

## Written evidence submitted by the Law Society of England and Wales (FRE0013)

### Summary

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.
2. It is vital that the Government ensures that services – particularly legal services – are prioritised during the negotiations. The UK should ensure it is negotiating on its areas of strength by ensuring an ambitious deal on services, and not just playing to the EU strengths by focusing on goods.
3. The UK and EU future relationship should contain provisions for services in the economic chapter of any free trade agreement (FTA). including:
  - a. the freedom to provide temporary services, particularly advice on English law;
  - b. the right to individual establishment;
  - c. routes for firms to establish in EU members states (e.g. ability to partner with local lawyers and share profits).
4. Any FTA should be complemented by provisions for civil and criminal judicial co-operation, as well as co-operation in areas of family law and commitment to international human rights obligations. These do not necessarily need to be constituent parts of the FTA, but could instead form separate agreements, as with the Lugano Convention, which provides for recognition and enforcement of civil and commercial judgments between EU and EFTA states.
5. It is critical that the UK Government takes a number of contingency measures if the UK is approaching the 1<sup>st</sup> January 2021 without either an extension of the transition period, or an agreement in place. Many, although not all, of these can be taken unilaterally.
6. We have previously worked to prepare our members for the potential of leaving the European Union with no Withdrawal Agreement and future relationship agreed, in the run up to various Article 50 deadlines. Nonetheless, such an eventuality would create challenges for solicitors and law firms, as well as for using the legal system in England and Wales.
7. Lack of sight of the UK legal text has been an impediment to contributing policy suggestions to the UK Government. This has skewed consultation toward analysing the

publicly available EU text and limits the contribution we can make. Being unable to comment on the UK position means that we are unable to fully analyse negotiations and prepare our members accordingly.

***What are the priorities for the UK, and for the EU, in the negotiations on the future relationship? How should the interests of different sectors of the economy and parts of the UK be balanced?***

8. Our legal services market is the second largest in the world, and the largest in Europe. Legal services support around 552,000 full time employees, and the sector was worth almost £60bn (GVA) in 2018. England and Wales remains an open jurisdiction and the proud home of over 200 foreign firms and over 2000 registered foreign lawyers from nearly 100 separate legal jurisdictions. Our members make a net contribution of £4.29 billion to the UK balance of trade and play a vital facilitatory role in wider international trade.
9. As an area of global strength for the UK, it is important that the Government ensures that services – particularly legal services – are prioritised during the negotiations. The UK should ensure it is negotiating on its areas of strength and not just those of the EU by focusing on goods.

**Free trade agreement**

10. We have concerns that the Government may be limiting its ambition by focusing on a precedent based approach, that is only provisions precedent in previous EU-third country free trade agreements. Previous free trade agreements have been severely limited on trade in services and seeking only to replicate these would set a low bar for professional or legal services.
11. FTAs usually contain provisions on cross-border provision of services, investment and movement of natural persons – all crucial for services sectors. Together, these provisions allow a lawyer to provide services remotely and in person, to establish under a preferred legal form and not have restrictions on foreign capital. UK and EU lawyers would benefit from provisions allowing them to secure visas, represent clients in arbitrations and act in dispute resolutions, and firms will need to be able to bid for public procurement contracts in the EU.
12. However, in practice current EU FTAs allow for limited liberalisation of legal services markets. This is because individual member states can include reservations – exceptions to the general rules on liberalisation – and thus maintain restrictions to accessing and exercising legal professional status in their jurisdictions.

13. The Government's priority for the legal services sector should be to address these national restrictions and seek their removal from the relevant FTA schedules of commitments and reservations.
14. Mutual recognition of qualifications is usually excluded from FTAs (save for enabling provisions allowing for subsequent agreements between relevant competent authorities) and is subject entirely to national law. However, we should push to allow greater ease of requalification for UK lawyers and we are aware that this has been noted in the UK future relationship negotiating position. We should look to provide for equivalence in data adequacy, to allow the flow of personal data between the UK and ensure barriers to providing legal services are not created.

### **Judicial co-operation**

15. On recognition and enforcement of judgments in civil and commercial matters, we are aware that the UK recently put in its application for accession to the Lugano Convention – something that the Law Society has continually advocated for – and we are now waiting for the EU response (the EFTA states have voiced their support publicly). It is vital that families, businesses and consumers can operate with confidence in Europe after December 2020, and the Lugano Convention, provides for the recognition and enforcement of a wide range of judgments which will allow greater efficiency and cost-effectiveness for SMEs when recovering assets and solving cross border disputes. The Lugano Convention also applies to maintenance obligations which would allow a parent to see a maintenance award quickly enforced across borders. those owed payments from another parent to make a cross border claim, helping achieve legal certainty across society.
16. Additionally, the Government should be looking to achieve a level of co-operation on family law. We appreciate the steps the Government is taking to implement several Hague Conventions<sup>1</sup> into domestic law through the Private International Law (Implementation of Agreements) Bill, but concerns remain around divorce recognition, pension sharing and domestic violence. To secure the future of EU families resident here, and the many UK families resident in the EU, we believe Government should seek to:
  - a. Encourage *en bloc* sign-up to the 1970 Hague Divorce Recognition Convention by the EU to ensure legal certainty across borders.

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<sup>1</sup> 1996 2007 Hague Conventions

- b. Amend before the end of the transition period the Matrimonial and Family Proceedings Act 1984 to allow jurisdiction for pension sharing orders after an overseas divorce for any UK pensions.
- c. Prioritise EU recognition of UK domestic protection orders in negotiation, to ensure reciprocity.

17. The future relationship should also contain a mutual commitment to the European Convention of Human Rights. This could help facilitate an agreement on the criminal justice and security cooperation.

***How will the implementation of the Withdrawal Agreement interact with the negotiations on the future relationship? What is the role of the Joint Committee, and what other mechanisms will be available for the UK and EU to resolve disagreements?***

18. In general, the Withdrawal Agreement (WA) will sit separately to the negotiations on the future relationship. It sets out rules for the transition period, during which the future agreement is negotiated, and it sets out rules on some issues, such as citizens' rights, that go beyond the transition period.

19. The WA sets out a number of areas where its operation extends beyond the transition period, and where the Joint Committee will continue to be active. Alongside the future relationship, the Joint Committee will:

- a. Assess, no earlier than 8 years after the end of the transition period, the functioning of the Independent Authority on Citizens Rights. If the committee is satisfied it may decide that the UK can subsequently abolish the Authority.<sup>2</sup>
- b. Update references to EU legislation on social security within the WA to incorporate any amendments or additions by the EU in the future.<sup>3</sup>
- c. Set out the procedure by which the UK shall be liable for its share of the financing of the EU's liabilities, particularly with regards to pension rights incurred up until the end of 2020.<sup>4</sup>
- d. Set out the system by which the UK and the EU shall make payments to each other, relating only to liabilities under the Withdrawal Agreement.<sup>5</sup>

20. There are a limited number of provisions contained in the Withdrawal Agreement which could be superseded by the Future Relationship negotiations:

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<sup>2</sup> Article 159, Withdrawal Agreement

<sup>3</sup> Article 36, Withdrawal Agreement; Regulations (EC) No 883/2004 and (EC) No 987/2009

<sup>4</sup> Article 142, Withdrawal Agreement

<sup>5</sup> Article 148, Withdrawal Agreement

- a. Further police and judicial cooperation on criminal matters for up to a year beyond the end of the transitional period, where an investigation or proceedings were ongoing during the transitional period. The UK would have to reimburse the EU for cooperation and access to data, to be determined by the Joint Committee.<sup>6</sup>
- b. Further cooperation between UK and EU authorities in the fields of VAT and excise duties for 4 years beyond the end of the transitional period. Again, the UK would reimburse the EU for this cooperation and access to data, with the Joint Committee to determine the process and costs.<sup>7</sup>

21. Additionally, it is the Joint Committee which would adopt the decision to extend the transition period by either 1 or 2 years.<sup>8</sup>

22. The Joint Committee is empowered, in addition to its own consultations,<sup>9</sup> to initiate an independent arbitration process by requesting the establishment of an arbitration panel by the International Bureau of the Permanent Court of Arbitration.<sup>10</sup> This would however only relate to issues of interpretation and implementation of the Withdrawal Agreement itself.

23. UK courts and tribunals will have the right for 8 years after the end of the transitional period to request a preliminary ruling by the ECJ on questions of interpretation, but only relating to Part II of the Withdrawal Agreement (Citizens' Rights).<sup>11</sup>

24. In the event of a disagreement on a matter relating to the future relationship, the outcome will depend on whether an agreement is reached and its scope. As currently envisaged, the UK and EU aim to sign a comprehensive agreement which includes (in its current draft version presented by the EU), provisions on dispute resolution. The Law Society published a paper on the various dispute settlement mechanisms, which clarified that such mechanisms can be either political or judicial, with varying levels of enforceability.<sup>12</sup>

25. Should there be no future agreement, how disputes are solved will depend on the area of law. In cases where both the EU and the UK belong to the same organisation, such as the World Trade Organisation (WTO), specific dispute settlement mechanisms are available. This applies to trade defence mechanisms, such as anti-subsidy and anti-dumping measures.

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<sup>6</sup> Article 62, Withdrawal Agreement

<sup>7</sup> Article 99, Withdrawal Agreement

<sup>8</sup> Article 132, Withdrawal Agreement

<sup>9</sup> Article 164, Withdrawal Agreement

<sup>10</sup> Article 170, Withdrawal Agreement

<sup>11</sup> Article 158, Withdrawal Agreement

<sup>12</sup> <https://www.lawsociety.org.uk/policy-campaigns/articles/options-for-the-future-uk-eu-dispute-settlement-mechanism/>

26. For other areas, it is possible to use international law mechanisms – e.g. in the framework of cooperation in the Council of Europe, the specific Council of Europe mechanisms would be applicable. There are no mechanisms available where there are no specific agreements or other institutional frameworks in place.

***How prepared is the UK Government to negotiate and implement the future relationship with the EU, including in the event a free trade agreement is not secured? Which aspects of the future relationship could be negotiated after the transition period?***

27. The Law Society of England and Wales is conscious that the timeframe by which to agree an FTA with the EU and have it in place for the 1<sup>st</sup> January 2021 is tight. The outbreak of the coronavirus pandemic has added to that pressure. We continue to work closely with the Ministry of Justice, Department for Business, Energy and Industrial Strategy and wider Government in reaching an agreement in the coming months.

28. It must be remembered that in the event the transitional period is not extended, any agreement must be largely concluded by September or October, in order to enable the process of ratification, including legal screening, to be conducted before the end of the year. This further constrains timeframes and increases the pressure on resources.

29. If the ratification and implementation is not completed by the end of transitional period, this would create a hugely detrimental interim period before the new agreement takes effect:

- a. With the recognition and enforcement of judgments, only cases conducted by the end of the transitional period will be enforced under EU or Lugano rules. Enforcement of judgments, where the litigation starts after the end of transition period, would revert to be considered under national law. This includes the cases where the parties have concluded a choice of court agreement in favour of a UK court. This means that there will be more complex procedural issues to be solved, taking more time and resource for them to be finalised – for example it is possible for another court to question even the choice of court agreement on basis of its national provisions. Furthermore, it is likely that these cases would not be folded into the new system once another EU - UK mechanism is agreed.
- b. With services, including legal services, the costs associated with ensuring compliance would be multiplied, as businesses first restructure to a no FTA framework, and then subsequently adjust.

**Aspects of the future relationship which could be agreed after the transition period**

30. The conclusion of an agreement on the future relationship during 2020 would be an important and welcome milestone. Yet, taking account of the negotiating mandates and the EU draft legal text, even in the scenario an agreement is concluded, there would be aspects which require subsequent negotiation. For example, it is currently proposed that a framework for mutual recognition of qualifications is included in the EU-UK agreement. Negotiating and concluding the associated MRAs will likely take several more years after the transitional period.
31. Additionally, in the event that an agreement is reached but it does not cover all those areas set out in the Political Declaration of October 2019, it may be possible for later negotiations to seek to close the gaps. This is far from guaranteed as the EU has stated it is not willing to consider sector specific agreements. It must also be cautioned that the EU has publicly stated it wants all areas under negotiation to proceed in parallel.
32. The emergence of any gap between the transitional period and the commencement of a new agreement would undermine the value of the new agreement, and cause uncertainty and significant costs in the short term.

**In the event that no FTA is secured**

33. It is critical that in the event the UK is approaching the 1<sup>st</sup> January 2021 without either an extension of the transition period, or an agreement in place, the UK Government implements contingency measures. Many of these can be taken unilaterally to prepare businesses and individuals for the repercussions of exiting the transitional period without an agreement.
34. For the services sectors the future relationship would initially rely on the EU General Agreement for Trade in Services (GATS) commitments. In the case of legal services this would enable UK solicitors to advise EU clients on UK laws and private international law, by email, by phone and (subject to visa requirements and reservations and limitations scheduled by individual EU countries) by face-to-face meetings. In-person advice in certain member states on a fly-in, fly out basis will rely on national regulations as it is not covered by GATS. The applicable rules will need to be reviewed for each member state, as it is up to individual member states to set out how they regulate legal services domestically and what level of market access they grant to foreign lawyers.
35. Given that the future agreement is expected to include not only economic arrangements but also security and criminal matters, a failure to secure the FTA would likewise require contingency measures in the field of criminal judicial co-operation. The Mutual Assistance Convention would be the key framework and the UK Government must ensure mechanisms are in place to facilitate its operation with regards to EU states.

36. Similarly, on the civil law side, further contingency measures would be required in the event that the EU rejected the UK application to become a signatory to the Lugano Convention on civil judicial co-operation. In the absence of the Lugano Convention the enforcement and recognition of judgments would largely fall back on national law, while transitional clauses would be required to enable businesses to rely on the Hague Convention on Choice of Court, subject to the scope of that international treaty.
37. The Law Society has previously worked to prepare our members for the potential of leaving the European Union with no Withdrawal Agreement and future relationship agreed, in the run up to various Article 50 deadlines. We provided specific guidance on several vulnerable areas of law, and will be looking to update these should it seem likely the transition period will end before an FTA is agreed. Nonetheless, such an eventuality would create immense difficulties for many of our members and for parts of the legal system in England and Wales, and should be avoided.

**How effectively is the Government consulting with businesses, stakeholders, and the devolved institutions, to inform the UK negotiating position?**

38. We have engaged closely with Government since the result of the 2016 referendum, both as the Law Society and through the Professional and Businesses Services Council (and its International working group) and the International Law Committee (previously the Brexit Law Committee).
39. We understand that the Welsh Government is concerned that the UK Government is currently providing insufficient information to the devolved administrations to allow them to effectively represent the people and interests of Wales. Wales has distinct legal needs and there has been consistent disappointment with the UK Government's level of engagement with Welsh Government. They point to the unwillingness to share the UK legal text as an example of this.
40. Lack of sight of the UK legal text has also limited the role that professional bodies and other business groups can make, skewing consultation toward analysing the publicly available EU text and limiting the contribution we can make to Government. Officials being unable to comment on the UK position means that we are unable to fully analyse negotiations and prepare our members accordingly.
41. The Government were especially active in communication with legal businesses in the lead-up to the October Article 50 deadline, sending officials to several of our regional 'no deal preparation' roundtables with members, which was appreciated. We hope the



Government will engage early with business if they believe an FTA will not be agreed before the transition period ends.

***May 2020***