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Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law

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Horst Eidenmueller
University of Oxford and ECGI

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Abstract

This article attempts to assess the consequences of Brexit for English and European private law. More specifically, I am interested in how the level of legal innovation in private law will be influenced by Brexit. I argue that Brexit will reduce the level of efficiency-enhancing legal innovation in Member States' and European private law. My analysis is based on the premise that regulatory competition between the EU Member States is, in principle, beneficial because it initiates a "discovery process" for new and, hopefully, more efficient legal products. It is based on the further premise that Brexit will reduce the level of regulatory competition in the EU. This is so because choosing UK legal products will likely be more difficult in the future—Member States will not be obliged to respect such choices to the same degree as under the current legal regime. As a consequence, Member States will be under less competitive pressure in the future to take note of popular UK, and in particular English, legal products and to improve their own laws as they currently stand. At the same time, reduced choice opportunities and choice certainty for private parties will also reduce the incentives for the UK to innovate—it will no longer be able to export its legal products to continental Europe as easily as under the existing legal regime. In essence, Brexit will eliminate a highly innovative competitor on the European market for new legal products in private law, reducing the beneficial effects of such competition. There is another reason why we can expect the level of legal innovation in private law to decline after Brexit. In the past, the UK has not only been quite successful in developing and exporting private law products to other Member States. It has also made significant contributions to innovative private law-making on the European level. With Brexit, this is set to go. Private law-making on the European level will no longer benefit from the UK's influence and contributions. Debates will be impoverished and the quality of outcomes might suffer. I substantiate and illustrate the main thesis of this article with examples taken mostly from contract law and dispute resolution, company law and insolvency law.

Keywords: Brexit, Regulatory Competition, Legal Innovation, Harmonisation, Private Law, Company Law, Insolvency Law, Contract Law, Dispute Resolution

JEL Classifications: K12, K22, K41, O35, O52

Horst Eidenmueller
Freshfields Professor of Commercial Law
University of Oxford, Faculty of Law
St Margaret's Road
Oxford, OX2 6LE, United Kingdom
phone: +44 1865 284 472
e-mail: horst.eidenmuller@st-hughs.ox.ac.uk

Collateral Damage:
Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law

Horst Eidenmüller (University of Oxford)

This article attempts to assess the consequences of Brexit for English and European private law. More specifically, I am interested in how the level of legal innovation in private law will be influenced by Brexit. I argue that Brexit will reduce the level of efficiency-enhancing legal innovation in Member States' and European private law. My analysis is based on the premise that regulatory competition between the EU Member States is, in principle, beneficial because it initiates a "discovery process" for new and, hopefully, more efficient legal products. It is based on the further premise that Brexit will reduce the level of regulatory competition in the EU. This is so because choosing UK legal products will likely be more difficult in the future—Member States will not be obliged to respect such choices to the same degree as under the current legal regime. As a consequence, Member States will be under less competitive pressure in the future to take note of popular UK, and in particular English, legal products and to improve their own laws as they currently stand. At the same time, reduced choice opportunities and choice certainty for private parties will also reduce the incentives for the UK to innovate—it will no longer be able to export its legal products to continental Europe as easily as under the existing legal regime. In essence, Brexit will eliminate a highly innovative competitor on the European market for new legal products in private law, reducing the beneficial effects of such competition. There is another reason why we can expect the level of legal innovation in private law to decline after Brexit. In the past, the UK has not only been quite successful in developing and exporting private law products to other Member States. It has also made significant contributions to innovative private law-making on the European level. With Brexit, this is set to go. Private law-making on the European level will no longer benefit from the UK's influence and contributions. Debates will be impoverished and the quality of outcomes might suffer. I substantiate and illustrate the main thesis of this article with examples taken mostly from contract law and dispute resolution, company law and insolvency law.

I. INTRODUCTION

The United Kingdom (UK) is set to leave the European Union (EU) on 29 March 2019 at 11pm GMT. However, full departure will not occur before the end of 2020. The EU and the UK envisage a transition period of roughly two years during which, in effect, the regulatory status quo will be maintained, albeit with the UK no longer formally a Member State. Beyond the end of 2020 lies *terra incognita*. The negotiating parties hope to agree on the principles governing their future relationship in a political declaration under the umbrella of the "withdrawal agreement" which they plan to conclude in the course of this year.[1] The details of this future relationship will have to be worked out during the transition period.

[1] For the latest draft of the withdrawal agreement, *see* European Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation

This article attempts to assess the consequences of Brexit for English and European private law.[2] More specifically, I am interested in how the level of legal innovation in private law will be influenced by Brexit. My analysis is based on the premise that regulatory competition between the EU Member States is, in principle, beneficial because it initiates a "discovery process" for new and, hopefully, more efficient legal products.[3] It is based on the further premise that Brexit will reduce the level of regulatory competition in the EU. This is so because choosing UK legal products will likely be more difficult in the future—Member States will not be obliged to respect such choices to the same degree as under the current legal regime.

As a consequence, Member States will be under less competitive pressure in the future to take note of popular UK, and in particular English, legal products and to improve their own laws as they currently stand. At the same time, reduced choice opportunities and choice certainty for private parties will also reduce the incentives for the UK to innovate—it will no longer be able to export its legal products to continental Europe as easily as under the existing legal regime. In essence, Brexit will eliminate a highly innovative competitor on the European market for new legal products in private law, reducing the beneficial effects of such competition.

There is another reason why we can expect the level of legal innovation in private law to decline after Brexit. In the past, the UK has not only been quite successful in developing and exporting private law products to other Member States. It has also made significant contributions to innovative private law-making on the European level. With Brexit, this is set to go. Private law-making on the European level will no longer benefit from the UK's influence and contributions. Debates will be impoverished and the quality of outcomes might suffer.

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round with the UK of 16-19 March 2018, https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf. For the European Council guidelines on the principles governing the future relationship, *see* European Council (Art. 50) guidelines on the framework for the future EU-UK relationship, EUCO XT 20001/18, 23 March 2018, http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf. For the UK's position, *see* the various papers available at https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu. On the Brexit negotiations, *see H. Eidenmüller*, Negotiating and Mediating Brexit, 2016 Pepp. L. Rev. 39 (2016).

[2] I adopt a broad conception of "private law". It encompasses, in particular, the law of persons, the law of property, the law of obligations, and litigation. *See*, for example, *A. Burrows* (ed.), English Private Law (Oxford: Oxford University Press, 3rd ed. 2013). *See* also *J. Basedow, U. Blaurock, A. Flessner, R. Schulze & Reinhard Zimmermann* (eds.), Editorial, 1 Zeitschrift für Europäisches Privatrecht (ZEuP) 1, 2-3 (1993).

[3] *See F. A. Hayek*, Competition as a Discovery Procedure, 5(3) The Quarterly Journal of Austrian Economics 9 (2002).

I will substantiate and illustrate the main thesis of this article with examples taken mostly from contract law and dispute resolution, company law and insolvency law. Brexit is of course an ongoing process, and some of the arguments and conclusions in this article might have to be modified if the future relationship between the EU and the UK turns out to be very different from what can be expected right now. But unless Brexit is fully reversed politically and legally—and there are no signs that this will happen—the main conclusion can be expected to hold: Brexit will reduce the level of efficiency-enhancing legal innovation in Member States' and European private law.

In Section II, I discuss the status quo of regulatory competition and legal innovation in private law in Europe before Brexit. Section III describes the "fundamental change of circumstances" triggered by Brexit and how it will be implemented externally—in the relationship between the UK and the EU—and internally in the UK. Section IV then discusses regulatory competition and legal innovation in private law in Europe after Brexit, under what is a likely scenario for the future relationship between the UK and the EU. Section V concludes and offers further reflections on the trajectory of the development of private law in Europe.

At the outset of this article, it should be recalled that the UK has, to varying degrees, distinct legal systems in each of its four constituent countries. While I argue in this article that the UK as a Member State has significantly contributed to the law-making process within the EU, it is clear that the UK's ability to exert regulatory competition in other Member States in the field of private law arises principally from the law applicable in England. I will thus refer to 'English' law, where appropriate.

II. REGULATORY COMPETITION AND LEGAL INNOVATION BEFORE BREXIT

Private law-making in the EU is currently driven by two key dynamics. First, there is regulatory competition between the Member States, enabled by primary EU law—notably the four fundamental freedoms[4] as interpreted by the Court of Justice of the European Union (CJEU)—and certain secondary EU law instruments. Second, the EU has engaged in harmonisation efforts with respect to key substantive areas of private law, reducing the level

[4] The free movement of goods, persons, services and capital: *see* Article 26 et seq. of the Treaty on the Functioning of the European Union (TFEU).

of regulatory competition between the Member States. The UK has contributed significantly to these two key dynamics, pushing legal innovation in private law in the EU forward.

1. Regulatory Competition between the EU Member States

Despite harmonisation efforts by the EU, private law in Europe today is still highly fragmented. "Today, all European countries have their own national contract law"[5], and the same is true for other key areas of private law such as the law of persons, the law of property, and litigation or, more generally, dispute resolution processes. European citizens live under widely different systems of private law rules. In essence, we have not one private law system in the EU but 28 different systems in the Member States. The differences have become smaller over time but they are still significant, and it would be wrong to ignore or downplay them.

However, what has changed significantly in the last two decades are the opportunities for European citizens to easily and safely opt out of their domestic and to opt into foreign regimes, *i.e.* those of other Member States.[6] New choice opportunities have been created by how the four fundamental freedoms have been interpreted by the CJEU and by secondary law instruments of the EU. For the most part, these opportunities can be exercised at low costs and do not require a physical relocation of people or assets. New technological developments, especially the digitisation of business activities, also facilitate the exercise of choice. Most importantly, under the European rules—as interpreted by the CJEU—Member States must respect the deselection of their own legal products by citizens who opt into another legal regime. A number of Member States suddenly realised that some of their private law products had fallen out of fashion. Other Member States experienced a rising demand for their legal products from citizens not domiciled in their country. As a

[5] *H. Kötz*, European Contract Law (Oxford: Oxford University Press, 2nd ed. 2017), p. 1. See also *S. Weatherill*, Contract Law of the Internal Market (Cambridge: intersentia, 2016), p. 3 ("… in Europe there is diversity among systems of contract law and contract regulation."); *M. W. Hesselink*, How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law, Centre for the Study of European Contract Law Working Paper No. 2012-03, 2012, p. 39-40 ("Nationalism's historical success in private law and the fact of its presence as a strong sense of belonging in most people today will often make that much of the harmony in the private law system will have to be sought bottom-up."). For company law *see L. Enriques*, A Harmonized European Company Law: Are We There Already?, 66 International & Comparative Law Quarterly 763 (2017)

[6] *See H. Eidenmüller*, The Transnational Law Market, Regulatory Competition, and Transnational Corporations, 18 Indiana Journal of Global Legal Studies 707, 709 et seq. (2011).

consequence, we have witnessed regulatory competition in key areas of private law in the EU—with the UK as a highly successful competitor.

a) Company Law

An excellent illustration of this development is afforded by the European market for corporation forms. As is well known, from 1999 onwards the CJEU handed down a series of landmark judgments which effectively forced EU Member States to adopt the so-called incorporation theory with respect to non-domestic legal entities and abandon the so-called real seat theory.[7] As a consequence, European entrepreneurs could now choose from a much larger menu of corporation forms, without being forced to physically relocate assets, people and/or activities. Entrepreneurs made extensive use of their new freedom, and the English private company limited by shares proved to be highly popular. Unlike the German GmbH, it did not—and still does not—require a certain amount of minimum capital when being set up, and the incorporation process is fast.[8] At the height of the "Ltd. boom" in 2006/2007, approximately one out of four closed corporations set up by German entrepreneurs were "German Ltds.", and more than 40,000 such limited companies operated in Germany.[9]

The German lawmaker was under pressure to make its domestic closed corporation law more competitive, and it acted swiftly (as did other EU Member States[10]): in 2008, it introduced the "Unternehmergesellschaft" (UG), essentially a GmbH without a minimum capital requirement.[11] The draft bill explicitly cited increased competition as one main driver for the reform.[12] The reform was successful in fending off the English "attack": in terms of company formations, the UG is an undisputed success. Approximately 150,000 such

[7] CJEU Case C-212/97, Judgment of 9 March 1999 (*Centros*); Case C-208/00, Judgment of 5 November 2002 (*Überseering*); Case C-167/01, Judgment of 30 September 2003 (*Inspire Art*).
[8] *See M. Becht, C. Mayer & H. F. Wagner*, Where do firms incorporate? Deregulation and the cost of entry, 14(3) Journal of Corporate Finance 241 (2008).
[9] *See H. Eidenmüller*, Die GmbH im Wettbewerb der Rechtsformen, 36 Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 168, 170-174 (2007). It is estimated that the total number of pseudo-foreign corporations operating in the UK today is still close to or above 335,000. *See J. Armour, H. Fleischer, V. Knapp & M. Winner*, Brexit and Corporate Citizenship, 12 January 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897419, p. 2, 10.
[10] *See*, for example, *J. Armour & W.-G. Ringe*, European Company Law 1999-2010: Renaissance and Crisis, 14 October 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691688.
[11] Bundesgesetzblatt 2008 I, p. 2026.
[12] *See* Deutscher Bundestag, Drucksache 16/6140, 25 July 2007, p. 25: "Zum anderen soll die GmbH dereguliert und modernisiert und dadurch ihre Attraktivität gegenüber konkurrierenden ausländischen Rechtsformen gesteigert werden."

companies operate in Germany, and the UG has almost completely replaced the English limited company as a low-cost limited liability corporate form for German start-ups.[13]

What is interesting about the case of regulatory competition with respect to corporation forms is not only the force of the competitive pressure on Member States just described. We have also some evidence that abolishing the minimum capital requirement is an efficiency-enhancing legal innovation: the total number of firms in Germany rose significantly once a corporate form that did not require the contribution of a minimum amount of capital was available, indicating a positive effect on entrepreneurship and growth.[14]

b) Insolvency Law

Another good example of the beneficial effects of regulatory competition on innovative law-making is provided by insolvency and restructuring law, and again the UK appears to have a competitive edge in this field. Here it is not the CJEU which has taken the lead and created new choice opportunities for European entrepreneurs. Rather, these opportunities flow from secondary EU law, notably the (recast) European Insolvency Regulation (EIR)[15] and the (recast) Brussels Ia or Judgments Regulation.[16]

Since the EIR entered into force in 2002, England has emerged as a premier venue for restructuring financially distressed firms. The regulatory goal of the original EIR was to prevent forum shopping (Recital 4). It did not achieve this goal. A significant number of non-UK firms shifted their "Centre of Main Interests" (COMI) to England to get access to main insolvency proceedings in London—usually associated with a prior transformation into an English company limited by shares.[17] This included major German firms such as Schefenacker and Deutsche Nickel.

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[13] For data on "Unternehmergesellschaften" in Germany from 2009 to 2014, *see* the "Forschungsprojekt Unternehmergesellschaft" of the University of Jena, http://www.rewi.uni-jena.de/Fakultät/Institute/Institut+für+Rechtstatsachenforschung/Forschungsprojekt+Unternehmergesellschaft-p-344.html.

[14] *See R. Braun, H. Eidenmüller, A. Engert & L. Hornuf*, Does Charter Competition Foster Entrepreneurship? A Difference-in-Difference Approach to European Company Law Reforms, 51(3) Journal of Common Market Studies 399 (2013). Our study also confirms this result for other EU Member States which reduced or abolished minimum capital requirements such as Spain, France, Hungary and Poland.

[15] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5 June 2015, p. 19–72.

[16] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012, p. 1–32.

[17] *See H. Eidenmüller*, Abuse of Law in the Context of European Insolvency Law, 6(1) European Company and Financial Law Review 1, 2-7 (2009).

Even more important, however, is the popularity of the English "scheme of arrangement" as a restructuring tool. The relevant statutory rules are to be found in Part 26 of the Companies Act 2006. Schemes are extremely flexible instruments. A firm need not be insolvent to use a scheme, and a scheme can be restricted to parts of the creditor population. Crucially, it is not an insolvency proceeding within the meaning of the (recast) EIR. Rather, it can be applied to firms which have their COMI outside the UK, making access to this tool easier and cheaper than access to insolvency proceedings which fall under the EIR. Recognition of schemes is, in principle, available under the Brussels Ia Regulation.[18] It is not surprising, therefore, that many non-English firms have sought to obtain access to schemes, including major German firms such as, for example, Rodenstock, TeleColumbus and Primacom.[19]

The reasons for the attractiveness of London as a restructuring venue are not entirely clear. It appears that the specialisation and professionalism of the commercial courts, the reputation of English insolvency practitioners, strong creditor control and London's role as global financial centre played and continue to play a prominent role.[20] Schemes in particular are popular because of their high degree of flexibility and their potential use in a pre-insolvency setting.[21] They are not only an innovative but also an efficiency-enhancing legal product: experience demonstrates that corporate restructurings benefit from an early initiation—the earlier such a restructuring is carried out, the higher the firm (reorganisation) value that can be salvaged.[22]

As with respect to company law, other EU Member States felt the competitive pressure exerted by regulatory competition with the UK and the need to modernise their domestic insolvency/restructuring regimes. That includes Germany. It fundamentally reformed its insolvency code in 2011 in order to provide a better framework for business restructurings.[23] As with the company law reform discussed in the previous section, the draft

[18] However, this is an area of the law which is extremely disputed. *See H. Eidenmüller & T. Frobenius*, Die internationale Reichweite eines englischen Scheme of Arrangement, 65 Wertpapier-Mitteilungen 1210 (2011).
[19] *See J. Payne*, Cross-border Schemes of Arrangement and Forum Shopping, 14 European Business Organization Law Review (EBOR) 563, 569-581, 586-588 (2013).
[20] *See*, for example, *R. Nevins*, What makes the UK so attractive for high yield bond restructurings?, August 29, 2014, https://blogs.lexisnexis.co.uk/randi/what-makes-the-uk-so-attractive-for-high-yield-bond-restructurings/; *I. Johnson & R. Bulmore*, Restructuring & Insolvency in the United Kingdom, December 15, 2017, https://www.lexology.com/library/detail.aspx?g=e997df75-3f4e-4653-bbef-ce3cb16b2821. On London's role (and power) as global financial centre *see T. Norfield*, The City (London: Verso, 2017).
[21] See *J. Payne* (*supra* note 19), 568 et seq.
[22] *See*, for example, *H. Eidenmüller*, Comparative Corporate Insolvency Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799863, p. 7-8.
[23] Bundesgesetzblatt 2011 I, p. 2582.

reform bill explicitly cited increased competition as a main driver for the reform.[24] What the German reform did not adequately address was the fact that German insolvency proceedings, unlike the English scheme of arrangement, can still be initiated only upon the (imminent) insolvency of the debtor—hence, much too late for an efficient restructuring. This is one of the problems that the EU is currently attempting to remedy with a proposed directive on "preventive restructuring frameworks" in the Member States.[25] The similarities between the proposed set of rules and those governing schemes of arrangements are obvious.[26]

c) Contract Law and Dispute Resolution

Finally, there is contract law and dispute resolution. The Rome I Regulation (choice of law) and the Brussels Ia Regulation (jurisdiction and recognition and enforcement of judgments)—and, for arbitrations, the New York Convention—offer choice opportunities for contracting parties, especially in B2B transactions. There is of course no need to choose the laws of a certain jurisdiction as governing a particular contract and to also stipulate that the courts of the same jurisdiction shall have (exclusive) jurisdiction with respect to disputes that might arise—or to provide for arbitration seated in that jurisdiction as a dispute resolution mechanism—, but this is what usually happens: choice of governing law and choice of forum are highly correlated.[27] It is straightforward why this is so: the courts of a particular jurisdiction are presumably best suited to apply their own contract law—or to take necessary procedural measures relating to an arbitration in which the contract in dispute is governed by the contract law of their jurisdiction.

As with respect to company law and insolvency law, England—together with Switzerland—is the European market leader when it comes to choice of law for contracts and

[24] *See* Deutscher Bundestag, Drucksache 17/5712, 4 May 2011, p. 17: "Das geltende Recht legt der frühzeitigen Sanierung insolvenzbedrohter Unternehmen zahlreiche Hindernisse in den Weg. In der Vergangenheit haben einige Unternehmen deshalb ihren Sitz nach England verlegt, da der Geschäftsleitung und den maßgeblichen Gläubigern die Eröffnung eines Insolvenzverfahrens nach englischem Recht zur Sanierung des Unternehmens vorteilhafter erschien."

[25] COM(2016) 723 final, 22 November 2016.

[26] For a critical assessment, *see H. Eidenmüller*, Contracting for a European Insolvency Regime, 18 European Business Organization Law Review 273 (2017).

[27] For the US, *see T. Eisenberg & G. P. Miller*, The Flight to New York: An Empirical Study of Choice of Law And Choice of Forum Clauses in Publicly-Held Companies' Contracts, 30 Cardozo L. Rev. 1475, 1509-1511 (2008/09) ("mismatch" of 6% for New York, 31% for Delaware and California, 5% for other jurisdictions). For Europe, *see S. Vogenauer*, Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, 21 European Review of Private Law 13, 44 (2013) ("There is a substantive degree of overlap between choices of law and choices of forum: the law chosen normally determines the choice of forum.")

choice of jurisdiction for disputes that might arise. If one excludes "home choices", *i.e.* choices of a governing law which corresponds to the home country of one of the contracting parties, English law is preferred by roughly 25% of businesses, and they usually also use arbitration in London or, as a second-best solution, litigation in London as a dispute resolution mechanism.[28] In an "attractiveness ratio" relating to 4,400 international contracts entered into by approximately 12,000 parties who participated in arbitration under the aegis of the International Chamber of Commerce (ICC), English contract law clearly ranked first, being close to four times more popular than French contract law and close to six times more popular than German contract law.[29] As for litigation, it has been observed that "… around three quarters of the claims brought to the [English] Commercial Court involve overseas parties."[30]

There is some dispute as to the reasons for the popularity of English law as the governing law for B2B contracts and London as the preferred dispute resolution forum. Given the link between the two choices described above, it appears to be clear that the (perceived) "quality" of the English judiciary, in particular its professionalism and sensitivity/knowledge about commercial matters, plays a significant role.[31] Further, English contract law appears to be "… regarded as more sophisticated, balanced, or adapted to the needs of commerce …"[32] than the contract laws of other EU Member States. It is also perceived to be comparatively stable and predictable.

These perceptions are probably fuelled by some objective characteristics of English contract law, notably its great respect for freedom of contract. The written contract between the parties takes priority over any oral agreements or negotiation statements (parol evidence rule[33]), enhancing legal certainty. Unlike in Germany (Sections 305 et seq. of the BGB) or, more recently, in France[34], most non-negotiated contract terms are not subject to review by the courts based on fairness considerations in B2B contracts (the exception are clauses which

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[28] *See Eidenmüller* (*supra* note 6), 719-722; *Vogenauer* (*supra* note 27), 53-60 (both surveying the evidence).
[29] *See G. Cumiberti*, The International Market for Contracts: The Most Attractive Contract Laws, 34 Northw. J. of Int'l Law & Business, 455, 459, 472-473 (2014).
[30] *Vogenauer* (*supra* note 27), 59.
[31] *See E. Lein, R. McCorquodale, L. McNamara, H. Kupelyants & J. del Rio*, Factors Influencing International Litigants' Decision to Bring Commercial Claims to London Based Courts, 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf, p. 2; *Eidenmüller* (*supra* note 6), 720; *Vogenauer* (*supra* note 27), 59.
[32] *Vogenauer* (*supra* note 27), 59.
[33] *See*, for example, *A. L. Zuppi*, The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*, 35 Ga. J. Int'l & Comp. L. 233 (2007).
[34] *See* Article 1171 of the Code Civil. On the new French contract law, *see G. Helleringer*, The Anatomy of the New French Law of Contract, 17(4) European Review of Contract Law 1 (2017).

exclude or restrict liability for breach of contract—they are subject to a requirement of "reasonableness" under the Unfair Contract Terms Act 1977). It is well known that German businesses have criticised the application of the BGB provisions on non-negotiated unfair contract terms to B2B contracts for many years and state this as one of the main reasons for choosing English or Swiss law as the governing contract law.[35]

As in company and insolvency law, the debate about how to enhance the competitiveness of domestic contract laws and dispute resolution processes vis-à-vis the UK is in full swing in many Member States. The German Bundesrat, for example, has just recently re-launched an initiative that would allow German district courts to establish specialised tribunals for international commercial cases which could hear cases in the English language.[36] France has already established an international chamber of the Paris Court of Appeal for commercial disputes, allowing submissions to be made in English and adopting certain elements typical of common law litigation.[37] The new German government also appears to be considering reducing the level of court control of non-negotiated contract terms at least for some types of B2B contracts.[38]

If one reviews the discussion in the previous sections, it appears clear that key areas of private law in the EU are characterised by intense regulatory competition between the Member States. The UK is currently the leader in this competition—its private law products enjoy a high popularity amongst European commercial actors. This has been illustrated with examples from company law, insolvency and restructuring law, contract law, and dispute resolution. Generalising from these examples, one can say that the leading position of the UK is due to a combination of factors: it "offers" highly innovative legal products such as the scheme of arrangement, it gives the parties a high degree of freedom and flexibility to adapt private law rules to their individual needs, and it has a judiciary which enjoys an outstanding reputation—at home and abroad.

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[35] *See Eidenmüller* (*supra* note 6), 720-722.
[36] *See* Bundesrat, Drucksache 53/18, 2 March 2018.
[37] *See* Protocole relatif à la procédure devant la Chambre Internationale de la cour d'appel de Paris, 7 February 2018, http://www.avocatparis.org/system/files/editos/protocoles_signes_creation_juridiction_commerciale_internationale_1.pdf.
[38] *See* "Koalitionsvertrag zwischen CDU, CSU und SPD", 14 March 2018, https://www.bundesregierung.de/Content/DE/_Anlagen/2018/03/2018-03-14-koalitionsvertrag.pdf?__blob=publicationFile&v=2, p. 131: "Wir werden das AGB-Recht für Verträge zwischen Unternehmen auf den Prüfstand stellen mit dem Ziel, die Rechtssicherheit für innovative Geschäftsmodelle zu verbessern. Kleine und mittelständische Unternehmen, die Vertragsbedingungen ihres Vertragspartners aufgrund der wirtschaftlichen Kräfteverhältnisse faktisch akzeptieren müssen, sollen im bisherigen Umfang durch das AGB-Recht geschützt bleiben."

2. Regulatory Innovation on the European Level

As has already been mentioned, regulatory competition between EU Member States is only one of two dynamics which characterise current private law-making in the EU. The EU has also engaged in harmonisation efforts with respect to key substantive areas of private law—sometimes to correct perceived deficits of regulatory competition between the Member States ("horizontal regulatory competition"), sometimes to open up new choice opportunities for European citizens, creating "vertical regulatory competition" between the Member States' and the EU's legal products.[39]

Doing adequate justice to the role of the UK in European private law-making would require a comprehensive assessment of the UK's regulatory strategies and actions in EU policy and law-making processes in this field of regulation over the last decades. Of course, that task is beyond the scope of this article. At the same time, I hope to be able to at least produce a couple of illustrative examples that support the assessment that the UK has attempted to push efficiency-enhancing legal innovation in private law in the EU forward, proposing or supporting efficiency-enhancing policies and resisting inefficient proposals.

Following the structure of the analysis in Section II 1 of this article, I should like to begin by mentioning the extensive discussion around 10-15 years ago on a possible fundamental revision of the so-called Second Company Law Directive.[40] Associated with the "Ltd. boom", the concept of "legal capital"—minimum capital at the time of company formation and restrictions on distributions—had come under fierce criticism by British business associations and scholars in particular.[41] The European Commission commissioned a feasibility study on alternatives to the existing regime which was undertaken and submitted

[39] On different forms of regulatory competition in contract law and dispute resolution, *see H. Eidenmüller*, Regulatory Competition in Contract Law and Dispute Resolution, in: *H. Eidenmüller* (ed.), Regulatory Competition in Contract Law and Dispute Resolution (Munich: C. H. Beck, 2013), p. 1-10.

[40] At the time, the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 26, 31 January 1977, p. 1–13.

[41] An important role in the debate was played by the Rickford Report, a report by an interdisciplinary group established in May 2003 to review company law on capital maintenance and developing accounting standards, *see J. Rickford* (ed.), Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance, 15 European Business Law Review 919 (2004). *See* also the contributions in *H. Eidenmüller & W. Schön* (eds.), The Law and Economics of Creditor Protection: A Transatlantic Perspective (The Hague: T.M.C. Asser Press, 2008).

by KPMG in 2008.[42] In the end, no legislative reform action was taken, not least because of the intense opposition by the German government and German legal scholars.[43]

In capital markets and commercial law, the influence of the UK was more profound and effective, even though, at times, a sensible UK initiative was watered down or even almost turned into its opposite by the political forces at work in the law-making process. The latter might be said with respect to the European Takeover Directive.[44] The UK was the first European state to have a liberal and efficient takeover regime in the form of the City Code on Takeovers and Mergers. It had been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be ensured.[45] However, the final legal product did not achieve the aim of creating a liberal level playing field for takeovers in the EU. Board neutrality and the breakthrough rule as found in the Directive were intended to be cornerstones of a harmonised European takeover regime. However, both lost a great deal of significance after being rendered optional, due to late-stage political resistance from the German government in particular.[46]

The UK had greater success with respect to other key elements of the European framework for commercial transactions, especially in the aftermath of the 2008/2009 financial crisis. I should like to mention the Alternative Investment Fund Managers Directive.[47] While it has been criticised from a UK perspective for not adequately differentiating between hedge funds and private equity when imposing its regulatory regime,[48] the UK surely had a positive influence on the Directive's regulatory approach, injecting a lot of subject-specific expertise into the law-making process. The UK Banking Act 2009 became even more important. The UK had the "benefit" of the Northern Rock collapse a year or so before the global financial

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[42] *See* KPMG, Feasibility study on an alternative to the capital maintenance regime established by the Second Company Law Directive 77/91/EEC of 13 December 1976 and an examination of the impact on profit distribution of the new EU-accounting regime, 2008, http://ec.europa.eu/internal_market/company/docs/capital/feasbility/study_en.pdf.

[43] *See*, for example, *M. Lutter* (ed.), Legal Capital in Europe (Berlin: de Gruyter, 2006).

[44] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30 April 2004, p. 12–23.

[45] *See* http://www.thetakeoverpanel.org.uk/the-code/download-code.

[46] For a very critical assessment *see*, for example, *P. L. Davies, E.-P. Schuster & E. van de Walle de Ghelcke*, The Takeover Directive as a Protectionist Tool?, 1 April 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554616 ("We find that, instead of facilitating the Commission's ideal of a comprehensive, mandatory board neutrality rule, the Directive has, in aggregate, likely had an opposite effect.").

[47] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1 July 2011, p. 1–73.

[48] *J. Payne*, Private Equity and Its Regulation in Europe, 12 European Business Organization Law Review (EBOR) 559 (2011).

crisis hit. Crucial features of the Banking Act later became part of the European Banking Union, especially its rules on the "Single Resolution Mechanism".[49]

The UK also exerted a significant influence on the recast EIR which entered into force in June 2017. While the "original" EIR, which had been in force since May 2002, tried to prevent all forum shopping, the recast EIR rightly recognises that forum shopping can be good (welfare-enhancing) or bad (welfare-reducing)[50]—depending on the circumstances of the individual case (*see* Recitals 29, 31 and Article 90(4)). English legal practitioners also invented the concept of "synthetic secondary proceedings"[51] which made their way into Article 36 of the recast EIR. Such proceedings moderate the welfare-reducing effect of "real" secondary proceedings on international company restructurings. I should also like to posit that the European initiative towards a directive on "preventive restructuring frameworks" would not have been undertaken had the scheme of arrangement not been so successful as a flexible pre-insolvency restructuring tool for a financially distressed firm.

Finally, there is contract law and dispute resolution. The most ambitious project of the EU in this field in the last decade was the proposal for a common European sales law (CESL).[52] If implemented, it would not have substituted the contract laws of the Member States. It would only have given European citizens an option—the crucial features of which were described in the proposal—to subject their contract to the European regime, *i.e.* the proposal would have created "vertical regulatory competition" in the field of contract law. Despite its mere optional character, the proposed CESL met with fierce criticism from scholars and policy-makers across Europe,[53] and rightly so:[54] the CESL option which was put on the table was a defective product. It could nevertheless have become a success on the law market or been at the very least highly influential as a reference text. Not surprisingly, the UK government joined the ranks of the critics and opposed the proposal.[55]

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[49] For an overview, *see* https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union_en.
[50] *See Eidenmüller* (*supra* note 17).
[51] *See J. A. E. Pottow*, A New Role for Secondary Proceedings in International Bankruptcies, 46 Texas Int'l L. J. 579, 584-586 (2011).
[52] COM(2011) 635 final, 11 October 2011.
[53] *See*, for example, the contributions by German academics in 212 Archiv für die civilistisches Praxis 467-852 (2012).
[54] *See H. Eidenmüller*, What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool, 50 Common Market Law Review (CMLR) 69 (2013).
[55] *See* Ministry of Justice—Department for Business Innovation & Skills, A Common European Sales Law for the European Union—A proposal for a Regulation from the European Commission—The Government Response, 2012, https://consult.justice.gov.uk/digital-communications/common-european-sales-law/results/cesl-government-response.pdf.

I should add that work on European contract law is of course an ongoing project. More specifically, after the failure of the CESL proposal, the European Commission tabled a proposal for a European directive "on certain aspects concerning contracts for the supply of digital content" in 2015.[56] Whether this proposal will eventually become law is currently quite unclear. Be that as it may: the EU proposal was heavily influenced by the innovative Consumer Rights Act 2015 in the UK. The Consumer Rights Act has been described by commentators as "… one of the most sophisticated and forward-looking legislative acts within the European Union."[57] It introduces, for example, "collective proceedings" (class actions) in competition law cases.[58] Alas, the further influence of the UK on the European proposal will be minimal at best.

III. FUNDAMENTAL CHANGE OF CIRCUMSTANCES: BREXIT

This is because of Brexit. To borrow from the language of contract law: Brexit will bring a "fundamental change of circumstances" for the two key dynamics in European private law-making discussed in the previous section, namely regulatory competition between the Member States and harmonisation efforts with respect to key substantive areas of private law. To understand why this is so, one needs to understand how Brexit will be implemented externally vis-à-vis the EU and internally in the UK.

1. Implementing Brexit Externally: Withdrawal Agreement and Future Relationship

As already mentioned in the introduction of this article, implementing Brexit externally involves a three-step process: the formal withdrawal on 29 March 2019, the transition period by the end of 2020, and then the future relationship between the EU and the UK from 2021 onwards. The three main withdrawal issues, namely the UK's "divorce payment", citizens' rights and the Irish border problem, have been negotiated and appeared to have been resolved in 2017.[59] However, the Irish border problem has proven much more

[56] COM(2015) 634 final, 9 December 2015.
[57] *S. Augenhofer*, Brexit – Marriage 'With' Divorce? – The Legal Consequences for Consumer Law, 40(5) Fordham Int'l L. J. 1475, 1493 (2017).
[58] *See* the new Section 47B of the Competition Act 1993, introduced by Schedule 8 of the Consumer Rights Act 2015.
[59] *See supra* note 1 for the status quo with respect to the withdrawal negotiations.

difficult than anticipated, and might re-emerge as a major stumbling block in the months to come: the UK wishes to leave the EU customs union—mainly to be free to conclude trade deals with third countries—, but at the same time wants to avoid a hard border between the Republic of Ireland and Northern Ireland in order not to upset the Good Friday Agreement.[60]

Details of the transition period from 30 March 2019 until the end of 2020 are set out in Part Four of the "Draft Withdrawal Agreement".[61] Crucially important is Article 122 on the "Scope of the transition". It reads as follows: "1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period. … 3. During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union." Hence, by virtue of the transition regime, effective withdrawal of the UK from the EU will be postponed until the end of the transition period, *i.e.* until the end of 2020.

What will happen then is currently being negotiated. It appears to be clear that the TFEU's fundamental freedoms on free movement of persons, goods, services and capital will cease to apply to the UK in their current form. However, the UK government has repeatedly emphasised its desire to conclude a bespoke trade deal with the EU that goes far beyond the trade agreement concluded between the EU and Canada, and contains crucial elements of the current single market arrangements. More than 40% of total UK exports go to the EU.[62] Hence, in her Mansion House speech on 2 March 2018, Prime Minister May stressed that "… [she wants] the broadest and deepest possible partnership—covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today. … The fact is that every Free Trade Agreement has varying market access depending on the respective interests of the countries involved. If this is cherry-picking, then every trade arrangement is cherry-picking."[63]

More specifically, and crucially relevant for the analysis undertaken in this article, the UK government is eager to conclude an agreement with the EU that provides a post-Brexit cross-border civil judicial cooperation framework that replicates, to the greatest extent possible, current secondary EU legislation on civil, commercial and family matters. In a

[60] *See G. Parker & J. Blitz*, The border issue eating away at Brexit, Financial Times of 26 April 2018, p. 7.
[61] *Supra* note 1.
[62] *Parker & Blitz* (*supra* note 60).
[63] The full text of the speech is available at https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union.

policy paper published on 22 August 2017, this is expressed as follows: "The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework."[64] It is envisaged that such an agreement would, for example, contain the rules and principles of the Brussels Ia Regulation and the (recast) EIR.

However, seeking an agreement is one thing—getting it is quite another. There is absolutely nothing in the "European Council (Art. 50) guidelines on the framework for the future EU-UK relationship"[65] that would suggest that the EU is prepared to accede to the wish of the UK. Quite to the contrary. Cross-border civil judicial cooperation on a *reciprocal basis* is a core feature of the Single Market. The guidelines emphasise that the UK post-Brexit will find itself "… outside … the Single Market … and a shared legal system …" (para. 4). "The European Council recalls that the four freedoms are indivisible and that there can be no 'cherry picking' through participation in the Single Market based on a sector-by-sector approach, which would undermine the integrity and proper functioning of the Single Market" (para. 7). Hence, it appears highly unlikely that anything closely resembling the existing system of cross-border civil judicial cooperation on a reciprocal basis will make its way into an agreement between the EU and the UK on their future relationship. As a second best option to the Brussels Ia Regulation, the UK might seek accession to the Lugano Convention of 2007.[66] Whether and when such accession might be feasible, if it is desired by the UK,[67] is very much an open question—it requires unanimous agreement of the contracting parties (Article 72(3) of the Convention).

I should like to add one further detail from the guidelines that is also relevant to the analysis undertaken in this paper. It is clear that European corporate mobility vis-à-vis the UK will not benefit from freedom of establishment—as interpreted by the CJEU—after Brexit. But it is conceivable that the agreement on the future relationship could provide for mutual recognition of companies incorporated in the UK or one of the EU Member States. However, the guidelines do not envisage this possibility. They emphasise the need for "…

[64] HM Government, Providing a cross-border civil judicial cooperation framework, 22 August 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf, para. 19.
[65] *See supra* note 1.
[66] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21 December 2007, p. 3–41.
[67] This is unclear at the moment. A certain downside would be that the Lugano Convention is based on the pre-recast Brussels I Regulation.

ambitious provisions on movement of natural (sic!) persons, based on full reciprocity and non-discrimination …" (para. 10). Corporations are not mentioned even once in the text.

2. Implementing Brexit Internally: European Union (Withdrawal) Bill

Implementing Brexit will not only require the UK to externally reconfigure its relationship with the EU. It will also be necessary to internally engage in a significant legislative project that ensures that, mainly for the purposes of the transition period, the domestic legal status quo in the UK after its formal exit from the EU on 29 March 2019 remains the same as before. The UK hopes to achieve this aim with what is officially called the "European Union (Withdrawal) Bill"[68], also known as the "Great Repeal Bill". It is currently being debated in both Houses of Parliament. The latter title is a misnomer because the Bill in fact only repeals one thing: the European Communities Act 1972 (Clause 1). Its main purpose is to transform primary and directly applicable secondary EU law into UK law. Hence, Clause 2(1) stipulates that "EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day." Clause 3(1) relates to "Direct EU legislation": "… so far as operative immediately before exit day, [it] forms part of domestic law on and after exit day." However, "[t]he Charter of Fundamental Rights is not part of domestic law on or after exit day" (Clause 5(4)). Finally, Clause 6 deals with the "Interpretation of retained EU law" and the relevance of the CJEU's jurisprudence. UK courts or tribunals will not be bound by any principles laid down, or any decisions made, on or after exit day by the CJEU and cannot refer any matter to the CJEU on or after exit day (Clause 6(1)).[69] However, CJEU decisions before the UK's exit are treated like domestic decisions: "In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justice must apply the same test as it would apply in deciding whether to depart from its own case law" (Clause 6(5)).

It is obvious that transforming directly applicable EU law into UK law will require many "technical" adjustments as the European acquis uses language that relates to the

[68] "European Union (Withdrawal) Bill", https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079.pdf.

[69] However, not being bound does not mean that UK courts may not consider the future jurisprudence of the CJEU when applying retained EU law. Clause 6(2) expressly authorises them to do so. It is highly likely that they will not only consider but also follow future CJEU decisions unless there is a very good reason not to.

Member States, and the UK will cease to be a Member State on 29 March 2019. Likewise, EU-derived domestic legislation will have to be adapted to the new situation.[70]

However, more interesting for the purposes of this article is what the UK is going to do with domestic laws on transnational civil justice and cross-border civil judicial cooperation after the end of 2020, *i.e.* after the end of the transition period. It is to be expected that a domestic equivalent of the Rome I and II Regulations will be retained in full. However, it is unlikely that this will also hold true for the Brussels Ia Regulation and the EIR: the UK has no interest in automatically recognising foreign court decisions if there is no reciprocity, i.e. if it is not guaranteed that UK decisions will receive the same treatment. Hence, while the provisions on jurisdiction and choice of courts in these instruments will probably survive after the transition period in one form or another, the same cannot be expected with respect to the recognition and enforcement of judgments.

IV. REGULATORY COMPETITION AND LEGAL INNOVATION AFTER BREXIT

The "fundamental change of circumstances" triggered by Brexit and its implementation both in the UK and as between the UK and the EU will have a profound impact on the two key European regulatory dynamics analysed in Section II of this article—efficiency-enhancing innovation through regulatory competition between the Member States on the one hand, and regulatory innovation on the European level, on the other. The impact will, unfortunately, be negative.

1. Regulatory Competition between the Member States of the EU

a) Reduced choices for European (corporate) citizens

If the UK does not succeed in agreeing with the EU on a replacement for the current system of mutual recognition of judgments in cross-border civil judicial matters—and the analysis in Section III 1 has demonstrated that this is highly unlikely—, then the choice

[70] Clause 7 foresees that this may be done, to a significant extent, by regulations of Ministers of the Crown ("Henry VIII powers"). This is a highly controversial issue in the UK as it allows for amendments to primary legislation by secondary legislation without full parliamentary scrutiny.

opportunities for European (corporate) citizens and, as a consequence, regulatory competition in private law in the EU will be much diminished.

Most obviously, London will lose its status as Europe's preferred litigation venue. If judgments handed down by English courts will no longer be recognised automatically in the EU Member States, choosing London as the (exclusive) dispute resolution forum loses much of its current appeal. Contracting parties will be increasingly wary that courts in EU Member States might start to second-guess judgments handed down by UK courts, openly or covertly engaging in a merit review based on their autonomous rules of recognition (for Germany, *see*, for example, Sections 328, 722-723 of the Code of Civil Procedure). Counsel advising parties on choice of jurisdiction clauses will have to point to the legal uncertainties associated with litigating in the UK and recommend a "safer" dispute resolution forum—at least if and to the extent that enforcement abroad is an issue.

This will undoubtedly also have a negative feedback effect on the popularity of English contract law, for various reasons. First, as discussed in Section II 1 c) above, choice of courts and choice of law are strongly linked in legal practice. If parties envisage a litigation forum other than in the UK, one of the perceived benefits of English law—if not the greatest—gets lost: its application by a highly professional and reputed judiciary which knows its domestic provisions inside out. Second, English contract law might also become less attractive because it is quite unclear in which direction it will evolve in the future (on this *see* also Section IV 1 b) *infra*). To what extent will it still emulate future European developments? If it sets out on a new course, will it become more free market-oriented, reducing "Brussels red tape", or—echoing Prime Minister May's promise of a "Britain that works for everyone"[71]—more social market-oriented than today? Nobody knows for sure. If stability and legal certainty are perceived qualities of English contract law (*see* Section II 1 c) *supra*), then we can expect parties' demand for it to drop.

Of course, there is arbitration. While the Brussels Ia Regulation will probably go after Brexit, the New York Convention will not. Arbitral awards handed down by a tribunal with its seat in the UK will be recognised to the same extent after Brexit as before, and for around two-thirds to three-quarters of businesses, arbitration is in any case the preferred method to resolve international commercial disputes.[72] At the same time, the arbitration market is relevant primarily for high-end (transnational) commercial disputes, *i.e.* a relatively small

[71] *Theresa May*, Speech at Conservative Party Conference in Birmingham, 5 October 2016, http://www.bbc.com/news/av/uk-politics-37563510/conservative-conference-theresa-may-s-speech-in-full.
[72] *Vogenauer* (*supra* note 27), 47.

segment of the dispute resolution market. Further, London is clearly not the only popular venue for international commercial arbitrations, and scholars have argued that Brexit will have a negative impact on its attractiveness.[73] I should also add that most arbitral awards are not made public, *i.e.* do not contribute to the process of legal innovation and development.

A similar situation as with respect to dispute resolution will likely emerge with respect to company and insolvency law: fewer choice opportunities for European citizens and firms and, as a consequence, a reduction in regulatory competition and legal innovation. EU Member States who were forced by the jurisprudence of the CJEU to adopt the incorporation theory as a conflicts-rule for corporations might well revert to the real seat theory for UK companies. Germany is a case in point: the real seat theory still applies vis-à-vis third-country states. The German Federal Supreme Court applied it, for example, to a Swiss stock corporation in 2008.[74] The consequences for a corporation's shareholders are dramatic: if the real seat of a foreign and non-EU company is in Germany, the company will be treated as a partnership, and the shareholders will face unlimited liability for the company's debts—not a prospect that favours incorporating as an English limited company.[75]

The UK international restructuring market will also have to take a big hit. Cross-border mergers under the 10th Company Law Directive[76] involving UK limited companies will be impossible in the future. This will make cross-border transformations more difficult—both for healthy businesses (Air Berlin plc used to belong in this category many years ago) and for businesses in financial distress. Insolvency proceedings opened in the UK will no longer have to be recognised automatically as is currently the case (Article 19 recast EIR). Instead, EU Member States will decide autonomously whether and, if so, under which circumstances to grant such recognition (*see*, for example, Sections 343 and 353 of the German Insolvency Code and Sections 722-723 of the German Code of Civil Procedure). The same holds true for the English pre-insolvency restructuring tool, the scheme of arrangement (*see*, for example, Sections 328, 722-723 of the German Code of Civil

[73] *M. Torsello*, The Effect of Brexit on the Resolution of International Disputes: The Impact of Brexit on International Commercial Arbitration, in: *J. Armour & H. Eidenmüller* (eds.), Negotiating Brexit (München and Oxford: C. H. Beck and Hart, 2017), p. 73-78.
[74] Bundesgerichtshof, II ZR 158/06, 27 October 2008 – Trabrennbahn.
[75] German law might offer some protection for "Altfälle" under the doctrine of vested rights, *see Armour, Fleischer, Knapp & Winner* (*supra* note 9), p. 19-20. However, there is legal uncertainty about the scope and application of this doctrine. Moreover, it does of course nothing to save post-Brexit foreign incorporations from the application of the real seat doctrine.
[76] Now consolidated in Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30 June 2017, p. 46–127.

Procedure).[77] As a consequence, choosing the UK as a restructuring venue will, in the future, be fraught with legal risks and uncertainty. Advising counsel will caution against such choices and will recommend safer alternatives for their clients. UK and, in particular, English private law will lose some of its current popularity, and its legal products will be less in demand than they are today.

b) Consequences for the private laws of the UK and EU Member States

Inevitably, this will have profound consequences for the future trajectory of the private laws of the UK and EU Member States. In the following, I will argue that Brexit will reduce the level of regulatory competition in private law in Europe and, as a consequence, reduce the level of efficiency-enhancing legal innovations.

Reduced choice opportunities for European (corporate) citizens translate into less regulatory competition between the EU Member States and reduce the competitive pressure on Member States to adapt their laws to the demands of those "consuming" legal products. It is highly unlikely, for example, that Germany would have abolished its minimum capital requirement for closed corporations had there not been the success of the English company limited by shares on the law market. The same holds true, *mutatis mutandis*, for the fundamental reform of the German Insolvency Code after London also turned out to be a popular restructuring venue for German companies. In the future, reduced competitive pressure on the EU Member States will translate into less efficiency-enhancing law reforms in these Member States.

At the same time, the UK will probably also engage less in efficiency-enhancing innovative law-making, and for various reasons. First, if the UK's legal products are less in demand because of reduced choice opportunities for European (corporate) citizens, the UK has fewer incentives to innovate and market its products to a non-UK clientele. In a shrinking market, it has less to gain from such legal exports. Second, and to the extent that it still wishes to export its private law products, it will be forced to pursue a strategy which minimises risks, and this means: to be conservative and not boldly move away from the European acquis. After all, recognition of UK private law products is not guaranteed in the

[77] The key event in the "life" of a scheme is the court decision sanctioning it, *see Eidenmüller & Frobenius* (*supra* note 18), 1217-1218. Hence, recognition of a scheme falls into the domain of court judgments and cannot be conceived of as a mere recognition of its intended effects on the substantive legal position of the creditors. It is therefore not sufficient for the purposes of recognition that all affected claims are subject to English law.

future, and staying relatively close to the European acquis maximises the likelihood of such recognition which, as we have seen, will depend on autonomous decisions by EU Member States' courts.

The latter point can also be approached from a commercial angle: given the huge importance of the EU for UK exports, it is in the interest of British businesses to trade with EU firms and especially consumers on terms that offer the recipients of goods or services a level of legal protection that is comparable to the status quo—otherwise British businesses could risk losing further market shares as customers turn to suppliers from other EU Member States.[78]

It is for these reasons that I consider it unlikely that English private law will depart quickly and thoroughly from the European acquis. It is true that, as things currently stand, the Charter of Fundamental Rights will not be part of domestic law on or after exit day (*see* Section III 2 *supra*), and it is also true that Schedule 1 of the European Union (Withdrawal) Bill adopts a cautious attitude with respect to the relevance and effect of general principles of EU law in the UK after Brexit.[79] I would also agree with the statement that "… new sources of EU contract law, found in the Charter of Fundamental Rights and general unwritten principles, represent a profound change in the rule of recognition [in the sense of H. L. A. Hart, *Horst Eidenmüller*] for EU Member States."[80] But I consider it to be an overstatement to postulate on this basis that "… English contract law will not participate in … a transnational conception of contract law which seeks to provide citizens with fundamental rights. This becomes the road not travelled."[81] The UK has neither an incentive nor an interest in initiating a paradigm shift in contract law away from the European acquis—not in a country that is supposed to "work for everyone".

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[78] *See Augenhofer* (*supra* note 57), 1500; *M. Gelter*, EU Law With the UK, EU Law Without the UK, Fordham Int'l L. J. 1327, 1331 (2017); *L. Conway*, House of Commons Briefing Paper: Impact of Brexit on UK consumer regime, 5 October 2017, http://researchbriefings.files.parliament.uk/documents/CBP-8102/CBP-8102.pdf, p. 10.

[79] "2 No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case). 3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. (2) No court or tribunal or other public authority may, on or after exit day—(a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law."

[80] *H. Collins*, The Revolutionary Trajectory of EU Contract Law towards Post-national Law, in S. Worthington, A. Robertson & G. Virgo (eds.), Revolution and Evolution in Private Law (Oxford: Hart Publishing, 2018), Section VI.

[81] *C. MacMillan*, Brexit, Business and Trade: The Impact of Brexit upon English Contract Law, 27 King's L. J. 420, 429 (2016).

Hence, I do not expect the Supreme Court or Parliament to move away from the model of "average consumer" to a model of a more rational/economic consumer[82], nor do I anticipate that court control of unfair terms in consumer contracts will disappear.[83] I am also not inclined to believe that the general duty of good faith and fair dealing in contract—which has made a limited inroad into English law via, in particular, s. 62(4) of the Consumer Rights Act 2015[84]—will necessarily have "… a more limited future in English law than it otherwise would have had."[85] To repeat: the UK is heavily dependent on trade with the EU, and maintaining or even raising the current level will require close regulatory alignment with EU law. What I do expect, though, is "… a gradual 'common law-ising' of provisions which might be thought to have [too] much of a civilian origin."[86]

Summing up the discussion in this section, Brexit is going to reduce choice opportunities for European (corporate) citizens. As a consequence, regulatory competition between the EU Member States will be less stiff in the future than it is today. Member States will be under less pressure to engage in efficiency-enhancing legal innovations. Unfortunately, the UK will also have fewer incentives to experiment with innovative private law products: demand from continental Europe will be lower post-Brexit, and recognition of UK legal products abroad will no longer be guaranteed. Minimising legal and economic risks requires the UK to remain close to the current European acquis.

2. Regulatory Innovation on the European Level

How will Brexit affect the level of efficiency-enhancing legal innovation on the European level, *i.e.* with respect to law-making by the EU? An answer to this question depends on the key regulatory challenges the EU faces in the years to come and on the potential contribution the UK could have made in addressing these challenges—had Brexit not happened.

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[82] But *see Augenhofer* (*supra* note 57), 1486-1488.
[83] But *see MacMillan* (supra note 81), 426.
[84] Good faith is not generally recognised as a concept in English law, but it has 'crept in' in some instances by way of EU legislation. See *Chitty* on Contracts (London: Sweet & Maxwell, 32nd ed. 2017), para. 1-039 and 1-043 with further references.
[85] *MacMillan* (supra note 81), 428 (asserting that "… English courts will come to interpret cases under the [Consumer Rights Act 2015] more in accordance with English precepts such as freedom of contract and caveat emptor than the broader protection the European Union seeks to provide its citizens … This will likely affect attempts to develop a doctrine of good faith outside consumer transactions.").
[86] *L. Gullifer,* The effect of Brexit on English commercial law, 2017 (unpublished manuscript on file with author).

One such challenge is certainly the impact of big data and artificial intelligence (AI) on our lives.[87] The EU is acutely aware of this issue. In May 2015, the European Commission launched a "Digital Single Market Strategy".[88] Meanwhile, many legislative proposals in various areas of private law have been made. I already mentioned the proposal for a European directive "on certain aspects concerning contracts for the supply of digital content". On 25 April 2018, the European Commission proposed a "Company Law package" which includes a (proposed) directive that would enable entrepreneurs to set up corporations by electronic means only.[89] AI also fundamentally affects the governance of companies, creating important regulatory challenges. Further, the European Commission is currently setting up an expert group that will "… provide the Commission with expertise on the applicability of the Product Liability Directive to traditional products, new technologies and new societal challenges (Product Liability Directive formation) and, in light of an assessment of the existing liability schemes, assist the Commission in developing principles that can serve as guidelines for possible adaptations of applicable laws at EU and national level relating to new technologies (New Technologies formation)."[90] Finally, smart contracts and cryptocurrencies pose stark regulatory challenges. The list is endless.

I think it is fair to say that as with company law and financial markets regulation, the regulation of big data and AI as applied to private transactions is a field in which the expertise of the UK representatives in the relevant EU law-making bodies will be painfully missed. This is all the more a significant problem as regulatory competition does not make sense in this field, *i.e.* harmonisation at EU level is called for: allowing for legal arbitrage would pose stark risks with respect to third parties (externalities) and might even upset markets. Of course, UK researchers and legal practitioners will continue to participate in international institutions that engage or assist in private law harmonisation such as UNIDROIT, UNCITRAL or the European Law Institute (ELI). However, this is no adequate compensation for the loss of expertise in the "real" law-making process within the European institutions.

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[87] *See*, for example, *H. Eidenmüller*, The Rise of Robots and the Law of Humans, 25 Zeitschrift für Europäisches Privatrecht (ZEuP) 765 (2017).
[88] *See* https://ec.europa.eu/digital-single-market/en.
[89] *See* https://ec.europa.eu/info/publications/company-law-package_en. On this issue, *see* also *G. Bachmann, H. Eidenmüller, A. Engert, H. Fleischer & W. Schön*, Regulating the Closed Corporation (Berlin: de Gruyter, 2014), p. 186-188.
[90] *See* http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=615947.

V. CONCLUSION

Brexit is on its way. It is already fundamentally disrupting the European political order. But it will also profoundly affect the private law landscape in the EU and beyond. In this article, I have attempted to assess the consequences of Brexit for private law in the UK and in the EU. More specifically, my interest is on how the level of efficiency-enhancing legal innovation in private law will be influenced by Brexit. My analysis is based on the premise that regulatory competition between the EU Member States is, in principle, beneficial because it initiates a "discovery process" for new and, hopefully, more efficient legal products. It is based on the further premise that Brexit will reduce the level of regulatory competition in the EU. This is so because choosing UK legal products will likely be more difficult in the future—Member States will not be obliged to respect such choices to the same degree as under the current legal regime.

As a consequence, Member States will be under less competitive pressure in the future to take note of popular UK, and in particular English, legal products and to improve their own laws as they currently stand. At the same time, reduced choice opportunities and choice certainty for private parties will also reduce the incentives of the UK to innovate—it will no longer be able to export its legal products to continental Europe as easily as under the existing legal regime. In essence, Brexit will eliminate a highly innovative competitor on the European market for innovative legal products in private law, reducing the beneficial effects of such competition.

There is another reason why we can expect the level of legal innovation in private law to decline after Brexit. In the past, the UK has not only been quite successful in developing and exporting private law products to other Member States. It has also made significant contributions to innovative private law-making on the European level. With Brexit, this is set to go. Private law-making on the European level will no longer benefit from UK influence and contributions. Debates will be impoverished and the quality of outcomes might suffer.

This is all the more unfortunate as no other EU Member State is capable of and willing to take on the role in EU private law-making that the UK currently plays. Estonia is to be applauded for being a leader in smart regulation of smart technologies, demonstrated, for example, by its (new) laws on fully electronic company formation.[91] It testifies to the perceived threat of Estonia's moves that German notaries muster the utmost "deutscher Tief-

[91] *See* https://e-resident.gov.ee/start-a-company/.

und Schnörkelsinn" (*Nietzsche*) to demonstrate that it would of course amount to the "Untergang des Abendlandes" if such an electronic formation were possible—without due *ex ante* involvement of public notaries.[92] To the disadvantage of the further development of German and European private law, I fear that the clout of entrenched, sophisticated and powerful special interest groups like the German notaries will suffice to prevent Estonia from becoming Europe's Delaware.

[92] *See J. Bormann & P. Stelmaszcyk*, Das kontinentaleuropäische Gesellschaftsrecht im Wettbewerb der Rechtsordnungen, 39 Zeitschrift für Wirtschaftsrecht (ZIP), 764 (2018).

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