The Effects of Brexit on the Law of Companies and Financial and Legal Services in Europe: A Summary Overview

by

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I. Some systematic observations of introduction

According to art. 50 para. 2 TFEU, once the UK has notified its intention to withdraw, the Union with its remaining 27 Member States (EU 27) shall negotiate and conclude an agreement with the UK, setting out the arrangements for the UK's withdrawal. Art. 50 para. 3 TFEU says that the Treaties shall cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, after the lapse of the period of negotiation of two years or such longer period as unanimously agreed. There are in my view several consequences from that express Treaty provision. First, since the Treaties cease to apply even if there is no agreement on the withdrawal arrangements, it is the unilateral notification of withdrawal that must legally be seen to trigger the withdrawal with all its consequences, and not the agreement on the withdrawal arrangements. Second, UK and EU 27 are free to extend unanimously the two years period for negotiating the agreement on the

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arrangements of withdrawal. Third, they are not free to stipulate in such agreement that certain provisions of the Treaties are for all future (and not merely transitionally) exempted from the express stipulation in art. 50 para. 3 TFEU that the Treaties cease to apply. If the content of certain provisions of the Treaties is to continue to be applicable after the UK's withdrawal has become effective, such continuing applicability can only follow from the agreement on the future relationship between UK and EU 27 as envisaged in art. 50 para. 2 TFEU. Thus one clear effect from Brexit (in the narrow sense of the withdrawal by UK) will be that the Treaties in their entirety are no longer applicable to the UK.

As regards the time post withdrawal, the arrangements for the withdrawal by the UK according to art. 50 para. 2 TFEU shall take account of the framework of the future relationship between the UK and the EU – the effect of Brexit in the wider sense of the new relationship that is to replace the present EU membership. That has several consequences. It is not the future relationship in its entirety, with all the many detailed provisions it will encompass, but only the framework thereof that is to be taken into account. To turn this framework into a detailed agreement that covers the entirety of the future relationship between UK and EU 27 will require difficult and time consuming negotiations. This is why art. 50 para. 2 TFEU states that the agreement on the arrangements for withdrawal shall only take into account the framework of the future relationship and does not have to include a full agreement on all of the future relationship with all its details. This means that there will in all likelihood be a time gap between the date when the UK's withdrawal becomes effective and the Treaties cease to be effective on the one hand and on the other hand the date when the agreement on the future UK/EU 27 relationship becomes effective.

The framework for the future relationship determines which transitional provisions will be needed in the withdrawal agreement. The more progress on the future relationship the parties make during the negotiation period of two years (or longer if extended), the better the basis for defining the provisions of transition.

Art. 50 paras. 2 and 3 TFEU, of course, do not rule out the possibility that the two sides in the negotiation period finalize the entire agreement on the future UK/EU 27 relationship (with the consequence that no provisions on transition would be needed), however that is for all practical purposes only a theoretical possibility. In all likelihood the withdrawal agreement will only reflect the framework of the future relationship and will define the provisions of transition that are to bridge with the aforesaid time gap between UK's withdrawal on the one hand and the new relationship on the other hand becoming effective.

Systematically speaking, our topic therefore has three sub-issues:

(i) What will be the effects from Brexit in the narrow sense, i.e. from UK's withdrawal as such? That is a question under existing law.

(ii) What will be the future relationship UK/EU 27 (Brexit effects in a wider sense) the framework of which is to be taken into account in the withdrawal arrangements? That is not a question of law but of political prophecy.

(iii) What will be the provisions of transition in the agreement on the withdrawal arrangements that are to bridge the aforesaid time gap – to put it shortly – between UK withdrawal from EU and new relationship UK/EU 27 becoming effective? This, too, is not a question of law but of political prophecy.

When looking backwards on the public and media discussion since the Brexit referendum of June 23, 2016, it is striking to note how little attention was given to the aforesaid systematic differences. The discussion rather focused on aforesaid sub-issue (ii), with all sorts of models being suggested – UK membership in the European Economic Area (EEA); UK/EU 27 association agreement like in the case of Switzerland and Turkey; tailormade agreement in which many or only very few provisions of the Treaties would be reflected and thereby would become applicable in the future relationship; or a mere free trade agreement, tailormade or standard type. Very little attention was given to the need for transitional provisions, i.e. sub-issue (iii). It took quite a while until it was realized that what is required, in particular on the part of responsible negotiators of the UK and the EU 27 as well as on the part of businesses and citizens that will all be affected by Brexit, is to deal, first of all, with sub-issue (i), i. the question of what will be the Brexit effects in the narrow sense. That sub-issue is so important because the Brexit effects in the narrow sense determine the basis from which UK and EU 27 as well as businesses and citizens have to start the reflection on their future course of action, and because the effects from Brexit in the narrow sense will also be the Brexit effects in the wider sense if no agreement at least on the framework of the future relationship UK/EU 27 is found in the very short negotiation period for the agreement on the arrangements of withdrawal.

II. Some remarks on the general effects of Brexit (in the narrow sense)

As already stated, the Treaties according to art. 50 para. 3 TFEU cease to apply to the UK once the UK withdrawal has become effective. Thus in particular the Treaty provisions on fundamental freedoms – free movement of goods,

persons, services and capital – are no longer applicable to the UK. The Treaty provisions on the Court of Justice of the European Union (CJEU) are no longer applicable either – the Court loses its jurisdiction over the UK, its institutions and its corporate and physical citizens.

As regards the adoption of EU secondary law the UK after withdrawal will not participate in the legislative process and will as a matter of principle be outside the reach of such secondary law. EU law due to the territoriality principle can bind businesses and citizens in other countries not on a per se basis but only when their conduct produces effects within the EU.

Existing EU regulations for the aforesaid reasons cease to apply in the UK except for those which deal with effects within the EU, e.g. the Merger Control Regulation. Of course, the UK legislator, if it so wishes, may adopt UK legislation that replicates the content of EU regulations which lose their effectiveness in the UK.

Recommendations by the EU Commission also lose their applicability to the UK because of the territoriality principle.

Existing EU directives, too, lose their effectiveness in the UK. However that affects not UK businesses and citizens but only the UK itself as addressee of the directive which the UK has to transpose into UK law. That obligation for transposition where not yet complied with ceases to exist when UK withdrawal from EU becomes effective. Claims that, according to CJEU case law (Francovich et al.), UK businesses and citizens may be able to derive directly from an untransposed however self fulfilling directive, cease to exist. The withdrawal from the EU means that the UK is now free to decide whether UK laws that transpose EU directives, shall remain in effect or not. A UK law that has been adopted in order to transpose a EU directive and that remains in effect post Brexit is no longer to be interpreted in the light of the underlying directive which means that references to the CJEU for the interpretation of the directive are no longer required.

As regards the UK's decision on whether to continue UK laws for transposition of EU directives or not, a distinction between two categories of directives may become relevant. The first category are directives that have no specific cross-border content, such as the Directive on Domestic Mergers and the Accounting Directives. The second category are directives that do have a specific cross-border content, e.g. the Cross-border Merger Directive. UK businesses and citizens can make cross-border use of these latter directives only if the relevant EU 27 Member State of destination accepts such use after the UK has withdrawn from the EU. Such recognition on the part of the EU 27 Member States may in most cases be rather unlikely, and that fact may induce the UK to at least modify its own law by introducing a reciprocity

requirement which the UK would be free to do since it is no longer bound by the EU Treaties. As far as directives without specific cross-border aspects are concerned the UK may be inclined to continue the laws of transposition without modification.

III. The effects of Brexit (in the narrow sense) on Company Law

The existence and recognition of companies in whichever form, corporate or partnership, is governed by domestic law of a given state, both as regards companies from such state or from other states. The pertinent laws on conflict of laws to be found in Europe can generally speaking be characterized as follows. The UK, the Netherlands and several other states follow the incorporation theory according to which it is the jurisdiction under which the company has been established that is decisive. Other states, e.g. Germany and Austria, follow the real seat theory according to which the controlling factor is where the company is being managed. The incorporation theory (also referred to as statutory seat theory) intends to give flexibility to the company (and its shareholders/partners) to manage the business operation wherever they wish and without effect therefrom on the legal status of the company. The purpose of the real seat theory (also referred to as seat of management theory) is to protect the creditors, the underlying assumption being that the highest number of creditors is to be found where the company is being managed. The incorporation theory allows free movement of a company whereas the effects of the real seat theory restrict free movement: A company incorporated under foreign law with real seat in a real seat theory country is not recognized in such country as a foreign company. Either the existence is not recognized at all or such company is re-qualified by the real seat country as a general partnership, with a consequence of unlimited personal liability of all partners. Vice versa, a domestic company from a real seat theory country with real seat in a foreign country loses its existence and is to be wound up in its home country of foundation unless domestic law of such home country specifically permits the real seat to be in another country as is the case with a German AG and GmbH since 2008.

In a nutshell and generally speaking there is no problem with free movement if both countries involved follow the incorporation theory. However there is a restriction of free movement whenever one country or both countries involved follow the real seat theory. The case law of the CJEU (Centros, Überseering, Inspire Art) has held that such restriction, if made by the country of destination, violates the company's fundamental right of establishment. However, such case law becomes irrelevant once the Treaties are no longer applicable to the UK. Thus, as between UK and EU 27 the restrictive effects from the real seat theory become relevant again.

This post-Brexit reactivation of the real seat theory will of course work in both directions. However, in terms of numbers of companies affected there is a considerable imbalance between UK and EU 27. The number of companies with legal form under UK law and with real seat in a EU 27 Member State has been determined to be ca. 100.000 with respect to 8 Member States[1] for which statistical data were available. Extrapolation from this figure leads to a total figure of above 300.000 companies for all EU 27 Member States. These high figures are evidence of the attractivity of UK law due to its greater flexibility, its lower minimum capital requirements and the absence of employees' participation on board level, to mention the most important reasons only. Compared thereto the number of companies having their real seat in the UK and their incorporation seat in a EU 27 Member State is insignificant, given the fact that the company law of those EU 27 Member States generally speaking is less flexible than UK law.

Yet the fact that the fundamental freedom of establishment is no longer applicable in relation to the UK, has practical consequences, as mentioned before, only for those out of the aforesaid 100.000 to above 300.000 UK law companies which have their legal seat in a EU 27 Member State that follows the real seat theory such as Germany or Austria. In the aforesaid figure of ca. 100.000 as determined for 8 countries, Germany alone accounts for over 60%. Thus, the number of companies affected by the reactivation of the real seat theory is still quite significant.

Owners and management of such companies so affected in order to be absolutely on the safe side and in order not to be dependent on the outcome of the negotiation of the future relationship UK/EU 27 and the provisions of transition in the withdrawal arrangements agreement, if any, will have to decide and will have to bring implementation to full completion (!) prior to the UK's withdrawal becoming effective, what they want to do in order to avoid the aforesaid negative consequences, in particular the personal liability in the real seat country. This could e.g. be achieved either by merging the company into a company established under the law of the real seat country or of another EU 27 Member State, in accordance with the Cross-border Merger Directive, or by converting the UK law company into a company under the law of the real seat country or of another EU 27 Member State, in accordance with CJEU case law (Cartesio, Vale). Such merger or transformation, as mentioned before, would have to become effective in good time, i.e. prior to the effectiveness of the UK's withdrawal. Given the complexity of such corporate measures and the time they take until effectiveness, the companies in question are left with not much time.

1 Austria, Czech Republic, Denmark, France, Germany, Italy, Netherlands and Spain, with data for 2011.

If there is no completion prior to the effective date of the withdrawal the companies in question are dependent on the future relationship UK/EU 27 and the provisions on transition in the withdrawal arrangements agreement which owners and management will be unable to predict in good time before having to get the process started and completed before the UK withdrawal takes effect.

The aforesaid provisions on transition can be structured in various ways. One way is to give timewise unlimited status quo recognition as offered by Prime Minister Theresa May in her speech of January 17, 2017 to companies and individuals from abroad with domicile in the UK. Such express recognition would create legal certainty. That is important because it is uncertain whether such status quo (or bona fides) protection already follows from intertemporal law. An alternative would be to grant status quo protection for a defined duration so as to give companies and citizens affected sufficient time, post effectiveness of the UK withdrawal, to adjust to whatever will be the new UK/EU 27 relationship or to the absence of an agreement thereon. Given their own interests the EU 27 Member States will probably be prepared to grant such status quo protection, unlimited or limited in time, to UK citizens and companies with domicile in EU 27 provided there is reciprocity. Yet, however high that probability may be, there is no legal certainty.

IV. The effects of Brexit (in the narrow sense) on financial services

UK domiciled financial institutions presently enjoy EU passport rights where provided in the relevant directives on financial services. That means in particular that their branches in another EU Member State do not require a local license, nor equity capital of their own, nor risk management and controlling systems of their own, and are subject to supervision by EU and UK authorities only and not by local authorities of the other EU Member State in question. It is for this reason that for all banks from all over the world, in particular from the USA, London is the most important hub for activities in all of the EU. The UK withdrawal from the EU will mean that these passport rights will go away – the hub times will be over.

The dimension thereof is quite significant. There exist in Germany alone – leaving aside the other EU 27 Member States – 19 branches from UK banks and 69 branches from other UK financial institutions. Cross-border activities from UK institutions into Germany in non-branch form are also covered by EU passports. 740 UK banks and more than 2.900 other UK financial service institutions engage in such non-branch activities into Germany. To these numbers must be added the branches and non-branch operations that UK banks and other financial institutions maintain in other EU Member States.

This easily explains why the City of London was close to panic when the result of the Brexit Referendum of June 23, 2016 became known – the number of jobs in London in financial services plus ancillary legal, auditing and other related services is about 700.000!

Some London banks and financial institutions have ventured the idea that existing EU law, namely MIFIR II (Markets in Financial Instruments Regulation of 2014) might help because it provides for the possibility of passport rights for institutions from a third country which the UK would be after withdrawal from the EU. However, such passport rights under MIFIR II are tied to several conditions: (i) The EU Commission must have adopted a decision to the effect that the legal and supervisory framework of the third country in question provides for an effective system that is equivalent to that of the EU. (ii) There must be in place a co-operation agreement between the foreign supervisory authority and ESMA (European Security and Markets Authority). (iii) The standards of supervision must be comparable.

These MIFIR II provisions have been modeled after a similar provision in the Auditing Directive of 2006 which owe their existence to the SEC Auditors' Independence Rule of 2003 which subjected to SEC registration requirements and control foreign auditors that have opined on the financial statements of companies that are listed in the USA, or of a subsidiary company whose financial statements are submitted to the SEC by the parent company with listing in the USA. The EU reacted by including in the Auditing Directive of 2006 a corresponding provision on EU registration by, and EU control of, foreign auditors. Both the SEC Auditors' Independence Rule and the EU Auditing Directive provide that the SEC on the one hand and the EU Commission on the other hand may waive the cross-border requirement of registration by, and control of, foreign auditing firms once they find that there is the necessary equivalence on the other side. Up to date such a recognition of equivalence and resulting waiver has not been made. This practical example shows that in all likelihood MIFIR II will not be suitable to mitigate the effects that will follow from the UK withdrawal from the EU. In any case it must for all practicable purposes be ruled out that such MIFIR II based third country passport rights will be in existence already on the effective date of the withdrawal.

Apart from that, one must realize that banking transactions are not covered at all by MIFIR II and that foreign exchange transactions are covered only if they are conducted (i) from outside the EU (i.e. not through a physical presence within the EU) and for professional customers and with suitable counterparties only. Thus the MIFIR II solution as devised by some London based financial institutions would at best solve only some problems of some members of the UK financial community and therefore cannot be regarded as an escape from the Brexit effects in the narrow sense.

Another idea ventured by financial circles in London has been to have a bilateral free trade and mutual recognition agreement between the UK on the one hand and a given EU Member State, e.g. Germany, on the other hand which would allow for free movement of financial services and related labor and which could be negotiated immediately so as to ideally become effective simultaneously with the UK withdrawal from the EU. Such an agreement could be attractive for Germany because German banks as a result of the UK withdrawal would lose their EU passport rights in London. However, such idea is legally not feasible and therefore cannot help to avoid the Brexit effects. Financial markets regulation and supervision has become a matter of EU law, as evidenced by Single Supervisory Mechanism (SSM), European Central Bank (ECB), European Banking Agency (EBA) and ESMA. As a consequence, no EU Member State can any longer conclude a bilateral agreement in this field of activities.

Therefore the future relationship UK/EU 27 as regards financial services can be dealt with not under existing EU law nor bilaterally between UK and a given EU Member State but only in a new UK/EU 27 treaty. This explains why a more recent proposal in the City of London, in order to find a substitute for the disappearing EU passport rights, suggests that the UK should conclude a new treaty with the EU whereby it would join the EU Banking Union by submitting to the EBA and the SSM which would enable, as between UK and EU 27, free movement of financial services and of persons working in financial services. This proposal is, of course, sensible from a business view point for the financial institutions in question, however political acceptability not only on the part of the EU 27 but also on the part of the UK (before the background of the promises made in the Brexit referendum campaign) is quite questionable. In any case, this proposal is a matter for above sub-issue (ii), e.g. the future UK/EU 27 relationship (Brexit effects in the wider sense).

V. The effects of Brexit (in the narrow sense) on legal services

The situation of legal services is different from the situation of financial services. Under the Treaties UK law firms and lawyers at present enjoy the fundamental cross-border freedoms of services and establishment in the EU. Under secondary EU law (the Lawyers' Service Directive of 1977 and the Lawyers' Establishment Directive of 1998) it is only the individual lawyer (and not the law firm as such) that on the basis of his professional qualification and professional title enjoys cross-border EU passport rights: EU lawyers, with some very few and relatively unimportant exceptions, enjoy the same practice rights as local lawyers. EU lawyers may practice in the other state (in and out of courts) their own home country law, EU law and the foreign local law, and they enjoy the same legal privilege / professional secrecy protection als local

lawyers. As a consequence, UK law firms have in all EU Member States been able to render legal services not only through local lawyers but also through UK lawyers as if they were local lawyers. London on that basis has become the center of legal services in Europe. The market position acquired by UK law firms in some EU member states is probably even stronger than the position held by UK financial institutions. In fact, UK law firms have strong, sometimes dominant positions in the high end business law market of several EU Member States.

To give an idea of the economic importance of legal services exports from London into other countries (i.e. without the volume of legal services rendered by local offices in other countries), the UK in 2015 had a net export of legal services to the rest of the world worth £ 3,6 billion, of which to the other EU Member States legal services of £ 1,9 billion. The UK is the second largest legal services market in the world and the largest legal services sector within the EU, accounting for 10% of global legal services fee revenue and 20% of all European fee revenue. According to Eurostat the total value of the UK legal services sector was almost three times the size of the German legal market and six times the size of the French market which are the second and third largest European markets respectively. The legal sector employs in London alone almost 110.000 people. Lawyers and law firms in the UK and in particular in London have probably been the major beneficiary of European legal markets integration.

As regards the post-Brexit situation, EU secondary law on legal services has no system of equivalence based recognition for lawyers from other countries. It is rather up to each EU 27 Member State to decide how it wants to deal with lawyers from the UK as a non-EU/EEA third country. The UK post Brexit would only benefit from the General Agreement on Trade in Services (GATS). Most EU 27 Member States in that agreement permit lawyers from other GATS member states to practice only their home country law and international public law with the express exclusion of EU law. Practically all EU 27 Member States have reserved the right to impose additional regulatory restrictions. GATS does not provide at all for obligations to grant visa and work permits, i.e. there is no free movement of persons.

Germany for instance permits foreign lawyers to practice in Germany only after they have opened an office in Germany and have become a member of the local bar. Legal services by non-EU foreign lawyers on a fly-in fly-out basis are in most EU 27 Member States not permitted. There are many other regulatory restrictions for foreign lawyers in effect in the EU 27 Member States, e.g. on market access in general, court work, ability to open an office without involvement of local lawyers, ability to form a partnership with local lawyers, etc. The protection of GATS lawyers' legal privilege / professional secrecy is not ensured in the EU 27 Member States. As a consequence, UK lawyers post Brexit can in

many of the important EU Member States no longer practice EU and local law as before through UK lawyers. Another Brexit consequence in the narrow sense will be that UK lawyers lose their right to represent clients before the European Courts, before the EU Intellectual Property Office and before the EU Commission in competition law investigations. UK lawyers can of course advise clients on such matters, however their legal privilege / professional secrecy would be protected not at all under EU law and under EU 27 Member State law only to the extent granted by the relevant EU 27 Member State.

As a result, services rendered by UK law firms pre Brexit through UK lawyers can post Brexit be rendered only through local EU 27 lawyers whom the firms take on board as partners or employees, provided that is permitted in such state. Italy, for instance, prohibits the employment of an Italian lawyer by no matter whom, including employment by other Italian or foreign lawyers.

In order to preserve their EU passport rights, some UK lawyers on the basis of their UK qualification are taking out an Irish solicitor qualification. Yet, the Lawyers' Service Directive and the Lawyers' Establishment Directive give EU passport rights to a lawyer with qualification of a EU Member State only if he is an EU citizen. UK citizenship post Brexit will not meet this requirement so that an Irish qualification cannot ensure EU passport rights for UK citizens and cannot help to escape the Brexit effects in the narrow sense.

What has been stated above with respect to the loss of EU passport rights as regards outbound legal services from the UK into the EU applies, of course, also the other way round, for outbound legal services from the EU into the UK – EU law firms and lawyers lose their rights under EU primary and secondary law. However, national UK law is quite different from the national laws of most EU Member States insofar as it permits everyone, from the UK or from another country, to practice any kind of law in the UK provided that it is not done under a UK title, in particular the title of a solicitor. This is quite a different approach to the issue – it imposes qualification requirements not for the service as such but rather for the UK title under which the service is rendered, the understanding being that the client will realize from the absence of title that he cannot expect a service with the quality of a duly qualified UK title holder, e. g. solicitor. A lawyer from a EU Member State when practicing in the UK legal market under his home country title, does not practice under the title of an English solicitor, therefore his market access is not restricted under existing UK law.

As a consequence, the post-Brexit situation when comparing cross-border possibilities of UK lawyers on the one hand and EU lawyers on the other hand is rather imbalanced – the possibility of cross-border services by UK lawyers is severely reduced whereas the possibilities of services by EU lawyers into the UK will not be affected.

This imbalance could induce the UK to establish an equal level trading field for bilateral treaty negotiations by changing its existing law in the direction that the presently unlimited market access and practice rights of lawyers from other countries are, in one way or another, restricted as far as EU lawyers are concerned, so as to establish an equal level restriction field as between UK and EU 27. Yet, such measure would in all likelihood constitute an illegal discrimination under GATS. If so the UK could escape the discrimination only by changing its present law also with respect to lawyers also from countries other than the EU 27 Member States which would mean, the restrictions apply also to lawyers from Commonwealth Countries and the USA – a sacrifice for the legal profession which would politically be extremely difficult to accept in the UK.

The UK may instead be inclined, as has been discussed above in connection with financial services, to enter into a bilateral agreement with one or more EU 27 Member States, preferably to become effective together with the UK's EU withdrawal, which would give reciprocal recognition to qualified lawyers from either side. Unlike in the case of financial services as discussed above, each of the EU 27 Member States would be competent to enter into such an agreement, due to the fact that regulation of the legal profession has not been unionized. An example for such a bilateral agreement would be the agreement between Portugal and Brazil (a former Portuguese colony). However, the practice rights granted by such a bilateral agreement would of course be limited to the signatory states, i.e. would not extent to other EU 27 Member States – in the case of the aforesaid agreement Portugal / Brazil Brazilian lawyers may practice in Portugal but not in the other EU Member States. Therefore one or several such bilateral agreements would not really help the UK legal profession to escape from the Brexit effects in the narrow sense. Apart from that, such a bilateral agreement would in all likelihood not be attractive for any EU 27 Member State as long as lawyers from EU 27 already under UK law have the right to practice in the UK under their home title.

It is worth noting that what has been stated above on the effects of Brexit (in the narrow sense) in company law is relevant for those law firms from EU 27 that have chosen a UK legal form while having their real seat in their home country. The legal form so used is very rarely a corporate form (company limited by shares or company with limited liability), in most cases it is a Limited Liability Partnership (LLP) which like a corporation offers the advantage of full protection of shareholders against personal liability for all liabilities (professional and others) while offering for tax purposes in many countries the transparent status of a partnership which means in the case of Germany for instance that the profits of the law firm are not subject to German trade income tax and are taxed only at the level of the partners and not, prior thereto, at the level of the firm itself. Those companies and LLPs established under UK law that have their real seat in a EU 27 Member State that follows the real seat

theory, will be affected by the Brexit consequences in the narrow sense, as discussed above. They will lose their protection against personal liability because they will be re-qualified as a general partnership with unlimited personal liability of all its partners. I am not aware of statistical data of how many EU 27 LLPs would be so affected. However, for Germany alone my estimate is between 50 and 100, which includes some significant players in the German legal market. For the avoidance of doubt it should be mentioned that this does not concern those LLPs which have their real seat in the UK, such as London based LLPs in which UK and German law firms have joined forces by merger in one way or another.

VI. Outlook

The aforesaid is a summary overview of the Brexit effects in the narrow sense in company law and in financial and legal services only. If one wants to have the full picture of said Brexit effects then one would have to do a similar analysis for all the other fields and sectors of law and activities that are presently covered by the immense body of EU law that by now deals with almost all aspects of business and private life. Needless to say that such analysis is a gigantic task. Yet such task needs to be done if one wants to have a full answer to sub-issue (i) above (Brexit effects in the narrow sense) as a basis for properly dealing with sub-issues (ii) and (iii) (future relationship UK/EU 27 and provisions of transition). It is of course impossible to predict which answer UK and EU 27 will give to those two issues. Yet it is evident that work on these two issues again is a gigantic task.

Such work could be significantly facilitated if UK and EU 27 were to use as model a legal structure that is in use already in another context, such as the European Economic Area (EEA). Full EEA membership of UK would mean (i) all four fundamental freedoms of mobility will continue to apply to the UK, (ii) many parts of EU secondary law will continue to apply to the UK, (iii) UK would be subject to the jurisdiction of the EEA Court of Justice, (iv) the UK would have no seat in the Commission, the Council and the Parliament of the EU as law making bodies also for the EEA, and (v) the UK would nevertheless have to make significant payments, like e.g. Norway does, into the EU budget.

Another model could be the Switzerland/EU Association Agreements which also cover the mobility of persons and provide for financial payments into the EU budget, or one of the other Association Agreements of the EU with e.g. Turkey and Ukraine which go less far.

Into these categories falls also the proposal by Bruegel, a Belgian think-tank, of a new special "Continental Partnership" under which the UK would make

financial contributions to the EU 27 for obtaining one way access to certain EU markets, in particular financial services. Jeroen Dijsselbloem, the chair of the Euro zone, has commented on this proposal (and on others going into similar directions) by stating: "We can't allow the financial service center for Europe and the Euro zone to be outside Europe and to go its own way in terms of rules and regulations." It is obvious that the Bruegel proposal intends to cater for the interests of the London financial community. If all the sectors of industry and services were to have their way in the same direction then the UK would more or less stay within the EU.

At the other end of the spectrum would be a simple free trade agreement.

Relevant for the decision on format and substance of the new relationship UK/EU 27 may also be the relevant majority requirement. It is clear that the agreement UK/EU 27 on the arrangements of withdrawal (sub-issue (ii)) according to Art. 50 para 2 TFEU requires a qualified majority on the part of the EU Council, i.e. at least 55% of the number of Member States which must represent at least 65% of the total EU population. The situation is less clear as regards the future relationship UK/EU 27. Depending on format and substance qualified majority in the EU Council may not be sufficient and unanimity on the part of all Member States may rather be required.

Theresa May, the British Prime Minister, in her speech of January 12, 2017 has put an end to all such theoretical discussions about the format of the future relationship by stating that UK wants to stick to the Brexit campaign promises (take back control on immigration, re-establish sovereignty of UK legislator and judiciary). This in particular rules out UK EEA membership. There is, however, one fact of law in this context that is often overlooked, namely that UK already now is a member of EEA, namely in its capacity as a EU 28 Member State, i.e. not in a stand-alone capacity like Norway which is EEA member without EU 28 membership. The fact, that UK already is a EEA member has led pro single market think tank British Influence to argue that UK's membership in the EU is separate from the membership in the EEA, and that the EEA membership must be brought to an end in accordance with art. 127 EEA Treaty, i.e. separately from the withdrawal from EU under art. 50 TFEU. British Influence argues in this context that the EEA withdrawal, just like the EU withdrawal for which that has been held in the Miller case by the High Court of London and the UK Supreme Court, requires Parliamentary assent which to grant or to deny Parliament, in comparison to the EU withdrawal, might have greater political freedom given the fact that the Brexit referendum did not address EEA membership. British Influence has brought the matter before the High Court of London which is expected to hear the case in early February 2017. The case seems to be more complicated than the Miller case on Parliamentary assent before notification of withdrawal from EU, due to the fact

that the British Influence case involving EEA membership concerns not only the requirement of prior Parliamentary assent which is a question of UK law, but also the question of whether UK's membership in EEA automatically expires with the withdrawal of UK from EU as UK Government pretends, or whether it continues unless separately terminated by UK (with separate Parliamentary assent) as held by British Influence which is a question of EEA law and maybe also of EU law which may require a reference to the EEA and / or EU Court of Justice.

Theresa May, according to her speech of January 12, 2017, is aiming at a "new, comprehensive, bold and ambitious Free Trade Agreement which may take in elements of current Single Market Arrangements in certain areas, on the export of cars and lorries for example or the freedom to provide financial services across national borders". The "new, comprehensive, bold and ambitious Free Trade Agreement" of Theresa May resembles the Comprehensive Economic and Trade Agreement between EU and Canada (CETA EU/Canada). The practical and legal difficulties with that agreement have been tremendous. It took about six years to negotiate CETA EU/Canada, and the legal difficulties in the end turned out to be significant due to the fact that under the EU Treaties the EU had authority to act on its own not on all matters involved; there were some matters in CETA EU/Canada, where the authority to regulate, or even the authority to conclude the treaty, vests with the EU Member States which is why the German Constitutional Court excluded certain parts of CETA EU/Canada from immediate provisional application. In the case of Belgium, the need for member state level approval meant that the independent provinces, too, had to give their approval which approval at first was refused by the parliament of Wallonia. This means in a nutshell that for those parts of CETA EU 27/UK that are within the regulatory competency not of the EU as such but of the EU 27 Member States, unanimity of all EU 27 Member States will be required, and Member States approval according to national law may mean that sub-entities of a given Member State must also give their approval. In summary, the CETA EU 27/UK envisaged by Prime Minister Theresa May will be a very time consuming and very difficult task to achieve.

Finally, it should be remembered that several other issues directly or indirectly connected must also be addressed. One – certainly controversial – issue is the settlement of mutual financial claims in the range of up to € 100 billion (outstanding and future EU payments into running projects in the UK, and vice versa outstanding and future payments by UK into the EU budget). The issue of permanent status quo protection for UK businesses and citizen in EU and vice versa has already been mentioned above. Another issue concerns the special situation in Ireland where in particular free access and mobility between Northern Ireland (as part of the UK) and the Republic of Ireland (as continuing EU 27 Member State) is at stake. Here, however, a solution should be possible if

one remembers that based on a special agreement between the Federal Republic of Germany and the European Economic Community (EEC), the former German Democratic Republic (DDR) was treated as part of the Federal Republic of Germany as regards tariffs and quotas etc., with the consequence, that the DDR indirectly became a member of the EEC – goods from the DDR could freely be imported into the Federal Republic of Germany and exported on to other EEC Member States.

As regards the forthcoming negotiations, many views have been expressed on the relative strength and weakness of the negotiating position of the UK on the one hand and the EU 27 and their Member States on the other hand, all based on the absolute and relative size of mutual exports and imports in goods and services. In my mind that purely quantitative approach is questionable. Decisive is not the volume of goods and services traded but rather the importance of the goods and services in question for the two sides. Generally speaking the UK economy as a consequence of Prime Minister Margaret Thatcher's politics has a quite high concentration on services in general and in financial (and to a smaller extent legal) services in particular while industrial production (coal, steel, chemicals, textiles etc.) has become relatively unimportant. Compared thereto the economic structure of EU 27 at large and of many EU 27 Member States appears better balanced and therefore less vulnerable. Another qualitative aspect is the existing division of production and services between the UK and EU 27. A production company from either side may be highly or entirely dependent on the import of certain specialized parts and components from the other side – quantitatively speaking the trade volume in question may be quite low, qualitatively speaking such trade may have essential importance for continuing production and continuing cost structures. Sheer trading volume figures say nothing about such dependencies.

There is finally another difficulty that the UK must cope with in addition to the difficulty of negotiating with EU 27 the "new, comprehensive, bold and ambitious Free Trade Agreement" envisaged by UK, namely that UK will have to negotiate free trade agreements with countries around the world which are to replace the approx. 150 free trade agreements of the EU to which the UK will no longer be a party as another effect from Brexit in the narrow sense. The negotiating power of the UK in such negotiations will be considerably smaller than the negotiating power of the EU in its free trade agreements around the world. To give an example, South Korea in the free trade agreement with the EU made concessions in financial services so important to the UK because Germany was prepared to permit a higher import volume of cars from South Korea. This EU wide trade-off possibility will no longer be available to the UK when negotiating on a stand-alone basis a free trade agreement with other countries.