

Article : *Siège réel* or *siège social*? Brexit: the potential effects upon the recognition of U.K. Companies within the EU once the EU protections as to recognition disappear.?

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The full effects of the United Kingdom's self removal from the European Union are manifold, and exponential.

The main historical effect of the Treaties and the European *acquis* on the corporate and individual level was to require Member States to observe a certain code, both written and unwritten when recognising or addressing individuals and entities governed under other EU Member States laws who were engaged in what have been coined cross-border activities. However that notion is very limited in comparison to the real effect of the present legal and economic reality which has flourished around it.

That will change on Brexit.

European Member States' administrations will no longer be bound to extend the same treatment as to the fundamental recognition, nor as to their attitudes with each other when it comes to addressing British companies and individuals. In other words, the United Kingdom, and its internal jurisdictions will be a third state, and will therefore not obtain the same treatment say in France as it will in say the Netherlands, Austria or elsewhere. Whether that lack of cohesion could even be in some manner accommodated by a decision or other means in the Withdrawal Treaty is one thing, what it does mean in practice is that there will be a form of economic deflection which can either be fruitful or catastrophic for British interests seeking to do business in Europe, or those companies currently "doing business" or even investing passively there.

Before embarking on the crux of this article, I refer the reader to a general article written on the legal consequences of Brexit, and the limited availability of certain prior intra EU Treaties to the Brussels Regulations: see <http://www.europeanfutures.ed.ac.uk/article-5722>. These Treaties may have survived their putting into regulatory form, or may not have survived. In any event, to have access to the rights granted under these prior treaties, there will undoubtedly need to be a set of provisions incorporating updates in the Withdrawal Treaty, which may or may not be as wide as the United Kingdom might wish, and will certainly require a degree of integration into the CJEU preliminary ruling procedure. It would perhaps be best to keep the House of Common's political agendas out of that, as frankly the Court of Westminster doesn't know its rearguard from its nose in this area, and it might be best to leave it to the retired senior Judiciary to make the practical running, in the background of the House of Lords Judicial sub-committees, on these issues.

The crux of this brief article is the potential but impending massacre of British Companies and commercial structures in Europe by the application by Member State's Courts of third country jurisdictional and interpretative measures. The underlying laws there are entirely different to say the English Courts' position on the recognition and respect of foreign entities of which the case of *Dreyfus v. The Commissioners of Inland Revenue* Tax Cases Vol XIV (1928-1929) p. 560 is but one laudable example of the strict application of the Court's principle that foreign entities are given their full force and legal effect under that foreign law in the United Kingdom, even in tax matters.

How so? The European Union has managed to require its constituent Member States to have a limited form of recognition of each other's legal entities, although this has not been without difficulty in the face of individuals seeking to elude their national restrictions: for example, the Centros case. Here that type of delocalisation of activity followed the American inter-state competition principle to the United Kingdom by those seeking to avoid social security contributions in their states of residence. That is the

prominent tip of the iceberg, and unfortunately obscures the main issues as to recognition of corporate status and identity.

That protection will be lifted. Once that protection has gone, any Member State's courts will be able to apply its domestic rules, and litigants will therefore be able to challenge the very identity of a British company if the law, the facts and the case permits.

How? There has been a fundamental issue as to which laws apply to any company or entity within Europe, is it that of the real seat of its activity, in other words where its management and day to day administration is situated, or is it that of the registered office, which may not house those activities? In certain states, such as France, a litigant, and worse, the social security and tax administrations can use either.

So therefore, post Brexit, any British company whose business is in effect administered on a day to day basis from the EU, say for example, France, can find its structure being reassessed, and the various corporate rights and obligations being in effect recast, according to French principles and understanding of company law, not those under which it was incorporated.

This is known as the *siège social* / *siège réel* debate which is still not resolved in Europe. An inter European Treaty was to be signed regulating these issues, but was not executed or ratified, owing to a last minute withdrawal by the Dutch, doubtless concerned that their licensed insolvency practitioners might be excluded from a certain part of the European market, were insolvency jurisdictions to be challenged on the basis that the law governing the identity of the company was foreign, not Dutch.

This is a debate from which the British have abstained from any real for of participation, as it is a civil law issue, not a common law matter. There is therefore a degree of blissful ignorance of its ramifications amongst English trained practitioners.

Those with longer memories will recall English limited companies being recast under the sobriquet Sarl, thus losing their status and identity as a company limited by shares, to that of a *société de personnes* with a degree of limited liability, but for which the French or even English resident director thus recast as a *gérant associé*/or member manager could be personally responsible on an unlimited basis for taxation and social security contributions.

Post Brexit, the jurisdictional gloves will be off, and the EU punches will now go further than the current toe to toe, and extend to a possible rabbit punching personal liability for legal liabilities as well. It will not take much for a French plaintiff to assert a director's personal liability as if they were a *gérant* arguing that the company was in fact governed by French law, owing to the manner in which it was managed, if so evidenced, on a day to day administration carried out from France.

The French Code civil establishes as a principle that the law of the registered office or *siège social* can regulate a company, but then provides that a third party can also chose to allege that it is the law of the *siège réel* or seat of day to day administration of its activity that regulates the company:

Article 1837 Code civil reads :

Toute société dont le siège est situé sur le territoire français est soumise aux dispositions de la loi française.

Les tiers peuvent se prévaloir du siège statutaire, mais celui-ci ne leur est pas opposable par la société si le siège réel est situé en un autre lieu.

In other words, all a litigant or an administration has to show is that the company is administered on a day to day basis in France for French law as a whole to apply to it. That principle has been deployed by the French tax administration to totally deconstruct foreign companies in France attempting to assert that the company laws of its foreign registered office apply.

Other Continental administrations have chosen to assert the same argument: the Danish did so in *Centros* but were refused that facility by the CJEU under the freedom of movement and establishment provisions in the TFEU.

The abusive practices objection to abusing EU rights aside, that absolute protection will no longer be available post-Brexit, which will increase the post-Brexit obstacles and uncertainty to doing business in Europe.

Definitely not the same principle as that in *Dreyfus*!

Note here that there will be a decreasing common law influence within the CJEU and the other jurisdictions, as Ireland will no longer have the United Kingdom at its side. The European legal area will therefore become increasingly formalistic, and will tend towards a strict interpretation of the letter of the laws concerned.

The manner in which the internet has been used to manage British companies from within the French jurisdiction might now only be continued at the personal risk of the person at the keyboard.

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