

<b>TITLE:</b> Impact Assessment for The Civil Legal Aid (Amendment) (EU Exit) Regulations 2019  <b>IA No:</b> MoJ025/2018  <b>RPC Reference No:</b>  <b>Lead department or agency:</b> Ministry of Justice <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>
	<b>Date:</b> 14/ 01/19
	<b>Stage:</b> Provisional
	<b>Source of intervention:</b> EU Exit
	<b>Type of measure:</b> Secondary Legislation
	<b>Contact for enquiries:</b> Chris.Rant1@justice.gov.uk

<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> N/A
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out?	Business Impact Target Status
n/a	n/a	n/a	n/a	Out of Scope
<b>What is the problem under consideration? Why is government intervention necessary?</b>				
<p>The EU Legal Aid Directive 2003/8/EC (EU Legal Aid Directive) established minimum common rules relating to legal aid in EU Member States in cross border disputes relating to both civil and commercial matters. The EU Legal Aid Directive applies to those domiciled or habitually resident in EU Member States who are: (i) party to proceedings in another Member State; or (ii) wish to enforce a decision in another Member State.</p> <p>In addition, there are several further references to the EU within legal aid legislation:</p> <ul style="list-style-type: none"> <li>• The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) requires the provision of legal aid for: (i) exceptional cases not normally within the scope of LASPO; and (ii) foreign legal advice for matters, where not to provide legal aid would be a breach of “enforceable EU rights”.</li> <li>• The Civil Legal Aid (Procedure) Regulations 2012 provides that, when applying for “controlled work”, an individual must attend a legal provider’s premises in person although an exclusion exists where an applicant is resident or present in the EU, cannot attend in person for good reason and authorises another person to attend on their behalf.</li> <li>• The Civil Legal Aid (Procedure) Regulations 2012 provides that an application for Licensed Work must be made in writing in a form specified by the Lord Chancellor and signed by the individual and proposed provider. Subparagraph 2 provides that the application must be in English subject to an exception (subparagraph 3), which stipulates certain requirements where an individual resides outside the EU and is not present in England and Wales when the application is made.</li> </ul> <p>Under the European Union (Withdrawal) Act 2018, the above legal aid framework will be retained as domestic law. However, as retained, it will contain deficiencies. Government intervention is therefore required to address these issues.</p>				

<b>What are the policy objectives and the intended effects?</b>
The policy objectives are to retain legal clarity and accuracy to the legislation post EU exit.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

- **Option 0a/Do nothing** – make no amendments to existing domestic legislation in this area.
- **Option 0b/Baseline:** Static acquis – the pre- EU exit application of the EU Legal Aid Directive and LASPO, in legislation extending to England and Wales and Northern Ireland with reciprocity from EU Member States and functioning statute book
- **Option 1-** Repeal legislation implementing the EU Legal Aid Directive, and make technical amendments to LASPO.
- **Option 2 -** Unilaterally apply requirements of the EU Legal Aid Directive.

Government's preferred option is option 1 as this best meets the policy objectives.

**Will the policy be reviewed?** It will not be reviewed. **If applicable, set review date:** n/a

Does implementation go beyond minimum EU requirements?		n/a		
Are any of these organisations in scope?	<b>Micro</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>
	Yes			
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		<b>Traded:</b>		<b>Non-traded:</b>

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister: Lucy Frazer Date: 14/01/19

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Repeal the legislation implementing the EU Legal Aid Directive, and make technical amendments to LASPO.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
n/a	n/a	n/a	Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
	Low	n/a	n/a	n/a
High	n/a	n/a	n/a	n/a
Best Estimate	n/a	n/a	n/a	n/a

**Description and scale of key monetised costs by ‘main affected groups’**  
None

**Other key non-monetised costs by ‘main affected groups’**

Option 0a/Do nothing:  
Under this option, there would only be negligible costs relative to the ‘do nothing’ option, because removing non-functioning legislation implementing the EU Legal Aid Directive from the statute book would provide no less provision to those seeking legal aid than leaving it in place as under the ‘do nothing’ option.  
  
Should the technical amendments not be made, the non-functioning legislation would risk, where relevant, impeding effective access to legal aid.

Baseline: Option 0b/Static acquis:  
The repeal of the legislation implementing the EU Legal Aid Directive will decrease the liability of the legal aid fund but it is not possible to estimate the size of the impact, although we expect it to be small.  
  
Making the requisite technical amendments will have no material impact other than to maintain a functioning statute book.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
	Low	n/a	n/a	n/a
High	n/a	n/a		n/a
Best Estimate	n/a	n/a		n/a

**Description and scale of key monetised benefits by ‘main affected groups’**  
None

**Other key non-monetised benefits by ‘main affected groups’**

Option 0a/Do nothing:  
Option 1 would ensure a functioning statute book on day 1 of Exit on 30 March 2019. This will also ensure legal certainty and greater clarity regarding legal aid entitlement, as there should be no uncertainty over who is entitled to legal aid provision. Making the technical amendments would bring clarity to the LASPO legislation post EU exit.

Baseline: Option 0b/Static acquis:

None		
<b>Key assumptions/sensitivities/risks (%)</b>	<b>Discount rate</b>	n/a
None		

### BUSINESS ASSESSMENT (Option 1)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m</b>
<b>Costs:</b> n/a	<b>Benefits:</b> n/a	<b>Net:</b> n/a	n/a

## Summary: Analysis & Evidence

## Policy Option 2

**Description:** Unilaterally apply the EU Legal Aid Directive.

### FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
n/a	n/a	n/a	Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	n/a	n/a	n/a

Description and scale of key monetised costs by 'main affected groups'				
None				
Other key non-monetised costs by 'main affected groups'				
<u>Option 0a/Do nothing &amp; Baseline: Option 0b/Static acquis:</u>				
There is no policy rationale for continuing to confer the benefits of the EU Legal Aid Directive to those domiciled or habitually resident in EU Member States when they are not conferred on those domiciled in England and Wales and Northern Ireland.				
BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low	n/a	n/a	n/a	
High	n/a	n/a	n/a	
Best Estimate	n/a	n/a	n/a	

<b>Description and scale of key monetised benefits by ‘main affected groups’</b>	
None	
<b>Other key non-monetised benefits by ‘main affected groups’</b>	
Option 0a/Do nothing & Baseline: Option 0b/Static acquis:	
Correcting the non-functional legislation would create more legal clarity as legislation in England and Wales and Northern Ireland would be more transparent and easier to understand.	
A unilateral arrangement would cause minimal disruption for the continued provision of legal aid under LASPO for individuals who are domiciled or habitually resident in EU Member States seeking advice and assistance for proceedings within scope of the EU Legal Aid Directive taking place in the UK.	
Key assumptions/sensitivities/risks (%)	<b>Discount rate</b>
None	1 /a n

**BUSINESS ASSESSMENT (Option 2)**

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m</b>
<b>Costs: n/a</b>	<b>Benefits: n/a</b>	<b>Net: n/a</b>	
			n/a

# Evidence Base (for summary sheets)

## A. Background

### *The EU Legal Aid Directive 2002/8/EC*

1. The EU Legal Aid Directive 2003/8/EC sets certain minimum standards for legal aid schemes in EU Member States. While its application is limited to cross-border disputes, it applies to all civil and commercial matters.
2. The EU Legal Aid Directive defines a cross-border dispute as “one in which a party domiciled or habitually resident in one Member State applies for legal aid in a different Member State where a court is sitting or where a decision is to be enforced”. The EU Legal Aid Directive is relevant for those domiciled or habitually resident in EU Member States who are: (i) party to proceedings in another Member State; or (ii) wish to enforce a decision in another Member State.
3. The EU Legal Aid Directive sets out certain circumstances where its provision is required or considered appropriate (subject to merits criteria, set out by the EU Legal Aid Directive, and means tests, set by each Member State). Any means test can be waived insofar as the applicant can prove that they remain unable to pay their legal costs as a result of differences in the cost of living in the Member State in which they reside.

### *Other EU References in Legal Aid Legislation*

4. In addition to the above, there are several further EU references within legal aid legislation:
  - The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) and the Access to Justice (Northern Ireland) Order 2003 require the provision of legal aid for exceptional cases not normally within scope where not to do so would be a breach of “enforceable EU rights”. LASPO also provides that the Lord Chancellor may make an order specifying circumstances where foreign legal advice may be provided where not to do so would be a breach of “enforceable EU rights”. This term will not function effectively once the United Kingdom (UK) has left the EU and therefore must be amended to ensure that these terms operate effectively following exit.
  - Regulation 22 of the Civil Legal Aid (Procedure) Regulations provides that, when applying for “controlled work” (certain types of assistance including legal help, family mediation, mental health and immigration proceedings etc.), an individual must attend a legal provider’s premises in person. There is an exception where: the individual is present in or resides in the EU; cannot attend and authorises someone else to do so on their behalf; or wishes the work to be conducted by telephone. Upon the UK’s Exit from the EU, this would not be appropriate because it confers a benefit on those within the EU over those in third countries which it is difficult to justify post-Exit.
  - Regulation 31 of the Civil Legal Aid (Procedure) Regulations 2012 provides that an application for Licensed Work must be made in writing in a form specified by the Lord Chancellor and signed by the individual and proposed provider. Subparagraph 2 provides that the application must be in English subject to the exceptions in subparagraph 3, which stipulates that where an individual resides outside the EU and is not present in England and Wales when the application is made, the application must (a) be in English or French (b) include a written statement of the individual’s financial resources; and (c) be verified by a statement that the individual believes that the facts stated in the application are true. Upon the UK’s Exit from the EU, it would not be appropriate for those within the EU to be excluded from these requirements over those in third countries where applicants are not present in England and Wales at the time of any application made.

5. Under the European Union (Withdrawal) Act 2018, the above legal aid framework will be retained as domestic law. Upon EU exit Government intervention is necessary because, as retained, the legal aid framework contain deficiencies that will render it unworkable, less effective or difficult to justify post exit. This Impact Assessment (IA) assesses the options for addressing each of these issues.

## B. Policy Rationale and Objectives

6. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to the more disadvantaged groups in society).
7. The main rationale for intervention for the options assessed in this IA is efficiency: reducing legal uncertainty regarding legal aid related matters will support wider economic and social interaction between the UK and all current and future legal aid recipients and sustain the reputation of UK law.
8. The associated policy objectives are (1) to retain legal clarity and accuracy to the legislation post EU exit. This will ensure that those seeking legal aid are not misled about their access to legal aid once these measures cease to function (2) to ensure that the terminology in the legal aid framework operates effectively (3) to avoid a unilateral arrangement where we make legal aid available under the EU Legal Aid Directive for those domiciled or habitually resident in EU Member States without guarantee that this will be reciprocated by the EU (4) to ensure that procedural requirements are aligned for all applicants outside the UK.

## C. Affected Stakeholder Groups, Organisations and Sectors

9. The Instrument will apply to the two UK legal jurisdictions: England and Wales, and Northern Ireland. The groups most likely to be affected by the options in this IA are as follows:
  - Recipients of legal services
  - Law firms
  - Professional bodies

## D. Description of Options Considered

10. In order to meet the policy objectives, the following options are assessed in this IA:
  - **Option 0a/ Do nothing:** make no amendments to existing domestic legislation in this area to account for the effects of the UK leaving the EU.
  - **Baseline: Option 0b/Static acquis** – the pre- EU exit application of the EU Legal Aid Directive, and related instruments in UK legislation with reciprocity from EU Member States and functioning statute book.
  - **Option 1:** Repeal the legislation implementing the EU Legal Aid Directive, and make technical amendments to LASPO.
  - **Option 2:** Unilaterally apply the requirements of the EU Legal Aid Directive.
11. The Government's preferred option is option 1 as this best meets the policy objectives.

## **EU Legal Aid Directive Options**

### **Option 0a: Do nothing**

12. Under this option, no amendments would be made to existing domestic legislation in this area. This would result in the legislation implementing the EU Legal Aid Directive remaining on the statute book, despite no longer functioning.

### **Option 0b/Baseline: Static acquis**

13. This option reflects how, pre-EU exit, the EU Legal Aid Directive currently functions in the UK. This artificial baseline does not represent a counterfactual of the UK remaining in the EU.

### **Option 1: Repeal the EU Legal Aid Directive**

14. Under this option, the legislation implementing the EU Legal Aid Directive would be repealed.

### **Option 2: Unilaterally apply the EU Legal Aid Directive**

15. Under this option, the legislation implementing the EU Legal Aid Directive would be amended so that the requirements of the EU Legal Aid Directive are applied unilaterally. However, it would be difficult to offer a rational justification for such differential treatment.

## **LASPO (England and Wales Legal Aid Framework) amendments Options**

### **Option 0a: Do nothing**

16. Under this option, no amendments would be made to existing domestic legislation in this area. This would result in deficient legislation remaining on the statute book.

### **Option 0b/Baseline: Static acquis**

17. This option reflects how, pre-EU exit, the LASPO legislation currently functions in the UK. This artificial baseline does not represent a counterfactual of the UK remaining in the EU.

### **Option 1: Make the proposed technical amendments to legal aid legislation**

18. Upon its Exit from the EU, it has been determined that the UK will no longer be a party to the EU Legal Aid Directive and therefore the legislation enacting it should be repealed. Under this option:

- The reference to “enforceable EU rights” will be replaced with “retained enforceable EU rights” and the term will be defined with reference to the Withdrawal Act.
- The exception regarding attendance at a legal provider’s premises in person when applying for “controlled work” will be changed to apply only when the individual is in the UK.
- The criteria to fulfil for individuals applying for licenced work who are outside the EU and not present in England and Wales will now apply to those outside of the UK and not present in England and Wales. As such, those within the EU will now be required to meet the same criteria that those in third countries are currently expected to meet when applying for licensed work and not present in England and Wales.

## **E. Cost and Benefit Analysis**

19. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.



20. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales and Northern Ireland with the aim of understanding what the overall impact on society might be from the options under consideration. These impacts are normally compared to those of the 'do nothing' option.
21. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, both positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.
22. As noted above, the primary rationale for intervention in this instance is to promote legal certainty. However, in this case, there is no measure of legal certainty or way for quantifying its impact on wider economic interaction so all the costs and benefits in this IA are non-monetisable in nature.
23. This cost benefit analysis section will first compare the two options against Option 0a/Do nothing, before comparing the two options against Option 0b/Static Acquis baseline which in essence reflects the current arrangements pre EU Exit.

### **Cost and benefit analysis, compared to Option 0a/Do nothing**

#### **Option 1: Repeal the EU Legal Aid Directive and make technical amendments to LASPO**

##### **Costs of Option 1**

*Recipients of legal services, law firms, professional bodies*

24. Under this option, there would only be negligible costs relative to the 'do nothing' option, because removing non-functioning legislation from the statute book would provide no less provisions to those seeking legal aid than leaving it in place as under the 'do nothing' option.
25. Making the technical amendments to both the LASPO and procedure regulations would have no financial implications.

##### **Benefits of Option 1**

*Recipients of legal services, law firms, professional bodies*

26. Option 1 would ensure a functioning statute book on day 1 of Exit on 30 March 2019.
27. Repealing the legislation implementing the EU Legal Aid Directive will ensure legal certainty and greater clarity regarding legal aid entitlement, as there should be no uncertainty over who is entitled to legal aid provision.
28. Making the technical amendments to both the LASPO and the procedure regulations would bring certainty to the LASPO legislation and the Civil Legal Aid Regulations post EU exit.
29. Repealing the legislation implementing the legal aid directive, as well as making the technical amendments to LASPO and the procedure regulations, would avoid a unilateral arrangement where those domiciled or habitually resident in EU Member States were being treated more favourably than third countries.

#### **Option 2: Unilaterally apply the EU Legal Aid Directive**

## **Costs of Option 2**

*Recipients of legal services, law firms, professional bodies*

30. There is no policy rationale for continuing to confer the benefits of the EU Legal Aid Directive to those domiciled or habitually resident in EU Member States when they are not conferred on those domiciled in England and Wales and Northern Ireland.

## **Benefits of Option 2**

*Recipients of legal services, law firms, professional bodies*

31. Removing the non-functional legislation would create more legal clarity as British legislation would be more transparent and easier to understand.
32. A unilateral arrangement would cause minimal disruption for the continued provision of legal aid under LASPO for individuals who are domiciled or habitually resident in EU Member States seeking advice and assistance for proceedings within scope of the EU Legal Aid Directive taking place in the UK.

## **Cost and benefit analysis, compared to Option 0b/Static acquis baseline**

### **Option 1: Repeal the EU Legal Aid Directive and make technical amendments to LASPO**

## **Costs of Option 1**

*Recipients of legal services, law firms, professional bodies*

33. Repealing the legislation implementing the EU Legal Aid Directive will decrease the liability of the legal aid fund but it is not possible to estimate the size of the impact, although we expect it to be small. Records show that these cross-border applications are relatively low in volume. In 2017 there were 27 cross-border applications made between England and Wales and central authorities in other EU Member states. 20 applications were from EU residents seeking legal aid in England and Wales.
34. Northern Ireland Department of Justice officials have confirmed that, although applications under the EU Legal Aid Directive are not centrally recorded for statistical purposes, they have been able to establish that an estimated 3 applications were made in the last 2 years.
35. Legal Aid Agency (LAA) management information does not record whether these applications were subsequently granted, and therefore if they resulted in a cost to the legal aid fund. It is also not possible to identify the category of law that each application refers to, and whether they would be in or out of scope post-exit. In addition, a number of legal aid applications that are in scope as a result of the EU Legal Aid Directive may have been made directly to the LAA or providers and not via central authorities - it is not possible to identify these cases.
36. Any changes to the scope of the legal aid scheme may have an impact on LAA resources. First, an initial one-off cost may be required to implement any changes to IT systems, procedures, and guidance. Second, any decision that results in an increase in the number of cases funded could potentially result in an ongoing resource burden due to the need to process additional applications.

## **Benefits of Option 1**

*Recipients of legal services, law firms, professional bodies*

37. None

## **Option 2: Unilaterally apply the EU Legal Aid Directive**

### **Costs of Option 2**

*Recipients of legal services, law firms, professional bodies*

38. There is no policy rationale for continuing to confer the benefits of the EU Legal Aid Directive to those domiciled or habitually resident in EU Member States when they are not conferred on those domiciled in England and Wales and Northern Ireland.

### **Benefits of Option 2**

*Recipients of legal services, law firms, professional bodies*

39. A unilateral arrangement would cause minimal disruption for the continued provision of legal aid under LASPO for individuals who are domiciled or habitually resident in EU Member States seeking advice and assistance for proceedings within scope of the EU Legal Aid Directive taking place in the UK.

## **F. Wider Impacts**

40. The equality impacts of adopting Option 1 have been considered.
41. The intention is to provide legal certainty and greater clarity regarding legal aid entitlement, as there should be no uncertainty over who is entitled to legal aid provision. In addition to this, making the technical amendments would bring further certainty to the LASPO and procedure regulations post EU exit
42. Individuals anticipated to be most affected are those domiciled or habitually resident in EU Member States involved in civil and commercial proceedings in a cross-border dispute with someone in England and Wales and Northern Ireland.
43. Consideration of protected characteristics impacts are difficult to quantify or predict at this stage, however on the basis of the available evidence considered in this impact assessment, it is likely that the overall impact of Option 1 is minimal and due to the broad nature and scope of the EU Legal Aid Directive and the fact that the technical and procedural amendments simply ensure functionality and clarity of the legal aid framework, there is no evidence to suggest that those with protected characteristics would be impacted any more than those without.
44. The proposed instrument does not amend, repeal or revoke any part of the Equality Acts 2006 or 2010 or subordinate legislation made under those Acts.
45. Due regard has also been taken on the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
46. NI Departments are assisting Whitehall Departments in identifying any equality impacts but as they are not the Department exercising the function, they are not generally conducting formal section 75 equality screenings. However, officials continue to consider the need for equality screenings on a case by case basis and in this instance, it was established that s75 equality screening test does not extend to nationals of Member States who would currently be benefitting from the EU Legal Aid Directive. There is therefore no impact in s75 terms as a result of this SI as NI citizens are not impacted upon by the SI.

## **G. Enforcement and Implementation**

47. Following the UK's exit from the EU, the amendments made to the EU Legal Aid Directive would be enforceable by the courts in England & Wales and Northern Ireland without the requirement for a declaration of enforceability.

## **H. Monitoring and Evaluation**

48. As this instrument is made under the EU (Withdrawal) Act 2018, no review is required.

## **I. Business Impact Target**

49. This measure is out of scope of the Business Impact Target.