The Impact of Brexit on UK Company Law

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Company law is harmonized to a substantial extent at the European Union (EU) level, particularly with regard to public corporations. The so-called 'Company Law Directives' (hereinafter the '**Directives**') cover a wide range of issues relevant to the corporate life, such as the minimum share capital, creditor protection, the process of statutory mergers (cross-border and domestic), takeovers, shareholders' voting rights, matters relevant to corporate financial statements and auditing, etc. The United Kingdom (UK) as a Member State of the EU has transposed into its domestic legal system the Directives, the provisions whereof are mostly to be found currently in the Companies Act 2006, which is the fundamental statutory text that regulates the affairs of UK corporations.

The question arises as to whether those British corporate law provisions that stem from the Directives shall stay in force after the UK's exit from the EU or whether the British corporate institutional setting shall follow a more 'solitary' route differentiating itself from its continental counterparts. It goes without saying that any post-Brexit developments at the corporate level have the potential to affect the level of investment by overseas investors in securities issued by British corporations going forward. This is because investing in a corporation regulated to some extent by rules of EU origin means subscribing to a set of legal institutions, which has been tested across a number of jurisdictions and has proven workable; this reduces transaction costs and, all things being equal, encourages investment.

Nothing prevents the British legislator, of course, to merely choose to leave the EU-originated provisions embedded in the Companies Act 2006 to avoid uncertainty and keep transaction costs low. Officially, though, the fate of the EU-originated provisions of UK corporate law largely depends on the relationship that shall be established between the UK and the EU after the formal 'Brexit'. Therefore, let's consider two of the prevailing scenarios discussed currently in the relevant literature on 'Brexit'.

If the post-Brexit UK eventually joins the European Economic Area (EEA), it will be bound by the Directives as they are also compulsory for EEA Member States; under this scenario the European roots of British corporate law would in principle remain largely unaffected post-Brexit.

If the UK leaves the EU without an ad hoc agreement or with an ad hoc agreement, which doesn't feature a special arrangement regarding the application of the Directives, then the UK shall not be bound by these Directives and shall no longer be obliged to maintain them in its national legal system. Under this scenario anything is possible in corporate law: the UK might, for instance, change the minimum share capital for corporations, increase or decrease the protection of creditors, loosen the rules on financial assistance (liberating the LBO market again) or choose to abandon the statutory requirements of the Takeover Bids Directive and return to the previous model of self-regulation of takeovers. In addition to this, any provisions regulating cross-border operations between companies registered in different Member States will in principle not be applicable to UK companies (for example, the Cross-border Mergers Directive); this may complicate business transformations involving a British corporation going forward.

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Apart from the vertical operations within a British corporation, Brexit may also affect the popularity of English law in a number of – mostly arbitration clauses in – corporate transactions, such as M&A and Investment agreements. English law is the law of choice in a great number of M&A agreements today, even if such business combinations have little relevance to the UK. This, of course, is due to the English contract law institutions, which provide legal certainty to the transacting parties; for instance there is little room for parties to seek to escape their obligations under M&A contract by invoking concepts well known to continental lawyers, such as *force majeure*, abuse of rights, etc.

This 'soft spot' that M&A parties have for English law is unlikely to change in the short-term as a direct result of the Brexit. However, the position of the UK as a non-EU Member State may affect the stance of continental Courts towards English (contract) law institutions; we might in the mid- to long-term start seeing EU national Courts' rulings identifying English law institutions as running afoul to the *lex fori* public order. This may disincentivize M&A parties to choose English law as being applicable. What is mostly evident though is that jurisdiction clauses in favour of English Courts in international M&A contracts will decline in quantity, given that English Court rulings won't be subject to the free movement of rulings now guaranteed under the recast Judgments Regulation; English Court rulings will have to undergo the 'exequatur' procedure, which introduces delays for M&A parties that seek to enforce a ruling within the EU area. This development will also affect the popularity of other English corporate law structures, such as the scheme of arrangement, which was quite in fashion lately for continental corporations as an alternative to domestic restructuring regimes. It is doubtful that continental Courts will recognize and enforce English Court rulings sanctioning a scheme of arrangement for a non-UK corporation.

Finally, another post-Brexit repercussion may be the number of incorporations in the UK. The UK is currently a popular destination for incorporations within the EU by entrepreneurs who may only have a remote connection to the UK. By incorporating in the UK, those entrepreneurs, apart from taking advantage of other institutions (e.g. tax law, effective public administration, etc.) know that their company enjoys access to the Internal Market. Whether this shall continue to be the case, remains to be seen.