

EUROPE INDIA CHAMBER OF COMMERCE

Position Paper on

Legal Services in the EU-India Free Trade Negotiations

Liberalization of legal profession in India – Opening doors to international law firms

Aim – This document ventures upon explaining the pertinent need for Liberalization of Legal Services in India. India is increasingly becoming a strong global player in terms of economic growth. Despite the policy makers calling for foreign investments in India, the need for liberalization of legal services in India remained for a long time to be go unnoticed. This might now shift since it is understood that legal services might become a priority issue in forthcoming negotiations on free trade agreements into which India engages.

1. Current framework

India is the world's second largest legal profession market with more than 1.2 million lawyers. The legal industry in India has traditionally remained a closed industry. The Indian law firms have maintained their hold on the legal industry. Time and again, they have opposed the proposal of allowing the foreign law firms to practice litigation in Indian Courts or solicit services in India. Foreign lawyers are not currently permitted to practice in India and there is no requalification system for foreign lawyers.

This scenario is now gradually changing with the Central Government along with Bar Council of India (BCI) and Society of Indian Firms (SILF) soothing to the idea of opening up India's non- litigious services and international arbitration legal services to foreign law firm.

In 2018 India's Supreme Court made a limited concession, formally allowing foreign lawyers to practice on a 'fly-in, fly-out' basis, meaning they can work in India for a set number of days each year. In addition, work has been delegated to Indian outsourcing companies located on different places in the world, but the outsourced work is mostly relating to transactional and paralegal work.

Foreign firms still cannot engage in representational or litigious practice of any law, including Indian law. Further, there are also reservations in the eligibility criteria of an advocate in the Advocates Act and no recognition is given to LLP law firms under the Act, even though the limited liability partnership act has long been passed by the Parliament.

Recently, the prospect of a U.K.-India free trade agreement is getting people's hopes up again. The Enhanced Trade Partnership could be a real game changer. In its press release announcing the deal, the British government specifically noted in a list of trade barriers addressed by the ETP:

“Commitment to work to remove barriers in the Indian legal services sector preventing UK lawyers from practicing international and foreign law in India, a step that could significantly increase UK legal services exports and UK legal services imports from India.”

However, this foreshadowing cannot be directly extended to the EU's legal market. It is therefore necessary to take a step back and look at where things stand and what might change.

In what follows it will be illustrated how the factors that are supposed to be 'justifying' the protectionist regime could to some extent be adversely affected by the non-admission policy.

2. Why liberalization would be beneficial to the Indian market as well as foreign markets

A. Strengthens position of the Indian legal services on the global market

Liberalization has been, historically, beneficial for India as an economy and there exists a strong case for it to happen in the legal services market as well. Firstly, it would lead to increase in competition and thereby, the growth of the Indian Legal System and Legal profession. International level competition shall increase the pace of economic development and would enhance the capacity and the quality of services.

A number of Indian Law firms have established offices in various other jurisdictions and hence, it would only be fair to allow the foreign firms to operate in India. There are specific areas of law that might be more developed under EU legislation, it would be in the interest of all to allow the foreign law firms and lawyers to provide services in such cases.

The protectionist approach might decrease the willingness to make use of Indian legal services (*e.g.* law-firms, arbitration institutions, etc.) by trading partners. In case an agreement provides for the right of choice of law or in case the parties jointly decide to let a certain legislation govern their relationship, a different legal system (than the Indian one) may be preferred. More specifically since this would also allow for Indian citizens (non-lawyers) and non-Indian lawyers to act. From this starting point a more flexible working-field can be established. The allowance of “*Fly In - Fly Out*” of foreign lawyers still requires prove of necessity and creates cumbersome transaction costs making this option less attractive in an international setting. More in general, legal systems that allow for a free choice of applicable (more beneficial/efficient) legislation and regulations offer more flexibility in favor of multinational companies and would therefore be the preferable option, and in such way stimulate foreign investment in the industry.

Allowing foreign firms in the Indian market would consequently have a positive impact on other sectors as well. This could provide more stability for international players to invest in India.

B. Specialized advisory – increase of service quality

Apart from the legal professionals, liberalization would also benefit the clients as foreign firms would be willing to provide the best services at minimal costs to attract and build a client base in India. Moreover, for several services, travel costs would be reduced, which would ultimately reduce the cost of services.

The specialized advisory from foreign firms is required in many cases such as cross border transactions or compliances relating to different jurisdictions. Since foreign firms possess expertise in some areas of law which are not so well developed in India, it would be the interest of all to allow these firms to provide direct service in such cases, which could also lead to more efficient cooperation possibilities between Indian and foreign firms providing an overall legal service to clients.

With increased cross border deals and outsourcing activities involving both Indian and International clients, it is pertinent to allow both Indian and international firms to work together without restrictions.

Another benefit of allowing foreign firms would be increased professionalism in Indian law practices in comparison to their international counterparts.

C. Increase of employment opportunities for legal professionals

Liberalization will also provide Indian lawyers with the opportunity to work with international fraternity and could lead to more employment opportunities with better pay and working conditions.

It is also stated that foreign firms in India won't hamper the working of Indian lawyers who practice before the court of law in India. These foreign firms would mainly concentrate on corporate or commercial transactional work and avoid functioning as litigators before the court of law in India because of various factors such as language and cultural problems, a dearth of knowledge of the Indian legal system and also the absence of litigating experience in Indian courts.

D. “Brain drain” fear causes tunnel vision

The opposition to liberalization, as advocated by the BCI rests on mainly one argument that the Indian lawyers might not be able to compete with the specialized services that would be provided by the foreign firms, for the lack of financial means. There is also a fear of ‘Brain-Drain’ of the most talented of the Indian law students.

Contrary to what is being focused on by the BCI, brain drain could be countered by offering students an open and broad field of practice, adapted to the current modern context of a globalizing world. The isolation of the Indian legal sector could be rather unattractive to young talents as it limits the content of cases in practice and does not contribute to the idea of an open-minded learning environment. Furthermore, it can be said that the presence of competition from foreign lawyers rather results in a "race to the top" instead of a “race to unfair competition”. In general, a healthy competitive environment leads to higher efficiency than eliminating stimulating competition for each international dispute.

There would also be an opportunity for the Indian lawyers to branch out internationally and there is a strong belief amongst various analysts and scholars that opening up the legal market would lead to an increase in the employment opportunities for Indian lawyers with better pay and work conditions.

3. Approach for the future - further (FTA) negotiations

Experts and researchers who have been analyzing the opening of India’s legal market agree that a phasic approach is most appropriate. After the parties have entered into the agreement as such to work towards opening the Indian legal market further, the next phase could compromise the restricted entry of foreign firms. This could include clearly defining the areas of law that the foreign law firms and lawyers can provide services in, not allowing the foreign firms to form Joint Ventures, defining the ratio of foreign to Indian lawyers in the law firms and granting market specific number of licenses to the foreign lawyers and firms. In the final phase, the foreign law firms can be allowed to expand in India, by means of granting permission to set up joint ventures in India and by creating laws and means of profit sharing between Indian and foreign law firms and lawyers.

Much will of course depend on the details of the trade agreement. It might be more efficient to anchor the opening of the legal market as such, based on the phased approach, in the FTA, whereby further specific contracts on the conditions of the opening of the legal sector could be concluded afterwards.

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