



The effect
of Brexit
on legal services

The APPG on Legal and Constitutional Affairs
October 2018

Table of Contents

3	Introduction
4	Executive Summary
5	Part one - Mutual market access
8	Part two - The importance of a labour mobility framework
10	Part three - The need for legal certainty
12	Conclusion
13	Recommendations
14	Acknowledgements
15	About the APPG on Legal and Constitutional Affairs

Introduction

The legal services sector is a UK success story. The UK is the second largest legal services market in the world and the largest legal services sector within the EU. In 2017, the legal services sector contributed over £26 billion to the economy. The latest statistics also show the sector was responsible for a net export of £4 billion. It also trains and employs over 380,000 people.

Brexit will be the largest ever change to the UK's legal framework, and it presents both opportunities and risks for the legal sector.

The impact of Brexit on lawyers, law firms and legal practices will be significant. Many questions remain unanswered in the negotiations around the United Kingdom's withdrawal from the European Union, any transition period, and the future relationship of the UK and the EU.

The APPG on Legal and Constitutional Affairs launched an inquiry on the effect of Brexit on the legal services sector in March 2018, focusing on mutual market access and how legal services will be able to operate following the UK's withdrawal from the European Union.

The APPG accepted written evidence and held sessions in Parliament to hear oral evidence from interested parties, including law firms and chambers, individual practitioners, and other stakeholders.

The APPG sought evidence on the impact of Brexit on legal practice's workforce, business structure and client base. It explored how lawyers currently practice across borders, looking at everything from rules on immigration, practice rights and recognition of professional qualifications, and how this is anticipated to be affected by Brexit. It sought to understand whether contingency planning was taking place, and what steps firms were already taking to mitigate any effect of Brexit on the legal services sector. And finally, the APPG sought to understand the key concerns of the sector on the effect of Brexit.

While many issues were raised throughout the inquiry, this final report comments on the main themes, namely the ability to practise as a lawyer in the EU, the importance of labour mobility, and the need for legal certainty including the need for transitional arrangements and the importance of avoiding a 'no deal' scenario.

This final report explores the concerns and comments raised in the oral and written evidence and makes 10 recommendations to the Government in relation to Brexit and the legal services sector, which we hope will be considered.

Jonathan Djanogly MP
Lord Hunt of Wirral

Co-Chairs
APPG on Legal and Constitutional Affairs

Executive Summary

- The APPG on Legal and Constitutional Affairs has concluded its inquiry into the effect of Brexit on the legal services sector.
- The APPG accepted written evidence and held two oral evidence sessions to discuss the impact that Brexit could have on the profession, the risks associated with leaving the European Union, and any opportunities that our new relationship may bring.
- Of key concern to the legal sector was the ability to practise in Europe. The current framework allowing for the mutual recognition of professional qualifications, rights of audience and the ability to practise and establish firms in EU member states has benefited the UK legal services sector, providing a large net contribution to the UK economy. As far as possible, mutual market access should be retained.
- The legal services sector has profited from the ability to attract talent from across the globe, and the right to work in the European Union. It is very important that post-Brexit, a labour mobility framework which guarantees these abilities is put in place.
- Crucially, the legal services sector requires legal certainty through the UK's withdrawal from the European Union. Law firms and their clients are already beginning to implement contingency plans, and moving business elsewhere. A detailed transition agreement must be confirmed as soon as possible to ensure that the UK legal services sector has the legal certainty required.
- Securing the right future relationship with the European Union is of utmost importance. A no deal scenario would be devastating to the legal services sector, and should be avoided at all costs.
- The APPG has made 10 recommendations to Government, which we hope will receive full consideration.

Part one - Mutual market access

Throughout the progress of the inquiry, the ability for solicitors, barristers and chartered legal executives to practise as a lawyer in the EU was at the forefront, whether through considering existing practise rights, the mutual recognition of professional qualifications or the ability for lawyers to fly-in and fly-out in order to advise their clients. This mutual market access is integral to the continued success of the legal services sector.

a) Ability to practise as a lawyer in the EU

Discussion at the first meeting of the APPG focused on the ability for individuals and firms to practise and establish themselves in the EU, and serious concerns were highlighted on the impact of Brexit on these long-established practices. Without a future agreement ensuring market access and practise rights, world-leading law firms based in the UK risk losing business or taking their business elsewhere in Europe.

At present it is relatively easy and straightforward for UK lawyers to practise in other EU countries. The current EU framework allows lawyers to provide legal services and establish law firms with few restrictions. As the Law Society of England and Wales noted in their remarks, lawyers within the EU benefit from a simple, predictable and uniform system of commercial and personal presence in other member states, with little scope for national variation.

However, unless an alternative agreement is reached, Brexit risks leaving a patchwork of 31 different regulatory systems and relationships for law firms to contend with in the EU27 and EFTA4, creating additional burdens and costs for lawyers and their clients. For example, EU directives have liberalised the legal services market to such an extent that it is currently easier for a UK lawyer to provide legal advice in Paris than it is for a Californian lawyer to provide legal advice in Illinois.

The Bar Council highlighted in the oral evidence sessions the challenges of operating under different jurisdictions post-Brexit, and the different levels of difficulty that could be present for lawyers wishing to practise across the EU. Many UK based international firms operate in EU jurisdictions through a branch of a UK firm, and that without specific agreement, this arrangement would not be permitted in certain jurisdictions post-Brexit. The risk of not securing continued mutual market access has seen some lawyers take matters into their own hands.

The Association of Partnership Practitioners (APP) noted in its separate written evidence that its members are putting in place contingency plans such as seeking requalification in another jurisdiction and reviewing the entities through which they practice in EU jurisdictions, while the Bar Council and Clifford Chance noted the number of UK solicitors qualifying in the Republic of Ireland. However, they observed that it is not unanimously agreed that this will work as an effective bypass. Despite this 1,600 solicitors in England and Wales have requalified automatically in the Irish Republic over the past two years.

Many solicitors or legal professionals without law degrees or other qualifications could be left unable to practise in certain countries after Brexit. This could be the case even for those who have many years' experience in the law, and of their clients' businesses and the facts of particular cases. To continue to be able to serve their clients, UK lawyers must be able to practise EU law via the mutual recognition of legal professional qualifications.

Legal services differ from other sectors, including financial services, as there is no need to follow a pan-EU body of law to set the standards at national level. Instead the EU framework for legal services has allowed each member state to set the standards for their profession whilst recognising each other's qualifications as equivalent.

This recognition allows several things (using France as an example):

- The right for a solicitor from England and Wales to operate in France using their home title as equivalent to a French lawyer – this can be on a temporary or permanent basis and they can give advice on French law, EU law and English and Welsh law.
- The right for a solicitor from England and Wales to requalify as a French lawyer through a requalification examination or after three years of practice in France.

But the current framework is not open for everyone. The Chartered Institute of Legal Executives (CILEX) observed in their written submission, that chartered legal executives are not currently allowed to practise in the EU, as they are not recognised under the definition of European Lawyer Condition within EU Directive 98/5/EC. They call for a new agreement to mutually recognise the status of lawyers from the relevant jurisdictions.

b) Fly-in fly-out

A large number of firms' clients are based in EU countries, and firms are able to serve these clients on a fly-in fly-out basis under the Lawyers' Services Directive. These rights allow UK lawyers to service the cross-border needs of businesses and individuals both from satellite offices in the EU and on a fly-in fly-out basis from their UK office. This is a daily business practice for many firms.

We heard evidence from Freshfields, Clifford Chance and Londono Global Law Firms on the need for lawyers to continue to be able to provide clients with the advice that they want, when and where they need it. If UK lawyers are not able to provide this, there is a risk that businesses may go elsewhere, leaving UK law firms less competitive. There is a clear need therefore to ensure that UK lawyers are able to continue to serve their clients post-Brexit on a fly-in fly-out basis.

c) Rights of audience and trade marks

At present, as the UK is a member of the European Union, UK lawyers enjoy rights of audience across EU courts, and legal professional privilege apply to their legal advice in European Commission investigations and at the level of the Court of Justice of European Union (CJEU). Following Brexit, these rights of audience and legal professional privilege may go. With the exception of EU/EEA lawyers, there is no precedent where a third country has been granted rights of audience in EU courts.

The APP highlighted in its written evidence the impact of potentially losing rights of audience in EU courts. UK lawyers would need to instruct EU lawyers to conduct advocacy in EU courts, and clients may therefore bypass their UK law firm and instruct firms which do have rights of audience at EU courts. Losing legal professional privilege at the CJEU would also be a material competitive disadvantage.

The effect of losing rights of audience would be felt across the legal services sector. The Chartered Institute of Trade Mark Attorneys (CITMA) highlighted in their written evidence the concerns of lawyers practicing in intellectual property law and trade marks. Without a suitable framework in place, UK chartered trade mark attorneys would lose the right to carry out EU trade marks and registered community designs work before the European Union Intellectual Property Office, including for UK clients. This would result in increased costs to UK businesses, damage to trans-national business relationships, and a diminished UK legal profession. The financial impact of UK chartered trade mark attorneys losing their right to represent clients at the European Union Intellectual Property Office (EUIPO) is likely to be between £789 million and £1.7 billion per year.

CITMA also highlighted that non-EEA applicants before the European Union Intellectual Property Office (EUIPO) need to have an address for service within the EEA to address objections,

and many UK chartered trade mark attorneys are appointed by clients in the USA, Japan, Australia, China and Canada for this specific purpose. If UK chartered trade mark attorneys cannot act then those clients must appoint other EEA attorneys in their place, and the work will be lost from the UK.

Laytons LLP emphasised that without rights of audience at EU courts, they will no longer be able to represent their clients both before the CJEU and the EUIPO. This will lead to the loss of potentially hundreds of long-standing client relationships.

CITMA also argued that the optimal position for UK chartered trade mark attorneys would be to remain a member of the EEA in order to retain rights of representation at the EUIPO, or a bi-lateral arrangement with the EU to ensure that UK chartered trade mark attorneys can continue to represent their existing and future clients at the EUIPO.

Recommendations:

1. The Government should ensure that mutual market access is retained, as currently envisaged, in any transitional arrangements.
2. The Government should retain mutual market access as far as possible in any future relationship with the European Union.
3. The Government should ensure that UK lawyers are able to continue to serve their clients post-Brexit on a fly-in fly-out basis.
4. The Government should ensure that any future relationship with the EU includes a mechanism for UK lawyers to practise EU law via the mutual recognition of professional qualifications and law firm structures.
5. The Government should seek to secure rights of audience in EU courts such as the CJEU and the EUIPO.

Part two - The importance of a labour mobility framework

Migration was a key issue in the wider debate in the referendum on the UK's membership of the European Union. Labour mobility, and the ability of law firms to recruit talented individuals was also a key theme throughout the APPG's inquiry.

The first oral evidence session of the APPG noted that the legal sector in the UK is increasingly diverse, attracting talent with different academic backgrounds and qualifications and allowing people into the profession in new ways such as through apprenticeships. The Law Society of England and Wales noted that the UK's competitive advantages are services, especially professional services. The success of the UK legal services sector has been built on the diversity of its workforce.

The APP noted that their 'membership requires highly skilled individuals to provide their services, meaning that additional restrictions on the talent pool represented by EU nationals would be unwelcome.' They also noted that their smaller member firms 'may be impacted by Brexit more heavily than appreciated, as smaller firms who work for EU based clients may lack the broader non-EU client base of larger firms and may be more impacted if key individuals are EU citizens or the pool of available workers exclude EU citizens.'

Lewis Silkin LLP highlighted that as a result of Brexit, immigration lawyers will increasingly seek clearance for foreign talent and argued that barriers being established will make the practise of law in the UK less competitive and raised concerns around potential changes to employment protections on unfair dismissal or discrimination.

The Law Society argued that rules which inhibit the mobility of highly-skilled legal professionals are unlikely to preserve jobs for UK nationals but risk the displacement of that work to more welcoming jurisdictions. Londono Global Law Firms emphasised this point by suggesting that lawyers with ability to practise across several EU member states were essential to serve its European wide client base, rather than those lawyers who are only able to cover one jurisdiction.

It is therefore vital that following Brexit, the immigration system operates in a way which does not restrict or lock away talent from our legal services sector. The Government should ensure that lawyers can continue to provide services in the EU and provide for the ability of the legal sector to easily recruit skilled individuals from outside the UK.

The Law Society argued that the overarching approach to the new immigration system must be shaped by adherence to the rule of law and principles of administrative fairness. They recommend that the Home Office should ensure transparency, fairness and accountability, base the system on reliable evidence, ensure that the new system is properly resourced and simplify and reduce the cost of the system.

The Bar Council urged the Government to keep restrictions on immigration low, and the APP recommended in their written submission that a reciprocal light touch regime, both in respect of immigration control and regulatory approval, would help maintain the high level of freedom lawyers presently enjoy to move and work across Europe.

Recommendations:

6. It is vital that following Brexit, the Government provides for the ability of the legal sector to easily recruit skilled individuals from outside the UK.
7. The Government should ensure that our immigration system does not block lawyers from continuing to provide services in the EU.

Part three - The need for legal certainty

More than any other issue, the call for legal certainty throughout the Brexit negotiations was clear from those that participated in the APPG's inquiry. The need for transitional arrangements, the importance of avoiding a 'no deal' scenario and early clarity on the terms of the UK's withdrawal and future arrangement are of paramount importance to the legal services sector.

a) The need for transitional arrangements

Throughout the inquiry, the importance of a transitional arrangement has been apparent.

Brexit will be the largest ever change to the UK's legal framework, and the legal services sector and the wider country must be ready to deal with those changes. A transition arrangement would be welcomed by the legal services sector, and detail on this arrangement made available at the earliest possible opportunity.

In their written submission, CILEX argued that 'at the point of exit and in the process of any prospective transition period, there should be absolute clarity as to what law is in effect.'

A transitional agreement would be essential in a situation where the terms of the UK's exit from the EU are agreed, but where the terms of the UK-EU future relationship have not yet been negotiated. Even if the UK and EU have agreed on withdrawal terms and established the new relationship before March 2019, a transitional period would likely be required so that the Government, EU member states, businesses and individuals could adapt to their new legal rights and obligations.

The APP argued that it is important to maintain the status quo during any transition period. They argue that it is particularly important that

individuals and groups of lawyers can continue to rely on the Establishment Directive, the EU rules which allow EU/EFTA lawyers to practise in other EU/EFTA member states, during the transition period in order to enable their EU/EFTA offices to continue to operate.

It was widely acknowledged throughout the APPG's inquiry, both by legal firms, or by representative bodies such as the Bar Council and the Law Society, that many in the legal sector are undertaking contingency planning as a result of the legal uncertainty surrounding Brexit. The implementation of those contingency plans would be disruptive and cost firms' money, and so many are holding on as long as possible before implementation. However, the APP argued that 'some firms may take the view that legal certainty may not come until it is too late to implement their contingency plans pre-Brexit, so may implement these plans before the post-Brexit arrangements have been agreed, and then be required to restructure their business again once the arrangements are agreed.'

CITMA highlighted that a number of larger UK trade mark attorney firms are establishing offices in other EU countries since the referendum, in order to mitigate the impact of Brexit on firms. Many smaller and independent firms do not have the resources to open such offices, and so are caught between being able to make arrangements to continue their clients work and potentially being forced to give up that work dependent on the outcome of Brexit negotiations.

It is clear that a transitional arrangement between the EU and the UK would benefit the legal services sector, providing legal certainty and allowing firms themselves to transition from the current framework to any agreed future framework.

b) The importance of avoiding a no deal

The Law Society argued that ‘in the interests of legal certainty, it is imperative that a ‘no deal’ scenario is avoided at all costs.’

A ‘no deal’ scenario would have a significant impact on legal services. The EU’s single market for legal services is facilitated by the current framework of EU Directives. These directives apply across the EU and EFTA and grant UK lawyers, and all other EU lawyers and law firms, the right to freely practise and establish in other jurisdictions in Europe. If there is no alternative or transitional arrangements agreed as part of the Brexit negotiations, the UK is likely to fall back on WTO arrangements under trade in legal services. As mentioned in section 1 a, this would involve 31 different legal regimes, depending on each EU and EFTA member state, many of which impose a number of restrictions and limit practice rights for third country lawyers and law firms.

Furthermore, under a no deal scenario, UK lawyers would immediately lose the right to represent their clients before EU courts and bodies, such as the EUIPO, a right which is held by lawyers who are authorised to practise in a member state or EEA state. In addition, clients of UK lawyers would no longer automatically be covered by legal professional privilege or client-lawyer confidentiality. This outcome would undermine legal certainty, increase legal costs and create confusion for clients who are in the process of taking cases through the national or EU courts, as they may not be able to rely on their legal teams to work on an ongoing case.

Laytons LLP outlined in their written submission that without a deal, Brexit will have a severely negative effect on their firm, leading to the termination of instructions, and the loss of numerous clients to firms within the EU27 jurisdictions. They will no longer be able to represent their clients at the EUIPO, in other EU states under the Lawyers Services Directive, before the Court of Justice of the European Union (CJEU), on competition law where issues of EU legal professional privilege are relevant to effective practice, and in the EU using our membership of a European Economic Interest Grouping. Businesses are more likely to select an alternative jurisdiction and governing law in contracts which in the medium term may lead to a downturn in the use of the civil and commercial courts in the UK, and thus a reduction in the dispute resolution work for firms like Laytons LLP.

In their written submission, the APP highlighted ‘major repercussions’ for firms and their employees as a result of no agreement with the EU. Firms and solicitors may have to close offices and cease operations, which would result in the redundancy of the individuals employed at those offices. They also argued that clients may choose to seek advice from alternative firms which would drive business away from legal services firms based or headquartered in the UK.

The Law Society argued that it is of vital importance that legal certainty and the rule of law are protected throughout the process of the UK’s withdrawal from the EU. It is imperative therefore that a ‘no deal’ scenario is avoided.

Recommendations:

8. The Government and the EU should agree on the draft withdrawal agreement as soon as possible to ensure a transition period which provides legal certainty.
9. Any transitional agreement should replicate the current legal framework as far as possible to ensure legal certainty and prevent businesses and individuals from having to adapt to changes in their rights and obligations twice – once during a transitional phase and once upon implementation of a new UK-EU agreement.
10. A ‘no deal’ scenario should be avoided at all costs.

Conclusion

The effect of Brexit on the legal services sector will be significant. Brexit will be the largest ever change to the UK's legal framework, and it presents both opportunities and risks for the legal sector. But those opportunities will only be possible if the risks are mitigated against, and the Government consider fully the key asks of the legal services sector in its negotiations with the European Union on the terms of withdrawal and the future relationship.

The mutual market access currently enjoyed by UK lawyers in the EU should continue as far as possible, including arrangements on fly-in fly-out rules, the mutual recognition of professional qualifications and practice rights.

The UK legal services sector relies on attracting top talent from around the world, and it is vital that appropriate labour mobility is maintained after Brexit.

It should come as no surprise that the legal services sector seeks legal certainty, and early agreement and detail on a transitional arrangement would be extremely beneficial to the sector. The cost of a no deal scenario for the legal sector would be substantial, and should be avoided at all costs.

Recommendations

The APPG makes the following 10 recommendations to Government:

1. The Government should ensure that mutual market access is retained, as currently envisaged, in any transitional arrangements.
2. We urge the Government to seek to retain mutual market access as far as possible in any future relationship with the European Union.
3. The Government should ensure that UK lawyers are able to continue to serve their clients post-Brexit on a fly-in fly-out basis.
4. The Government should ensure that any future relationship with the EU includes a mechanism for UK lawyers to practise EU law via the mutual recognition of professional qualifications and law firm structures.
5. The Government should seek to secure rights of audience in EU courts such as the CJEU and the EUIPO.
6. It is vital that following Brexit, the Government provides for the ability of the legal sector to easily recruit skilled individuals from outside the UK.
7. The Government should ensure that our immigration system does not block lawyers from continuing to provide services in the EU.
8. The Government and the EU should agree on the draft withdrawal agreement as soon as possible to ensure a transition period which provides legal certainty.
9. Any transitional agreement should replicate the current legal framework as far as possible to ensure legal certainty and prevent businesses and individuals from having to adapt to changes in their rights and obligations twice – once during a transitional phase and once upon implementation of a new UK-EU agreement.
10. A 'no deal' scenario should be avoided at all costs.

Acknowledgements

The APPG on Legal and Constitutional Affairs would like to thank everybody who submitted written evidence or attended an oral evidence session, and all the Parliamentarians who attended those sessions. In particular, we would like to thank:

The Bar Council
The Chartered Institute of Legal Executives (CILEX)
The Chartered Institute of Trade Mark Attorneys (CITMA)
The Association of Partnership Practitioners (APP)
Clifford Chance LLP
Freshfields Bruckhaus Deringer LLP
Lewis Silkin LLP
Londono Global Law Firms Ltd.
Laytons LLP

About the APPG on Legal and Constitutional Affairs

The All-Party Parliamentary Group on Legal and Constitutional Affairs exists to facilitate greater interaction between Parliament and the different branches of the legal profession, and to promote dialogue and understanding of legal and constitutional issues relating to justice and the legal services sector.

The APPG is co-chaired by Jonathan Djanogly MP and Lord Hunt of Wirral. Bambos Charalambous MP and Ellie Reeves MP are both officers of the APPG.

The APPG is supported by the Law Society of England and Wales, who provide the secretariat and administrative support.



For further information, please contact:

Joe Ferreira

Public Affairs Adviser

The Law Society of England and Wales

113 Chancery Lane

London

WC2A 1PL

Email: joe.ferreira@lawsociety.org.uk

Tel: 020 7320 5817