

Justice Committee

Oral evidence: The implications of Brexit for the justice system: follow-up, HC 1648

Tuesday 23 October 2018

Ordered by the House of Commons to be published on 23 October 2018.

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Members present: Robert Neill (Chair); Mrs Kemi Badenoch; Ruth Cadbury; Bambos Charalambous; David Hanson; John Howell; Victoria Prentis; Ellie Reeves; Ms Marie Rimmer.

Questions 1 - 101

Witnesses

I: Andrew Walker QC, Chair, Bar Council; Simon Davis, Vice-President, Law Society; and Kate Gibbons, Partner (Finance and Capital Markets), Clifford Chance.

II: Lucy Frazer MP, Parliamentary Under-Secretary of State, Ministry of Justice; and Paul Candler, Director, International and Rights, Ministry of Justice.

Examination of witnesses

Witnesses: Andrew Walker, Simon Davis and Kate Gibbons.

Chair: Good morning, everyone. Thank you very much for coming to give evidence to us. Before we start, those of you who are familiar with our procedures know that we have to make formal declarations of interest every time. I am a non-practising barrister and consultant to a law firm.

Victoria Prentis: I am a non-practising barrister married to another barrister.

Ellie Reeves: I am a non-practising barrister.

Bambos Charalambous: I am a non-practising solicitor.

Q1 **Chair:** There are some non-lawyers as well.

Thank you very much for coming. Perhaps you would like to introduce yourselves and your organisations. We are aware of the written submissions—we have had those. We will then go into the questions.

Andrew Walker: I am Andrew Walker QC. I am chair of the Bar Council.

Kate Gibbons: I am Kate Gibbons. I am a partner in Clifford Chance in the finance and banking department.

Simon Davis: My name is Simon Davis. I am vice-president of the Law Society of England and Wales.

Q2 **Chair:** Both the Bar Council and the Law Society and one of your colleagues, Ms Gibbons, gave evidence to our previous inquiry on the impacts of Brexit on the legal system. We are seeking to update where we are on that, and will be hearing from the Minister and her officials later. I would like to get a sense of what progress you think there has been in relation to the issues that your organisations previously raised with us on specific areas of concern. Is the progress real? Is it a wish list? What are the key areas of outstanding concern?

Simon Davis: Perhaps I might start with an overarching view of the position, because then the individual components can fit within that. The Committee is well aware of the fact that there has been some positive direction of travel, in the sense that in March there was an announcement that agreement in principle had been reached that, if there is a deal, there will be a transition period. That is a welcome development in relation to all the areas we are talking about; if there is to be a deal, it will avoid the cliff edge and a plunge into uncertainty, and retain the status quo for the provision of legal services and mutual co-operation, to name just two. Those will continue.

To use your own phrase, Chair, where we are more in wish-list territory is that the Government have published their White Paper that sets out what they seek to achieve in relation to important areas such as criminal,



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family and commercial. In that sense, using the now very popular phrase “Nothing is agreed until everything is agreed,” we are still in a position of uncertainty.

Q3 Chair: We have not had a specific financial services White Paper, for example, and we do not seem likely to have one. Is that a matter of concern, Ms Gibbons?

Kate Gibbons: To receive as much detail as possible would be greatly welcomed. We have been heartened by the Government’s announcement pursuant to their White Paper. I think Lucy Frazer said that the Government plan to establish a new civil and judicial co-operation framework mirroring as closely as possible the current provisions. From my perspective, looking at it through the lens of a financial services lawyer, it would have been helpful if we could have had more detail about what is proposed, but we will take what we’ve got.

Q4 Chair: At the moment, just two technical notices—they relate to mutual recognition and establishments—have been published. There is nothing else as far as I can see. Did those technical notices give you any comfort? It seemed to me that they rather dumped it in the laps of the profession and their clients.

Andrew Walker: To be fair to the Government, the technical notices were to tell us what to do if there is no deal, so in one sense it was always going to be over to us to resolve it because there is no immediate fall-back available.

To answer your first question perhaps a little more bluntly, in our perception there is progress only in three respects since we put in our written evidence in November 2016, nearly two years ago. First, we are told that we have 95% of the withdrawal agreement, with transition in it, but the last 5% remains somewhat problematical. We have confirmation from the EU that it is interested in some of the family co-operation that exists within the EU remaining, as part of the future deal; and we have the separate crime or security pillar, however you want to look at it, which has given priority to criminal justice matters.

There seems to be agreement on both sides that one should be working hard towards a future criminal and security arrangement that is relatively effective. The difficulty we have in that respect is that there is absolutely no information that I am aware of that tells us what is being discussed, how close that will be and what the outstanding difficulties may be.

Q5 Chair: Mr FitzGibbon, the then chairman of the Criminal Bar Association, placed particular emphasis on the need for data alignment to enable information to be shared on criminal justice co-operation and so on. Have you sensed any progress around those matters?

Andrew Walker: I think that remains the case, not just in criminal justice but in a whole series of other spheres. If we cannot move data across borders effectively, it will inhibit all forms of trade, certainly



services and legal services, across borders. I am afraid to say that, again, it is not clear where we will end up on that. Our assessment is that it will be very difficult indeed to do anything other than mirror the EU regime on data protection, whatever we might like to do. We could have tighter regulations, so that there is even less concern for the EU than there would be in mirroring the regulation, but we will have to mirror it. As yet, we have no confirmation that that is what is in the deal.

Simon Davis: An obvious challenge for the Committee is that, bearing in mind the length of time that has elapsed, it is apparent that a great deal of preparatory work will have had to be done behind the scenes, but none of that work can be advanced or rolled out until we are in a position to say that a deal has been done and, therefore, we can start to fill in the detail. I think that is an important lacuna in your own knowledge.

Q6 **Chair:** I understand. Are you satisfied with the level of engagement that the Law Society and Bar Council have had with either the MOJ or DExEU?

Simon Davis: I am, in the sense that one of the perhaps unexpected side benefits of recent events has been that the relationship between the Government and legal profession, which has not always been easy—there will always be tensions—has improved. The Government have taken seriously the fact that the legal profession has come forward with solutions and ideas rather than just whinging that it is all terrible.

To take one particular component, a body called the Brexit law committee has been formed and meetings are held at the Law Society. It has on it, as you might imagine, the relevant constituencies: the Ministry of Justice, the Bar, judges, solicitors and, hugely importantly, clients. We discuss appropriately what we are able to be told, but in that context we have made very clear submissions to the Government as to what should have been included in various White Papers along the way. Those views have been heeded. There have been areas where we wanted more, such as that legal services be treated the same as goods, but that is a more generic issue. I would say that engagement between the professions and the Government has been positive.

Andrew Walker: I agree with that, with just one caveat. There have been a number of routes through which we have been able to feed information and have information fed back to us, not just with the Ministry of Justice but in particular with BEIS and the Treasury. It has not included the Home Office, but that is probably because the Home Office is concerned with criminal justice agencies rather than the professional view; we have not had much to do with the Home Office on the criminal justice side.

The one caveat is that, for reasons I am sure we will come to in relation to our concern about where the negotiations are likely to lead, we put forward a draft treaty dealing with civil justice co-operation measures. We have sent that to the Ministry of Justice and circulated it in Brussels. We have not had a response as to whether or not it is being taken up as



an idea, or any real comment on the detail of it. That may be because the Government's position remains that we want a deal that covers everything, but, given that at the moment we do not look as if we are anywhere near an agreement that will cover everything, it is disappointing to have had no indication as to whether that proposal finds any sort of favour on either side of the negotiation.

Q7 Chair: Ms Gibbons, our previous inquiry took a particular interest in the way the legal services sector underpins the role of the UK's financial capital markets sector. I know that is an area you are involved in. What is your assessment of the position? You will need to advise clients. They will be writing contracts that go beyond the withdrawal date. Issues were raised last time about enforceability. Some technical points raised by the Financial Markets Law Committee and the City of London Corporation were debated in the withdrawal Bill. Are you satisfied with progress on that, or are there key areas where you might still have a problem advising your clients?

Kate Gibbons: I do not think much has shifted. I share the views of my colleagues that we have some strong statements of intent but no resolution. Increasingly, as we advise clients, we find ourselves focusing on three key problems. The first is the competitive statement that lawyers from other jurisdictions make that English law is broken because of Brexit. Clearly, English law is not broken because of Brexit. It comprises for transactional purposes, which is the lens through which I see things, contract law, security law, trusts law and property law. All of those things are untouched by the way we have operated with the EU over time.

Consequently, we can be confident by virtue of the Rome I and Rome II regulations that English law will be recognised both before and after Brexit, but when you start to scratch beneath the surface and get into the problems clients are identifying, the question they ask is, "Okay, so you choose English law, but is submission to the jurisdiction of the English courts and enforceability of judgments going to remain the same before and after Brexit?" That is something we can speculate on, but we have no confidence. I think that is what you were driving at.

There are two other areas where there is uncertainty. The first relates to the problem around the fact that there are certain aspects of EU law that will only work if you have contracts that are governed by another EU law. When we leave, after the Brexit date, we will be a third country, so, for example, in relation to qualifications of debt instruments for MREL capital purposes, it is not clear that English law-governed agreements will achieve that.

The second point you might be alluding to—my partner Simon Gleeson spoke to it previously—is the paper that the Financial Markets Law Committee has written, in addition to civil jurisdiction. I should explain that I am a member of the Financial Markets Law Committee. It talks about what it calls broadly contractual continuity. What do you do with



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contracts you have entered into now, often framework agreements in relation to derivatives, which provide for ongoing engagement after the Brexit date?

The issue is that, in addition to the fundamentals of English law, in order for firms to be able to operate in the EU, they have to comply with regulatory requirements, and at present they are able to achieve that through what is commonly known as the passport. There are lots of different passports under lots of different regulatory regimes. Activities provided for under a framework agreement are ongoing. For example, I come from a lending background. You do not make a loan once; you keep making loans. You have revolving credit facilities, and you might want to make available a multi-currency arrangement. Each time you do that, depending on the European jurisdiction you find yourself in after Brexit, you may discover that you require new consents to do so. Your consents will have gone but your contract continues.

There is a lot of uncertainty about what might happen in that regard. We were hoping for clarity around possibly the provisions in the withdrawal agreement providing that this will be grandfathered, so that if you have entered into a contract any activities you were going to undertake afterwards would be grandfathered. Unfortunately, that has not been forthcoming, and it is a real concern.

Q8 Chair: There is a real risk that you will have an ongoing contractual obligation, but you cannot comply with it.

Kate Gibbons: Absolutely. Some contracts provide for illegality provisions that let you off the hook. They may say, "Transfer your obligations to somebody else." Those clauses are about four lines long and they refer to illegality, but what does illegality mean? We are back to our colleagues at the Bar and in courts to tell us that. At the cutting edge, if someone says, "Advance me the funds because you are obliged to do so under the contract," and you say, "Am I or aren't I?" that is exactly when you get into legal jeopardy and commercial uncertainty, which is not good for anyone.

Q9 Victoria Prentis: Ms Gibbons, you have just explained very clearly the whys of the problem. I want to probe a bit more deeply into what is actually happening on the ground at the moment. Obviously, I am fully aware that we have not left the EU yet, but are you seeing concrete examples of the uncertainty of Brexit in your daily work?

Kate Gibbons: I sit on my firm's legal opinions committee. In that capacity, I have gone out to all my partners twice, once in the summer, and most recently a few weeks ago, to say to them, "What evidence is there of people questioning whether the use of English law is appropriate in contracts?"

On the first occasion, out of 550 partners, we had 15 responses and they indicated three key areas where there were concerns. One is that certain



European institutions—for example, the EIB—have stated that they will no longer want to contract under English law. The second is that provision has now been made in the derivatives market for a French and an Irish law-governed derivatives contract to overcome what are being described as concerns around recognition of jurisdiction, mutual enforcement of judgments and recognition of resolution planning under things like the BRRD for banks. You can explore those. I am not sure they are entirely correct, but that is the prevailing idea. English law has always been readily used by people. I have practised in Japan and Hong Kong, and it is a kind of lingua franca, but people are now taking a deep breath before they embark on its use and saying, “Does it remain appropriate?”

Q10 **Victoria Prentis:** Do they decide to go for it anyway?

Kate Gibbons: Largely, they do. The last time I asked, we had 11 more queries. I would say that there is no torrent of concern, but you can feel a slight loosening of the tooth in the mouth. It is a question that is being asked, but the longer we go without a clear resolution, the greater the tendency for the tooth to wiggle.

Q11 **Victoria Prentis:** Do you agree, gentlemen?

Andrew Walker: Absolutely. We go abroad on business development missions and talk to colleagues internationally. Certainly, more questions are being asked about English law and what the position will be after Brexit. We still feel in a position to answer most of those questions with a certain amount of confidence, but the more you ask questions, the more people start to ask questions of themselves. It is quite clear that all those who would like a slice of the work that comes to London and is dealt with under English law are agitating for alternatives.

Q12 **Victoria Prentis:** Have you seen evidence of that?

Andrew Walker: We know it. The Netherlands, France, Germany and Belgium are all setting up commercial courts involving the English language, and to some degree involving English law. We know it is happening internationally, but it is now happening in Europe as much as anything because of the opportunity seen in Brexit, and the professions and judges behind it are agitating in support. The Irish are saying, “Come to Dublin.” If you want the common law, that is now your choice for a common law jurisdiction in the EU.

Kate Gibbons: If we could say straightaway that there will be mutual enforcement of judgments and recognition of jurisdiction, that would get rid of most of it, which is why we place so much emphasis on achieving a resolution of that. Again, there is a Financial Markets Law Committee paper on it.

Q13 **Victoria Prentis:** Mr Davis, are you seeing changes in choices of jurisdiction, willingness to enter into contracts or anything concrete you can tell us about?



Simon Davis: There is something concrete in that there have been a number of research papers, which I am sure are available to the Committee. Thomson Reuters and, most recently, Oxford Economics go into this in some detail and reinforce the point, which has already been made from the point of view of the Bar, that choice of law and jurisdiction, perhaps as a statement of the obvious, was already intensively competitive, in the sense that if you know that in a particular jurisdiction you will find law that is readily understandable, commercial and flexible, with top-class judges, people will want to go there. If they want to go there, they are likely to want to do business there, because they know that if things go wrong they will be sorted out.

We are already subject to fierce competition from Singapore and New York, to name but two. This has given the competition an extra stick to beat us with. It is the stick of uncertainty. You do not need to say that English law can no longer be used, or that judgments will not be enforced in our jurisdiction.

My personal view is that the story is likely to be more positive. Are people who have chosen English law and accepted the jurisdiction going to say, "Ah, but when you come to my country you're not going to be able to enforce your judgment," particularly those who already have assets in the UK? What it does is give people the opportunity to say to clients, "Be very careful of entering into this contract in this way." It is injecting an element of uncertainty into business folk who prize certainty above other things, so, even if that uncertainty is worse than the present position, they may elect for certainty, and that is the problem. We are seeing that.

Q14 **Chair:** Is that having an impact on the number of members of the professions qualifying in other jurisdictions, maybe to hedge their bets? The Irish Bar and the Irish Law Society are obvious examples. There was a bit of an uptake. Has it levelled off now?

Simon Davis: A bit of an uptake is perhaps an English understatement. The last figure was that about 1,000 solicitors had requalified, or sought to requalify, in Ireland, obviously to seek to ensure rights of audience in EU courts—as one example—will not go, because they will be able to say, "I am a lawyer who is qualified in Ireland."

It becomes potentially more challenging when firms seek to set up their own presence in Ireland and not just to qualify. They seek either to merge with firms or set up their own practices, with a view to dealing not just with rights of audience issue but with the problem of mutual qualification and rights of establishment, to be able to say, "We are lawyers in an EU country, now coming to practise in yours." I think it is a matter of public knowledge that, if you were to strip out the lawyers in Ireland and treat previously English-qualified lawyers as Irish lawyers, the two largest firms now in Dublin would be Freshfields and Eversheds. That gives you an idea of the kinds of numbers we are talking about.

Q15 **Chair:** That is extraordinary.



Andrew Walker: The Bar is the same. People have not been able to wait for a resolution. Some of those who have significant practices in EU law have gone to EU countries other than Ireland because they have family or personal connections; they may have practised there. For example, a number have gone to Belgium. For those who do not have that opportunity, Ireland is the alternative, and they have already taken steps to become members of the Irish Bar. Indeed, we published a guidance note to help them and explain the pros and cons and how they need to go about it, for the simple reason that they are our members and they clearly understand that they risk losing their practice if they do not do this. The problem remains that there is no treaty basis for it; there is no right to do it. At the moment, we depend on co-operation from the Irish professions.

Chair: Perhaps I ought to own up to having become a member of King's Inns in the early 1990s, but I never thought it would be relevant in this context.

Q16 **Ellie Reeves:** My question is to Mr Walker and Mr Davis. A House of Lords EU Committee concluded in 2017 that leaving the EU without an alternative system in place would have a profound and damaging impact on the UK's family justice system. I think a barrister told that Committee that it would be a potential nightmare for family law if civil judicial co-operation was lost. Do you agree with that?

Andrew Walker: I agree with that. It is not that everything would go. There are fall-backs that would provide some elements of the existing regime, but none of them is as good as where we have managed to get to with the EU; none of them is as broad, and all will involve additional cost, expense, time and additional burdens for those involved. It may take many months to get something done that at the moment could be dealt with swiftly. We will potentially lose co-operation at the judicial level and the ability to pick up the phone and speak to a judge in the other jurisdiction concerned. I agree with all of that. I do not think anything has changed, and that evidence could be taken as evidence of where we are now.

The chink of light is that the EU has recognised this as one area where, in principle, it is prepared to look for some new arrangement, but whenever you look at what that might be, you come up against red lines once again. At the moment, we are still entirely unclear as to whether there will be a solution and how good that solution will be. Inevitably, I suspect it will be somewhere in between, if it comes at all, but nothing has fundamentally changed.

Simon Davis: Your question teases out a welcome reminder that what we are talking about today is not just about corporations and international business. What underlies everything are people—the clients, who are often forgotten in this debate. Last week, I was in Bordeaux meeting some members of the Bordeaux Bar. A number of them were dealing with exactly the kind of work that will be affected.



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The point was made to me that a number of British couples go to France to live the dream, but it does not always work out and one of them returns to the UK. They are trying to work out—often in extremely stressful and distressing circumstances, as you might imagine—rights of contact with children and access, where the divorce is going to take place and how assets are to be divided. Leaving aside for the moment the rules and regulations, a practice has developed that works. Let us say that the wife is in France and does not speak much French, but she will be able to see lawyers who will explain to her, “Don’t worry; we have a perfectly workable system,” and it is all calm. By the way, I share Andrew’s optimism, because both the EU and the UK have said, “We must not allow something to happen that negatively affects families and children; we must keep children at the heart of it.”

If nothing happens quickly—let us assume there is a cliff edge at the end of March—couples will come before the courts. I mentioned France because I have been there, but the same will apply across Europe and of course in the UK. Although judges will be told they can now fall back on Hague and, to the extent that there are gaps, they can be plugged, what does that do to the families who are sitting there? Again, as a British understatement, it adds a wholly unwelcome feature.

I do not think I would use the word “nightmare” because these people are going through a difficult enough time. To be told, “You’re going to have a nightmare,” will add to their worst nightmares, but it will be hugely important, more than ever before. Those families will now have to sit down with lawyers and ask them a new question: “What is now going to happen? Does the fact that I am not from this jurisdiction mean that it is all going to change?” I have talked about the British, but it could be anyone in the UK, or any other jurisdiction. It is those questions that we would like to avoid them asking in the first place.

Q17 Chair: As I recall, in the old days there used to be awful things called parallel proceedings in family cases. If one of the parties was domiciled in a different state, the divorce proceedings would be in EU law and in, say, French or British law. Without something to bridge the gap, the risk of that rears its head again.

Andrew Walker: Absolutely. We forget that there are ever-more families that cross nationalities and now potentially borders. The most recent of The Hague conventions is more than 10 years old; the next most recent is more than 20 years old; and the earliest is nearly 40 years old. Things have moved on, and they have all moved on in the European context. There is no alternative to that at the moment.

Simon Davis: It is important to talk about it with real-life examples; otherwise, it gets a bit lost in theory. There are large numbers of EU families in our jurisdiction, and to the extent that their marriages break up there will be greater risks that somebody from this jurisdiction will go to their home jurisdiction somewhere in Europe and say to their spouse, “You will now be dealing with this regime.” As you know from previous



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evidence, the existing regime in itself is not perfect in terms of potentially allowing people arbitrage to game the system, but, in a free-for-all, unscrupulous individuals will seek to make the most of it.

Q18 Chair: A particular concern was raised by Jacqueline Renton about the lacuna she fears in relation to child abduction cases. Have you any sense that the Government have yet taken steps to bridge that lacuna?

Andrew Walker: Not beyond the broad and general, but there is a lot of talk about ambition and aspiration. I am sure that both ambition and aspiration would cover that, but whether the substance will cover it I do not know.

Q19 Bambos Charalambous: Do you think Brexit will have a big impact on the legal services sector?

Andrew Walker: Let me give you a Bar perspective while Simon and Kate decide how best to answer that question. It will have an effect. My personal view is that the effect will start small. Whether it grows and becomes a big effect will depend partly on the final deal. It will also depend on intangibles—things we cannot possibly know now. How well do we persuade people that England and Wales and English law are still the place to be and the law to choose? How well will we continue to compete? It throws a whole host of additional hurdles in the way of that competition. That will undoubtedly have an impact.

We will be affected to a very large extent by the impact on the economy and, certainly for the City law firms, by the impact on the financial services sector. The biggest concern for us and the whole of the professional business services sector, as was made clear in a letter to the Prime Minister a couple of months ago, is that, because of the Irish and Northern Irish border question, the focus is all on goods. Services are effectively being pushed to the back of the queue. Whatever comes through on services, we do not expect it to be particularly good, to put it in very broad terms. That will have an impact on UK plc and on us.

Kate Gibbons: My answer to that question is that it depends on the deal. If we could have the wish list—mutual recognition of judgments and acceptability of jurisdiction, lawyers being mutually recognised and free to operate as they do now, flying in and out—and assuming that there is clarity over how contracts operate before and after, we have a really good chance of managing through it, because the English and UK legal profession is very robust. There are great strengths in the use of English law, quite apart from the quality of our judges and the flexibility of our legal system, which is not a regulatory one but gives people the ability to contract in the way they see fit, and gives effect to that. All of those are great strengths.

However, people may find that it is difficult to travel to their major markets. I think I saw in some of the reports that about 50% of legal services take place in the EU. If in restructuring to enable the operation



of law in the EU they find that that will be undertaken by EU rather than UK lawyers, it is bound to have an impact, and that is before we start to discuss what will happen to the industries we service. I am obviously thinking of the financial services industry, which has often been talked about. As we discussed at the beginning, there is no resolution of the many concerns it has, in particular loss of passport. That will shrink what is available in terms of the work that can be done. There are some imponderables and there are some ways of rescuing it, but there are deep concerns, and the deepest concern of all is a hard Brexit.

Simon Davis: I will try not to repeat what has already been said. The Committee already has a series of figures before it as to the significance that underlies your question, but it is worth airing them for a second because they are important in the context of this debate.

The first is that the UK is the largest legal services sector in the EU. You are already familiar with the figure of £26 billion being contributed to the economy in 2017, but what is often lost is that 380,000 people are employed and trained. What is also sometimes lost is the openness of our existing jurisdiction and sector. As we speak, there are some 200 law firms from around the world with offices here. Of those, 60 come from the EU, and 3,000 EU nationals are practising in the UK.

Harm is likely to be done in a number of ways. One arises from the ephemeral words "loss of confidence." It is very hard to put a figure on that. A second, as Andrew has already said, is the slowdown in the economy if that happens. We must proceed on the basis, just to be absolutely clear, that lawyers spend a great deal of time advising companies and citizens. That is part of the work, but it is the next, commercial or otherwise, activity that generates profits for law firms; it is doing the deals and running the cases—the activity. If the slowdown of the economy occurs, as is predicted, slowdown of activity will translate immediately to the bottom line of law firms.

The other cost, which again is very difficult to put a figure on, would be if we leave without some kind of arrangement about mutual qualification, establishment and the like. To put that into context, one of the key differences that is sometimes overlooked is that we are one jurisdiction, but when law firms are seeking to understand what they will be able to do in Europe, they have to work out what regulatory regime or system exists in 31, if you include Switzerland. They are trying to work out what to do, and whether they have the resources available to do it.

Yesterday at the launch of the report by the APPG on the impact of Brexit, we heard from a particular firm that gives a great deal of advice in Spain. If no deal is done that caters for that, there is a risk that it will no longer be able to do that, so it is faced with doing what a number of firms are already doing, as you might imagine. Contingency planning has had to be put in place, which is "We'll have a new office. We'll establish something." But all of that is at a cost. Larger international firms will be



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able to accommodate that, but moving away from those there will be the ones that are no longer able to provide that advice, so there will be an impact. You will have seen various figures, from Thomson Reuters, the Law Society itself and Oxford Economics of a loss of £3 billion, or an £840 million loss. The trouble with figures is that they often mask what is important. It is impossible to price uncertainty. The larger clients always try to put a price on something, but you cannot put a price on that.

Kate Gibbons: If I might make one concrete observation, at the moment if someone says to me, "Why don't you say in your legal opinions on transactions that you are speaking as to English and EU law?" we have a semantic argument about whether English law is EU law, but there is no doubt that we are advising on both. Afterwards, that is a whole tract of law where, subject to whatever arrangements we come to, if we do not have some positive arrangements, I will not be able to advise on EU law any more; I will not be an EU lawyer. That has quite a profound effect potentially, which is why mutual recognition and other arrangements are crucial, and why we are so concerned.

Q20 **Chair:** There will be a significant potential loss of business.

Kate Gibbons: Of course. Potentially.

Q21 **Mrs Badenoch:** We have talked a lot about the negative impacts that would come from Brexit. My questions are about the potential benefits. The Government have said that new trade deals with non-EU countries will offer significant opportunities for the UK services sector. Does the panel agree? Is it true for the UK's legal services sector?

Andrew Walker: No. From our perspective, legal services are always at the absolute bottom of the list for a free trade agreement. Legal services markets are the hardest markets to break into. The EU has not stopped us trying to break into those markets over the years, and we have been trying for years. To take India as an example of a legal services market, Brexit does not make life any easier for us in that regard. If you want a short answer, it must be no.

Kate Gibbons: In fact, it could make it harder because, for example, our ability to open an office in South Korea is dependent on EU arrangements that we will lose. We will have to start again.

Q22 **Mrs Badenoch:** Is that because there is an existing trade agreement that covers that and, if we do not replicate it, that is the effect?

Kate Gibbons: Exactly. We have to fight to stand still. The key issue is that a bird in the hand is worth two in the bush. We have a marvellously successful ability to operate in a very large market near us, and that is the EU. If we cannot do that, we are back to where I was, for example, when I used to practise in Japan all those years ago, where, by the way, I could not practise Japanese law. We had six licences to operate in the office of Japanese lawyers, and the rules have changed since then. It was



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a long time ago. We were severely constrained in what we could do. To build up a practice there can take decades.

We are giving up a thriving market now for what in legal circles we would call a spes—a hope that at some stage something might work. The trouble is that people are not desperate to facilitate lawyers in new markets under a free trade agreement. That is a very unusual thing to achieve. It would be slightly naive to suppose that all these doors are going to open immediately. I really want to be positive, but I confess that it is the bird in the hand being worth two in the bush idea. It means a lot of hard work just to get back to where you first started, with no certainty that that will happen.

Simon Davis: I am perhaps more towards the optimistic end of the scale, but only because, by definition, with uncertainty there may come some benefits; what might happen is uncertain. It is important to bear in mind that there is a key difference between legal services and financial services. For obvious historical and pragmatic reasons, for financial services there is a raft of regulation across Europe. The argument goes that if some of that regulation was lifted the UK would go its own way, and it may benefit from that. It is not the same for the legal services market because regulations are in each individual country. There is no pan-European regulation. There is nothing from which we would now be benefiting by way of a reduction in regulation, if indeed that was ever desirable.

If the economy were to slow down, activity goes down, and lawyers do not do so well. If there were substantial trade deals and opportunities, as the Government anticipate, they should translate, just as activity leads to work, into more deals. As more deals are done, more deals break up and lead to disputes, so it goes around and around. To answer your question, it is not so much what the legal sector does or does not do, but what happens in relation to activity and business that will drive whether the legal sector goes up or down.

Q23 **Mrs Badenoch:** You have almost answered my second question. I was going to ask how far all the benefits we were supposed to have talked about would make up for loss of access to the single market. From what Ms Gibbons and Andrew Walker have said, it sounds like it would certainly would not make up for it. Mr Davis, you are saying that the activity might generate different sorts of revenue.

Simon Davis: It is key to understand that it is the timing of that. I think that every single piece of work that has been done shows that in the short term this new trade, if it happens, will take a considerable period to build up, so it will not compensate for the loss of trade in the EU in the short term.

Q24 **Mrs Badenoch:** On single market access, in other industries I have worked in, it is constantly repeated that there is no real single market for services in the same way as there is for goods. You are saying that the



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legal services sector is different, and you are able to do things that you would not be able to do post the scenario—for example, regaining control of our laws and ECJ judgments. You can think of absolutely nothing where you would be able to say, “We couldn’t do this before and now we definitely can.”

Andrew Walker: Not for the legal services sector.

Simon Davis: I was about to say exactly the same thing.

Andrew Walker: The legal services sector is slightly different from other service sectors, indeed even from other professional service sectors, because we have a dedicated regime. It is the best and easiest regime, and the closest to a single market regime of any service sector. That will go, and with it all those people who are moving to Brussels, Dublin or wherever else. That is an immediate loss of both market access and the people who are taking advantage of that market access. They will be earning their euros in Brussels or Dublin.

Q25 **John Howell:** You have commented a bit on the situation if there is no Brexit deal in terms of the cost, but can I push you on that in relation to civil legal services? The Government have issued guidance on those. Do you think the guidance is adequate?

Andrew Walker: The guidance reflects our understanding. To be fair, the guidance published by the Ministry is as much driven by what we have been telling the Ministry as anything else. There are political decisions within the guidance. There will be political decisions, for example, on whether to apply to rejoin Lugano and so forth. In basic terms, we have a pretty clear understanding of what the implications structurally are going to be. The reality is that everyone has been having to prepare already for those, so it is not telling us anything we did not already know on the legal side, only perhaps giving us an indication as to where the Government may end up if we have no deal.

Kate Gibbons: The guidance does not tell you how to mitigate the problem. It, effectively, describes the problem, but it does not provide a solution. This is not my particular area of expertise, but if I were an English lawyer practising, for example, in France now and there was a hard Brexit, where would that leave me with the cases I was running? Indeed, we heard last night from some patent lawyers that, if you lose your right of audience in patent cases, you will have to look for another lawyer who has right of audience to carry on the case. The Government guidance explains that but it does not overcome it.

Q26 **Chair:** It is ironic, as we have only recently signed up to the Patents Court, which we thought to be a good thing.

Andrew Walker: Indeed; we are one of the major players in European patents.

Kate Gibbons: We have 25% of that business.



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Simon Davis: All I would add is that the guidance given, which was, of course, in the context of a no deal, says all it possibly can say. In relation to choice of jurisdiction and enforcement of judgments, it says that it is not a question of there being a complete void, because there are steps that we can take by signing up to The Hague convention on judgments ourselves, and to Lugano, assuming, of course, as I am sure you are aware, that the existing parties to Lugano agree to us coming in. One may think, "Why on earth wouldn't they?"

Kate Gibbons: It is all of them.

Simon Davis: It is all of them, including the EU, so we cannot take it for granted that we will be welcome. Some respected members of the Bar and academics say that there will be potential opportunities if we have to fall back to a situation that will be a blend, effectively, of Lugano, our own common law and some Hague, in the sense that much of the regime that exists at present focuses on what jurisdiction you must be in if you have a dispute. Have you chosen it? Have you not? There are rules.

There are those who say that if you get back to the old system it means that in fact there will be opportunities for the English courts and lawyers to become much busier, because they will have greater flexibility to have cases brought in the UK than at present. It is certainly a view that Professor Briggs holds, and I think he has given evidence to the Committee along those lines.

In relation to that, we are not going down to a nothingness; there is certainly a structure we can fall back on. The difficulty, of course, is that the structure we would be falling back on is a structure that was much worked on and improved, with, by the way, a great deal of input from the UK legal sector, to reach Brussels I (recast). If Lugano was so good and Hague was adequate, why would we have spent such a lot of time developing the new system. The reason is that it was not as adequate as the present situation.

Q27 **Chair:** Brussels is sometimes described as the gold standard, isn't it?

Andrew Walker: In terms of international instruments, it goes far beyond what any other instrument does. One qualification I would place on views such as those of Professor Briggs is that it is all very well seeing the possibility of opportunities for international litigation, but that does not mean there will be benefits for individuals and SMEs who are not in the position to take that type of opportunity, because it is far too costly and does not really affect them. For them, it is more likely to be only negatives.

Q28 **Chair:** Litigation is always a good thing for anybody other than the litigator.

Andrew Walker: Indeed.

Q29 **David Hanson:** Let me touch briefly on criminal justice. I want to get



your sense of where we are with regard to that and Brexit. As I understand it, no technical note has yet been produced and there is no definite end to what happens with the European arrest warrant. We do not know what is going to happen with European information sharing. We are not quite sure whether we are going to fall back on the 1957 convention. Forget the politics of it. I just want to know about the practicalities in relation to where we are now, where you think we should be and whether it causes any of you difficulties or challenges.

Andrew Walker: It all depends, I am afraid, as with everything. The mood music, if I can call it that, coming from the Government is that they have achieved a great deal by way of looking for agreement on the criminal justice and security pillar of the EU's four pillars, but rather like those words "ambition" and "aspiration," that does not tell us very much. We have been told right the way through the negotiations that the Government are confident of being able to achieve all sorts of things that now, perhaps, we cannot be so confident of achieving. It is very difficult to know where we are going to end up.

If we remain where we are with nothing, all the consequences that a number of parliamentary Committees, both in this House and in the House of Lords, have heard about mean that we will have a very difficult world in which to live. No one wants that on either side. If you are looking at predictions, no one would predict that we will end up with something as difficult on the criminal side as we will end up with, potentially, in the family and civil sphere. We just do not know, because we have no information. It is not that there is no technical notice, but we have no information as to how far the negotiations have reached.

Q30 **David Hanson:** There is currently European jurisdiction even over the European arrest warrant. What if the Government do not accept that European jurisdiction? Talk me through it.

Andrew Walker: You are absolutely right. As with all of these things, we come across red lines. The European arrest warrant is part of the European legal order, and it requires the Court of Justice of the EU to be involved in interpreting the law on that. In order to replicate that outside the EU, we are asking the EU to do what they are refusing to do in every other sphere, which is to come up with a new arrangement, a new philosophical and legal approach, for dealing with third countries, without the Court of Justice being involved. That is the fundamental problem with so many of the different strands of the negotiations. It is impossible to square the two. It needs some good thinking, but we do not know what is out there.

Q31 **David Hanson:** In the event of its settling like that, will it incur more costs to our legal system?

Andrew Walker: Absolutely.

Q32 **David Hanson:** Is it going to incur more delay to our legal system? Is it going to mean less justice, or people getting off who, perhaps, should not



get off? What is your assessment?

Andrew Walker: All of those. We are facing, potentially, not being able to bring people to justice. We all remember the stories about people disappearing to Spain and never being able to be brought back to this jurisdiction. We face people not being brought to justice, people being brought to justice but the evidence not being available, people fleeing across borders and terrorists fleeing, potentially, across borders without us being able to get information in a timely way to enable us to resolve the situation. Time matters in many criminal justice and security spheres. It is not just a question of being able to get to the result; you have to get to the result quickly.

Q33 **David Hanson:** From the legal profession's perspective, what should Lucy Frazer and/or David Gauke and/or Prime Minister Theresa May be doing between now and 29 March to secure those issues?

Andrew Walker: I hope the Minister will be able to tell you what is being done, but this is, as I understand it, a Home Office matter, so it is not being dealt with by the Ministry of Justice, as I am sure she will be able to clarify. Our ask would be to have in place an equivalent regime that rolls over. Certainly, in the transition, the regime must be continued as best we can. That will, I think, include CJEU jurisdiction, but that has been conceded, fundamentally, for the transitional period.

We must have an arrangement that replicates, as closely as possible, all of those instruments. None of this is perfect. The European arrest warrant has needed improvements. Improvements can be made, but this is not an opportunity for improving; it is an opportunity for trying to preserve as much as possible of what we have.

Simon Davis: I hope that there will be a difference in what we have just been discussing, in this sense. We were talking earlier about competitive tensions between markets. Everything I have read so far suggests that this is one area where it is recognised that competitiveness is not an appropriate factor to take into account.

I am also aware, in relation to the red lines, that the Government have shown themselves amenable not so much to the recommendation that I think was made by your Committee about allowing the CJEU a limited role on the interpretation of contracts and the like, but to the extent that the United Kingdom stays part of an agency—there are criminal agencies—that would accept the jurisdiction of the CJEU in relation to that. I may be wrong. It may be something that you will ask Lucy Frazer about, and I am sure that she will be able to confirm it, but I think it is an area where you may be able to see, bearing in mind the role of the criminal agencies, that if we were part of an agency, and the CJEU had some jurisdiction, it might be a way forward.

Q34 **Chair:** That is very helpful. We are going to hear from the Minister shortly. She has been listening, so I suppose that will save me asking



what else you had as asks for her. Both of your organisations—the Law Society and the Bar Council—gave evidence to the House of Lords Committee on the EU quite recently. That evidence is distilled in a letter that Lord Boswell of Aynho wrote to the Lord Chancellor very recently. I imagine you have probably seen it. Do you adopt the evidence that is in that letter?

Andrew Walker: Essentially, I would adopt everything that has been said so far. Because we do not have a concrete outcome yet, everything that we have said about what we fear, and about what, in an ideal world, we would like, remains the case. The only real change is that we are having to move further and further back as we see less and less being likely to find its way into the final agreement. We remain hopeful.

Chair: The same applies to the Law Society. We have the evidence. Thank you all very much. I very much appreciate your time and trouble in coming. I am very grateful to you. If, at any point, there are additional things that you want to submit to us, please do so. Thank you very much for your co-operation.

Examination of witnesses

Witnesses: Lucy Frazer and Paul Candler.

Q35 **Chair:** Thank you very much for coming to give evidence to us. It is always nice to see you. We know that you have responsibility for Brexit matters, if I can put it that way, at the Ministry of Justice. Minister, you have with you Mr Candler, who is the director for international matters, rights and so on at the Ministry. I think that is correct.

Lucy Frazer: That is right. It is a pleasure to be here.

Q36 **Chair:** You have, very kindly, patiently listened to a lot of the questioning, Minister. There is an ambitious vision but precious little flesh on the bones of all of this, isn't there?

Lucy Frazer: There is an ambitious vision. We at the Ministry of Justice, in so far as the issues affect us, want to get as close as possible an arrangement as we have at the moment.

It is now well understood that the negotiation has been taken in stages. The first part of the negotiation was to agree the withdrawal agreement, and we have agreed that. We have agreed the circumstances in which, when we leave, cases currently before the courts will be treated. The second thing we negotiated was the implementation agreement. We have agreed an implementation period and what the position will be in that period. Now we have turned to the deal itself and the future arrangement. That is in negotiation. I know you want certainty and answers, but we are still in the negotiation for the future arrangement in respect of the matters we are dealing with.

Q37 **Chair:** It is pretty clear, whatever the negotiation is, that there is



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precious little chance of any kind of win for the legal services or the British legal system in this. It is just how little the loss is.

Lucy Frazer: We are working towards an arrangement as close as possible to what we have at the moment. We have to accept, particularly in relation to services, that we are leaving the single market and there will be consequences of that. We have some fall-back provisions—Mr Davis mentioned some of them, as did the other panel members—in relation to existing conventions, which will protect us in some areas going forward, but, of course, the relationship we have at the moment with the EU is much more advanced and gives better relationships for individuals and companies.

Q38 **Chair:** We have to be honest and accept that whatever we get will be less good than we have at the moment.

Lucy Frazer: On services, we have to accept that we are leaving the single market. We are pushing very strongly for a civil judicial co-operation that is as close as possible to the one we have. That goes to a number of levels. We can sign up to The Hague conventions, and we have committed to doing that. We would like to stay in Lugano, but that depends on the EU signing up as a member. We want an arrangement as close as possible to what exists at the moment in relation to Brussels. We are in a negotiation for that.

Q39 **Chair:** That is understood. You mentioned Lugano. Have you seen the letter that Lord Boswell sent on behalf of the EU Committee to the Lord Chancellor?

Paul Candler: If it is the letter dated 16 October, we are aware of that in the Department.

Q40 **Chair:** Yes, 16 October. A passage specifically deals with Lugano. I am glad you mentioned it, Minister. It says, broadly, that UK membership of the Lugano convention was highlighted in their report in March 2017 as a workable but imperfect solution. Lord Keen, your fellow Minister, shared that view.

The conclusion of the House of Lords Committee was: "Yet, in the meantime, we have been left with the impression that the Government has done little, so far, to take this solution forward. If the Government had been better prepared it could have been on the verge of securing our membership. With the current dangers of a no-deal Brexit and the potential loss of the safety net provided by the transition period, it is deeply regrettable that the opportunity to achieve membership of the Lugano Convention before March 2019 appears to have been lost; the Government's aspiration of securing a 'seamless transition' has been missed." Why were we not able to move forward quickly?

Lucy Frazer: We are working on Lugano. We accept that Lugano does not offer the same solutions as the Brussels (recast) regulation, but we have talked at official level to the other countries that are in Lugano. We understand that those discussions have gone very well. The EU has been



extremely clear that Lugano forms part of our future arrangement, not part of the existing withdrawal arrangement, so it forms part and parcel of our discussions in relation to the deal, which are ongoing and have not been finalised yet.

Q41 Chair: How much work has been done in relation to no deal from the legal services point of view?

Lucy Frazer: A lot of work has been done in relation to no deal. We have made it clear that we are going to bring Rome I and Rome II into domestic law. We have made it clear that we will be signing up to Hague. We published two technical notices, one this month and one last month, in relation to Hague on both civil jurisdiction co-operation and legal services. We have put some of the SIs that we are currently drafting to the sifting committee, and obviously we hope to lay those SIs between now and exit day. There has been a lot of work in relation to preparations for no deal because, as a competent Government, while that is not the solution we want, we are preparing for it.

Q42 Chair: I understand it is not the desired solution. I suppose the fear that one has—you will have heard the evidence from the previous panel—is particularly about the distinction between the legal services sector and, say, financial services, and the different impacts of loss of market access around that. In the horse trading of whatever the final deal and the future relationship is, the concern is that civil justice co-operation might get sacrificed along the way.

Lucy Frazer: I understand that concern, but we in the Ministry of Justice are doing everything to ensure that it is not sacrificed. I went to Brussels last month and spoke to a number of my counterparts to express the importance of civil judicial co-operation from our perspective. That was recognised. The Secretary of State has made those points clear, as have officials, at a number of meetings across member states.

Internally, I have raised those concerns with my counterpart in DExEU and in other Departments, formally and informally. I have sat before the Lords Sub-Committee on Legal Services with my counterpart in DExEU, who is a lawyer and completely understands these issues. We are very much trying to ensure that this area is recognised both on our side and in member states. It is not a technical issue. As Ellie Reeves said earlier, it is about individuals and small businesses, as well as the huge significant contribution it makes to our economy. I do not think that is lost either in the Government or across our borders.

Q43 Chair: Mr Candler, can you help us on the practical and technical things your team at the Department does on a day-to-day basis, for example, to ensure that there is proper consultation with the legal services sector and with the judiciary, where appropriate? What is the mechanism to make sure that the issues the Minister has referred to are fed across Government and that practitioners are properly involved?



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Paul Candler: A key forum for us is the Brexit law committee, which the vice-president of the Law Society was telling you about. It is a monthly meeting at which we discuss with representatives of the legal sector the negotiating position of the UK and, recently, the arrangements for no deal—the technical notices—and progress on statutory instruments. That, as you have heard, is proving a very useful forum for an exchange of views on how things are going generally.

In terms of how we represent the interests of the legal sector within the Government, my team at the Ministry of Justice is fully involved and plugged into the overarching architecture in Whitehall for Brexit negotiations and no-deal planning. From a Ministry point of view, I have no concerns about the importance of the issues affecting the legal sector not being heard across Government. That is certainly true.

Q44 **Chair:** What are the key bits of that overarching architecture from our perspective?

Paul Candler: There are a range of meetings in Whitehall that reflect the structure of the White Paper that the Government put out in July on the future economic partnership and the future security partnership, and other meetings to ensure that everything is properly coherent and that the negotiations are taken forward together.

Q45 **Chair:** Does the Government legal service or your Department have representation, for example, when DExEU Ministers go to meetings and negotiations in Brussels?

Paul Candler: Certainly in the context of the withdrawal agreement, as the Minister was outlining earlier. We have been negotiating elements of the withdrawal agreement that are of interest to the Ministry. There is a very effective structure within Government for ensuring that points on civil judicial co-operation and issues affecting the legal sector more generally are made in the right forums. As the Minister said, she and the Secretary of State frequently meet their opposite numbers in European member states and in Brussels; we also work closely with the Home Office and BEIS particularly, and with other Departments such as the Treasury, to ensure that the points of importance to our Ministers and the Ministry are made in those wider meetings as well.

Q46 **Chair:** That is an important point, because, although the Home Office leads on criminal justice co-operation, there could be a lot of downstream impacts on the legal system and the court system, if we do not get those areas right. To what level are you engaged and represented at all of their dealings?

Paul Candler: The future security partnership is clearly a Home Office lead, but elements within the security partnership that the Government are aiming at are very much MOJ areas, such as the prisoner transfer framework and measures around mutual recognition of financial penalties. We are very much engaged in the Home Office-led discussions and negotiations on the security partnership.



Lucy Frazer: Could I add to that?

Q47 **Chair:** Yes, indeed. There is a ministerial level as well, isn't there?

Lucy Frazer: Yes. I have been to the Brexit law committee and spoken to them. I have been to City and UK meetings and spoken to them. When Mr Candler and I were together in Brussels, we went to the Law Society and met lawyers and businesses based in Brussels. I have met with sub-committees of the Brexit law committee to discuss technical issues of family law and civil judicial co-operation. When I appeared before the Justice Sub-Committee of the House of Lords, they said that there was no shortage of us listening. I have met all three panel members who were before you today and discussed various issues with them, particularly the chairman of the Bar.

Q48 **Ms Marie Rimmer:** The ordinary family on the street is very concerned. What confidence can you give a divorced British mother that the courts will continue to recognise and enforce any maintenance agreements that she has with her ex-husband for her children, come Brexit?

Lucy Frazer: Families are a really important area. Three million EU citizens live in this country, and there are UK citizens who live abroad. It is important that their positions are recognised as easily as possible. We are working, as I mentioned, to get the best possible deal, to replicate the best possible arrangement in the family sphere. We are very much encouraged, as the chairman of the Bar mentioned, that in the guidelines the EU put out in March, they specifically mentioned family as an area where they wanted to look more carefully at a deal.

If we do not get an arrangement, there are some fall-backs. We are already signed up in our own right to The Hague convention on international child abduction, the 1970 Hague convention on recognition of divorce and to the 1996 Hague convention on parental responsibility. We will sign up again in our own right to The Hague maintenance convention. On divorce, there is an issue about the fact that those conventions do not cover jurisdiction agreements, but they cover enforcement. We are trying to get the best arrangement.

Q49 **Ms Marie Rimmer:** Are we any further on than we were when you reported to the Lords back in June 2018 when they raised a query about article 11 in the regulation relating to the abduction of children?

Lucy Frazer: In relation to the abduction of children—

Q50 **Ms Marie Rimmer:** Yes. In respect of issues of parental responsibility, they said: "Article 11 in the Regulation, however, does not relate to 'jurisdiction' but instead relates to 'return of the child' and encompasses the rules that apply in the international child abduction cases." They particularly ask that the discussions be amended "so that it is made explicitly clear that this includes Article 11 of Regulation (EC) No. 2201/2003."



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Lucy Frazer: I dealt with that when I went before the House of Lords Sub-Committee. It is covered by section 63, so it should not be a concern. We could write to you about that if you would like.

Ms Marie Rimmer: Yes, please, if you would.

Q51 **Chair:** I am sure you will be aware, Minister, that Ms Renton, who is an experienced family lawyer, said that she thought there was a lacuna in that area.

Lucy Frazer: She did. After that was raised, I checked with the Department and I was told that there was not a lacuna, but we are very happy to write to you further about that.

Q52 **Chair:** That would be very helpful, because I think you told the Lords Committee that you had read the evidence and assured them that it was covered. If you could spell out specifically why you gave that assurance, it would be very helpful, probably to both Houses.

Lucy Frazer: I will definitely tell you. We will write to you and tell you that.

Q53 **Chair:** The other point that has been raised is that you recognise it does not cover jurisdiction points around divorce, which raises the issue of parallel proceedings. What are the Government's plans to try to prevent a situation where parallel proceedings start up again, which most people agree was an unsatisfactory situation?

Lucy Frazer: That is a very good point. The plan is to get a deal on this area. We recognise that there is a gap in relation to jurisdiction. We are pleased that the EU has recognised that it is an area where they understand it will be important to get a deal, and said so in their March guidelines.

Ms Marie Rimmer: Could we ask for a written update on exactly where we are on this family law stuff?

Q54 **Chair:** Minister, you are going to come back about the lacuna and I am sure we will be able to talk about that. You get a sense that there is willingness on the EU side about this.

Lucy Frazer: In the March guidelines, they specifically mentioned family as an area where they were interested in having an arrangement.

Q55 **Chair:** It is not a question of willingness to do a deal. It is whether we have a deal.

Lucy Frazer: That is the important thing.

Chair: I understand that. Are there any other points on family law that anyone wants to raise?

Q56 **Victoria Prentis:** I should probably declare an interest in that Lord Boswell of Aynho knows my father. I had not realised that his letter was going to be quoted. I am so sorry. Otherwise I would have brought it to



the Committee's attention earlier.

Minister, you are clearly aware that legal services are not an area that is doing well out of Brexit broadly. Has the Department made a financial assessment of the different outcomes, and is it something you have been talking about more widely across Government? Has the Department, for example, assessed a no-deal situation financially for the legal services sector? Is that the sort of argument you use to ensure that Ministers are hearing your voice loudly and clearly?

Paul Candler: We constantly continue to represent the importance of the legal sector to the UK economy generally in the Treasury, as they continue to argue the case for an ambitious relationship with the EU in the economic sphere.

Q57 **Victoria Prentis:** What figures are you giving them?

Paul Candler: It is very difficult to put specific figures on the specific scenarios we are considering because of the issues that the previous witnesses were outlining in terms of the differing impacts for legal services, depending on relationships with other industries and what the deal looks like. There is not a specific economic case around the legal sector, because it is difficult to isolate the factors on which you would be basing such an assessment. The importance to the economy of the legal sector in the UK overall is very much understood at the centre of Government.

Lucy Frazer: All the points that Mr Davis put forward are well known in the Department and often put—the £24 billion to £26 billion contribution to the economy, the fact that the sector employs 300,000 people, not just in the City but regionally, across the country, and the importance of it in supporting the financial services sector. All those points in generic terms are regularly put to many people.

Q58 **Victoria Prentis:** But it is difficult to make that point without having stark differences, as it were. I know the Minister would make the point that lawyers are not what matters; it is their clients who matter. She made that point very clearly earlier. When trying to sell English and Welsh law to a new client, Minister—somebody signing a contract at the moment—what would you say is the reason for choosing us as a jurisdiction at the moment?

Lucy Frazer: That is a very good question. There are many reasons for choosing our law and jurisdiction. There is the huge respect in which our judiciary are held, and the integrity of the judiciary. We have outstanding lawyers, solicitors and barristers. We have English law as law. Our courts operate well and give good judgments.

We are hugely respected not only in terms of the court system but in international arbitration. Many of our senior judges have gone to other jurisdictions to lead courts because of the respect in which they, we and our law are held because we uphold the rule of law. Although it is really



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important that we get a good relationship with the EU as regards our laws going forward, we have to remember that we are an international jurisdiction, and many people and companies who choose English law as a forum and law do so for various reasons. They want to enforce elsewhere, not necessarily in the EU. The only effect the changes will have is on our ability to enforce judgments in the EU. If companies do not have assets in the EU, yet they are international, English law will still remain an attractive option for them.

Q59 Victoria Prentis: Yes. We are hoping it will remain an attractive option for other companies as well.

Lucy Frazer: Absolutely.

Q60 Victoria Prentis: Those are very good and positive reasons why you think we have a future. I do not know if you were here for the evidence that was given earlier about how other European nations are mustering around the edges.

Lucy Frazer: Yes, I was.

Q61 Victoria Prentis: I know the Department's budget is very constrained at the moment. That is blindingly clear and it is something we all need, I hope, to be talking about in the Budget debate next week. Are you confident that sufficient resource is being spent on selling the Great British legal service?

Lucy Frazer: We have the Legal Services are GREAT campaign, which Lord Keen launched in Singapore. That has been to China and Kazakhstan. The Prime Minister launched it in Nigeria when she was there recently. It was very interesting to hear what the panel said. I met someone at a Legal Services are GREAT campaign event who said that as part of that his firm had gone to one of those jurisdictions and had won work there as a result.

We are selling our services beyond the EU. The Secretary of State recently signed an MOU with India. I recognise what the panel were saying in relation to exporting our services, which we have been trying to do. I was a member of chambers that, I should declare, did a lot of overseas work in Bermuda, the BVI and the Cayman Islands. We are an international jurisdiction.

Q62 Victoria Prentis: To go back to my question, are you confident that we are spending enough money, resource and departmental time on that?

Lucy Frazer: We are supporting the Legal Services are GREAT campaign. Not only are we doing that, but we are supporting LawTech, innovation in technology, because we need to be ready for the changes that are taking place in the way contracts are put together, with blockchain and smart contracts. The Ministry of Justice is very much supporting that as well. We established a law panel chaired by the president of the Law Society,



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and she is looking into a number of areas where we can help firms to innovate in this very important area.

Paul Candler: The links between the Ministry and, for example, the Department for International Trade are strengthening all the time. In terms of supporting the legal sector beyond Brexit both in relation to the EU and globally, we are very confident and working hard on that.

Q63 **Chair:** India is in large measure a common law jurisdiction, although not totally, but it has always been notoriously difficult for the legal services sector to penetrate. What in the MOU makes you think that is going to change?

Lucy Frazer: You are right. It is a very protectionist area, but it is an advancement to have signed an MOU.

Q64 **Chair:** What are the specifics that the MOU will give us, do you think?

Lucy Frazer: I knew you would ask me that. We will write to you about that.

Q65 **Chair:** That will be very helpful. We would like to know precisely what the position is. Can you say anything particularly, Mr Candler?

Paul Candler: Essentially, it is around sharing expertise on regulatory models and so on with the Indians, but, as you say, there has been a long-running discussion with the Indians and we are very pleased that it has come to a successful outcome.

Q66 **Chair:** There is talk about regulatory expertise and models, but it does not say anything about access to the market.

Paul Candler: As the Minister said, we will write to you with further details.

Chair: We would be very grateful.

Q67 **Ruth Cadbury:** The professional panel we have just heard from said that one unintended and possibly unwelcome growth in terms of legal services is among those who could potentially take advantage of uncertainty with Brexit and get a lot of business, which, ultimately, costs small businesses and ordinary families more, because of the confusion that Brexit causes in the law. Do you have concern that the wrong kind of business growing is one of the downsides of Brexit, given the level of uncertainty about which jurisdiction, professional qualifications and so on?

Lucy Frazer: Could you clarify?

Q68 **Ruth Cadbury:** If I got it right, the previous panel from the legal profession suggested that there would be solicitors who would gain additional business as a result of Brexit, but it would be through the confusion and uncertainty that Brexit has caused where we are talking about cases that are UK/Europe, the dual tracking of cases and so on.



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Lucy Frazer: That would be a real shame. A lawyer's duty is to serve their clients and to do that in the most cost-efficient and best way possible. One generally tends not to get repeat business from people who are not treated well. It is in their interests to ensure that their clients are well served.

We are, as I mentioned at the outset, trying to ensure that whatever arrangement we come to works for individuals. From a Ministry of Justice perspective, we will try to ensure that our courts continue to run well and that the judiciary are trained. I hope that lawyers do not take unfair advantage of individuals.

Q69 **Ruth Cadbury:** You just hope.

Lucy Frazer: If there were specific instances where we felt we could assist, I am sure we would look into them, but we would need to understand a few more specifics.

Q70 **Chair:** There is also the overall risk, isn't there, that the more uncertainty there is, the more room there is for dispute, and the more dispute, potentially the more litigation?

Lucy Frazer: The Brussels regulations have ensured streamlining, in that, where one court is seized, the other is not seized and there is no multiplicity of proceedings. If we do not get a deal that recognises that, there will be scope for more multiplicity of proceedings where people try to take advantage, possibly in the interests of their client, to get proceedings in the country where they want to pursue them. That is why we are working for a deal.

Chair: Understood. There is frank recognition of something that I know you want to avoid, but it is a risk.

Q71 **Bambos Charalambous:** Minister, having heard from the previous panel, how much certainty does the legal services sector have about its position after March 2019? For example, will English and Welsh lawyers be able to have their qualifications recognised when they work in the EU, so that they have the right to practise?

Lucy Frazer: In our White Paper in July, we identified that we wanted to have joint practice between UK and EU lawyers, recognition of qualifications in the EU and EU-UK ownership of accounting firms. We have also set out in our technical notice, if we do not get a deal, what qualifications we will recognise and when.

Q72 **Bambos Charalambous:** What about English and Welsh lawyers in other jurisdictions?

Lucy Frazer: In a deal scenario, we hope to agree those provisions. Is that what you mean—a deal scenario? Those are the things we will be working towards agreeing.

Q73 **Bambos Charalambous:** You have talked about the benefits to the legal



services sector of leaving the EU. What are the realistic opportunities for the UK's legal services sector from the UK securing trade deals with non-EU countries? I think you touched on that previously, but how realistic do you think it is?

Lucy Frazer: DExEU and the Department for International Trade are working very hard to get free trade deals across a variety of jurisdictions. We mentioned the work that we are doing in relation to India, and the work that we are doing going out and promoting legal services abroad.

Q74 **Bambos Charalambous:** Do you think those markets are going to be hard to penetrate?

Lucy Frazer: I think that some countries are easier than others. We are always asked for certainty and it is very difficult to give certainty until certainty is reached. At the moment, we are trying to get a deal with the EU. We are working with a number of countries and have been doing so in any event.

Paul Candler: As the Minister has set out, the Government's ambition for a comprehensive agreement with the EU on civil judicial co-operation will enhance the position of the UK as a legal sector, and that continues. That is what we are working to. We believe that the UK has a great deal of other factors, which we have been discussing today, in its favour as a legal sector, such as the quality of its courts and the quality of its judges.

As well as continuing to try to deliver the comprehensive deal with the European Union, as we have been discussing, we are equally working with the Department for International Trade to set our sights higher in terms of global reach to try to get further business for the UK legal sector in non-EU countries. The two seem complementary. The Government's intention for a comprehensive deal with the EU complements the increasing work that we are doing to try to strike deals with other, non-EU, countries.

Q75 **Ruth Cadbury:** On policing and security, if we go ahead with a no-deal Brexit, British citizens want to know that they will be safe after Brexit, particularly a no-deal Brexit. What progress has been made in discussions about criminal justice matters, particularly the system to replace the European arrest warrant and data sharing in regard to Schengen?

Lucy Frazer: We want to have as broad a security relationship as possible. The Prime Minister has been extremely clear about that from day one. She has also said that it is not conditional on any other areas. That would include operational capabilities as well as data sharing.

I have spoken to my counterpart in the Home Office, who tells me that the Home Office, in whose arena this matter sits, has met many Interior Ministers. They have had a lot of meetings, and there is broad recognition that this is an area that is both in other member states' interests and in our own. It was very good to see that in July Michel Barnier mentioned a number of areas where he wanted to see the UK and the EU explore close



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co-operation on matters such as those you mentioned, extradition, exchange of DNA, fingerprints, passenger records and suchlike.

Q76 **Chair:** Data sharing implies adherence to common data standards and regulations. How do you ensure that, if you have left the legal mechanism that polices and ensures adherence to those common standards?

Lucy Frazer: As I mentioned, that is primarily a Home Office matter.

Q77 **Chair:** But it must be a matter of real concern for the Ministry of Justice.

Lucy Frazer: It is a huge concern. Obviously, we have prisoner transfers, which will affect us directly. There are 40 measures that we have signed up to, and some of them affect court process, prisoners and information. It is a very important area. In relation to agencies, we said that we would have to recognise that we were dealing with those agencies as a third party, and there would be consequences in payment and recognition of operating systems as they were operated in the EU.

Q78 **Chair:** Does that also, inevitably, involve recognition of the role of the ECJ as the arbitral mechanism in the event of any need for interpretation or dispute?

Lucy Frazer: It may involve the ECJ. The Prime Minister said in one of her speeches some months ago that she recognised that.

Q79 **David Hanson:** How do you square non-membership of the ECJ with continuing membership of the European arrest warrant? How would you advise our lawyers who have been before us today to deal with that in six months' time?

Lucy Frazer: There are a number of ways of dealing with it. We have been very clear that the ECJ will always be the arbiter of EU law. There are a number of ways of dealing with that. One is through an overarching arrangement with the ECJ being the arbiter of its laws.

Q80 **David Hanson:** Let's put it this way. I am a Portuguese citizen, and I have committed offences in the United Kingdom. The United Kingdom applies to bring me back to the UK to face trial under the European arrest warrant and I decide to take it through the courts, to fight it generally. Tell me how that works in March next year.

Lucy Frazer: That is a matter that is being discussed and agreed. The Prime Minister and the EU have been extremely clear that the European arrest warrant is an important mechanism in our suite of measures.

Q81 **David Hanson:** What technical advice are you giving people who have been before us, from the Bar Council and other organisations, about how to deal with this issue in April next year?

Lucy Frazer: The European arrest warrant sits with the Home Office. I am sure that is a discussion they have been having.

Q82 **David Hanson:** QCs are going to be defending, prosecuting or trying to



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take these matters through the courts. What advice have you given them with regard to the preparations they should make in the event of a no-deal scenario next year?

Lucy Frazer: I do not think the Home Office has yet put out their technical notice on the European arrest warrant, but I am sure they will be doing so in due course.

Q83 **David Hanson:** Given that you have responsibility for the legal system, what discussions are you having with QCs, the Bar Council and others in relation to the applicability of this matter next year from their perspective, even though it is a Home Office matter? What is your role and responsibility?

Lucy Frazer: You heard from the chairman of the Bar Council that he recognised that this was a Home Office matter. Of course, it affects the justice system. As I have said to you, this is an area where there is real and genuine recognition that security is in the interests of both us and other member states. As I mentioned, I have spoken to my counterpart in the Home Office who has spoken to a number of Interior Ministers ensuring that we work towards the best possible arrangement.

Q84 **Chair:** Can we be clear? As far as you are aware, it is the intention, you think, of the Home Office to issue a technical notice around areas of criminal justice co-operation?

Lucy Frazer: I am sorry. I would have to clarify that.

Q85 **Chair:** Do you have any idea, Mr Candler, from your day-to-day discussions at official level?

Paul Candler: I am not aware of the Home Office's plans to issue a technical notice. To add to what the Minister said in relation to the European arrest warrant, if there is an agreement with the European Union, the scenario for next April would fall within the implementation period during which the UK would remain part of the European arrest warrant and the other measures that we currently participate in. There are issues as to how the European arrest warrant would relate to the UK during the implementation period because we would no longer be a member state, but the implementation period, obviously, allows for the UK to continue participating in the measures it participates in.

Q86 **Chair:** It buys you time to sort it out is the kindest thing we can say, isn't it? Really, that is what it comes down to, isn't it, Minister? If we had an implementation period, we might be able to sort it out.

Lucy Frazer: From the discussions I have had, I understand that this is a matter where there is mutual recognition of the seriousness and importance across borders. As I mentioned, Michel Barnier specifically mentioned it in July, as the Prime Minister has done at every stage in her statements.

Q87 **David Hanson:** I appreciate that the European arrest warrant is a Home



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Office matter, but time in court, costs in court and the ability to have justice brought in court are matters within your remit.

Lucy Frazer: You are absolutely right. We are, as a Department, taking steps to ensure what would happen in a no-deal scenario. In so far as there are downstream effects for our Department, we are doing that, not only with the Home Office but with every Department. You are right that there would be an effect. Westminster magistrates court deals with a lot of European arrest warrant cases. We are looking at what contingencies we would have to put in place for the downstream effects.

Q88 David Hanson: That leads to the next question. You answered Mr William Wragg's parliamentary question by saying that there is, roughly, a cost of £17.5 million for the Department to prepare for Brexit. Can you give us an idea of what you have spent £17.5 million of our taxpayers' money on?

Lucy Frazer: Yes. You are right. In the last spring statement, in 2018, we were allocated £17.4 million. Two thirds of that we have spent, essentially, on staffing.

Q89 David Hanson: How many staff?

Lucy Frazer: That would be staff in HMCTS as well as in other areas in the MOJ itself.

Q90 David Hanson: How many additional staff in total?

Lucy Frazer: I would have to let you know the precise figures. It is not just staff. Two thirds is on staff. The rest is on IT and judicial training to ensure that judges are up to date with the legislative changes. If you want specific figures—

Q91 David Hanson: Is it possible to have a breakdown of exactly how much of the £17.4 million has been spent to date, and what the budget headings are that it has been spent on?

Lucy Frazer: I can ask the Department to do what they can on that.

Paul Candler: The £17.4 million that was allocated is earmarked for Brexit as it affects the MOJ. As of today, not all of that money has yet been spent. It is currently being planned in the areas that the Minister outlined. Of course, that is dependent on the scenarios we face, but the bulk of it is on staffing and recruitment to deal with the downstream impacts. In terms of category headings, I am sure we can let you have that information.

Chair: That would be helpful.

Lucy Frazer: We are also putting in a bid to the Treasury for future spending as well.

David Hanson: This may be an ironic comment, but perhaps you could tell us how many prison officers that would purchase at the same time,



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just by the side.

Chair: We may do our own calculations around that one. If you could set out the factual position we asked for in a letter, we would be grateful.

Q92 **David Hanson:** Minister, you speak for England and Wales. Scotland is a separate jurisdiction, and Northern Ireland is a separate jurisdiction. Scotland has an Administration. Northern Ireland does not. I wonder how the different parts of the United Kingdom are being wedded together in the Government's response to the judicial issues on Brexit.

Lucy Frazer: You have identified some issues. In addition, Northern Ireland and Scotland have distinct legal systems, and, for example, the regulation of legal services is devolved. We work together with the devolved Administrations. I met the Law Society for Scotland in June. Lord Keen met the Law Society for Scotland and representatives from Scottish firms at the International Bar Association conference in October.

On legal services, MOJ officials organised a round table in Scotland with the devolved Administrations and professional bodies in August. The Secretary of State has been in correspondence with his counterparts. We engage with them on a number of matters. For example, the Scottish Parliament has confirmed that it is content for the UK to legislate for Scotland on The Hague SIs, which are an important part of our portfolio.

Q93 **David Hanson:** What is happening in Northern Ireland, given the absence of a political Administration? Who has signed off Northern Ireland's perspective on the criminal justice position and the legal position in Northern Ireland?

Paul Candler: I cannot give you the name of who signed it off, but the conversations we have been having with Scottish officials at my level have certainly been at the same level of intensity with Northern Irish officials, who have indicated that they, too, are content with how we are proceeding with some of the statutory instruments that the Minister outlined. We are very confident about our discussions to date with the devolved Administrations.

Q94 **David Hanson:** In the event of a devolved Administration being reinstated at some point in Northern Ireland, have you done any scenario planning as to the different views of the political parties in Northern Ireland? Obviously, the DUP is one factor, but there are other political parties and they may have a different view.

Paul Candler: We work very closely with the Department for Exiting the European Union, which leads Whitehall in negotiations or discussions about Brexit with the devolved Administrations. I think we would take our lead from central Government on that.

Q95 **Chair:** The Home Affairs Committee published a report in March on implications for security right across the UK, the devolved Administrations as well, post Brexit. What discussions have Home Office officials had with you and your officials, Mr Candler, about drawing up a response, for



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example, on the various technical matters that will be needed to make sure that the UK police forces, Northern Ireland, Scottish and English, have access to the data systems that we have talked about, and how the warrant will be applied and so on? Is your Ministry involved in those discussions?

Paul Candler: Yes; very closely with the Home Office in relation to the devolved Administrations on security matters.

Q96 **Chair:** That is helpful. There has been some talk about contingency planning in the event that, say, the worst of events happens and we do not leave with a satisfactory deal, and there are potential public disorder matters and so on. That is a Home Office matter, but again there are potential downstream implications for the court system and so on. Have you had to do anything around that, Minister, and if so, what?

Lucy Frazer: We are aware that if there was no deal there would be an increase in volume and complexity, and there would be different laws and changes to forms, so we have, as I said, put in a bid to the Treasury to ensure that we are prepared for those eventualities.

Q97 **Chair:** Given that it could be in March or maybe even sooner—

Lucy Frazer: We are already doing work to understand any impacts. In April, for example, we wrote to all Departments to ask for information about how their post-exit policy might affect our courts and tribunals. We have received returns from all Departments, and we are drilling down with the priority Departments where we think most cases will come from—for example, the Home Office.

I should mention that in September the National Police Chiefs' Council said that it has no intelligence to suggest that there will be an increase in public disorder.

Q98 **Chair:** No. It is very much about putting it in context.

Lucy Frazer: We are, of course, preparing to ensure that our courts operate, as they did in the London riots, very effectively. We are ensuring that we are prepared for any increase in volume and complexity.

Q99 **Chair:** Do you intend to publish any guidance to the justice agencies in relation to that?

Lucy Frazer: I am sure we will. We engage at all times with the judiciary on a number of matters, and very closely with HMCTS. Should further guidance be needed, I am sure we will be publishing it.

Q100 **Chair:** You have done the two technical notes on what would happen in relation to a no-deal scenario, which say, basically, "Tell your clients you have a problem." That is what it comes down to.

Lucy Frazer: What I have heard when I have been engaging with lawyers is that they want certainty, so I hope we have given them some



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certainty. Often lawyers say, "Whatever the arrangement is, we just want to know."

Chair: Indeed.

Lucy Frazer: I hope we have given them some certainty that we are signing up to The Hague conventions. We have said very clearly that we want to sign up to the Lugano convention, but, as I mentioned, that is a future deal arrangement in so far as it relates to the EU. We have said that we want a broader arrangement. They can have a level of certainty that we will be signing up to The Hague conventions in our own right.

Q101 **Chair:** Do you intend to issue any further technical notices on aspects of the legal system or the legal sector, as a Department?

Paul Candler: At the moment, we have issued the technical notices. We are working for all scenarios, continuing to plan for a no-deal scenario and continuing to support the Government generally, and our own Ministers, in achieving a deal with the EU.

Chair: Are there any other questions from colleagues? Minister and Mr Candler, thank you very much for your time and evidence. It is always good to see you. Thank you very much indeed.