

# SUPPLEMENTARY EVIDENCE

## BAR COUNCIL



## HOUSE OF LORDS EU INTERNAL MARKET SUB-COMMITTEE INQUIRY

### BREXIT: FUTURE TRADE BETWEEN THE UK AND EU IN SERVICES

#### Introduction

1. This submission from the Bar Council Brexit Working Group is supplementary to written evidence provided to the inquiry. This supplementary evidence explores the potential for the UK to enter a post-Brexit bi-lateral FTA on legal services with the EU under the WTO framework, and the implications of relying on access to the legal services market under WTO rules.
2. Trade in legal services is not comparable to trade in goods or to the trade in the services of less regulated professions. Maintaining current levels of market access would require agreements not only on trade, but also on physical movement of persons and the recognition of qualifications and regulatory frameworks.

#### UK membership of the single market

3. Following the Prime Minister's speech on 18 January 2017, during which she confirmed that the UK Government will not be seeking to maintain membership of the single market or the EEA, it seems likely that the UK's access to the European market for legal services will be determined by a FTA under terms set by the WTO.

#### WTO framework

4. Under the WTO, GATS Member States (including the EU) have the right to regulate their legal professions subject to any constraints they may otherwise have undertaken in their WTO Schedule of Commitments. Once the UK leaves the EU, it will be treated in the same way as every other WTO Member State in terms of access to the EU legal services market and will be subject to the same qualification and other regulatory requirements. The issue of rights of audience and practice rights before the EU Courts and institutions and in the 27 Member States are of great importance to the UK legal profession if it is to continue to be an international profession, contributing as it does to the UK's trade surplus.

5. Written evidence from Hook Tangaza para 10-14 effectively summarises the limitations that a baseline WTO position would place on access to the EU legal services market.
6. Additionally, Annex 2 of the Bar Council's written evidence to the inquiry (attached for convenience) summarises the level of access the UK will have to the EU legal services market and the implications for the UK legal services sector if such trade is determined only by WTO rules.
7. The evidence referred to in the previous two paragraphs makes clear that our members' practice rights under WTO rules would be very significantly reduced and would allow for immigration and other regulatory barriers to be raised by Member States.

### **Free Trade Agreements**

8. The UK will not have to rely on the current, unsatisfactory WTO terms if it can negotiate a FTA with the EU. Switzerland for example has some access to the EU legal services market through part of the bilateral FTAs between Switzerland and the EU. There is no other existing FTA that replicates this breadth of access. There is moreover clear evidence from the recent (2016) EU negotiations with Switzerland that largely unfettered free movement rights will be the price for Swiss-style access to the EU market.
9. In addition, it would in any event be challenging to negotiate a FTA with the EU allowing UK lawyers free movement within the EU and rights of audience because:
  - i. Firstly, different member states have different definitions of legal services and "reserved legal activity", which determine what work can be performed only by a qualified lawyer. Whereas in the jurisdiction of England and Wales, relatively few areas of legal practice are reserved to lawyers, in many EU jurisdictions (including the major markets of Germany, France and Italy) much larger fields of practice are reserved. Even if these activities are not reserved to lawyers, lawyers from outside the EU face additional legal or regulatory restrictions (such as local partnership and residency requirements) which do not exist in the UK.

Lawyers from Member States (not the UK) could therefore continue to carry out much of their current activities in the UK without the need for any recognition of their qualifications or regulatory frameworks, subject of course to agreements on freedom of movement and trade. As far as legal services are concerned, it would not be an effective strategy threaten to diminish access to our legal services market in which many EU lawyers are present, if we face increased restrictions across the EU jurisdictions. This is for the simple reason that our strength as an international legal centre rests strongly on the open and free access which we provide to foreign lawyers and firms (currently around 200 firms from c. 50 jurisdictions). To restrict

access to our jurisdiction would be to reduce the attractiveness of our jurisdiction and the influx of international legal work to England and Wales.

In any event, we are not free to raise trade barriers as we see fit, since we would possibly be open to legal challenges from EU Member States under the Most Favoured Nation provision of the GATS which provides that we must not refuse the EU the favourable terms on which other WTO Members currently access our market.

Therefore we cannot succeed in any negotiations within the context of the legal services market alone and would likely have to offer access to other sectors of the economy which are currently more restrictive to foreign services or goods providers, which will considerably complicate the negotiations.

- ii. Second, because the UK is a net exporter of legal services (due to the international popularity of English law and dispute resolution), we provide much greater competition for local lawyers and their firms in other EU Member States than vice versa. Therefore, they are very likely to lobby their governments to keep UK competitors restricted to what they have committed to under WTO terms (much less than we have) and hence reduce our access to their markets.
  - iii. Third, there is a keen competition in this field as can be seen from activities such as the *Fondation pour le droit continental*<sup>1</sup> and Germany offering English language dispute resolution under German law in its courts. Lawyers from other Member States will undoubtedly be able to obtain a great market share as they are able to restrict our national market by persuading clients to use their national laws and dispute resolution facilities instead of English ones.
10. On the other side of the balance, certain EU Member States, including France for example, have a strong interest in UK lawyers retaining free movement both in order to protect the position of French lawyers in the UK and also in order to protect the position of French avocats carrying out their stage/training contract in UK law firms. One third of all Paris stagiaires are reported to be employed in the Paris offices of English law firms.

**Bar Council Brexit Working Group**  
**25 January 2017**

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<sup>1</sup> <http://www.fondation-droitcontinental.org/fr/>

## Annex 2: Practical consequences of a WTO rights based Brexit solution

	<b><i>Restrictions faced by an English lawyer in the EU today</i></b>	<b><i>Restrictions faced by non-EEA lawyers</i></b>	<b><i>Practical Consequences of a WTO rights based Brexit solution</i></b>
<b>Limits on ability to provide legal services without needing to open an office</b>	None	Non-EEA lawyers must register a physical presence in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Finland, Germany, Hungary, Italy, Latvia and Spain in order to practise law.	UK lawyers could no longer provide cross border advice from the UK to clients in these 12 EU member states, including to UK citizens resident in the EU on purely UK matters.
<b>Limits on ability to give advice attracting legal professional privilege to clients</b>	None	Communications with and advice given to clients in the EEA by non-EEA lawyers cannot be kept private. They may be obtained and used by the European Commission in competition proceedings against clients.	Businesses would no longer wish to use UK lawyers for deals between UK and EEA businesses or proceedings arising from them.
<b>Limits on ability of independent lawyers or lawyers under contract to obtain work permits</b>	None	Economic needs tests apply to non-EEA lawyers working as independent professionals in Belgium, Bulgaria, Czech republic, Denmark, Greece, Spain, Finland, Hungary, Italy, Latvia, Malta, Romania, Slovenia and Slovakia.	UK Lawyers would only be able to obtain contracts to provide services in 14 Member States of the EU if no EEA lawyers were qualified to undertake the work required.
<b>Limits on ability to open an office</b>	Must take one of forms permitted to local lawyers (varied ability in member states to form MDPs, have non-lawyer participation – otherwise no restrictions	Cannot open a fully owned law office in Austria, Denmark, France and Portugal – must have local lawyers involved.  Cannot go into partnership with lawyers from Bulgaria, Denmark, Estonia, France, Ireland, Latvia, Lithuania, Malta and Slovenia. Residency for foreign partners required in Sweden and Luxembourg.	UK law firms with a presence (branch or subsidiary) and US law firms operating under UK regulatory banner in these 15 member states would need a different regulatory authorisation and possibly restructuring to remove UK only qualified lawyers and/or head quartering in another EU member state in order to maintain a presence in those member states.
<b>Limits on ability to acquire right to</b>	None	<b>No right to requalify in 13 Member States:</b> Austria, Greece, Croatia, Bulgaria, Cyprus, Estonia, Greece, Hungary, Lithuania, Malta, Poland, Portugal, Slovenia.	UK lawyers no longer entitled to requalify as local lawyers within the EU – i.e. ability to provide joined up services possible through EU membership

<b>advise on local law</b>		<u>Limited rights in 8 Member States:</u> Belgium (reciprocity), Czech Republic, Latvia (language test); Denmark, France Germany, Netherlands, Spain (local qualifications or assessment required).	cannot be replaced by acquiring local title in a majority of EU MS.
<b>Limits on ability to draw up contracts</b>	None	No right to draw up a legal contract in Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia and Slovakia  Contracts drafted outside France and Denmark applying in those countries no longer valid	Provision of legal advice to UK businesses continuing to operate within the EU and across different member states could no longer be done without greater recourse to local lawyers. Advice to UK citizens and businesses will be more expensive and not subject to the protections of UK regulators
<b>Limits on ability to represent clients in national courts</b>	Must be introduced by a local lawyer	No right of foreign lawyers to appear except in limited and ad hoc circumstances; following application process in Bulgaria, Cyprus, Luxembourg and Poland.	Emergency representation of e.g. UK citizens arrested in EU, of children of mixed EU nationality marriages etc. no longer possible for UK lawyers, neither would be increasingly frequent co-counselling arrangements in commercial matters.
<b>Limits on ability to represent clients in European proceedings</b>	None	Cannot provide any representational services before the courts of the EU institutions	Any representation of UK or international clients in cases before the EU courts would go to lawyers with EEA qualifications i.e. Post Brexit litigation on behalf of UK companies not in the hands of UK lawyers