGB	*Handelsgesetzbuch*
IFRS	International Financial Reporting Standards
KvK	*Kamer van Koophandel*
Limited	UK private limited company
MoMiG	*Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*
MPB	Main place of business
NV	*Naamloze vennootschap*
OHG	*Offene Handelsgesellschaft*

PIL	Private international law
PLC	UK public limited company
SARL	*Société à responsabilité limitée*
SME	Small and medium-sized enterprise
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UG	*Unternehmergesellschaft*
WFBV	*Wet op de formeel buitenlandse vennootschappen*

1. Introduction

In the early 2000s, entrepreneurs seeking ways to set up their businesses as effortlessly as possible were often targeted by services such as “Go Limited,” “Limited 4 You” and “Limited 24.”[1] Those are websites offering entrepreneurs across the EU to incorporate their businesses in the form of UK private limited liability companies (hereinafter ‘Limiteds’) instead of comparable company forms of their home Member States. In essence, the then-recent rulings in *Centros, Überseering* and *Inspire Art*[2] of the Court of Justice of the European Union (hereinafter ‘CJEU’) have enabled them to set up such ‘letter-box’ companies by using Limiteds. This was, and still is, done primarily to avoid using domestic company forms and benefit from the Limited’s favourable incorporation requirements and substantive rules, even if it has no economic ties to the UK whatsoever.

Such ‘pseudo-foreign’[3] Limiteds, having their main places of business (hereinafter ‘MPB’)[4] in the EU-27,[5] will certainly be affected by the UK’s withdrawal from the EU next year as a result of being stripped of their rights of establishment. However, it is noteworthy that even the softest of post-Brexit arrangements discussed since UK-EU negotiations commenced – such as joining the EEA or negotiating ‘Swiss-style’ comprehensive bilateral agreements[6] – would likely not contain any provisions recognising legal personality of foreign companies.[7] This is even more worrisome if one considers that the UK has little interest in the fate of such ‘foreign’ Limiteds, since they barely contribute to the UK economy.[8] Hence, the future of those Limiteds is even more important to investigate.

The Limited is arguably the most attractive company form when compared to private limited companies in other EU Member States. This is so due to, *inter alia*, the absence of minimum capital requirements and low incorporation costs both in terms of time and money, compared to other company forms such as the German GmbH or the French SARL.[9] The ability to cherry-pick the Limited company form by relying on EU rights of

---

[1] *Go Limited* <https://golimited.co/> accessed 30 June 2018; *Limited 4 You* <http://www.limited4you.de/> accessed 30 June 2018; *Limited 24* <http://www.limited24.de/> accessed 30 June 2018.

[2] For an analysis of the relevant case law of the CJEU, see: Section 2.2.

[3] This is synonymous to ‘letter-box’ companies. See: Peter Böckli and others, ‘The Consequences of Brexit for Companies and Company Law’ (2017) University of Cambridge Faculty of Law Research Paper No 22/2017 <https://ssrn.com/abstract=2926489> accessed 28 June 2018.

[4] The concept of ‘main place of business’ is further defined in Section 2.1.

[5] This refers to the post-Brexit EU.

[6] Chris Giles and Alex Barker, ‘Hard or soft Brexit? The six scenarios for Britain’ *Financial Times* (London, 23 June 2017).

[7] Cátedra José María Cervelló, ‘And Here Remain with Your Uncertainty: the Consequences of Brexit for Business Law’ (2017) Working Paper IE Law School AJ8-239, 18.

[8] Matthias Lehmann and Dirk Zetzsche, ‘Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK’ (2016) 27(7) EBLR 999, 1013.

[9] Michael Schillig, ‘Corporate Law after Brexit’ (2017) 27(3) King's LJ 431, 436f.

establishment has thus been attractive to entrepreneurs across the EU wishing to commence business activities as effortlessly as possible.[10] Different studies provide estimates of 'pseudo-foreign' Limiteds ranging from 227,000[11] to 335,000[12]. Although some of those Limiteds are undoubtedly large companies motivated by reasons other than minimising incorporation costs,[13] most Limiteds are thought to be incorporated by entrepreneurs,[14] which are at the core of this paper.

Assuming that no other UK-EU agreement is reached,[15] those Limiteds will be affected post-Brexit when their rights of establishment under EU law seize to apply and national rules of the respective Member State become applicable. Since in Member States such as Germany and Austria Limiteds even risk to lose their legal personality, Brexit will certainly have an immense impact on such companies. Issues connected therewith thus merit further research.

Prior literature on the topic, although not extensive, has already dealt with this issue on a general level. Armour and others, for instance, have discussed implications of different alternatives of Brexit for legal persons and have introduced valuable statistics and analysis thereof on the use of Limiteds on the continent, especially in Germany and Austria.[16] Böckli and others, besides analysing Brexit's effects on UK company law domestically, also outline an overview of the national treatment of 'third country' companies in 10 Member States.[17] Finally, a particularly noticeable debate has been sparked in German academia regarding how German law could offer solutions to Limiteds with MPBs in Germany incorporated pre-Brexit (*Altgesellschaften*).[18]

This paper, however, aims to delve deeper into analysing Brexit's impact on Limiteds by doing so in a comparative manner. To do so, it answers the question of *what will*

---

[10] Nevertheless, one must take into account that attractive substantive company law is a very important but not the sole factor which influences entrepreneurs to incorporate businesses in particular Member States. Other factors affecting their choices include socio-economical, linguistical and cultural similarities, as well as the quality and clarity of national conflict rules. See: Carsten Gerner-Beuerle and others, 'Why do businesses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules' (2018) 56 Intl Rev of L and Economics 14, 26.

[11] Carsten Gerner-Beuerle and others, *Study on the Law Applicable to Companies* (2016) 43 <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1> accessed 28 June 2018.

[12] John Armour and others, 'Brexit and Corporate Citizenship' (2017) 18(2) Eur Business Organization L Rev 225, 226.

[13] Note, "Air Berlin," "H&M," "Müller" and other large companies have their MPBs in Germany but are incorporated as Limiteds, likely in order to circumvent German co-determination laws: Lasse Pütz and Sebastian Sick, 'Der deutschen Unternehmensmitbestimmung entzogen: Die Zahl der Unternehmen mit ausländischer Rechtsform wächst' (2010) 64(1) WSI-Mitteilungen 34, 35.

[14] However, another reason of incorporating a 'pseudo-foreign' Limited is when a multinational corporation uses the Limited as a top holding company or as the main European arm of its operations in the EU. See: Andreas Kokkinis, 'The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity' (2016) 27(7) EBLR 959, 960.

[15] See Section 2.1.1.

[16] See: Armour (n 12).

[17] See: Böckli (n 3).

[18] Lehmann (n 8) 1013f.

be the effects of Brexit on the legal personalities and duties of UK Limiteds with main places of business in the EU-27, and what can they do to mitigate such effects. Section 2 first presents the reader with the paper's analytical framework, including a legal framework of companies' rights of establishment under EU law. Section 3 then analyses Brexit's effects on Limiteds with MPBs in 'incorporation' theory Member States, using the Netherlands as a case study. Then, Section 4 does so with regard to 'real seat' theory Member States, with a case study on Germany. Section 5 briefly outlines steps which Limiteds could take to mitigate Brexit's effects. Finally, the paper is concluded in Section 6.

2. Analytical Framework

This Section first defines the key terms used throughout the paper to identify the scope of the present research. Second, it outlines the current legal framework applicable to Limiteds under their rights of establishment under EU law, which is required to subsequently compare it to a post-Brexit framework in the following Sections.

2.1 Definitions of key concepts

2.1.1 Brexit

First, it is important to define 'Brexit' itself, as the term is generically used when referring to the UK's withdrawal from the EU by triggering the procedure under article 50 TEU.[19] There is a myriad of possible scenarios of what the UK-EU relationship will look like after the withdrawal occurs.[20] 'Soft' and 'hard' Brexit scenarios are two possible extremes, where the former supposes that the UK will remain, similarly to Norway and Switzerland, a member of the EEA/EFTA and continue having (partial) access to the Single Market.[21] A 'softer' Brexit would hence be likelier to allow Limiteds to continue relying on their rights of establishment. A 'hard' Brexit, on the other hand, assumes that no UK-EU agreement will be reached on future UK-EU relations, and that, *inter alia*, all trade between the UK and the EU will fall back on World Trade Organisation rules.[22] Since the UK would lose access to the Single Market, Limiteds would no longer be able to rely on rights of establishment in case of a 'hard' Brexit.

---

[19] Consolidated Version of the Treaty on European Union [2016] OJ C 202/1.

[20] Herbert Smith Freehills, 'Brexit Legal Guide' (June 2018) 12-17 <https://www.herbertsmithfreehills.com/file/26966/download?token=xeC_pG9w> accessed 30 June 2018.

[21] Giles (n 6).

[22] ibid; One should be cautious that a 'hard' Brexit does not exclude the possibility that a UK-EU trade deal is negotiated at a later stage.

Although there is a spectrum of possible scenarios,[23] the analysis in the following Sections assumes the 'hard' Brexit scenario for two reasons. First, a 'hard' Brexit is the worst-case scenario, as its consequences for Limiteds would be the harshest. Since a 'softer' Brexit would entail some UK-EU agreement being reached, its consequences would not be as harsh and would not need to be analysed in as much detail.

Second, Theresa May has repeatedly rejected the option of remaining in the Single Market.[24] This, coupled with progress in the UK-EU negotiations remaining minimal despite the rapidly approaching 29 March 2019 withdrawal deadline,[25] makes the prospect of a 'hard' Brexit gain likelihood every day.

2.1.2 Connecting factors: registered office and main place of business

The modern reality of companies' cross-border operations requires legal systems to have the ability to determine which country's law governs a company's affairs. The applicable law is hence determined via connecting factors, which link "a factual situation with the laws of a specific jurisdiction."[26] Although countries use varying connecting factors to determine the law governing different aspects of company affairs,[27, 28] this paper only analyses connecting factors used to determine the law governing a company's corporate matters.[29] Such matters include its legal personality, management structure (including employee participation), capital requirements and more.[30] The connecting factors that jurisdictions principally use to determine applicable law are the company's 'registered office' or its 'main place of business.'

The registered office is the place where the company has its official address, which is stated in its articles of association and is published in a country's commercial register.[31] The registered office is determined when a company is incorporated and is

---

[23] See, for instance, a CETA-like trade agreement as an alternative: Jim Brunsden and Mehreen Khan, "Why the UK needs a 'plus plus plus plus' version of Ceta" *Financial Times* (Brussels, 12 December 2017).

[24] Most recently, in Theresa May's Brexit white paper: Department for Exiting the European Union, *The future relationship between the United Kingdom and the European Union* (Cm 9593, 2018) 7 <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> accessed 10 September 2018.

[25] Alex Barker, 'EU calls for ramp-up in Brexit 'no-deal' preparations' *Financial Times* (Brussels, 19 July 2018).

[26] Heinz-Peter Mansel, 'Connecting factor', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 442.

[27] For instance, a company's employment contracts are usually governed by the employees' place of work, while a company's insolvency-related obligations may be governed by the law of the country where the company is actually active, rather than incorporated. Regarding the latter, see: Case C-594/14 *Kornhaas v Dithmar* [2015] ECLI:EU:C:2015:806.

[28] For a discussion on *Kornhaas* (n 27), see: Stephan F G Rammeloo and Bastiaan Kemp, 'Cross-border Company Migration Post-Brexit – An Attempt to Define Legal Parameters' (2018) 11 (forthcoming).

[29] This is because only a company's corporate matters fall within the scope of rights of establishment under EU law. For more, see: Armour (n 12) 236.

[30] Cervelló (n 7) 18.

[31] Thomas Biermeyer, *Stakeholder Protection in Cross-border Seat Transfers in the EU: Between Freedom and Boundaries* (Wolf Legal Publishers 2015) 28f.

ordinarily a mandatory incorporation requirement.[32] If the registered office is used as the connecting factor, several conclusions can be drawn. First, this allows the persons incorporating the company to be in control and choose which law will be applicable to the company.[33] Second, even if the management decides to entirely conduct the company's business activities in a country different from that of the registered office, the law of the latter will remain decisive for the applicable company law.

The second frequently used connecting factor is the company's MPB, which is, with slight variations, also referred to in literature and case law as the company's 'headquarters,' 'actual centre of administration,' 'central management' and others.[34] For instance, in Germany, where a variation of this connecting factor is used,[35] the MPB has been defined in case law as the place where "the material corporate decisions of the management are implemented in day-to-day managerial decision-making."[36, 37] This approach determines the 'objective proper law' concept used in private international law,[38] which parties are not able to freely choose as they would choose the registered office. Contrary to the registered office, it is difficult to determine a company's MPB, since it requires a factual assessment of factors such as managerial decision-making and business activities. In a globalised world, this can span across jurisdictions. For the purposes of this paper, a precise definition of MPB is not decisive, because the entire concept of 'pseudo-foreign' Limiteds is that they have *all* their activities in one country. Hence, the MPB is used to refer generally to the law 'most closely connected' to the company.

2.1.3 Theories of recognition: 'incorporation' and 'real seat'

The two connecting factors most commonly used across legal systems were outlined above, as they are the core principles underlying the 'incorporation' and 'real seat' theories of recognition of foreign companies. According to the 'incorporation' theory, the registered office is decisive in determining the governing law.[39] The major advantage of adhering to this theory is that (a) it stimulates trade by making it easier for foreign companies to operate in an 'incorporation' state and (b) it provides for a straight-forward method of determining the applicable law via the registered office.[40]

---

[32] For instance, with regard to the UK, see: Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (OUP 2012) para 1.03.

[33] ibid.

[34] Stephan F G Rammeloo, *Corporations in Private International Law: A European Perspective* (OUP 2001) 14.

[35] Paschalidis (n 32) para 1.21.

[36] BGH, 21.03.1986 - V ZR 10/85, BGHZ 97, 269.

[37] Armour (n 12) 236.

[38] Rammeloo, *Corporations in Private International Law* (n 34) 11.

[39] Note, additionally, that where some countries use the 'place of incorporation' as the connecting factor instead of the 'place of the registered office', the former is slightly different from the latter. In case of the former, even if Company A incorporates in Country A and transfers its registered office to Country B, the law of Country A will continue applying, while in case of the latter, the law of Country B would start applying. However, for present purposes, the two concepts need not be distinguished and are treaded as one.

[40] Rammeloo, *Corporations in Private International Law* (n 34) 16.

However, the theory's greatest weakness, i.e. the incentive of managers to 'forum shop' for the most advantageous regime, is the 'real seat' theory's largest advantage, because it ensures that the law 'most closely linked' to the company is applicable.[41]

Moreover, the two theories provide merely a framework of applicable law, where the connecting factors express the policy reasons mentioned in the preceding paragraph. They should thus be viewed as two extremes, with a pure 'incorporation' theory and a pure 'real seat' theory on both ends, because, in practice, countries recognise the benefits of both and use either of the theories only as starting points.[42] For example, the Netherlands is an 'incorporation' country, as can be seen from the *statutaire zetel* requirement under article 10:118 of the *Burgerlijk Wetboek* (TD: Dutch Civil Code, hereinafter 'BW'). Since a pure 'incorporation' approach meant that companies could circumvent the rigid regulation applicable to Dutch BVs by incorporating themselves under more lenient foreign company laws,[43] the Netherlands limited its liberal stance by adopting the *Wet op de formeel buitenlandse vennootschappen* (TD: Dutch Formally Foreign Companies Act, hereinafter 'WFBV'),[44] applicable to 'pseudo-foreign' companies with MPBs in the Netherlands. The Dutch legislator has thereby imposed obligations on such companies that are comparable to those imposed on Dutch BVs; this way, it has put a cap on its 'incorporation' approach.[45] In Germany, on the other hand, where the *Sitztheorie* ('real seat' theory) has been traditionally applied by courts, GmbHs have been allowed to move their MPBs abroad since the introduction of the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (TD: Law for the modernization of Limited Liability Companies Act and for combating abuses, hereinafter: 'MoMiG') in 2008 and continue being recognised as GmbHs.[46] In conclusion, it is common for countries to adopt elements that resemble both theories.[47]

2.2 Legal framework of freedom of establishment under EU law and of national conflict rules applicable to companies

In the EU, although Member States' domestic private international laws (hereinafter 'PIL') must comply with the freedoms prescribed under EU law,[48] articles 49 and 54

---

[41] ibid 11.

[42] Paschalidis (n 32) para 1.01ff.

[43] Rammeloo, *Corporations in Private International Law* (n 34)102.

[44] *Wet op de Formeel Buitenlandse Vennootschappen*, *Stb*. 1997, 697.

[45] For a further discussion on the WFBV, see Section 3.

[46] Catherine Cathiard, 'European Added Value Assessment on a Directive on the Cross-border Transfer of Company Seats (14th Company Law Directive), Annex I: Legal effects of the requested legislative instrument' (2012) Jeantet Associés Aarpi Research Paper EAVA 3/2012, 36 <https://publications.europa.eu/en/publication-detail/-/publication/a0d481e1-ae0a-48da-89c4-3e9751aec774/language-en/format-PDF/source-search> accessed 11 July 2018.

[47] Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 119-127.

[48] Rammeloo, *Corporations in Private International Law* (n 34) 88.

TFEU[49] neither explicitly impose the 'real seat' or 'incorporation,' nor any other theory, on Member States. The CJEU's case law attempts to clarify this somewhat.

First, in *Centros*,[50] the CJEU determined Denmark's refusal to register a branch of a Limited – which two Danish nationals could have used to establish their MPB in Denmark and avoid local capital requirements – to breach articles 49 and 54 TFEU.[51] However, the Court did not address Denmark's conflict rules following the 'incorporation' theory, but rather Danish substantive law on abusive conduct with regard to circumventing capital requirements. This resulted in uncertainty as to whether the *Centros* ruling merely applied to 'incorporation' Member States, or if it effectively precluded the use of the 'real seat' theory and introduced a new, pan-EU connecting factor.[52]

Then, in *Überseering*,[53] the CJEU ruled that the German court's decision not to recognise the legal personality of Überseering BV and grant it standing by following Germany's 'seat' theory constituted an unjustified restriction on freedom of establishment. Although, at the time, commentators deemed this to be 'the end' of the 'real seat' theory in Germany,[54] the judgment should be viewed as not going beyond what was needed to decide the case: the CJEU is not concerned with the 'real seat' theory *per se*, but rather with the consequence of its application being the non-recognition of a company duly incorporated in another Member State.[55]

Finally, in *Inspire Art*, the CJEU held that the stringent requirements of the WFBV applying to a Limited with its MPB in the Netherlands were against the freedom of establishment.[56] This confirmed that even measures by 'incorporation' States such as the Netherlands can also restrict freedom of establishment.

What does this mean for the purposes of this paper? First, it must be noted that the abovementioned case law has shaped the obligations of Member States with regard to companies incorporated in other Member States, including Limiteds. Second, such obligations, although not abolishing the 'real seat' and adopting the 'incorporation'

---

[49] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

[50] Case C-212/97 *Centros Limited v Erhvervs- og Selskabsstyrelsen* [1999] ECLI:EU:C:1999:126.

[51] In particular because the measure (a) was an obstacle to the exercise of freedom of establishment, (b) was not justified by public interest under the *Gebhard* test, and (c) it did not constitute an abuse. See: *Centros* (n 50) para 34; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411; *Centros* (n 50) paras 27-29.

[52] Justin Borg-Barthet, *The Governing Law of Companies in the EU* (Hart Publishing 2012) para 5.3.1; See also: Paschalidis (n 32) paras 3.21-3.22.

[53] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECLI:EU:C:2002:632. The case concerned a Netherlands-incorporated company, Überseering BV, with its MPB in Germany, which brought a contractual enforcement claim before a German court. The court clarified the above by ruling that, according to Germany's 'real seat' theory, Überseering was *in fact* a German company. However, it could not be considered a German GmbH, as it failed to meet German formation requirements. See also: Paschalidis (n 32) para 3.27.

[54] Paschalidis (n 32) para 3.39.

[55] As was explained in: Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam tegen Inspire Art Limited* [2003] ECLI:EU:C:2003:512, para 103; See also: *Inspire Art,* Opinion of AG Alber, para 103.

[56] *Inspire Art* (n 55) para 105; Paschalidis (n 32) para 3.64f.

theory, have profoundly changed the way in which national PIL rules are applied to such companies. Finally, following Brexit, Limiteds will become 'third country companies' and will allow Member States to apply national PIL rules to Limiteds.[57]

2.3 Scope of consequences of non-application of Freedom of Establishment

This paper only addresses Limiteds that have their MPBs in an EU-27 Member State, including *Centros*-like situations where they operate through secondary establishments (branches or agencies) to which the law of primary establishment is applicable.[58] Situations when Limiteds own subsidiaries incorporated and active in the EU-27 are excluded, as they do not pose uncertainty with regard to PIL rules.[59]

As mentioned in Section 1, out of the 227,000 to 335,000 Limiteds with MPBs in the EU-27, most are likely to have been incorporated by entrepreneurs seeking to reap the financial savings of incorporating as Limiteds. Although such Limiteds operate throughout multiple Member States, Germany is by far the MPB for most of those Limiteds (61,485), followed by the Netherlands (13,988).[60]

Although Member States' adherence to either the 'incorporation' or 'real seat' theory is never binary,[61] Figure 1 nevertheless provides a categorisation of which theories Member States follow as starting points. Since Germany has the highest number of 'pseudo-foreign' Limiteds that risk being affected by losing their rights of establishment, it will be used as a case study for all 'real seat' Member States. Since the next largest number of such Limiteds is in the Netherlands, it will be used as a case study for the 'incorporation' Member States. Those two case studies are therefore relevant because (i) they provide an overview of the treatment offered by Member States where most Limiteds have their MPBs, and (ii) they offer an estimate of the treatment that will be given to Limiteds in other Member States which adhere to the same theories as Germany and the Netherlands do.

---

[57] Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules on Company Law' (2017) <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=607669> accessed 28 June 2018.

[58] Böckli (n 3) 14.

[59] This is because subsidiaries are, in such cases, established as domestic company forms and will therefore not be subject to changes post-Brexit. For a discussion on the differences of legal regimes applicable to subsidiaries and branches, see: Böckli (n 3) 14–17.

[60] Armour (n 12) 231.

[61] See Section 2.1.3.

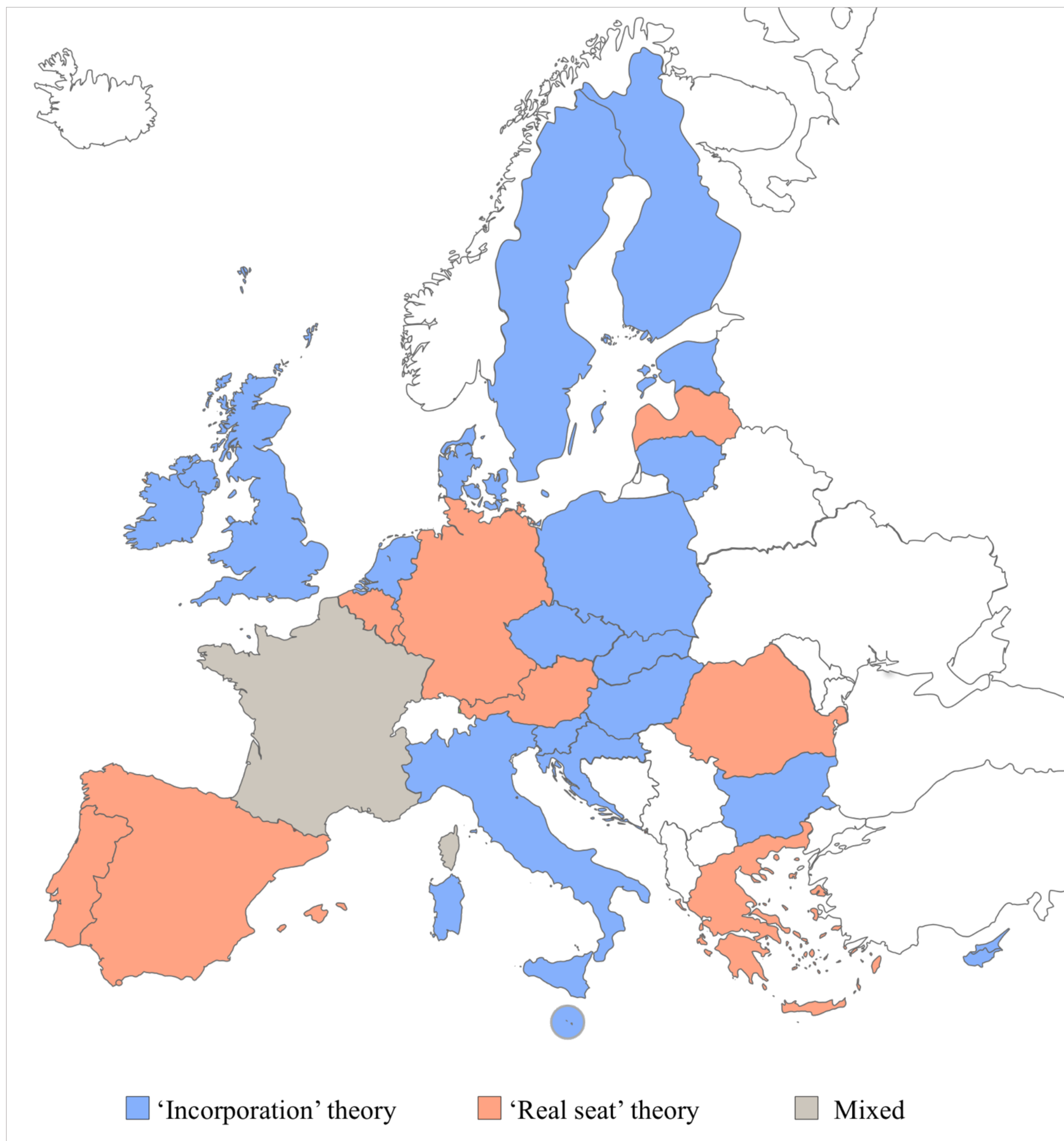

Figure 1: Overview of Member States adhering to the 'incorporation' or 'real seat' theories.[62,63]

[62] This categorisation is based on the state of national law of Member States in 2016, as provided in: Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 119-127. For example, note that Belgium is expected to discontinue its 'real seat' approach and adopt the 'incorporation' approach instead: Marc Van De Looverbosch, 'Real Seat Theory v. Incorporation Theory: The Belgian Case for Reform' (2017) 28 Intl Company & Common L Rev 1, 4-7.

[63] For a different view of how Member States should be categorised into 'incorporation' and 'real seat' States, see: Cathiard (n 46) 35.

3. Limiteds operating in 'incorporation' Member States: the Netherlands

As concluded in Section 2, post-Brexit Limiteds will become 'third country companies' and lose their rights of establishment. Member States will be able to apply national PIL rules and treat the companies less favourably, in an *Inspire Art*-like fashion.

If a Limited operates in an 'incorporation' Member State, that State will recognise it as a legal person by referring to the law of the State of incorporation – the UK – where it was duly incorporated. However, many host States following the 'incorporation' theory have realised that such policy, although liberal and progressive, has allowed companies to 'forum shop' and circumvent often more stringent local company laws by incorporating in States where those laws are more lenient.[64] Since, in such cases, foreign laws can pose risks towards local creditors and shareholders, Member States adopt important safeguards for their protection.[65]

One way in which Member States have done so is by adopting Formally Foreign Company Acts (hereinafter 'FFCA'), which impose additional obligations under domestic law on 'pseudo-foreign' companies with MPBs in that host State.[66] This is the approach followed by the Netherlands since the WFBV was adopted in 1997 at the time of the CJEU's rulings on freedom of establishment, to tackle the 'circumvention' of Dutch company forms in favour of foreign ones.[67] Other jurisdictions, such as Sweden and Italy, include additional obligations relating to matters such as documentary disclosure and public issuance of securities in their company and PIL acts.[68]

Therefore, this Section analyses the effects of Brexit on Limiteds with MPBs in 'incorporation' States by using the Netherlands as a case study.

---

[64] Biermeyer (n 31) 39.

[65] For an overview of types of mandatory creditor protection laws commonly used by States, see: Peter O Mülbert, 'A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection' (2006) 7(1) Eur Business Organization L Rev 357, 377-405.

[66] Armour (n 12) 239.

[67] Xandra Kramer, 'Dutch Private International Law-Overview 2002-2006' (2007) IPRax No 1, 6 <https://ssrn.com/abstract=988086> accessed 29 June 2018.

[68] Böckli (n 3) 43–45.

3.1 Dutch legal framework applicable to Limiteds post-Brexit

Under Dutch law, article 10:118 BW states that a company shall be governed[69] by the law of the State in which it has its registered office, as laid down in its articles of association (or, in case of a partnership, in its formation agreement).[70]

However, due to the far-reaching consequences of the liberal approach rooted in adhering to the ‘incorporation’ theory, article 10:118 BW only prescribes the law of the registered office as a starting point,[71] and numerous exceptions are made under Dutch law. First is when, according to the same article, no registered office has been designated in the articles; in that case, the centre of an entity’s activities at the time of formation is used to determine the governing law. Since this exception is mostly relevant for partnerships, where a specific place is not always designated in formation agreements,[72] it is not relevant for present purposes. Secondly, article 10:6 BW prescribes that foreign law governing a company will not apply in the Netherlands if such law conflicts with Dutch public morals. An example of such company law would be where female shareholders are not given voting rights in shareholder meetings.[73] Since this exception is also somewhat extreme,[74] it is not discussed further.

By far the exception most significantly affecting foreign companies is that provided by the WFBV. The WFBV aims to mitigate the harsh consequences of article 10:118 BW, namely that anyone wishing to set up a company in the Netherlands could, prior to the WFBV, incorporate a company under less strict rules of another State and thereby circumvent the more stringent requirements imposed on BVs under Dutch law. However, this regime is still applicable to companies incorporated in other EU/EEA States, to which the WFBV does not apply (except for article 6 WFBV, which imposes unlimited liability on supervisory and ordinary directors in case of the publication of misleading information in annual accounts and reports).[75]

However, Brexit will bring ‘pseudo-foreign’ Limiteds within the scope of the WFBV and thereby subject them to additional requirements,[76] if several conditions are fulfilled. Limiteds will likely satisfy the first condition of being incorporated under non-EU/EEA law. Second, the company must be in the form of a *kapitaalvennootschap,* i.e. it must

---

[69] That is, the governing law will be applicable to the company’s (i) legal personality and the capacity to possess rights and obligations, (ii) the internal rules governing the company, (iii) the powers of directors and managers to represent the company, (iv) liabilities of directors and other functionaries, (v) the question who, jointly with the company, is liable for acts binding the company, and (vi) the dissolution of the company. See: Rammeloo, ‘Cross-border Company Migration Post-Brexit – An Attempt to Define Legal Parameters’ (n 28) 7.

[70] See art 10:118 BW in Dutch: “Een corporatie die ingevolge de oprichtingsovereenkomst of akte van oprichting haar zetel of, bij gebreke daarvan, haar centrum van optreden naar buiten ten tijde van de oprichting, heeft op het grondgebied van de staat naar welks recht zij is opgericht, wordt beheerst door het recht van die staat.”

[71] Böckli (n 3) 42.

[72] Biermeyer (n 31) 36.

[73] Paul Vlas, *Rechtspersonen in het international privaatrecht* (Kluwer 1982) 47.

[74] ibid.

[75] WFBV, art 1(2).

[76] ibid, art 1(1).

be of a legal form comparable to the Dutch BV.[77] Limiteds, also being private limited liability companies, fall within this category. The WFBV thereby excludes company forms such as the UK's public limited company. Third, and most importantly, the Limited must be exercising its activities either entirely or almost entirely (that is, have its MPB) within the Netherlands and have no genuine link to the UK.[78] The WFBV will therefore be applicable to *Inspire Art*-like factual situations.

In conclusion, the WFBV will not strip Limiteds from the legal personality that they acquired under English law, meaning that the Dutch principle of *numerus clausus* of company forms is compromised. To nevertheless protect the relevant stakeholders (which the *numerus clausus* aims to do),[79] the WFBV instead imposes multiple obligations on such companies, which are discussed next.

3.2 The WFBV – consequences for Limiteds

The WFBV will amend the substantive company law governing the Limiteds, including rules on board structure, (distribution of) capital, and duties and liabilities of directors. The rule of thumb under the WFBV is that wherever the WFBV is silent, UK company law based on the Companies Act 2006 (hereinafter 'CA 2006') will be applicable.[80] The rules where the WFBV intervenes, and will consequently impact Limiteds post-Brexit, are those which are necessary for the protection of creditors and shareholders of the company,[81] particularly those located in the Netherlands. The protection offered by the WFBV can be categorised into two kinds: (i) it prescribes a mandatory disclosure regime and (ii) it imposes more stringent liability rules on the Limited's directors.

3.2.1 Mandatory disclosure regime

Three changes will be most important for Limiteds regarding mandatory disclosure. Firstly, article 2 WFBV requires that the company registers with the *Kamer van Koophandel* (TD: Dutch Chamber of Commerce, hereinafter 'KvK') the following information: (i) a confirmation that the company falls under the WFBV, (ii) certified copies of the deed of incorporation and the articles of association if they are separate from the deed, (iii) the registration details from the company's domestic commercial register, and (iv) where there is a sole shareholder, the personal details of that shareholder. The directors must also notify the KvK of any changes to such information.

---

[77] Böckli (n 3) 42.

[78] Bastiaan Kemp, 'Vennootschappen uit het Verenigd Koninkrijk in Nederland na brexit: gaan zij terug naar het verdomhoekje?' (2017) 3/4 Maandblad voor Ondernemingsrecht 59, 61.

[79] Lars van Vliet, 'New Developments in Dutch Company Law: The Flexible Close Corporation' (2014) 7 J of Civil L Studies 271, 282.

[80] Böckli (n 3) 42.

[81] John Lowry, 'Eliminating obstacles to freedom of establishment: the competitive edge of UK Company law' (2004) 63(2) CLJ 331, 344.

At present, Limiteds are not subject to such information requirements. However, the obligations are almost the same as what Dutch BVs are obliged to provide upon registration with the KvK anyway and are not unduly burdensome on companies. [82]

Second, article 5 WFBV requires that companies attend to proper bookkeeping, including conducting proper accounting and storage of the company's assets and liabilities. [83] Moreover, the directors are under the obligation to draw up annual accounts and management reports of the company's activities within five months from the end of each financial year; such accounts and reports are subject, in the same way that Dutch BVs are, to articles 2:360-2:455 BW as regards the preparation and filings of such reports. These articles require companies to use either the Dutch Generally Accepted Accounting Practice (hereinafter 'GAAP') standards or the International Financial Reporting Standards (hereinafter 'IFRS'). Hence, since under UK law Limiteds were able to use either the UK GAAP standards or the IFRS standards, this change will only significantly affect Limiteds which have been using the UK GAAP accounting standards pre-Brexit.[84] However, given that such 'pseudo-foreign' Limiteds are frequently used by local SMEs in the Netherlands without any connection to the UK, widespread usage of the UK GAAP rules pre-Brexit seems unlikely.

The abovementioned obligations under articles 2 and 5 WFBV will not be *per se* burdensome on Limiteds. A Limited would ordinarily comply with those registration rules at the moment of incorporation (for instance, when a Dutch entrepreneur incorporates a Limited, he or she will at the same time provide the KvK with the necessary documents) and with the reporting rules in the subsequent years. However, Limiteds active in the Netherlands pre-Brexit have not followed such a procedure, because at the moment of their incorporation they did not fall within the scope of the WFBV. [85] Therefore, Limiteds would be well-advised to comply with the abovementioned disclosure obligations by the time the WFBV becomes applicable to them. This is crucial, because in the absence of a proper registration in the KvK, the Limited's directors would become jointly and severally liable for the Limited's activities throughout the period until article 2 WFBV is complied with.[86] Hence, it would also be useful if the Dutch legislator introduced a supplement to the WFBV, similar to article 11 thereof,[87] offering a transition period for Limiteds during which they would be obliged to comply with the WFBV's registration and financial reporting obligations.

---

[82] Steven R Schuit, 'Legal' in Steven R Schuit (ed), *Corporate Law and Practice of the Netherlands: Legal, Works Councils and Taxation* (2nd edn, Kluwer Law International 2002) 42.

[83] For a more precise range of obligations, see art 2:10 BW.

[84] Hugo van den Ende, 'All about: the impact of Brexit on the financial statements and management report' (2017) PwC *All About* Report Series, 11 <https://www.pwc.nl/en/publicaties/all-about-the-impact-of-brexit-on-the-financial-statements-and-management-report.html> accessed 28 June 2018.

[85] Kemp (n 78) 62.

[86] WFBV, art 4(2).

[87] Art 11 WFBV provided a transition period which allowed companies to comply with their art 2 obligations after the WFBV came into force.

Third, article 3 WFBV will oblige the Limited to additionally state a range of details on *all* documents and announcements produced by it or on which it appears, except for telegrams and advertisements.[88] Such details include its legal form, place of incorporation, MPB, registration number, the first date of registration and the register name in which it is required to be registered (in this case, the Companies House).[89] In essence, the Limited would have to make it clear to third parties that it is a 'pseudo-foreign' company and not a Dutch one.[90] The purpose of this is to 'warn' and ensure that any potential creditors dealing with the company are aware of the risks that arise from the company being governed by foreign law; this would be significantly different from the pre-Brexit regime, where Limiteds are not subject to such obligations, and are required to disclose less details by UK law.[91] Although compliance with article 3 WFBV would not necessarily be costly, it is plausible that Limiteds could be negatively affected economically by the mere fact of being perceived by third parties as 'sub-standard' compared to the Dutch BV as they would be deemed to be 'less safe' to conduct business with.

3.2.2 Liability of directors

The second category of rules are those of article 4(1) WFBV, according to which directors of Limiteds, including day-to-day managers exercising directors' duties,[92] may be held jointly and severally liable in certain instances in the same ways as directors of Dutch BVs. Hence, in addition to acquiring unlimited liability for fraudulently misrepresenting the Limited's annual accounts[93],[94] or for not complying with the registration requirements of article 2(1) WFBV,[95] directors of Limiteds will also run the risk of joint and several liability if they choose to (i) distribute profits to shareholders, (ii) repurchase shares, or (iii) reduce the subscribed capital and cancel the shares.[96] This is because all three situations make it likelier that the Limited has no capital left to be paid out to creditors. In any of these situations, three principle obligations applicable to Dutch BVs will apply to Limiteds (and their directors) *mutatis mutandis*.

Firstly, Limiteds' directors will have to bear the general duty of care under article 2:9 BW, according to which they will have to properly perform tasks assigned to them. According to Dutch case law, this duty generally requires the director "to meet the standard of care which can be expected of a director who is competent for his task

---

[88] See the English translation of the CJEU in: *Inspire Art* (n 55) para 26.
[89] WFBV, art 3(1).
[90] Kemp (n 78) 61f.
[91] See: The Companies (Trading Disclosures) Regulations 2008, as amended by The Companies (Trading Disclosures) (Amendment) Regulations 2009.
[92] WFBV, art 6; BW, art 2:261.
[93] WFBV, art 6; BW, arts 2:249 and 2:260.
[94] Schuit (n 82) 42.
[95] WFBV, art 4(2).
[96] WFBV, art 4(1).

and performs his/her duties with diligence;" this is an objective standard.[97] At present, Limiteds' directors must, according to UK law, exercise their duties with reasonable "care, skill and diligence that would be exercised by a reasonably diligent person with — (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has."[98] Since the duty under UK law includes a subjective element in an objective test,[99] in practice the threshold for holding a director liable under Dutch law is somewhat lower than under UK law.[100] Although liability can only be properly assessed on a case-by-case in light of the facts of each case, this finding suggests that with the application of article 2:9[101] to Limiteds post-Brexit, the risk of directors being held liable will be somewhat higher than pre-Brexit when only section 174 CA 2006 was applicable.

Second, article 2:216(3) BW will apply in case the Limited distributes its profits to shareholders through dividend payments and subsequently is left with insufficient capital to pay out its due (especially short-term) debts. However, since the abolishment of the minimum capital requirements for the Dutch BV in 2012, the WFBV no longer has a corresponding capital maintenance requirement.[102] Nevertheless, the directors or shareholders receiving the payment can still be held jointly and severally liable to pay the deficit sum arising from the distribution,[103] unless they prove that they, respectively, were not negligent in trying to avert such a situation and did not know or could not have foreseen the Limited incurring such problems.[104] In this case, however,

---

[97] Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 117.
[98] CA 2006, s 174.
[99] Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 91f.
[100] For instance, see: Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 95ff. In that Study, lawyers were given a hypothetical case and asked to assess the likelihood of a CEO's liability for a breach of his duty of care in light of the facts given. The answers allowed to conclude that under Dutch law, "[it] is likely that the CEO is considered to have acted 'severely culpable' and that he is, accordingly, liable since he ignored clear warning signs. In practice, however, it is difficult to judge when red flags are so obvious that the threshold of 'severe culpability' is crossed." In the same hypothetical case, it is concluded that under UK law "[l]iability is unlikely:

1) [as] far as the content of business decisions is concerned, courts ask whether the decision could rationally or plausibly have made sense in the shareholders' interests at the time the decision was made. That is possible in this case even if some warning signs existed.

2) Decision-making process: objective/subjective standard applies. Here, the facts do not suggest that inadequate care was taken in deciding to make the sub-prime investments."
[101] This is because, *in casu*, although Dutch law will start governing certain aspects of the Limited (such as directors' duties), from the UK's perspective, UK law will still continue to govern the Limited as well: Böckli (n 3) 42f.
[102] *Wet op de formeel buitenlandse vennootschappen* (n 44), as amended by *Stb.* 2012, 300.
[103] Norton Rose Fulbright, 'Distributions of profits out of a Dutch BV' (November 2015) <http://www.nortonrosefulbright.com/knowledge/publications/133190/distributions-of-profits-out-of-a-dutch-bv> accessed 24 June 2018.
[104] BW, art 2:216(3) sentences 3 and 4.

UK law is very comparable[105] if not stricter than Dutch law when it comes to profit distribution;[106,107] consequently, Brexit will not have adverse effects in that regard.

Finally, article 2:248 BW prescribes that, in the event of bankruptcy, each director will be held jointly and severally liable for the outstanding amount of debt towards a Limited's creditors in so far as it cannot be recovered from the company's assets, whenever the director in question acted manifestly improperly and that the act was likely to be a major contribution to the bankruptcy. Generally, this is similar to the UK's approach,[108] where the director, to be personally liable, must have or should have known that the company could not have avoided insolvency following the director's act in question.[109]

To conclude, Limiteds in the Netherlands will in principle remain subject to the same legal regime under the UK Companies Act as they have been pre-Brexit. Changes will, however, be incurred in the degree to which Limiteds would have to disclose information and to which their directors would be liable in cases of insolvency.

4. Limiteds operating in 'real seat' Member States: Germany

The consequences for Limiteds with MPBs in 'real seat' States are fundamentally different from those in 'incorporation' States. This Section first elaborates on the mechanics of applying the 'real seat' theory to Limiteds by using the German *Sitztheorie* as an example. Then, the effects thereof on Limiteds and their directors, shareholders and creditors are analysed.

4.1 Sitztheorie theory in Germany: Non-recognition of the Limited's legal personality

As with having MPBs in the Netherlands, Limiteds with MPBs in Germany post-Brexit will not be able to rely on their rights of establishment under EU law.[110] They will thereby be subject to the connecting factor applicable to 'third country' companies –

---

[105] For instance, shareholders also have the duty to repay the received payments if they knew that they were paid out unlawfully: CA 2006, s 847.

[106] Jaap Barneveld, 'Legal capital and creditor protection: some comparative remarks' (2009) in D F M M Zaman and others (eds), *The European private company (SPE): a critical analysis of the EU draft statute* (Intersentia 2009) 91.

[107] For an overview of the UK's perspective on profit distributions, see: Financial Reporting Faculty, *UK Regulation Factsheet: UK Distributable Profits* (ICAEW 2015) 1ff <https://www.icaew.com/-/media/corporate/files/technical/audit-and-assurance/2015-aaf-and-frf-roadshow-resources/audit/distributable-profits.ashx?la=en> accessed 29 June 2018.

[108] Insolvency Act 1986, s 214.

[109] Samantha Renssen, 'Corporate Restructuring and Corporate Dissolution of Companies in Financial Distress: Ensuring Creditor Protection. A Comparison of the US, UK and Dutch Models' (2017) 26 Intl Insolvency Rev 204, 209-212.

[110] Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules on Company Law' (n 57).

the law of the company's 'real seat' (the company's MPB). With EU law restricting the application Germany's *Sitztheorie* to EU-incorporated companies, German courts have tried to expand the scope of other fields of law to limit EU law's effects.[111] Nevertheless, it is clear that issues such as legal personality, formation requirements as well as limited liability are all governed by the law of a company's MPB.[112]

The *Sitztheorie* has not been codified and has only been introduced and developed in case law. According to the *Bundesgerichtshof* (TD: German Federal Court, hereinafter 'BGH'),[113] the law of a company's MPB is the law of "the place where the material corporate decisions of the management are implemented in day-to-day managerial decision-making."[114] Armour further notes that neither the market on which the company operates nor the country where corporate decisions are taken are conclusive for determining the governing law. It thus matters most where management decisions are executed in day-to-day activities.[115] This definition of the MPB under German law can cause serious uncertainties in case of large corporate groups or SMEs with cross-border operations. However, given that this paper focuses on local entrepreneurial businesses (for instance, think of a local bakery or a café), such 'pseudo-foreign' Limiteds will, *in casu*, almost always be considered to have MPBs in Germany.[116]

As a result, German PIL rules will deem German law to govern those companies, and, in order to be recognised as a corporate legal entity, a company would have to fall within the *numerus clausus* list of companies with capital under German law, which are mainly the GmbH or the AG.[117] Since Limiteds will not have followed the incorporation requirements under German company law (such as registration in the German company register and minimum capital requirements),[118] German courts would likely arrive at the conclusion that a Limited is not a legal person under German law in the first place, but rather a kind of partnership, thereby leading to a 'requalification' of the company's legal form.

A practical example of this is the *Trabrennbahn* case, decided by the BGH in 2008,[119] which concerned a Swiss company that transferred its MPB from Switzerland to Germany, but kept its registered office in Switzerland. The Court was requested to establish whether, following the CJEU's case law, the *Sitztheorie* nevertheless survived with respect to non-EU/EEA 'third country' companies. It subsequently ruled

---

[111] See, in the case of insolvency, the judgment referred to the CJEU: *Kornhaas* (n 27).
[112] Armour (n 12) 236.
[113] BGH, 21.03.1986 - V ZR 10/85, BGHZ 97, 269.
[114] Translation provided in: Armour (n 12) 236.
[115] Armour (n 12) 236.
[116] Designating Germany as the MPB of larger Limiteds mentioned in Section 1 will also likely be clear-cut, even if to a lesser degree due to the increased likelihood of cross-border activities of companies of such size.
[117] Böckli (n 3) 47.
[118] Adriaan F M Dorresteijn and others, *European Corporate Law* (3rd edn, Kluwer Law International 2017) 168-173.
[119] BGH, 27.10.2008 - II ZR 158/06, BGHZ 178, 192.

against the Swiss company and determined it to rather be a partnership.[120] Since the assumption of this paper is that the UK, like Switzerland, will choose not to be in the EEA, Limiteds will likely be subject to similarly harsh treatment.

Before discussing the consequences of such requalification, it should be noted that German legal literature is facing an active debate regarding how German law could be interpreted to avoid requalification in the first place. The first suggestion, albeit one that is receiving less support in academia, is that German constitutional law should recognise the legitimate expectations of founders of Limiteds who have incorporated them even before the Brexit vote, thereby relying on the assumption that they would be able to continue making us of their rights of establishment.[121] Secondly, it is suggested that the intertemporal 'vested rights' theory in German PIL could be applied by Courts. The reasoning is that founders of pre-Brexit Limiteds (*Altgesellschaften*) could be worthy of protection and have UK company law applied to their Limiteds because this is the law that governed the companies *at the time* when they were incorporated, i.e. when the UK was still in the EU.[122] Evidently, either of the two possibilities, or any other legislative intervention on Member State level,[123] would be the most optimal solution for Limiteds' operations post-Brexit.

4.2 Non-recognition of company form: consequences of requalification for Limiteds in Germany

Assuming that the *Sitztheorie* continues to apply despite the arguments noted in the preceding paragraph, German courts applying German law to a Limited would, as mentioned earlier, conclude that the company instead falls under the criteria of a partnership. A Limited can be expected to be requalified as either a *Gesellschaft bürgerlichen Rechts* (hereinafter 'GbR') or an *offene Handelsgesellschaft* (hereinafter 'OHG'), because the other partnership forms require, as do the GmbH and AG, registration in the German commercial register.[124]

The GbR – also referred to as the *BGB-Gesellschaft*[125] – is a civil partnership governed by §§ 705-740 of the *Bürgerliches Gesetzbuch* (TD: German Civil Code, hereinafter 'BGB'), for which the establishing formalities are not at all burdensome: it can come into existence by the mere agreement, oral or written, of at least two parties having a common purpose or goal in mind, without neither the requirement of registration in the commercial register, nor of having a common trading name.[126] The

---

[120] Armour (n 12) 237.

[121] Cervelló (n 7) 20.

[122] Lehmann (n 8) 1013f.

[123] ibid 1013.

[124] Those include professional partnerships, limited partnerships, and partnerships limited by shares: Andreas Cahn and David C Donald, *Comparative Company Law* (CUP 2010) 28-33.

[125] Rammeloo, *Corporations in Private International Law* (n 34) 178.

[126] ibid 27; For formation requirements, see: BGB, §705.

OHG, on the other hand, is a commercial partnership regulated under §§ 105-160 of the *Handelsgesetzbuch* (TD: German commercial code, hereinafter 'HGB'), which is distinguished from the GbR in that it requires activity by the partnership that is sufficient to be called a 'commercial enterprise'.[127] Similarly to the GbR, the OHG requires a partnership agreement for a particular purpose. However, the OHG in principle additionally requires that the partnership be registered in the German commercial register;[128] nevertheless, registration is not immediately required for the OHG to come into existence.[129]

The two abovementioned partnership forms are those which 'pseudo-foreign' companies with MPBs in Germany can be classified into, particularly because both can come into existence without registration in the commercial register. To illustrate, if a hairdresser business in a German town is incorporated as a Limited, a factual assessment under German law would see the former shareholders become united by the same purpose of controlling the business; thereby, a partnership is formed.[130] Although whether the partnership is civil or commercial will depend on the initial economic size of the Limited, the general consequences of requalification into either type are very similar.

The ultimate consequence of requalification into a GbR or an OHG is the loss of legal personality of the partnership formed by the shareholders.[131] The impact of this is four-fold.

Firstly, under the CA 2006, the shareholders of a Limited are liable only up to the capital they have subscribed for by acquiring shares in the Limited.[132] Shareholders will thus lose this limitation once they also become partners of a German partnership, in which all partners are held jointly and severally liable,[133] meaning that creditors would have recourse to the Limited's shareholders' assets. Moreover, partners leaving either the OHG or the GbR will continue being liable for the debts that existed at the time of leaving for the subsequent five years.[134] This is, of course, a dire consequence for any Limited's shareholders.

Secondly, losing legal personality may well result in the assets and liabilities of Limiteds being stripped, at least in Germany, from their ownership by the Limited and

---

[127] Rammeloo, *Corporations in Private International Law* (n 34) 29.
[128] HGB, §123.
[129] HGB, §123(2); BGH, 01.07.2002 - II ZR 380/00, BGHZ 151, 204.
[130] Armour (n 12) 237; See, for instance, the requalification of a Jamaica-incorporated company operating in Germany: BGH, 01.07.2002 - II ZR 380/00, BGHZ 151, 204.
[131] Dorresteijn (n 118) 20.
[132] CA 2006, s 3.
[133] For the OHG, see: HGB, §128; For the GbR, see: BGH, 27.09.1999 - II ZR 371/98, BGHZ 142, 315.
[134] For the OHG, see: HGB, §§130 and 160; For the GbR, see BGB, §736(2) and BGH, 10.02.1992 - II ZR 54/91, BGHZ 117, 168, 178ff.

consequently become *bona vacantia*, since neither the GbR nor the OHG have legal personality. The assets could, however, become co-owned by the shareholders.[135]

Thirdly, a Limited's requalification into a partnership will also cause dramatic changes to the management structure, where the shareholders become the managing (general) partners of the company.[136] This also means that the directors and executive officers, who formerly managed Limiteds, will now be stripped of their right to represent them; this role will now shift to the former shareholders, unless directors are given special proxies.[137] Moreover, since the newly established partnership's voting procedures would be relying on default rules,[138] decisions regarding the Limited's operations would have to be adopted by shareholders unanimously.[139] However, in practice, Limiteds founded by entrepreneurs, which are at the core of this paper, are very closely held. They are either managed by a sole director who is also the sole shareholder, or by multiple directors each of whom holds shares of the Limited.[140] Consequently, the effects of requalification, at least on management structures, will be minor, because the same entrepreneurs will continue managing the same companies, who most likely acted unanimously with their co-entrepreneurs anyhow.

Finally, although the GbR and OHG partnerships do not possess legal personality, they have the legal capacity of getting sued by other parties. This feature is clearly good news for creditors in Germany, who will be able to streamline their efforts and lay claims for the repayment of debts via one legal entity rather than multiple partners.[141] Although this capacity of the OHG is straightforward as it is laid down in the HGB,[142] such legal capacity of the GbR to be sued has not traditionally been granted: the BGH only confirmed this in the context of 'pseudo-foreign' companies in 2002, when it gave standing in court to a Jersey-incorporated company with its MPB in Germany, thereby recognising its legal capacity in that regard.[143] Since this effectively will allow shareholders of Limiteds with MPBs in Germany to be sued via a GbR or OHG, this will also be a significant impact on Limiteds.

In conclusion, this Section has illustrated that the effects of Brexit on Limiteds with MPBs in Germany as well as other Member States adhering to the 'real seat' theory are significantly more burdensome than on Limiteds in 'incorporation' Member States

---

[135] Lehmann (n 8) 1012.
[136] Böckli (n 3) 47.
[137] ibid.
[138] This is because the GbR or OHG would have been formed 'automatically' as a result of the requalification, without the shareholders having the chance to agree on the terms of their newly formed partnership agreement(s).
[139] BGB, §§ 709 and 714.
[140] Michael J Peel, 'Owner-Managed UK Corporate Start-Ups: An Exploratory Study of Financing and Failure' (2016) 6(4) Entrepreneurship Research J 345, 346.
[141] Martin Schulz, 'European Challenges for German Law: An Analysis of the Recent Jurisprudence of the European Court of Justice on the Freedom of Establishment and its Impact on German Corporate Law and Conflict of Laws' in Russell A Miller and Peer Zumbansen (eds), *Annual of German & European Law*, vol 2 (Berghahn Books 2007) 136f.
[142] HGB, §124.
[143] Schulz (n 141); BGH, 01.07.2002 - II ZR 380/00, BGHZ 151, 204.

such as the Netherlands. The next Section, for this reason, presents ways in which such harsh consequences could be mitigated.

5. What can Limiteds do to mitigate the effects of Brexit?

Based on Sections 2 and 3, it would be disadvantageous in the future for entrepreneurs to incorporate as 'pseudo-foreign' Limiteds merely to benefit from their corporate form. This Section, however, deals with Limiteds which have already been incorporated as such before Brexit was on the horizon.

Overall, the practical steps each Limited would have to follow will depend on how much the particular Limited is affected by losing its rights of establishment. For instance, Limiteds operating in the Netherlands are not likely to be harmed significantly, because they retain their limited liability and are subject to rules under the BW which a Dutch BV would have been subject to anyways.[144] Even so, given that the application of provisions of the BW in parallel to the CA 2006 would lead to more confusion, Dutch entrepreneurs should consider the below means of converting into a company form (i.e. relocating its registered office) in the EU-27. On the other hand, Limiteds with MPBs in Germany are likely to be hit harder by being requalified into partnership structures. For those, the suggestions for conversion presented below are imperative.

The three main ways which a Limited could use to convert into a company form of the State of its MPB or that of another Member State[145] are outlined below. Those include (i) re-incorporating the Limited by way of an asset deal, (ii) conducting a cross-border merger, or (iii) undergoing a cross-border seat transfer.

5.1 Asset deal: re-incorporation of the Limited

Perhaps the most straight-forward method to relocate a Limited's registered office is by way of incorporating a new company in the Member State of choice, transferring the Limited's assets and liabilities to the new company (i.e. an asset deal), and subsequently winding up the Limited. The clear disadvantage is that there is no legal continuity of the company, which would be problematic for the company from a tax perspective (assets will be taxed upon winding up) and the perspective of legal contracts signed on behalf of the original Limited rather than the new company.[146]

In case of small companies with fewer assets, an asset deal would nevertheless have the advantages of being less costly and more flexible than undergoing a cross-border

[144] Rammeloo, 'Cross-border Company Migration Post-Brexit – An Attempt to Define Legal Parameters' (n 28) 10f.

[145] In case the Limited finds that Member State's company law more attractive, it could rely on its rights of establishment and convert into a 'pseudo-foreign' company form of that Member State whilst keeping its MPB in a 'real seat' State.

[146] Biermeyer (n 31) 45f.

merger or seat transfer.[147] It would also not be reliant on EU law,[148] meaning that there would be less legal risk in the event of Brexit occurring earlier than the conversion is complete.

5.2 Cross-border merger

The second option would be to undergo a cross-border merger (hereinafter 'CBM'), the process and requirements for which are laid down in the Company Law Directive, which now includes the earlier Cross-border Merger Directive.[149] In order to relocate its registered office, the Limited would therefore ordinarily need to set up a new company in a Member State of its choice, after which it would transfer all of its assets and liabilities by merging into the newly established company.

On the one hand, undergoing a CBM is deemed to be more complex and therefore costlier to implement. On the other, it has two key advantages: (a) it preserves legal continuity of the company (i.e., the CBM could be implemented tax-neutrally and contracts could be preserved) and (b) is harmonised by the Directive, thereby allowing for legal certainty.[150] However, given that this option will not be available post-Brexit[151] and the entire merger process could take 5 to 7 months,[152] Limiteds considering this choice should commence their conversions no later than in the summer of 2018.[153]

The attractiveness of converting into another company form by way of a CBM to mitigate Brexit's effects is likely to have caused the surge in UK-exiting CBMs occurring since the Brexit vote took place.[154]

---

[147] Deloitte Legal, 'Ahead of Brexit: A corporate law primer on relocating your business to Germany' (November 2017) 12 <https://www2.deloitte.com/content/dam/Deloitte/dl/Documents/legal/Ahead%20of%20Brexit%20CL%20Germany.pdf> accessed 30 June 2018.

[148] ibid.

[149] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46, Title II, Chapter III;

Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies [2005] OJ L 310/1;

For an overview of key provisions, see: Armour (n 12) 240f.

[150] The advantages of CBMs were confirmed in a survey of lawyers regarding the best practices of relocating a company's registered office to another Member State. See: Carsten Gerner-Beuerle, *Study on the Law Applicable to Companies* (n 11) 81-83.

See also regarding the overall necessity of the harmonisation of cross-border seat transfers in the EU: Carsten Gerner-Beuerle and others, 'The Law Applicable to Companies in Europe: Study and Possible Reform' (2017) 14(4) Eur Company LJ 148, 148.

[151] Schillig (n 9) 438.

[152] Will Pearce and Simon J Little, 'Cross-border mergers involving UK companies: some key questions and answers' (July 2017) <https://www.internationallawoffice.com/Newsletters/Corporate-FinanceMA/United-Kingdom/Davis-Polk-Wardwell-LLP/Cross-border-mergers-involving-UK-companies-some-key-questions-and-answers> accessed 28 June 2018.

[153] For the consequences of Brexit for incomplete cross-border mergers, see: Armour (n 12) 241-243.

[154] Thomas Biermeyer and Marcus Meyer, 'Cross-border Corporate Mobility in the EU: Empirical Findings 2017' (2018) 24f <https://ssrn.com/abstract=3116042> accessed 28 June 2018.

5.3 Cross-border seat transfer

The third 'tool' under EU law is the possibility to undergo a cross-border seat transfer (hereinafter 'CBST') of the Limited from the UK to a Member State on the continent. This would, in essence, not change the legal personality of the Limited and would therefore secure continuity, whilst still changing its legal form.[155]

Theoretically speaking, the right of companies for both outbound (*in casu* exiting the UK) and inbound migration (*in casu* entering another Member State such as Germany and converting into a UG or GmbH) are covered, subject to certain requirements, by companies' rights of establishment under EU law. In accordance with the CJEU's rulings in *VALE* and *Polbud*,[156] Limiteds can now choose to conduct CBSTs, respectively, to the Member State where their MPB is located or to any other Member State the company law of which they deem most favourable.[157]

In practice, however, it is hard to see how CBSTs could be used by Limiteds, since outbound migration of a Limited from the UK is, at the time of writing, not allowed under UK law.[158] Furthermore, the Commission recently announced a proposal for a Directive amendment which, if adopted, would force the UK to introduce legislation permitting CBSTs.[159] However, since the Directive Proposal has not even been adopted on an EU level yet, it seems extremely unlikely that it would get implemented by the UK in time for Limiteds to make use of CBSTs pre-Brexit.

5.4 A fresh look at domestic company forms?

The above-mentioned 'conversion tools' are not the only way in which the harms of Brexit can be mitigated. Importantly, the domestic company forms which Limiteds would be converting into have changed significantly compared to the same company forms which, 10 years ago, incentivised entrepreneurs to choose Limiteds in the first place. As a consequence of the 'race to the bottom' and the resulting increase of

---

[155] Deloitte Legal (n 147) 13.

[156] Case C‑378/10 *VALE Építési kft* [2012] ECLI:EU:C:2012:440; Case C‑106/16 *Polbud — Wykonawstwo sp. z o.o.* [2017] ECLI:EU:C:2017:804; On the interpretation of *Polbud*, see: Gitte Soegaard, 'Cross-border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country' (2018) 15(1) Eur Company LJ 21, 22ff.

[157] Mirjam Meyer, 'The long path to a broad reading of the Freedom of Establishment and its impact on the Brexit era' (Master thesis, Lund University 2018) 35f <http://lup.lub.lu.se/student-papers/record/8947135> accessed 30 June 2018.

[158] Stephan Rammeloo, 'Cross-border company migration in the EU: Transfer of registered office (conversion) – the last piece of the puzzle? Case C-106/16 Polbud, EU:C:2017:804' (2018) 25(1) Maastricht J of Eur and Comparative L 87, 106.

[159] Commission, 'Proposal for a Directive of the European Parliament And of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM(2018) 241; This proposal is part of the new Company Law Package, available at: <https://ec.europa.eu/info/publications/company-law-package_en> accessed 28 June 2018.

foreign incorporations,[160] many Member States have responded thereto by modernising the regimes applicable to domestic private limited companies by reducing minimum capital requirements and incorporation formalities.[161]

In the Netherlands, for example, most notably the capital requirements of the BV have been abolished in 2012.[162] In Germany, the effects of the MoMiG have been even more grand, since the 2008 reform modernised the GmbH by (a) making it easier to incorporate through an electronic register and with lower registration and handling costs[163] and (b) introducing a sub-type of a GmbH – the *Unternehmergesellschaft* (the 'entrepreneurial company', hereinafter 'UG').[164] The UG's most notable innovation is that it can be established with capital of as little as €1.00, as long as the overall capital does not exceed €10,000.[165] Such improvements have certainly made arguments in favour of incorporating as Limiteds as opposed to GmbHs weaker in the eyes of entrepreneurs than they were before the MoMiG was introduced.[166]

Indeed, multiple studies show that incorporations of Limiteds in Germany have surged following *Centros* and *Inspire Art* in 2003 onwards and peaked in 2006-2007, but that ever since 2008, the number of Limiteds in Germany has been steadily declining.[167] Ringe attributes this decline to, *inter alia,* entrepreneurs beginning to make use of the UG as an alternative to the Limited.[168] Similar trends can also be witnessed occurring in other Member States.

6. Conclusion

The answer to how a 'hard' Brexit will affect the legal personalities and duties of UK Limiteds with MPBs in the EU-27, as well as what they can do to mitigate such effects, ultimately depends on whether the Limited has its MPB in a Member State adhering to the 'incorporation' or the 'real seat' theory.

In the first scenario, Limiteds in 'incorporation' States such as the Netherlands will in principle be able to preserve their legal personality and continue their operations as

---

[160] I.e. the process through which Member States, in light of the CJEU's *Inspire Art* and *Centros* rulings, adopt more favourable regulatory frameworks to persuade businesses to incorporate as their domestic company forms. For more detail, see: Johan Meeusen, 'Freedom of establishment, conflict of laws and the transfer of a company's registered office: towards full cross-border corporate mobility in the internal market?' (2017) 13(2) J of Private Intl L 294, 309ff.

[161] Armour (n 12) 231

[162] Rammeloo, 'Cross-border Company Migration Post-Brexit – An Attempt to Define Legal Parameters' (n 28) 11.

[163] Michael Beurskens and Ulrich Noack, 'The Reform of German Private Limited Company: Ready for the 21st Century?' (2008) 9(9) German LJ 1069, 1073-1075.

[164] ibid 1083f.

[165] For a discussion on the differences between the UG and the 'GmbH-proper,' see: Beurskens (n 163) 1083f.

[166] Tobias-Georg Schmidt, *Founding Limited Companies (Ltds) in Germany: Perspectives and Risks* (Salzwasser Verlag 2007) 57-65.

[167] Armour (n 12) 232.

[168] Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10(2) Eur Company and Financial L Rev 230, 230f.

they have done pre-Brexit. Nevertheless, they are likely to be subject to laws of the ‘incorporation’ State, which can include additional disclosure obligations and director liability rules that are more stringent than those governing Limiteds under UK law. Although such rules will merely put Limiteds on par with domestic company forms in order to ensure protection of local creditors, this parallel application of both UK company law and the law of the ‘incorporation’ State will likely cause some uncertainty. Limiteds with MPBs in ‘incorporation’ States other than the Netherlands will be affected by Brexit in similar ways.

In the second scenario, Brexit’s effects on Limiteds with MPBs in ‘real seat’ States will be significantly harsher. In Germany, Limiteds will lose their legal personality and be requalified into German partnerships. Besides possibly affecting Limiteds’ asset ownership and management structures, the most dramatic consequence will be the loss of shareholders’ limited liability. Hence, entrepreneurs will likely not be able to use Limiteds to conduct their businesses in Germany and other ‘real seat’ States after Brexit.

In both scenarios, however, Limiteds are able to convert themselves into company forms on the continent in order to mitigate Brexit's effects, preferably by way of CBMs or asset deals rather than CBSTs. While for Limiteds in ‘incorporation’ States conversion is merely advisable in order to avoid uncertainties, for Limiteds in ‘real seat’ States this seems to be the only way forward. Considering, finally, that the company forms Limiteds would be converting into are much more attractive now than they were 10-15 years ago, the effects of Brexit can be mitigated considerably.

Needless to say, clearly the most welcome post-Brexit scenario for ‘pseudo-foreign’ Limiteds would be a ‘soft,’ positive outcome of the UK-EU negotiations. The risk of Limiteds abruptly losing their rights of establishment under EU law should therefore be no less important than other issues discussed in the UK government’s Brexit white paper. However, even so, the political instability and resulting uncertainty about the ‘hard’ or ‘soft’ paths Brexit is expected to take preclude this paper from offering further predictions of what ‘pseudo-foreign’ Limiteds will face post-Brexit. Nevertheless, entrepreneurs and others managing such Limiteds should prepare for change and keep in mind that the end of the UK as the ‘European Delaware’ may well be around the corner.

7. Table of Legislation

7.1 European Union

Commission, 'Proposal for a Directive of the European Parliament And of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM (2018) 241

Consolidated Version of the Treaty on European Union [2016] OJ C 202/1

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46

Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies [2005] OJ L 310/1

Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1

7.2 Germany

Bürgerliches Gesetzbuch

Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen

Handelsgesetzbuch

7.3 Netherlands

Burgerlijk Wetboek

Wet op de Formeel Buitenlandse Vennootschappen, *Stb*. 1997, 697

7.4 United Kingdom

Companies (Trading Disclosures) Regulations 2008, as amended by The Companies (Trading Disclosures) (Amendment) Regulations 2009, The

Companies Act 2006

Insolvency Act 1986

8. Table of Cases

8.1 European Union

Centros Limited v Erhvervs- og Selskabsstyrelsen (C-212/97) [1999] ECLI:EU:C:1999:126

Kamer van Koophandel en Fabrieken voor Amsterdam tegen Inspire Art Limited (C-167/01) [2003] ECLI:EU:C:2003:512

Kamer van Koophandel en Fabrieken voor Amsterdam tegen Inspire Art Limited (C-167/01) [2003] ECLI:EU:C:2003:512, Opinion of AG Alber

Kornhaas v Dithmar (C-594/14) [2015] ECLI:EU:C:2015:806

Polbud — Wykonawstwo sp. z o.o. (C‑106/16) [2017] ECLI:EU:C:2017:804

Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (C-55/94) [1995] ECLI:EU:C:1995:411

Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) (C-208/00) [2002] ECLI:EU:C:2002:632

VALE Építési kft (C‑378/10) [2012] ECLI:EU:C:2012:440

8.2 Germany

BGH, 21.03.1986 - V ZR 10/85, BGHZ 97, 269

BGH, 10.02.1992 - II ZR 54/91, BGHZ 117, 168

BGH, 27.09.1999 - II ZR 371/98, BGHZ 142, 315

BGH, 01.07.2002 - II ZR 380/00, BGHZ 151, 204

BGH, 27.10.2008 - II ZR 158/06, BGHZ 178, 192

9. Bibliography

9.1 Books

- Biermeyer T, *Stakeholder Protection in Cross-border Seat Transfers in the EU: Between Freedom and Boundaries* (Wolf Legal Publishers 2015)
- Borg-Barthet J, *The Governing Law of Companies in the EU* (Hart Publishing 2012)
- Cahn A and Donald DC, *Comparative Company Law* (CUP 2010)
- Dorresteijn AFM and others, *European Corporate Law* (3rd edn, Kluwer Law International 2017)
- Paschalidis P, *Freedom of Establishment and Private International Law for Corporations* (OUP 2012)
- Rammeloo SFG, *Corporations in Private International Law: A European Perspective* (OUP 2001)
- Schmidt TG, *Founding Limited Companies (Ltds) in Germany: Perspectives and Risks* (Salzwasser Verlag 2007)
- Vlas P, *Rechtspersonen in het international privaatrecht* (Kluwer 1982)

9.2 Chapters of books

- Barneveld J, 'Legal capital and creditor protection: some comparative remarks' (2009) in Zaman DFMM and others (eds), *The European private company (SPE): a critical analysis of the EU draft statute* (Intersentia 2009)
- Mansel HP, 'Connecting factor', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017)
- Schuit SR, 'Legal' in Schuit SR (ed), *Corporate Law and Practice of the Netherlands: Legal, Works Councils and Taxation* (2nd edn, Kluwer Law International 2002)
- Schulz M, 'European Challenges for German Law: An Analysis of the Recent Jurisprudence of the European Court of Justice on the Freedom of Establishment and its Impact on German Corporate Law and Conflict of Laws' in Miller RA and Zumbansen P (eds), *Annual of German & European Law*, vol 2 (Berghahn Books 2007)

9.3 Journal articles

- Armour J and others, 'Brexit and Corporate Citizenship' (2017) 18(2) Eur Business Organization L Rev 225

- Beurskens M and Noack U, ‘The Reform of German Private Limited Company: Ready for the 21st Century?’ (2008) 9(9) German LJ 1069
- Gerner-Beuerle C and others, ‘The Law Applicable to Companies in Europe: Study and Possible Reform’ (2017) 14(4) Eur Company LJ 148
- — — ‘Why do businesses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules’ (2018) 56 Intl Rev of L and Economics 14
- Kemp B, ‘Vennootschappen uit het Verenigd Koninkrijk in Nederland na brexit: gaan zij terug naar het verdomhoekje?’ (2017) 3/4 Maandblad voor Ondernemingsrecht 59
- Kokkinis A, ‘The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity’ (2016) 27(7) EBLR 959
- Kramer X, ‘Dutch Private International Law-Overview 2002-2006’ (2007) IPRax No 1 <https://ssrn.com/abstract=988086> accessed 29 June 2018
- Lehmann M and Zetzsche D, ‘Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK’ (2016) 27(7) EBLR 999
- Looverbosch MVD, ‘Real Seat Theory v. Incorporation Theory: The Belgian Case for Reform’ (2017) 28 Intl Company & Common L Rev 1
- Lowry J, ‘Eliminating obstacles to freedom of establishment: the competitive edge of UK Company law’ (2004) 63(2) CLJ 331
- Meeusen J, ‘Freedom of establishment, conflict of laws and the transfer of a company’s registered office: towards full cross-border corporate mobility in the internal market?’ (2017) 13(2) J of Private Intl L 294
- Mülbert PO, ‘A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection’ (2006) 7(1) Eur Business Organization L Rev 357
- Peel MJ, ‘Owner-Managed UK Corporate Start-Ups: An Exploratory Study of Financing and Failure’ (2016) 6(4) Entrepreneurship Research J 345
- Pütz L and Sick S, ‘Der deutschen Unternehmensmitbestimmung entzogen: Die Zahl der Unternehmen mit ausländischer Rechtsform wächst’ (2010) 64(1) WSI-Mitteilungen 34
- Rammeloo SFG, ‘Cross-border company migration in the EU: Transfer of registered office (conversion) – the last piece of the puzzle? Case C-106/16 Polbud, EU:C:2017:804’ (2018) 25(1) Maastricht J of Eur and Comparative L 87
- Renssen S, ‘Corporate Restructuring and Corporate Dissolution of Companies in Financial Distress: Ensuring Creditor Protection. A

Comparison of the US, UK and Dutch Models' (2017) 26 Intl Insolvency Rev 204

- Ringe WG, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10(2) Eur Company and Financial L Rev 230
- Schillig M, 'Corporate Law after Brexit' (2017) 27(3) King's LJ 431
- Soegaard G, 'Cross-border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country' (2018) 15(1) Eur Company LJ 21
- Vliet LV, 'New Developments in Dutch Company Law: The Flexible Close Corporation' (2014) 7 J of Civil L Studies 271

9.4 Working Papers

- Böckli P and others, 'The Consequences of Brexit for Companies and Company Law' (2017) University of Cambridge Faculty of Law Research Paper No 22/2017 <https://ssrn.com/abstract=2926489> accessed 28 June 2018
- Cathiard C, 'European Added Value Assessment on a Directive on the Cross-border Transfer of Company Seats (14th Company Law Directive), Annex I: Legal effects of the requested legislative instrument' (2012) Jeantet Associés Aarpi Research Paper EAVA 3/2012 <https://publications.europa.eu/en/publication-detail/-/publication/a0d481e1-ae0a-48da-89c4-3e9751aec774/language-en/format-PDF/source-search> accessed 11 July 2018
- Cervelló CJM, 'And Here Remain with Your Uncertainty: the Consequences of Brexit for Business Law' (2017) Working Paper IE Law School AJ8-239

9.5 Reports

- Biermeyer T and Meyer M, 'Cross-border Corporate Mobility in the EU: Empirical Findings 2017' (2018) <https://ssrn.com/abstract=3116042> accessed 28 June 2018
- Gerner-Beuerle C and others, *Study on the Law Applicable to Companies* (2016) <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1> accessed 28 June 2018

9.6 Other electronic publications

- Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules on Company Law' (2017) <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=607669> accessed 28 June 2018
- Deloitte Legal, 'Ahead of Brexit: A corporate law primer on relocating your business to Germany' (November 2017) <https://www2.deloitte.com/content/dam/Deloitte/dl/Documents/legal/Ahead%20of%20Brexit%20CL%20Germany.pdf> accessed 30 June 2018
- Department for Exiting the European Union, *The future relationship between the United Kingdom and the European Union* (Cm 9593, 2018) <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> accessed 10 September 2018
- Ende HVD, 'All about: the impact of Brexit on the financial statements and management report' (2017) PwC *All About* Report Series <https://www.pwc.nl/en/publicaties/all-about-the-impact-of-brexit-on-the-financial-statements-and-management-report.html> accessed 28 June 2018
- Financial Reporting Faculty, *UK Regulation Factsheet: UK Distributable Profits* (ICAEW 2015) <https://www.icaew.com/-/media/corporate/files/technical/audit-and-assurance/2015-aaf-and-frf-roadshow-resources/audit/distributable-profits.ashx?la=en> accessed 29 June 2018
- Herbert Smith Freehills, 'Brexit Legal Guide' (June 2018) <https://www.herbertsmithfreehills.com/file/26966/download?token=xeC_pG9w> accessed 30 June 2018
- Meyer M, 'The long path to a broad reading of the Freedom of Establishment and its impact on the Brexit era' (Master thesis, Lund University 2018) <http://lup.lub.lu.se/student-papers/record/8947135> accessed 30 June 2018
- Norton Rose Fulbright, 'Distributions of profits out of a Dutch BV' (November 2015) <http://www.nortonrosefulbright.com/knowledge/publications/133190/distributions-of-profits-out-of-a-dutch-bv> accessed 24 June 2018
- Pearce W and Little SJ, 'Cross-border mergers involving UK companies: some key questions and answers' (July 2017) <https://www.internationallawoffice.com/Newsletters/Corporate-FinanceMA/United-Kingdom/Davis-Polk-Wardwell-LLP/Cross-border-

mergers-involving-UK-companies-some-key-questions-and-answers>
accessed 28 June 2018

9.7 Newspaper articles

- Barker A, 'EU calls for ramp-up in Brexit 'no-deal' preparations' *Financial Times* (Brussels, 19 July 2018).
- Brunsden J and Khan M, "Why the UK needs a 'plus plus plus plus' version of Ceta" *Financial Times* (Brussels, 12 December 2017)
- Editorial, 'Theresa May's fragile Brexit truce is unlikely to last for long' *Financial Times* (London, 23 February 2018)
- Giles C and Barker A, 'Hard or soft Brexit? The six scenarios for Britain' *Financial Times* (London, 23 June 2017)

9.8 Miscellaneous

- *Go Limited* <https://golimited.co/> accessed 30 June 2018
- *Limited 4 You* <http://www.limited4you.de/> accessed 30 June 2018
- *Limited 24* <http://www.limited24.de/> accessed 30 June 2018
- Rammeloo SFG and Kemp B, 'Cross-border Company Migration Post-Brexit – An Attempt to Define Legal Parameters' (2018) (forthcoming)