

## BAR COUNCIL BRIEFING



### Westminster Hall Debate: Promotion of Legal Services post-Brexit Wednesday, 28 April 2018

#### Introduction

1. The Bar Council welcomes the fact that the Government has recognised the need to increase and coordinate its activities in relation to the promotion of the UK legal services sector in the context of Brexit because our competitors in the EU and beyond are stepping up their efforts to take advantage of the “uncertainty” surrounding Brexit.
2. The Ministry of Justice (MoJ), the Department for Business, Enterprise and Industrial Strategy (BEIS) and the Department for International Trade (DIT) are all reaching out more pro-actively to the legal sector in order to understand its needs and to develop promotional strategies. This is required urgently. There has been increasing competition for international legal business, both contentious and non-contentious, in recent years which Brexit has exacerbated. The MoJ has set up a Working Group on the promotion of Legal Services which brings together the key organisations working on this issue (including the Bar Council, The Law Society, The CityUK and the City of London Law Society) with the relevant departments which are collaborating on joint projects.
3. In this connection the MoJ has successfully applied to the GREAT Campaign to adopt a Legal Services Stream for the current financial year. As part of this the Bar Council is working with The Law Society and the MoJ on an English Law Summit in Kazakhstan and online promotional materials for the GREAT web-portal.
4. The Bar Council is grateful for the support that is being given by the Judiciary – notably by convening a new Working Group called “LegalUK” which is bringing together key organisations in the legal services sector to discuss strategy in relation to promotion, development of a core script on the strengths of the sector and the jurisdiction, and the development of ideas for sector-wide promotional initiatives.

#### **Brexit- related aspects of effective international promotion of the sector**

5. The most important part of promoting UK legal services effectively in the post-Brexit era is to ensure that certain elements of the EU *acquis* are preserved as part of the Brexit negotiations.

6. The reasons for this are two-fold and they are interlinked. First, there is a significant risk that the current EU legal framework in relation to civil justice cooperation may not be replicated as part of the future relationship deal(s) if it remains part of the overall horse-trading involved in trade negotiations. Secondly, the legal professions of the EU27 have increased their efforts to persuade international clients not to use English law in their contracts and to use EU27 courts instead for their dispute resolution needs.
7. The first risk is significant. Any reduction in the ease with which international clients can enforce their UK judgments in the EU reduces the attractiveness of the UK – and London in particular – as the preferred venue to resolve international disputes. Reduced ease of enforceability also makes English law less attractive as a law of choice for international contracts because enforcement of UK judgments in EU Member States is of great importance to corporate clients.
8. As for the second risk, since the EU referendum a number of initiatives have been launched designed to lure clients away from London through English language courts in Paris, Amsterdam and Frankfurt.<sup>1</sup> Even if those venues may not necessarily attract significant business, since English is not the native language and the local judiciary and legal profession are not so expert in the common law, a reduction in enforceability will benefit other powerful common law jurisdictions such as Singapore and New York. Uncertainty in relation to the future of the recognition/enforcement regime is already being highlighted by our competitors.<sup>2</sup>
9. In addition to the paramount importance of access to justice, it is of great importance that the Government requests that the civil justice *acquis* is placed on a separate track from the economic deal that will be negotiated. This should not be problematic since recognition of judgments (covered by the Brussels I Convention) and the other parts of the civil justice *acquis* are in the mutual (that is to say, rule of law) interest of both sides and do not constitute in and of themselves an economic advantage. There is, however, a risk of abuse to that end as is clear from the above (see paragraph 8). It should not therefore be part of the horse trading of a Free Trading Agreement (FTA). Indeed, it is even possible to have this part of the *acquis* adopted in an intergovernmental agreement in the case of a “no deal” scenario since the regime was originally an intergovernmental one before it was transferred into EU Regulations. Unfortunately, although it has stated its desire to retain the current regime, the Government has not so far publicly committed to the “separate track” proposal from the Bar Council.

### **International Strategies**

10. When it comes to defending or growing the UK market share in international legal services there are trade policy and promotional strategies to consider.

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<sup>1</sup> See, for example, The Brief, 14 February 2018: [www.thetimesbrief.co.uk](http://www.thetimesbrief.co.uk)

<sup>2</sup> <https://www.lto.de/recht/justiz/j/lg-frankfurt-gerichtsstandort-kammer-englischsprachig-handelssachen/>

## Trade Policy

11. As is commonly known, the Government is developing FTA offers for the post-Brexit era. In this respect, most industry experts are agreed that there are few jurisdictions where FTAs could lead to the opening of significant markets which are of interest to UK legal service providers and which remain subject to significant legal trade restrictions. India is by far the most significant market with the most severe barriers to the provision of international legal services. The conclusion of an FTA with India to allow UK legal services providers to establish in India, employ local lawyers and enter into associations with them would be a significant gain.<sup>3</sup> Somewhat less important would be an FTA with Brazil, if it included such provisions. However, at this point there are no indications known to us that these two jurisdictions are a priority although they should be since they are part of the “BRICS”.
12. There are few other jurisdictions where we consider an FTA would lead to significant gains for UK legal services providers. An FTA with the US would not be a suitable tool since the Federal Government does not have the legal competence to commit the individual States of the Union to open their legal services markets. The situation is very similar to CETA in this respect which foresees the establishment of a framework in which easier mutual recognition of qualifications may be agreed. However, we have had reliable information that the Canadian legal professional regulators have no interest in entering into relevant negotiations with their EU counterparts.
13. History has shown that including legal services in FTAs is notoriously difficult given the protectionist attitude of most legal professions and of all the FTAs concluded by the EU to date only the one with South Korea contains a legal services element. In addition, there are other non-tariff barrier equivalents in the shape of domestic regulation that is often controlled by local bar associations and difficult to overcome.
14. An FTA with the EU would be of the most significant importance since 55% of UK services exports are bound for the EU and legal services make up about a quarter of all business services. Although it would be in the economic interest of the EU27 to include a strong legal services element in a future FTA it is far from certain that the EU will be interested. We have clear indications that influential voices in the legal professions of the EU are seeking to reduce market access for UK lawyers in the hope that they will gain a greater share of the market. The key economic argument to make to the EU27 will be that international clients choose the common law (and hence the UK) as opposed to the continental civil law for sound business reasons. Secondly, the EU27 cannot provide the expertise in common law dispute resolution without relying on UK expertise. It is therefore likely that other common law centres will become the beneficiaries of a protectionist approach. Nonetheless, given what has been outlined above (in paragraph 8.) there will be significant hurdles to overcome in order to reach a deal which will

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<sup>3</sup> Legal services may already be supplied in India on a fly-in fly out (GATS Mode 4) basis further to a recent judgment in the Supreme Court of India <https://www.lawsociety.org.uk/news/press-releases/indian-supreme-court-protects-access-for-foreign-lawyers/>

provide anywhere near the market access we have now. That kind of market access could only be achieved in the context of an Association Agreement (for example, Ukraine, Turkey, EEA) which will require the UK to concede aspects of its regulatory autonomy.

15. Within an FTA context (not just in relation to the EU, but all other FTA negotiations) the following elements should be requested:
  - (i) Establishment of legal services providers under host state rules
  - (ii) Rights to employ and be employed by local lawyers and legal service providers
  - (iii) Rights to advise on home state and public international (including the right to advise on EU law not, or not yet, incorporated into national law)
  - (iv) Rights to conclude contracts under third country laws on the territory of the Member States
  - (v) Rights to represent clients in any dispute resolution fora not reserved to lawyers with a host state legal professional title
  - (vi) Access to the Transfer Tests under the Mutual Recognition of Diplomas Directive. This would necessitate Member States that currently maintain nationality requirements to waive these in respect of UK citizens.

A Foreign Legal Consultants regime on this basis, which is accepted by all Member States, would avoid the situation where UK lawyers have a different level of practice rights from Member State to Member State. However, it faces the same drawback as CETA (see paragraph 12, above) unless a Mutual Recognition Agreement is put in place as part of the FTA negotiations which will be implemented subsequently by all Member States. The regulation of legal services is a Member State competence with the result that there is a risk of Member States entering significant reservations, as is currently the case under the General Agreement on Trade in Services (GATS).

## **Trade Promotion**

16. The second part of a strategy to grow the international legal services market share for UK provides would be increased and co-ordinated trade promotion efforts. The Bar Council welcomes the initiatives which are underway and makes some suggestions as to how they could be improved.
17. The Bar Council welcomes the increased efforts made by the Government since the EU referendum in 2016 to co-ordinate efforts with the main organisations representing the legal services sector in relation to international trade promotion. Two Working Groups should be highlighted in particular.
18. The Ministry of Justice set up a “Legal Services Working Group” (LSWG) which brings together the Bar Council, the Law Society, the City of London Law Society, TheCityUK, the Law Society of Scotland, the Judicial Office and others with the DTI, BEIS and their own civil servants. This Working Group has already produced a number of results. It has produced a core script with key promotional messages for Ministers to use on official engagements abroad. It gathered information about key overseas legal markets targeted

by the sector and on that basis pitched for a legal services strand to be added to the “GREAT” campaign which is co-ordinated by the Cabinet Office. This has now been funded for one year, a web-portal has been set up and a couple of cross-sectoral projects have been adopted in Hong Kong and Kazakhstan. The latter is the most significant and will feature an English Law Summit in Astana and Almaty from 23-26 April 2018.

19. The other Group to be highlighted is the Brexit Law Committee (BLC), reporting to BEIS, which was set up with the dual remit to advise the Government on law reform issues arising from EU withdrawal and to consider the positioning of the UK in the international legal services market post-Brexit. That Committee, like the LSWG, represents the major stakeholders of the sector as well as the Judiciary. It is fair to say that the BLC has to date been pre-occupied with the enormous task to which the first part of its terms of reference relates. An undesirable overlap would be created if there was insufficient co-ordination between the LSEG and the LegalUK (see further below).
20. A third initiative to be mentioned is “LegalUK” which has been spearheaded by the Judiciary. As mentioned in paragraph 4 above, this Group sees itself as the think-tank on strategic messaging for the sector, and one to initiate relevant campaigns and projects. It has not yet produced any official output but it has made good progress in drawing up plans for a promotional campaign which could include elements of PR, social media, a dedicated website and events targeted at overseas customers of UK legal services. This group could become instrumental in identifying and promoting the USPs of our jurisdiction as compared to overseas competitors.
21. These are very useful initiatives. Key to success will be co-ordination and sustainability. It appears to us that there may need to be some consolidation between these initiatives and in the medium term one overarching co-ordination group in relation to international promotion should be agreed between the different stakeholders. The “LegalUK” initiative looks promising in this respect particularly if it draws on useful precedents such as the “Unlocking Disputes” campaign which was put together by the sector in connection with the launch of what is now the Business Court in the Rolls Building.
22. Effective international promotion costs money. While many legal services providers serving international clients are relatively well resourced, the trade bodies which represent them do not have large promotional budgets. Barristers, in particular, are sole traders and few chambers have significant marketing budgets. In the Brexit context outlined above particularly strong efforts are needed to counter the narratives of our competitors. The Bar Council therefore calls on the Government to support cross-sectoral campaigns beyond the current very welcome commitment made by the GREAT campaign which is nevertheless limited to the current financial year.

**The Bar Council**  
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