Law Society of England and Wales – Written evidence (FTS0045)

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 190,000 solicitors, promoting the highest professional standards and the rule of law.

2. The UK legal services sector is very important to the UK economy. In 2018, legal services were worth nearly £60bn gross value added (GVA) to the UK economy, while in 2017 legal services exports hit £5bn.[1] Legal services support around 552,000 full time employees, and our members play a vital faciliatory role in wider international trade.

3. Our legal services market is the second largest in the world, and the largest in Europe. England and Wales remains an open jurisdiction and the proud home of over 200 foreign firms and thousands of foreign lawyers from nearly 100 separate legal jurisdictions.

What is the impact of the UK-EU free trade agreement on trade in services?

4. We welcome the conclusion of the EU-UK Trade and Co-operation Agreement (TCA) as it delivers a level of certainty for many sectors, including legal services. The TCA represents the most ambitious services free trade agreement (FTA) concluded by the EU.

5. In assessing the impact on the legal profession, we must stress that no matter how ambitious an FTA is, it cannot replicate the deep integration of the single market and the level of freedom to provide services within the EU.

6. Therefore, while we welcome the fact that the agreement goes further than other EU trade agreements, it nevertheless reduces opportunities to export legal services and limits the ways in which the legal professions in the UK can serve their clients and provide advice to citizens and businesses.

7. As with every FTA, the TCA includes provisions on investment liberalisation, cross-border trade in services and the mobility of professionals. Unique to the TCA is a specific section on legal services based on new definitions around home title practice (designated legal services) and other legal services.

8. However, despite the innovative way in which legal services are dealt with, and some useful provisions in the Services and Investment Chapter of the TCA, the key to understanding the real scope of rights for UK lawyers lies in the Annexes which contain a list of non-conforming

[1] Contribution of the UK legal services sector to the UK economy report: https://www.lawsociety.org.uk/support-services/research-trends/economic-contribution-legal-services-sector-report/

measures (following the "negative listing" methodology of the TCA), i.e. continuing restrictions, often at Member State level , that can limit the applicability of these rights.

9. While a detailed analysis of these provisions will take time, an initial analysis suggests only a limited market opening, in a handful of jurisdictions, compared to the position of other non-EU lawyers.

10. At the same time, we acknowledge that the TCA provides a foundation on which future co-operation can be built. It allows for further constructive engagement between the UK and EU at a Governmental level, as well as regulator-to-regulator and bar-to-bar.

11. Many larger firms are confident that they have sufficient ability under national laws to continue to provide the same level of service to clients as before. This requires some changes to working practices, but is largely manageable. However, for sole practitioners and firms without a European network it will be much harder to service their EU client base effectively.

12. This is compounded by the lack of surety of when (or if) the UK will be able to accede to the Lugano Convention.

What effect may national reservations to the EU-UK Trade and Cooperation Agreement have on trade in services with the EU?

13. The non-conforming measures in the TCA limit the application of the provisions in the relevant chapters that apply to services (including Section 7 on legal services).[2]

14. While Section 7 allows for provision of 'designated legal services' (UK law and public international law as well as arbitration, mediation and conciliation services) in principle, many member states scheduled non-conforming measures that either impose additional conditions such as residency or effectively remove the possibility to practice under home title on a temporary and/or permanent basis. While the TCA might initially appear to allow home title practice for UK qualified lawyers across the EU, in reality, the non-conforming measures scheduled in the Annexes generally mirror the treatment of other non-EU lawyers such that in most cases the actual market access granted to UK lawyers is no better than that available to lawyers from countries that do not have a free trade agreement with the EU.

[2] According to the Vienna Convention on the Law of the Treaties, states take reservations to '*exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*.' Therefore, even if there are provisions that, for example, do not allow parties to require having commercial presence in order to provide services, a state can take a reservation against this provision.

15. Positively, the transparent manner in which the reservations are listed in the Annexes under the new definitions of "designated legal services" and "other legal services" make the rules applying to UK lawyers much easier to understand. The commitments will also serve to ensure that market access is not restricted in the future.

16. However, it will take time to clarify the exact scope or meaning of the non-conforming measures, not least because they may be rooted in national law or practice. The practical effect of the provisions of the EU-UK TCA and the accompanying non-conforming measures is that the UK legal profession will now face 27 different regulatory regimes in the EU. While most of the provisions may not be discriminatory, dealing with such regulatory diversity will be burdensome for some operators, especially small and medium-sized ones.

17. Moreover, as explanatory provisions in Annexes SERVIN-1 to 4 set out, there are numerous requirements or provisions that do not have to be listed in the schedules of reservations as long as they are non-discriminatory and do not constitute a limitation within the meaning of the provisions in the agreement proper. Member states can introduce qualification requirements such as licenses, memberships in professional organizations, examinations, and language requirements without these having been listed in the Annexes.

What effect will arrangements on the mobility of professionals have on trade in services between the UK and EU?

18. There are several categories of personnel covered by the agreement:
    a. business visitors for establishment purposes,
    b. intra-corporate transferees,
    c. contractual services suppliers,
    d. independent professionals, and
    e. short-term business visitors.

    Each of these categories is strictly defined and for each of these categories there are specific time limits for their stay in the territory of the other party.

19. While these definitions seem clear enough, their application in practice will vary country by country as they interact with national laws. Most of the EU27 do not follow definitions in FTAs in their national immigration laws and, as a result, determining the scope of the actual rights will be complicated and will take time.

20. In addition, member states have also in many cases applied reservations (Annexes SERVIN-3 to 4) to the mobility provisions as well, frequently

requiring "economic needs tests" to prove that no national would be able to do the job before granting visas for contractual services suppliers and independent professionals. Such reservations sometimes impose limitations even for short-term business visitors intending only to travel for a client meeting.

21. Those who intend to provide services in the EU will have to deal with a patchwork of (different) national regulations. UK lawyers will no longer be able to board a plane or the Eurostar on short notice to travel to meet a client in Europe, and will no longer be able to directly charge for any services provided during such travel. Rather, UK lawyers will need to carefully research the particular immigration requirements of each member state well in advance before considering business travel to member states. They may need to submit economic needs tests and apply for work visas and permits months before intended travel.

How will the intellectual property provisions set out in the Agreement affect UK-EU trade in services?

22. During the UK's membership of the EU, the law governing IP was, to a large extent, harmonised across the EU, with certain IP rights enjoying pan-EU coverage. The EU-UK Withdrawal Agreement subsequently converted pre-existing EU IP rights into comparable UK ones (with the exception of patents), with the new UK rights taking effect from the end of the transition period.

23. As of the 1 January 2021, the EU and UK systems became fully separate with automatic reciprocal arrangements falling away. The TCA addresses this area of law, with a primary focus on affirming current standards of IP protection and enforcement, while also providing a basis for future cooperation in this field.

24. As expected, the agreement does not grant rights of representation before the EU Intellectual Property Office (other than in ongoing proceedings) or before the Court of Justice of the European Union, with both the UK and EU IPOs requiring an Address for Service in their own territories for newly created rights. However, the UK has remained a member of the European Patents Convention and retains access to the European Patents Office.

25. A key issue of concern in this area is that of exhaustion of IP rights, where the EU-UK TCA confirms the right of each side to set its own exhaustion regime. From the 1 January 2021, goods placed onto the UK market have not been deemed exhausted in the EEA and require consent. In contrast, the UK government has elected to continue with the regional EEA exhaustion regime for the time being, meaning that goods placed on the

EEA market will be deemed exhausted in the UK. This asymmetrical framework is expected to be reviewed in 2021.

26. There is uncertainty over the future treatment of new geographical indications. The EU-UK Trade and Cooperation Agreement states simply that both sides will jointly use reasonable endeavours to agree rules for the protection and effective domestic enforcement of their geographical indications, with a future review now expected. Importantly, Geographical Indications which were protected before the end of the transitional period remain protected by virtue of the Withdrawal Agreement, with the UK Government creating three new UK GI logos for the newly created UK rights.

27. The EU-UK Agreement otherwise largely aligns with typical FTAs signed by the EU. With regards to trademarks and designs, it should be noted that the Withdrawal Agreement ensured the retention of the original filing date, but from the 1st January 2021 UK and EU rights can be challenged, assigned, licensed or renewed separately in each jurisdiction. Any unregistered community designs (UCDs) arising before the end of the transition continue to be protected in the UK as new supplementary rights for the remainder of their three-year term.

28. For unregistered designs disclosed from the beginning of 2021, there is no reciprocity for recognition of first disclosure in the other territory, with first disclosure in the UK securing the new UK supplementary right, while first disclosure in the EU secures the UCD right. The Law Society has been urging solicitors to consider whether clients affected by this change may wish to simultaneously disclose designs in the EU and UK to try to obtain maximum protection.

29. On enforcement, there is disappointment over the loss of pan-EU mechanisms, both judicial remedies from proceedings and Applications for Action with Customs authorities, but this was not expected to be included in the Agreement. Businesses must now file actions in each territory for enforcement, which undoubtedly adds to costs and complexity.

30. Finally, Intellectual Property is an area of law subject to a number of international conventions, particularly in the fields of patents and copyright. This limits the impact of Brexit in these fields. However, arrangements which are unique to EU member states have fallen away, which impacts cross-border portability of online content services, copyright clearance for satellite broadcasts, and the orphan works exception.

How will the new EU-UK framework for the mutual recognition of professional qualifications affect professionals and service sector businesses?

31. The TCA does not have any provisions that envisage a new framework for recognition of professional qualifications. Instead, it includes provisions that allow both parties to conclude agreements to that effect. Until such agreements are concluded, the impact on the UK professionals is that they will have to follow national or even sub-national procedures if they wish to requalify into host state profession.

32. The EU-UK TCA model largely follows the current EU practice whereby a free trade agreement includes a framework provision for professional bodies to develop a proposal and for the Partnership Council to negotiate and adopt relevant arrangements.

33. There are several changes to the model worth mentioning. The most important is the possibility for various levels of commitment from member states / professional bodies when they enter an MRA (paragraph 8 of Annex SERVIN-6). It thus allows for a certain flexibility as compared with the previous EU FTAs. It remains to be seen whether the take up of this opportunity will increase as compared to CETA (under which no MRA has been concluded to date).

What will be the impact of the Agreement's provisions on the cross-border supply of services and rights of establishment, such as commitments on local presence and economic needs tests?

34. The impact on trade in services between the EU and UK is impacted predominantly by the UK's departure from the Single Market. This applies to legal services which until 31 December 2020 benefitted from the extensive set of legislation and wide-ranging rights for UK lawyers and law firms. This set of rights no longer applies to UK lawyers.

35. Compared to a scenario where the EU-UK relations would fall back onto the rules of General Agreement on Trade in Services (GATS), there are some improvements in the TCA.

36. We welcomed the dedicated provisions on legal services as they set an important precedent for future EU and UK agreements and acknowledge the importance of international practice of law under home title (i.e. without burdensome mutual recognition procedures or the need to requalifying fully into host state profession). Section 7 of Chapter 5 (Title II) further defines a 'lawyer', 'legal services' and 'designated legal

services' which may help pave the way for including more concrete provisions on legal services in trade agreements.

37. The TCA includes provisions that lock in the commitments taken therein and thus prevent backtracking (i.e. re-introducing more restrictive measures after the TCA has entered into force). The provisions of Chapters 2 and 3, covering investment liberalisation and cross-border supply of services respectively, prohibit the parties from enacting barriers or limitations on services providers. These include the number of enterprises allowed to provide services on the territory of the other party, total volume of transactions, economic needs tests, restrictions on legal form or shareholding requirements. Importantly, in case of cross-border trade in services, parties cannot require commercial presence of an operator as a condition of providing a service.

38. The provisions of these two Chapters benefit from the most favoured nation (MFN) treatment. This means that the EU and the UK will benefit from any further market opening in these areas that will be subsequently agreed by either party in its future trade agreements.

39. The TCA contains provisions that are not mirrored in GATS, such as domestic regulation or provisions allowing for regular review of the commitments and restrictions in the TCA (for example Article SERVIN.1.4 and FINPROV.3).

The EU has granted the UK a six-month data adequacy 'bridge' to allow the free flow of personal data until the EU determines whether or not to grant a data adequacy decision to the UK. How would the absence of a data adequacy decision at the end of this bridging period affect trade in services?

40. In the Law Society's view, the earliest possible determination on data protection adequacy to ensure data flows continue in with appropriate rigour for the security of personal data whilst supporting the vital contribution of the UK legal sector to the economy must be a priority for the UK.

41. The four or six month 'bridge' or grace period on data flows in the trade and cooperation agreement is welcome, as it provides additional time for legal businesses and others to ensure regulatory compliance. Should the EU not find the UK regime 'adequate' before the end of the grace period, this will entail significant extra resources and costs on the part of the profession.

42. While the impacts a lack of 'adequacy' would have are already largely known, and solicitors are preparing their data supply chains for that eventuality, the uncertain outcome is adding costs to the profession as it awaits clarity.

43. These additional costs are also being felt at a time when legal services businesses are adapting to new more rigorous standards of due diligence and surveillance in their use of standard contractual clauses (SCCs) and binding corporate rules, and awaiting further guidance on new model contracts for SCCs.

44. Therefore, the earliest possible determination of the future UK-EU data trading relationship is keenly awaited, particularly by smaller and medium sized legal businesses on which compliance costs are often disproportionately felt.

What impact will the arrangements agreed have on digital trade and trade in digital services between the UK and EU?

45. It should first be noted that the provisions on digital trade cannot be considered in isolation from other parts of the TCA, notably trade in services and corresponding schedules of commitments and reservations, when assessing their impact on digital trade/ trade in digital services.

46. As in every international agreement, provisions on digital trade will interact with domestic regulation. In many cases, domestic laws cover aspects that are relevant to trade in services (including digitally enabled ones) and not covered in trade agreements. This can include, for example, the use of a certain encryption standard.

47. Provisions which provide greater clarity and certainty for businesses operating internationally in the digital sector are a welcome development. Article DIGIT.6 commits both parties to continue cross-border data flows by prohibiting measures leading to data localisation or use of network or computing facilities of the other party. At the same time, Article DIGIT.7 leaves the discretion for parties to regulate in the field of personal data and privacy.

48. In case of legal services, the impact of the digital trade chapter is yet to be determined. The TCA's Article DIGIT.10(2) on the conclusion of electronic contracts excludes several areas of law from its application, including contracts for legal representation services. Our understanding is that this approach follows the standard practice in EU free trade agreements and reflects the limitations applicable in national law.

49. Article DIGIT.11 reads that '*A Party shall not deny the legal effect and admissibility as evidence in legal proceedings of an electronic document, an electronic signature, an electronic seal or an electronic time stamp, or of data sent and received using an electronic registered delivery service, solely on the ground that it is in electronic form*.' The article also prevents the parties from enacting measures that would prohibit parties to an electronic transaction to choose a mutually acceptable electronic authentication method or to be able to prove to relevant authorities that the use of electronic trust or electronic authentication complies with relevant laws. This, in our view, brings certainty to such transactions and is welcome.

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