

# The Impact of BREXIT on Cross-border Company Migrations

***“BREXIT” 15 months on – socio-legal perspectives for the EU and Europe Queen’s University Belfast, 23 Sept. 2017***

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## CJEU *Inspire Art Ltd.* (2003) [website January 15, 2017]

**The Strange Life of One Company at 80 Sidney Street.**

**80 Sidney Street, Folkestone Kent, is an address where over 4300 companies have been registered and/or are registered. One of the companies which started of life at Sidney Street was a company called Inspire Art Ltd.**

Inspire Art Ltd was **incorporated** on the 28 July 2000, it's sole Director was a one **Mr. Erik Koen**. In 2003 Inspire Art Ltd had ended up in the European Court of Justice, the case being about their registered office, central administration and their principal place of business within the Community (EU) – was it Holland or the UK – the **ECJ ruled** inspire Art could pursue activities in other Member States through an agency, branch or subsidiary.

If we go back a bit to 2001 and take a look at the **annual-return 2001** we can see a company which goes by the name of **Haag Juristen College (Cyprus) Ltd** (in English, Hague Jurist College (HJC)) on page 4 of the document. Many of the companies which were set up at Sidney Street had dealings

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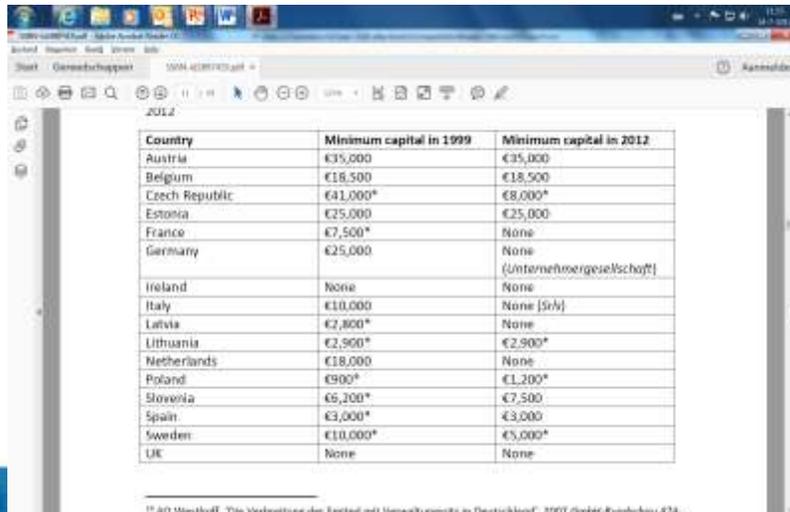
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## CJEU Inspire Art Ltd. – Aftermath (ECGI Rep. 2017)



Country	Minimum capital in 1999	Minimum capital in 2012
Austria	€35,000	€35,000
Belgium	€18,500	€18,500
Czech Republic	€41,000*	€8,000*
Estonia	€25,000	€25,000
France	€7,500*	None
Germany	€25,000	None (Unternehmensgesellschaft)
Ireland	None	None
Italy	€10,000	None (Srl)
Latvia	€2,800*	None
Lithuania	€2,900*	€2,900*
Netherlands	€18,000	None
Poland	€900*	€1,200*
Slovenia	€5,200*	€7,500
Spain	€3,000*	€3,000
Sweden	€10,000*	€5,000*
UK	None	None

\* All Westhoff, Die Verbreitung der Einheit mit Verwaltungssitz in Deutschland, 2007 Debet-Rechtsku 474.



## Heading for 'Brexit' – Kicking Off..

Focus only on companies being 'creatures of *national law*'

'Brexit undoubtedly will affect many British private limited companies (LTDs) with their effective place of management in Germany.

Following the Brexit decision, they see the potential risk of Germany ceasing to recognize them as an EU/EEA company – with an adverse impact in terms of liability and possibly taxation, too.

The cross-border conversion might prove to be an alternative to the more common cross-border merger as a means of transforming an LTD into the more "sustainable" equivalent German GmbH in a tax-neutral way.'

(Quote: M. Winter/E. Marx/N. De Decker, blog August 2016, available <https://www.fgs.de/en/news-events/news/details/from-paris-to-charlottenburg-cross-border-conversion-in-practice-1.html>.)



**Which companies could leave the UK because of Brexit?**

Deutsche Bank is the latest corporation to be hit by Brexit.

It is thought the bank could **lose 4,000 jobs** out of the UK, nearly half of its UK workforce, over concerns it won't be able to conduct business throughout Europe once the UK leaves the union.

According to people familiar with the matter, the bank could start relocating jobs as early as next year, ahead of the March 2019 deadline for Brexit.

Reporting at a conference in...

**TIMELINE FOR ARTICLE 50**

Five: 23: 2017

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## Cross-border company migration – Why; how?



### 'Modalities & Motives'

- Headquarters (HQ)
  - Economic drives
  - Taxation of corporate income
- Registered Office (RO)
  - Legal drives: company 'changing clothes'; company conversion (PIL: 'proper law of the company')
  - Cost saving??
- HQ & RO simultaneously
  - Economic & legal drives
  - Upcoming Brexit?

## Cross-border company migration – Perspective

Recall: 'Brexit undoubtedly will affect many British private limited companies (LTDs) with effective place of management

1 UK Ltd's (only?) – Interests involved...

- UK investors – Access to EU?; other FOE options? Cf. prst Dr. B. Kemp). Cf. flood of comments on line
  - 'Domestic' use by entrepreneurs on continent (and Ireland?) of (pseudo?) foreign (UK) 'proper law of the company'
- 'dramatic growth in the overall total number of companies registered in the UK, which grew from approximately 1.7 million in 1999 to nearly 3.5 million by 2015' ECGI Brexit Corporate Citizenship '017)

2 'Responses' (interests) legal order 'of origin'/'host state'

- Freedom of departure (outbound); of establishment (inbound)



## Cross-border company migration – Perspective

United Kingdom	<i>Ex ante</i> Brexit	<i>Ex post</i> Brexit: 'Great Repeal Bill' - EU/EEA law? - Bilateral Treaties? - National law (PIL)? (Cf. further next slide)
HQ	Inbound: CJEU Centros (1999); Inspire Art Ltd. (2003). Reform CompA 2006 Outbound: CJEU Daily Mail (tax law); Cartesio (cf. insolvency law!)	Inbound: national conflict of laws?  Outbound: companies - <i>a fortiori</i> - remain 'creatures national law'
RO + HQ	Inbound: CJEU Vale  Outbound: Cartesio a contrario ('...whilst <i>not</i> retaining its identity')	Inbound: national law  Outbound: national law without prerequisites set by Cartesio



## Cross-border company migration – Perspective

EU Member States	<i>Ex ante</i> Brexit	<i>Ex post</i> Brexit - Bilateral Treaties? - National law (PIL)? - Respect vested rights pre-Brexit Ltd's? - Exclusively for EU? 'Level playing field'; UK 'not just any third state'? Mind Ltds in cross-b litigation!
HQ	Inbound: (EU law parameters) = LNRE; MoMiG; Impresa Nueva; Flex-BV (etc.) Outbound: (EU law)	Inbound: EU MS laws: revival of 'real seat' approach? Cf. BGH 2008 ('Trabrennbahn', Swiss company = non EEA) Outbound:
RO + HQ	Inbound: (EU law) Cf. French-G conversion (ECL August, 2017) Outbound: (EU law)	Inbound: discretionary margins national laws individual EU MS? Outbound (UK persp?)



## What goes up... Rise and fall Ltd. in Germany



## Re-appreciating domestic company types?

- 2011 – German Unternehmens Geschäft (UG, i.e. the 'light GmbH,' (Private Ltd. company in a 'deregulated' format):
  - *U. Noack, January 7, 2011*: Das GmbH-Derivat der Unternehmergeellschaft (haftungsbeschränkt) machte kräftige Fortschritte: inzwischen sind über 41 000 UG zu verzeichnen. (German 'light' GmbH got real popular, over 41.000 registries)
  - *M. Gehrlein, BB 2011, p. 3*: Germany counts about 990.000 limited liability GmbH companies, overall capital outnumbering overall capital of 18.000 AG companies...  
*As to UK Ltd.:* 34.000 registries by June 2010, but the MoMiG created a halt/standstill... (the Ltd. is 'tenzentiell Rückläufig...')



## Re-appreciating domestic company types?

Is UK Ltd. (still) more attractive to continental business world?

- *Extrem hohe Frühsterblichkeit der Ltd. (DB online, August 7, 2009).*
  - Cf. risk: 'limping legal relationship'; OHG/commercial partnership?
- *Unterkapitalisierung und verweigerte Finanzierung durch Banken* (absence of capital... absence of solvability?)
  - Even complaints (EU Commission) did not change this 'attitude'
- Conflict of Law tools 'neutralizing' Ltd attraction:
  - (i) By narrowing scope of the proper law of the company,
  - (ii) By widening the scope of the proper law of a contract, tort or insolvency (cf. paralleled approach in court proceedings CJEU C-594/14 (Kornhaas))
- Narrow(ed) interpretation of e.g. paragraph 4 GmbHG on *German Ltd. companies moving HQ to non-EU (UK) legal order?* Ratio!



## UK Ltd's in Germany... Update (recent data) (Source: ECGI Brexit and corporate citizenship, January 2017)

new 'entrepreneur company' ('Unternehmergesellschaft') in 2008, which did away with the mandatory minimum capital requirement.<sup>26</sup>

**Table 3: Total number of German branches registered in the German commercial register by UK-incorporated companies, 2009-2016.**

Year	2009	2010	2011	2012	2013	2014	2015	2016
Registrations	17,524	17,551	14,814	12,553	11,282	10,491	9,703	8,968

<sup>26</sup> UK Companies House, Statistical Release: Companies Register Activities 2014/15 (2015), 7.

<sup>27</sup> Estimates differ according to the date and methodology employed. Westhoff, above n 18, estimates that the total number of UK limited companies incorporated by German entrepreneurs peaked at 48,000. However, this was measured as of 2007. In contrast, the figure for Germany in Table 3 (81,485) includes all those incorporated up to 2011, but also subtracts 'deaths' during the period 1999-2011, to estimate the net



## Beyond 'Brexit' – Feasible Approaches?

➤ Cross-border company migration - Hard or soft(er) 'Brexit'?  
Recall 'matrix' slides... How to serve EU, UK *and* business?

I Competence: excl. EU... Or EU (individual) Member States?

II Depending on (I): potential approaches

- The 'Norway' option (EEA): imposes *acquis* elements (no free lunch), Annex XXIII EEA Agreement on company law ('FOE'-proof)
- Bilateral agreement UK-EU/EFTA?; UK-EU MS? Cf. C Najy/D.Phinnemore, <http://blogs.lse.ac.uk/brexit/2017/07/12/the-uk-should-look-for-membership-or-association-with-efta-for-the-sake-of-continuity-and-flexibility/>
- Respect '*Altgesellschaften*' (pre-Brexit Ltd's): PIL vested rights; constitutional rights (justified expectations)  
- *Intertemporal* PIL: 'old' v. 'new' Ltd debts = limited/unlimited liability  
'Name tag' different regimes
- NL: revival PFC regime? Note: capital requirement for 'BV's' relinquished!
- Offer conversion 'time slot' to all Ltd's 'anywhere' in EU (cf. Germany: trans. costs + inertia managers of Ltd's duly incorporated in the past?)
- UK access, indirectly, to Market via subsidiaries (no longer: branches)?



## Issues not (even) explored... Further debate

- Company group structures
- Cross-border transfer of solely RO: CJEU C-106/16 (Polbud)
- How about the company law *acquis* (Directives)?  
Cf. Pre-, post, *and* transition period Brexit!
  - Implementation (still?) of new shareholders right Directive (duty!)
  - Claims interested parties before CJEU in case of *non*-transposition in *pre*-Brexit era? Expectations 'justified' or not?
  - Company law... *cum annexis* (cf. accounting & auditing; take over; MAR)  
Cf. Legal Studies Research Cambridge University Paper 22/2017
- Cross-border seat transfer operations involving third (EU/non-EU) states
- Cross-border seat transfer of SE from UK to remaining EU Member States (July 2016: 61 UK based SE's; conversion (art. 66) to Plc?  
Example (appendix): Star Stone Insurance



## Issues not (even) explored... Further debate

- FOE (art. 49/54 TFEU) for Member States only; free movement of capital also for 3d countries (art. 63 TFEU)!
- Commercial litigation in/outside 'Europe'  
Art. 24 the Recast/and or (?) EFTA reign of Lugano (exclusive 'company forum') and under UK civil procedural law – Notably r & e of judgments (assets located 'abroad'!)
- Insolvency proceedings under EIR 2015/848:  
'COMI' in/outside EU? (UNCITRAL Model Law 2014? Greece, Plnd, Rum, UK, Slovenia only), cf. 'scope' proper law of company, contract, tort, etc.

### Unaffected?

- Human & constitutional rights bottom line  
Cf. ECHR *Bramelid v. Malmström* affecting e.g. shareholder rights



## Brexit - 'Questions rather than conclusions'

- Positive law – Expectations/speculations for the (near) future?
  - Transition period?; vested rights respected (favor) or 'discrimination'?; harmonisation efforts (secondary EU law) respected 'until further notice' Cf. Legal capital, bonus caps?
- Recall: versatile perspectives & interests/drives, of:
  - (i) UK business world in EU 'ex post Brexit':  
*Professional* rather than *company* law barriers:  
[http://www.europarl.europa.eu/facts\\_2004/3\\_2\\_3\\_en.htm](http://www.europarl.europa.eu/facts_2004/3_2_3_en.htm).
  - (ii) UK legal order (promoting and 'exporting' Ltd as business vehicle)
  - (iii) Continental/Irish business world: *Freundschaftsübereinkommen*?
  - (iv) Continental/Irish) legal orders remaining EU Member States  
(revival of real seat approach?; continent affected more than UK?;  
note: Irish law requests company HQ in Ireland)
- (Positive) countereffect: commerce & trade = jobs, prosperity



## Miscellaneous matters... Appendix...



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1 CJEU C-106/16 *Polbud* – Op. AG Kokott May 4, 2017

Cross-border conversion of Polish company into Luxembourg company

Characterization of two, different situations:

(1) Cross-border transfer RO: company 'changing clothes only'  
(without transfer HQ?)

- *De iure* this is the mirroring image of CJEU *Cartesio*: cross-border transfer HQ without RO

(2) Cross-border transfer RO + 'economic activity' in the 'host' MS  
(= not necessarily HQ!)



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CJEU C-106/16 *Polbud* – Op. AG Kokott May 4, 2017

Preliminary questions lodged – Opinion AG

1 To which extent is the conversion operation *captured* by (scope of) articles 49 and 54 TFEU?

Only insofar there is *economic activity* or *the intention to pursue genuine economic activity* in EU MS other than the MS of incorporation (Luxembourg)

Op. 38: 'Cross-border conversion is *not* caught by FOE where it is *an end in itself*, [*unless*] *accompanied by actual establishment*.'

Ratio: 'domestic' affair only, to be decided over by laws MS the company *originates* from...?



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CJEU C-106/16 *Polbud* – Op. AG Kokott May 4, 2017

2. If company [in Plnd] actually established itself, or intends to establish itself, in [Lux] to carry on genuine economic activity there, and converts itself into a [Lux] company national legislation under which removal of the company from the commercial register of [Plnd] must first be wound up after having been liquidated restricts the freedom of establishment.

3. The general obligation to carry out a liquidation procedure [under Polish law] is not a proportionate means of protecting the creditors, minority shareholders and employees of a company that performs a cross-border conversion



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## 2 CJEU C-594/14 (Kornhaas): EU Insolvency Reg. 2015?

UK Ltd.; business conduct (COMI) in Germany

- German law prevailing over corporate law (liability grounds in insolvency proceedings)
- German law imposing personal liability on company directors for payments made by company after failure to file for insolvency proceedings within three weeks of the company becoming over-indebted, because this dealt with the consequences of failure to open insolvency proceedings, and regulated acts detrimental to all the creditors
- Cf. stronger/weaker creditor protection under corporate/insolvency laws state A (incorporation)/state B (HQ/COMI)



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## 3 'Moving pictures...' SE Transfer UK – Liechtenstein... (Star Stone Insurance)

In accordance with Article 18(1) of the Council Regulations (EC) 2157/2001 (Regulation 11) of the European Public Limited Liability Company Regulations 2004.

### SE TR03

Transfer from the United Kingdom (UK) of Societas Europaea (SE)

**Laserform**

What this form is for  
You may use this form to transfer an SE from the UK.

What this form is NOT for  
You cannot use this form to supply any other information.

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**SE details**

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## Should the Netherlands consider taking a different approach?

- Consideration to take into account:
  - Do we need these additional requirements for UK Companies?
  - Current functioning of UK companies in Netherlands (13.988 in 2011)
  - Future regulatory competition?
    - Both from UK and EU-member states perspective
  - Protection of other stakeholders?
    - Developments in Belgium
    - Developments on EU-level

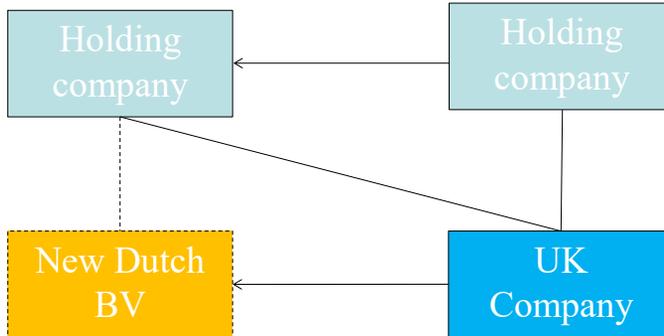


## What should UK companies in the Netherlands do?

- Uncertainty averse
  - Cross border merger
  - Cross border conversion (?)



## Cross border merger



## Cross border conversion

