



THE BAR
OF IRELAND

The Law Library

Submission by Council of The Bar
of Ireland to the Minister of State for
Financial Services on the
Development of a New Strategy for
Ireland's International Financial
Services Sector

23rd October 2018

**PUBLIC CONSULTATION ON THE DEVELOPMENT OF A NEW STRATEGY FOR IRELAND’S INTERNATIONAL
FINANCIAL SERVICES SECTOR**

SUBMISSIONS OF THE COUNCIL OF THE BAR OF IRELAND

I. Introduction

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Council of the Bar of Ireland (“the Council”) has prepared these submissions for the purpose of contributing to the above-noted public consultation process. The submissions address a number of points that the Council believes are relevant to the successful development of the financial services industry in Ireland.

II. The Importance of a Reliable and Efficient Legal System to the Development of the Financial Sector

A reliable and efficient legal system is generally regarded as essential to any jurisdiction’s development of a thriving, internationally-competitive financial services industry. This has been recognised by policy-makers, interest groups, and others directly involved in global financial services hubs such as London and New York. For example, TheCityUK, one of the City of London’s foremost lobby groups, has noted as follows:

Law and legal services are a cornerstone of the broader financial and related professional services cluster that makes the UK the leading international business hub. Major global firms come to the UK to access this unrivalled breadth of services, seek advice from world-class legal and advisory firms, raise finance, and insure their businesses – helping to create jobs throughout the UK. A strong, competitive and

well-regulated legal services sector is essential for sustainable economic growth.¹

Lorenzo Bini Smaghi, current Chairman of Société Générale and former member of the ECB Executive Board, similarly has underscored the vital role that a country's legal system plays in its economic growth, particularly in the financial services sector.

The economics literature has emphasised that institutions in general, and the legal system in particular, represent a fundamental determinant of economic growth, especially in connection to financial development. By the "legal system" I mean not only legislation and rule books, but also the infrastructure of the civil courts and the market regulators.

In cross country analyses, the quality of institutions and the efficiency of the legal system often overshadow other classical determinants of growth such as the availability of national resources ... country size, physical capital, and so on. This is a consideration that we, as economists, perhaps need to take more seriously into account than we currently do.

The link between law and finance is inextricable. It would be unconceivable to think of a financial system and indeed of any financial instrument without a legal system to support it.

...

At this point it should be clear that an efficient legal system is a key ingredient of competitiveness among financial centres.²

Finally, a 2007 report by US Senator Charles Schumer and then-Mayor of New York City Mike Bloomberg entitled *Sustaining New York's and the US' Global Financial Services*

¹ November 2017 TheCityUK Report on UK Legal Services 2017, page 7 (<https://www.thecityuk.com/assets/2017/Reports-PDF/39ccc4245b/Legal-excellence-internationally-renowned-Legal-services-2017.pdf>).

² Opening remarks at a conference entitled *Legal Issues related to the Financial Markets*, Frankfurt am Main, 26 October 2007 (<https://www.ecb.europa.eu/press/key/date/2007/html/sp071026.en.html>).

Leadership found that “[t]he second most important factor of competitiveness revealed by the surveys and interviews [on which the report was based] was the quality of the legal system”.³ The report went on:

Only about 15 percent [on senior executives surveyed] felt that the US system was better than the UK’s in terms of predictability and fairness, while over 40 percent favored the UK in both these regards. The CEOs interviewed also shared this sentiment, although they felt that London’s advantage was particularly strong in terms of the predictability. Legal experts indicated that this is a major reason why many corporations now choose English law to govern their international commercial contracts.⁴

The importance of a strong legal system to the financial services sector also has been recognised by the judiciary—Sir Geoffrey Vos, Chancellor of the High Court of England and Wales recently highlighted the role of a strong legal system in attracting investors in the following terms:

It is obvious that potential court users will only wish to use a particular legal system to resolve their business disputes if they have confidence in its integrity. That is the same whether or not the process is web-based. Moreover, *overseas investors will only wish to invest in a market where a reliable, efficient and independent dispute resolution process is available.*⁵

It is thus imperative that any strategy for the development of Ireland’s financial services sector takes close account of the need to promote in parallel the reliability, predictability, and efficiency of the Irish legal system—particularly in the area of dispute resolution.

³ *Sustaining New York’s and the US’ Global Financial Services Leadership*, page 73 (https://apps.americanbar.org/buslaw/committees/CL116000pub/materials/library/NY_Schumer-Bloomberg_REPORT_FINAL.pdf).

⁴ *Id.*, page 77.

⁵ 20 March 2018 Speech to the Banking Standards Board, *Integrity and independence in the judiciary and the financial services industry: a comparative study*, para. 16 (emphasis added) (<https://www.judiciary.uk/wp-content/uploads/2018/03/chc-speech-banking-standards-board-lecture.pdf>).

III. Existing Advantages of the Irish Legal System in the Promotion of the Financial Services Sector

The Irish legal system already provides a number of significant benefits to international financial institutions seeking to establish operations or manage cross-border financing transactions here. Ireland will be the only English speaking common law jurisdiction that remains in the European Union⁶.

Common law

The common law system is attractive to international financial institutions because it provides predictability in respect of the law applicable to cross-border contracts—including those governing financial transactions—and is regarded as being procedurally effective. Following Brexit, Ireland will be the only pure common law jurisdiction in the EU.

EU legislation

Ireland is a committed member of the EU and will continue to implement EU-wide regulations in the area of financial services. It will also retain EU rules governing choice of law and jurisdiction, and the recognition and enforcement of judgments.

Regulatory infrastructure

Ireland has a strong regulatory infrastructure. The Central Bank of Ireland is a well-resourced and engaged regulatory authority that works closely with the European Supervisory Authorities. It has assured firms seeking authorisation in Ireland that it will be “*engaged, efficient, open and rigorous*”⁷ and that firms dealing with the CBI can expect a pragmatic and constructive approach.

⁶ Malta and Cyprus do not have pure common law systems.

⁷ Cyril Roux, former Central Bank Deputy Governor – Financial Regulation, in the Central Bank’s Annual Performance Statement: Financial Regulation 2016-2017.

Quality of the judiciary

The Irish judiciary is widely regarded as having a record of integrity, commercial awareness, fairness and impartiality.

Experienced legal advisors

Ireland's leading barristers and solicitors' firms provide strategic advice and legal services to a wide range of financial services providers both domestically and internationally. They have extensive experience and expertise in financial services litigation, including disputes in other EU countries and the United States.

IV. Proposal to Government for Promoting Ireland as a Centre for International Legal Services

The Council of The Bar of Ireland, the Law Society, and leading Irish law firms submitted a joint proposal to Government in May 2018 aimed at ensuring that Ireland's legal and regulatory frameworks meet the needs of companies, financial institutions and others investing or doing business in Ireland⁸ (see Appendix 1). This proposal has a number of elements, but its key ambitions are for Ireland to recognise and communicate globally the considerable existing advantages of Irish law, the Irish legal system and the Irish courts, and to promote investment in our legal infrastructure (including laws and regulations) to support and develop businesses, including in the area of financial services.

The proposal suggests a number of ways to boost those features of the legal system identified above as being vital to a successful financial services sector—*i.e.*, reliability, efficiency and predictability—thereby enhancing the attractiveness of Ireland to international financial institutions. For example:

⁸ <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf> The proposal was submitted jointly by the Council of The Bar of Ireland, the Law Society of Ireland, 16 of Ireland's largest law firms, the Commercial Litigation Association of Ireland, the Dublin Solicitors Bar Association, and Arbitration Ireland.

- Changing court procedures to make commercial dispute resolution cheaper, faster and more predictable including reducing the time and cost of discovery.
- Further reinforcing the rules, structures and resourcing of the Commercial Court, given its critical role in resolving business disputes, including introduction of a fast track commercial appeals procedure.
- Changing the courts system to allocate additional judicial and other resources where necessary (and particularly to the Commercial Court and the Court of Appeal) and to provide for effective and proactive case management in all courts to reduce the time and cost involved in litigation.
- Benchmarking Judicial and Courts Service resources against competitor jurisdictions.
- Increasing the use of technology in the courts.
- Significantly increasing the resources available to and required by both the judiciary and the Courts Service and identifying measures required to continue to attract top quality, internationally respected lawyers to the judiciary (including review of judicial training, and remuneration) and to develop greater specialisation and sectoral expertise within the judiciary.
- Increasing investment in key regulatory bodies to ensure that we have an adequate and fully resourced regulatory structure, avoiding uncertainty for business as to the interpretation and application of regulatory requirements as well as ensuring a timely process for all applications by business.
- Undertaking international comparative studies to contrast existing Irish law (and legal and regulatory structures) in business related areas to the laws of other relevant jurisdictions to identify ways Irish law could be developed to make Ireland an even more competitive business environment.

- Reviewing procedures and allocating additional resources (including allocation of time immediately after the conclusion of hearings to judges to prepare judgments) to ensure that Judges have sufficient time allocated to consider trial papers in advance of hearings, and that judgments are always delivered expeditiously at the conclusion of hearings and that any delays or issues in this regard are addressed.

The Council of The Bar of Ireland strongly believes that the implementation of these measures (and others) would dramatically improve the attractiveness of the Irish legal system to global businesses and thus would be very beneficial in the State's further development of its financial services industry.

We believe that the Government should adopt a co-ordinated approach to integrate a legal services strategy into the broader Government effort to promote Ireland, including IFS2025. We thus reiterate our call for the Government to adopt the legal professions' proposal—either independently or as a component part of the new strategy that will replace IFS2020.

Appendix 1

Promoting Ireland as a leading centre globally
for international legal services



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Promoting Ireland as a leading centre globally for international legal services



LAW SOCIETY OF IRELAND

9th May 2018

EXECUTIVE SUMMARY

- 1 Brexit poses unique and difficult challenges for Ireland and Irish business. This Proposal from the Irish legal profession aims to assist the Irish Government in its “key priority” to “minimise the impact on trade and the economy”. It is made as an integral part of a broad national economic response to Brexit and also, independently, to support existing Foreign Direct Investment (FDI) and generate increased Irish employment and tax revenue.
- 2 The Proposal has a number of elements but its key ambitions are for Ireland to recognise and communicate the considerable existing advantages of Irish law, the Irish legal system and the Irish courts – our legal infrastructure advantage, and to communicate Government policy commitment to continue to improve and invest in our legal infrastructure (including laws and regulations) to support and develop business, both international and indigenous – our policy advantage.
- 3 The Proposal is designed to ensure that Ireland's legal and regulatory framework is both seen to, and does, meet the needs of companies, financial institutions and others investing or doing business in Ireland and to encourage on a global scale the market for legal services provided in Ireland and by Irish lawyers.
- 4 The Irish legal profession has more than three decades of experience in promoting Ireland as a place to do business and for FDI. Thus, in making this Proposal, it offers the Government the collective experience of dealing with and in overseas jurisdictions, experience garnered across the world in advising international clients on cross-border transactions, working with non-Irish governing laws, and in our daily engagement with international businesses and financial institutions.
- 5 This Proposal has the potential to support the national FDI strategy and increase economic activity in Ireland by encouraging international businesses, including those already doing business in Ireland, to have greater recourse to Ireland for the provision of legal services, including dispute resolution. This, in turn, can benefit Ireland through job creation and tax revenue - the Irish legal services sector already generates at least €2.46 billion annually in turnover, contributes at least €1.6 billion in GVA¹ to the Irish economy, employs 18,000 tax payers directly² and supports the local economy and suppliers.³
- 6 As Irish lawyers we foresee a meaningful role for Irish law in certain areas and industry sectors allied with the provision of a greater range of legal services in Ireland for the benefit of international and Irish business. In a number of sectors, we believe that Ireland as a location and Irish law and the Irish courts are and can be advantageous contractual choices for international clients (now or in the future).
- 7 This Proposal involves a commitment on the part of all stakeholders to further develop Ireland's laws and legal system to make them even more effective, responsive and business friendly and also requires an undertaking on the part of the Government to ensure that the judiciary and the Courts Service are properly resourced, and a further commitment by the Government, Government Agencies and the legal profession to work together to promote Ireland as a place to do business, including legal business, eliminate any unnecessary barriers and make Ireland an even more attractive place to transact legal business (including dispute resolution).
- 8 The challenges are significant and should not be underestimated but to make the most of this unique opportunity the Government can lead the way by moving quickly to endorse the Proposal, establish an Implementation Group and by promoting the use of Irish law and Irish legal services in contracts and transactions.

¹ Gross Value Added.

² See Law Society of Ireland Report, *the Solicitors' Profession, Contribution to the Irish Economy, November, 2014*. These figures are based on 2012 CSO material.

³ Law Society of Ireland, *the Solicitors' Profession: Contribution to the Irish Economy, November 2014*.

INTRODUCTION FROM THE CHIEF JUSTICE OF IRELAND

The departure of the United Kingdom from the European Union in March 2019 will have a significant impact on Ireland. It also raises a number of issues for lawyers around the world.

The UK has benefitted hugely from the access it provides the English-speaking world to the European Union. EU legal principles have become embedded in the Common Law jurisdictions. Equally, Community (now Union) law has embraced elements taken from the Common Law.

Against that backdrop, the Irish legal system has much to offer, particularly to those concerned about the effect of the UK departure.

Multinational companies continue to be drawn to Ireland as a base for their European operations. The economic advantages offered by Ireland are enhanced by its legal system which, like the UK, is based on the Common Law. Ireland possesses highly skilled practitioners in all fields of law, and an open and transparent judicial system integrated into the EU legal order.

Ireland has been responsive to changes in the domestic and international legal landscape. The success of the Commercial Court is but one example of how we are ready to adapt to these changes.

As Chief Justice, I am committed to ensuring that the judicial system continues to respond to these demands in future.

FRANK CLARKE
CHIEF JUSTICE OF IRELAND

INTRODUCTION

This Proposal from the Irish legal profession aims to assist the Irish Government in its **“key priority”** to **“minimise the impact on trade and the economy”** following the decision of the UK to leave the European Union⁴. It is made as an integral part of a broad national economic imperative in response to Brexit and also, independently of Brexit, as an opportunity to support existing FDI strategy and generate increased Irish employment and tax revenue⁵.

The Irish legal profession (both the Bar and Solicitors) recognises and supports the Government in developing and adapting policies **“in order to ensure that Ireland’s economy continues to remain competitive”**. Specifically, we agree with the Government that the required responses to Brexit will include improvements to our business environment – with more competitive, diversified markets and better infrastructure (including legal infrastructure) and the pursuit of trade and investment opportunities.

This Proposal represents a consensus between stakeholders (including the Bar of Ireland, the Law Society of Ireland, the Dublin Solicitors Bar Association and a number of leading law firms) directed at supporting the national priority, strategy and responses referred to above.

It is noted that the Irish legal profession has more than three decades of experience in promoting Ireland as a place to do business and for FDI. This has been done in many ways: including the opening of overseas offices, the marketing of the IFSC (and, before that, the Shannon free development trade zone), and supporting Government, IDA, Enterprise Ireland and trade bodies in overseas trade missions and conferences. Thus, in making the Proposal, the Irish legal profession offers the Government our collective experience of and in overseas jurisdictions, experience garnered across the world in advising international clients on cross-border transactions, working with non-Irish governing laws, and in our daily engagement with international lawyers, businesses and financial institutions.

It is important, at the outset, to identify the opportunities so as to enable a focussed and comprehensive plan of action to be developed based on a long term commitment and strategy similar to that seen in the context of physical infrastructure and the national development plan.

There is of course the wider opportunity that Brexit presents to grow the Irish economy (and, in particular, specific sectors such as financial services) by increasing the level of FDI into Ireland. This project has now been in train amongst all relevant stakeholders (e.g. Government, Government Agencies and legal and other professional services firms) since June 2016 with reasonable success to date. The investment in and improvements to the wider Irish legal system identified in this Proposal will naturally have additional benefit in further enhancing our overall FDI proposition. In particular, this Proposal identifies the potential for growth in the Irish legal services sector by “selling” Ireland and/or Irish law as the preferred jurisdiction and/or governing law for international businesses, transactions and disputes that would otherwise choose English law or jurisdiction. If successfully implemented, this is a chance to create further employment, primarily in the Irish professional services sector, and to generate increased tax revenue from such increased activity in a sector which already generates €2.46 billion annually in turnover, and contributes at least €1.6 billion GVA to the Irish economy.

Ireland’s Business, Professional, and ICT sectors are projected to grow in each of the scenarios modelled in the Copenhagen Report, and Government can promote Irish based legal services on the basis of our pro-business, English speaking, Common Law justice system, the Irish judiciary’s international record of integrity, fairness and impartiality and the extensive experience and expertise of the Irish legal profession.

In order to maximise the opportunity for Ireland, it would not be sufficient to simply promote Ireland’s existing offering – it would be necessary for the Government to demonstrate its commitment to reform and modernise the existing

⁴ See the documents ‘Brexit – Ireland’s Priorities Information Booklet’ (published 15 March 2017), ‘The Government’s Approach – Ireland and the negotiations on the UK’s withdrawal from the European Union’ (published May 2017) and Ireland and the Impacts of Brexit Strategic Implications for Ireland arising from Changing EU-UK Trading Relations (February, 2018).

⁵ Supporting the existing IFS2020 Strategy – A Strategy for Ireland’s International Financial Services Sector 2015 – 2020 and the Government’s Action Plan for Jobs.

Courts and legal system and to commit the additional financial and other resources⁶ required to ensure that Ireland's judiciary, Courts service and legal system continue to best meet the needs of domestic and international business (as well as, of course, private individuals) and provide a "best in class" service matching or exceeding the offerings available in competing jurisdictions.

Over many years, the UK's Government, Judiciary, Bar and Solicitors' professions have worked together to promote England and Wales as a place to conduct legal business, with English lawyers. In the period 2005 – 2015, the UK legal sector grew by a 3.3% per year to a total of £25.7 bn. The UK is believed to account for 20% of European Union legal services fee revenue. This success story is a direct result of the UK Government's focussed support over many years for its legal sector and there is significant scope to replicate this type of success in Ireland.

⁶ Including increasing the numbers of Judges and Courts Service Staff, investing in technology to simplify and modernise the proceedings of the Courts and regulatory authorities, upgrading and investing in physical facilities for Courts and Regulators and reforming and modernising Court rules and regulatory requirements as appropriate.

THE LEGAL CHANGES RESULTING FROM BREXIT

While this initiative is desirable in any event (to reinforce Ireland's offering as a place to do business), Brexit makes it even more timely. The extent of post Brexit changes remains entirely uncertain as negotiations continue. However, as matters now stand, two key legal changes that will inevitably arise are as follows:

- (i) Ireland will become the largest Common Law jurisdiction in the EU. Due to its procedural effectiveness and certainty, Common Law is the preferred governing law for a high proportion of global cross border commercial contracts and arbitrations; and
- (ii) Even more significantly, the post-Brexit recognition and enforcement of English judgments across the EU remains unclear. Unless and until these issues are resolved, there is likely to be additional complexity, uncertainty and risk for businesses and individuals⁷ as a result of Brexit. These matters can be managed and the risk alleviated by choosing a different legal forum to adjudicate disputes. That choice of legal forum is made by international businesses based on a number of factors including competence, process efficiency and cost. In direct response to this issue, other jurisdictions – including France, Germany, Belgium, Holland⁸ and the UK itself - are now exploring or making significant investments and innovations to increase the attractiveness of their jurisdictions post Brexit.

These changes may and hopefully will lead to increased demand to conduct cross border commercial litigation through the Irish courts system or through commercial arbitration in Ireland. Thus, we must ensure that Ireland's dispute resolution system is best positioned to meet international expectations and the needs of international as well as domestic court users - speed and predictability are arguably the most fundamental drivers for international business in this regard and the Irish legal system must continue and indeed improve its capability to provide these features if it is to encourage international business to choose to avail of the Irish legal system.

The recent announcement by ISDA⁹ - that Irish law will henceforth be an option for parties to its derivatives documentation - is a welcome development in its own right and one which underscores the potential attractiveness of Ireland and Irish law in the context of certain international transactions post-Brexit. The new Irish law ISDA Master Agreement will provide for the jurisdiction of the Irish Courts. It is expected that Irish law will be the preferred option for any parties to such international derivatives transactions who wish their contracts to be subject to Common Law principles of interpretation and also to be governed by the laws of an EU member state.

The risks posed by Brexit - legal as well as economic and geo-political concerns - have already led a range of businesses to signal their intention to relocate some or all of their operations from the United Kingdom to within the European Union, including Ireland. It is wholly appropriate that Ireland responds to such changes and competes with other jurisdictions' innovations. Where opportunities can be identified, we should act with appropriate urgency.

⁷ It is unclear, following Brexit (and during the transition period), whether it will be possible to enforce judgments obtained in the UK post-2018/9 throughout the EU. As Ireland remains within the EU, judgments obtained in Ireland will have EU-wide application and immediate enforceability in any of the member states, providing litigants with a speedy and efficient dispute resolution mechanism with minimum administrative burden, through a similar legal system. For corporations with high value assets operating across the EU, a judgment obtained in the UK - a prospective non-EU country - will potentially be less readily enforceable and may require separate applications in each member state, rendering them cumbersome, slow and expensive to enforce and accordingly less effective.

⁸ English language international commercial or financial courts are in place or proposed for Singapore, Paris, Amsterdam, Brussels and Frankfurt.

⁹ ISDA has more than 900 member institutions from 68 countries encompassing a broad range of derivatives market participants including regulatory authorities, banks, corporates and law firms.

THE PROPOSAL

As Irish lawyers serving both Irish and international clients, we foresee a meaningful role for Irish law in certain areas and industry sectors allied with the provision of a greater range of legal services in Ireland for the benefit of international and Irish clients. In some sectors, we believe that Ireland as a location and Irish law and the Irish courts are and can be advantageous contractual choices for international clients. Thus, the Proposal is that Ireland:

- recognises and communicates the considerable existing advantages of Irish law, the Irish legal system and the Irish courts – **our legal infrastructure advantage**;
- communicates the existing Government commitment to continue its policy of making, as and when required, changes to our legal infrastructure (including laws and regulations) to support and develop business, international and indigenous – **our policy advantage**;
- promotes the use of Irish legal services internationally;
- augments our existing attractiveness for new FDI, and supports businesses (in whatever sector) which relocate to Ireland, by ensuring that the legal infrastructure, support and services are available in Ireland which they can expect to obtain or rely upon in other jurisdictions;
- promotes Ireland as a centre for international dispute resolution (including arbitration) which, uniquely, enjoys EU access while also applying a familiar Common Law legal system;
- increases awareness within the international business and legal community as to reasons it may be appropriate to select Irish law or the Irish courts as the forum to resolve disputes or undertake legal transactions (including cross-border restructuring) in Ireland; and
- through Government and State Agencies, should lead the way in promoting the use of Irish law and Irish legal services in contracts and transactions.

The Proposal is designed to ensure that Ireland's legal and regulatory framework is seen to meet the needs of companies, financial institutions and others investing or doing business in Ireland and to encourage and promote the market for legal services provided in Ireland and by Irish lawyers internationally.

The Proposal has the potential to support the national FDI strategy and increase economic activity in Ireland by encouraging international businesses (especially those already established or doing business in Ireland) to have greater recourse to Ireland for the provision of legal services, including dispute resolution. This in turn will benefit Ireland through job creation and tax revenue - the Irish legal services sector already generates €2.46 billion annually in turnover, and contributes €1.6 billion GVA to the Irish economy. Meeting the demand of Irish, UK and overseas-based individuals and operations, the sector already employs 18,000 tax payers directly and supports local economies and suppliers.

The economic, legal and fiscal benefits to prioritising Ireland as a legal hub within the EU will be felt by our citizens, businesses and the State. Accordingly, this Proposal is part of the strategy and work to develop further our regulatory and legal framework and increase international recognition of Ireland as providing an effective legal infrastructure attuned to the needs of the global economy. It also will ensure that the legal system keeps pace with technological and economic development by providing for much more extensive use of technology in the commencement and conduct of legal proceedings (for example, on-line filing of legal documents, electronic document bundles etc.).

BASIS FOR PROMOTING IRISH LEGAL SERVICES

While we need to further enhance our offering, as matters stand, Irish based legal services can and should be promoted on the basis of:

- our pro-business, English speaking, Common Law justice system;
- the Irish judiciary's international record of integrity, commercial awareness, fairness and impartiality;
- the experience and expertise of the Irish legal profession;
- the record and commitment of our Government to respond to the changing nature and demands of international business (as evidenced by the responses and legislative changes made to facilitate the development of international financial services in Ireland since 1991 and changes to the legal system over the years such as the establishment of the Commercial Division of the High Court, the Competition list and the Court of Appeal and the Arbitration Act 2010); and
- the advantages arising from Ireland's continued membership of the European Union, including that Irish judicial decisions are recognised and enforced throughout the European Union, the benefits of uniform interpretation of rules regarding jurisdiction and choice of law and the ability for other legal procedures in Ireland to be recognised and enforced throughout the European Union (including insolvency proceedings where the "centre of main interest" is in Ireland).

IMPORTANCE OF LEGAL INFRASTRUCTURE TO IRELAND'S GLOBAL COMPETITIVENESS

A strong, predictable, responsive and modern legal and regulatory system is a key infrastructural element of a modern economy and should be planned and provided for just as a physical infrastructure is required and provided for in the National Development Plan. With the necessary commitment, development and investment, our legal and regulatory system can help ensure Ireland's economic progress in the context of Brexit and beyond.

Ireland's value proposition for international investment is predicated on our talent, corporate environment and political stability. As global trade intensifies, the quality of legal institutions and processes, the regulatory regimes and resolution channels will be of increasing strategic importance, particularly for more value-added services and sectors (e.g., ICT, Life Sciences, IP, Financial Services, Advanced Manufacturing etc.). Accordingly, the current initiative as discussed in this Proposal is relevant to the Irish Government's strategy of focussing on the development of the intangible economy – legal developments to make Ireland a global leader in the enforcement and application of digital and IP rights would complement this FDI objective.

Thus, it is in the Irish national interest to demonstrate to the international business community Ireland's unequivocal national commitment (led by its Government) to:

- an effective, responsive, reliable and cost effective legal infrastructure;
- clear, consistent, effective and decisive regulation and regulatory guidance;
- the elimination of unnecessary, expensive or time-consuming legal, bureaucratic or regulatory barriers to carrying on business; and
- a willingness to invest in systems and technology and to adapt and modernise Irish law and the Irish legal system where necessary in order to provide fair, effective and up to date solutions for legal issues and disputes - the Irish Courts' capacity to meet the evolving business and market needs of both international and Irish litigants is an important element in Ireland's competitiveness and global positioning.

The objective is to encourage international business to see Ireland as a preferred jurisdiction in which to do business, undertake transactions, obtain legal services or resolve disputes against a backdrop of legal certainty. The legal profession believes that the opportunity – increasingly urgent – exists for the Government to reframe its approach to the Irish legal system as:

- a strategic asset of the State in attracting and retaining FDI
- an effective facilitator of commerce and sustained economic development
- a generator of increased funding for the Courts Service and the State, and
- a generator of increased employment and tax revenue.

In considering opportunities to increase international demand for Irish legal services, it is important to recognise that many jurisdictions which compete with Ireland for jobs and FDI are likewise reviewing and enhancing their legal infrastructure in response to Brexit¹⁰. Ireland must be proactive in competing for these opportunities.

Over many years, the UK's Government, Judiciary, Bar and Solicitors' professions have worked together to promote England and Wales as a place to conduct legal business, with English lawyers. They recognise the importance of the market in legal services to the wider UK economy. In the period 2005 – 2015, the UK legal sector grew by c.3.3% per year to a total of £25.7 bn. In the same period, UK net exports of legal services grew by 73.2% in real terms and in 2015 the UK legal services market generated £3.4 billion of net export revenue. The UK is believed to account

¹⁰ Including France, the Netherlands, Germany and the UK itself.

for 20% of European Union legal services fee revenue. Since 2010, around 80% of all Commercial Court cases in London each year involve at least one foreign party. In almost 50% of all cases, all parties are foreign¹¹.

This success story is a direct result of the UK Government's support over many years for its legal sector¹².

Ireland must do the same if it is to take advantage of the existing and impending opportunities and continue to compete successfully with other jurisdictions.

¹¹ *"Factors Influencing International Litigants' Decisions to bring Commercial Claims to London Based Courts", UK Ministry for Justice Analytical Series 2015.*

¹² *In the last 20 years, the Government of Singapore has successfully created an Asian legal hub through similar support measures.*

OPPORTUNITIES FOR GREATER RECOURSE TO IRISH LEGAL SERVICES IN KEY INDUSTRY SECTORS

Another key opportunity considered in this Proposal is the opportunity to create jobs¹³ and generate tax revenue by growing the Irish legal services sector and making it more responsive to business generally. UK studies show that a £1 increase in spend on legal services in the economy adds £2.39 to the whole economy and that every 100 extra jobs in legal services support a further 67 jobs in the wider economy¹⁴. This shows that the potential for Ireland could also be very significant.

It is also important to note the additional opportunities in key FDI sectors. By developing greater specialist expertise among Irish lawyers and judges, there is also significant potential to enhance our FDI offerings in key specific sectors and to generate further employment and tax revenue (primarily in the legal sector) by offering such industry sectors reasons to extend the range of corporate activities undertaken in Ireland, particularly by encouraging greater recourse to Ireland for legal, including dispute resolution, services.

Where such specific sectors present particular opportunities, these often arise because of their particular needs in terms of legal infrastructure. Focus on such sector specific issues may help to better attract FDI in key sectors (and also to develop a demand for associated legal services, as in the funds industry, creating further employment and tax revenue). For example, Ireland is home to leading global technology, pharmaceutical and financial services companies, amongst other emerging sectors, whose activities are wholly cross border and increasingly complex. These sectors present opportunities for growing significantly the range of services provided to them in Ireland by promoting the advantages of the Irish legal and regulatory infrastructure where possible.

Examples of such opportunities to complement existing growth sectors might include the following:

- a state of the art, internationally focussed, specialist court dealing exclusively with patents, intellectual property and technology issues to complement Ireland's offering to the life sciences, pharma and software sectors;
- the introduction of other more specialised divisions of the High Court, building on the success of the Commercial and Competition lists;
- a commitment to modernise or clarify legislation or regulation to remove any unnecessary obstacles to doing business in Ireland in, for example, the financial services sector (including banks, insurers, investment funds) while ensuring that necessary safeguards continue to be maintained. This is particularly pertinent in the context of Brexit related relocation of business from the City of London;
- changes to law or the legal system directed at the needs of international aviation, to encourage the industry to do even more aviation business in Ireland, and to make Irish law and jurisdiction an optimal choice for the sector in their commercial contracts;
- greater investment in data protection and regulation to ensure that Ireland has a leadership role in developing fair, robust, and clear rules for data protection and use, ensuring that we can regulate effectively tech companies in Ireland and ensure effective but proportionate regulation for such companies eliminating uncertainty as to regulatory parameters;
- completion of the steps required to bring key provisions of the Legal Services Regulation Act into full effect and to introduce reforms provided for in the 2016 Act. The implementation of the statutory provision for new business models such as limited liability partnerships (LLPs) is a particular priority. LLPs are required to allow Irish law firms to compete and practise law on the same basis as their international counterparts in

¹³ *The job creation opportunity is not limited to Dublin and extends to large urban centres such as Cork, Limerick and Dublin. In addition there are substantial cross border opportunities for the 'all island' market in legal services, particularly in the scenario where separate Brexit arrangements are contemplated for Northern Ireland. The large Irish legal firms already have a substantial presence in Belfast and are well placed to take advantage of these opportunities.*

¹⁴ *Law Society of England and Wales Report on the Economic Value of the Legal Services Sector, March, 2016.*

comparable jurisdictions – the Legal Services Regulation Authority's recent indication in its strategic plan that steps will be taken in Q4 2018 to allow the provision for LLPs to be commenced is both timely and welcome). Other reforms initiated in comparable jurisdictions such as England & Wales and Australia which permit the introduction of other business models for the practice of law should also be explored and permitted subject to appropriate regulatory safeguards.

- measures to further encourage R&D activity in Ireland (including associated legal infrastructure) and particularly in the tech, life sciences and Fintech sectors including:
 - public/private collaboration
 - participation of Ireland's third level educational establishments
 - other incentives for new investments
- the UK may become less relevant as a venue for other types of litigation and Ireland may be an appropriate alternative for parties wishing to litigate such issues in an English speaking, Common Law, system. For example:
 - Private damages actions in competition law infringement cases where Common Law jurisdictions are seen as procedurally more suited to dealing with such claims;
 - Ireland would be well placed to increase its importance as a hub for cross-border restructuring post-Brexit. Ireland's examinership regime and its Companies Act provisions for schemes of arrangement are effective tools for corporate restructuring which could assume greater importance post-Brexit.

CHANGE IS CONSTANT: CHANGES TO MAKE IRELAND A MORE BUSINESS FRIENDLY ENVIRONMENT

To compete successfully, Ireland must continue its commitment to make legal and regulatory changes and reforms and to invest in infrastructure to support and develop both indigenous and international companies and business. Areas for possible reform and investment to enhance further Ireland's offering may include:

- 1 Researching the expectations of international clients in respect of the Irish legal system (and their perceptions and requirements) to identify opportunities to:
 - introduce reforms designed to address any perceived concerns or obstacles and to ensure that our system is (and continues to be) perceived internationally as fast, effective, responsive and predictable;
 - better promote existing advantages of Ireland's legal infrastructure (while countering and responding to any misconceptions or concerns);
 - introduce measures tailored to the needs of specific industry sectors, complementing existing FDI strategy; and
 - identify steps required to ensure that Ireland is recognised as having a "best in class" legal infrastructure for supporting and regulating business and resolving disputes.
- 2 Changing Court procedures to make commercial dispute resolution cheaper, faster and more predictable including reducing the time and cost of discovery. (The current review under the auspices of the President of the High Court is expected to focus on this objective, among other important issues). The fast track procedures available to litigants in the Commercial Court should apply to all commercial disputes.
- 3 Further reinforcing the rules, structures and resourcing of the Commercial Court, given its critical role in resolving business disputes, including introduction of a fast track commercial appeals procedure.
- 4 Changing the Courts system to allocate additional judicial and other resources¹⁵ where necessary (and particularly to the Commercial Court and the Court of Appeal) and to provide for effective and proactive case management in all Courts to reduce the time and cost involved in litigation.
- 5 Benchmarking judicial and courts service resources in Ireland against competitor jurisdictions.
- 6 Increasing the use of technology in the Courts, including a commitment for the immediate acceleration of measures to allow for:
 - the electronic commencement of proceedings
 - the electronic filing of pleadings
 - the greater use of electronic trial bundles
 - the streaming of Court proceedings across the internet
 - the conduct of procedural hearing without requiring in person hearings – either by review of submissions and affidavits exchanged electronically or by teleconference or videoconference.

¹⁵ While recent appointments are welcome, additional judges are required to ensure that the legal and business needs of key sectors are met, particularly in the Superior courts, including the Commercial Division and the Court of Appeal. Ireland has one of the lowest number of judges per capita in Europe. Additional judicial supports, increased specialisms and further ICT expenditure are vital building blocks to raise Ireland's profile as a full service destination for international commerce and trade.

- 7 These measures should be introduced throughout the Irish Court system at the earliest opportunity, but particularly in the Commercial and Competition Courts – there should be a commitment to introduce such measures in the Commercial and Competition Court by 2020 and in the Supreme Court, Court of Appeal, and the Chancery, Non-Jury, and Judicial Review Lists of the High Court within 5 years.
- 8 Significantly increasing the resources available to and required by both the judiciary and the Courts' Service and identifying measures required to continue to attract top quality, internationally respected lawyers to the judiciary (including review of judicial training, and remuneration) and to develop greater specialisation and sectoral expertise within the judiciary. Such specialisation has been a successful feature of the English Court system over recent years with the introduction of the Technology Court, the Competition Appeals Tribunal etc.
- 9 Increasing investment in key regulatory bodies to ensure that we have an adequate and fully resourced regulatory structure, avoiding uncertainty for business as to the interpretation and application of regulatory requirements as well as ensuring a timely process for all applications by business.
- 10 Increasing employment by the Irish Government of senior lawyers (in both Dublin and Brussels) specialising in EU law. This will be crucial if Ireland is to monitor and influence legal developments at EU level and is to undertake a greater leadership role from a Common Law and business perspective in a post Brexit environment. Such leadership will be important if Ireland is to maintain a competitive and effective regulatory regime. An increasing proportion of Irish law and regulation is derived from the EU. Until now, the UK (and, in particular, the City of London in relation to financial services) played a strong role in influencing EU legislative policy from a Common Law perspective. Following Brexit, it will likely fall to Ireland's legal profession and Governmental representatives to play a more active role in ensuring that EU legislation and other policies develop in a manner conducive to Ireland's economic interests.
- 11 Undertaking international comparative studies to contrast existing Irish law (and legal and regulatory structures) in business related areas to the laws of other relevant jurisdictions to identify ways Irish law could be developed to make Ireland an even more competitive business environment, especially in sectors relevant to Ireland's FDI strategy.
- 12 Committing to any necessary supplemental allocation for the Courts Service in order to build capacity and position the State competitively in response to the current developments of other EU and global jurisdictions.
- 13 Reviewing procedures and allocating additional resources (including allocation of time immediately after the conclusion of hearings to judges to prepare judgments) to ensure that Judges have sufficient time allocated to consider trial papers in advance of hearings, and that judgments are always delivered expeditiously at the conclusion of hearings and that any delays or issues in this regard are addressed. There should be a commitment to deliver judgments, where possible, in all Courts within (at most) 30 working days of a hearing (or within 20 working days in the case of the hearing of a procedural motion). The Commercial Court and Appellate Courts should aspire to significantly shorter deadlines. Significantly increased resources and changes in systems would be required throughout the Courts system to make these objectives feasible.
- 14 As an immediate priority, the Court of Appeal needs to be adequately resourced by an increase in the number of Judges from 10 to 14. In addition, there should be a commitment to the timely filling of Superior Court vacancies.
- 15 It would facilitate business in Ireland (and the wider community) if there was a clear commitment to simplify and use plain English in all legislation, regulations and regulatory guidance, to regularly publish update consolidations of key legislation and regulations and for regulators to commit to publishing more detailed guidance as to their expectations with regard to compliance with evolving regulatory requirements¹⁶.

¹⁶ *The greater use of plain English in Court proceedings is currently under active consideration by the Civil Justice Review Group, a welcome initiative.*

- 16 Urgent consideration should be given to the adoption of the UNCITRAL Model Law on cross-border insolvency to reinforce Ireland's reputation as a pro-business jurisdiction and to facilitate such transactions in Ireland.

IMPROVED FUNDING

Court fee income in 2016 was in excess of €44m. This represents the main source of revenue for the Courts Service, and equalled 40% of the total cost of running the Courts Service. In the context of adopting a policy to attract increased litigation to the Irish Courts, this revenue stream (through stamp duty, fees etc.) could be augmented, delivering a further gain for the Exchequer, even leaving aside the benefit to the State as a result of the potential for increased employment and the corresponding tax revenue. When PAYE/PRSI and VAT are taken into account, supporting the judiciary in this area is positive as a revenue generating step. For example, the revenue generated as a result of Commercial Court litigation (by way of tax paid on professional fees and stamp duties) exceeds the cost to the State of funding the Court itself.

LEGAL EDUCATION AND REGULATION

In the absence of the UK as a member state, it is important that Ireland takes the lead in ensuring that future EU measures do not unnecessarily diverge from or distort the Common Law system (particularly in ways which will make Ireland, or indeed the EU, less business friendly). This requirement, and other opportunities and challenges presented by Brexit, increase the need to further develop the range of options available for legal education in Ireland, with particular emphasis on the law of the European Union and on specialist legal issues arising in growth industry sectors. Accordingly, while further resources are required for increasingly specialist legal education generally, the commitment of further resources to the study of the law of the European Union and to areas of law relevant to FDI and international business is particularly urgent. Such investment and development is necessary both to enable Ireland to be a leader shaping the development of EU law but also to produce sufficient numbers of Irish lawyers with the necessary EU and international expertise to support and advocate for the post-Brexit requirements of the Irish Government, Irish industry and international business.

For example, Irish law students, and students in other relevant disciplines such as commerce and accounting, should be offered new pre-qualification training courses specifically focused on international and European Union commercial law. Incentives and encouragements should be put in place to attract students in this area – in the way emphasis has been placed on maths and science in recent years.

The immediate establishment of further professorial chairs and teaching positions in third level institutions would advance this objective. Increased investment in legal education generally, and the development of a greater range of options in legal education, would also encourage competition in the market for legal services in Ireland to the benefit of companies doing business in Ireland (and, indeed, consumers) while leading to more jobs and tax revenue. The imminent review of arrangements for legal education in Ireland by the Legal Services Regulatory Authority which is mandated by the Legal Services Regulation Act will doubtless consider these issues and the best way to upskill Irish lawyers to help Ireland compete even more effectively internationally in future.

As part of these initiatives, legal and regulatory requirements for admission as an Irish barrister or solicitor should be reviewed to ensure more flexibility in terms of routes to admission, qualification and practice. Additionally, it would also be important to maintain (and, if necessary, reinforce) appropriate regulation and supervision and admission controls in respect of all individuals practising as Irish barristers and solicitors.

LEAD BY EXAMPLE

The Irish Government and State Agencies should lead the way in promoting the use of Irish law and Irish legal services in contracts and business transactions generally. Unless there is a compelling reason for a different approach in a particular context, all State and semi state agencies, including local government and the Office of Government Procurement, should require all contracts which they enter into to be subject to Irish law and to provide for resolution of any disputes in Ireland.

Such an initiative by the Irish State and State agencies would complement efforts by the legal profession to make Irish law and jurisdiction a more attractive option for international business which would lead to an increased willingness among international clients to choose Irish law and jurisdiction when drafting international contracts.

THE CHALLENGES

It is important not to underestimate the challenges that will be faced in seeking to grow the Irish legal services sector in the manner described in this Proposal. To the extent that English law becomes less prevalent in international business contracts, transactions and disputes, a widely held view within international business and legal circles is that the laws and Courts of New York (and by extension the US legal services sector) will be the principal beneficiary rather than Ireland or other EU jurisdictions.

The challenges will include:

- Persuading major international businesses that they should choose Irish law and jurisdiction in relation to their major projects, transactions and disputes as opposed to the other (perhaps more familiar) options available to them. While we have advantages as noted above (e.g. English language, similarity to the English legal system, Common Law, stability, etc.), the fact remains that Ireland is a small country rather than a major player on the world stage. Many global businesses will naturally incline towards jurisdictions they perceive to be more substantial and more sophisticated and able to offer a swift and predictable resolution to any issue, hence the view that New York law may well be the principal beneficiary in some cases. However, the recent ISDA announcement, (that Irish law will henceforth be an option for parties to its derivatives documentation) shows that Irish law can be an attractive option for complex financial transactions post Brexit, particularly where the preference is to choose the law of an EU member state and a Common Law system;
- We will face intense competition from other jurisdictions (including the US);
- There will be very significant resistance and opposition from relevant UK stakeholders. This is likely to encompass everybody from the UK Government to all the major international law firms with a significant presence in London; and
- Timing is important. Competing jurisdictions will certainly point to the need for significant investment in the Irish legal system to make it a viable alternative to English law in terms of offering the speed and certainty that international business expects. Time is of the essence.

NEXT STEPS

Government should now formally endorse this Proposal. A commitment to its implementation is required in order to ensure that the State's response to Brexit is broad-based, and to make the most of the opportunities for Ireland. There is an urgency to the matter and Government should now establish an Implementation Group to oversee the strategy.

We would welcome the opportunity to engage with relevant Government Departments and State Agencies in considering this Proposal.

We recommend a Government sponsored/funded enterprise working alongside or as part of the IDA with a mandate to promote its implementation, with representatives from key public and private stakeholders (such as relevant Government Departments, the IDA, the universities, the judiciary, the Bar of Ireland, the Law Society, the Dublin Solicitors Bar Association, leading law firms, etc.). Initiatives to further support job creation in the Irish legal services sector should be considered (including grants to encourage research and innovation, new job creation and investment). The group would need a mandate to ensure that Ireland's laws and legal system are developed and marketed as effectively as possible internationally with a view to increasing employment, tax revenue, and supporting existing Governmental FDI initiatives. The Irish legal profession is fully committed to supporting all endeavours to implement this Proposal by Government and will make resources available to the Implementation Group as appropriate and required.

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