What the EU did for English law – and British lawyers

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In the first of two posts for BrexitVote, Edward Pitt examines the benefits EU membership has brought to the legal profession – including allowing British firms to 'export' English law abroad – and explains how it enables the free movement of goods and services. In the second, he will look at areas where perceived 'overreach' in EU law may be hampering Britain's ability to trade.

Leaving aside the topic of immigration – and the protection of non-eurozone economies within the EU and the London market for financial services – there are some other issues which ought to be in the pot during a renegotiation. They relate to the provision of goods and services, and may help us to be more exact about what is meant by reclaiming "sovereignty".

It is useful to remind ourselves of the huge impact over the last 42 years of the basic EU provisions on the free movement of goods and services – in particular, the directly enforceable provisions, such as what is now Article 30 TFEU, which prohibits customs duties on imports and exports, and Article 34 which prohibits quantitative restrictions (quotas) on imports and measures of equivalent effect. Similarly, Article 56 TFEU allows service providers, in principle, to provide services unrestricted to customers in other EU member states. Articles 28-37 TFEU provide for a customs union so that

- there is a common tariff on goods coming in from outside;
- goods from third countries can circulate freely once inside the EU;
- there can be no customs duties or quotas on goods moving between states;
- member states may not enact domestic legislation (such as an internal tax or a product standard) which has the same economic effect as a duty or quota.

The system is underpinned by the competition rules, which prevent private undertakings protecting their national markets. Furthermore, the state aid rules prevent member states from protecting national industries with financial support.

It seems to me that, were the UK to withdraw from the EU, any replacement Association Agreement would preserve these basic provisions. So it may be that trade in goods between the UK and EU states would continue unhampered by tariffs or quotas.

However, what could change is that the UK would have less control over setting the terms on which such goods are sold.

How harmonisation works

Cassis de Dijon, the subject of a celebrated legal case. Photo: PilotGirl via a Creative Commons licence 2.0.

Freedom to provide services is covered by Articles 56 to 62 TFEU. In practice there is no neat distinction between the provision of services and the right of establishment set out in Articles 49-55 TFEU.

Freedom to provide services and the right to establish have needed considerable harmonisation measures, in those service sectors which are regulated in each member state. There is a long list of measures to harmonise, and then give mutual recognition to, qualifications for architects, doctors, dentists and so on. In any withdrawal negotiations there may have to be detailed agreement on each profession or qualification to see whether UK or EU member states' qualifications are still mutually recognised.

The Court of Justice of the European Union firmed up what is meant by "measures of equivalent effect" to customs duties and quotas during the 1970s and 1980s – thereby allowing challenges to national legislation which, while on the face of it was not a customs duty or a quota, in practice impeded Imports from other European countries. (See Cassis de Dijon or the drinks cases against France and Germany (duties on spirits) – I am still perplexed that the UK's square pinned electrical plugs have not been challenged on hidden protectionism.)

The Court also greatly speeded up market integration by holding that some Treaty articles are directly enforceable by individuals or undertakings. Withdrawal could mean, depending on the terms of any revised Association Treaty, that British businesses would lose the ability to effectively challenge protectionist legislation, which, while not on its face a quota or customs duty, had the same economic effect. The old association agreements, with Spain and Portugal for example, in force before those countries joined the EU, could not be directly enforced by individuals or undertakings.

Legal services

The British legal profession, in particular that of solicitors, has enjoyed very great benefits from membership of the EU, especially resulting from the direct applicability of what was Article 52, EEC Treaty, now Article 49 TFEU. This meant that:

- In few member states is the giving of legal advice a prerogative of nationally qualified lawyers. Anyone can advise on the law and help negotiate commercial or property contracts. In 1973 a solicitor could go to another European country, relying on his or her directly enforceable right of establishment under the Treaty, and practice and advise on the law under his home title; we needed no residence or work permit.
- This is what many solicitors and barristers did from 1973 onwards, establishing offices in first Paris, Brussels and Amsterdam and later in Frankfurt, Madrid and elsewhere in the EU. Those offices were then a platform which helped London based law firms export English law, efficiently enforced by the English courts, to other

centres, such as Hong Kong, Singapore and the Middle East. Withdrawal could, or would, remove those wonderful establishment rights which have been so very useful to UK lawyers.

The implications of leaving the EU (and recalibrating the UK's relationship with the EU as a member of the EEA or something similar) differ:

(a) For those law firms which depend on and are fed by the financial services industry, their fortunes will follow whatever the effect of withdrawal is on the financial services industry. Assessing the economic value to the UK of EU related legal services is difficult, but crude estimates put legal services at 1.6% of the UK economy, generating an export surplus of £3.1 billion. The numbers may be rough and ready, but the views of London based commercial finance sector lawyers are almost universally opposed to the UK leaving the EU as they see legal work reducing;

(b) To the extent that English law, as I say, as efficiently enforced by the English courts, is a choice of law for major international commercial contracts not specifically in the financial sector, the effect of withdrawal is perhaps more nuanced. Some commercial entities may see English law and English courts, free from the EU, as a better forum than a country which is a full member of the EU. This is the advantage which, for example, Switzerland has as a choice of law and choice of forum for commercial contracts and disputes. However, the majority view seems to be that English law's real attraction as the law of choice for major commercial contracts is that the UK is part of the EU mutual recognition system on jurisdiction and enforcement.

It is important to move in the EU debate from generality (immigration, UK financial services) or iconic issues (working time directive) to specific areas relating to the cross-border provision of goods and services, where perceived EU overreach causes government frustration and public irritation. Such overreach may restrict the UK government's ability to innovate in regulation. I will examine these in the second piece for this series.

This post represents the views of the author and not those of the BrexitVote blog, nor of the LSE.

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