

Paper One

Legal Services



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Bar Council Brexit Working Group
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Access to the Legal Services Market Post-Brexit

Summary

The UK legal services market generated £3.3bn of our net export revenue in 2015. More importantly, our exporters' confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

The EU Legal Service regime which we may lose, permits UK lawyers with unfettered and non-bureaucratic access to all legal services throughout the EU.

- We therefore urge the Government to preserve in the negotiations the rights of UK lawyers under the Lawyers Services and Establishments Directives to ensure that they may represent clients before the European Court, maintain rights to legal professional privilege and retain freedom of movement for immigration purposes.
- In order to maintain the position of England and Wales as a leading arbitration centre we also urge Government to ensure that immigration hurdles are not imposed for parties, lawyers and arbitrators from EU jurisdictions.

Access to the Legal Services Market Post-Brexit

1. The UK legal services market is a significant revenue generator for the Exchequer, worth £25.7 billion in total, employing approximately 370,000 people and generating an estimated £3.3 billion of net export revenue in 2015. Central to this is the ability of barristers, solicitors and other legal professionals to provide legal services, including advocacy, across national borders within the EU and EEA. In 2015, of the 1,100 cases registered at the Commercial Court, more than two-thirds had one non-UK based party to proceedings. Equally importantly, our exporters' confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

2. Although a significant body of work comes to the UK independent of our membership of the EU, there is a very strong business case for maintaining the greatest possible extent of cross-border rights for UK lawyers post-Brexit. We address primarily the position of barristers (including Scottish advocates).¹ But these issues are likely to be equally significant for the solicitors' profession,² and of course many barristers are employed by UK and non UK-law firms.

3. On the other side of the coin, around 100 EU law firms together with a significant number of individual lawyers are established in London and high ranking French Bar representatives have expressed their strong desire to retain free movement rights for French lawyers in the UK, both for establishment of new law firms and also fly in fly out provision of services.

4. Currently, there are numerous aspects of barristers' work which will no longer be possible if the UK leaves the EEA, unless cross-border rights are preserved. Cross-border rights include, in particular:

4.1. establishment on a permanent basis in other Member States – currently possible under the Lawyers Establishment Directive 98/5/EC, which allows registration with the host State Bar and, after three years of effective and regular practice in the host Member State, permits an application to acquire the professional title of the host State without any further qualification requirements. (A barrister may also requalify as a full member of the local Bar under Directive 2005/36/EC on the recognition of professional qualifications, by taking an aptitude test.) Some barristers are established in Brussels; many are employed by firms of solicitors in other Member States e.g. in Brussels, Paris and the Netherlands;

4.2. advising clients in other Member States on a temporary basis, whether on issues of EU law, domestic law (including the law of the host Member State) or international law – currently possible under the Lawyers Services Directive 77/249/EC, with no

¹ There are c. 15,500 members of the Bar in England and Wales, 450 practising advocates in Scotland and 753 practising barristers in Northern Ireland.

² The solicitors' profession in England and Wales has c. 138,000 practising members, and the solicitors' profession in Scotland has c. 11,000 practising members.

requirement to register with the local Bar. This Directive creates both substantive rights and (where local rules are obscure) regulatory certainty. Barristers regularly advise clients throughout the EU, often within the jurisdictions of other Member States;

4.3. representing clients in the domestic courts and tribunals of other Member States – currently possible under the Lawyers Services Directive, provided that advocacy is undertaken in conjunction with a host state lawyer. Again, there is no requirement to register with the local Bar, nor any restriction as to the issues on which the advocate may present argument;

4.4. advising and representing clients in Commission investigations, including in particular competition proceedings – in practice only possible for EEA-qualified lawyers, since the EU rules only recognise legal professional privilege in relation to lawyers entitled to practise in a Member State. If UK lawyers were to fall outside that principle, even UK clients would have to instruct lawyers from other Member States to advise and represent them in these proceedings. It is for this reason in particular that hundreds of solicitors are now registering with the Law Society of Ireland;

4.5. representing clients in intellectual property proceedings before the EU Intellectual Property Office – currently possible because barristers are legal practitioners established in the EEA that are entitled to act before the UK Intellectual Property Office; and

4.6. representing clients in the European Courts – Article 19 of the Statute of the Court of Justice states that only a lawyer authorised to practise before a court of a Member State or an EEA State may represent or assist a party before the European Court. That extends even to being named on a pleading in the European Court. Absent a specific amendment this means that from the moment the UK exits the EU law no UK-only lawyers will be able so to act. Currently this does not also require EEA nationality, but there is a considerable risk that this too could be changed post-Brexit.

Examples: in the Commission’s current EIRD investigation, both JP Morgan and HSBC were represented by UK barristers. Likewise, Intel has instructed UK barristers for its European Court appeals against a Commission antitrust decision. Similar instructions will not be possible post-Brexit unless the UK either remains within the EEA or negotiates an arrangement to allow continued free access to the EU legal services market (including European Court practising rights).

5. In addition, at present barristers who hold the nationality of an EU/EEA Member State are able to move, without immigration controls or prior authorisations, from one Member State to another for the purposes of work on a permanent or temporary basis. This free movement right is the basis upon which barristers physically move within the EU and EEA to work, establish themselves, provide services, and exercise rights of audience in courts physically located in EU/EEA Member States. It is imperative that this right is maintained, if barristers are to be able to continue to work in other EU and EEA Member States.

Cross-border rights under FTAs – CETA case study: In the case of a so-called “hard Brexit”, the position of UK lawyers would be identical to other third country lawyers. By way of example we attach at Annex 1 a table which compares the position of UK lawyers to that of Canadian lawyers at present (pre-CETA). There are significant restrictions, in particular no rights to appear in court. Even if CETA is ratified, the position of Canadian lawyers will not change. Although CETA provides a framework for the negotiation of Mutual Recognition Agreements covering the recognition of professional qualifications, this does not improve the market access of European lawyers to Canada. It merely offers encouragement to professional regulatory bodies in the EU and Canada to agree to reduce the number of steps involved in requalification in either direction, where this is possible. Furthermore CETA does not change the fact that requalification is simply not possible in many EU Member States due to nationality requirements.

6. The importance of cross-border rights to the provision of legal services by barristers is most obvious in relation to the practice of EU law itself. Outside Brussels, London in particular has the highest concentration of lawyers with specialist EU law knowledge and experience anywhere in the world. As the examples above demonstrate, those lawyers are in demand not just for domestically-focused EU law, but also for advice and representation services on behalf of EU and third country clients, including in the national courts of other Member States, Commission investigations, and European Court proceedings.

7. Barristers also advise and represent clients across the EU in commercial proceedings under the Services Directive, for example where an international contract has an English choice of law clause, and in arbitrations conducted in English. Barristers also act as arbitrators in numerous EU Member States, an activity which in the absence of EU-equivalent guarantees could not be guaranteed to continue in any Member State which classed it as the supply of a legal service. Advisory and advocacy work across the EU in the areas of private and public international law, and in fields such as international financial services and wealth management, is also dependent on the cross-border rights that the legal profession currently enjoys. The cross-border rights of UK lawyers thus help to support the current dominance of English common law as an international benchmark, and of UK financial services in Europe.

8. All these streams of business rely on UK legal professional qualifications being recognised in other Member States and in the European Courts. These are high-profile and lucrative activities. In EU competition proceedings alone, multinational clients who have been represented by the Bar in recent years (including some major ongoing proceedings) include Microsoft, Google, Apple, Samsung, Ryanair and AstraZeneca. In European Court proceedings, barristers also frequently represent not only major private clients from across the EU and third countries, but also the European Commission, other EU institutions such as the European Parliament and the EMA, and foreign governments (both EU and non-EU).

9. Equally importantly, London is a hub not only for EU transactional work such as merger filings, but also, increasingly, for litigation in the EU courts and follow-on damages litigation related to Commission competition investigations. The same is true for complex multi-national intellectual property litigation in which London is a widely acknowledged centre of expertise with a specialist bar. Major international clients are sophisticated litigators, and are choosing to bring cases in the UK rather than in other Member States because of the critical mass of

experience and expertise of UK lawyers, as well as litigation advantages of the UK courts (such as the disclosure rules). A vast amount of this work will be lost if UK lawyers lose access to the EU market for legal services. This will in turn reduce the attractiveness of London to (for example) top US law firms who currently establish offices in the UK and use these as their passport into the EU legal market by instructing or employing barristers.

10. In conclusion, whilst some lawyers will doubtless be in high demand in the short-term, for new, Brexit-related work, the medium and long-term uncertainty in established areas and types of practice is high. The Bar Council therefore urges the government, in formulating its negotiating strategy, to have regard to the contingent nature of much of the legal work that comes to the UK as a consequence of the UK legal profession's expertise, not least in the law of the EU. The enduring international appeal of the UK for its legal standing will depend on the ability of UK lawyers to provide legal services, including representation, to clients across the EU and elsewhere.

Recommendations

Any post-Brexit arrangement with the EU should, at the very least:

- (1) Preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC and the Lawyers Establishment Directive 98/5/EC;
- (2) Ensure that, lawyers entitled to practise before UK courts may represent parties before the European Court;
- (3) Ensure that UK lawyers enjoy the same rights to legal privilege under EU law as lawyers of EU Member States;
- (4) Maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

Brexit Working Group

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Annex: Practical consequences of a WTO rights based Brexit solution

	<i>Restrictions faced by an English lawyer in the EU today</i>	<i>Restrictions faced by non-EEA lawyers</i>	<i>Practical Consequences of a WTO rights based Brexit solution</i>
Limits on ability to provide legal services without needing to open an office	None	Non-EEA lawyers must register a physical presence in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Finland, Germany, Hungary, Italy, Latvia and Spain in order to practise law.	UK lawyers could no longer provide cross border advice from the UK to clients in these 12 EU member states, including to UK citizens resident in the EU on purely UK matters.
Limits on ability to give advice attracting legal professional privilege to clients	None	Communications with and advice given to clients in the EEA by non-EEA lawyers cannot be kept private. They may be obtained and used by the European Commission in competition proceedings against clients.	Businesses would no longer wish to use UK lawyers for deals between UK and EEA businesses or proceedings arising from them.
Limits on ability of independent lawyers or lawyers under contract to obtain work permits	None	Economic needs tests apply to non-EEA lawyers working as independent professionals in Belgium, Bulgaria, Czech republic, Denmark, Greece, Spain, Finland, Hungary, Italy, Latvia, Malta, Romania, Slovenia and Slovakia.	UK Lawyers would only be able to obtain contracts to provide services in 14 Member States of the EU if no EEA lawyers were qualified to undertake the work required.
Limits on ability to open an office	Must take one of forms permitted to local lawyers (varied ability in member states to form MDPs, have non-lawyer participation – otherwise no restrictions	Cannot open a fully owned law office in Austria, Denmark, France and Portugal – must have local lawyers involved. Cannot go into partnership with lawyers from Bulgaria, Denmark, Estonia, France, Ireland, Latvia, Lithuania, Malta and Slovenia. Residency for foreign partners required in Sweden and Luxembourg.	UK law firms with a presence (branch or subsidiary) and US law firms operating under UK regulatory banner in these 15 member states would need a different regulatory authorisation and possibly restructuring to remove UK only qualified lawyers and/or head quartering in another EU member state in order to maintain a presence in those member states.

Limits on ability to acquire right to advise on local law	None	<p><u>No right to requalify in 13 Member States:</u> Austria, Greece, Croatia, Bulgaria, Cyprus, Estonia, Greece, Hungary, Lithuania, Malta, Poland, Portugal, Slovenia.</p> <p><u>Limited rights in 8 Member States:</u> Belgium (reciprocity), Czech Republic, Latvia (language test); Denmark, France Germany, Netherlands, Spain (local qualifications or assessment required).</p>	UK lawyers no longer entitled to requalify as local lawyers within the EU – i.e. ability to provide joined up services possible through EU membership cannot be replaced by acquiring local title in a majority of EU MS.
Limits on ability to draw up contracts	None	<p>No right to draw up a legal contract in Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia and Slovakia</p> <p>Contracts drafted outside France and Denmark applying in those countries no longer valid</p>	Provision of legal advice to UK businesses continuing to operate within the EU and across different member states could no longer be done without greater recourse to local lawyers. Advice to UK citizens and businesses will be more expensive and not subject to the protections of UK regulators
Limits on ability to represent clients in national courts	Must be introduced by a local lawyer	No right of foreign lawyers to appear except in limited and ad hoc circumstances; following application process in Bulgaria, Cyprus, Luxembourg and Poland.	Emergency representation of e.g. UK citizens arrested in EU, of children of mixed EU nationality marriages etc. no longer possible for UK lawyers, neither would be increasingly frequent co-counselling arrangements in commercial matters.
Limits on ability to represent clients in European proceedings	None	Cannot provide any representational services before the courts of the EU institutions	Any representation of UK or international clients in cases before the EU courts would go to lawyers with EEA qualifications i.e. Post Brexit litigation on behalf of UK companies not in the hands of UK lawyers