

## BAR COUNCIL BRIEFING



WESTMINSTER HALL DEBATE, 29 MARCH 2018

NINTH REPORT OF THE JUSTICE COMMITTEE, SESSION 2016-17

*IMPLICATIONS OF BREXIT FOR THE JUSTICE SYSTEM, HC 750 AND THE  
GOVERNMENT RESPONSE, HC 651*

1. This briefing has been produced by the General Council of the Bar of England and Wales (the Bar Council). It outlines:
  - 1) The current challenges the Government faces in achieving its stated objectives on civil justice cooperation and legal services
  - 2) The importance and benefits of placing justice issues on a separate negotiating track, and
  - 3) A series of options for achieving the Government's stated objectives on legal services.

### Overview

2. The Bar Council gave [written](#) and [oral](#) evidence to the Justice Committee inquiry, whose report and recommendations on civil and criminal justice cooperation and legal services were welcomed and supported by the Bar. For ease of reference, a copy of the Bar's written evidence to the Justice Committee (covering the effects of Brexit on civil justice, criminal justice and legal services), is annexed.
3. In the run-up to, and throughout the current negotiation phases, the Bar Council along with other legal and professional services bodies, has sought to impress upon the Government the vital role played by the UK legal services sector in underpinning our current and future economic success.<sup>1</sup> We have argued that the UK's status as an international hub for legal and financial services, and its attractiveness as a leading

---

<sup>1</sup> In 2016 legal activities added £24.4bn to the UK's national accounts, around 1.4% of the UK's total GVA. In 2015, UK legal activities (made up of law society, legal services, and commercial bar association services) amassed exports of around £4.1bn, and contributed a trade surplus of £3.4bn. – The City of London economic research, [The value of the UK's legal services sector and its importance to the City's economy](#)

country in which to do business, depend not only on access to the EU market for legal services, but also on close and comprehensive cross-border civil judicial cooperation.<sup>2</sup>

4. As the Government has acknowledged, the value of such cooperation extends far beyond our economic interests. As UK citizens and businesses continue to live and trade across Europe after exit day, they must be able to enforce their rights and resolve their civil, family and commercial disputes through an accessible system of justice that provides certainty and clarity. But this requires more than just close judicial cooperation. The terms of the future treaties and trade deals must be directly applicable<sup>3</sup> and, if the rights of citizens are not to be derogated, the General Principles of EU law must be retained.<sup>4</sup>

### **The Government's vision for civil justice cooperation and legal services**

5. Since the publication of the Justice Committee's report, the Government has articulated a positive and ambitious vision for criminal and civil justice cooperation matters and has rightly highlighted the value and importance of legal services and of securing the "freest trade deal possible in services between the UK and the EU."<sup>5</sup>
6. On civil justice, for example, the Prime Minister referred in her Mansion House speech to the Lugano Convention (and by implication to wanting a "Lugano plus", given that the existing [Brussels Regulation](#) already provides an improved version of that regime.) This is a key area for both the UK and the EU, as set out in the [Bar Council's Brexit Paper 4, Civil Jurisdiction and Judgments](#).
7. On legal services, the Prime Minister said that the UK would like to see the continued mutual recognition of qualifications as part of a "comprehensive system of mutual recognition". Such a system could enable self-employed legal professionals to continue to travel to the EU to provide services to clients in person as well as over the 'phone or the Internet'. The Bar also welcomes the ambition recently stated by the Lord Chancellor "to ensure that our Brexit settlement is one that is good for legal services in this country."<sup>6</sup>

---

<sup>2</sup> "Legal services are considered integral to the effective functioning of the City's business ecosystem. . . Legal service activities have been closely tied to those in financial services (FS), the City's predominant sector. Financial services firms require a range of enabling legal services, such as the development of contracts, broader advisory and project and deal structuring services, as well as dispute resolution services." – The City of London economic research, [The value of the UK's legal services sector and its importance to the City's economy](#)

<sup>3</sup> See paras. 9-11 of the [Bar Council's written evidence to the House Of Lords EU Justice Sub-Committee inquiry Brexit: Enforcement and dispute resolution](#)

<sup>4</sup> Oral evidence by Hugh Mercer QC, Chair of the Bar Council Brexit Working Group to the House of Lords EU Justice Sub-Committee inquiry, Brexit: Enforcement and dispute resolution, 6 February 2018 ([see press release](#))

<sup>5</sup> [The implications of Brexit for the justice system: Government Response to the Committee's Ninth Report of the Session](#)

<sup>6</sup> Justice Select Committee, Oral evidence from the Lord Chancellor, The work of the Ministry of Justice, 7 March 2018: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-ministry-of-justice/oral/80253.html>

## Challenges

8. The level of ambition and the direction of travel articulated by the Government, particularly by the Prime Minister's Mansion House speech, are necessary if we are to achieve a Brexit that will not diminish the quality of justice, undermine the rights of citizens and their ability to access to courts and legal representation, or limit the post-Brexit potential of the legal and professional services sector. But ambition and vision do not on their own overcome the negotiating obstacles which lie ahead.
9. Statements emanating from Brussels since the Prime Minister's speech indicate, for example, that whilst much of its content is a step in the right direction, it is seen as unrealistic. On March 14, the European Parliament adopted its [resolution](#) on the Future Relationship, referring to the Prime Minister's Brexit speeches, and poured cold water on several of its propositions.
10. One of the challenges is the existence of red lines drawn on both sides, for example, over what role the CJEU or another body would play in resolving disputes over future treaties and trade deals. There is currently no clear solution to this obvious stumbling block.
11. Another challenge is the lack of detail about the Government's vision for civil justice cooperation and legal services. There are calls from both the UK and across the Channel for detailed proposals rather than statements of principle and intent at this stage. Indeed, there exists an urgent need for the UK to produce drafting suggestions to spell out its offer, as the Commission has done at each stage. Both the content and ultimate legality of any agreement call for clear and robust drafting.
12. More detail is required in particular on legal services. Although from a UK point of view a comprehensive system of mutual recognition may appear to be a reasonable proposal, mutual recognition as a principle of EU law is carefully circumscribed and operates against the backdrop of the rules and obligations of the Single Market. From an EU point of view, the UK's present offer is therefore likely to look like a bid to have a deal more favourable than existing Member States have achieved.

## Separate track for justice negotiations

13. Given the scale of these challenges, the complexity of the arrangements we seek to secure, the importance of civil justice cooperation, and the vital role legal services play in underpinning our economy and the rights of citizens, the Bar Council has urged the Government and the EU chief negotiator, Michel Barnier to consider placing justice issues on a separate negotiating track.
14. The Rule of Law and legal services underpin the economy of the UK and the EU and are the mainstay of our civil and democratic societies. Rule of Law and access to justice issues surmount economic considerations and should not be, nor be seen to be, bargaining chips that can be traded against other, purely economic matters in the UK's negotiations to leave the EU.

15. The Bar Council has suggested<sup>7</sup> that a separate track could be best achieved through a separate treaty between the EU and the UK covering justice issues, akin to that currently in place between the EU and Denmark in civil matters.
16. Such a separate track would cover: Civil jurisdiction and enforcement of judgments; civil judicial cooperation including services of process and taking of evidence; family law; dispute resolution; insolvency and restructuring; and road traffic accidents.<sup>8</sup>

### **Legal services and mutual recognition**

17. The Prime Minister's ambition for a "comprehensive system of mutual recognition", and to ensure that the UK and EU benefit from an open regime on legal and professional services, should be considered in the context of the [guidelines](#) published recently by the President of the European Council.
18. The Bar Council has evaluated three possible ways forward which are not without their challenges. Nevertheless, there are grounds for cautious optimism.
19. The Draft Guidelines propose the conclusion of a Free Trade Agreement (FTA) which includes:

“trade in services with the aim of allowing market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that the UK will become a third country and the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework. The FTA should include ambitious provisions on movement of natural persons as well as a framework for the recognition of professional qualifications.”
20. The Bar Council welcomes this as a very permissive statement which enables the negotiators to go well beyond what has so far been concluded in relation to legal services in other FTAs previously concluded by the EU. Negotiators should be ambitious in this respect.
21. Whilst there has been much debate around the notion of “cherry-picking”, the Government should aim to persuade the EU to pursue an agreement which meets the public interest and the interest of clients everywhere. Legal Services are linked to the functioning of the rule of law and should not be considered akin to lamb quotas and help provide access to justice on the basis of reciprocity. Private individuals as well as corporate clients in both the EU and the UK are not served by a lesser degree of mutual legal market access.

---

<sup>7</sup> [Bar Council letter to Michel Barnier, 21 December 2017](#)

<sup>8</sup> It would be possible to envisage police and criminal judicial cooperation being dealt with on the same track, although we appreciate that this raises specific issues regarding participation in EU institutions and arrangements (for example, Europol and the European Arrest Warrant).

## Options for negotiating the legal services regime as part of the Future Relationship Negotiations

### Option 1: Replicating the status quo

22. It would be possible to replicate the provisions contained in the European Lawyers' *acquis* in the future relationship to be negotiated if the necessary political will can be found. This would become easier for the EU27 if the UK Government were to shift its position on regulatory autonomy to some degree (or consider an Association Agreement instead of an FTA model) as it must be remembered that only two of the FTAs concluded by the EU include commitments on legal services (CETA (very modest) and South Korea).
23. The standard FTA model on offer under the current UK "red lines" allow each Member State to enter whatever reservations it pleases, which means that in effect we will have to negotiate 27 individual deals and all we can hope for is that the FTA will set up a somewhat stronger framework as in previous EU FTAs which permits us subsequently to negotiate a practice rights regime which provides the same level of rights throughout the EU27. This would probably take many years to achieve.
24. We accept that we may not achieve this result but we would invite the UK Government to attempt it, as the framework has proven itself to work and it can be administered and enforced in other ways than under the current institutional framework.
25. In all likelihood this will require:
  - a) A political will in the EU to accept that legal services are linked to the rule of law and that it could therefore be considered on a different plane from other services that usually do not get included in FTAs, and
  - b) A certain level of guarantees that the regulatory standards of the UK do not fall behind what the EU considers of sufficiently high quality to permit access to the EU legal market without creating risks to the public interest.
26. What we understand the EU may be seeking is set out in the European Parliament's draft resolution on the future relationship,<sup>9</sup> where we find calls for measures such as a binding convergence mechanism to support the future trade and economic relationship; a binding and sole interpretation role for the CJEU regarding EU law; dispute resolution and governance structures; and a non-regression clause.
27. As a starting point it would be very helpful if the UK Government were to commit in any case to keeping in place all the current structures on the UK side that are currently required by the lawyers' *acquis* or at least to commit to retain market access at current levels. This would not constitute a difficult step since there is little regulation of third

---

<sup>9</sup> <http://bit.ly/2FtOHgi>

country lawyers in place at the moment and few activities are reserved to our legal professions.

28. Additionally, there may be a need to agree further guarantees (such as indicated by the European Parliament above) to ensure Mutual Recognition at the current level remains acceptable to the EU. This may require some flexibility as regards the current position of the “red lines”.
29. Obviously, barriers may still arise in some shape or form, notably if there is only a limited agreement on the free movement of professionals. Avoiding significant immigration barriers is essential to the effective delivery of legal services cross-border in the 21<sup>st</sup> century.

### **Option 2: Foreign Legal Consultants Regime and limited Mutual Recognition**

30. In case Solution 1 should not be agreeable between the two sides, we propose a Foreign Legal Consultants (FLC) regime which is accepted by all Member States in order to avoid the situation where UK lawyers have a different level of practice rights from Member State to Member State (see above). CETA provides for a framework to negotiate an MRA for legal services but does no more than that. We propose that an MRA framework is put in place as part of the FTA negotiations which has a high degree of likelihood of subsequently being implemented by all Member States. The regulation of legal services is a Member State competence and hence there exists the patchwork of national regimes that is currently in place for third country lawyers.
31. An FLC regime agreed on the basis of such an MRA framework should permit the following:
  - a) Establishment of legal services providers under host state rules
  - b) Rights to employ and be employed by local lawyers and legal service providers
  - c) Rights to advise on home state and public international (including the right to advise on EU law not or not yet incorporated into national law)
  - d) Rights to conclude contracts under third country laws on the territory of the Member States
  - e) Rights to represent clients in any dispute resolution fora not reserved to lawyers with a host state legal professional title, and
  - f) Access to the Transfer Tests under the Mutual Recognition of Diplomas Directive. This would necessitate Member States that currently maintain nationality requirements to waive these in respect of UK citizens.
32. Reciprocal rights in the UK are already in place in relation to EU lawyers as regards the six rights proposed above and in any case the UK may well be bound by WTO rules to maintain this access post-Brexit - even in the event of “no deal”.

### **Option 3: Individual MRAs between the UK and EU Member States**

33. We hesitate to call this a solution as this would be the position if an EU-FTA were to make no further commitments on legal services.
34. Under current commitments made under the General Agreement on Trade in Services (GATS), and additional voluntary commitments, made by the EU and its Member States, market access is very uneven for third country lawyers. In some Member States, market access will remain extensive, in others it is closed. In the event of an EU-UK FTA, individual bar associations and member states have the option to go beyond their current GATS commitments to ensure that UK lawyers continue having market access.
35. By way of examples, the UK Government and the professional bodies could negotiate access to the new French Foreign Lawyer status given to Korean lawyers and the EU-South Korea FTA or Greece could consider providing a Foreign Legal Consultant status for UK lawyers. This is permitted under WTO rules: as part of an FTA, each member state has the right to improve on their GATS market access should an EU-level agreement under solutions 1 and 2 not be possible. However, in the absence of an express framework to permit MRAs, the prospects of persuading individual Member States to grant a privileged status to UK lawyers would be low.

**Bar Council**  
**March 2018**

*For further information please contact:*  
*The General Council of the Bar of England and Wales*  
*Senior Public Affairs and Communications Adviser, Luke Robins-Grace*  
[Lrobins-grace@barcouncil.org.uk](mailto:Lrobins-grace@barcouncil.org.uk)  
020 7611 4689  
289-293 High Holborn  
London  
WC1V 7HZ



## Written Evidence submitted by the Bar Council to the Commons Justice Committee Inquiry into the Implications of Brexit for the Justice System

1. This response, which is submitted by the Bar Council of England and Wales, addresses in turn the three areas of inquiry the Committee wishes to pursue, namely the effect of Brexit on civil justice, criminal justice and legal services.

### Civil Justice

2. In a globalised world, it is crucial that the judgments of one state are enforced by the courts of another. The UK is currently in the unique position whereby judgments of its courts are currently enforceable both in EU Member States and also in most Commonwealth states which is very important for the role of the UK as a hub for international litigation. It is critical that UK citizens, businesses, institutions and the UK Government retain the right to have judgments which they have obtained in the UK courts efficiently enforced, and to have the jurisdiction of the UK courts recognised, throughout the EU. This is also essential in order to retain our position as the leading dispute resolution centre in the world, with the important economic benefits which this brings.

#### *The current position on enforcement of judgments in the EU*

3. The current position is governed by the Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (**‘the Recast Brussels Regulation’**).<sup>[1]</sup> This applies to “civil and commercial matters” and provides that:

3.1. Judgments of the courts of EU Member States are to be enforced throughout the EU as if they were judgments of a court of the Member State in which enforcement is sought;

3.2. The courts of one Member State may apply “protective measures” to assist with proceedings in another Member State;

3.3. Common rules are applied in the EU for determining the jurisdiction of courts;

3.4. Where the parties have specified in their contract that disputes should be heard in a particular jurisdiction (an exclusive jurisdiction clause), the courts of other Member States are required to abide by the terms of that jurisdiction clause and to decline jurisdiction – such clauses are frequently in favour of UK courts;

3.5. Where proceedings have already been commenced in one Member State, the courts of other Member States are required to stay any subsequent proceedings dealing with the same subject matter until jurisdiction has been decided by the court first seized of the matter.[\[2\]](#)

4. Another vital element of legal process is the service of claims by claimants on defendants. Without proper service, as a general rule, a claimant cannot bring a claim against a defendant. The position as to service has also been harmonised within the EU by the Service Regulation.[\[3\]](#)

5. These mechanisms are vital for the healthy functioning of the UK economy in general and the UK legal sector in particular.

#### *The Importance of an Effective Jurisdiction and Judgments Regime – For the Legal Sector in England and Wales*

6. The reputation of England and Wales as the pre-eminent destination for international dispute resolution will be damaged unless the status quo as outlined above is protected. Much international dispute resolution work comes to English lawyers because the parties to a dispute have chosen to have their dispute resolved in the English courts. If jurisdiction clauses designating the English courts are not effectively respected in the EU, this will make such clauses considerably less popular. Further, if the EU *lis alibi pendens* rules do not apply to proceedings in English courts such that subsequent proceedings in EU Member States' courts will not automatically be stayed, this will deter parties from including English jurisdiction clauses in their agreements.

**7. Similarly, if the judgments of the English courts are more difficult to enforce in the EU, then jurisdiction clauses naming England and Wales will become much less attractive.**

#### **The Position if nothing is done**

##### *Jurisdiction and Judgments*

8. Commercial parties value continuity and certainty. If the UK becomes a 'third state' for the purposes of the Recast Regulation, the Lugano II Convention and the 2005 Hague Convention, the status of English jurisdiction clauses and judgments in other Member State courts will become more open to question. This may encourage foreign parties to amend their contractual clause in favour of resolving disputes elsewhere.

9. This is demonstrated by a survey conducted by law firm Simmons & Simmons in Germany, France, Italy, Spain and the Netherlands as to their courts' approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses. The survey showed that 88% of clients thought the UK Government should make a public and early statement to remove this uncertainty.

10. Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts because of the

uncertainty surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England owing to this uncertainty over enforceability. Since large-scale litigation would frequently take longer than two years it is essential that interim measures are put in place.

### *Service*

11. The Service Regulation will cease to have effect upon Brexit. At this point the residual service framework will revive which includes the methods of service permitted by the common law and the Hague Service Convention.<sup>[4]</sup> If the UK does not enter into an agreement akin to the Denmark-EU Service Agreement,<sup>[5]</sup> service of process will become more difficult and expensive as permission to serve out of the jurisdiction may be required and the permitted methods of service will be more cumbersome.

### **Criminal Justice**

12. Crime, especially more serious and organised crime, increasingly does not recognise national borders. Even less serious crimes are increasingly likely to have a cross-border element as citizens of the EU have for the last 43 years exercised their Treaty rights of freedom of movement and establishment, and availed themselves of goods and services sent from, or supplied in, EU and other states. Foreign nationals who commit crime in the UK often flee abroad. Some crimes can be committed easily across national boundaries, such as child exploitation, fraud and identity theft. In particular the UK has seen a massive increase in people trafficking offences. Police and the judicial authorities need to cooperate internationally in order to combat crime and bring perpetrators to justice.

13. Doing so on the basis of case by case contacts, or even bi-lateral agreements to cooperate, especially where several states are involved, is likely to be slow and cumbersome. Under the EU framework we have been doing so by mutual recognition of key elements of each other's systems, with minimum standards applicable in all states for certain factors, together with mutual legal assistance measures that are understood and apply in all the Member States.

14. In particular the EU has been active in recent years in identifying cross-border policing issues and putting in place regimes to tackle them, such as Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography; and Directive 2011/99/EU on the European Protection Order. The UK will probably wish to continue co-operation in these areas and provide legislation to enable reciprocal arrangements to continue.

15. As we withdraw from the EU, the UK will need to seek, if possible, measures in an agreement with the EU that:

15.1. Secure the speedy arrest of suspects with minimum bureaucracy, via use of the European Arrest Warrant, of those wanted by the British police who have absconded to the Continent. There will need to be some reciprocal measure;

- 15.2. Provide for the use of Joint Investigation Teams to investigate drug cartels, people trafficking networks and fraud which operate across national borders;
  - 15.3. Secure evidence from overseas, using the mechanisms currently in use in the EU;
  - 15.4. Provide rapid access via fingerprint and other identification databases to overseas convictions, for sentencing and other purposes; and
  - 15.5. Provide for example for the transfer of prisoners to their home countries.
16. The courts and police will continue to want properly to identify those people with whom they deal, so that justice can be done, and the public protected against dangerous people from other countries.
17. It is unlikely that the UK Government will want to negotiate 27 separate treaties, or indeed that the remaining EU members will want to negotiate separately either, given the growth in co-operation through Europol, Eurojust and the European Public Prosecutors Office.
18. In addition, the UK will undoubtedly want to secure some bilateral recognition of systems to protect the large populations of UK nationals living in EU states. They, for example, make up the largest group of non-nationals living in France and Spain, and the second largest living in Germany. The largest non-national groups living in the UK are the Polish and the French, followed by the Portuguese and Spanish. Whilst there may be some transfer of population after Brexit, substantial numbers of foreign nationals are likely to remain. In addition, if Britain is to be open to the world for business, substantial numbers of visitors can be anticipated.
19. The UK will therefore need to engage with Europol, Eurojust, and the European Judicial Network. If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, and would be even less so in the face of the growth of technology-enabled crime. Moreover, cross-border surveillance is now greatly improved from recent years. The police, even at local level, will themselves generally know how the system works, allowing them to deal with cross-border issues themselves. This was not the case even ten years ago. This increases efficiency and speed, which is often of the essence in such cases.
20. The UK has the most developed Criminal Justice System of all the current EU Member States, containing safeguards for the accused, and established rights which are not prevalent in all other Member States. Withdrawal will therefore not immediately affect the way the Crown Court and Court of Appeal conduct their business. Rights to a fair trial, the entitlement of the accused to legal advice, and support, legal aid and advance disclosure of the prosecution case, and disclosure of material undermining the prosecution, routinely take place in UK courts and will be unaffected.
21. British citizens currently have the right to make challenges to the law enforced against them on the basis of the European Convention on Human Rights (ECHR). This is not

part of the EU treaty regime, but entirely separate, although frequently treated as part of the EU regime by public commentators. There is some discussion of the substitution of a “British Human Rights Act” for the Human Rights Act 1998. If such a substitution entailed a renunciation of the ECHR, then the UK would have to withdraw from the Council of Europe and other treaties. The developed law relating to Human Rights in the UK is, however, consonant with common law and any changes are unlikely to be significant.

## Legal Services

22. The UK legal services market is 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 within the EU and EEA. Equally important, our exporters’ confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries in which they seek to trade and invest.

23. There are numerous aspects of barristers’ work which will no longer be possible if the UK leaves the EEA, unless current cross-border rights are preserved. Such rights include:

23.1. Acquiring the professional title of another EU Member State through three years of practice<sup>[6]</sup> or requalification by taking an aptitude test;<sup>[7]</sup>

23.2. Advising clients in other Member States on a temporary basis with no requirement to register with the local Bar;<sup>[8]</sup>

23.3. Representing clients in the domestic courts and tribunals of other Member States;<sup>[9]</sup>

23.4. Advising and representing clients in Commission investigations, including in particular competition proceedings – but EU rules only recognise legal professional privilege in relation to lawyers entitled to practise in a Member State;<sup>[10]</sup>

23.5. 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

23.6. Representing clients in the European Courts – limited to lawyers authorised to practise before a court of a Member State or an EEA State.<sup>[11]</sup>

**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 negotiates continued free access to the EU legal services market.

24. In addition, at present barristers who are EU/EEA nationals are able to move, without immigration controls, from one Member State to another for the purposes of

providing legal services. It is imperative that this free movement right is maintained if barristers are to be able to continue to work in other EU and EEA Member States.

25. 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.

26. 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.<sup>[12]</sup> 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 in turn help to promote UK financial services and many other sectors of UK business in Europe.

27. Equally important, 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. Major international clients are choosing to bring cases in the UK rather than elsewhere because of the expertise of UK lawyers, as well as litigation advantages of the UK courts (such as the disclosure rules). Much of this work will be lost if UK lawyers lose access to the EU market. This will in turn reduce the attractiveness of London to (for example) top US law firms which currently establish offices in the UK and use these as their passport into the EU legal market by instructing or employing barristers.

28. In conclusion, the medium and long-term uncertainty in established areas and types of practice is high. In formulating its negotiating strategy, the Government should therefore 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 EU law. The enduring international appeal of the UK, not just for its legal standing but also its attractiveness to foreign investors, will depend on the ability of UK lawyers to provide legal services to clients across the EU.

## **Recommendations**

29. The Bar Council recommends that the Government should take action in relation to the matters covered in this response as follows:

### **Civil Justice**

29.1. Enter into an agreement based on the Denmark-EU Jurisdiction Agreement, both with the EU and with Denmark albeit with a clause providing not for

interpretative jurisdiction of the CJEU but for 'due account' to be taken of the decisions of the courts of all 'Contracting Parties';

29.2. Sign and ratify the Lugano II Convention, to preserve the present regime vis-à-vis Norway, Iceland and Switzerland;

29.3. Make a decision that these will be its aims as soon as possible and that this is publicly stated; and

29.4. Ensure that these arrangements take effect immediately upon Brexit so that there is a seamless transition between the existing and new regimes.

### **Criminal Justice**

29.5. Seek agreements with the EU as outlined in paragraphs 15 and 19 above.

### **Legal Services**

29.6. Preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC and the Lawyers Establishment Directive 98/5/EC;

29.7. Ensure that lawyers entitled to practise before UK courts may represent parties before the European Court;

29.8. Ensure that UK lawyers enjoy the same rights to legal privilege under EU law as lawyers of EU Member States; and

29.9. Maintain free movement for immigration purposes for UK lawyers as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

11 November 2016

---

[1] In force in the UK since January 2015.

[2] The *lis alibi pedens* principle.

[3] Council Regulation (EC) No.1393/2007, in force in the UK since 13 November 2008. It creates a 'European judicial area' for the free movement of judicial and extra-judicial documents.

[4] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

[5] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L/299/62, 16 November 2005.

[6] Currently possible under the Lawyers Establishment Directive 98/5/EC.

[7] Provided for in Directive 2005/36/EC.

[8] Currently possible under the Lawyers Services Directive 77/249/EC.

[9] *Ibid.*

[10] It is for this reason that hundreds of English solicitors are currently registering with the Law Society of Ireland.

[11] Article 19 of the Statute of the Court of Justice.

[12] Barristers also act as arbitrators in numerous EU Member States, an activity which in the absence of EU-equivalent guarantees