EU Referendum Bar Council Position
Paper II

Reform or withdrawal? The legal impact on finance, business, work and free movement

Introduction

1. This is the second of a series of three papers in which the General Council of the Bar of England & Wales (the Bar Council) examines the legal aspects of the pending referendum on the UK's membership of the EU and its possible outcomes.

2. Paper I provides an overview of the legal implications of the in-out question, focusing on the Government's "New Settlement for the United Kingdom within the European Union" and its "reform baskets", and examining what BREXIT would actually look like. Paper III examines the implications of this debate for areas of law and practice not touched on by the New Settlement, such as civil and criminal law, family and fundamental rights.

3. In this, Paper II, we take a closer look at policy areas linked to the reforms agreed as part of the New Settlement. We examine areas where changes to the UK's relationship with the EU are likely to have a significant impact on legal rights and obligations, and where change would have particularly significant repercussions for law and justice. For ease of reference we group these under the three "basket" headings to which they most closely relate, namely Economic Governance, Competitiveness, and Social and Employment Policy. Unlike in Paper I, we do not address Sovereignty separately in this paper (though see the discussion of fundamental rights in Paper III, which raises issues regarded by the Government as touching on "sovereignty" within the UK constitution).

4. This paper thus covers the following:

Economic Governance: Financial Services, the Freedom of Establishment and the Free Movement of Capital

5. The Bar Council takes this opportunity to examine wider areas of EU financial services policy that are linked to the first of the reform baskets. The UK's recent experiences in the context of financial services policy led to the negotiation points discussed in the context of economic governance in Paper I, a reading of which will assist understanding of the more detailed discussion that follows. The Bar Council's view on some of these experiences is set out below. We also deal here with some wider concerns arising out of EU regulation of financial services. As noted in Paper I, because of their close link with the wider questions of economic governance, and their link to important legal issues such as the subsidiarity principle and the Treaty base for EU secondary legislation, financial services represent an important area in any analysis of the UK's relationship with the EU.

Shared competence – getting the balance right

6. Financial services regulation is an area where competence is shared between the EU and Member States. However, EU financial legislation since the 2008 economic crisis has in practice tended increasingly to encroach on areas formerly considered to lie within

Member States' competence, and towards prescriptive, centralised decision-making. This raises concerns about subsidiarity, legal basis and institutional balance, which it is worth considering in some detail because of the wider relevance of these issues to a discussion of UK/EU relations more generally.

7. The powers conferred on the European Supervisory Authorities (ESAs) are a significant aspect of this. Articles 9, 17, 18 and 19 of the European Securities and Markets Authority (ESMA) Regulation (Regulation 1095/2010), for example, confer wide powers on ESMA, including powers to intervene if it considers that a Member State's competent authority has applied EU financial legislation *"in a way which appears to be a breach of Union law"* (Article 17(1)), in emergency situations (Article 18) or where different Member States' competent authorities disagree, including in that instance action *"requiring them to take specific action or to refrain from action"* (Article 19(3)). ESMA may even, in such circumstances, adopt individual decisions addressed to financial market participants (Articles 17(6), 18(4) and 19(4))[1].

8. Similarly, under Article 28 of the Short Selling Regulation (Regulation 236/2012), which was the subject of an unsuccessful challenge by the UK, ESMA is empowered to prohibit, impose conditions on, or require disclosure of, short positions. Powers of this nature represent a shift from EU financial regulation at a general and high level, to direct intervention in the supervision by Member States' competent authorities of their markets. Such intervention is hard to square with the principle of subsidiarity (and arguably also the principle of proportionality), and the accepted balance of powers between the EU and Member States, as well as between the EU institutions themselves.

9. We have also been concerned that insufficient analysis is being provided as to whether the measures that have been taken in pursuit of harmonisation in the area of financial services are compatible with the principle of subsidiarity as set out in Article 5 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality annexed to the Lisbon Treaty. In the Impact Assessments produced to accompany its proposals establishing the ESAs, the Commission did not engage in any real discussion of subsidiarity, with only passing reference being made to the principle, and then only where the Commission considered it to have been satisfied. The Explanatory Memoranda contained only one paragraph on this topic.

10. It is of course the case that these measures were adopted under the previous Commission. As noted in Paper I, the 2014–2019 Commission under President Juncker has placed its Better Regulation Strategy, adopted in May 2015, at the heart of its agenda, with its emphasis on increased consultation and transparency in the EU policy making and legislative processes. The strategy itself describes the new approach thus:

[1] The regulations establishing the other two ESAs, the European Banking Authority and the European Insurance and Occupational Pensions Authority, contain the same provisions.

"It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiary and proportionality i.e. acting only where necessary and in a way that does not go beyond what is needed to resolve the problem."

The Commission Action Plan towards the setting up of a Capital Markets Union in the EU, adopted at the end of September 2015, reflects this new approach, though it is obviously too soon to tell whether that will be carried through into the legislative and soft law measures that will eventually be adopted pursuant to it.

The powers of EU agencies

11. In a number of areas of EU activity, recent years have seen a growing trend to legislate to establish new specialised agencies alongside the institutions created by the Treaties. In EU financial regulation, this increasing "agentification" (adopting the word used by AG Jääskinen in the short selling case (Case C-270/12)) raises concerns about the exercise of wide-ranging powers by EU bodies when there is no Treaty basis for those powers to be exercised. This issue makes it necessary to consider the correct meaning and application of the *"Meroni"*[2] doctrine.

12. Under this doctrine, which dates back to the earliest days of the EEC, an EU institution may delegate powers to a specialist agency, but only within specific limits. The overall result of those limits is that the delegation of powers must be specific, rather than broad and general; cannot give the agency a wide "margin of appreciation" (i.e. any discretion conferred must be carefully constrained); and the power must be subject to the same kind of legal safeguards as would apply to the exercise of similar powers by the institution itself. This doctrine was one of the bases on which the UK challenged Article 28 of the Short Selling Regulation 2012, which purported to confer on ESMA a power to impose emergency restrictions on the short selling of securities in financial institutions.

13. The Commission, in the short selling case, accepted that the *Meroni* jurisprudence remains of "*particular relevance for the constitutional order of the Union*". The Court of Justice in *Meroni* itself referred to the *"fundamental guarantee"* as to *"the balance of powers which is characteristic of the institutional structure of the Community"*, and said *"[t]o delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective"*.

[2] Case 9/56 *Meroni v High Authority* [1957 & 1958] ECR 133.

14. It was therefore troubling that in its judgment in the short-selling case the CJEU, while purporting to adhere to *Meroni*, applied it in such a way as to deprive it of any real effect[3]. The Court concluded that the *Meroni* principle was satisfied because the power given to ESMA to regulate short selling in an emergency requires ESMA to *"examine a significant number of factors"*, ESMA can take only certain types of measure, and ESMA has duties to consult and notify various bodies. On any realistic view, however, the extremely broad nature of the factors to be weighed up, and the far-reaching nature of the measures available to ESMA, make Article 28 of the short selling regulation a clear breach of *Meroni*. That raises the question whether the CJEU was in reality making an exception to *Meroni* to meet the particular exigencies of the financial crisis, or was rather diluting the *Meroni* principles in their general application to EU legislation.

15. Moreover, given that Articles 290 and 291 TFEU narrowly and exhaustively circumscribe the circumstances in which even the Commission can be empowered "*to adopt non-legislative acts of general application"* or to exercise implementing powers, we find it hard to see how such a power can validly be delegated to a mere agency. In this respect, it is of concern that the CJEU concluded that the conferral of the Article 28 intervention powers on an agency was valid even though it did not (in the Court's words) *"correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU"*. The Court's reasoning as to how in those circumstances the delegation of powers was consistent with the Treaties is opaque.

16. Until the question posed above is answered, it is hard to gauge the extent to which the short-selling decision has wider significance, given the obvious read-across to financial services regulation more generally (the Markets in Financial Instruments Regulation, for example, contains provisions which mirror Article 28 of the short selling regulation), and other areas of EU law where agencies are being given increasing powers – such as the European Public Prosecutor's Office, and the European Data Protection Board. The possibility of EU agencies receiving broad powers to intervene in areas of national activity – whether in financial services or other sectors -- has an obvious resonance with the UK Government's wider concerns about sovereignty in the context of the balance of power between the EU and Member States. If the UK remains a member of the Union, this is an area of EU law that in our view would repay careful attention when the Treaties are next revisited.

Legal base

17. The Bar Council has expressed concern over the Treaty bases that have been relied upon by the Commission in proposing EU financial services legislation, particularly those relied upon since the global financial crisis in 2008. The default basis now appears to be Article 114 TFEU, which operates by the ordinary legislative procedure, formerly known as

[3] Case C-270/12 *United Kingdom* v *European Parliament & Council of the EU*.

Qualified Majority Voting (QMV). However, it is questionable whether such powers may properly be conferred on EU institutions by a decision under Article 114(1) TFEU. That provision allows the Parliament and the Council to adopt *"measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States"* which have as their object the establishment and functioning of the internal market.

18. As Advocate General Jääskinen pointed out in his Opinion in the short selling challenge, the conferral of decision-making powers on ESMA *"in substitution for the assessments of the competent national authorities"* cannot be considered as approximation measures within Article 114 (Opinion para 37). In substance this practice inappropriately bypasses the need for unanimity under Article 352 TFEU (Opinion paras 54-58). The CJEU rejected that view in its decision on the short selling challenge.

19. Equally, ESMA measures directed at individual financial institutions, overriding the determinations made by national competent authorities, cannot readily be seen as Article 114 harmonisation measures. In substance, they are a form of direct regulation by an EU agency of individual citizens in Member States.

20. A specific aspect of the legal base problem concerns EU regulation of the financial sector for the purpose of consumer protection. We agree with the then UK Government's observation, made in the context of the Balance of Competences review conducted between 2012-2014, that in the context of financial services legislation there has been a shift at the EU level from *"identifying and removing obstacles to the free movement of financial services to a new…focus on enshrining financial stability and consumer protection and addressing the risk of regulatory and supervisory arbitrage."*

21. Ensuring the functioning of the internal market requires the EU to take measures to abolish unjustified restrictions on the exercise of the four freedoms. Ensuring the functioning of the internal market in this sense does, of course, have a consumer pay-off. But measures adopted to ensure the functioning of the internal market are not in themselves consumer protection measures. The legal basis for measures designed to promote consumer protection is, rather, Article 169 TFEU.

22. It is true that consumer protection is referred to in Article 114 (3) TFEU:

"The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

There is also a strong and obvious policy case for ensuring strong consumer protection measures as the quid pro quo of the freedom to trade in financial services across borders.

For instance, certain London-based suppliers of forex and derivative trading services have adopted a business model of selling what is in reality a form of online gambling to members of the public. However, in legal terms, this is not a basis for adopting measures whose predominant purpose is consumer protection legislation, as opposed to predominantly internal market measures which may contain a consumer protection element. As explained earlier, Article 114(1) is only a basis for adopting legislation that ensures the functioning of the internal market. The division of competence appears clearly from Article 169(2) TFEU which provides:

"The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: measures adopted pursuant to Article 114 in the context of the completion of the internal market;…"

Thus only measures that have as their aim the completion of the internal market (i.e. measures that remove impediments to the exercise of the four freedoms) can legitimately be dealt with under Article 114 TFEU.

23. "Competence creep" of this kind is a concern in relation to Article 114 TFEU, as it was with the predecessor provision, Article 95 TEC. Article 95 was sometimes used to "harmonise" national laws simply on the ground that national divergences existed, with little or no inquiry into whether such divergences adversely affected the functioning of the internal market. In the *Tobacco Advertising Case* (Case C-376/98 *Germany v European Parliament and Council*), the CJEU appeared to rein in this practice, stating that mere divergence in national laws was insufficient to generate competence under Article 95 EC and that it was necessary to show some more discrete impact on the functioning of the internal market. However, subsequent CJEU decisions have held EU regulatory competence to exist precisely because divergent national laws constitute an impediment to the functioning of the internal market such as to justify EU harmonisation.[4]

24. A clear statement of the legal base is important, not least because failure to adopt an adequately reasoned Impact Assessment may entitle a State to judicially review the EU measure adopted. An Impact Assessment ought to explain clearly why divergent national laws have led to impediments in the proper functioning of the markets for financial goods and services, so as to justify measures under Article 114.

25. Those are further areas in which we would hope to see the UK driving institutional reform if it remains a member of the EU.

The Single Supervisory Mechanism

[4] See C-377/98 *Netherlands v Parliament and Council*; C-491/01 *The Queen v S/S for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453; C-210/03 *R v S/S for Health ex parte Swedish Match* [2004] ECR I-11893; C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573.

26. One of the areas of negotiation that led to the New Settlement, was to address the development of groupings within the Union, pursuant to changes in voting rules or as a result of the increasing integration of the Member States that use the euro (the Eurozone).

27. As noted in Paper I, the European Central Bank (ECB) has, in accordance with the Single Supervisory Mechanism (SSM)[5], been given overall prudential supervisory responsibility for all banks within the SSM and direct responsibility for the most significant banks. The SSM and the Single Resolution Mechanism (together "banking union") have been said to be the first step towards a genuine economic and monetary union. Subsequent steps that have been mapped out are an integrated budgetary framework (fiscal union), an integrated economic policy framework (economic union) and strengthened democratic legitimacy and accountability (political union). This current and prospective Eurozone (EZ) integration led to the UK calls, considered in Paper I, for principles to recognise and protect the position of non-EZ States. But banking union raises legal as well as political concerns.

28. Under Article 127(6) TFEU the Council may confer specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions. The original intention behind Article 127(6) is not clear, but the problems that arise with its use as the legal basis for the SSM suggest that it was probably not designed to convert the ECB into a bank supervisor. These problems include the following:
    (a) How can the monetary policy and supervisory responsibilities of the ECB be separated?
    (b) Is there an effective appeal mechanism from decisions of the ECB?
    (c) Which courts will enforce supervisory decisions?
    (d) Can there be equality of treatment within the SSM between the EZ and participating non-EZ countries?
    (e) Can the European Banking Authority treat the ECB in the same manner as national regulators?

29. Many of the above problems have a legal source. For example, Article 12.1 of the Statute of the European System of Central Banks and of the ECB ("the ESCB Statute") provides that the Governing Council is responsible for taking all decisions necessary to ensure the performance of the tasks entrusted to the ECB under the Treaties and Statute. So whereas separate internal bodies may prepare monetary policy and supervisory decisions, the ultimate decision-maker remains the same in both policy arenas. Accordingly, the Supervisory Board established under the SSM is empowered to carry out the preparatory works regarding the supervisory tasks conferred on the ECB, but then can only propose draft decisions to the Governing Council.

[5] Regulation 1024/2013.

30. Banks subject to supervision by the ECB will want to be able to challenge supervisory decisions speedily and transparently on their merits, just as is currently possible in respect of decisions taken by national supervisors. Article 6.1 of the European Convention on Human Rights requires that:

> *"In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

31. The Upper Tribunal (Tax and Chancery Chamber) review mechanism enables the UK to satisfy this requirement by permitting individuals and firms who disagree with certain supervisory decisions of the regulators to refer the disagreement to an independent judicial body established by the Tribunals, Courts and Enforcement Act 2007.

32. By contrast, at EU level the supremacy of the Governing Council[6] combined with Treaty provisions which expressly guarantee the independence of the ECB (Article 130 and Article 282(3) TFEU and Article 7 ESCB Statute) make the creation of an internal appeal mechanism difficult, which explains why the Administrative Board of Review can only express opinions and not take appeal decisions. The Governing Council remains the taker of first instance and appellate decisions.

33. The Treaty provides that decisions of the ECB may be appealed to the CJEU (under Article 263 TFEU) so that the CJEU may review the legality of acts of the ECB. However, this is not a merits/facts-based review, but akin to judicial review. A challenge must be based on lack of competence, procedural impropriety or unlawfulness; and cases take, on average, around two years to be heard. This mechanism is clearly not appropriate to deal with a bank's concern about a technical supervisory decision, yet is the only avenue of recourse from decisions of the Governing Council.

34. The European Supervisory Authorities have the ability to impose direct decisions on national regulators. The European Banking Authority is required to treat the ECB as any other national regulator when doing so. Given the Treaty provisions which guarantee the independence of the ECB and provide for its decisions to be appealed to the CJEU, in addition to the difference in status between the two bodies[7], it is questionable whether the EBA has the legal ability to impose decisions on the ECB.

35. The concerns detailed jeopardise the effectiveness of the SSM and call into question its legal certainty. They also demonstrate the risks inherent in not having a firm legal basis for legislative proposals.

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[6] As with the taking of supervisory decisions, an internal appellate body can carry out preparatory tasks and make recommendations but the Governing Council must be the ultimate decision-maker.

[7] The ECB is an EU institution established under the Treaty whereas the EBA is an agency established under secondary legislation.

Effect of the UK's New Settlement

36. The UK's settlement addresses the political rather than legal concerns of recent developments in the EU regulation of financial services. From a purely legal perspective, it is hard to escape the conclusion that the only way to address the difficulties noted above while remaining an EU member, and to create a credible, legally robust system which provides effective supervision is, ultimately, through Treaty change. Yet the alternative of a withdrawal from the EU would not necessarily address our legal concerns, because of the extent to which the EU legal order would still be likely to exert an influence on regulated activities in the UK and in the content of the UK's own post-Brexit law.

37. Traditionally, the EU has had responsibility for financial services regulation but deferred to Member States as regards operational supervision and enforcement: in effect, there has been a distinction between making and applying the rules. This distinction, with the notable exception of banking union, has largely continued to the present day but there has been significant change in the legislative process. Post- financial crisis the EU has made greater use of directly applicable regulations to set out the rules on financial services, as opposed to directives which each State implements using national legislation tailored to its own legal traditions. And the directives that are adopted are increasingly likely to impose maximum harmonisation of national laws.

38. The result is that the UK legislative framework for regulating financial services is entwined with EU regulation, both because it has implemented directives and because it relies on regulations. Further, a large proportion of EU legislation implements international obligations or guidelines (i.e. those agreed at global level beyond just the EU), albeit the EU may "gold-plate" those obligations or guidelines for the purpose of its internal market. Accordingly, it would be an enormous endeavour for the UK to revoke or repeal its existing legislation and, if it were to do so, it might be faced with a need to replicate the effect of much EU legislation in order to meet global standards. It is likely that the UK might revoke or repeal certain discrete EU-specific obligations with which the present government does not agree, such as the cap on bankers' bonuses (though of course a future government might seek to reinstate such controls). But the vast majority of the corpus of financial services regulation would be likely to remain, post-withdrawal, at least for the near future.

39. Indeed, if the UK wishes to maintain a trading relationship with the EU for services, which is perhaps economically most necessary in the financial services arena, that is likely in practice to be best served by mirroring EU legislation as closely as possible. The UK is the leading global financial centre, and the de facto financial centre of the EU. Its status is at least helped by, if not dependent on, its position in the EU, as many non-EU financial services players see the UK as the gateway to Europe. Financial institutions established in a EEA Member State benefit from a 'passport' which enables them to access the markets of other EEA Member States without having to set up a subsidiary and obtain a separate

licence to operate as a financial services institution in those Member States. On this basis a financial institution which establishes itself in the UK may choose either to:

(a) establish a presence in another EEA Member State, (the "host" state), referred to as an "establishment" passport; or
(b) carry out its permitted activities cross-border, without establishing a presence in the host Member State, referred to as a "services" passport.

The adoption of any of the post-withdrawal options discussed in Paper I other than the EEA option would result in the automatic loss of the passport, unless and until the successful negotiation of some relationship providing for its reinstatement or replacement. In at least the short term, and possibly the longer term too, that would be highly problematic for financial services institutions established in the UK and indeed elsewhere in the EU. It would mean that financial institutions established in the UK, both UK headquartered groups and subsidiaries of non-UK headquartered groups, could not provide services to customers in the EU from within the UK.

40. Equally, financial institutions established in the EU could not provide services to UK customers from the EU. Nor could they rely on an EU establishment passport to provide outward services from the UK to other parts of the world. They would need to be separately authorized by the UK authorities: that is, they would need to apply for a licence here and be subject to the (possibly divergent) supervisory requirements and enforcement regime then applicable in the UK. That would be a time and resource-consuming exercise. It is right to point out, however, that this would provide the UK with at least some leverage in negotiating a new relationship: EU financial institutions seeking a London presence may well press their governments to concede reciprocal arrangements mirroring as closely as possible the EU/EEA passport. That would benefit UK institutions too.

41. There is in fact a mechanism for recognition of non-EEA Member States which gives financial services institutions established in their jurisdictions certain rights within the EEA, although such rights are in no way equivalent to the passport and the type of right is developed on a case-by-case basis in individual pieces of legislation. This process is known as equivalence. There is not a prescribed process but it typically involves an assessment of whether the third party legislative regime is equivalent to that in the EEA.

42. Given the close relationship between Switzerland and the EU, Switzerland is often one of the first non-EU jurisdictions to be granted equivalence. Other jurisdictions, including jurisdictions such as the US, which might be assumed to have similar legislation to the EU, struggle to obtain equivalence. A need to benefit from equivalence decisions after any withdrawal may encourage the UK to maintain and develop legislation in line with that of the EU. That may make rather theoretical the freedom from EU law and regulation resulting from Brexit.

43. As has been pointed out in Paper I, much of the UK's domestic financial services legislation has an EU source; but as noted above, that EU source in turn often implements international obligations. This provides another reason why it is probable that UK financial services legislation after any Brexit would not diverge significantly from EU legislation, save perhaps where the EU has gold-plated international obligations as it has, for example, with capital requirements for banks and large investment firms. Moreover, one by-product of the pre-eminence of the UK as a global financial centre is that its domestic legislation has historically been amongst the most sophisticated in the world, and has in fact been used as a model for much EU-level legislation. This provides a further reason why a post-Brexit UK regime could be expected to closely resemble the EU regime – at least in the short term.

Competitiveness

44. The Bar takes this opportunity to examine wider areas of EU policy that are linked to this second reform basket. These are all areas in which our members practise and can offer their informed views.

The Internal Market for Services

45. A comprehensive analysis of the impact of EU action on the market for services, and the consequences in this area of a UK withdrawal from the EU, would require an empirical analysis of a wide range of areas of economic activity which is beyond the Bar Council's purview. Rather, we make a few preliminary remarks and then focus on three areas within our particular expertise: the success story that has been the free movement of legal services in the EU to date, noting our concerns about its review; a few broad comments in the area of company and insolvency law; and finally a look at public procurement. Please refer to the preceding section for our views on financial services.

46. In general terms it seems to be accepted in Government that free movement of services is desirable. To take one example to stand for the many, we note that the Department for Business, Innovation and Skills was swift to announce the importance for the UK economy of the opening up of the online music services market by the adoption of the Collective Rights Management Directive in early 2014. It is probably uncontroversial that it is in the UK's best interest to enable the most effective opening up of service markets such as these. The question is thus how best to achieve it, and who should do that? And how best to ensure that the UK is involved in that decision- and law-making process?

47. It could be said that the UK Government answers these questions for itself on a repeated basis. The example of the Collective Rights Management Directive is a good one. EU action in this area is available now. The possibility that the World Trade Organisation (WTO) might do something here in the future is not in itself a reason not to participate in

EU activity at this stage. It is hard to see how the market access achievements of the single market could be delivered by unilateral action by the UK. So that raises much the same question as considered above: if the UK were not a member of the EU, what relationship would it be likely to have with the remaining EU single market for these services, and how far would that relationship enable the UK's law to differ from the existing EU regime?

Free Movement of legal services

The Significance of Legal Services for the UK Economy

48. Plainly, the successful operation of a market for legal services is of direct importance to the Bar. However, the successful operation of this market is important not just for the Bar and the wider legal profession but, in our view, brings with it important benefits for society and the UK economy. The Bar has always been a committed supporter of the development of an effective internal market in legal services, for this is to the benefit of the UK as a whole.

49. The global legal services market has seen significant growth over the past decade and more, as a result of increasing international trade and growth in developing economies, which has led to an increase in demand for legal services and the UK having the largest share of the European legal services market. This is largely due to the popularity of the English common law in international commerce as well as the reputation for expertise and professional integrity enjoyed by our judges and lawyers. The sector was worth £22.6bn or 1.6% of UK GDP in 2013. A substantial contribution to this is made by the continued demand by parties (including from the EU) for the use of London as a venue for litigation and arbitration.

50. Secondly, and much more important for the EU economy than growth in the legal sector itself, is how legal services underpin the rest of the economy in relation to imports as well as exports. As leading economist George Yarrow has pointed out:
"Economic analysis and evidence suggests that legal services can have wide ranging economic significance through their very close connection with the general institutional architecture of society (sometimes encompassed by a term such as the 'rule of law'). Moreover, this analysis and evidence suggests that it is not by chance that good economic performance tends to be closely associated with the stable and well-functioning legal systems. Rather the institutions (including laws and norms) of a legal system condition and determine economic performance. Institutions that are stable and credible facilitate economic development and lead to higher levels of economic activity. In addition, although political institutions determine important aspects of the structure of a legal system, and whilst the judiciary determines how given laws are implemented, lawyers

actively contribute, through their everyday actions and conduct, to both the shape of a legal system and how effectively it operates and functions." [8]

51. He continues:
"a particularly important relationship between legal services and economic performance stems from the roles that legal services play in facilitating and sustaining markets. The core activity of the professional legal services sector tends to expand market activity throughout the economy, and it is therefore closely linked to economic performance and growth; a feature that distinguishes legal services from a number of other professional service activities with which they are often compared in economic and policy assessments."

The Internal Market for Legal Services

52. The profession of lawyer is the only (liberal) profession that is covered by a separate system of Directives governing the free movement of practitioners within the EU:

- The Lawyers Services Directive - 77/249/EEC of 20 March 1977, [1977] OJ L 78, governing the temporary provision of services, and

- The Lawyers Establishment Directive - 98/5/EC of 16 February 1998 [1998] OJ L 77/36, which provides for establishment under home country title, with the option to integrate into the host country's profession after three years.

This so called "Lawyers' Regime" specifically employs a unique mechanism of mutual recognition, without (immediate) integration into the profession of the host Member State.

53. Besides the two Lawyers' Directives, lawyers have also been able to, and have in practice, made use of the general system of recognition of Professional Qualifications, governed by Directive 2005/36, which leads to full integration into the profession of the host Member State. Under the PQD, to proceed to full integration, a lawyer must first successfully complete an aptitude test.

54. The Lawyers' regime is widely seen to be an Internal Market success story, allowing practitioners to offer their services in other Member States on an occasional or long-term basis, based on mutual recognition. Indeed, it has served as a model for EU regimes in other services sectors.

Current EU developments affecting the Lawyers' regime

[8] 'Assessing the economic significance of the professional legal services sector in the European Union', Regulatory Policy Institute, June 2012.

55. The Establishment Directive provides for its own evaluation and possible revision after 10 years of operation, a process that is in fact still underway. To date, there has been a strong consensus that the lawyers' regime has been, and remains, necessary and relevant, despite the existence of complementary horizontal measures such as the PQD; and that for the most part, it has achieved its objectives of facilitating free movement of legal services. There are of course areas where improvements and updates are needed, and these are the subject-matter of ongoing debate. The Bar and others within the legal profession will continue to strive to ensure that any changes that may be necessary in order to adapt the existing regime to the changing market (e.g. the regulation of new legal forms; non-lawyer ownership of legal practices; greater use of information technology, including the availability of online platforms offering legal services; double deontology; professional indemnity insurance; etc.) retain the flexibility and respect for national legal traditions that have allowed the regime to thrive to date.

56. The EU has been looking at related issues of interest, not only to the legal profession, but to other professional service providers, including liberalising possible access to such professions, and the training of such professionals. As in other areas of law discussed in this paper, a key concern for us is ensuring that possible future changes of this kind that affect the UK can be influenced by the UK. By that, we mean ensuring that UK qualified lawyers are involved in the drafting of instruments, the UK being present at the table in Council and EP negotiations, and also UK stakeholders having a say, through consultations, expert groups and other means, on content and context.

57. Overall, it seems that the steps taken towards creation of an Internal Market for Legal Services have had broadly positive effects for the UK, and it is difficult to see how they could have been implemented without conferral of those competences upon the EU institutions.

What would happen were the UK to leave the EU?

58. It seems clear that the UK would wish to retain access to the Internal Market even in the event of an EU withdrawal. As noted earlier in this and Paper I, the question is: how, and what terms would be realistically achievable? If access to the market for legal services meant having to comply with rules such as those above, without our having had any say in the content of those rules, it is easy to envisage a context in which the UK's professionals could rapidly be placed at a disadvantage.

59. Late last year, the Law Society of England & Wales published a study[9] it commissioned on the economic impact of UK withdrawal from the EU for the legal profession. The headline finding is that "*The legal services sector would be disproportionately disadvantaged compared to the whole UK economy if the UK were to leave the European Union*".

[9] See: http://bit.ly/1VPmhA1

60. The UK is focused on becoming a regional/global legal sector hub both for transactional services and for dispute resolution services. This is not a free movement issue as such, because Switzerland has free movement for lawyers but is not a regional hub for law firms wishing to establish in the EU. London has developed into such a hub, with numerous third country law firms having substantial operations there, often their principal EU operation. It is uncertain to what extent third country law firms would continue to be attracted to siting their EU base in London if the UK were no longer a member of the EU. But in any event, we consider it very likely that some financial, and therefore legal business would be lost to London. Indeed, in some cases withdrawal could be expected to give rise to legal and regulatory constraints which would exclude certain EU-related business from London. For example, it seems plain from the background to Case T-496/11 *UK v. European Central Bank*, in which the UK successfully challenged an ECB policy to prevent the settlement of euro-denominated transactions outside the euro zone (see Paper I), that certain classes of high-value financial/legal business would be barred from London.

61. Of course, it must be acknowledged that, at least in the short term, the volume of EU law-related work for UK lawyers, in the UK, would likely increase, rather than decrease, were the UK to withdraw its EU membership. This would in part arise from the legal complexity of structuring the withdrawal under Article 50 TEU (which it should be recalled, has never before been invoked); as well as the need to negotiate new arrangements with the EU and other international bodies. Lawyers' expertise would also be called upon to conduct a thorough review of domestic legislation across the board to see what would stand and fall, need amending or replacing etc, as well as to advise all other clients on the impact of the UK's withdrawal on their business/family relationships/rights and obligations/property interests/employment issues etc. That level of legal uncertainty would likely keep the profession busy for several years. But that would be a finite "bulge" in work, and would be focused largely on specialist EU and regulatory lawyers. Long term, we consider that there is a clear risk to the contribution to the UK economy made by the legal sector as a whole, and at this stage it is far from clear that whatever relationship with the EU follows a withdrawal will provide an environment in which that contribution can continue and flourish.

Company Law

62. The Bar Council has supported several specific EU Company Law initiatives over the years. However, we consider that the major overriding difficulty with EU action in this area has been over-ambition. Introducing company law rules, or even corporate models, intended to work in Member States which range from the highly sophisticated, which are attempting to lead the world and to follow best practice as it develops outside the EU, to less sophisticated Member States, has proved unworkable in many instances. A one-size-fits-all approach simply cannot cover the different structures, markets,

conflicting interests. Accordingly, in our positions on EU company law policy over recent years, we have consistently called on the EU to set up the right framework for regulatory competition, allowing for a high level of flexibility and choice; and calling for future work to focus on increased administrative cooperation and exchange of good practice, rather than further harmonisation. We have also sought consolidation of EU company law directives with a similar scope.

63. The EU has made several attempts to create EU company legal forms, with rather mixed results. Whilst the Bar Council sees the attractiveness of providing workable alternatives to existing national company law forms, their uptake has varied wildly across the EU according to how attractive the model is in the different Member States versus the known and trusted national ones. As ever, no one wants to be the guinea pig adopting a novel form which is not, at least initially, widely understood and is frequently viewed with suspicion. There have also been well documented difficulties with legal base in this area. The Bar Council has tended to take the view that, provided such EU models exist in parallel with national models, leaving flexibility for companies to choose, there is no particular reason to object. For as long as that flexibility remains, we would continue to be open to EU activity in this area, applying in the UK, but the importance of retaining that flexibility is to be emphasised.

Insolvency

64. The conclusion in the company law context regarding the need to maintain scope for flexibility at the national level can be repeated here. The Bar Council responded to the Commission consultation on the future of European Insolvency Law in the spring of 2012. The consultation preceded the review of Regulation (EC) No 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation") and we expressed our view that, in practice, the regime is generally effective and efficient. Inevitably, there have been issues as to its scope and effect, to which we referred. However, most of these have been satisfactorily resolved in our view by the CJEU and at national court level, in a manner which we believe is consistent with the aims and objectives of the original Insolvency Regulation of 2000. The Bar Council was happy to see its concerns and call for flexibility reflected in the reform of that regulation, now enshrined in Regulation 2015/848.[10]

65. We also await the Commission's next steps, expected later this year, on a possible harmonisation of substantive insolvency law, likely now to occur in the context of its work on the Capital Markets Union. Provided the same flexibility shown above can be brought to bear here, and that will also likely mean maintaining UK influence on any future legislative process, we remain open-minded.

[10] And see the several references to insolvency in the section "Judicial Cooperation in Civil matters", Paper III.

Public Procurement

66. On 11 February 2014 the Council adopted three new Directives covering procurement of goods, works and services by public bodies and utilities and the procurement of concession contracts. All three are to be implemented into Member States' national law this year. These are very substantial legislative achievements and a detailed analysis of their content is beyond the scope of a short section such as this.

67. There are no doubt parts of the new legislation which represent an unwelcome extension of EU regulation, but it also contained much to commend it, and the UK was accordingly enthusiastic about its adoption. Domestic implementation of the Directives was recently completed**.** Since UK entities are significant providers of services throughout the EU, it is certainly arguable that the UK would benefit from continued rules guaranteeing fair access to these markets.

68. There is, however, a further point worth making regarding the EU's competence in the area of public procurement, beyond the EU market. Much has been made by the EU and by the UK Government of the promising opportunities in services exports that may flow from trade agreements entered into by the EU with countries such as Singapore, South Korea, Canada and perhaps also the United States. It must be acknowledged that these agreements, in particular those regarding Canada and the United States, are politically controversial insofar as they enable firms based outside the UK to acquire a commercial interest in services currently run within the UK public sector, and the Bar Council does not take a collective position on the desirability of any particular agreement with third countries on any particular terms. But if an agreement is reached enabling the import of services into new sectors, its effect ought to be reciprocal; that is, it should also give rise to opportunities for the export of services to those countries, as they substantially expand the market available to EU suppliers beyond that provided for under the current WTO arrangements (under the Government Procurement Agreement). Current EU negotiations on such agreements, as well as a newly revived attempt by the EU to adopt an "International Procurement Instrument", may result in an opening up of third country procurement markets, or parts of those markets, to EU companies that an individual state alone might lack the bargaining power to achieve.

69. A UK exit from the EU would have, as a consequence, a rather startling effect. It is correct, as noted in Paper I, that the UK would, as a backstop, continue to benefit from WTO rights. The UK may well in due course achieve trade agreements with third countries that at least approximate to the position achieved, or aspired to, by the EU in its dealings with those countries. But even assuming that this is achieved, by leaving the EU the UK would – at any rate in the short term - find itself in a less favourable position than its former EU partners. Remaining Member States would enjoy liberalised access to public procurement and other service markets under existing bilateral arrangements, and under the prospective agreement with the United States, which the UK would not

benefit from until it had negotiated bilateral arrangements with those countries. And it is far from clear that the terms of each arrangement, once agreed, would be as favourable to the UK as its counterpart is to the EU.

Competition Policy

Anti-Trust

70. Anti-trust law is aimed at ensuring a level playing field for businesses operating in a particular market. It seeks to ensure that dominant players are not able to abuse that dominance, by e.g. unfairly selling at below market price or tying up all means of access to the market. It is also designed to prevent price fixing agreements and other anti-competitive practices. Increasing numbers of UK businesses would define their geographical market place beyond the UK's borders, be that in terms of suppliers, customers or competitors, and thus wish to benefit from the protection afforded by anti-trust law applying throughout that wider market.

71. In practice therefore, effective antitrust enforcement necessarily involves cooperation and centralisation so as to ensure the effective impact of antitrust law on cross-border business. This is reflected in the active support given by UK and EU authorities for cooperation between antitrust authorities worldwide. Conversely, there are inevitably aspects of antitrust enforcement better dealt with at a level below the EU, and national authorities are of course very active there too. There will always be issues as to where and how to draw the line between the national and EU jurisdictions, and this is the subject of constant discussion and evolution. Improvements can always be made. However, that UK business benefits from effective enforcement of EU antitrust laws is, in our view, unassailable.

72. In a counterfactual world in which the UK was not part of the EU, the UK authorities would in any event find that the activities of EU authorities would still have a substantial impact upon UK markets, but UK authorities would struggle to maintain their current level of influence over those activities.

73. In relation to mergers specifically, it should be noted that the current division of competence - allocating exclusive jurisdiction to the Commission to a defined class of large transactions with cross-border effects - offers business a welcome one-stop shop (and thus a cheaper, simpler and quicker procedure) for dealing with cross-border transactions, while containing provisions, generally sensibly used, for transferring mergers with a particular impact on one country back to that country.

74. Apart from the loss of influence on the evolution of EU law that a UK withdrawal would occasion, there would also be specific disadvantages in the field of anti-trust law for UK-based businesses, were the UK to no longer be an EU member. This can best be

illustrated by way of hypothetical example: A merger is notified to the Commission involving two companies based elsewhere within the EU, but having a significant market share in the UK market. Since the UK would be outside the EU, the impact of the merger on the UK market for that product would not be relevant to the Commission's consideration for the purposes of allowing or blocking the merger, with the obvious risks to the UK market that could then flow.

State aid

Advantages and disadvantages of having a State aid regime at EU level

75. The State aid regime exists to prevent distortions of competition in the internal market that would be caused by Member States subsidising particular undertakings in their jurisdiction.

76. The European Commission plays a central role in the system of State aid control:
- It is, for most practical purposes,[11] the only entity that has the power to authorise State aid, that is to say to find it compatible with the Internal Market under Article 107(3) TFEU;
- It has power to issue block exemptions from the requirement to notify State aid; and
- It has the duty to enforce the State aid rules, and is equipped with powers of investigation and enforcement, including the power to order the repayment of unlawfully granted and incompatible aid.

77. National courts also play a key role in the enforcement of the State aid rules: -
- National courts must grant appropriate relief to complainants if there is a breach or threatened breach of the State aid rules – that relief may include injunctions preventing the implementation of aid that has not been notified to and approved by the Commission;
- National courts must enforce recovery orders made by the Commission;
- National courts may also award damages against the grantor of unlawful aid to adversely affected parties; and
- This complementary system has evolved over time and is widely considered to operate effectively.

78. There are generally considered to be at least three broad justifications for State aid control:
- The need to avoid disruption to the Internal Market by, for example, Member States promoting "national champions" as a way of reducing competition from imported goods;

[11] The power of the Council under Art.108(2) to authorise aid is limited to exceptional circumstances, and cannot be used where the Commission has already taken a decision.

- The need to avoid distortions of competition as between undertakings benefitting from aid and those that do not; and
- The need to prevent the waste of public resources that flows from "subsidy races" e.g. competition between Member States to attract a particular industrial investment.

79. As to the third of these, the protection of taxpayers' money in itself is of course, a matter for individual Member States. Nonetheless, pursuit of these objectives at Internal Market level necessarily requires EU competence, given the obvious need to vest the power to decide on the question in a body that is independent of the Member State(s) concerned, and the clear cross-border negative effects of unrestrained subsidies on the internal market, on competition, and on national finances.

80. However, there is another side to State aid regulation, which is its undoubted effect in diminishing Member States' autonomy in determining the balance between public and private sector economic activity within their own boundaries. In this respect the State aid rules share some features with sector-specific Internal Market legislation requiring Member States to "liberalise" certain areas of activity in which the State itself has historically acted as a sole or primary provider of services: For example, passenger rail services, and wholesale and retail energy markets. The quality and cost of these services has recently been a topic of huge political controversy in the UK, leading to extensive debate about the extent to which the balance between public and private sector provision might have been wrongly struck in recent years.

81. It is not altogether clear whether, for example, the proposed Fourth Package of EU rail legislation – would either facilitate or prevent a shift from operation of passenger services by private franchises to operation by one or more State-owned bodies. Significantly, the 2014 Procurement Directives expressly state that they apply only to such contracts for goods, works and services as public authorities choose to enter into with private entities; they explicitly do not require authorities to procure from the private sector rather than providing the relevant services etc. themselves. But there has been a tendency for the Commission, quite apart from the effect of the sector-specific legislation, to intervene (or threaten intervention) on the basis that the funding arrangements for provision of services by publicly-owned bodies fall foul of the general State Aid rules under the Treaties; and that the rules can only be met by the authorities seeking competitive tenders in the market.[12]

82. It is one thing to insist on fair competition rules (including rules about State aid) to govern those services which Member States determine should be provided through competitive markets. It is something entirely different to insist that competition rules require Member

[12] See for example the recent controversy concerning the Clyde Hebrides Ferries: http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10229 (and for background http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011D0098)

States to provide those services by means of market structures in the first place. Thus there is doubtless room, within the current debate, for consideration of the extent to which existing EU rules, which there is no present agreement to review, might hamper the political freedom of the UK to readjust the boundaries of private and public service provision in a number of areas of the economy.

83. State aid rules are also frequently perceived to clash with the countervailing public interest in ensuring the survival of industrial sectors whose loss would have serious repercussions for the public interest at national or regional level with a Member State. Not surprisingly, State aid featured prominently in political debate about the feasibility and scope of possible Government intervention to stave off closure of the Port Talbot steelworks. The currency and banking crisis in the late 2000s threatened widespread economic collapse throughout the Union, and it is not surprising that the Commission's approach to the large-scale State intervention necessary to stabilise the situation was informed by a degree of realpolitik rather than a focus on the effects on competition. It certainly could not be assumed that the Commission would take a similarly benevolent view of intervention measures – such as short term lending or acquisition of an equity stake by government – where the problem is essentially one affecting an individual Member State rather the Union as a whole. There is no doubt that the UK government would have a freer hand in devising strategies for intervention in troubled sectors of the economy if not bound by EU State aid rules.[13]

84. However, that is not the end of the matter. The UK would wish, whether within or outside the EU, to continue to benefit from access to the Internal Market. That has two consequences. First, the UK would also no doubt wish to continue to take the benefit of the State Aid regime, along with the anti-trust rules, in order to ensure that UK companies are themselves able to compete fairly across the EEA on a level playing field. The airline industry is but one example of an industry where the ability of the Commission to prevent other Member States from subsidising "national champions" has been a central element in the development of a competitive pan-EU market in which UK business can compete fairly, enabling consumers to benefit as a result. Second, the likelihood is that any new arrangements for UK access to the Internal Market would be expected to require the UK to accept the burden of those or equivalent rules.

85. The present Treaty provisions governing State aid (now Articles 107 and 108 TFEU) date in all essential respects from the outset of what was originally the European Economic Community. Those provisions are replicated in Article 61 of the EEA Agreement, and so fully extend to the EEA Contracting Parties (in relation to which the EFTA Surveillance

[13] There is of course a link between State aid and other competition rules, one that often reflects political rather than purely legal considerations. For example, the context for the debate about the UK steel industry is the prevalence in the European market of cheap steel imported from China, where production is effectively subsidised by regional governments e.g. through supply of water and electricity at reduced costs. This could be controlled by EU-wide anti-dumping measures under its external trade competence, but the UK Government itself pressed for the relevant tariffs to be set at the minimum permissible level.

Authority plays in all essential respects the same role as the Commission in the EU, interpreting both the substantive and procedural rules in the same way as the corresponding EU State aid rules[14]). So, were the United Kingdom to leave the EU and instead become a Contracting Party to the EEA Agreement, that would have no material impact on the application of State aid law in the United Kingdom. As in other areas of law looked at elsewhere in this paper, though, when it came to reviewing and amending EU legislation in this area post-exit, the UK would no longer enjoy any material influence over any changes to the regime.

86. As noted earlier, membership of the EEA is not the only possibility for a post-withdrawal relationship between the UK and EU; indeed, as we observed, it may well be the least probable of the three options. But the other two options would involve negotiation of conditions for access to the EU/EEA Internal Market, which could be expected to include – as a minimum – submission to competition rules (including rules on State Aid) of comparable stringency to the present rules. Those could be expected to apply internally within the UK in any sector of activity where UK undertakings sought to provide services etc. in that sector in the territory of EU Member States.

Are there other supra-national alternatives?

87. Although all EEA Member States are members of the World Trade Organisation ("WTO") we would not regard the WTO subsidies framework as offering UK business anything like the same protection from the distortive effect of subsidies by other Member States as is offered by the State aid rules. First, the WTO Agreement on Subsidies and Countervailing Measures does not extend to services (a key area for the United Kingdom). Second, save in relation to export subsidies and subsidies contingent on the use of domestic goods, subsidies can be challenged only if they can be shown to cause adverse effects, which a complaining WTO member State has to prove. Third, the WTO regime relies on enforcement by complaining Member States, and provides no mechanism for affected businesses themselves to take action about subsidies that harm them. In contrast, the EU State aid regime allows affected businesses, and in some cases (subject to rules about standing) third parties, both to complain to the Commission and to take action themselves in the courts of all Member States to prevent unlawful aid.

The Bar Council's wish list on State Aid

88. Nonetheless, there are criticisms to be levelled at, and improvements to be made to, the scope and effectiveness of the EU State aid regime.

[14] References to the Commission in this paper therefore include references to the ESA in relation to the EEA Contracting Parties.

89. First, the Commission's central role in the State aid regime can lead to unacceptable delays before entirely justified aid measures can take effect. The Commission has managed to take State aid decisions very quickly – overnight in the case of at least one of the measures notified during the banking crisis – but in general the process will delay any notified project by many months, and often years if an in-depth investigation is launched or if a third party challenges a Commission decision in the General Court of the CJEU.

90. The Bar Council welcomes the Commission's approach of seeking to broaden block exemptions, of issuing detailed guidance as to its approach and setting up various categories of aid that can be "fast-tracked", but the delay in issuing decisions remains a problem that causes considerable expense and frustration to all those involved in the process.

91. As for delays to cases before the General Court, these have long-since reached unacceptable levels, and the Bar Council remains concerned as to whether the soon to be fully implemented regulation facilitating a doubling of the number of judges will in practice produce the essential improvements. Like many others, the Bar Council would have preferred to see a selection process put into place that put merit and expertise ahead of national interests, but it was not to be.

92. Related to the problem of delay is the point that the State aid regime, as presently constituted, catches too many cases that are not genuinely of cross-border interest. As we noted above, the requirements that a State aid have a potential effect on trade between Member States and that it have a potential effect on competition have been interpreted broadly, so that many aids with only a minimal prospect of a significant cross-border effect are caught. Although the Commission has issued (and continues to revise) a *de minimis* Regulation, making it clear that aid below certain thresholds (essentially, aid to one undertaking of a value of less than €200,000 over three years) is not caught by the State aid rules, that leaves many aids with little conceivable distortive effect on competition or impact on trade between State at least arguably caught by the State aid rules. The effect is that (unless they can be made to fit within a block exemption, which is frequently not possible) many desirable local projects either have to be delayed pending notification; proceed at the commercial risk that the beneficiary may have to repay the aid if there is a complaint (a risk that can endanger parallel commercial funding of such projects); proceed in a way that excludes private sector involvement so as to eliminate aid risk, or simply do not go ahead at all.

93. The distinction between what is and is not a State aid can be very difficult to draw, particularly (although not only) in relation to taxation measures. That uncertainty is compounded if the ultimate EU arbiters of the issue take a decade or more to resolve the issue.

94. We accept that some of the problems identified above are difficult to resolve within the current State aid regime. Indeed, the problems associated with the scope of the State aid regime stem from case-law based on the State aid provisions of the TFEU and would be difficult to resolve without treaty change. If the UK remains a member of the EU, it would do well to ensure that any attempt to change those treaty provisions would (a) avoid weakening the scope and enforceability of the State aid rules in ways that harm the ability of UK business to deal with harmful interventions by other Member States in favour of their competitors, but (b) confine the operation of the rules to cases where there is a genuine EU-level impact on competition.

Consumer Policy

95. Whether the UK is within or without the EU, with the ever-growing volume of cross-border, and in particular, online sales, consumers in the UK will need to be protected when purchasing abroad and non-UK consumers likewise will be put off buying from UK companies if they do not have confidence that their rights are protected there too. As in other areas of law therefore, the issue arising when considering a possible UK withdrawal from the EU will not be whether the particular branch of law continues to apply at all, but rather, whether a possible divergence between UK and EU law in the future would be disadvantageous. Inherent in that question is whether there would in fact be a divergence at all. If not – if English law were to develop in parallel with EU law in this field, it rather begs the question too obvious to pose. Part of the analysis also hinges on the extent to which English law has influenced EU law in this field in the past, and the extent to which the UK would wish it to continue to do so going forward.

96. The Bar has participated in several EU consultations in the area of consumer protection over the past decade and more. We have consistently taken positions that support the ongoing development of a simplified and complete regulatory framework in the area of consumer protection at EU level. Despite the volume of EU legislation in the field, there has been a lack of coherence on consumer protection as between the Member States, which logically remains a dampener to inter-state trade, and which the EU is best placed to tackle. We have supported EU initiatives that serve to increase consumer confidence, including in cross-border purchasing, through issues as diverse as information requirements, security of means of payment, delivery and returns policies and many others. As in other areas of EU law, the principles of subsidiarity and proportionality must be upheld, and an objective need for the EU action shown, supported by sufficient evidence.

97. As to the level of harmonisation required to create that optimal market, we remain of the view that minimum harmonisation should be the rule, but maximum harmonisation can be acceptable only, and to the extent that, it is carefully targeted. We have highlighted the potential risk that its imposition would reduce the level of consumer protection in Member States that have to date applied higher standards, including the UK in some

areas. In addition, the application of broad horizontal standards would inevitably leave many areas to be determined by domestic courts, with fragmentation and opacity the most likely result. Thus our prevailing view remains that the laudable aims of maximum harmonisation (to give consumers the confidence to shop across border by assuring them of certain key standards and rights of redress) may not be achievable in practice, and in fact that consumer protection and business confidence in the internal market would be weakened if maximum harmonisation were to be applied too widely. In any event, as EU law currently stands, consumers shopping across borders benefit from the provisions of Article 6 of the Rome I regulation (Regulation (EC) No 593/2008), which in most cases guarantees them the protection of consumer law in their home Member State.

98. We have in the past also been concerned that the EU should be more sensitive to Member States' and consumer sensitivities as regards initiatives in this area, including what, when and how they are tabled and adopted. By way of example, the Bar Council welcomed the adoption of the Consumer Rights Directive 2011/83/EU, noting the controversy in Council which resulted in the final text not covering key areas of consumer protection law, including in particular, remedies. In the intervening years, rather than focus efforts on reviewing and ensuring full and correct implementation and application of that Directive, the Commission attempted to push through an entirely separate proposal for a Common European Sales Law (CESL). The controversy surrounding that proposal meant that, early in 2015, it was finally withdrawn by the new Commission. In its stead, and in the context of the Digital Single Market, in December 2015 the Commission adopted a package of related proposals, including one for a directive on online and distance sale of goods, and the other on contracts for the sale of digital content. Both are based on the Single Market Article 114, both are targeted, full harmonisation directives with good interlinks with national law, and both apply only to business to consumer contracts, with the consumer defined as "any natural person who in contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession".

99. Though there is plenty of room to improve both measures, the Bar Council has welcomed them, not least because the points we have raised in this context over the years are now reflected in both their scope and content. The Bar Council will remain supportive for as long as that remains the case, whilst cooperating to ensure that they result in solutions that do indeed make cross-border and online shopping simpler and safer for consumers; the corresponding sales simpler for business, whilst avoiding unnecessary interference in business to business transactions. In the context of our comments, above, about Treaty base, in our view, carefully-focused measures of this kind, bearing a proportionate relationship with the identified problems in cross-border trade that prompts their adoption, are properly within the competence conferred by Article 114 TFEU. A wide-ranging measure like CESL, which (as conceived) would have re-written entire swathes of the domestic law of contract in the Member States, would not have been.

100. The UK has of course recently updated its own domestic law in this area. Thus UK consumer rights in relation to digital content are dealt with in the Consumer Rights Act 2015. As a general observation, we have been urging the EU institutions to build on the experiences of Member States which have sought to address this emerging area rather than to seek to address everything at EU level from a standing start. We see it as advantageous to UK traders to have a predictable set of consumer protection rules that applies across the EU, particularly where UK law and experience have influenced the content of those rules. That is precisely the logic of recognizing that consumer protection has a role to play in rules aimed at enabling trade to take place across borders.

Free Movement and Social Benefits

Social and Employment Policy

101. In this section, we examine other areas of social and employment policy beyond the specifics included in the fourth basket of reforms, notably in the area of workplace rights and discrimination law, which were not the subject of the UK's reform negotiations.

102. This section has been prepared with particular input from practioners active in the fields of equality and diversity and employment law, so its focus is on the impact of EU law and of a UK withdrawal from the EU, in those fields. It does not deal with other potentially controversial areas of regulation such as health and safety at work or claims for compensation for injury (though the latter topic is touched on in Paper III, which covers judicial co-operation in civil matters).

General observations

103. The Bar represents clients on both sides of the employment relationship. For workers, rules prohibiting discrimination and unrestrained "hire and fire" treatment confer valuable and essential rights. For some on the employer's side, there are concerns that rules in this area can amount to a regulatory burden adding to costs – particularly for SMEs – and affecting competitiveness. The Bar, many of whose members are self-employed sole practitioners rather than employees, approaches the issue from a slightly different standpoint. We are committed to promoting a strong and effective rule of law, with equality for all before the law. The Bar has historically faced challenges in ensuring equality and diversity among its own ranks. The Bar Council, in recent years, taken steps to help the profession move towards being truly representative of the society it serves and from which its members are drawn, at every level of seniority and in every area of law. That cannot be achieved without a clear commitment to an effective, coherent and workable system of employment and discrimination rights.

104. Strong anti-discrimination laws underpin equality before and under the law. So long as there is a European single market, such laws are an essential complement to its

operation. As we point out in Paper I, one of the basic foundations of the single market is free movement of workers. Individuals who are vulnerable to discrimination will be reluctant to exercise their free movement rights unless they are guaranteed a comparable standard of protection from discrimination in the Member State to which they are moving. In comparison to many other EU Member States, the UK has a longer tradition of anti-discrimination law and it has often been at the forefront of legal developments in this field. Setting common minimum EU standards benefits the UK because it helps to ensure (for example) that British citizens will not be deterred from exercising their free movement rights due to inadequate protection from discrimination elsewhere in the EU.

105. From the Bar's own standpoint, many barristers have cross-border practices within Europe. It helps them and their clients that they are protected from discrimination on the same basis across the EU.

106. Given the importance of promoting equal treatment, both from a rule of law and a single market standpoint, it follows that we believe that this is in principle a desirable function of the EU. Given the reality of integration of economies and peoples after many years of the EU's existence, social problems within any Member State tend to affect other Member States. Furthermore, the EU seeks to promote equality through its international development policies, for example in relation to women. It can only do this convincingly if it has strong internal standards in this sphere; and the same would be true of the UK outside the EU.

Background – a snapshot of EU in the areas of Discrimination and Employment

Discrimination rights

107. Protection against discrimination is a fundamental aim of the EU, as stated in Articles 8 and 10 TFEU, and equality is now recognised by the CJEU as a fundamental value which takes priority over the economic aims of the Treaty: see e.g. *Deutsche Post* [2000] ECR I-929 at §57. Discrimination in employment is now fully underpinned by EU law, which has had many important consequences for domestic law, in favour of workers' rights and remedies. The relevant Directives and Articles of TFEU are set out below, which are given domestic effect by the Equality Act 2010.

108. The combined effect of these rules is to protect against the relevant kinds of discrimination at all stages of employment, from access to employment, through treatment at work including pay, to dismissal, and even including post-employment victimisation. The Directives contain special rules on the burden of proof to ensure that victims of discrimination have effective means of vindicating their rights. As a result of the ruling in *Marshall No.2*, [1993] ICR 893, in every case the Directives require that the remedies for unlawful discrimination fully compensate successful claimants for their loss.

109. Providing protection against sex discrimination and unequal pay between men and women were early EU social rights. Now the Equal Treatment Directive, 2006/54/EC, protects against direct or indirect sex discrimination in employment, including pay. In addition, Article 157 TFEU, formerly Article 141 and before that Article 119, requires equal pay for male and female workers.

110. It is difficult to overstate the significance of EU law in protecting against sex discrimination. The CJEU has repeatedly acted to correct earlier decisions of the UK domestic courts which failed to give proper effect to female workers' rights:

- In recognition of the foundational importance of equal pay in EU law, the CJEU extended equal pay laws to cover all forms of pay relating to the employment relationship, regardless of their source, and in both the public and private sectors, including pensions. This led, for example, to changes to domestic legislation because retirement benefits were excluded from the domestic Equal Pay Act 1970, and equalisation by means of 'levelling up' of pension benefits for men and women across almost all sectors;
- Clarifying that equal pay embraced work of equal value for which no job evaluation study had been done, and so potentially applied wherever there was evidence of systemic under-payment of women;
- Extending indirect sex discrimination beyond where the employer imposed a requirement or condition, and laying down a strict test of objective justification where pay or other practices had a disproportionate effect on women;
- Ruling that pregnancy was a condition unique to women, so that sex discrimination could arise without the need for comparison with a sick man, and as a result giving women special protection against any detrimental treatment because of pregnancy or owing to absence in a protected period of maternity leave;
- Requiring effective remedies for work-related sex discrimination, so precluding caps on damages or some temporal limitations on arrears of damages**;**
- Protecting against gender reassignment discrimination;
- Extending discrimination protection to embrace post-employment victimisation owing to the principle of effectiveness, which in turn led to explicit adoption of this in all the relevant Directives and domestic law; and
- Introducing protection against harassment which led to important changes to domestic legislation, widening its reach to ensure it complied with EU law.

111. The other Directives on discrimination are more recent additions to EU law. Directive 2000/43/EC protects against discrimination at work on the basis of racial or ethnic origin, and the Framework Directive 2000/78/EC protects against discrimination owing to religion or belief, disability, age or sexual orientation in employment or occupation. In keeping with the law on sex discrimination, they protect against both direct and indirect discrimination before, throughout and after the employment relationship. The decisions

on sex discrimination will be, for the most part, read across so as to apply equally to them.

112. Age discrimination was prohibited by the UK government at the latest possible time, and only because it had to comply with the 2000 Framework Directive. Rules about this form of discrimination have since been very strongly driven by EU law, and the many judgments of the CJEU include the important ruling in *Kücükdeveci* (Case C55(/07), in which the CJEU determined that non-discrimination on grounds of age is a general principle of EU law, which was directly effective against private bodies, and which overrode inconsistent national legislation.

113. The important influence of the Directive and the CJEU decisions on it is shown by two recent decisions of the Supreme Court. First, *Seldon v Clarkson Wright* [2012] ICR 716 where, in reliance on the CJEU case-law, Baroness Hale said that age discrimination (here a compulsory retirement age) could only be justified by public interest objectives, broadly categorised as inter-generational fairness and dignity, so making it much harder to justify age discrimination and probably relevant to the abolition of the default retirement age in the UK. Second, *Homer v Chief Constable of West Yorkshire* [2012] ICR 704, where the leading judgment was again given by Baroness Hale, who explained that the test for showing "particular disadvantage" in the equality legislation, derived from the EU Directives, was intended to make it easier to establish indirect discrimination **-** a decision which applies to all types of indirect discrimination - and stressed the strictness of justifying age discrimination by reference to rulings of the CJEU.

114. Protection against religion and belief discrimination was enacted precisely to comply with the Framework Directive 2000/78/EC. The recitals to the Directive refer to the corresponding duty in Article 9 of the ECHR, meaning that the rulings of the European Court of Human Rights will inform the interpretation of the Directive and hence domestic law.

115. Protection against discrimination because of sexual orientation, introduced by the Employment Equality (Sexual Orientation) Regulations 2003, was also a direct consequence of the Framework Directive. Prior to that, domestic law gave no real protection against this form of discrimination. Even after the ruling of the ECtHR in *Smith v UK* [1999] IRLR 734, holding that the ban on gay men and lesbian women serving in the armed forces was contrary to Article 8 ECHR (on private life), it was EU law in the form of the Directive which led to regulations to address this form of discrimination, protection now cemented in the Equality Act 2010.

Pregnancy, maternity and parental leave

116. As has already been mentioned, the CJEU cases on the Equal Treatment Directive on sex equality in employment, determined that detrimental treatment because of pregnancy

amounted to sex discrimination. Recognising that pregnancy is unique to women and should not require a male comparator, the CJEU cases protected pregnant women against non-appointment to employment, dismissal because of pregnancy or taking maternity leave, and discrimination in terms and conditions except pay during maternity leave. The cases were a marked departure from how domestic courts had interpreted and applied the Sex Discrimination Act 1975.

117. Protection of pregnant workers is supplemented by the Pregnant Workers Directive 92/85, which lays down minimum standards to protect the health and safety of pregnant women and which cannot justify a lowering of the standard in each Member State. In addition to requiring assessments and measures to protect against risks to pregnant workers' health and safety, the Directive confers compulsory rights to at least 14 weeks' maternity leave paid at the level of an adequate allowance which is least at the level of sick pay, paid time off for ante-natal examinations if these have to take place in working hours, a prohibition on dismissal from the beginning of pregnancy until the end of the 14-week period (save in exceptional cases), and the maintenance of terms and conditions of employment during the maternity leave period, with the exception of pay, where the requirement is just the maintenance of a payment or an adequate allowance.

118. "Family friendly" policies are reflected too in the Parental Leave Directive 2010/18/EU, giving effect to the Framework Agreement on Parental Leave. The Framework Agreement lays down minimum conditions, cannot justify a lowering of the protection given to workers, and allows Member States to introduce rules more favourable to workers.

Part-time and fixed-term workers

119. The two Directives, the Part-time Work Directive 97/81/EC and the Fixed-Term Work Directive 1999/70, both implement Framework Agreements between the social partners. They provide a degree of protection for part-time workers and those on fixed-term contracts, though it seems their objectives are also to encourage such forms of flexible working.

120. Part-time workers are already protected under EU law because less favourable treatment of them compared to full-time workers will often amount to indirect sex discrimination since part-time workers tend to be overwhelmingly female, as many cases of the CJEU and domestic courts have recognised. So too may be other forms of 'atypical' working. The Part-time Work Directive, giving effect to a Framework Agreement among the social partners, supplements that protection. Its effect is to give some important protection to a form of working which is often used to accommodate some sort of family life.

121. The Fixed-term Work Directive works along similar lines, and aims to protect against discriminatory treatment of workers on fixed-term contracts and the abuse of successive fixed-term contracts. It gives this often precarious category of workers a general right not to be treated less favourably than a comparable permanent employee unless the difference in treatment can be objectively justified and requires the adoption of measures to prevent the abusive use of successive fixed-term contracts. In *Del Cerro Alonso* [2008] ICR 145 the CJEU, emphasising that the Directive was a provision of social law which should be given a broad reach, rejected the argument of the UK Government that clause 4 of the Directive did not apply to cover discrimination in pay - a further illustration of the UK Government's stance to rights of this sort, and an indication of what it might do in the absence of EU law. To the same end of enhancing the protection given by the Directive, the CJEU also made clear that objective justification for any difference in treatment required precise and concrete factors based on objective and transparent criteria; the mere fact the difference in treatment was based on legislation or a collective agreement was not sufficient.

Agency Workers Directive

122. So far as the Temporary Agency Work Directive 2008/104/EC of 19 November 2008 is concerned, the UK only dropped its opposition to the Directive after many years, when the CBI and TUC reached an agreement on agency workers in 2008. The Regulations require a 12-week qualifying period before an agency worker has a right to the same "basic working and employment conditions" as apply to comparable direct employees of the hirer; they adopt a narrow definition of what counts as "pay" for the purpose of equal treatment; and they make maximum use of what is known as the 'Swedish derogation', which enables employers to avoid the requirement of equal pay in certain circumstances**.**

123. Whether this minimalist approach is consistent with the Directive has yet to be tested in the CJEU, and it is easy to criticise the limitations in the Directive (for example, it does not give agency workers a general right to equal treatment in relation to statutory rights, such as unfair dismissal) and the practical problems of workers enforcing their rights. But it is only because of the Directive that agency workers enjoy any degree of legal protection in the UK. In the absence of the rights in the Directive -- most importantly, to equal treatment in certain "basic working and employment conditions" (Article 5) and a right of access to "amenities or collective facilities" in the user undertaking (Article 6) -- agency workers' rights under domestic law would be minimal. Agency workers will often not have employment status under UK law and so do not benefit from the many legal rights conferred on employees only, such as unfair dismissal.

Working time

124. The Working Time Directive, now 2003/88/EC, was introduced as a health and safety measure under former Article 118A of the Treaty (now Article 153). This Directive too only lays down "minimum safety and health requirements for the organisation of working time" and does not affect the right of Member States to introduce provisions more favourable to workers. The Directive applies to every worker and contains, in broad terms, rights to daily and weekly rest, limits on maximum weekly working time, paid annual leave of at least four weeks, and measures to protect night workers. It is supplemented at EU level by Directives applying to workers who originally fell outside the scope of the Directive, such as workers in the transport sector and those at sea.

125. Without the Working Time Directive there would be almost no legal protection against long hours of work in the UK – a problem in a number of professional services sectors including law -- and no legal requirements for rest or paid holiday. The common law provides only minimal protection. There is no implied contractual entitlement to holidays and no implied right to be paid for them. In principle, if the UK left the EU and the WTR were revoked, an employer could dictate whatever contractual terms it wanted about working time: express terms could require working many hours a work, could leave workers 'on call' for 24 hours a day or could confer no paid holiday at all.

Collective rights

126. Several EU Directives require collective consultation with unions or workers' representatives. Prior to EU initiatives in this sphere, UK law laid down almost no duties on worker consultation, instead relying on free collective bargaining or, in the case of the now abolished wage councils, a form of statutory collective bargaining. The notable exception was the Safety Representatives and Safety Committees Regulations 1977, requiring consultation about health and safety where the employer recognised a union.

127. Those scant domestic requirements have now been greatly supplemented by several EU Directives. The earliest Directive at EU level, Directive 75/129 on collective redundancies, aimed to avoid employer strategies of 'social dumping'. It was followed by others, the justifications for which include the higher productivity of companies with social dialogue, maintaining a balance between "flexibility" and security ('flexicurity' in the jargon), and avoiding social dumping to the detriment of those Member States with established systems of social dialogue. The Directives cover the topics set out below:
- Collective redundancies, originally Directive 75/129 and now Directive 98/59, requiring consultation where redundancies cross the numerical thresholds in Article 1 "in good time with a view to reaching agreement" about e.g. ways of avoiding, reducing or mitigating the dismissals, which must be completed before notices of dismissal are issued.
- Consultation under the Acquired Rights Directive 77/187, now consolidated in Directive 2001/23/EC, the aim of which is to require employers to provide

information and to consult in order to address the social consequences of economic change caused by transfer of undertakings.

- The Framework Directive on Health and Safety 89/391/EEC, which provided the overarching umbrella for the later 'daughter' Directives, requires consultation with workers and/or their representatives "on all questions relating to safety and health at work".
- The European Works Council Directive (EWC Directive), originally 94/45/EC, now 2009/38/EC, which was extended to the UK after the Labour Government signed up to Social Chapter.
- The Information and Consultation Directive 2002/14/EC is now implemented in the UK by the Information and Consultation of Employees Regulations 2004 (or 'ICE'). It applies only to establishments or undertakings employing at least 20 (establishments) or 50 (undertakings) in a Member State, and adopts a similar weak conception of consultation as that in the EWC Directive. In the UK it is the 50 threshold which applies. The Directive requires, in broad terms, a Member State to establish arrangements for information and consultation about the development of the undertaking, the circumstances surrounding employment in the undertaking, including in particular any threats to employment, and decisions likely to lead to changes in work organisation or contractual relations.

Acquired rights and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

128. The Acquired Rights Directive was implemented domestically by domestic regulations known as TUPE. Though its provisions are now familiar to employment lawyers, the Directive marked a radical break with the common law in the UK. At common law, a transfer of a business from A to B operated as a dismissal of the workers employed by A because the employment relationship is personal. If the dismissal was with notice, the termination would not be a breach of contract; if it was without notice, damages would be restricted to lost earnings in the notice period.

129. The Acquired Rights Directive gave much greater protection to employees. It is of particular importance in a commercial environment, especially in the service sector, dominated by compulsory competitive tendering (partly, but not solely, as a result of EU law in this area). The Directive applies to a wide range of transfers of undertakings in both the public and private sectors save for administrative reorganisations within public authorities. In a radical break with the common law, it requires the compulsory transfer of employees, with their existing terms and conditions intact, to the transferee: in effect a continuation of the employment relationship. The only exception to this is old-age, invalidity or survivors' benefits under company pension schemes; but this provision did not prevent the transfer of the right to a payment of full pensions on redundancy before normal retirement age, once a common feature in the public sector. The Directive protects employees against variations of their terms of employment owing to the

transfer. Employees are also protected to a degree against dismissals because of a transfer, save for economic, technical or organisational reasons "entailing a change in the workforce". Duties of information and consultation, referred to above, supplement these duties.

Employment rights on insolvency

130. Under the Insolvency Directive, now consolidated in Directive 2008/94/EC, each Member State is required to guarantee employees the payment of outstanding claims arising out of contracts of employment or the employment relationship against employers who are in insolvency. This means that the State must pay the sums owing to employees whose employer cannot pay owing to insolvency. Once again, implementation of the Directive cannot be a means of reducing the existing level of protection of workers, and nor does the Directive prevent the UK introducing rules which are more favourable to workers. Member States may (i) limit the period of pay which guaranteed, but subject to a minimum of eight weeks' remuneration; and (ii) set a ceiling on the payments, provided this is compatible with the social objectives of the Directive. Article 8 of the Directive separately requires the guaranteeing of pension liabilities, which has proven to be very important in protecting the rights of workers in the UK. These provisions are very important in practice: it is very common where a plant closes following the insolvency of an employer for the workers to recover significant sums in respect of arrears of pay against the state, claims which would be worthless against the employer.

Economic freedoms and posted workers

131. The Posted Workers Directive 96/71/EC (PWD), gives a degree of protection to workers posted from one Member State to another. It guarantees the posted workers certain listed terms and conditions (including working time rules, minimum wage rates, health and safety standards and provisions on non-discrimination) that are applicable to workers in the State to which they are posted, provided these are laid down by (i) law, regulation or administrative provision or (ii) in relation to Annex 1 activities (mainly construction) collective agreements or arbitration awards which have been declared 'universally applicable'. The PWD permits this to happen in legal systems such as the UK's by the State adopting standards in generally applicable sectoral, geographical or national collective agreements. It is now supplemented by a Directive intended to enhance the enforcement of the PWD by allowing e.g. workers in construction to recover under-payments of the national minimum wage from contractors other than their direct employer. Although the PWD confers rights on posted workers and is said not to prevent national legislation which is more favourable to them, in light of its intersection with the economic freedoms in the Treaty, such as freedom of establishment and freedom to provide services in Articles 49 and 56 TFEU respectively, it has in practice come to be treated as a ceiling and not a floor of rights.

132. Broadly, in some circumstances the economic freedoms in EU law permit commercial organisations to resist conditions in public contracts requiring contractors to comply with labour standards, such as pay rates, which go beyond those set out in Article 3 of the PWD. For example, in the public procurement arena, a contracting authority is not allowed to impose its own State's legal standards for pay and conditions on bidders from other Member States (so long as the bidder employing the workers concerns in its home State rather than posting them to the contracting authority's State) – see *Bundesdruckerei GmbH v. Stadt Dortmund*, C-549/13.

133. By the same token, the Directive has limited the power of unions to take collective action in order to press for such "levelling up" of standards. This is illustrated by *Laval* [2008] IRLR 160 where the CJEU, despite saying that the right to take collective action was a fundamental right under EU law, held it could not justify strike action by Swedish trade unions in the building sector aimed at compelling a Latvian company to sign a collective agreement providing for rates of pay which were higher than those laid down in national legislation. Such action, according to the CJEU, was an interference with the freedom to provide services which could not be justified because it sought to enforce higher wage rates than those required by Article 3 of the PWD.

Equal treatment and workplace regulation in a UK outside the EU

134. We do not suggest that withdrawal from the EU would result, in the short term, in the dismantling of the entirety of the workplace and other non-discrimination rights currently enjoyed as a result of EU legislation. There is no doubt that the UK would continue to need a comprehensive framework of anti-discrimination legislation, but in the absence of EU legislation requiring it to do so, there is a real risk that protections in this area would be lost. It is important that those voting in the referendum should be aware of the extent to which rights now taken for granted emanate from EU law, and could therefore be substantially modified in future, without the possibility of those affected seeking redress under EU law.

135. In a number of other areas, we have suggested that the likely post-withdrawal trading relationship between the UK and EU would entail the retention of significant areas of regulation of the kind currently found in EU law. That is particularly so in relation to the rules of operation of the single market. However, social and employment rules of this kind are further from the core of the EU's economic freedoms than, say, rules about competition or consumer protection. So one cannot assume that the new UK/EU relationship would necessarily entail the UK being held to existing EU standards in those areas.

136. In assessing where anti-discrimination and employment protection law is likely to end up following withdrawal, there are a number of competing factors.

137. Whilst it is true that the UK has a strong domestic tradition of promoting equality and diversity, it is also the case, as outlined above, that several strands of the protections now afforded in domestic law have their origins in EU Law.

138. As noted above, the jurisprudence of the CJEU has helped to shape domestic courts' interpretation of anti-discrimination legislation. It can be said, however, that UK courts have on occasions also led the way on important developments in discrimination jurisprudence. For example:

- in developing and applying the concept of indirect discrimination in the field of equal pay (see *Jenkins v Kingsgate (Clothing Productions) Ltd* [1980] 1 WLR 1485; Wilson v HSE [2010] IRLR 59, paras 65-67 *per* Arden LJ);
- domestic courts have recognised that UK discrimination legislation goes further than EU law (see for example *North Cumbria Acute Hospitals NHS Trust v Potter* [2009] IRLR 176, paras 80-87).

139. In summary, therefore, the available legal materials suggest that in the absence of EU equal treatment legislation:

- Though there would be good arguments in terms of both policy and international law against reducing the level of protection currently provided by the Equality Act 2010, or substantially amending the essential structure or principles of that and related frameworks; were a future government to decide to do so, there would be no recourse to EU law to prevent it;
- That said, the Bar Council believes that the interpretation and application of such domestic anti-discrimination legislation by domestic courts would be unlikely to change in any substantial respect, unless and until a future government passed new domestic legislation mandating such a change.

140. Turning to employment regulation other than equal treatment, in the absence of EU legislation (and domestic implementing legislation) regulating the treatment of fixed-term, part-time, agency, posted workers and others currently afforded particular protections as outlined above, consideration would undoubtedly need to be given to the rights of such workers and how their treatment is to be regulated compared with permanent, full-time and direct employees. The forms of employment relationship within the modern UK labour market are diverse and include increasing numbers of workers in all of these categories. Whilst such forms of employment relationship offer increased flexibility for both employers and workers, they also pose a question about the extent to which and circumstances in which employers should be permitted to exploit that flexibility in order to treat such workers differently (less favourably) than their core, permanent or full-time employees. There may be differences in the make up by gender, race/national origins and perhaps other characteristics of workers in these different groups, which mean that other equal treatment principles are likely to be engaged,

though the extent to which these would provide adequate protection in those circumstances is questionable.

141. Therefore, any coherent system of employment rights in a post-Brexit UK will necessarily need to grapple with the comparative treatment of these different groups and make clear provision for the extent to which the employment rights and treatment of workers in the different groups should be the same and/or the extent to which differential treatment should be permitted. There can be no doubt that, in the absence of EU legislation on the subject, there would be ample scope for the UK to regulate the treatment of these workers differently, so whilst it is likely that some statutory regulation would be considered necessary, the very real risk of a reduction of existing protections cannot be excluded.

142. As to the regulation of information and consultation, including in the specific context of collective redundancies, any coherent, effective and workable system of industrial relations requires legislation to support and facilitate appropriate consultation and bargaining at a collective level. Moreover, the UK has a positive obligation pursuant to Article 11 of the ECHR to facilitate a system of meaningful collective bargaining as an essential element of trade union rights under that Article (see *Demir and Baykara v Turkey* ECHR Case No. 34503/97, 12 November 2008). Therefore, those matters would require domestic legislation even in the absence of EU legislation. They are presently regulated by primary legislation in the form of the Trade Union and Labour Relations (Consolidation) Act 1992, which contains a large number of purely domestic provisions as well as those which implement underlying EU legislation in this field and is intended to form a coherent overall domestic industrial relations code. It is, therefore, unlikely that any substantial revision of the 1992 Act would be appropriate, though it certainly cannot be excluded.

143. It should be noted, that domestic policy in this area is notoriously susceptible to changes of national government. A number of the equalities reforms introduced by the 1997 and subsequent administrations have in turn prompted "levelling up" at EU level, which means that – so long as the UK remains bound by EU law – it is hard for a more deregulation-minded government to row back to an earlier domestic position. Withdrawal from the EU would mean there would be little to prevent such a government from changing UK law to remove or dilute a number of the workplace and related rights currently enjoyed in the UK. Because of the more obviously economic flavour of policy in this area, in contrast to the specific area of equal treatment legislation, we would expect to see greater scope for significant change in the wake of UK withdrawal from the EU.

Bar Council wish list were the UK to remain a member of the EU

144. UK domestic legislation on anti-discrimination goes beyond the minimum requirements set by the EU (e.g. in respect of material scope). This means that UK citizens who exercise their free movement rights may not enjoy the same level of legal protection elsewhere in the EU that they currently find in the UK. This may be a barrier to free movement or hinder British businesses operating in other EU Member States. It would be in the interests of the UK to see the quality of EU anti-discrimination law enhanced further, in particular through the adoption of the 2008 proposal to extend the prohibition of discrimination on grounds of religion or belief, age, disability and sexual orientation into all areas of EU competence.

145. The Bar Council does not believe that it is in the interests of the UK for the EU to take less action in social policy so far as it relates to equality/discrimination. In the limited area where some adverse effect has been noted, the view of practitioners in this area is that the appropriate course would be to rectify the problem by seeking to change the current position in EU law, rather than by reducing the EU's competence in this sphere.

146. EU legislation in the field of anti-discrimination provides significant guarantees with regard to subsidiarity and proportionality. For example, the Directives leave Member States great flexibility with regard to what type of institutional support is provided to individuals (such as equality bodies). These vary across the Member States, often reflecting local traditions and context. Likewise, there is considerable flexibility regarding the enforcement infrastructure. While the UK has retained its emphasis on Employment Tribunals, other states have relied on local legal traditions, such as Ombudsmen. There is also flexibility with regard to the exceptions permitted within anti-discrimination law. For example, some States have chosen to retain mandatory retirement ages. The debate, therefore, is between the possible economic advantages of flexibility and the desirability of clear minimum standards for EU citizens wherever they choose to live and work in the Union.

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