



The Law Society

www.lawsociety.org.uk



**BREXIT
AND THE LAW**

JANUARY 2017

THE LAW SOCIETY OF ENGLAND AND WALES

CONTENTS

FOREWORD	4
EXECUTIVE SUMMARY	6
CHAPTER 1: KEY THEMES FOR THE NEGOTIATIONS	10
The impact of the loss of reciprocity	10
The impact of loss of harmonised standards and pan-European regulation	10
The impact of removal of participation in EU bodies	11
The need to uphold international obligations	11
The importance of transitional arrangements	11
CHAPTER 2: THE IMPACT OF BREXIT ON THE LEGAL SERVICES SECTOR	12
Economic contribution of the legal services sector	12
Promoting England and Wales as a global legal centre	12
Continued access for UK lawyers to practise law and establish law firms in EU member states	13
Maintaining judicial cooperation in civil and commercial matters	17
Recognition and enforcement of judgments in specific areas	21
Ability to choose English and Welsh law	22
Relationship with other sectors	23
The legal sector's relationship with financial services	24
Opportunities for the legal services sector	24
CHAPTER 3: COLLABORATION WITH EU IN THE FIELD OF POLICING, SECURITY AND CRIMINAL JUSTICE ISSUES	25
CHAPTER 4: SPECIFIC ISSUES	27
Intellectual Property	27
CHAPTER 5: LEGAL CERTAINTY	28
The Great Repeal Bill	28
International conventions	30
CJEU jurisprudence	31
Transitional arrangements	31

FOREWORD

In September and October 2015 we published two reports which looked at the potential effect of Brexit on the legal sector. The first was an independent assessment of its economic impact. The second report examined the impact of the EU on England and Wales as a global legal services centre and jurisdiction of choice.

Over the years of membership our legal system has become intertwined with that of the EU. Unravelling this is a complex and challenging task with far reaching implications not just for our sector but for the whole of the UK economy.

Since the referendum result was announced we have been working tirelessly with our members, with partners across the legal and other sectors and, of course, with Government and parliamentarians from across the parties. This work includes the creation of our Brexit taskforce.

As well as multiple meetings with the key ministers, we have also held regular talks with key officials, business leaders, academics and other key stakeholders.

The legal sector underpins the UK economy – and not just because it is worth more than £25.7bn in its own right. In every part of the economy people rely on the advice and support of solicitors.

A 1% growth in the legal services market creates 8,000 jobs. Each £1 of additional turnover stimulates £1.39 in the rest of the economy. And the legal economy grew by 8% last year.

English and Welsh law is a vital export with a global reputation based on its common sense approach to contract law, and our widely respected judiciary. We are also a world centre for dispute resolution.

So we are delighted to be able to contribute to the wider effort to assess the opportunities and risks presented by Brexit. This submission on the impact of Brexit on legal services and the justice system is intended to help inform the coming negotiations as Britain prepares to leave the EU.

At the heart of this we have some key priorities:

- continued access for UK lawyers to practise law and base themselves in EU member states
- maintain mutual recognition and enforcement of judgments and respect for choice of jurisdiction clauses across the EU in civil cases
- maintain collaboration in policing, security and criminal justice
- to promote England and Wales as the jurisdiction of choice, ensuring that legal certainty is maintained throughout the process of withdrawal.

Throughout 2017 we will continue to work with the Government to ensure key legal issues are identified, kept to front of mind, that legal certainty continues and our members' voices are heard. At the same time, it is important to remember that the Law Society has a role in representing the public interest – keeping the public informed about key legal issues is central to what we do.



Robert Bourns

President of the Law Society of England and Wales

EXECUTIVE SUMMARY

The Law Society of England and Wales works globally to support and represent more than 170,000 solicitors, promoting the highest professional standards and the rule of law. We have held extensive consultations with our members asking for their views on the potential impact of leaving the EU on both their clients and their own businesses, to identify core issues in the legal sector to be considered in the Government's negotiations with the EU.

We have held roundtable events across England and Wales, discussions with our expert legal policy committees and with members of our Brexit taskforce. Both our policy committees and our Brexit taskforce are committed to helping the Government with discussions and tasks in plans to withdraw from the EU.

From our discussions, our view is that the key priorities for legal services and the justice system as part of any Brexit agreement are to:

1. Continue access for UK lawyers to practise law and base themselves in EU member states by maintaining, or introducing arrangements equivalent to:
 - a. the Lawyers' Services and Lawyers' Establishment Directives
 - b. the Professional Qualifications Directive

- c. Rights of audience before the Court of Justice of the European Union (CJEU) and legal professional privilege for communications in EU cases.
2. Maintain mutual recognition and enforcement of judgments and respect for choice of jurisdiction clauses across the EU (the Brussels I Regulation) in civil cases.
3. Maintain collaboration in policing, security and criminal justice to protect citizens, including information sharing and efficient and effective extradition arrangements.
4. Liberalise priority jurisdictions beyond the EU to increase international trade in legal services.
5. Ensure that Government works effectively with the legal services sector to continue to promote England and Wales as the governing law of contracts, the jurisdiction of choice and London as the preferred seat of arbitration.
6. Ensure that legal certainty is maintained throughout the process of withdrawal so that businesses and individuals are given sufficient time to adapt to both transitional arrangements and any agreed new legal framework.
7. Mitigate the impact on sectors of particular importance to the UK economy and the legal sector. We would specifically highlight:
 - a. financial services
 - b. technology, media and telecoms
 - c. energy and utilities
 - d. real estate and construction.

We ask the Government to consider the impact that wider policy decisions will have on the competitiveness of the legal sector and that it actively support the industry, particularly through its industrial strategy.

Key recommendations

Support legal services

- **Ensure continued access to practise in the EU** – The UK Government should seek to maintain access for lawyers to practise and establish within the EU through the Lawyers' Services Directive and Lawyers' Establishment Directive, or equivalent mechanisms. The UK should also seek access for lawyers to represent their clients before the EU courts and allow their clients to benefit from legal professional privilege.
- **Provide the ability to recruit skilled individuals from the EU** – The UK Government should support the continued international success of the legal sector by facilitating law firms' ability to recruit skilled individuals from outside the UK through a proportionate and efficient sponsorship and visa process.
- **Ensure lawyers can provide temporary services in the EU** – If, post-Brexit, the UK were no longer to be a participant in the single market, our members would wish to see reciprocated visa-free travel in Europe and the ability for solicitors to be able to maintain easy face-to-face client contact in other European countries through fly-in fly-out services.
- **Minimise wider uncertainty in legal services** – The UK Government should consider how policy changes to the legal services sector could have an impact on international competitiveness of the sector. In particular it will be important to consider how competitor jurisdictions could use any reforms to capitalise on uncertainty surrounding English and Welsh law or the courts of England and Wales.
- **Promote legal services** – The UK Government should continue to promote England and Wales as a global legal centre and English law as the governing law of contracts. We are already in discussions with the UK Government on how we can work with them on our campaign.

Maintain judicial cooperation in civil and commercial matters

- **Maintain recognition and enforcement of judgments with EU member states** – The UK Government should negotiate continued participation in the Brussels I framework as there is a need to maintain the reciprocal framework of recognition and enforcement between the UK and EU member states. It will help to keep English and Welsh law, and English and Welsh courts, attractive to businesses.
- **Maintain protections for consumers, employees and the insured** – The Brussels I framework also sets out special provision on weaker party protection which help the UK consumers and employees to bring claims in their home courts. As well as the Brussels I Regulation, the UK Government should maintain reciprocity with the EU on the Motor Insurance Directive, so that victims of accidents overseas can use their home courts and have the court's decision enforced near automatically.
- **Sign up to the Lugano Convention** – The UK Government should negotiate a continued participation in the Lugano Convention (a similar framework to Brussels I for EU and EFTA states). If the UK were not to continue participation in Brussels I, the UK should work with members of the Lugano Convention to adopt text which would align the Lugano Convention text with the newest version of the Brussels I recast Regulation.

- **Join global recognition and enforcement mechanisms independently as soon as possible** – The UK Government should, as a minimum, make a public commitment as soon as possible to independently become party to the Hague Convention on Choice of Court Agreements.¹ This covers recognition and enforcement of judgments where there is an exclusive choice of court agreement between the parties. Most commercial contracts do contain such a clause. Specifically, the UK should explore whether it could succeed to the Choice of Court Agreements Convention directly at the end of EU membership to avoid a gap in its application.
 - **Participate in and encourage the development of future global recognition and enforcement mechanisms** – The UK Government should continue to participate in and actively promote the Global Judgments Project and if the new convention is agreed in 2017, the UK should join the new convention.
 - **Ensure cases involving children are dealt with swiftly** – The UK Government should look to continue participation in Brussels II bis in respect of children matters. The Law Society is encouraged by the Government’s decision to opt-in to the proposed revision of the Regulation and proposes to engage fully in the process of revision.²
 - **Sign up to international conventions on family law independently** – Where the UK is a member of an international convention in family law due to its membership of the EU, the UK should signal as early as possible its intention to look to succeed or accede into that convention on leaving the EU. This includes the Hague Convention on Maintenance if the Maintenance Regulation is not kept.
 - **Maintain mechanisms that support swift operation of the courts** – The UK Government should consider maintaining participation in EU instruments on service of documents and taking of evidence as they facilitate the operation of the courts.
 - **Remain party to EU choice of laws systems** – The UK should continue to take part in the Rome I and Rome II regulations. If the UK is unable to continue to be part of Rome I and Rome II, the UK should maintain the rules contained in these regulations. As an immediate step the UK Government should make it clear that they will apply the rules set out in Rome I and Rome II by converting them into domestic law.
- Collaboration with EU in the fields of policing, security and criminal justice issues**
- **Continue cooperation and coordination of criminal court proceedings** – The UK Government should either remain a college member of Eurojust or seek to conclude a cooperation agreement with Eurojust, as Norway has done.
 - **Continue to share vital information with EU member states** – The UK Government should continue to share information related to law enforcement through Schengen Information System II.

¹ The UK is currently a signatory as part of the EU.

² The Law Society has some concerns on the matter of the matrimonial *lis pendens* rule, which can create an unhelpful ‘rush to court’ in divorce proceedings.

- **Continue cooperation of joint security operations** – The UK Government should continue its involvement in Europol as a member or through a cooperation agreement. The UK should also look to retain the European Arrest Warrant, which safeguards UK citizens and helps ensure that the interests of justice are served. The UK should seek to remain party to the European Investigation Order instruments, or negotiate equivalent mechanisms. Experience shows that extending such cooperation to non-EU states can take years to negotiate and can result in more limited forms of cooperation.
- **Provide legal certainty** – The UK Government should also give businesses and consumers the time and necessary clarity to adapt to the changes to rights and obligations in the case of either a new deal with the EU, or withdrawal from the EU without a new deal.
- **Maintain international obligations** – The UK Government should review its non-EU international obligations and ensure that participation remains on withdrawal from the EU. Where there is a multilateral arrangement, participation may continue by a simple notification. For the reasons of legal certainty and clarity, it would be advisable that the UK approaches the institution or state responsible for the administration of the agreement to affirm how it can continue membership or withdraw from the agreement.

Intellectual Property

- **Ensure the UK remains a centre of excellence for patent law** – Notwithstanding the UK's exit from EU membership, it should negotiate to ensure that the UK can continue to participate in the Unified Patent Court Agreement and retain the Court in London.

Provide legal certainty

- **The Government should publish a draft Great Repeal Bill** – Due to the significance of the legislation, the UK Government should publish a draft Bill to allow pre-legislative scrutiny to occur. It may be beneficial for the draft Bill to be scrutinised by a joint committee to ensure both Houses are given the opportunity to input into the draft Bill at this stage.
- **Negotiate transitional arrangements** – The Law Society recommends that the UK Government should negotiate practicable transitional arrangements with the EU. This will allow businesses to prepare for the new regime and effect necessary changes and should help avoid a 'cliff-edge' before a new relationship with the EU has been finalised.

CHAPTER 1: KEY THEMES FOR THE NEGOTIATIONS

The impact of the loss of reciprocity

The UK's membership of the EU creates a legal framework of reciprocal rights and obligations between states, which also confers rights and obligations to businesses and individuals. Ensuring that these reciprocal rights and obligations continue where they are of benefit to the UK must be a priority for negotiations.

In some instances, it might be possible for the UK legal sector to make greater use of existing international frameworks. In family law, for example, the UK is a signatory to the Hague Convention on Civil Aspects of International Child Abduction. In practical terms, however, these alternatives are often less effective and more time-consuming.

The impact of loss of harmonised standards and pan-European regulation

In a number of areas of law, the UK's membership creates rights and obligations for individuals and businesses which work hand in hand with harmonised standards to facilitate cooperation. Divergence between the UK and the EU regimes could mean businesses, particularly those looking to continue to trade with the EU, may need to conform to both. Such an impact could be particularly challenging for SMEs.



Example: Data and consumer protection standards

The EU has a common system for data protection and minimum standards for consumer protection. The impact on the UK and EU system diverging would mean businesses would be required to comply with both the UK and the EU rules in order to continue trading with the EU. The impact will be particularly felt by SMEs who might find additional bureaucracy burdensome and time-consuming. Furthermore, this may have an impact on those importers and exporters, who are using the UK to reach both the UK and the European markets from third countries.

The impact of removal of participation in EU bodies

Divergence from the EU will mean a new set of standards for the UK and a move away from EU institutions. Some responsibilities will need to be returned to UK bodies and in some areas there is likely to be a need for new institutions to be created in the UK to maintain standards and to oversee the behaviour of the market participants or licence operators. An example, which is of particular importance to competition law practitioners, is that the Competition and Markets Authority will need more resources to handle mergers meeting the threshold for one-stop review in Brussels and pan-European anti-trust cases.

The need to uphold international obligations

EU regulation has been a tool to transpose international standards into member state law, particularly in areas such as financial services and banking. In such areas there will be little scope to change the essential elements of rules and regulations. Anti-Money Laundering is an example: the UK is a member of the Financial Action Task Force and is bound by FATF rules regardless of its EU membership. It should also be noted that in a number of areas such as financial services, consumer protection and digital commerce, the UK has led the development of international regulation. Any significant changes from the EU framework would mean a departure from established UK practices.

The importance of transitional arrangements

Recommendation: The Law Society recommends that the Government should negotiate practicable transitional arrangements with the EU. This will allow businesses to prepare for the new regime and effect necessary changes and should help avoid a 'cliff-edge' before a new relationship with the EU has been finalised.



CHAPTER 2: THE IMPACT OF BREXIT ON THE LEGAL SERVICES SECTOR

Economic contribution of the legal services sector

In 2015, UK legal services contributed £25.7bn to the economy, of which £3.6bn was the net export value which contributed to a reduction in the UK balance of payments.³ The legal sector also employs, trains and supports over 370,000 people. Every 1% of growth within the legal sector contributes £379m and 8,000 jobs to the economy.

There are over 314,000 people employed in private practice. The legal services sector employs over 107,100 people in London and there are a number of other legal centres across England and Wales including Birmingham (7,600), Bristol (6,800), Cardiff (3,400), Leeds (8,200), Liverpool (5,500), Manchester (10,800) and Sheffield (3,500).⁴

The UK is the second largest legal services market in the world and the largest legal services sector within the EU.⁵

The UK accounts for 10% of global legal services fee revenue and 20% all European fee revenue. In 2014, Eurostat noted that the total value of the UK legal sector is almost three times the size of the German legal market and six times the size of the French market (the second and third largest European markets respectively).⁶

Promoting England and Wales as a global legal centre

England and Wales is recognised as a global legal centre for legal services, particularly for international commercial transactions, dispute resolution and arbitration. In 2015, more than 22,000 commercial and civil disputes were resolved through arbitration, mediation and adjudication in the UK.⁷ English and Welsh law is the governing law in global corporate arbitrations in English law.

TheCityUK's recent report on legal services noted that English and Welsh law is the most commonly used law in international business and dispute resolution. A survey of 500 commercial law practitioners and in-house counsel conducted by the Singapore Academy of Law found that 48% of respondents identified English law as their preferred choice of governing law in contracts.⁸

Many of the factors that make English contract law attractive will not change following the UK's decision to leave the EU, as contract law is determined at a domestic level. It will remain stable, reliable and predictable while offering the flexibility that makes it so attractive to commercial parties.

England and Wales is also renowned as a centre for commercial dispute resolution. In the Commercial

³ This accounts for 1.6% of the UK Gross Value Added and is five times the amount of accountancy, auditing, book-keeping and tax consulting combined.

⁴ 2013 – **The Economic Value of the Legal Services Sector**

⁵ The UK accounts for 10% of global legal services fee revenue and 20% of all European fee revenue.

⁶ Value of turnover or gross premiums written for legal activities (this includes legal representation of one party's interest against another party, such as advice and representation in civil cases, criminal actions, and labour disputes. It also includes preparation of legal documents, such as articles of incorporation, partnership agreements or similar documents in connection with company formation, patents and copyrights, preparation of deeds, wills, trusts and so on, as well as other activities of notaries, bailiffs, arbitrators, examiners and referees).

⁷ TheCityUK report on legal services 2016.

⁸ TheCityUK report on legal services 2016.

Court, nearly 1,100 claims were issued with two-thirds involving at least one party whose address was outside England and Wales. Over the last ten years, there have been a number of jurisdictions looking to compete with England and Wales for our international commercial dispute resolution specialism. Both Dubai and Singapore have attempted to replicate the English Commercial Court and build their expertise in commercial dispute resolution.

Some competitor jurisdictions might see Brexit as an opportunity to suggest instability within English law and to offer themselves as alternatives as the governing law of contracts and their courts for dispute resolution. Many international commercial contracts specify the same governing law and court. It is therefore important that during negotiation, the Government takes steps to ensure English and Welsh law remains the preferred choice for the governing law of contracts as this often leads businesses to also specify England and Wales as the jurisdiction. If fewer contracts begin to specify English and Welsh law, there is likely to be less demand for dispute resolution within the UK.

Recommendation: Promote legal services – The UK Government should continue to promote England and Wales as a global legal centre and English law as the governing law of contracts. We are already in discussions with the UK Government on how we can work with them on our campaign.

Recommendation: Minimise wider uncertainty in legal services – The UK Government should consider how policy changes to the legal services sector could have an impact on international competitiveness of the sector. In particular it will be important to consider how competitor jurisdictions could use any reforms to capitalise on uncertainty surrounding English and Welsh law or the courts of England and Wales.

⁹ As well as Norway, Iceland, Switzerland and Liechtenstein.

¹⁰ Based on gross fee revenue.

Continued access for UK lawyers to practise law and establish law firms in EU member states⁹

The UK has an excellent reputation as an open market for legal services. Four of the largest law firms in the world, judged by fee income, have their main base of operations in the UK.¹⁰ Two of the four largest law firms in the world, based on headcount, have their main base of operations in the UK.

There are more than 200 foreign firms in London, including 100 US firms, and firms from over 40 jurisdictions. The UK, and specifically London, is seen as the European hub for legal services, in part, due to the ability to practise and establishment across the EU.

It is commonly accepted that the EU single market in services is a work in progress. However, in legal services specifically, the single market, which also applies to EEA countries and Switzerland, is already a reality. This allows UK lawyers and law firms to benefit from a simple, predictable and uniform system of commercial and personal presence in other EU member states, with little scope for EU member states to introduce national variations.

Through the Lawyers' Services Directive 1977 (temporary provision of legal services), Lawyers' Establishment Directive 1998 (on permanent establishment), Professional Qualifications Directive 2005 (on mutual recognition of qualifications) and Framework Services Directive 2006 (establishing a single market in services), individual solicitors and law firms have extensive rights. These directives allow them to:

- provide services on a temporary basis
- establish permanently in another member state under their home title

- provide advice on the law of England and Wales, EU law and international law but also on the host state law, subject to competency and with some very limited restrictions (e.g. in probate and conveyancing work in a number of jurisdictions)
- appear in court in conjunction with a local lawyer
- requalify without an equivalent examination after three years of regular and effective practice of host state law
- set up a branch of a home state law firm using the firm title or to use one of the legal forms of the host state to set up a new entity.

This current system is seen as a success both by UK firms and other EU law firms as it allows firms and individual solicitors to be treated on a par with domestically established firms across the EU. It provides a simple, predictable and uniform system of commercial and physical presence across the EU member states.

A 2012 report by the Council of Bars and Law Societies of Europe (CCBE), says that the legal framework for lawyers is 'highly successful'.¹¹ The report says that the legal framework has provided the conditions under which cross-border needs of clients can be met, and has facilitated access to legal services for clients requiring assistance in cases involving more than one member state.

During our discussions with our members, they show support for the current legal framework for lawyers to practise and establish across the EU.

The Law Society has also had discussions with a number of European Bars and Law Societies since the UK's vote to withdraw from the EU. Many have supported the continuation of the current framework with the UK so that their lawyers are able to practise in the UK and vice versa.

Both UK law firms and US firms based in the UK may still be able to practise in a number of EU countries (but not necessarily all) but our members anticipate it will be more complicated and costly. Members anticipate that it will impact on their bottom line and are likely to have fewer opportunities.

A significant side effect could be that US law firms would have fewer incentives to employ UK qualified lawyers as a way to access European markets or EU practice areas, for example European competition, state aid and procurement work. The UK solicitor title might therefore be less desirable for US law firms.

Thirty six of the top 50 UK law firms have at least one office in another EU member state. UK law firms have a presence in 25 of the 27 member states (there is no presence in Malta and Cyprus due to the smaller size of the market). It is also a daily business practice for solicitors to provide legal services within the EU on a temporary basis.¹²

For the UK, the loss of rights equivalent to those granted under the Lawyers' Services Directive, Lawyers' Establishment Directive and the Professional Qualifications Directive could potentially:

- Make the UK less attractive to third country¹³ businesses and law firms which often look to set up an office in the UK as a means of gaining access to the EU market.¹⁴

¹¹ **Evaluation of the Legal Framework for the Free Movement of Lawyers** – Final Report.

¹² There are no exact figures available for the number of solicitors of England and Wales practising temporarily (e.g. fly-in fly-out) in EU member states as it requires no prior authorisation under the current regulations.

¹³ i.e. non-EU/EEA.

¹⁴ The Qualified Lawyers Transfer System (QLTS) allows those qualified in non-EU countries to requalify as an England and Wales solicitor and practise English and Welsh law.

- Lead to firms in England and Wales losing existing clients and business partnerships, as England and Wales solicitors would not automatically be able to practise local or EU law or establish in member states. It may not be possible for them to appear before member states' courts. All these factors could mean they become less attractive to both existing and prospective clients as well as causing loss of opportunities to grow their business effectively and quickly at an international level.

Recommendation: Ensure continued access to practise in the EU – The UK should seek to maintain access for lawyers to practise and establish within the EU through the Lawyers' Services Directive and Lawyers' Establishment Directive, or equivalent mechanisms. The UK should also seek access for lawyers to represent their clients before the EU courts and allow their clients to benefit from legal professional privilege.

Ability to practise outside of the EU/EEA/ Switzerland

Outside the internal market for legal services – which extends to the EEA countries and Switzerland – UK lawyers and law firms would lose rights to practise and establish and would rely on the World Trade Organisation (WTO) framework and the General Agreement on Trade in Services (GATS). The EU framework for legal services is sophisticated and functions well and offers a far more advanced level of market access than the GATS. UK lawyers and law firms could face significant restrictions on practising and establishing in EU member states, as many jurisdictions are far less open than England and Wales. Each member state is able to list its own limitations on the market access and national treatment of foreign lawyers as part of the EU schedule of commitment under the GATS.

A number of EU countries have restrictive rules such as:

- a nationality requirement, meaning someone can only be a EU/EEA/Swiss national to requalify/practise host state law, eg Austria
- local content requirements, where one also has to be qualified in local law, eg France
- strict rules prohibiting local lawyers from partnering with non-EU lawyers, eg Spain and Sweden
- compulsory membership of professional bodies in relation to commercial presence, eg France, Germany and Luxembourg
- restrictions relating to company structure or commercial presence, such as restrictions on foreign investment in law firms, eg France, Spain or Portugal.

Access to the EU courts

EU membership currently allows English and Welsh solicitors to represent their clients before the EU courts and allows the clients to benefit from legal professional privilege (LPP). The loss of these rights would almost certainly significantly impact on a number of practice areas including competition law. There may also be problems with the extent to which clients can benefit from legal professional privilege – which would be of serious concern to both lawyers and their clients or prospective clients. This could also pose a serious competitive disadvantage to firms wishing to compete with their EU/EEA/Swiss counterparts.

For a firm operating internationally, it is crucial to be able to represent clients in different courts. Many UK law firms receive instructions from clients based in other European countries and are involved in several cross-border disputes. Retaining the rights of audience and legal professional privilege is essential for the law firms to continue to provide the best possible services to their clients.

Mutual recognition of qualifications

The qualification of solicitor is recognised across EU member states through the Professional Qualifications Directive (PQD). Solicitors can requalify into any EU/EEA legal profession through an

equivalence examination under the PQD or through the Lawyers' Establishment Directive after three years of establishment and effective and regular practice of host state law (including EU law).

The PQD is particularly beneficial as it allows non UK lawyers to requalify as English and Welsh solicitors. The solicitor qualification is attractive for those lawyers operating at an international level. Due to the dominant use of the law of England and Wales and the international standing of the solicitor qualification, some global law firms ask their staff to requalify in either English and Welsh common law as an alternative to New York state law (which is often an alternative for businesses).

If the UK left the EU/EEA and was not able to maintain the PQD separately, the UK may be able to establish a mutual recognition agreement. However some of the education and training requirements in the UK could make mutual recognition more difficult. We are, for example, the only country to allow non-law graduates to become lawyers. Under PDQ, this route to qualification (bringing a wide range of alternative skills, knowledge and experience to the legal profession) is automatically recognised across the EU. However UK lawyers without a law degree do not achieve equivalence in many US states, and in particular with the New York State Bar.

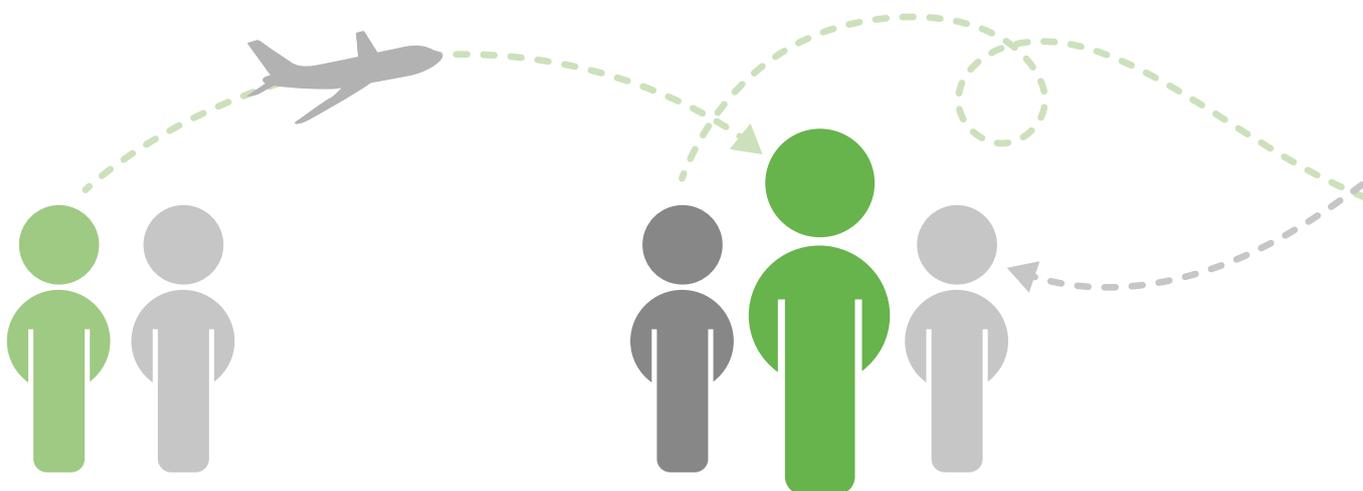
Access to skills

Free movement of people within the EU is beneficial to law firms as they can easily employ legal and other staff from the EU in their UK offices, just as solicitors and other staff from England and Wales firms can easily gain work in other EU states. From the legal sector's view, continued free movement would be beneficial economically, but we of course recognise that there is a competing public policy commitment to control immigration.

The uncertainty around the future status of EU citizens currently working in the UK and the reciprocal rights of UK citizens who are currently working in the EU must be resolved as soon as is practicable.

Recommendation: Ensure lawyers can provide temporary services in the EU – If, post-Brexit, the UK were no longer to be a participant in the single market, we would wish to see reciprocated visa-free travel in Europe and the ability for solicitors to be able to maintain easy face-to-face client contact in other European countries through fly-in fly-out services.

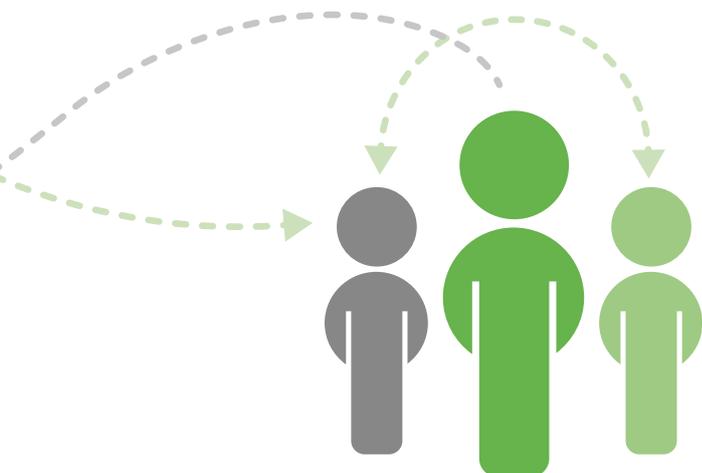
When overseas workers can be employed within the limits permitted by immigration policy, law firms, like many other businesses, need faster access to them through an efficient sponsorship process.



England and Wales law firms are highly successful within Europe and beyond. A significant proportion of the legal sector's value to the UK economy is generated by international law firms. These firms advise on complex deals spanning multiple jurisdictions. They operate in a global marketplace and have to meet the demands of international clients against tough competition from rival legal centres in the US, Europe and Asia. To do this, they must be able to recruit and deploy teams of specialist lawyers across the world with market-relevant experience and skills which, by definition, cannot always be sourced from within the UK. These firms draw heavily on the mobility of international staff to provide international services.

Put simply, London is a good place for global businesses to be based geographically and commercially, with easy transport links when a client abroad requests a face-to-face meeting.

Recommendation: Provide the ability to recruit skilled individuals from the EU – The UK Government should support the continued international success of the legal sector by facilitating law firms' ability to recruit skilled individuals from outside the UK through a proportionate and efficient sponsorship and visa process.



Maintaining judicial cooperation in civil and commercial matters

Mutual recognition and enforcement of judgments in civil and commercial matters

England and Wales is renowned as a global centre for dispute resolution, particularly for international commercial cases. In part this is because a judgment made in an English or Welsh court is recognised and enforced almost automatically in countries across the EU. There are a number of EU instruments that facilitate this free movement of judgments:

- Brussels I Regulation
- Service of Documents
- Taking of Evidence Regulations.

Brussels I Regulation

Currently the UK is party to the Brussels I Regulation which sets out a uniform system under which civil and commercial judgments are recognised and enforced throughout the EU area. As the UK renegotiates its position with the EU, the recognition and enforcement of judgments in civil and commercial matters might no longer be automatic and therefore the UK will need to negotiate a new bilateral framework with the EU.

The Brussels I framework determines which national court has jurisdiction, recognising where there is a choice of court clause or not between parties to the dispute. Following on from this it provides for a near-automatic recognition allowing parties to enforce the judgment in all EU member states. It covers all judgments reached in civil and commercial matters, including contractual and non-contractual disputes, employment, insurance and consumer disputes.

Additionally as a member of the EU the UK is signed up to the Hague Convention on Choice of Court Agreements which sets out rules for recognition of judgments where there is a choice of court agreement between the parties. Currently Mexico and Singapore have also ratified the Convention, and the USA and Ukraine have signed the Convention but have not ratified it which means it is not currently enacted in those two countries.

Participation in Brussels I:

- Encourages cross-border trade – as cross-border trade continues to grow, commercial parties will correspondingly need judgments to be enforced against counterparties with assets in other countries. Brussels I allows them to do this easily and cheaply due to the near automatic nature of the mechanisms. This can encourage investment in member states and promotes the growth of UK businesses overseas. The ability to enforce judgments (or awards in the case of arbitration) in a country is often a threshold question for businesses contemplating an investment in that country so will be beneficial for UK businesses in the EU and for those EU businesses looking to continue to trade with the UK.
- Increases the predictability and certainty leading to reduced costs for businesses – these mechanisms give businesses a level of predictability that when they pick England and Wales as the jurisdiction for their dispute to be heard, this choice will be respected by other countries. It also gives them a better ability to predict where they might sue and be sued across member states which is also attractive. Such conditions allow businesses to reduce time and costs as local law advice may not be necessary at the transaction stage, again encouraging the use of English and Welsh law.
- Makes England and Wales attractive to litigants – maintaining Brussels I would provide a continued incentive for parties to negotiate jurisdiction clauses in favour of the English courts (and select English and Welsh law to govern their contracts) as those judgments will still be enforceable throughout the EU.
- Provides protection for consumers – Brussels I gives consumer protection by allowing consumers to sue or defend themselves in the home court which is more familiar to them.

There is anecdotal evidence that some foreign businesses are already voicing concerns around recognition and enforcement of English judgments, discouraging them from naming England and Wales as the jurisdiction of choice in commercial contracts. If this continues, the situation will adversely affect the legal services sector in England and Wales and the large contribution it makes to the UK economy.

Recommendation: Maintain recognition and enforcement of judgments with EU member states – The UK Government should negotiate continued participation in the Brussels I framework as there is a need to maintain the reciprocal framework between the UK and EU member states. It will help to keep English and Welsh law, and English and Welsh courts, attractive to businesses.

Recognition and enforcement in consumer issues Brussels I also covers a number of areas which are significant for individual consumers including employment, insurance and business to consumer disputes. Brussels I allows the consumer to sue or defend themselves in the home court where they are likely to be familiar with the process. It also means that consumers are able to enforce their judgments almost automatically across the EU.

The reversal of the normal jurisdiction rule helps to allow the consumer, victim or employee – under certain circumstances – to have the case brought in their home system, which they are likely to be more familiar with.

Also, the combination of the Brussels I Regulation and the Motor Insurance Directive, allows UK victims to use their home courts to pursue insurance claims, which is particularly important where the accidents involve personal injuries or fatalities in other EU jurisdictions.

Recommendation: Maintain protections for consumers, employees and the insured – The UK should maintain reciprocity with the EU on the Motor Insurance Directive, alongside the Brussels I Regulation, so that victims of accidents overseas can use their home courts and have the court’s decision enforced near automatically.

If the UK is not party to Brussels I or the Lugano Convention (a similar framework to Brussels I for EU and EFTA states), the UK will have to consider alternatives for recognition and enforcement of judgments for insurance, employment or consumer contracts, as the Hague Conference Conventions do not provide for weaker party protection. In consumer transactions outside the EU, the consumer faces the challenge of choice of court clauses within standard terms and conditions, which means they might be unable to have their case heard in the court that is familiar to them.

Alternatives to Brussels I Regulation

Recommendation: Sign up to the Lugano Convention – There are some alternative options to the Brussels I Regulation, including joining the Lugano Convention. If this option was chosen, the UK should work with members of the Lugano Convention to adopt text which would align the Lugano Convention text with the newest version of the Brussels I Regulation recast.

A particular benefit of Brussels I over the Lugano Convention is that parties can no longer frustrate a case by racing to open proceedings in courts of member states known to be slow in making a determination of jurisdiction rather than the court chosen under the choice of court agreement.

It must be noted that the Lugano Convention will need to be ratified by all parties involved, which may result in a delay, in which case a transitional arrangement ensuring continued recognition and enforcement may be needed.

Recommendation: Join global recognition and enforcement mechanisms independently as soon as possible – The UK should, as a minimum, make a public commitment as soon as possible to independently become party to the Hague Convention on Choice of Court Agreements¹⁵. This covers recognition and enforcement of judgments where there is a choice of court agreement between the parties. Most commercial contracts do contain such a clause. Specifically, the UK should explore whether it could succeed to the Choice of Court Agreements Convention directly at the end of EU membership to avoid a gap in its application. However, it needs to be noted that this Convention does not apply where there is a hybrid choice of court agreement, which is often used in financial services.

¹⁵ The UK is currently a signatory as part of the EU.



Case study: differences between the EU and the Hague Conventions' mechanisms

A small business based in Manchester buys some glass from a factory in Athens. The contractual documents do not contain a choice of court clause. A dispute occurs. The Greek manufacturer says payments have been missed; the UK company claims the glass is defective. The Greek company threatens to bring proceedings against the Manchester company in the courts of Thessaloniki.

Under the Brussels regime, the starting point would be that a claimant should sue the defendant in its place of domicile. So, in this scenario, the English company could be fairly confident that the general rule would be followed and it would be sued in England. It could also be fairly confident that if the Greek company did initiate proceedings in Thessaloniki, the Greek courts would stay those proceedings (as per the Brussels regime). There are of course alternative grounds the Greek company could rely on – place of performance or place of harmful event – but we do not consider them here.

Outside the Brussels regime, the English company would need to investigate what the relevant rules are in Greece and whether it has any basis to challenge any subsequent proceedings brought in Greece. The English company may as a result face increased legal costs investigating the position, as well as the costs and uncertainties involved in litigating in a foreign jurisdiction in a foreign language if proceedings do progress in Greece.

Also, if the English company wanted to bring a claim against the Greek company in the courts in Manchester it might be able to rely on an alternative ground of jurisdiction contained at Article 7(1) of the Brussels Recast Regulation – the place of performance of the contract. For a sale of goods, the place of performance is where goods are delivered (or should have been delivered) ie Manchester. It would not need permission to serve those proceedings outside the jurisdiction on the glass company in Greece. If the UK is not a party to the Brussels Recast Regulation or the Service Regulation, the English company will presumably have to seek the English court's permission to serve proceedings out of the jurisdiction (adding to costs and time) and have to persuade the court that the claim falls within one of the 'jurisdictional gateways'; for example it may have to persuade the court that the breach of contract took place in England. The English company may also have to seek local law advice as to how to serve the proceedings in Greece, because it could not rely on the Service Regulation.

Recommendation: Participate in and encourage the development of future global recognition and enforcement mechanisms – The UK Government should continue to participate and actively promote the Global Judgments Project and if the new convention is agreed in 2017, the UK should join the new convention. Even though the Convention does not cover as many issues as Brussels I, as it does not provide for a similar framework for weaker party protection as Brussels I on insurance, consumer or employment contracts it would provide recognition and enforcement of judgments in a number of areas, possibly with both the EU and the USA expected to ratify the convention.

Recognition and enforcement of judgments in specific areas

Insolvency

The Insolvency Regulation provides for the recognition of opening insolvency proceedings in one member state. The Insolvency Regulation provides a speedy and efficient procedure, which is particularly beneficial if the business is being sold.

Family cases

The EU has a role in family law matters. While each individual member state has its own rules on separation, divorce, maintenance of spouses and children, contact, guardianship and other family law matters, there are specific EU measures which deal with cross-border implications, primarily the Brussels II bis Regulation and the EU Maintenance Regulation. The Brussels Regulation allows mutual recognition of divorce orders and decides jurisdiction and forum of divorce cases, and close collaboration

of courts and national welfare authorities in matters of children and jurisdiction, recognition and enforcement of children orders, child protection and child abduction.

Brussels II bis is beneficial to UK citizens in relation to children matters as it:

- provides an automatic system of recognition of contact orders
- provides easier enforcement of child arrangement orders which decide where a child lives and how much time they spend with each parent
- allows cases to be transferred to a court that is best for the child and the case.

Recommendation: Ensure cases involving children are dealt with swiftly – The UK Government should look to continue participation in Brussels II bis in respect of children matters. The Law Society is encouraged by the Government's decision to opt-in to the proposed revision of the Regulation and proposes to engage fully in the process of revision.¹⁶

In any international cooperation regime there has to be a mechanism for resolving disputes between countries, in this case the UK and an EU member state. If adjudication by the CJEU about the interpretation of Brussels II is politically unacceptable to the UK, then an alternative mechanism will need to be found.

EU rules in the family law area generally build on existing international conventions. If the UK does not continue to be party to Brussels II bis, the applicable regime will be the one provided by the relevant international conventions.¹⁷

¹⁶ The Law Society has some concerns on the matter of the matrimonial *lis pendens* rule, which can create an unhelpful 'rush to court' in divorce proceedings.

¹⁷ Hague Convention on Child Abduction 1980, Luxembourg Convention 1980, Hague Child Protection Convention 1996.

Recommendation: Sign up to international conventions on family law independently – Where the UK is a member of an international convention in family law due to its membership of the EU, the UK should signal as early as possible its intention to look to succeed or accede into that convention on leaving the EU. This includes the Hague Convention on Maintenance if the Maintenance Regulation is not kept.

Service of documents

Recommendation: Maintain mechanisms that support swift operation of the courts – The UK Government should consider maintaining participation in EU instruments on service of documents and taking of evidence as they facilitate the operation of the courts.

There are alternative regimes established by the Hague Conventions which have been ratified by the majority of the EU member states and other non-EU states, including the UK. However, practitioners involved in the processes have highlighted how the procedures are more cumbersome and last much longer than those under the EU Regulations. This means that the proceedings become slower and more costly for the parties involved.

Ability to choose English and Welsh law

TheCityUK's recent report on legal services noted that English and Welsh law is the most commonly used law in international business and dispute resolution.

Rome I and II Regulations set down rules governing choice of law. They set out the rules by which law is to be applied to a case having cross-border dimensions eg the parties to a contract can choose to apply English law to the dispute, even though the case would be heard in France and the French court must apply English law to the dispute.

Under Rome I, if the parties agree on English and Welsh (or any other) law as the governing law of the contract, this must be respected by the courts of the EU member states. Because it applies to third countries and there is no need for reciprocity, recognition of the choice of English and Welsh law should not be affected by Brexit as long as Rome I remains unchanged.

Rome I also states that consumer contracts will be governed by the law of the country where the consumer lives if the business operates or undertakes marketing in the consumer's country. As many consumers now undertake cross-border transactions, Rome I ensures that if they have to undertake a dispute it can be done using the law they are familiar with.

Rome II outlines rules for determining which law governs non-contractual obligations, for example in relation to a tort. In relation to a tort, the general rule is that the national court must apply the law of the country in which damage was done.

There is no need to secure reciprocity or mutuality of the arrangements, because the Rome II rules are also applied automatically to third countries and EU member state courts will continue to apply English and Welsh law when the rules dictate so.

Recommendation: Remain party to EU choice of laws systems – The UK should continue to take part in the Rome I and Rome II regulations. If the UK is unable to continue to be part of Rome I and Rome II, the UK should maintain the rules contained in these regulations. As an immediate step the UK Government should make it clear that they will apply the rules set out in Rome I and Rome II by converting them into domestic law.

Relationship with other sectors

The top 50 UK law firms conduct deals on behalf of clients in the following industries:¹⁸

- Finance and banking – 33%
- Fund/investment management – 11%
- Technology, media and telecoms – 9%
- Energy and utilities – 10%
- Real estate and construction – 5%
- Manufacturing – 3%
- Other – 29%

Financial services is also a key sector for smaller and specialist law firms. Looking at the entire market, including smaller and specialist law firms, the importance of demand from financial services is lower compared to its importance in deals advised on by the top 50 firms (at around 20% in 2013).¹⁹ This was nevertheless more than three times the demand from the next largest source outside of internal purchases within the legal sector (construction, 5%).



¹⁸ <http://www.lawsociety.org.uk/support-services/research-trends/city-legal-index/>

¹⁹ The EU and the Legal Sector (Law Society 2015).

The legal sector's relationship with financial services

The financial sector is a key purchaser of legal services in the UK, especially in the City. Between 2009 and 2014, financial services accounted for 44%²⁰ of the total value of transactional work amongst the Top 50 City law firms.²¹ Maintaining London as a global financial centre will be important if the legal services sector is to continue its vital contribution to the UK economy.

Engagement with individual international firms who serve financial services clients suggests that they would adapt to new circumstances. If financial services clients move elsewhere in the EU, then a number of firms have told us that they would follow their clients, including moving offices or headquarters to other parts of the EU if a new financial centre emerged in other locations. Their approach depends on the model of individual firms. The loss of passporting, in particular, could affect financial services providers, particularly medium and small providers operating outside the City which account for over two-thirds of the 2.2million people employed in the UK's financial and related professional services.

If large firms are not undertaking work in England and Wales and smaller providers reduce in size, it will have implications for the legal sector's contribution to the UK economy, and at an individual level, on England and Wales' qualified lawyers working in those firms.

One particular issue on the use of England and Wales for dispute resolution in financial services is the wording of Article 46 of the Markets in Financial Investments Regulation (MiFIR). It compels parties offering financial services from outside the EU to

a party within the EU to ensure that the dispute or arbitration can take place within a member state. This may lead to UK financial institutions having to resolve their dispute in a member state rather than in English and Welsh law, leading to a decrease in dispute resolution here.

Opportunities for the legal services sector

Leaving the EU does not seem to offer significant benefits or growth opportunities for the legal sector in itself – although in the short term it has been acknowledged that current levels of uncertainty and potential changes as a result of withdrawal have prompted a spike in the demand for legal advice. Similarly, clients will be looking to their legal advisers to help them understand and adapt to changes resulting from future negotiations.

The legal sector could benefit from future trade deals with markets other than the EU if these successfully enable or facilitate access to markets that are currently closed or present barriers to the legal services sector.

The Law Society is already working actively to liberalise a number of legal markets. If future trade deals are successfully negotiated with countries of particular interest to the legal sector, this will help to maximise the opportunities for growth in the trade of legal services more generally.

²⁰ The EU and the Legal Sector (Law Society 2015).

²¹ <http://www.lawsociety.org.uk/support-services/research-trends/city-legal-index/>

CHAPTER 3: COLLABORATION WITH EU IN THE FIELD OF POLICING, SECURITY AND CRIMINAL JUSTICE ISSUES

The review into EU criminal measures in 2014, to which the Law Society contributed, means that the UK has recently considered which measures are important to ensure mutual cooperation in criminal justice and security.

This review has streamlined the UK's involvement in criminal justice and security measures. The Law Society has highlighted the four priorities for effective continued cooperation with other member states to help protect UK citizens and ensure effective law enforcement on cross border issues.

Any reduction in the level of access and cooperation the UK enjoys in the criminal justice sector will impair and cause delay in effective law enforcement. Swift exchange of information is needed to establish cross-border investigatory teams and recover property. The relationships between European police forces have developed over time to achieve this mutual trust and cooperation, much of this developed through joint initiatives introduced by the EU. This level of trust towards the UK will be difficult to maintain if the UK is no longer involved in cross-border mechanisms and agencies.

With involvement in all of these measures, the UK will also have to consider safeguards for personal data and these will need to be negotiated.

Cooperation of courts

The UK's membership of Eurojust allows it to benefit from the coordinated work of joint investigation teams across member states which facilitate the prosecution of serious cross-border criminal offences including terrorism and child trafficking.

²² SISII enables participating countries to share and receive law enforcement alerts in real time for: Persons wanted for arrest for extradition purposes for whom a warrant has been issued; missing persons who need to be placed under police protection or in a place of safety; witnesses, absconders or others to appear before the judicial authorities; people or vehicles requiring specific checks or surveillance; items that are lost or stolen, and which are sought for seizure, or for use as evidence (eg firearms, passports).

There is precedent for non-member states to have a relationship with Eurojust. While Norway is not an associate member of Eurojust, it signed a cooperation agreement with the organisation in 2005, and has liaison prosecutors based at Eurojust. If the UK were to move from national college members to liaison officers, it is likely to lose influence on the work of the organisation. The USA has also signed a cooperation agreement.

Recommendation: Continue cooperation and coordination of criminal court proceedings –

The UK Government should either remain a college member of Eurojust or seek to conclude a cooperation agreement with Eurojust as Norway has done.

Cooperation through the sharing of information

The UK currently participates in the Schengen Information System II (SISII), the European-wide IT system to facilitate cooperation for law enforcement including persons wanted for extradition, missing persons and witnesses. The UK has not opted in for immigration and border control purposes.

Recommendation: Continue to share vital information with EU member states – The UK Government should continue to share information related to law enforcement through SISII.

Cooperation of joint security operations

Europol focuses on intelligence analysis to support the operations of national law enforcement agencies in member states. This allows EU member states to continue to work together to combat serious crime including unlawful drug trafficking, illegal immigrant smuggling, trade in human beings, money laundering and terrorist activities.²² Norway has a cooperation agreement with the EU which centres on exchange of operational information but can also include Europol activities such as exchange of strategic intelligence and specialist knowledge of participation in training.

The Law Society welcomes the recent Government commitment to opt into the most recent Europol regulation in May 2017.

Recommendation: Continue cooperation of joint security operations – The UK Government should continue its involvement in Europol as a member or through a cooperation agreement.

European Arrest Warrant (EAW)

The EAW sets out a court-led process whereby the surrender request (in the EU, surrender replaces extradition) from one member state's courts or prosecutors is almost automatically recognised and enforced. The EAW is more efficient than traditional extradition requests which are usually dealt with by the diplomatic services.

The EAW is particularly important as the UK may not be able to fall back on previous extradition arrangements, namely the 1957 Council of Europe Convention on Extradition (ECE). Some member states would be unable to apply the ECE due to superseding legislation and others never brought it into force (eg Ireland in relation to the UK) so bilateral arrangements would be required which are likely to be less efficient.²³ Our members have noted that this could lead to extraditions taking years, rather than months as under the current system.

Recommendation: Continue cooperation of joint security operations – The UK Government should look to retain the EAW, which safeguards UK citizens and helps ensure that the interests of justice are served.

The UK would have to have some involvement in the CJEU's jurisdiction under the European Arrest Warrant in order to settle inter-state disputes. A

possible option could be to negotiate to have CJEU judgments as influential but not binding.

European Investigation Order (EIO)

As from 22 May 2017, the EIO will replace most of the existing laws in the area of judicial cooperation.²⁴ The new mechanism will cover almost all investigative measures, such as interviewing witnesses, obtaining information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications, and information on, and monitoring of, bank accounts.

Recommendation: Continue cooperation of joint security operations – The UK Government should seek to remain party to the European Investigation Order instruments, or negotiate equivalent mechanisms. Experience shows that extending such cooperation to non-EU states can take years to negotiate and can result in more limited forms of cooperation.



²³ As the **House of Lords Committee on Extradition Law** acknowledged in 2014, even if we were able to fall back on the ECE it would be slower than under the EAW and many witnesses (including the Law Society) criticised the Convention system as being inefficient, cumbersome, slow (which resulted in long periods of pre-trial detention for suspects), expensive, technical, political, restrictive, containing a series of loopholes and subject to less judicial oversight.

²⁴ The Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April, 1959 (and its two additional protocols), Parts of the Schengen Convention, The 2000 EU Convention on Mutual assistance in criminal matters (and its Protocol), The 2008 Framework Decision on the European evidence warrant, The 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence (as regards freezing of evidence).

CHAPTER 4: SPECIFIC ISSUES

Intellectual Property

Unified Patent Court (UPC)

The UPC Agreement aims to establish a pan-EU patent system. The UPC Life Sciences Division has been allocated to be set up in London. The UPC Agreement is open to all EU member states, and in order for it to enter into force, it would need to be ratified by the three largest European patent jurisdictions: Germany, the UK and France. At this point only France has fully finalised the ratification of the Agreement. When the UPC comes into force the EU Unitary Patent Regulations will come into force as well.

Currently, according to Article 84 of the Convention, participation in the UPC Agreement is open only to EU member states, so it is unclear whether the UK could continue to be a party outside the EU. Now that the Government has agreed to ratify the UPC, it is strongly recommended that the UK should try to ensure that the UK can continue to participate fully in the Agreement following its withdrawal from the EU, including maintaining the location of the Life Sciences Division of the UPC in London.

If the UK is not party to the EU UPC system, it will become considerably less appealing as a patent-granting jurisdiction and this could mean businesses choose to take their patent business to another country within the EU regime. Additionally, if London were no longer to host a division of the UPC it could lead to significant economic loss for the UK.²⁵

Recommendation: Ensure the UK remains a centre of excellence for patent law – Notwithstanding the UK's exit from EU membership, it should negotiate to ensure that the UK can continue to participate in the Agreement and retain the Court.



²⁵ A FTI Consulting report on the Economic Impact of Alternative Locations for the Central Division of the Unified Patent Court estimated £569-1,968 million as the direct quantified loss to the UK economy from the Court being located outside the UK.

CHAPTER 5: LEGAL CERTAINTY

The Great Repeal Bill

The Law Society welcomed the move towards legal certainty provided by the Government's announcement that it will publish the Great Repeal Bill in the next parliamentary session.

The Law Society recognises that a Bill to transition the UK's withdrawal from the EU will not be a simple task. In light of this we have considered the legal and practical issues which may require further consideration to ensure legal certainty and a smooth transition.

Specifically:

- How the Great Repeal Bill will work with the withdrawal agreement and the agreement of the UK's new relationship with the EU
- Whether the Government will seek to amend or repeal legislation currently within EU competency through executive powers – The Law Society considers that all changes should be made through ordinary parliamentary procedures as it would not be appropriate to effect changes through executive powers. This would be in the interest of legal certainty and the preferable solution in terms of the separation of powers and rule of law.

As the Bill has not been introduced yet, the Law Society has provided some initial thoughts on the challenges which may need to be considered in moving away from EU law, many of which stem from the unique way in which legal rights and obligations operate within the EU framework.

Recommendation: The Government should publish a draft Great Repeal Bill – Due to the significance of the legislation, the UK Government should publish a draft Bill to allow pre-legislative scrutiny to occur. It may be beneficial for the draft Bill to be scrutinised

by a joint committee to ensure both Houses are given the opportunity to input into the draft Bill at this stage.

Timing

The Law Society presumes that the legislation will be enacted in advance of the UK's withdrawal from the EU, however, the date on which the transfer from EU to UK law should be on the date that the UK withdraws from the EU to ensure that there is no conflict of authority and that there is no gap. It is also possible that some form of transitional agreement between the UK and the EU might enter into force at that point. The Great Repeal Act, when it enters into force, must be consistent with the agreed transitional arrangements and any other agreements which have been reached with the EU in order to avoid gaps or inconsistencies.

Transitional arrangements are dealt with in the section below but there are a few points at which EU law could be captured and preserved under the Act:

- when the Act receives Royal Assent
- when the Act comes into force
- at the conclusion of negotiations
- when UK membership of the EU ceases
- at some other point, depending on what is agreed in terms of transitional arrangements.

Timing may be less relevant in terms of EU directives which require implementation through domestic law as it will be clear from the statute books which EU rules are already in effect. However, clarity as to the effective date will be of particular importance when assessing whether rules are maintained which emanate from legislative sources with direct effect eg EU Treaties, regulations or judgments of the Court of Justice of the European Union.

Reciprocity

The focus of the Great Repeal Bill, however, seems to be the ‘leftover’ legislation – ie issues which are not included in the context of negotiations. It is anticipated the UK would be able to change this legislation following Brexit as these rules are not directly related to the legal framework of the new relationship.

In practice, the task is significantly more complicated than merely retaining the existing rules, even if it takes account of the UK’s new relationship with the EU. Many areas of EU law operate within a framework of reciprocity, where all participating states have agreed to mutually respect the rights and obligations. EU legislation is often formulated around EU institutions, such as the Commission or the Court of Justice or other EU bodies and agencies.

Reciprocity operates through mutual recognition, harmonisation and standardisation. For example, the recognition of professional qualifications applies mutually, where each member state has undertaken the obligation to recognise the qualifications from those educated in other member states. With only a unilateral acknowledgement, a state can ensure that the qualifications from other states are recognised in that state, but it cannot ensure that the qualifications it has granted to persons will be recognised abroad. The UK cannot unilaterally pass legislation which only makes sense in the context of a two (or twenty eight)-way relationship.

This illustrates both the importance of cooperation in certain areas and the fact that a catch-all clause is not a panacea, because many EU rules become meaningless when taken out of context.

Reciprocity in the internal market

The bulk of EU legislation has been directed at the creation, facilitation, or enhancement of the internal market. Where an EU directive has been transposed into UK law in the context of EU membership, it may not be appropriate to maintain this law outside the internal market for a number of reasons:

1. The rules may be irrelevant or ineffective because they are inextricably linked to participation in the internal market
2. If an advantage is predicated on reciprocity then maintaining the measures may not make sense or the way in which they would operate could be unclear
3. If the EU Member States do not maintain the rules in relation to the UK/UK companies/UK citizens, this could put the UK and its companies and citizens at a comparative or competitive disadvantage
4. Under the WTO rules, any benefit that is offered to one member must be offered to all members (the most favoured nation rule) and the UK cannot therefore offer preferential treatment to the EU member states without a specific trade agreement which must be registered with the WTO.

The same can be said for other sources of law other than directives – most obviously regulations and rulings of the Court of Justice of the European Union (CJEU) – which currently apply directly in the UK. The problem is widespread and a comprehensive audit of EU legislation and other rules will need to be undertaken to ensure that where laws originating at EU level are preserved, they actually make sense.

Relationship with EU institutions, organisations, and structures

Many pieces of existing legislation refer to the EU institutions, EU organisations, or structures that have been created specifically for the EU. Transferring EU law into UK law would require all of these references to be replaced with a reference to a non-EU body (unless there is a specific arrangement otherwise) – which in many cases would involve creating a new body for the UK if none currently exists.

Again, the elements of a multilateral arrangement based on reciprocity may come into play. For example, the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation are predicated on the use of an EU platform. It might be possible to pay to access the platform if the UK were to decide this would be beneficial to UK consumers but this would be a matter for negotiations.

International conventions

The EU has concluded 1,139 bilateral and multilateral agreements with third parties on behalf of its member states. A number of questions have arisen as to the UK's position (or possible position) upon withdrawal:

- whether it will be able to succeed to the agreements, or whether all these international agreements would need to be renegotiated and ratified
- where the UK would like to amend its participation in the agreement and how this could be achieved.

In order to arrive at an answer, it is necessary to examine the different types of international agreements that have been ratified in the context of the EU. These are:

- Agreements that have been ratified by the EU under its exclusive competence. An example of this is the Hague Choice of Court Agreements Convention, which has been ratified simply by the EU (further information in Chapter 2).
- Mixed agreements where the competence is shared between the EU and the individual member state and therefore needs to be ratified by both. An example of this type of international agreement is the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Recommendation: Maintain international obligations – The UK might be able to continue to participate in the agreements by a simple notification where there is a multilateral arrangement. For the reasons of legal certainty and clarity, it would be advisable that the UK approaches the institution or state responsible for the administration of the agreement to affirm how it can continue membership or withdraw from the agreement.

For mixed agreements – those ratified by the UK separately – a simple notification is likely to be sufficient where the continued participation does not entail changes to the agreement or require reallocation of the UK's share in the maintaining of the legal framework.

Where there are institutional consequences for the UK becoming a separate party, renegotiation and possible re-ratification by all the parties may be needed.

The continuation of the UK's participation in bilateral EU–third country agreements will need to be considered. These agreements are often tailored to the needs of the EU and the participating third country, e.g. on trade access, and they are not automatically convertible for multilateral purposes. It may be possible for the UK to use the existing framework to create a new trade relationship with the third country involved. However, the formalisation of this will need to be ensured by negotiations and ratification of a new agreement.

CJEU jurisprudence

Other than as provided for in legislation, the extent to which Court of Justice of the European Union (CJEU) jurisprudence will continue to have an impact on UK law which is derived from EU law will become clear over time through domestic case-law.

There will be a continuing need for an ultimate judicial arbiter to resolve disputes on matters of EU law, whether between private parties or between the UK and the EU. If the arbiter is not to be the CJEU, an alternative would have to be agreed with the EU and with the CJEU itself.

Transitional arrangements

While the focus so far has been on the exit arrangements for the UK leaving the EU, it is also important to consider transitional arrangements. Below we have highlighted some of the key considerations in transitional arrangements and emphasised the importance for all stakeholders of ensuring that proper care is taken to manage the logistics of changes in a way that is achievable for all parties, with particular attention to legal certainty and achievable timescales.

It is of paramount importance that an orderly transition to whatever follows on from UK membership of the EU is achieved. Legal certainty is a key point and the likely breadth of changes means that citizens and businesses – and indeed the member states themselves – will need time to familiarise themselves with changes to the system and adapt. As such, a sensible lead-in time and timescales throughout the transition period are desirable. This is of benefit to both the UK and the EU.

The Law Society considers that there are three scenarios where there may be a need for transitional arrangements:

- If at the end of the two year period set out under Article 50 no agreement on the arrangements for the withdrawal of the UK from the EU has been reached, and no extension is being granted. At this point the UK will cease to be an EU member state and will become, to all effects, a third country in its relationship with the European Union. This is to ensure that rights and obligations do not simply 'fall away'.
- The UK has established the terms of withdrawal but not established a new relationship with the EU within the two year window given by Article 50.
- The UK and EU have agreed on withdrawal terms and established their new relationship but there is need for a period of time for the UK Government,

EU member states, businesses and individuals to adapt to the new legal rights and obligations.

In all these scenarios transitional arrangements will need to address the following issues:

- the date at which rights and obligations cease – both in terms of individuals and member states
- if any rights are to be preserved, the effective date for determining whether certain categories of persons (natural or legal) will continue to benefit
- what happens in relation to ongoing cases before the CJEU or those before the national courts which have a cross-border element

- any changes within the institutional structures if there is a phased approach for transitioning to the new relationship.

The practicalities which must be covered by the transitional arrangements will, of course, depend on the new relationship that is agreed. Some areas of law will experience more change than others, depending on the current level of EU action and the way in which this will change as a result of the negotiations.



Case study: the impact on competition law

Competition law is one area where EU membership has a significant impact in the UK and therefore offers an illustration of issues which will need to be considered in transitional arrangements if the UK were to cease participation in the single market. The EEA states, such as Norway, are subject to the jurisdiction of the European Commission in relation to all competition matters with a community element. The UK remaining a part of the internal market, as a member of the EEA or on a different but analogous basis, would of course result in less change than if the UK were to entirely withdraw from the internal market.

The following issues would therefore need to be considered in transitional arrangements only if the UK were no longer subject to the EU competition rules:

- what should happen to competition investigations which have already begun?
- what should happen to competition cases which are underway – ie will the European Commission continue to have jurisdiction to determine these cases?
- if the UK is to remain a member on an interim basis or the status quo is to be maintained on an interim basis but membership will cease, how is jurisdiction to be determined between the European Commission and the CMA?
- what will happen to any new EU legislation which comes into force – will it have effect in the UK?

Potential models for transitional arrangements

International negotiations take a long time and those for a new UK/EU relationship are likely to be particularly complex. It may be that two years is an ambitious timeframe for the details of a new relationship to be finalised. The transitional arrangements could be seen as a ‘place holder’ for negotiations. Potential models for these arrangements are:

- Retain the majority of rights and obligations of membership – The Law Society notes that retaining membership is unlikely to be politically desirable for either the UK or the EU. However it may be possible to continue formal membership of the EU beyond the two year period with the UK continuing the rights and obligations it entails. It may also be possible to make alterations to certain obligations to recognise the UK does not have the same long term objectives. However there may be problems if the UK and EU were to deviate too far from current EU arrangements as this may be seen as a new deal which we would need to ratify or could lead to a lack of compliance with WTO obligations.²⁶ Such an approach could offer advantages in terms of the legal certainty for individuals and businesses, and the continuity of the UK’s wider international relationships – eg WTO membership, the EU’s free trade agreements, conventions such as the Hague Conventions or the Aarhus Convention, US privacy shield etc. However, it would also mean that the UK would be unable to move forward with negotiating new agreements in trade or other areas covered by the EU competences.
- ‘Freeze’ rights without formal membership – It might also be possible to ‘freeze’ the status quo as to legal rights and obligations. This would mean that the UK’s formal membership of the EU would cease, even though the EU legal framework is otherwise still applied between the EU and the UK. Within such a model there would still be significant questions to address including what contribution the UK can make to the adoption of new legislation and whether it would be compatible with WTO obligations.
- Establish a temporary EEA model – The UK would formally leave the EU but retain the key aspects of its trading relationships. This could include continued participation in the internal market membership and perhaps also the customs union. This could still work alongside participation in EU programmes, cooperation in criminal justice and policing, and cooperation in the field of civil justice. Such an agreement may need ratification by all parties. In addition to the EU states and the UK, it is likely that the other EEA states would need to agree to such an agreement.²⁷

Ratification of transitional arrangements and the effect on timings

In relation to the withdrawal agreement, the voting process is clear – a qualified majority of member states. However, although Article 50 TEU foresees the possibility of negotiating a new relationship, the withdrawal agreement is only to ‘take account’ of such hypothetical new arrangements.

²⁶ As a rule, where the agreement concerns only EU competences, EU can ratify it en bloc, as a whole. This could ensure a speedy adoption of the transitional agreements by the EU and the UK.

²⁷ Some have suggested that the EEA/EFTA option (or at least something similar) could in fact be a successor to membership, even on a permanent basis.

It is not currently clear what the ratification process for a new relationship would be. It is possible that it will be different for transitional arrangements than agreed for withdrawal in Article 50. The ratification procedure for the agreement on transitional arrangements – whether part and parcel of the agreement for a new relationship or a separate instrument – has significant implications for the timescales of UK withdrawal.

It could mean that a full withdrawal – ie falling back on WTO membership only – is in fact more likely as it could take years for all member states to agree to a new relationship if the requirements of all the various constitutional processes must be met. Obtaining ratifications from all parliaments at national level may cause considerable delay and cause danger of a gap, which the transitional agreement's purpose is to avoid.

As mentioned above, the UK/EU arrangements must also comply with the WTO's rules to avoid a case, or cases, being brought against either party in the WTO. Exactly what is required to achieve this is not yet clear but it would be helpful if the UK Government could begin discussion with the WTO at the earliest opportunity to mitigate against the chances of infringing the WTO's rules.

Recommendation: Negotiate transitional arrangements – The Law Society recommends that the UK Government should negotiate practicable transitional arrangements with the EU. This will allow businesses to prepare for the new regime and effect necessary changes and should help avoid a 'cliff-edge' before a new relationship with the EU has been finalised.

Recommendation: Provide legal certainty – The UK Government should also give businesses and consumers the time and necessary clarity to adapt to the changes to rights and obligations in the case of either a new deal with the EU, or withdrawal from the EU without a new deal.



The Law Society

www.lawsociety.org.uk

The Law Society

113 Chancery Lane
London WC2A 1PL

Tel: 020 7242 1222

Fax: 020 7831 0344

DX: DX 56 London/Chancery Lane

www.lawsociety.org.uk

 [@TheLawSociety](https://twitter.com/TheLawSociety)

