The Law Society

The UK-EU future partnership - legal services sector

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Introduction

The Law Society calls on the UK Government to seek to negotiate a future agreement with the EU that contains provisions allowing English and Welsh solicitors to maintain their right to practise in the EU. Such an agreement should replicate the Lawyers' Directives,[1] as other models are unlikely to deliver the comprehensive practice rights that have substantially contributed to the UK legal sector's large export surplus (£4.4bn as of 2017).[2]

There are precedents for such agreements providing necessary in-depth frameworks on legal services: the EU has association agreements through the EEA with Norway, Liechtenstein and Iceland and with Switzerland. These extend the application of the Lawyers' Directives to EFTA countries.

The Law Society also calls on the Government to avoid leaving the EU without a deal. In August 2018, the Law Society predicted that should we leave the EU without a deal, UK legal services turnover would likely decrease by £3.5 billion (nearly 10% of turnover), and the sector could lose up to 10,000 jobs.

Whilst some positive steps have been taken to prepare for a no deal, including legislation on European lawyers practising in the UK and ratifying the relevant Hague Conventions, there are some issues that cannot be resolved without an agreement with the EU.

Should we leave without a Withdrawal Agreement we would no longer be negotiating for legal services market access with the EU, but with 31 different regulatory regimes, with different levels of restrictions placed on third-country lawyers.

The current transition or implementation period arrangements would also not be available anymore. These go deeply into national powers, and the agreement on transition arrangements would need to be ratified by the EU and its member states. This is a lengthy process.

International judicial co-operation would also suffer, with enforcement of UK judgments abroad decreasing in speed and efficiency, reducing business and consumer confidence alike.

Legal services regulatory framework in the EU

The EU operates the broadest and most open service market in the world, allowing the globally respected UK legal sector to thrive. The UK is the largest legal services export

[1] Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained and Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services

[2] Office of National Statistics

sector in the EU, and the second largest in the world after the US. It accounts for a third of Western European legal services fee revenue.[3] The liberalisation of services in the EU has directly contributed to its success.

The UK legal services sector employed 329,000 people in 2017 – two thirds outside London. The sector contributed £27.4 billion to the UK in 2018 (1.4% of GDP) and in 2017 it posted a trade surplus of £4.4 billion. Much of this productivity relies on market access provided by the EU directives.

The legal services framework, which applies to all EU/EEA/Swiss qualified lawyers,[4] allows English and Welsh solicitors to:

- advise their clients across the EU/EEA/Switzerland on all matters of concern to them and in all types of law, including English law, EU law and the law of the host state.
- have their qualifications recognised and to requalify under these rules with few barriers compared to non-EU lawyers.
- employ local lawyers in a different member state and retain the ability to form partnerships with lawyers from all EU/EEA states and Switzerland.
- be employed by EU/EEA/Swiss law firms (provided the jurisdiction in question allows the employment of lawyers) and companies.
- retain their freedom to establish a permanent presence in EU/EEA states and Switzerland and extend this to English and Welsh law firms.
- have all communications with their EU clients and vice versa protected by the EU legal professional privilege (LPP) when in private practice at EU level, i.e. they cannot be disclosed to the EU institutions or bodies without the permission of the client.
- represent their clients in the Court of Justice of the European Union (CJEU), domestic courts and other fora (such as arbitral proceedings and alternative dispute resolution mechanisms).

The current framework is based on the principle of mutual recognition, whereby participating states retain control over domestic regulation on the provision of legal services, while recognising those of the other member states. Unlike financial services, there is no common legal services rule book or regulator at EU level,[5] and relevant EU legislation is kept to a necessary and justifiable minimum. Because of this existing retention of sovereignty, maintaining the current framework with the EU will not limit the ability of the UK to seek free trade agreements (FTAs) in legal services or wider services with other countries.

[3] TheCityUK, Legal excellence internationally renowned – UK legal services 2018, November 2018: https://www.thecityuk.com/assets/2018/Reports-PDF/86e1b87840/Legal-excellence-internationally-renowned-UK-legal-services-2018.pdf

[4] Some member states require also EU/EEA/Swiss nationality in combination with the EU/EEA/Swiss qualification, to be able to benefit from the framework. The representation of clients in front of EU institutions does not require EU nationality.

[5] There are some forms of coordination between bar associations and law societies at EU level. One such example is the Council of Bars and Law Societies of Europe (CCBE) Code for cross-border practice: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

The EU framework gives certain automatic rights, including giving our solicitors the right to be recognised as lawyers by all other European bars, the protection of legal professional privilege (LPP) for those in private practice throughout the EU when advising their clients, and the right to represent their clients in the CJEU. This is mirrored by our own automatic recognition of the lawyers from all other European bars - resulting in an open and commercially thriving sector of the economy.

Case study: a UK law firm opens an office in the EU

A medium sized law firm based in England and Wales is looking to open a branch in France. The firm specialises in providing legal advice on financial products and insurance to small and medium-sized exporters, many of which are increasing their presence in France (two of the major clients of the firm have just expanded into several EU member states). The firm would therefore like to start servicing their clients from Paris, providing advice on English and Welsh financial regulations, as well as EU regulations and other international conventions that apply.

As a UK limited liability partnership (LLP), the firm can open an office or a UK LLP branch in France without any restrictions under the current regime. Its lawyers who are qualified in England and Wales can also provide advice on EU, French and English law in person, on a temporary basis, or remotely, by phone or email.

They can establish themselves in France under clear rules which cover all EU/EEA/Swiss lawyers, concerning registration with the local bar, professional indemnity insurance and compliance with the professional rules. As EU/EEA lawyers, they can represent their clients in front of the CJEU and in front of national courts (subject to local bar rules). Finally, they and their clients can rely on LPP before the EU institutions and CJEU.

Should there be no deal or grandfathering of certain historic LLP structures, the firm would not be able to open a UK LLP in Paris as this is not a recognised legal form in France. Instead, the law firm would have to choose one of the available legal forms under French law and conform to the relevant equity caps and shareholding restrictions – meaning 75% of partners holding 75% of shares must be fully admitted to an EU/EEA/Swiss bar, while holding one of the nationalities. Given its limited coverage, this does not change if the EU and UK agree an FTA based on the EU-Canada deal (CETA) as France maintained the same restrictions under that agreement.

Similarly, lawyers who wish to provide advice on EU law to their EU-based clients may no longer be able to do so, as an English and Welsh solicitor where advice on EU law is considered as part of the domestic law of the country in question. In these cases, the ability

to give advice is reserved for EU/EEA/Swiss qualified lawyers and the firm would have to rely on EU/EEA/Swiss-qualified lawyers.[6]

No deal/FTA impact on law firms, clients and the legal profession

- Immediate costs for law firms as they restructure their operations to be able to fulfil the requirements of states where they operate.
- Law firms may not be able to base English and Welsh qualified solicitors in EU member states, leading to fewer opportunities for our members, and in the long term may choose to employ local lawyers rather than English and Welsh qualified solicitors for their operations in the EU area.
- More costs for clients/businesses, who may not be able to rely on their local solicitor or firm as they may need to employ English and Welsh qualified lawyers to work in England and Wales, and EU lawyers for their operations in the EU. This applies in particular where clients have engaged with smaller firms that do not have an EU presence at the moment.

Why this framework matters for lawyers, businesses and citizens

Access to legal advice

We believe that access to good quality, timely and affordable legal advice is a cornerstone of a properly functioning justice system and guarantees the exercise of legal rights. We fear that the lack of robust provisions on legal services in the future EU-UK agreement (or in case of a no deal Brexit) could significantly reduce that access and thus hamper businesses' and citizens' capacity to deal with the challenges resulting from the UK's withdrawal from the EU. Access to legal advice in the context of Brexit is paramount for several reasons:

- The length of the UK's membership in the EU has produced a tight and complex web of relationships between businesses and citizens on both sides of the English Channel. Dismantling that relationship and forging a new one will be one of the greatest challenges of the coming decades. Many disputes arising because of Brexit will cover more than one area of law and more than one jurisdiction and will face time restrictions.
- Legal services play a vital facilitatory role in international trade. Businesses rely on solicitors for advice on addressing cross-border compliance and access, and counsel on how best how to operate in foreign markets. The current regime allows UK legal teams to advise in a cross-border and pan-European environment. Should that change, businesses may face higher costs and barriers in their operations as they may need to employ more than one legal team to cover multiple jurisdictions.
- EU citizens in the UK and UK citizens in the EU will need access to legal advice in the short and long term on matters related to the UK withdrawal. It is important that these

[6] And, where necessary, ensure that those lawyers have EU / EEA / Swiss nationality.

clients can instruct lawyers of their choosing who can advise them without restrictions and linguistic limitations.

Maintaining the attractiveness and strength of the English and Welsh legal services market and profession

The English and Welsh legal profession has long been a gateway for pioneering lawyers, from the UK or the wider world, to access European legal services markets. The UK's withdrawal from the EU is likely to disrupt this trend and reduce the opportunities and economic activity that come with it.

There are over 200 foreign law firms with offices in the UK[7] and 72% of the largest UK law firms have at least one office in an EEA country. English and Welsh solicitors are in partnership with almost 3,000 European lawyers – close to 60% of their total overseas partnerships.[8]

The English and Welsh legal services market is an attractive destination for international law students, academics, newly-qualified lawyers and experienced lawyers alike, and has been for many years. The sector has greatly benefited from this diversity and intends to maintain its openness by continuing to welcome international talent.

This thriving sector, however, is at risk due to Brexit. In fact, the prospect of the UK leaving the EU may have already had a negative impact on solicitors and law firms from England and Wales, even when there has been no actual change in the legal framework yet. In 2019, the number of SRA-regulated law firms in the EU dropped from 201 to 187 (a 7% decrease) and there was a 5% decrease of practicing certificate (PC) holders in the EU member states, when compared to 2017.

Case study: UK firm operating in intellectual property (IP) law

The UK legal scene has a particularly vibrant IP sector. Many UK firms have active and successful IP law departments and can currently assist their clients with registered trademarks either in any EU country or in the UK. UK based clients currently enjoy trademark protection and do not need to re-register those trademarks in other EU countries.

After Brexit trademarks registered in the UK will no longer have EU-wide recognition: any client wanting to operate in the EU area with a protected trademark will need to register theirs with an EU authority as well. Trademark protection is open to challenge in EU bodies and the CJEU, and English and Welsh qualified solicitors will not have rights to represent clients in front of the CJEU and relevant European bodies. UK clients with European

[7] TheCityUK
[8] Brexit and the Legal Services Sector, Professional and Business Services Council, July 2017

operations may need to employ an EU or EEA qualified lawyer to represent their interests in front of the EU courts and bodies.

UK law firms may therefore need to open a branch in an EU or EEA state and employ also EU and EEA qualified lawyers in their operations. This may prove difficult due to the different regulatory regimes governing partnerships and forms of company in each state, making altogether 31 different regimes. For example, as described above, not all EU countries recognise a LLP, meaning a UK firm would need to re-establish using a different entity in the EU.

Impact on law firms dealing with IP rights and English and Welsh qualified lawyers who are working on IP law cases under no deal or FTA scenario

- *Cost implications for the firms as they may need to re-establish offices in the EU.*
- *Cost implications for clients as they will need to claim and defend rights both in the UK and in the EU.*
- *Fewer opportunities for the English and Welsh solicitors to engage in the EU trademark work, as their qualifications are no longer recognised as EU qualifications.*
- *Opportunities for English and Welsh qualified solicitors engaging in European trademark work may decrease, meaning they may have less experience for senior level European legal work. This could mean fewer English and Welsh partners and senior legal voices in the European IP market.*

Maintaining the opportunities for the future generations of lawyers

We particularly fear that Brexit disruption is likely to affect junior lawyers yet to begin their legal careers, as many will not be able to move in Europe as easily as their predecessors. This has an impact on the attractiveness of qualifying in England and Wales. Their rights to provide services under their home title, to establish and practise in Europe and to requalify in host state law will all become more complex under an FTA or in case of a no deal Brexit. Moreover, the prospective candidates from the EU may no longer be attracted to studying in the UK and getting an English and Welsh qualification since they cannot use it in their home country to the same degree as under the current regime. This in the future may result in fewer ambassadors for the English and Welsh law in the EU and potentially worldwide.

Case study 3: Junior lawyers qualifying in England and Wales

A recently qualified solicitor employed by an international or European law firm can:

- *provide legal advice on English law, EU law and local law to individual and business clients across the EU.*

- *work without a visa or a residence permit in another member state on a temporary or permanent basis.*
- *in their future to foresee to represent clients before EU institutions, the Court of Justice of the European Union, and national courts (subject to local bar rules).*
- *rely on the LPP in cases before EU institutions and the CJEU, if employed in private practice. This protects the communications between the lawyer and the client in such cases.*
- *requalify in another member state after a three-year period of practising EU law / home state law while established there, or earlier either if established or after taking an exam on the local laws (subject to exemptions).*

An English and Welsh solicitor qualifying after Brexit will not have these rights under a no deal or any current FTA model. Instead of one regime they will be subject to 31 different regulatory regimes limiting their ability to provide services or establish in member states or EEA countries. As stated above, this also means that the English and Welsh qualified solicitors may not be able to advise on EU law to EU-based clients, where EU law is considered as domestic law.

In addition, English and Welsh qualified solicitors will not benefit from the right to appear before the CJEU, and their communications with their clients will not be covered by LPP at EU level. Only EU / EEA lawyers have an unquestionable right to appear in front of EU institutions, EU courts and bodies and be protected by the LPP at EU level in dealings with them. This means, if a law firm is engaged with a European case, they will need to employ an EU / EEA qualified lawyer to represent their interests in front of the EU bodies.

Why an FTA model is not ambitious enough

The FTA model for a future EU-UK partnership agreement, as set out in the Political Declaration and White Paper, would be a long way off delivering the framework required for the optimal performance of the UK legal services sector, and more importantly its clients and the justice system. Historically, FTAs have not delivered substantial legal services market opening in the EU. Should the UK choose to pursue this model then several important rights and provisions for UK lawyers and their clients will not be automatically guaranteed. These include:

- the unrestricted ability to provide legal advice into another member state when not established in that member state[9]
- recognition of practice vehicles / legal forms, such as limited liability partnerships;
- access to an EEA-wide mutual recognition of qualifications regime
- cooperation between competent authorities (for example, on disciplinary actions)

[9]This right is subject to national legislation and / or professional rules and will vary from state to state.

- the protection of lawyer-client communications by LPP at EU level, when in private practice
- the unrestricted ability to provide advice on EU law in the EU, where not allowed under national law
- rights of audience in front of the CJEU, and the possibility to directly resolve disputes in domestic courts.

These rights have never been included in any of the previous EU FTAs for several reasons:

- Provisions on legal services in most EU FTAs have not substantially increased the EU legal services market liberalisation compared to that included in the World Trade Organisation's General Agreement (WTO) on Trade in Services (GATS). As such, a UK-EU FTA risks being a *de facto* no deal for legal services, and in many respects the ability to provide legal services would fall back on international rules governing trade in services such as the GATS.[10]
- Most EU member states have reserved the practice of EU law to their full membership only (which may come with additional requirements such as EEA/Swiss nationality and/or commercial presence) under the FTAs and GATS' definition of legal services specifically excludes ability to advice on EU law.
- Recent EU FTAs include most favoured nation (MFN) clauses for services.[11] These MFN clauses in FTAs are designed to lock in the preferential treatment negotiated between the parties. In practical terms, this means that any preferential treatment afforded by the EU in its future FTA with a third country would automatically mean the extension of such treatment to other *existing* FTAs as well.
- In other words, if the EU were to extend its preferential treatment to the UK it would need to extend it to current trading partners. This could make it more difficult for the EU to agree an FTA that would try to duplicate the provisions of the current arrangements, in particular on issues such as giving advice in EU law, establishment on a permanent basis in another Member State under home title, cross-border provision of legal advice when not established in a member state and affording preferential treatment in recognition of qualifications.
- Only a few FTAs contain provisions on mutual recognition of qualifications. However, unlike the Lawyers' Directives, which provide for an automatic recognition system, they include only a general aim to open mutual recognition of qualifications. This means that the recognition is left to member states or competent authorities, such as professional bodies, to implement at their will.
- The provisions on the rights of audience in front of the CJEU are set out in the Court's statute (Article 19) and cannot be changed by a trade agreement, only by a unilateral action of the EU. The only existing example is an association agreement such as the EEA, under which lawyers qualified in Norway, Iceland and Liechtenstein have rights of audience in front of the CJEU. Similarly, the protection of lawyer-client

[10] The WTO is a global body which consists of 164 member countries that negotiate the rules on international trade. The UK, individual EU member states, and the EU as a whole, are all WTO members.
[11] These clauses are included in the CARIFORUM, EU-South Korea FTA, CETA, EU-Vietnam and EU-Japan EPA.

communications by LPP is not set out in legislation but in CJEU case law[12] and also cannot be changed by a trade agreement.[13]

There are, however, some elements of FTAs which are beneficial to professional (including legal) services when compared to the GATS offers. These include more categories of persons under Mode 4, provisions on cross-border legal advice when not established in that member state, disciplines on domestic regulation, transparency, regulatory cooperation, government procurement and mutual recognition of qualifications (the latter subject to the reservations set out above). Most of recently concluded FTAs also include chapters on e-commerce and data flows which are important for international trade in services.

Why WTO GATS does not deliver on legal services

GATS provisions on legal services are restricted to advice on international public law and home country law, and include some provisions on the movement of natural persons and establishment of operations and practice. A solicitor or a firm that wishes to provide legal services based exclusively on GATS will have to be mindful of national regimes of EEA countries, some of which have varying restrictions for non-EEA lawyers or law firms. These include restrictions (or additional regulations) on the legal form of law firms, minimum qualification requirements, equity caps, and residency requirements. Apart from restrictions on the rights to practise and establishment on a permanent basis under home country title, dealing with a patchwork of national regulations increases the compliance burden significantly which is likely to impact small and medium sized firms disproportionately as illustrated in the case studies set out above.

Why an association agreement would deliver on legal services

On this basis, we believe that it is crucial that English and Welsh solicitors continue to have the right to provide legal services in the EU at present, and vice versa. Solicitors remaining free to carry out their duties to clients is essential to safeguard the effective exercise of the rights of citizens and businesses.

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[12] Paragraph 25 of the AM&S judgment (C-155/79) reads '*the protection thus afforded by Community law, in particular in the context of Regulation No 17, to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives*.' (own emphasis) Paragraph 190 of AG's opinion in the appeal in Akzo Nobel (C-550/07) reads (on affording privilege to lawyers from third countries) '*unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.*'

[13] In our earlier publications, we pointed out this fact and encouraged Government to address these (i.e. rights of audience and LPP), where applicable, on a case by case basis with relevant regulators and professional bodies. More details: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/trade-in-services/written/95425.html

This also recognises the deep knowledge and expertise in EU law in the UK as a result of a longstanding relationship with the EU, which sets the UK apart from any third country. This is why the best possible outcome for legal services and the justice system could be achieved under a comprehensive EU-UK association agreement.

Importantly, such a deep relationship would not trigger MFN provisions in other FTAs. This is because the MFN does not apply in those agreements concluded by the EU with EEA or Switzerland, which aim to replicate the Lawyers' Directives, include approximating legislation and adopting measures for recognition.[14]

It would also be possible to include in an association agreement framework other key justice issues, in particular on providing for continued judicial cooperation on civil, commercial, family law or criminal justice matters. The Law Society has argued for the need to maintain these provisions in its other communications and the UK government has agreed on the importance of including these forms of judicial cooperation in the future agreement.[15] With this respect, it is worth to note that no previous third country-EU FTA has contained civil and commercial law matters, or criminal justice, while they fit within the association agreement model.

The Law Society notes that such an in-depth relationship would benefit from provisions on dispute resolution to which individuals or businesses have access. This would not necessarily need to be through the CJEU. The Law Society has previously outlined how various systems work and believes that the UK and EU can create a dispute settlement scheme which would allow an in-depth relationship, without the direct jurisdiction of the CJEU.[16]

We would equally urge the Government to maintain the openness of England and Wales for EEA lawyers and seek to maintain EEA lawyers' ability to establish themselves in England and Wales and provide advice on EU law, laws of EEA member states, English and Welsh laws (outside the reserved areas), public international law and any third-country law in which they are qualified.

Case study: England and Wales as an open jurisdiction

The Law Society recognises the contribution of EU and foreign lawyers to England and Wales' status as a world leader in legal services provision, and will continue to highlight it to Government, the domestic profession, and the wider population. Over 200 foreign law firms and over 6,000 foreign lawyers are established in England and Wales.

[14] The EU has scheduled a reservation in Annex II (policy space) of several recent FTAs where it sets out when and how the MFN clause included in a particular FTA would not apply. See also Briefing Paper 25 – November 2018, Most Favoured Nation clauses in EU trade agreements: one more hurdle for UK negotiators by Julia Magntorn, available at: http://blogs.sussex.ac.uk/uktpo/publications/most-favoured-nation-clauses-in-eu-trade-agreements-one-more-hurdle-for-uk-negotiators

[15] For a list of Law Society priorities on Brexit, see https://www.lawsociety.org.uk/news/stories/law-society-work-on-brexit-march-2019/

[16] https://www.lawsociety.org.uk/policy-campaigns/articles/options-for-the-future-uk-eu-dispute-settlement-mechanism/

England and Wales is an open jurisdiction for foreign lawyers. Even without the EU Lawyers' directives, in England and Wales EU lawyers can continue to:

- be partners in UK law firms and share in the profits
- practise as a sole practitioner; as an assistant or consultant with a firm of foreign lawyers
- practise in a partnership of foreign lawyers, employed by English and Welsh solicitors or work in partnership with English and Welsh solicitors (but only if registered with the Solicitors Regulation Authority as a registered foreign lawyer)
- be employed as an in-house lawyer (e.g. in the legal department of a commercial company)
- give advice that will be covered by legal professional privilege when practicing in England and Wales
- take examinations to requalify as a solicitor if they wish to practise in the few reserved activities in England and Wales.