How UK law firms could lead in Europe

Iain Miller considers the restrictive regulatory environments of EU member states

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On the face of it, the decision to Brexit and leave the EU casts a shadow over the ambitions of UK law firms wanting to expand into Europe. But, it could also prove to be a golden opportunity.

A big part of the UK's economic success is its strength in professional services. Our law firms are world leaders, with turnover of more than £31bn a year, 20 per cent of the European legal market, and 7 per cent of the market globally.

This has been underpinned by the EU Establishment of Lawyers Directive, which recognises our right to practice in other member states. But how can UK lawyers maintain and grow this market share when we are not in the EU, and as we potentially find our free movement across Europe restricted?

England and Wales have the advantage of leading the world in the way we regulate lawyers. Our framework is one of the most open, and one of the few that permits external ownership. This has encouraged innovative firms to set up and grow, and has attracted forward-thinking legal providers from other jurisdictions.

By contrast, the EU legal services market is still dogged by restrictions. In particular, some jurisdictions limit the type of business structure that can be used to provide legal services.

For example, many EU jurisdictions require services to be provided through a partnership. In addition, there are restrictions in member states relating to multi-disciplinary practices (MDPs) and legal practices that have external ownership (ABSs).

This is a matter of concern at EU level and the issue is likely to be addressed in due course. However, the UK is at the forefront of modernising the legal services market, and this has provoked debate within various European bars as to how their regulatory frameworks need to change to deal with the creation of ABSs here.

Lawyers and the legal market are no longer the same thing, and lawyers in other countries will not be able to hold back the competition. How could they hope to do so when so much law will be delivered via websites or through innovative technology-led providers?

The UK has led the way in supporting those international clients who demand better analytics and management information to support decision-making and manage risk, through new operating models, artificial intelligence systems, and IT.

The current concern is that even if we end up with European Economic Area (EEA)- type arrangement with the EU, it is unlikely that UK firms will be allowed to operate in exactly the same way on the continent in the future.

However, it is unsustainable that legal services in Europe continue to be controlled mostly by lawyers.

English law is already the most widely used legal system in the world. The UK's decision to leave Europe could allow the country to go on modernising its processes in line with global legal systems without the need to build agreements with European partners that lag behind.

So Brexit could, in fact, be an opportunity for the UK to further dominate the international legal sector, because we have created a better environment than other countries when it comes to allowing firms to grow and compete worldwide. **SJ**

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'Just in time' is a must for a global legal business

Contrary to the common view point, efficiency should be the by-product of a law firm's drive to deliver the best possible service to clients, and not the other way round.

Fundamental to this approach is 'just in time' information. The concept of component delivery being just in time is well adopted and proven in the manufacturing sector to improve production efficiency and reduce inventory costs. This concept relates readily to information delivery too.

To deliver the best possible client service in today's fast globalising and dynamic legal sector, lawyers need to work at the same productivity levels while on the move as they would in the office. With a global client mix and team structures, lawyers are spread across time zones with no common working hours.

Also, lawyers are increasingly working from wherever is most convenient for them – the office, home, on holiday, and while travelling. They no longer have the luxury to ask peers about the status of matters and the firm's key business metrics at designated times, such as prior to client reviews and board meetings. They must have information at their fingertips and at any point in time via their preferred device.

Consequently, traditional ways of accessing information from on-premises systems are no longer suitable. For example, if a client asks for advice on the implications of the new personal information privacy regulation in a particular country, regardless of the lawyer's physical base or location, the fee earner must be able to access information to clarify the issue. Fundamental information such who are the firm's experts in this area, is the firm doing similar work for other clients, and what is the current legal information available on this regulation will be typical for the lawyer to need access to.

Similarly, a partner travelling to meet a client may need to know the firm's risk exposure to that organisation. Often, clients have multiple appearances in a firm's business and prior to taking on more work, a realistic assessment may be necessary, both internally by way of state of debt to the firm against the actual billing to date, and externally by considering the state of the industry and market that client plays in.

Technology, including a combination of an enterprise resource planning system, devices, and connectivity options, can facilitate such an approach to business operation. The right type of IT is essential to enabling lawyers to access vast rafts of data from any device, in a format that works for the device of choice, and from any location in the world.

Referring back to the example above, its relevant to see only the heads of terms of the personal information privacy regulation on a smartphone on the move – secure in the knowledge that the entire and most current document is available to review on a PC later. Or the data on financial exposure may be better displayed in a pie chart for easily comprehensible information on the move.

In a law firm scenario, the 'just in time' concept pertains to access to business-critical data at the right time, anywhere, on any device, and securely to make lawyers their own self-sufficient, 'multi-functional' device. In essence, they become their own researcher, credit controller, and risk assessor. This kind of capability is essential for lawyers to effectively work in a globalised business landscape. **SJ**

YOUNGLAWYER

Unreasonable changes?

Georgia Francis considers the costs and consequences of fund switching in personal injury claims

The reasonableness of switching client funding arrangements during litigation has recently come under the spotlight. This follows appeals of decisions that found it unreasonable to change from public funding (legal aid) to conditional fee agreements (CFAs).

In *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC B17 (Costs) (a clinical negligence claim where liability had been agreed), due to ongoing quantum negotiations, a request to increase the funding limitation on the claimant's certificate was made. However, this was refused by the Legal Services Commission (LSC). The claimant's solicitors therefore switched to a CFA. They did not apply to discharge the certificate but did serve a notice of funding (N251) on the defendant, who argued that a failure to discharge the certificate meant the claimant could not recover the costs generated under the CFA.

Master Rowley disagreed, ruling: 'Where a party has exhausted the costs that can be claimed under a certificate so that it is "spent", they can in principle establish a discharge by conduct in the same manner as certificates in which all of the work up to a limitation of scope has been carried out. The effect of that discharge is to end the services funded by the LSC and enable a private retainer to fund the remainder of the proceedings.'

It was held that it was not unreasonable for a claimant, having reached the limit of funding on a public funding certificate, to continue the case by CFA. The fact the public funding certificate had never been discharged did not prevent the claimant recovering the costs from the defendant.

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By contrast, the High Court, on appeal from the Senior Court Costs Office in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2016] EWHC 1598 (QB), ruled that in cases where claimants were advised to switch from legal aid to CFA funding shortly before 1 April 2013, the claimant should be entitled to recover the success fee and after the event (ATE) premium if the decision to switch to a CFA represented a reasonable choice at the time, having regard to all the circumstances applying to them. This would be determined on a case-by-case basis.

The relevance of the April cut-off date is that the claimant's solicitors can recover 'additional liabilities', for example a success fee of up to 100 per cent of the solicitor's and barrister's costs on CFAs pre-dating 1 April 2013, but not after.

The claimant's solicitors here had asked all case-handlers to review their legally aided cases ahead of the reforms and decide whether the client would be in a better position with a CFA and ATE funding. Therefore, after damages were agreed in November 2013, detailed assessment proceedings were begun and within the total costs claimed was a success fee of £57,000 and ATE premium of £51,000. The defendant argued the decision to switch funding was not reasonable.

It was held that the solicitor's advice to the claimant was insufficient as they had failed to advise appropriately, in particular, about the recovery of additional damages following the decision in *Simmons v Castle* [2012] EWCA Civ 1288.

Since 1 April 2013 success fees and ATE premiums are largely irrecoverable between the parties, apart from in limited circumstances. However, claimants must still be advised of all funding options, including the positive and negative implications for the arrangement.

In light of these cases, it is vitally important for lawyers to provide clients with comprehensive and detailed explanations of their funding options in all circumstances. Failure to do so could lead to costs consequences. **SJ**

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