



## EU Referendum: Position of the Bar

### *Executive Summary*

#### *The Bar Council*

1. The General Council of the Bar (the Bar Council) represents over 15,000 barristers in England and Wales and is the Approved Regulator for the Bar of England and Wales. The referendum regarding the UK's membership of the European Union is fast approaching. As part of its contribution to the debate, the Bar Council has published a series of three papers. These papers examine the impact that a possible withdrawal could have on the law of England and Wales and its practice; consider how a withdrawal would be effected; and assess what relationship the UK would have post-withdrawal, and the effects of that future relationship on the Bar and on the law.
2. The Bar Council is a non-political body and does not seek to campaign for a particular answer to the controversial in/out question to put to the electorate. Rather, it offers the expertise of many of its members with knowledge and experience of EU and related areas of law to help inform the debate. The three papers set out to identify advantages and disadvantages, from a legal point of view, of changes to the UK's relationship with the EU in some important areas of law and policy. Individual barristers have volunteered their time to contribute their expertise in this exercise.

#### *The EU Referendum Bar Paper*

3. Paper I is entitled "New Settlement or Brexit? Key legal issues for the UK's post-referendum relationship with the EU". It offers an overview of the legal implications of the in/out question, looking in particular at the "New Settlement" negotiated by the UK Government, and considers what Brexit would actually look like from a legal and constitutional standpoint. Papers II and III look in more detail at the potential impact of a UK exit from the EU, on various fields of law in which members of the Bar practice. Paper II is entitled "Reform or withdrawal? The legal impact on finance, business, work and free movement". Paper III is entitled "Reform or withdrawal? Rights and justice". The topics covered by these papers include areas in which exit from the EU would be likely to require new domestic legislation covering similar ground. We also examine which EU reforms might be achieved without incurring some of the disadvantages we identify as flowing from UK withdrawal from the EU.

4. The following sections summarise the three substantive papers. After the summary we have set out a few examples of the potential legal impact of UK withdrawal from the EU across a range of areas of law and policy. It is not intended to be a comprehensive list, but provides a snapshot of issues raised in some key areas, most of which are developed further in the three substantive papers.

#### *Summary of Paper I*

5. In this paper, the Bar Council provides a brief overview of how the EU works. We then analyse the proposed reform i.e. the European Council Decision and supporting annexes, contained in the Summit Conclusions of 18 & 19 February 2016, concerning “A New Settlement for the United Kingdom within the European Union”.
6. We consider each of the four “baskets” of reforms in the New Settlement, namely Economic Governance, Competitiveness, Sovereignty and Social Benefits and Free Movement. While we have doubts about the necessity of some of its contents – in the sense that legally very little is added to safeguards and constraints that characterise the existing UK/EU relationship – overall we consider that the New Settlement would bring useful clarification and effectiveness to the UK’s relationship with the EU, were the vote cast in June favourable to remaining in the EU.
  - **In the area of Economic Governance**, and following analysis of the legal situation, we consider that calls for Treaty change, to secure the UK’s non-Eurozone position, were probably unnecessary. The desired protections for non-Eurozone countries were essentially already in place in the Treaties, as further confirmed through the jurisprudence of the Court of Justice of the EU (“CJEU”). The New Settlement does provide for additional safeguards, including the emergency brake mechanisms, which the Bar Council considers would be enforceable in the context of decision-making by the Council of the EU, were the UK to remain a member. In practice too, where the European Parliament’s agreement is required to give effect to particular elements of the Settlement, we consider it likely that a majority of its members would take the politically expedient position in those circumstances, and endorse those elements.
  - **In the area of Competitiveness**, the Bar Council considers the New Settlement to be in effect, a restatement and endorsement of the trend of existing EU policy, the detail of which is explored below and in Paper II, as long supported by the Bar Council and indeed by the UK government. We are inclined to the view that the UK and the EU’s ambitions in these important areas are broadly in line with each other.

**As regards Sovereignty**, we explore the subtle variations in the meaning of the term in the EU and UK context. We note that despite the totemic nature of the Treaty reference to “ever closer Union” for the UK, this provision has little, if any, legal significance in defining the respective competence of the EU and the Member States – considerably less, at all events, than the principles of subsidiarity and proportionality. Nevertheless, the Bar Council welcomes the European Council’s clear declaration of the principle that “it is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into

the European Union”, and that such position will be included in the next Treaty change. We also welcome the increased role for national parliaments, which helps address the EU’s perceived democratic deficit and brings with it the need for governments to take greater account of their own parliaments in their policy development and position-taking.

**Social Benefits and Free Movement:** Free movement of persons and the prohibition on discrimination is a cornerstone of the Treaties, and long-standing interpretations by the CJEU leave limited room for rule change. Against that background, we analyse the changes agreed in the New Settlement, and legal constraints affecting their impact. There are concerns about the compatibility of specific elements of the changes with the present Treaty provisions. We are concerned that the complexity of these new arrangements risks further weakening access to justice for persons affected, and we urge the Commission to ensure that their implementation is made simple and Treaty-compliant.

7. In addition, we briefly examine the potential process towards and following Brexit, in the event that the referendum produces a “leave” decision. It is clear that any such process would be extremely complex, with a number of possible outcomes. The following require particular consideration:
  - The Prime Minister has indicated that withdrawal from the EU would be carried out under Article 50 Treaty on the European Union. Article 50 provides only for the negotiation of a withdrawal arrangement and not for a deal on the UK’s future relationship with the EU. From the UK’s point of view, it would make sense for these two sets of negotiations to be handled together if possible and in principle, Article 50 requires that they be concluded within two years. This is a highly ambitious timetable, bearing in mind the time taken for the few other more or less comparable negotiations, and that all of the other Member States would have to agree to any extension. If the substance of a deal over the future UK-EU relationship is not achieved, the legal status of that UK relationship with the EU would be far from clear following expiry of the two-year period.
  - Given that almost half of Britain’s exports go to the rest of the EU, most participants in the in/out debate agree that maintaining maximum access to the EU’s Single Market, the world’s biggest, would be crucial. We examine the advantages and disadvantages of the various available models for a possible UK relationship with the EU post-Brexit, in particular the varying degrees of UK access they would provide to the Internal Market for goods and services in comparison with the UK’s current position as an EU member enjoying flexible membership terms. Any post-withdrawal relationship with the EU that is satisfactory in terms of mutual trade would probably need to replicate much of the current body of rules in the EU Treaties regarding mutual access to markets for goods and services (and on some scenarios, free movement of persons), as well as corresponding rules in the EU’s external trade deals with States which will continue to trade with the UK. In addition, within the UK, legal rules corresponding to current EU *acquis* will be required in many areas, particularly those linked to the Single Market for goods and services.

- Any post-withdrawal agreement with the EU would need to take particular care to deal with the issue of acquired rights – i.e. to protect the legal position of businesses and individuals from the UK who have made long term changes to their activities or status in reliance on rights enjoyed as citizens of an EU Member State. A clear resolution to this issue should be prioritised in any post-withdrawal negotiations. Absent such agreement, the extent to which “vested” rights would survive UK withdrawal from the EU would depend on the application of general legal principles for which there is little reliable precedent.
- Since UK accession to the European Communities, a considerable volume of Community, and later EU, law has been transposed into domestic law pursuant to the European Communities Act 1972 (ECA). The total EU *acquis* applicable in the UK legal order is enormous and much of it is legally interdependent with ordinary (non-EU) domestic legislation. Similarly, many of the directly applicable EU laws are closely intertwined with rules expressly transposed by primary legislation or ECA instruments. For this reason, giving domestic effect to Brexit is a huge challenge, even allowing for the two year (or possibly extended) period for completion of Article 50 negotiations. Parliament (and to some extent the devolved legislatures) would have to consider which parts of the *acquis* transposed through primary legislation should be repealed and which should remain in place – and whether in its current or modified form. Alongside that would be the perhaps even greater challenge of determining which directly applicable EU rules should continue in effect post-Brexit, and giving each of them domestic effect through appropriate legislation.

Finally, Paper I considers whether, in the event of a “remain” vote, there might nevertheless be mechanisms for bringing about future UK withdrawal from the EU other than by a fresh referendum, concluding that, as for any sovereign state that has signed up to an international treaty, that must be a possibility. For example, the repeal of the ECA by a future Parliamentary majority could trigger withdrawal.

#### *Summary of Paper II*

8. The second paper takes a closer look at policy areas linked to the four “baskets” of reforms that were included in the New Settlement. It focuses in particular on the issues of Economic Governance, Competitiveness and Social Benefits and Free Movement.
9. **In relation to Economic Governance:**
  - We examine wider areas of EU financial services policy linked to the first “basket” of reforms. Financial services regulation is an area in which competence is shared between the EU and Member States. Since 2008, the effect of certain EU financial legislation has been to permit encroachment on areas formerly considered to lie within Member State competence, through legislative initiatives which have attracted concern because of what the Bar Council considers to be, in certain cases, an inappropriate choice of Treaty base. In general, there is a need for clarity regarding subsidiarity, legal basis and institutional balance. Should the UK vote to remain a

member of the EU, these are areas of reform which we would hope to see the UK drive in any future Treaty negotiations.

- The UK's New Settlement addresses the political rather than legal concerns of recent developments in this area. From a purely legal perspective, future Treaty change appears to be the most effective way of securing the required reform. Withdrawal from the EU would not necessarily address our 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 on the content of the UK's own post-Brexit law.
- The UK legislative framework for regulating financial services is currently significantly entwined with EU regulation, and a large proportion of EU legislation implements international obligations or guidelines. Accordingly, it would be an enormous endeavour for the UK to revoke or repeal its existing legislation; and the extent to which it could do so would be limited by the need to replicate the effect of much EU legislation in order to meet global standards. Indeed, if the UK wished to maintain a relationship with the EU it is likely in practice to be best served by mirroring EU legislation as closely as possible, since significant differences would be likely to preclude cross-border "passporting" by firms authorised in the UK and EU respectively.

10. **In relation to Competitiveness:** It is beyond the scope of our review to consider the full impact of EU action on the market for goods and services. Rather, our review contains our general observations and then focuses upon three areas within our particular expertise: the free movement of legal services in the EU to date; the area of company and insolvency law; and public procurement and related areas such as competition regulation.

11. **In relation to legal services:**

- Within the EU, lawyers are covered by a separate system of directives governing the free movement of practitioners. This regime, which reflects the historic nature of legal practice as closely bound up with essentially national systems of justice, 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.
- 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. This has led to an increase in demand for legal services and the UK having the largest share of the European legal services market. A substantial contribution to this is made by the continued demand by parties (from the EU and beyond) for the use of London as a venue for litigation and arbitration, and the role of legal services in underpinning cross-border trade.
- We therefore consider that the successful operation of this market is important not just for the Bar and the wider legal profession, but that it also brings with it important benefits for society and the UK economy.

- Were the UK to leave the EU, and if access to the single market meant having to comply with a body of EU rules, it is easy to envisage a context in which UK professionals could rapidly be placed at a disadvantage if the UK had no say in framing future changes to those rules.
- Brexit could be expected to produce a (relatively) short-term increase in EU law and related work: lawyers would be required to advise on the structuring of the withdrawal, to negotiate new arrangements and to review, amend and advise upon domestic legislation. However that would be a finite 'bulge' of work, focused largely on specialist EU and regulatory lawyers. Long term, the contribution that the legal sector as a whole could make to the UK economy would depend crucially on the nature and terms of the post-Brexit relationship.

**12. In relation to Company, Insolvency Law, Public Procurement, Anti-trust, Consumer Protection and Discrimination and Employment:**

- The EU has launched ambitious initiatives in the fields of company and insolvency law. Whilst the Bar Council has supported several of those initiatives, we have sounded and continue to sound a note of caution in respect of a "one size fits all" approach. Provided such models exist in parallel with national models, leaving flexibility for companies to choose, we continue to be open to EU activity in this area.
- There have been recent reforms to EU regulation in respect of public procurement, dealing with the position of SMEs, and for the first time laying down specific rules about the award of "service concession" contracts. Since UK entities are significant providers of services throughout the EU, it is arguable that the UK would benefit from continued opening up of these markets. In addition, UK entities stand to benefit from trade agreements between the EU and other countries, such as South Korea and Canada (though we recognise that agreements of this kind may also have disadvantages and are therefore politically controversial). Again, the position of UK entities seeking to provide services to public procurement markets in the EU and third States would depend crucially on the nature and terms of the post-withdrawal relationships the UK were able to secure. As a backstop, the World Trade Organisation regime would apply, but this may be of limited assistance in the area of services. If the EU were to complete its free trade arrangements with the US and Canada, that would not in the short term benefit UK firms, post-Brexit, seeking access to those markets.
- In the event of a vote for withdrawal, we consider on balance that there would be a disadvantageous effect in relation to the application of EU anti-trust law to UK businesses and consumers. Businesses defining their geographical marketplace beyond the UK's borders – be that in terms of suppliers, customers or competitors – might be deprived of the anti-trust protection afforded to their EU counterparts, yet the activities of the EU competition authorities would still have a substantial impact on UK businesses' activities in EU and to some extent in UK markets. The removal of EU control over State aid granted by the UK Government could be beneficial to industrial sectors' reliance on public sector assistance in facing severe economic

challenges. But, as in other areas of regulation, the effects of this might be limited, since the UK may well be required to maintain the effect of EU State aid restrictions as a condition for continued trade with the Single Market.

- Any post-Brexit negotiations would need to take particular care to ensure adequate consumer protection. 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 might be deterred from buying from UK companies if they do not have confidence that their rights are similarly protected in these transactions.
- We note that the body of EU law that has emerged in the areas of discrimination and employment law provides significant protections, in particular as regards gender and age discrimination, and as regards the terms and conditions of employment, in all of its various forms. The Bar Council regards rules on equal treatment and prevention of discrimination as a crucial component of the rule of law. The UK would need to make a political choice on whether to ensure that the range and level of protections currently in place was carried over into its post-Brexit law. As regards the rights of individuals in the workplace, if the UK were to leave the EU a future UK government would be freer than at present to alter or diminish the standard of protection presently available in UK law.

### *Summary of Paper III*

13. The third paper examines the implications of the New Settlement and of BREXIT for areas of law and practice not directly covered by the New Settlement but where the referendum results could have profound implications. These areas are relevant to the Bar Council's wider rule of law and public interest work and mainly concern the administration of justice (civil and criminal) and citizens' fundamental rights.
14. A significant number of UK nationals live in other EU Member States. The ending of the UK's involvement in EU law that defines rights and obligations in these areas would therefore be of significant and practical concern to them. But this body of EU law also benefits UK citizens resident in the UK, whose lives are touched by membership of the EU in ways of which they may not be conscious.
15. There is EU-wide legislation regarding where disputes with a cross-border element should be heard, recognition and enforcement of judgments, choice of which country's law will govern a dispute in contract and in non-contractual obligations and insolvency. There are also pan-European instruments dealing with family law and personal status, and with civil procedure and judicial co-operation. Together, these measures provide a framework for the great majority of cross-border civil disputes. They provide a largely level playing field for citizens and businesses across the EU in the resolution of their disputes. They are considered by the Bar Council to represent an extremely valuable part of the body of EU law.

16. In the event of a vote for withdrawal, transitional and ultimately alternative arrangements would need to be made for these matters. In some areas there would be an obvious, if slightly less attractive, fallback – for example, in relation to the enforcement and jurisdiction rules covered by the Brussels I Regulation in civil and commercial disputes, the UK could join the parallel Lugano Convention. In other areas, however, it would be necessary to negotiate new international arrangements and in the meantime apply a series of ad hoc rules. There may be some specific advantages to removing the UK from the compulsory application of these regimes, for example in relation to anti-suit injunctions in aid of arbitration (which were historically a popular feature of the English court system but have run into problems of compatibility with the Brussels I regime). However, overall the Bar Council considers that there would be a net disadvantage for the resolution of cross-border disputes, particularly in the short term while uncertainty remains regarding the likely shape of the new arrangements.
17. Many other EU civil justice instruments (e.g. the European Enforcement Order, the European Order for Payment, the European Small Claims Procedure and the more recent European Protection Order) have a complementary procedural, usually automatic, recognition and enforcement function. The Bar Council has long endorsed the adoption of such measures. In practical terms, these measures ease the dealings of individuals and businesses (including SMEs) who visit, work or trade across European boundaries. In the event of withdrawal from the EU it would probably be regarded as sensible to negotiate new arrangements to continue or replicate most of these measures.
- 18. In relation to specific fields:**
- In family law, EU measures have had a significant impact that the Bar Council considers beneficial and that is still growing. Obvious advantages include having uniform jurisdictional rules in all or most Member States for divorce proceedings and for maintenance proceedings; having a system of summary enforcement in the courts of all Member States of orders under the Maintenance Regulation; and likewise as regards orders for contact between parents and children made in the courts of each Member State. The terms of the UK's current membership of the EU have allowed it to "pick and choose" which measures in this, as in other civil and criminal justice fields, it wishes to take part in, and which not. Those that it has opted into, are generally seen as useful by practitioners in the field. A major change, or withdrawal from these EU instruments, would risk disruption and confusion. That could be particularly problematic at a time when (a) the availability of legal aid has been greatly reduced in this field, resulting in a real increase of litigants who do not have the benefit of legal advice or representation; and (b) the family courts are undergoing or adjusting to, major structural changes.
  - In the criminal justice field, the Bar Council's general view is that cross-border co-operation, whether through mutual assistance or mutual recognition, is in the UK's interest. If the UK were to leave the EU, it would be important that provision be negotiated for this co-operation to continue so far as possible. The fallback of reverting

to the practice of intergovernmental conventions would probably be less efficient and effective, not least in the face of the growth of technology-enabled crime.

- In the specific area of extradition, the operation of the European Arrest Warrant (EAW) means that suspects, and convicted persons, who flee to other EU countries can be brought back to the UK to face justice, and vice versa, via a streamlined procedure. It is widely recognised that this power has been misused by some Member States, and there is a need to reform its operation, but overall the effect has been positive. The unity of a single common approach in this area seems to us preferable in principle to its likely replacement in the event of UK withdrawal, viz. a network of bilateral arrangements between the various States.
- The EU Charter of Fundamental Rights covers similar, but not identical, ground to the European Convention on Human Rights. It can result in a court setting aside incompatible legislation (a power already open to UK courts applying the devolution legislation in Wales, Scotland and Northern Ireland); but it only applies in cases involving implementation of EU law. So it would cease to apply, following BREXIT, once the UK no longer implements EU rules. However, even if the UK left the EU, the UK's obligations under the European Convention on Human Rights would remain binding on it under international law. By virtue of the Human Rights Act the rights conferred by the Convention would continue to be justiciable in domestic courts.
- In respect of information rights, including data protection, the Bar Council has been broadly supportive of the evolution of the EU Data Protection regime. We consider, were the UK to remain in the EU, that the new General Data Protection Regulation, which clarifies the meaning of key terms such as "personal data", is likely to be beneficial overall to businesses processing personal data across borders, and to data subjects themselves. The Bar Council was generally supportive of the proposals that led to this reform, but recorded its concerns about particular aspects of the measure such as its consideration of the strict relationship of confidentiality that lawyers owe to their clients. If the UK were to leave the EU, Council of Europe Convention 108 would require the UK to continue to adhere to comparable data protection standards, although the EU might insist on UK law closely matching the EU rules as a condition for entering into a "safe harbour" agreement enabling personal data to be freely exchanged between the EU and UK.

## A sample of the legal impacts of withdrawal

This list assumes that following withdrawal, the UK would negotiate a legal and trading relationship with the EU lying somewhere on the spectrum between the 'maximum' position of becoming an EEA Member State and the 'minimum' position of falling back on membership of the WTO. On that basis, some version of the extensive body of EU rules relating to trade in goods and services into and from the Single Market would continue to apply to the UK. In other areas, the extent to which UK legislation would continue to track the content of EU legislation would vary from topic to topic.

For a full analysis of the post-Brexit options available to the UK, see *Paper I*.

### Economic governance and Financial Services

- UK withdrawal from the EU could release it from some of the obligations imposed by EU financial legislation, which since the 2008 crisis, has tended increasingly to encroach on areas formerly considered to lie within Member States' competence, and towards prescriptive, centralised decision-making. This tendency has raised concerns about subsidiarity, legal basis and institutional balance which might be side-stepped in the event of withdrawal, depending on the terms of the UK's future relationship with the EU.
- However, the UK legislative framework for regulating financial services would likely remain closely entwined with EU regulation, at least immediately following any withdrawal, for a number of reasons. First, a large proportion of EU legislation implements international obligations or guidelines, by which the UK would continue to be bound post-Brexit. Secondly, EU financial services legislation has historically modelled itself to a large degree on a pre-existing UK framework. Thirdly, if the UK wanted to continue to access EU markets (which is perhaps most economically necessary in the context of financial services), it would be required to have a legislative regime equivalent to that of the EU. Thus a Brexit is unlikely to have an immediate impact on the UK's regulatory framework for financial services.
- Notwithstanding the above, there might be some discrete areas of law implementing EU obligations that the UK would revoke or repeal, such as, for example, the cap on bankers' bonuses.

### *Passporting*

- Financial institutions established in EEA Member States benefit from the right to obtain 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.
- Of the possible post-withdrawal relationships with the EU, only the EEA option would enable the continuation of the current passporting regime.

- UK financial institutions which already use a passport to access other EEA markets and other EEA financial institutions which already use a passport to access the UK, will certainly lobby to maintain their existing passports. Although there are valid arguments for such maintenance based on international law and the Greenland exit precedent, the success of the arguments cannot be guaranteed. Further, even if the arguments succeeded, UK financial institutions without a passport could not, post any Brexit, apply for one and other EEA financial institutions could not apply for new or extended passports to access the UK market.
- Given that many non-EEA financial institutions are established in the UK because, due to the availability of the passport, they regard it as the gateway to Europe, the loss of the passport regime would be significant for non-EEA financial institutions currently established in the UK, UK financial institutions and EEA financial institutions alike.
- It is right to point out, however, that this varied impact would provide the UK with at least some leverage in negotiating a new relationship: EEA financial institutions seeking a London presence may well press their governments to concede reciprocal arrangements mirroring as closely as possible the EEA passport. That would benefit UK institutions too.

### **Employment Protection**

- English employment law currently incorporates a significant volume of EU legislation including laws on discrimination rights, duties to agency workers, working time, maternity and paternity leave, Transfer of Undertakings, Protection of Employment (TUPE) transfers and data protection. In the event of a Brexit, it is unclear what status these laws would enjoy, or whether they would continue to evolve without reference to relevant EU jurisprudence.
- To date there has been no clear exposition of how or even whether these rights will be safeguarded. It would be open to a future government to maintain, amend or repeal the current legislation.
- Given the range and volume of relevant legislation in place, it seems highly likely that, were it to be repealed, that would be cumbersome and cause disturbance and confusion for businesses.
- Employment discrimination: removal of guarantees from EU law could lead to reduced protection for particular categories of worker: e.g. pregnant workers and working mothers.
- The UK would no longer be subject to the Posted Workers' Directive, which enables companies to use cheap labour to undercut UK wages.

## **Free movement of persons – everyday life**

- Unless and until a future UK-EU relationship was defined, the rights of UK citizens to travel, work, study or settle in an EU Member State would be subject to the same restrictions as for other third country nationals, and vice versa.
- Rights acquired by UK citizens who had already moved to another Member State (and vice-versa), or otherwise exercised free movement rights which could be jeopardised by a UK withdrawal, would need to be prioritised as part of the UK's withdrawal agreement.

## **Environmental protection**

- Environmental standards currently based on EU legislation (e.g. on air pollution and water quality) may be removed or modified.
- Rights of public participation in consenting decisions, flowing from the Environmental Impact Assessment Directive and EU membership of the Aarhus Convention, would not automatically continue. The Aarhus Convention would revert to having the status of an unincorporated treaty unless specifically applied by new UK legislation.

## **Consumer Law**

- European legislation has driven the advancement of consumer rights in the UK in recent years. This includes legislation in respect of unfair contract terms, liability for defective products and compensation for flights which are delayed or cancelled. A new trade agreement between the UK and EU could be expected to contain some rules about consumer protection but the scope of those rules is presently unclear.
- UK Passenger rights to compensation for delayed and cancelled flights could be removed or modified once the UK is no longer bound by EU rules.
- Consumers and traders would not benefit from common rules for online sales currently proposed as part of the Digital Single Market initiative, which the Bar Council supports, unless those rules were specifically incorporated into a new UK/EU trade agreement.

## **Civil Law - Jurisdiction and enforcement of judgments**

- A Brexit would mean that key EU legislation regarding jurisdiction (e.g. the Brussels I Regulation) would not be automatically applicable to the UK. The Brussels Regulation has created a far more streamlined procedure for enforcement than that which existed at common law. The UK would be likely to fall back on the parallel Lugano Convention as a replacement for Brussels I, and in other areas would need to negotiate replacement provision either as part of its arrangements for access to the Internal Market or under individual bilateral arrangements.

- This is likely to have some effect on the ability of UK citizens and businesses to enforce English and Welsh judgments abroad and vice versa, and could have consequences for the attractiveness of the UK as a jurisdiction of choice for third country businesses.
- The same applies to non-commercial cases, such as personal injury judgments obtained in a UK jurisdiction against an insurer or defendant in another EU Member State.
- However, in commercial cases courts in the UK might be freer to exercise powers currently restricted by the Brussels I regime, such as certain kinds of anti-suit injunction.

### **Civil law – Choice of law**

- In the event of a Brexit, there will be uncertainty regarding the law applicable in, for example, international tort claims. The rules on conflict of laws, which determine the proper law of an intra-EU tort claim or contract, will need to be reconsidered. The Rome Regulations currently allow parties to select in advance the law governing their contractual (Rome I) and non-contractual (Rome II) rights and liabilities. This was not the case under the English common law which preceded it. It would be open to the UK to adopt a similar regime, but not mandatory. That could make it harder to identify which law applies to e.g. a personal injury claim resulting from a road traffic accident abroad, or a faulty product delivered from abroad.
- The UK could modify the rules, currently laid down by EU legislation, on protection for victims of road traffic accidents at risk in relation to uninsured and untraced drivers, (which currently include uninsured and untraced drivers from other EU Member States) and the right of victims to bring proceedings against foreign insurers in the English courts.

### **Personal health and safety**

- Health and safety at work: the UK Government could in future modify EU standards of protection in relation to workplace accidents.
- Protection of injured consumers may be reduced in relation to rules currently laid down by EU legislation, such as those relating to package holidays, defective products, food safety, defective toys and similar products and services either produced or provided in another EU Member State.
- Protection in relation to international transport (aviation and maritime transport) currently laid down by EU rules will need to be re-negotiated.

## Family Law

- UK citizens involved in cross-border family disputes would lose the benefit of uniform jurisdictional rules for divorce proceedings, including child contact arrangements (Brussels IIa regulation, applicable in all Member States bar Denmark) and for maintenance proceedings (the Maintenance Regulation).

## Criminal Law

- Unless new arrangements are negotiated to replace the part of the Schengen Information System the UK is currently signed up to, UK nationals, and other EU nationals living in the UK, who are accused of crime in other Member States might not automatically be identified as being in the UK.
- It will be more difficult to trace, freeze and confiscate the assets of criminals in Europe; further, without access to Eurojust it will be more difficult to arrange the giving of evidence from EU Member States in UK trials, and more difficult to obtain details of relevant previous convictions from EU countries for use in UK courts.
- The EAW would cease to apply. Under that system a person in another Member State can be returned swiftly to the UK to stand trial or serve a sentence, and conversely, a person wanted for criminal activity in the UK can be returned from another Member State. New extradition arrangements would have to be negotiated which might or might not be similarly effective. However, the EAW rules have been criticised for a lack of proportionality (especially as regards requests by certain Member States for the return of UK nationals to face criminal proceedings). That said, plans to reform the EAW, together with the implementation of more recent and planned EU level measures such as the European Investigation Order may, in any event, alleviate some of these difficulties.
- Joint Investigation Teams to uncover cross-border criminal activity will no longer take place with the facilitation and support of Europol and/or Eurojust funding and organisation. It would be necessary to make new ad-hoc arrangements and funding agreements.
- The UK will not have access to the European Criminal Records Information System (despite having spent years developing it for the EU), unless a bi-lateral arrangement could allow this to occur. Such an arrangement would be likely to require the UK to agree to apply the criminal justice arm of the new EU data protection rules. Until conclusion of the new arrangements, and depending on their terms, this is likely to mean having less information available with which to try suspected criminals.

- Although the UK has traditionally led the way in the field of victim support, there is a risk that, without the minimum standards laid down by the EU, victim support measures could be reduced domestically, requiring, for example, less information to be provided about the progress and outcome of a case and whereabouts of convicted persons. Likewise, there would be no obligation upon the UK to provide support services for vulnerable victims of crime.

### **Fundamental rights and information privacy**

- If the UK were not subject to the (recently revised) EU data protection rules, rights of persons to control the use of their personal data, and access data held about them, would revert to the Council of Europe Convention 108. This imposes lower and more generic standards than the EU rules. However, in order to continue to process data originating in the EU, the UK would be likely to have to conclude a “safe harbour” agreement with the EU to the satisfaction of the Commission, and this may well replicate most of the rules applicable within the EU.
- The EU Charter of Fundamental Rights, which includes the right to an effective remedy, would cease to apply to the UK. That would remove the prospect of a UK court setting aside an Act of Parliament for incompatibility with the Charter (which has the same status as the Treaties). Individuals and businesses would be able to fall back on parallel rights under the European Convention on Human Rights, which currently has effect in UK law under the Human Rights Act 1998 and the devolution legislation for Scotland, Wales and Northern Ireland. The Convention (unlike the Charter) applies to any act or decision of a public authority, not just those within the scope of EU law; but the rights it confers are slightly narrower in scope, and a court is bound to apply Westminster legislation even if incompatible with a Convention right.

### **Customs and taxation**

- The UK would no longer be bound by EU rules on customs and indirect tax harmonisation and by the rules on State aid applicable in the tax field. It would no longer be prevented by those rules from discriminating in its income and corporate tax policy against entities from EU Member States, thus giving an advantage to domestic entities.
- However, if it chose to do so, UK businesses would more than likely face the same discrimination from EU Member States, and would only be able to have protection from such discrimination to the limited extent that EU law provides it for third countries.
- In any event, rules similarly limiting the UK’s freedom of action in this area could be expected to form conditions of a future trade agreement with the EU. The extent to which UK persons could directly take advantage of these provisions in their dealings with the authorities of other EU Member States is currently unclear.

- Individuals and corporates who are subject to double taxation (i.e. tax on the same revenue or gain once in the UK and once in an EU Member State) would no longer have the benefit of EU double taxation rules. They would have to look for relief to individual double taxation treaties, which may be more limited in scope. As the UK's double taxation treaties with other EU Member States often differ in their terms between treaties, companies are likely to be faced with a more complex and burdensome system. As a result the UK could be a less attractive jurisdiction for corporate headquarters in particular.
- As EU Customs Duty would no longer apply, the UK is likely to enter into another form of agreement for customs, with similar provisions to those currently in place.
- The UK could set its own VAT rates, but is unlikely to dispense with VAT altogether, as VAT accounts for a substantial proportion of tax collected in the UK. However, it would have greater freedom of choice in deciding which classes of goods and services should benefit from reduced or zero rates of tax (subject to whatever restrictions are agreed as part of a future UK/EU trade agreement).
- The UK would become a "third country" for EU purposes, so goods moving from the UK to the EU would be subject to import VAT.

### **Competition and procurement Law**

- A UK Government would no longer be prevented by EU State aid rules from saving threatened industries such as steel without seeking the Commission's approval, though some restrictions on State aid would be likely to feature in any new UK/EU trade agreement.
- Local authorities contracting for goods, works and services would be freed from rules under the 2004 and 2014 Procurement Directives restricting their ability to implement supplier diversity policies and local labour/living wage clauses. However, if a future UK/EU trade agreement were to contain provisions for mutual access to procurement markets, it is likely that certain of the existing procurement rules – in particular those designed to prohibit discrimination – would be replicated.
- EU withdrawal would result in the removal of sector-specific rules (for example, Third Energy Package, proposed Fourth Rail Package) that impair government's ability to reverse privatisation and outsourcing of transport, utilities and other services.
- Individuals and businesses harmed by cross-border anti-competitive practices would no longer be able to claim damages under the competition rules in the Treaties.
- The UK territory would no longer be part of the geographical scope of an EU-led merger inquiry, which could result in EU level mergers being passed that had a detrimental effect on the UK market.

### **Intellectual Property**

- The UK would no longer be able to participate in the Unified Patent Court (UPC) which is due to commence in operation in early 2017. The UPC is an EU civil court with a pan-EU jurisdiction in relation to the infringement and validity of European and EU Patents. The London Local Division and the London-based Central Division of the UPC would close, with the Central Division moving elsewhere in the EU.
- The new EU patent (a single patent intended to have effect in all countries in the EU) would no longer have effect in the UK, nor would all other EU law relating to patents (including Supplementary Protection Certificates).
- Community registered trademarks, Community registered designs and Community unregistered designs would no longer be effective in the United Kingdom.
- The Trade Secrets Directive protecting UK and other businesses from theft or loss of trade secrets would no longer be effective in the United Kingdom.
- Businesses and individuals would no longer be able to rely on EU principles of free movement of goods as a defence to civil claims for patent, copyright and trademark infringement, with the result that parallel imports of goods from other EU countries would cease where such imports infringed UK national intellectual property rights.
- EU anti-trust defences to civil claims for patent, copyright and trademark infringement, and criminal prosecutions for breach of copyright would no longer apply.
- The UK would suffer a loss of influence and standing in relation to the development and harmonisation of intellectual property law in the EU.
- The UK would continue to participate in the system for the application and grant of European patents operated by the European Patent Office ("the EPO") in Munich: the EPO is set up pursuant to the European Patent Convention which is not part of the EU legal order.

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